Journal of Health Care Law and Policy

Volume 12 | Issue 2 Article 7

# Childhood Obesity: The Law's Response to the Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity

Leah Loeb

# CHILDHOOD OBESITY: THE LAW'S RESPONSE TO THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY

LEAH LOEB*

## INTRODUCTION

The general public is awakening to what the public health community has known for years: childhood obesity is a public health crisis.[1] In 2001, the Surgeon General stated that "[o]verweight and obesity . . . have reached epidemic proportions in the United States," calling on individuals to make healthy choices, communities to promote healthy eating and physical activity, and the nation to build solutions to address this problem.[2] Obesity, defined as a body mass index (BMI) over thirty,[3] is directly related to the onset of diseases including coronary heart disease, type II diabetes, stroke, gall bladder disease, sleep apnea, respiratory disease, hypertension, osteoarthritis, and some cancers.[4] The obesity crisis

---



* Litigation Associate at Herrick, Feinstein LLP (Princeton, N.J.); J.D., 2009, University of Maryland School of Law (Baltimore, Md.); B.A., Political Science, University of Maryland, Baltimore County (Baltimore, Md.).

1. *See, e.g.*, Madelon Lubin Finkel & Joanna M. Paladino, *Obesity and Public Policy*, *in* TRUTH, LIES, AND PUBLIC HEALTH 154, 159 (2007).

2. David Satcher, *Foreword to* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001, at XIII, XIII–XIV (2001), *available at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf.

3. Obesity occurs when the body's adipose (fat) tissue increases in relation to lean body mass consisting of bone, muscle, and organs. S.W. Coppack, *Adipose Tissue Changes in Obesity*, 33 BIOCHEMICAL SOC. TRANSACTIONS 1049, 1049 (2005). Body Mass Index (BMI) reflects a formula based upon weight and height. The Centers for Disease Control and Prevention (CDC) considers BMI a reliable indicator of "body fatness." Ctrs. for Disease Control & Prevention, Healthy Weight: Assessing Your Weight: BMI: About Adult BMI, http://www.cdc.gov/nccdphp/dnpa/healthyweight/assessing/bmi/adult_BMI/about_adult_BMI.htm (last visited Nov. 28, 2009). For adults, a BMI between 18.5 and 24.9 is considered normal, between 25 and 29.9 is overweight, and above 30 is obese. *Id.* The BMI formula for children also includes consideration of age and sex. *Id.*

4. Julie Neal, *Childhood Obesity Prevention: Is Recent Legislation Enough?*, 27 J. JUV. L. 108, 108 (2006); Ctrs. for Disease Control & Prevention, Obesity and Overweight for Professionals: Childhood, http://www.cdc.gov/obesity/childhood/ (last visited Nov. 28, 2009).

continues to grow in the United States.[5] Specifically, the United States has among the highest worldwide rates of childhood obesity, diabetes, and asthma.[6] This Comment concentrates on fighting childhood obesity. Because national policy focusing on children alone would prove inadequate, comprehensive policy must also reflect efforts to abate obesity in the contemporary adult population.[7]

Policymakers, health care providers, legal scholars, and educators have proposed solutions to the childhood obesity epidemic from all quarters, including limiting food advertisements aired during children's television programming, prohibiting the fast-food industry from using certain unhealthy ingredients, mandating disclosure of nutritional content, and requiring city planning to include parks and bicycle paths to encourage outdoor activity.[8] This Comment, however, posits that school-based programs, on which research and policymaking have focused, are a vital piece of the solution because children are educated and form habits in school, and the systems to achieve change are already in place in schools. Because children spend most of their waking and eating hours in school from early childhood through late adolescence, legislation that changes the food choices available in schools, requires nutrition education, and incorporates and promotes physical activity can help turn the tide of childhood obesity.[9] In 2004, when Congress reauthorized the National School Lunch Act (NSLA)[10] and the Child Nutrition Act (CNA),[11] it required all schools receiving federal funding for meals to

5. Karen E. Peterson & Mary Kay Fox, *Addressing the Epidemic of Childhood Obesity Through School-Based Intervention: What Has Been Done and Where Do We Go from Here?*, 35 J.L. MED. & ETHICS 113, 113 (2007) ("The obesity epidemic among children and adolescents in the United States continues to worsen."). The CDC reported that obesity levels in 2005–06 did not increase from 2003–04, and noted that while obesity remains at alarmingly high rates, the rates may be leveling off. *See* CYNTHIA L. OGDEN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, OBESITY AMONG ADULTS IN THE UNITED STATES—NO STATISTICALLY SIGNIFICANT CHANGE SINCE 2003–2004, at 1 (2007), *available at* http://www.cdc.gov/nchs/data/databriefs/db01.pdf.

6. INST. OF MED. & NAT'L RESEARCH COUNCIL, CHILDREN'S HEALTH, THE NATION'S WEALTH: ASSESSING AND IMPROVING CHILD HEALTH 2 (2004).

7. David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 684 (2008).

8. *See* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address at European Union Platform on Diet, Physical Activity and Health Joint EU-US Meeting: The United States Federal Trade Commission Promoting Solutions to Childhood Obesity: Perspective on Food Marketing and Self-Regulation (May 11, 2006), *available at* http://www.ftc.gov/speeches/majoras/060511Brussels Obesity.pdf.

