

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Transportation Committee

BILL: CS/SB 1124

INTRODUCER: Education Pre-K Committee and Senator Montford

SUBJECT: Public School Buses

DATE: March 23, 2011      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	deMarsh-Mathues	Matthews	ED	<b>Fav/CS</b>
2.	Sookhoo	Spalla	TC	<b>Pre-meeting</b>
3.			BC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

Under the bill, commercial advertisements would be permitted to be placed on the exterior of a school bus, according to district school board policies that delineate the content, placement, number, and cost of advertisements. If a bus does not comply with these requirements, it must be withdrawn from use until it does so.

Under the bill, 50 percent of the advertising revenue would be allocated to the school district's transportation program, 40 percent to other programs specified by the district, and 10 percent to the district's driver's education program. Of the allocation to the driver's education program, 30 percent would be directed to behind-the-wheel instruction.

This bill substantially amends s. 1006.25 of the Florida Statutes.

**II. Present Situation:**

Exterior advertising on public school buses is currently prohibited in the Florida School Bus Specifications, adopted by reference in administrative rule under the authority in s. 1006.25,

F.S.<sup>1</sup> According to the Department of Education (DOE), this specification requirement is based on the 2005 National School Transportation Specifications and Procedures to provide national uniformity of the familiar exterior yellow and black coloration of school buses and ensure safety.<sup>2</sup> The specifications limit the coloration, lettering, identification, and markings that may be installed on public school bus exteriors, including the National School Bus Yellow paint, black trim, and white roof; retroreflective conspicuity striping; belt line lettering identifying the school district; and bus numbers.

States that permit this type of advertising include New Mexico<sup>3</sup> and Arizona.<sup>4</sup> These states permit local officials to set policies and prohibit or limit various types of advertisements, such as those related to alcohol or tobacco products. Arizona law specifies the permissible location of the ads (e.g., in areas other than those that will impede the safe operation of the school bus).<sup>5</sup>

### III. Effect of Proposed Changes:

Under the bill, commercial advertisements would be permitted to be placed on the exterior of a school bus, according to district school board policies that delineate the content, placement, number, size, and cost of advertisements. If a bus does not comply with these requirements, it must be withdrawn from use until it does so.

School board policy would delineate the types of objectionable advertising, including those that are discriminatory in nature, contain material that is not child- and community-sensitive, or relate to antisocial behavior. These policies would be incorporated into contracts with businesses. In making its determination as to what constitutes objectionable advertising, a school board would have to balance this with an advertiser's exercise of commercial speech.

Proponents note that school bus advertising provides a necessary source of revenue in challenging economic times. Opponents assert that advertising will compromise the distinctive characteristics of school buses, namely the uniform color of buses, which is associated with the presence of children. They further express concern that a motorist may be distracted by advertising and will result in driving hazards. In response, proponents cite the absence of empirical evidence that advertising distracts motorists. Opponents cite studies that confirm the effects of distraction on motor vehicle crashes.<sup>6</sup>

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<sup>1</sup> Rule 6A-3.0291, F.A.C. According to the Department of Education (DOE), the 2010 specifications have not yet been adopted by the State Board of Education; however, the 2010 specification in this area have not changed. DOE draft bill analysis for HB 109, March 16, 2011.

<sup>2</sup> E-mail, DOE, January 5, 2011, on file with the committee. See [www.NCSTOnline.org](http://www.NCSTOnline.org).

<sup>3</sup> NMSA §22-28-1.

<sup>4</sup> A.R.S. §15-342.

<sup>5</sup> Based on responses to a January 2010 survey of all states, the DOE reported that 23 states (74 percent of the 31 respondents) prohibited exterior advertising on school buses: one state allowed it without restrictions; and, seven states (23 percent) allowed it with some restrictions. The DOE notes that this information includes the 2011 New Jersey legislation, which allows exterior school bus advertising, subject to specified limitations. DOE draft bill analysis, March 16, 2011.