9. RON HASKINS ET AL., FUTURE OF CHILDREN: POLICY BRIEF: FIGHTING OBESITY IN THE PUBLIC SCHOOLS 2–3 (2006), *available at* http://www.futureofchildren.princeton.edu/briefs/briefs/FOC%20 policy%20brief%20spr%2006.pdf.

10. *See* Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, §§ 101–129, 118 Stat. 729, 730–68 (amending the National School Lunch Act, 42 U.S.C. §§ 1751–1769(i) (2006)).

11. *Id.* §§ 201–206.

adopt and implement local wellness policies by Fall 2006.[12] However, this mandate does not go far enough to target childhood obesity.[13]

This Comment analyzes the legal tools available to attack the childhood obesity epidemic. Part I examines the obesity epidemic in the United States, outlines contributing factors, and considers the complexity of crafting policy to address a multifaceted problem. Part II reviews the federal and state roles in addressing public health issues and recommends cooperative federalism to target childhood obesity. Part III weighs the benefits and challenges of two legal mechanisms available to address childhood obesity: regulation and litigation. Part IV suggests further amendments to the NSLA to condition federal funding for meal programs on the adoption of more stringent nutrition requirements, incorporation of nutrition education in the curriculum, and inclusion of more rigorous and continuous physical activity in schools to tackle childhood obesity. Finally, this Comment concludes that it is Congress's duty to safeguard the nation's health and wellness, and today, this requires amending the NSLA to target childhood obesity.

## I. CHILDHOOD OBESITY: A BALLOONING EPIDEMIC

Data collected in National Health and Nutrition Examination Surveys—one from 1976 to 1980 and the other from 2003 to 2006—show that in just over two decades, the prevalence of overweight children has increased dramatically.[14] During this period, prevalence increased from 5% to 12.4% for children ages two through five years; for those ages six through eleven years, prevalence increased from 6.5% to 17%; and for those ages twelve through nineteen years, prevalence increased from 5% to 17.6%.[15] More generally, data indicate that 33.6% of American youth between the ages of two and nineteen were overweight in 2003 and 2004.[16] Americans must aggressively reform their lifestyles related to diet and exercise to reduce the incidence of childhood and adult overweight and obesity, national conditions that policy makers in the United States have recognized as a "critical public health threat."[17] To achieve reform, researchers and policymakers

12. *Id.* § 204.

13. *See* Alicia Moag-Stahlberg et al., *A National Snapshot of Local School Wellness Policies*, 78 J. SCH. HEALTH 562, 563 (2008).

14. *See* Ctrs. for Disease Control & Prevention, *supra* note 4. Overweight is defined by a BMI between 25 and 29.9. Ctrs. for Disease Control & Prevention, *supra* note 3.

15. Ctrs. for Disease Control & Prevention, *supra* note 4.

16. P.K. Newby, *Are Dietary Intakes and Eating Behaviors Related to Childhood Obesity? A Comprehensive Review of the Evidence*, 35 J.L. MED. & ETHICS 35, 35 (2007).

17. JEFFREY P. KOPLAN ET AL., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE 22 (2005).

should continue to study diet and exercise habits and offer recommendations on how we can effectively change our nation's deeply rooted habits.[18]

### *A. Defining the Problem*

In the simplest terms, excess accumulation of body fat causes obesity.[19] Medically, obesity occurs when one's weight is 20% greater than his or her ideal weight.[20] Obesity and related conditions are leading causes of death in the United States, second only to tobacco.[21] The U.S. Department of Health and Human Services (HHS) considers obesity one of the ten leading health indicators that reflect the major health concerns in the United States.[22] As a result of the ballooning obesity epidemic, the average lifespan of today's generations may decline by two to five years.[23] This would represent the first drop in life expectancy since 1900.[24]

In the year 2000, obesity caused 400,000 deaths, a 33% increase in obesity-related deaths since 1990.[25] While this statistic reflects adult obesity,[26] it also implicates childhood obesity because obesity among youth is not a benign condition that most will outgrow.[27] In 70% of cases, an overweight adolescent will remain overweight or obese as an adult.[28] Additionally, 61% of overweight children between the ages of five and ten already exhibit at least one risk factor for heart disease.[29] An obese lifestyle can cause metabolic changes and increase the

---

18. It is worth noting that the obesity epidemic in the U.S. is mirrored globally. World Health Org., Fact Sheet No. 311: Obesity and Overweight (Sept. 2006), http://www.who.int/mediacentre/factsheets/fs311/en/index.html. The World Health Organization data show that in 2005 approximately 1.6 billion adults worldwide were overweight and 400 million were obese. *Id.*

19. ANDREW R. SOMMERS, CRS REPORT FOR CONGRESS: OBESITY AMONG OLDER AMERICANS 5 (2008), *available at* http://aging.senate.gov/crs/aging3.pdf.

20. *Id.* at 1, 5–7.

21. *See* Bonnie Hershberger, *Supersized America: Are Lawsuits the Right Remedy?*, 4 J. FOOD L. & POL'Y 71, 73 (2008); Neal, *supra* note 4, at 108.

22. Lawrence O. Gostin, *Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity*, 297 JAMA 87, 87 (2007); U.S. Dep't of Health & Human Servs., What Are the Leading Health Indicators?, http://www.healthypeople.gov/LHI/lhiwhat.htm (last visited Nov. 28, 2009).

23. *Id.*

24. *Id.*

25. Lisa Smith & Bryan A. Liang, *Childhood Obesity: A Public Health Problem Requiring a Policy Solution*, 9 J. MED. & L. 37, 38 (2005).

26. "Today 33% of the population is obese and 66% overweight, up from just 15% obese and 46% overweight only two decades ago." Yosifon, *supra* note 7, at 682.

27. *See* Ctrs. for Disease Control & Prevention, *supra* note 4.

28. Nat'l Conference of State Legislatures, Childhood Obesity: 2006 Update and Overview of Policy Options (Apr. 30, 2007), http://www.ncsl.org/IssuesResearch/Health/ChildhoodObesity2006PolicyOptionsNutrition/tabid/14397/Default.aspx.

29. *Id.*

difficulty of losing weight in later years.[30] Further, bad habits die hard, and once a child adopts an unhealthy diet and sedentary habits, reversing that path toward adult obesity is difficult.[31] An obese child usually becomes an obese adult who experiences numerous health problems[32] and generates societal costs.[33]

### *B. A Polygenetic Problem Requiring a Multifaceted Solution*

Implementing policies aimed at preventing overweight and obesity in America is complex because what we eat, how much we eat, and similar health decisions are matters of personal choice.[34] Weight and size typically result from one's choices regarding diet and exercise.[35] Obesity among children stems from poor food choices, increased caloric consumption, and lack of physical activity.[36] Because obesity implicates personal choice,[37] methods of addressing the problem are controversial.[38] It is widely accepted, however, that the law, including legislation, regulation, and litigation, is a useful tool in resolving this public health crisis, just as the law encouraged "reduction of lead exposure and tobacco use, and the improvement of the workplace and motor vehicle safety."[39]

Physiologically, intake of more calories than calories expended yields weight gain.[40] Today's children are more sedentary than ever before.[41] Children, however, often do not make their own decisions regarding diet and exercise.[42] Parents, schools, and other social factors help to determine a child's food intake and level of physical activity.[43] Consideration of these variables is critical in crafting a viable

---

30. Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, Dep't of Health & Human Servs., *Preventing Obesity Among Children*, CHRONIC DISEASE NOTES & REP., Winter 2000, at 1.

31. *Id.*

32. *Id.*

33. *See* Nat'l Conference of State Legislatures, *supra* note 28. Societal costs include illness, an estimated expense of over 100 billion dollars annually, a threat to our medical infrastructure, and reduced productivity in the workplace. *See* Fred Kuchler & Nicole Ballenger, *Societal Costs of Obesity: How Can We Assess when Federal Interventions Will Pay?*, FOOD REV., Winter 2002, at 33, 33–34.

34. Gostin, *supra* note 22, at 87.

35. *Id.* A person's genetic makeup, as well as a number of medical factors or disorders can contribute to obesity. Smith & Liang, *supra* note 25, at 40.

36. Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, *supra* note 30, at 1.

37. Gostin, *supra* note 22, at 87. Beyond personal choice, experts have tied obesity to environment, income, genetics, and other factors. *See* David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 360–61 (2007).

38. *See* Gostin, *supra* note 22, at 87.

39. Hershberger, *supra* note 21, at 75.

40. MayoClinic.com, Childhood Obesity: Causes, http://www.mayoclinic.com/health/childhood-obesity/DS00698/DSECTION=causes (last visited Nov. 28, 2009).

41. Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, *supra* note 30, at 1.

42. Neal, *supra* note 4, at 110.

43. *Id.*

policy solution to childhood obesity because *polygenetic* problems often require *polygenetic* solutions.[44] Moreover, policy must account not only for the current state of disease and obesity, but also for the future of our nation's health.[45]

To develop solutions, policymakers must consider the conditions that cause childhood obesity. The Mayo Clinic has identified six main factors that contribute to childhood obesity.[46] First, consumption of high-calorie foods, including fast-food, baked goods, candy, soft drinks, and high-fat foods, directly contributes to weight gain.[47] Second, children who are sedentary do not burn enough calories to balance their consumption.[48] Third, genetics may predispose a child to weight gain.[49] Fourth, psychological conditions impact weight.[50] Some youth, for example, over-eat to deal with problems or emotions such as stress or boredom.[51] Finally, both family factors and socioeconomic factors greatly contribute to childhood weight gain.[52] Children do not purchase the groceries and stock the cupboards.

---

44. Yosifon, *supra* note 7, at 683. "The problem is polygenetic—stemming from many overlapping sources including changed patterns of work and recreation, involving less continuous physical exertion and fewer calories burned, and changed patterns of food consumption, involving more frequent consumption of highly caloric foods, in larger portions." *Id.*

45. *See* INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 6, at 5.

46. *See* MayoClinic.com, Childhood Obesity: Risk Factors, http://www.mayoclinic.com/health/childhood-obesity/DS00698/DSECTION=risk-factors (last visited Nov. 28, 2009).

47. *Id.*

48. *Id.* The Mayo Clinic notes that children today often spend their free time playing video games and watching TV instead of engaging in physical activity. *Id.*

49. *Id.* The leading cause of obesity among youth is overwhelmingly not genetic predisposition; it is eating and exercise habits. MayoClinic.com, *supra* note 40. Bardet-Biedl and Prader-Willi syndromes, for instance, predispose some children to obesity. Terry-Lynn Young et al., *A Fifth Locus for Bardet-Biedl Syndrome Maps to Chromosome*, 64 AM. J. HUM. GENETICS 900, 902 (1999); Prader Willi Syndrome Ass'n, What Is Prader Willi Syndrome?, http://pwsa.co.uk/main.php?catagory=1 (last visited Nov. 28, 2009). These diseases are rare. Prader-Willi Snydrome afflicts only 1 in 22,000, Prader Willi Syndrome Ass'n, *supra*, while Bardet-Biedl syndrome is a rare autosomal recessive disorder with major clinical manifestations, one of which is obesity, that plagues between 1 in 125,000 and 1 in 160,000. Young et al., *supra*.