<sup>6</sup> *Statistics and Facts about Distracted Driving*, U.S. Department of Transportation. See <http://www.distraction.gov/stats-and-facts/>.

the district's driver's education program. Of the allocation to the driver's education program, 30 percent would be directed to behind-the-wheel instruction.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

In general, that a property is government-owned does not automatically open the property up to the public.<sup>7</sup> Rather, the nature of the forum dictates the level of government control over that property.<sup>8</sup> Courts distinguish among traditional public forums; designated or limited forums; and nonpublic forums.<sup>9</sup> A traditional public forum is a physical space such as a public street or park that has traditionally been held in trust for public use, and is a place of open discourse and assembly.<sup>10</sup> A designated public forum refers to public property the government has provided specifically for the purpose of expressive activity, such as university meeting facilities, school board meetings, and municipal theaters.<sup>11</sup> Courts have consistently applied strict scrutiny, or the highest level of review, to content-based government restrictions on speech that takes place in a traditional public forum.<sup>12</sup> To survive strict scrutiny, the state is required to show a governmental regulation is narrowly drawn to accomplish a compelling governmental interest, the regulation is reasonable, and the viewpoint neutral.<sup>13</sup> If the regulation is content-neutral, and the government imposes restrictions in a time, place, and manner approach, mid-level scrutiny applies.<sup>14</sup> If so, the state is required to demonstrate a significant, rather than compelling state interest.<sup>15</sup> These same levels of scrutiny apply to a designated public forum, provided the character of the forum is maintained.<sup>16</sup> Public property that is neither a traditional public forum, nor a limited purpose forum, is designated as a nonpublic forum, and subject to low-level scrutiny.<sup>17</sup> Here, the state only needs to show the

<sup>7</sup> *Uptown Pawn & Jewelry, Inc.*, 337 F.3d 1275, 1278 (11<sup>th</sup> Cir. 2003).

<sup>8</sup> *Id.*

<sup>9</sup> Michael A. Scherago, *Closing the Door on the Public Forum*, 26 LYLALR 241, 244-245 (Nov. 1992).

<sup>10</sup> *Id.* at 244.

<sup>11</sup> *Id.* at 245.

<sup>12</sup> *See Ledford v. State*, 652 So.2d 1254 (2<sup>nd</sup> DCA 1995).

<sup>13</sup> *Id.* at 1256.

<sup>14</sup> Scherago, *supra* note 6, at 245.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 246.

restrictions are reasonable and not viewpoint discriminatory.<sup>18</sup> Public buses, subways, and streetcars have been classified as nonpublic fora.<sup>19</sup> Courts have been mixed, however, regarding whether the advertising space on buses constitutes public fora.<sup>20</sup>

For example, in 1974, the U.S. Supreme Court held that interior advertising space on a city transit system does not constitute a public forum.<sup>21</sup> Here, the city refused to allow advertising that was political in nature, basing its decision on the appearance of support of one political candidate over another. In upholding the city's action, the court distinguished between speech conveyed in a traditional public forum, where passersby are free to come and go, and speech that is forced upon a captive audience.<sup>22</sup> In a concurring opinion, Justice Douglas stated more specifically, "...if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners."<sup>23</sup> The decision to designate a public bus as a nonpublic forum has subsequently been questioned.<sup>24</sup>

In refusing to rule on whether the interiors of subways and trolley cars constitute a public forum, a 1994 court cited inconsistency and lack of clarity in its application to those places. Instead, the court proceeded directly to the issue of whether the Massachusetts Bay Transportation Authority's restriction was content neutral.<sup>25</sup> The First Circuit U.S. Court of Appeals affirmed the District Court's opinion, which struck down the Massachusetts Bay Transportation Authority's ("Authority") policy on restricting advertising in subways and trolley cars.<sup>26</sup> Here, where the Authority prohibited ads which used sexual innuendo to educate about Acquired Immune Deficiency Syndrome (AIDS) and condom use, but permitted movie ads with similar levels of sexual content, the court held that the Authority committed viewpoint discrimination.<sup>27</sup>