50. MayoClinic.com, *supra* note 46.

51. *Id.* Often these are behaviors that parents also exhibit. *Id.*

52. *Id.* Children from minority or low-income families are at a greater risk of becoming overweight because low-income parents may lack the time and resources to make healthy food choices, and to make physical activity a priority. *Id.* Additionally, social influences play a role in obesity. Carol Graham et al., *Obesity and the Influence of Others*, WASH. POST, Aug. 21, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/08/20/AR2007082001454.html. A recent study indicates that an individual's chance of becoming obese is much higher if that person has a close friend who is obese. *Id.* "A social norm creates an ideal image of behavior that acts as a constraint on what individuals might otherwise do." *Id.* Researchers analyzed thirty-two years of data for over 12,000 adults and concluded that the medical assessments over time demonstrate that if one person becomes obese, people close to that individual are more likely to become obese. SOMMERS, *supra* note 19, at 25. The authors called obesity "socially contagious," as "[p]eople come to think that it is okay to be bigger since those around them are bigger." *Id.* Perhaps this study further supports the equal and opposite condition: if people are healthy and active, those around them will strive for that social norm.

Parents may fail to make wise and healthy choices for their children.[53] Additionally, commentators note that children are lured to high-calorie junk food through targeted advertising and are too immature to reasonably consider the implications of their food choices.[54] In most cases, a combination of these factors sets the stage for childhood obesity.[55] While most of these factors implicate personal choice and decisions made within the home, childhood obesity is a national public health concern that warrants government action, especially because society pays a high price for personal behaviors that cause obesity.[56]

Obesity contributes to the death of hundreds of thousands of people annually and has a high economic cost.[57] It imposes $47.5 billion in medical expenses each year.[58] Further, increased health insurance prices, sick leave, and disability insurance relating to obesity cost U.S. businesses $13 billion annually.[59] Moreover, the Centers for Disease Control and Prevention (CDC) estimate that the total cost related to treatment of overweight and obesity in 2003 was $75 billion.[60] The Food and Drug Administration (FDA) reported that the total annual cost of obesity in the United States in 2004 was about $117 billion.[61] The social cost of overweight and obesity includes a staggering death toll, many related diseases, and a decreased quality of life.[62] Thus, despite the claims that food choices and exercise habits are private choices that should remain free of government intervention,[63] the current overweight and obesity problem in the U.S. is a public health danger necessitating

53. MayoClinic.com, *supra* note 46.

54. Neal, *supra* note 4, at 110–11.

55. *Id.* at 109–11.

56. Breighanne Aileen Fisher, *Community-Based Efforts at Reducing America's Childhood Obesity Epidemic: Federal Lawmakers Must Weigh In*, 55 DEPAUL L. REV. 711, 711–12 (2006).

57. *Id.* at 711. Johns Hopkins Bloomberg School of Public Health reports that the price tag for being overweight includes (1) lower wages, (2) fewer hours worked, (3) higher healthcare costs, (4) higher cost for air travel, and (5) paying for more gasoline for the car. Tina Peng, *Five Financial Costs of American Obesity*, NEWSWEEK, Aug. 15, 2008, http://www.newsweek.com/id/153309.

58. Fisher, *supra* note 56, at 711.

59. Neal, *supra* note 4, at 109.

60. *Id.*

61. *See* OBESITY WORKING GROUP, U.S. FOOD & DRUG ADMIN., CALORIES COUNT 1 box 1 (2004), *available at* http://www.fda.gov/OHRMS/DOCKETS/ac/04/briefing/4039b1_01_calories%20count.pdf. That is approximately 8% of the national health care budget. Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, *supra* note 30, at 2.

62. *See, e.g.*, Stephen R. Daniels, *The Consequences of Childhood Overweight and Obesity*, CHILDHOOD OBESITY, Spring 2006, at 47, 47.

63. *See* Gostin, *supra* note 22, at 87. In many areas of personal behaviors, the government regulates because of the conduct's societal costs. These include, for example, drugs, seatbelts, alcohol, vaccines, tobacco, and helmets. Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 59–60, 70–72 (1999); *see also* Hershberger, *supra* note 21, at 88–90.

further action by the federal government,[64] just as the government regulates tobacco use and alcohol consumption.[65]

## II. THE FEDERAL AND STATE ROLES IN THE OVERWEIGHT AND OBESITY PUBLIC HEALTH CRISIS

The purpose of the U.S. Constitution is to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ."[66] The Constitution does not expressly empower Congress to provide for the public health,[67] a significant element of our welfare, liberty, and posterity.[68] Therefore, the obligation and power to protect public health lie with the states in accordance with the Tenth Amendment.[69] And, early Supreme Court decisions such as *Gibbons v. Ogden*[70] and *Willson v. Black-bird Creek Marsh Co.*[71] recognized that it was within the province of the states to protect public health.[72] Over time, however, the federal role in public health has steadily expanded.[73] Today, HHS, United States Department of Agriculture (USDA), Department of Labor, Environmental Protection Agency, Social Security Administration, and Federal Emergency Management Agency oversee and regulate many public health issues.[74]

Federalism seeks to maintain dual sovereignty of our federal government and the states.[75] This system of governance often creates a tug-of-war between federal

---

64. The Federal Trade Commission (FTC) and Department of Health and Human Services (HHS) held a joint conference on childhood obesity in 2005. Lydia B. Parnes, *Anticipating New Consumer Protection Challenges in the Food and Drug Marketplace*, 63 FOOD & DRUG L.J. 593, 595 (2008). They issued recommendations for self-regulation to the food and entertainment industries. *Id.* The FTC completed a comprehensive study of food marketing to children in July 2008 and made recommendation to the food and beverage industry and the entertainment industry. FED. TRADE COMM'N, MARKETING FOOD TO CHILDREN AND ADOLESCENTS (2008), *available at* http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf.

65. *See* Gostin et al., *supra* note 63, at 59–60, 71–72.

66. U.S. CONST. pmbl.

67. *See* U.S. CONST. art. III, § 8.

68. *See* HANK MCKINNELL & JOHN KADOR, A CALL TO ACTION: TAKING BACK HEALTHCARE FOR FUTURE GENERATIONS 16–21 (2005) (attempting to define and describe the importance of health).

69. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

70. 22 U.S. 1, 203 (1824) (stating that "[i]nspection laws, quarantine laws, health laws of every description" are all within the "immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government . . . .").

71. 27 U.S. 245, 251–52 (1829) (upholding Delaware law authorizing a dam under the state's police power to clean up a health hazard and finding that it did not violate the Commerce Clause).

72. Wendy E. Parmet, *Public Health and Constitutional Law: Recognizing the Relationship*, 10 J. HEALTH CARE L. & POL'Y 13, 15 (2007).

73. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 41 (2001).

74. *Id.* at 41–45.

75. *See* Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719–20 (2006).

and state exercise of power and authority.[76] In the arena of public health, and specifically in fighting obesity, the federal government wields the power to regulate and affect policy through the Commerce Clause, the power to tax, and the Spending Clause.[77] The states wield the power to regulate, through the police power, to protect the health, safety, and morals of their citizens.[78] In his book *Public Health Law: Power, Duty, Restraint*, Lawrence Gostin explains that "[t]he constitutional design reveals a plain intent to vest power in government, at every level, to protect community health and safety."[79] Gostin further notes that national, state, and local governments are active in the sphere of public health and each offers its own benefits.[80] The federal government, for example, has more resources and expertise in many areas and can address issues that cross state lines, while states have the ability to craft creative solutions to complex local problems and implement the solutions at local levels.[81] When federal law conflicts with state laws and regulations, however, the federal law preempts state law pursuant to the Supremacy Clause.[82] The role of preemption is important when evaluating national policies targeting obesity that may conflict with state and local laws already working to address obesity on a state or local level.[83]

Cooperative federalism is a model of federalism that eases the tension between federal and state assertions of power.[84] It offers a partnership between federal and state authorities and allows the states to maintain some decision-making authority "subject to minimum federal standards."[85] In *Hodel v. Virginia Surface Mine and Reclamation Association Inc.*, the Supreme Court clarified that while federal law is supreme, cooperative federalism "allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."[86] Under this model, the federal government can target the national problem of childhood obesity

---

76. *See id.* at 722.

77. GOSTIN, *supra* note 73, at 46.

78. *Id.* at 47.

79. *Id.* at 6.

80. *Id.* at 27, 55.

81. *Id.* at 55.

82. U.S. CONST. art VI; Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 776 (2008).

83. *See* Rutkow et al., *supra* note 82, at 774.

84. *See* New York v. United States, 505 U.S. 144, 166 (1992).

85. Glicksman, *supra* note 75, at 726. The Individuals with Disabilities Education Act is a model of cooperative federalism because it "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 52 (2005) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 183 (1982)).

86. 452 U.S. 264, 289 (1981).

while affording the states flexibility to incorporate regulation and programming appropriate for the local environment.

## III. WEIGHING THE LEGAL OPTIONS

In past decades, the law helped tackle public health problems in many industries and areas of life.[87] For example, reduced rates of cigarette smoking, decreased lead exposure, safer workplaces, advancements in motor vehicle safety, and increased vaccination rates are the positive outcomes of legislation, pointed regulation and enforcement, fervent litigation, or a combination of these legal mechanisms.[88] These successes indicate that the law can effectively manage the public health problem of childhood obesity.[89]

Legal scholars, health care professionals, and policymakers have considered several approaches to address both adult and childhood obesity. Some suggest regulation of the food industry through mandatory disclosure, food labels, and restrictions on marketing and advertising that target children.[90] Others recommend litigation to address deceptive practices, false claims, and unreasonably unhealthy products.[91] Commentators also discuss new legislation, including taxing calorie-dense or nutrient-poor foods, and enacting zoning laws that limit fast-food establishments and increase recreational opportunities in neighborhoods.[92] Additionally, researchers have encouraged enhancing school nutrition policies through amendments to existing legislation.[93] This section explores these legal approaches.

Countless federal agencies are considering the problem of obesity and their role in promoting healthy lifestyles. In 2007, for example, HHS established the Childhood Overweight and Obesity Coordinating Council to develop community-based intervention programs.[94] In 2006, HHS teamed with the Federal Trade

87. *See* Gostin et al., *supra* note 63, at 59–60, 70–72.