While the court has recognized it is possible for a transit authority to define as a legitimate policy the rejection of ads harmful to children, the inquiry does not end upon a mere assertion of child protection.<sup>28</sup> Where a transit authority prohibited marijuana decriminalization ads but had previously accepted ads promoting the use of alcohol, the court held the authority had not adequately refuted viewpoint discrimination. Further, the

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<sup>18</sup> *Id.*

<sup>19</sup> Cynthia R. Mabry, *Brother Can You Spare Some Change?—And Your Privacy Too?: Avoiding a Fatal Collision Between Public Interests and Beggars' First Amendment Rights*, 28 USFLR 309, 329 (Winter, 1994).

<sup>20</sup> *See, i.e., New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir. 1998) in which the court held that advertising space on buses were designated public forum; *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1<sup>st</sup> Cir. 2004) in which the court finds the opposite.

<sup>21</sup> *Lehman v. City of Shaker Heights*, 94 S.Ct. 2714 (S.Ct. 1974).

<sup>22</sup> *Id.* at 2715.

<sup>23</sup> *Id.* at 2719.

<sup>24</sup> Scherago, *supra* note 6, at 261.

<sup>25</sup> *Aids Action Committee of Massachusetts, Inc., v. Massachusetts Bay Transportation Authority*, 42 F.3d 1, 10 (1<sup>st</sup> Cir. 1994)

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.* at 12.

<sup>28</sup> *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65, 85-86 (1<sup>st</sup> Cir. 2004).

court held the authority failed to show a sufficient link between the drug ads and a negative impact on juveniles.<sup>29</sup>

The bill, as written, does not provide guidelines on sponsor language, and therefore, is not likely itself to be the subject to a court challenge. A greater potential for challenge exists when a school board adopts policies for acceptance/rejection of sponsors. It is unclear whether a court would interpret the listing of a sponsor's name and logo on the outside of school buses as forcing ideas on a captive audience, in this case the students riding on the bus, in the same vein as the impact of political advertising inside the bus or subway on passengers, as was the case in *Lehman*. Provided that a court would likely designate a school bus as a nonpublic forum, it appears that lower level scrutiny would apply to a review of restrictions on speech, such that the state would only be required to show a reasonable relationship between the restriction and the state's purpose. In this case, the state would probably assert the protection of children as the state interest. Case law, however, still requires restrictions on speech to be viewpoint neutral. This is particularly notable if a district school board rejects certain sponsors and permits others who are similarly situated.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The revenue that would accrue to businesses under contract with school districts for advertisements is indeterminate.

### C. Government Sector Impact:

Businesses under contract with school districts must reimburse school districts for all costs associated with advertising, such as retrofitting buses and related maintenance. The amount of revenue that will accrue to school districts is indeterminate.

## VI. Technical Deficiencies:

Lines 80-82 states "...the 10 percent allocated for behind-the-wheel instruction may be allocated for other programs as determined by the school district"; however, the intent seems to indicate a rephrasing to "...the 10 percent allocated for driver education programs may be allocated for other programs as determined by the school district". This change is necessary because 10 percent of funding from the revenue generated from advertising is allocated to driver education programs and not behind-the-wheel instruction.

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<sup>29</sup> *Id.* at 88-89.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Education Pre-K – 12 on March 23, 2011:**

The committee substitute:

- Provides that advertisements may not exceed a specific size;
- Prohibits political advertising;
- Deletes the requirement for the Commissioner of Education to hold harmless and indemnify school districts from liability arising from school bus advertisements;
- Revises the manner in which revenue generated from advertising is allocated to programs other than school district transportation; and
- Corrects a technical reference to the required lettering on school buses.

- B. **Amendments:**

None.