88. Hershberger, *supra* note 21, at 75; Michelle M. Mello & Katherine Zeiler, *Disease Prevention and Health Outcome: Empirical Health Law Scholarship*, 96 GEO. L.J. 649, 656 (2008).

89. Hershberger, *supra* note 21, at 76–77.

90. Gostin, *supra* note 22, at 88.

91. *Id.*

92. *Id.*

93. *See id.* at 88–89.

94. Press Release, U.S. Dep't of Health & Human Servs., HHS Launches Childhood Overweight and Obesity Prevention Initiative (Nov. 27, 2007), *available at* http://www.hhs.gov/news/press/2007pres/11/pr20071127a.html. These programs include the Centers for Disease Control and Prevention's *School Health Index: A Self-Assessment and Planning Guide*; the National Institutes of Health's *We Can! (Ways to Enhance Children's Activity and Nutrition)* program; Indian Health Service's diabetes prevention activities; Food and Drug Administration's *Using the Nutrition Facts Label to Make Healthy Food Choices* activities; and President's Council on Physical Fitness and Sports' *National Fitness Challenge. Id.*

Commission (FTC) to discuss marketing of food to children.[95] They issued a joint report providing recommendations to the food industry and the media on how these industries can help our nation reverse the childhood obesity trend.[96] Between 2003 and May 2008, HHS spent approximately $4.5 billion on obesity prevention, treatment, and research.[97] HHS is involved in more than 300 obesity-related programs.[98] The USDA's Food and Nutrition Services division oversees fifteen nutrition assistance programs that have improved the healthfulness of food choices offered in recent years.[99] Investment in nutrition assistance has increased by $60 billion, or 76%, from 2001 to 2008, and the USDA has since incorporated "evidence-based nutrition guidance" into its Dietary Guidelines and introduced a public awareness campaign on nutrition.[100]

Local governments have also taken steps to address obesity. In 2007, six states were recognized for their legislative and public-policy efforts to control childhood obesity.[101] These states passed legislation: (1) setting nutrition standards and limiting vending machine access in schools; (2) requiring BMI measuring and reporting of students; (3) requiring recess time and physical education classes; (4) adding obesity-awareness and weight-reduction programs to school curricula; (5) supporting obesity research; and (6) supporting insurance coverage of obesity; or a combination of these efforts.[102] While public awareness has increased, more programs focus on obesity, and laws aimed at improved health and nutrition have taken effect in many states, these efforts are insufficient.[103] HHS's *Progress Review*

---

95. Press Release, Fed. Trade Comm'n, FTC, HHS Release Report on Food Marketing and Childhood Obesity (May 2, 2006), *available at* http://www.ftc.gov/opa/2006/05/childhoodobesity.shtm.

96. *Id.*

97. Press Release, Nancy Montanez Johner, Undersecretary for Food, Nutrition, & Consumer Servs., Dep't of Agric., Combating Obesity (May 30, 2008), *available at* http://www.fns.usda.gov/cga/PressReleases/2008/OPED-0001.htm.

98. SOMMERS, *supra* note 19, at 26.

99. *See* Food & Nutrition Serv., U.S. Dep't of Agric., *Strategic Plan*, http://www.fns.usda.gov/ora/menu/gpra/StrategicPlan.htm (last visited Nov. 28, 2009); Food & Nutrition Serv., U.S. Dep't of Agric., *Programs & Services*, http://www.fns.usda.gov/fns/services.htm (listing the programs offered by the Department including the Child and Adult Care Food Program, Commodity Supplemental Food Program, Eat Smart Play Hard, and the Farmers' Market Nutrition Program among others) (last visited Nov. 28, 2009).

100. Press Release, Nancy Montanez Johner, *supra* note 97.

101. Val Wadas-Willingham, *Six States Get an "A" for Work Against Kids' Obesity*, CNN.COM, Jan. 31, 2007, http://www.cnn.com/2007/HEALTH/diet.fitness/01/30/obesity.report/index.html. Each year the University of Baltimore Obesity Initiative grades states on their efforts to reduce obesity within the state, and in 2007 California, Illinois, Oklahoma, Pennsylvania, South Carolina, and Tennessee were recognized. *Id.*

102. *Id.*

103. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., PROGRESS REVIEW: NUTRITION AND OVERWEIGHT (2008), *available at* http://www.healthypeople.gov/data/2010prog/focus19/2008Focus19.pdf (concluding that public health professionals and policymakers should consider a series of additional steps to further awareness about nutrition and obesity).

*Toward Healthy People 2010* lists further efforts required to fight childhood obesity, including integrating a public-private partnership to address nutrition and overweight, increasing public awareness and communication, providing greater support for school health and physical education programs, and changing the way the food industry and media market food to children.[104]

Other non-food related agencies are also active in combating childhood obesity. The Department of Interior issued a *Memorandum of Understanding to Promote Public Health and Recreation* to encourage physical activity through the use of public land and national parks.[105] Likewise, the Department of Transportation runs the Federal Safe Routes to School Program, which funds infrastructure improvements to "encourage children to walk and bicycle to and from school."[106] Although we cannot discount the value of the initiatives already underway to fight obesity, we can and must do more to complement and supplement these programs.[107]

### *A. Regulation and Legislation*

Many legislative and regulatory reforms are being considered and implemented as means of fighting childhood obesity. Regulatory efforts include mandating improved nutrition labeling on food products, requiring nutrition information disclosure of restaurant food items, prohibiting certain targeted advertising to children, and banning certain unhealthy ingredients in foods. Legislative solutions to childhood obesity include taxing unhealthy foods and changing the structural environment through zoning laws.[108] School-based reform as a legislative solution is discussed separately in the next section.

#### *1. Nutrition Labels*

Some commentators propose regulating consumers' exposure to food and nutrition information to attack the national childhood obesity epidemic. First, mandatory improved food labeling would more clearly and accurately disclose the nutritional contents of products.[109] The Nutrition Labeling and Education Act of 1990 requires that the packaging of foods intended for human consumption list

104. *Id.*

105. SOMMERS, *supra* note 19, at 31. Additionally, the National Park Service now offers a grant matching program to help states and municipalities acquire land for public outdoor recreation areas. *Id.*

106. *Id.*; *see also* Safe, Accountable, Flexible, Efficient Transportation Equity Act, Pub. L. No. 109-59, § 1404, 119 Stat. 1144, 1228–30 (2005).

107. *See* SOMMERS, *supra* note 19, at 20 (explaining that public health officials continue to call for more action by healthcare providers, schools, and cities to combat overweight and obesity).

108. Gostin, *supra* note 22, at 89.

109. *Id.* at 87.

certain nutrition values.[110] The FDA subsequently enacted regulations outlining what information food producers must include on the nutrition panel.[111] Disclosure allows the consumer to make more informed decisions and thus accords with consumer autonomy.[112] Regulatory options include requiring increased prominence of the calorie content on the food label, authorizing statements indicating healthfulness of foods that meet the FDA's definition of *low* or *reduced* calorie, and encouraging manufacturers to use more appropriate comparative labeling.[113] Research shows that consumers consult the required nutrition fact box when choosing their foods; consequently, more information that is meaningful to the consumer will likely assist consumers in making healthful choices.[114] In 2005, the FDA proposed a rule to increase the prominence of calorie content on food labels, but the rule did not become final.[115] As food labels can mislead or be difficult to decipher, regardless of the information provided,[116] the FDA continues to study ways of effectively communicating nutrition values and usefulness of labeling as a means to address endemic obesity.[117]

*2. Restaurant Disclosures*

Other commentators propose regulation of the restaurant industry as an avenue to help reduce unhealthy food choices and excessive caloric consumption. This approach focuses on the availability of nutrition information in restaurants through listings on wrappers and tray liners, posting calorie counts on menu boards, and indicating healthy meal choices with either a separate *healthy choice* section of the menu or via a special symbol adjacent to the product name.[118] Regulating the fast-food industry has gained relevance in the past decade as the rate of on-the-go

110. Nutrition Labeling and Education Act of 1990, Pub. L. 101-535, § 2(a), 104 Stat. 2353, 2353–56 (codified as amended at 21 U.S.C. § 343(q) (2006)).

111. *See* 21 C.F.R. §§ 101.1–.9 (2007); Nutrition Labeling and Education Act of 1990, § 2(b).

112. Gostin, *supra* note 22, at 87.

113. OBESITY WORKING GROUP, U.S. FOOD & DRUG ADMIN., *supra* note 61, at 19–20, 23.

114. *See* Jennifer L. Pomeranz & Kelly D. Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws*, 98 AM. J. PUB. HEALTH 1578, 1578 (2008).

115. *See* Food Labeling; Prominence of Calories, 70 Fed. Reg. 17,008, 17,008 (proposed Apr. 4, 2005) (to be codified at 21 C.F.R. pt 101).

116. *See* Gostin, *supra* note 22, at 87.

117. *See* Michelle M. Mello et al., *Obesity: The New Frontier of Public Health Law*, 354 NEW ENG. J. MED. 2601, 2606–07 (2006); *see also* OBESITY WORKING GROUP, U.S. FOOD & DRUG ADMIN., *supra* note 61, at 19 (outlining the plan of action for food labeling recommended to the FDA by the Obesity Working Group in 2004).

118. OBESITY WORKING GROUP, U.S. FOOD & DRUG ADMIN., *supra* note 61, at 26–27.

consumption has increased dramatically.[119] While the FDA encourages restaurants to promote healthy food choices,[120] it has not mandated that they do so.[121]

States and localities, however, have passed regulations in recent years requiring calorie disclosures in fast-food eateries. For example, the New York City Health Code now requires that all chain restaurants with fifteen or more outlets across the country provide caloric information on menu boards.[122] The New York State Restaurant Association challenged this rule, but the United States District Court of New York's Southern District held that the Nutrition Labeling and Education Act does not preempt the City's rule and that the rule is an "entirely reasonable approach to the City's goal of reducing obesity."[123] On February 17, 2009, the United States Court of Appeals for the Second Circuit affirmed this decision.[124] Similarly, in 2008, the Philadelphia City Council passed an ordinance requiring all restaurant chains with more than fifteen outlets to provide nutrition information on the menu boards.[125] California now requires all restaurants with twenty or more outlets to list the calorie content on menus and overhead menu boards.[126] These laws may be effective, but they only reach as far as the state and city lines.

---

119. *See* Pomeranz & Brownell, *supra* note 114, at 1578–79. Data indicate that in 2007, Americans spent 47.9% of their food budget on restaurant food. *Id.* at 1578. This is important because most people significantly underestimate the calorie content in restaurant food. *Id.*

120. OBESITY WORKING GROUP, U.S. FOOD & DRUG ADMIN., *supra* note 61, at 26–27.

121. Congress found that full nutritional labeling of restaurant food would be "impractical." H.R. Rep. No. 101-538, at 7 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 3336, 3337. Therefore, the NLEA expressly exempted restaurant foods from mandatory nutrition labeling. *See* 21 U.S.C. § 343(q)(5)(A)(i) (2006).

122. N.Y. CITY, N.Y., HEALTH CODE tit. 24, § 81.50 (2008).

123. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *5, *12 (S.D.N.Y. Apr. 16, 2008).

124. N.Y. State Rest. Ass'n. v. N.Y. City Bd. of Health, 556 F.3d 114, 136 (2d Cir. 2009).

125. BILL NO. 080167-A, § 1 (PHILA., PA. 2008), *available at* http://webapps.phila.gov/council/attachments/5823.pdf. The rule provides that:

> Chain restaurants shall provide nutrition information for all food or beverage items listed for sale on menus as follows: (a) The total number of calories (rounded to the nearest ten calories), grams of saturated fat, grams of trans fat, grams of carbohydrates and milligrams of sodium, per menu item as usually prepared and offered for sale shall be provided adjacent to each item on the menu, in a size and typeface similar to price and other information provided about each menu item; (b) When menu boards or food tags are used in lieu of other forms of menus, the nutrition information may be limited to the total number of calories per item, provided that (i) the additional information required in subsection (a) is made available, in writing, to customers upon request; and (ii) a sign on or near the menu board or food tag states in clear and conspicuous typeface: "Additional nutrition information for all menu items available upon request."

*Id.* Compliance is required by January 1, 2010. *Id.* § 2.

126. CAL. HEALTH & SAFETY CODE § 114094 (California Law through 2008 legislation). For an analysis of the constitutionality of menu labeling laws under the commercial speech doctrine of the First Amendment, see generally Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 159–94 (2009).

National regulation of the food industry, by requiring that restaurants provide nutrition information for each food item sold, may facilitate better eating habits and decrease the incidence of childhood obesity. Initially, the restaurant industry resisted national regulation, claiming that it is "paternalistic intervention" and that it "enfeeble[s] the notion of personal responsibility."[127] But today, and in the wake of the Second Circuit's decision to uphold New York City's labeling laws, the National Restaurant Association supports federal legislation requiring uniform national standards for labeling in chain food-service establishments.[128] Legislation aimed at accomplishing a national standard did not move from committee during the 110th Congress,[129] and similar legislation was introduced in the 111th Congress.[130] With the restaurant industry now advancing a national standard to resolve the challenges created by a patchwork of state legislation, this policy approach toward healthier eating may gain momentum in coming years.

*3. Advertising*

Advertisements for "junk" food and other high-calorie and high-fat content food items also influence children's food choices.[131] Reports indicate that American children are exposed to 40,000 advertisements per year, of which 72% are for candy, cereal, and fast-food.[132] The American Psychological Association (APA) explains that young children do not comprehend the persuasive intent of advertisements and commercials.[133] Indeed, advertisements shape children's product preferences and eating habits.[134] Thus, to address childhood obesity, the FTC can regulate food advertisements targeting children.[135] To date, the FTC has not restricted food advertising to children. However, the agency remains active in discussing the effect that advertising has on childhood obesity.[136] In his remarks in

127. Mello et al., *supra* note 117, at 2602.

128. Nat'l Rest. Ass'n, Public Policy Issue Briefs: Menu Labeling/Nutrition Information, http://www.restaurant.org/government/issues/issue.cfm?Issue=menulabel (last visited Nov. 28, 2009).

129. S. 3575, 110th Cong. (2008); H.R. 7187, 110th Cong. (2008).

130. S. 558, 111th Cong. (2009); H.R. 1398, 111th Cong. (2009). The recent health care reform debates have also included consideration of nutritional labeling requirements. *See* Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 2572 (2009) (as passed by House, Nov. 7, 2009); Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 4205 (2009) (as passed by House, Oct. 8, 2009).

131. Smith & Liang, *supra* note 25, at 46–47.

132. Mello et al., *supra* note 117, at 2601.

133. *Id.*

134. *Id.*

135. *See id.* at 2604. The FTC has authority over food advertisements while the FDA has authority over food labeling. *Id.*

136. Lydia Parnes, Dir., Bureau of Consumer Protection, Fed. Trade Comm'n, Luncheon Remarks, PMA 29th Annual Promotion Marketing Law Conference: Who's in Control Now: Navigating Tumultuous Marketing Change (Nov. 16, 2007), *available at* http://www.ftc.gov/speeches/parnes/

July 2007, FTC Commissioner Jon Leibowitz emphasized that regardless of how much or how little the food marketers contribute to the problem of childhood obesity, they must be part of the solution.[137] The FTC, however, does not plan to promulgate regulations that would restrict television advertising for foods and beverages during children's television programming or that would require air time devoted to promotion of good nutrition and physical activity.[138] Rather, the FTC encourages self-regulation of the food and entertainment industries, under threat of future government action if childhood obesity does not decrease.[139]

The food marketing and entertainment industries have responded to the outcry against childhood obesity and its relationship to food advertisements. Specifically, in 2006, the Better Business Bureau (BBB) launched the Children's Food and Beverage Advertising Initiative, and today, fifteen of the nation's largest food and beverage companies participate.[140] Participating companies agree to: (1) devote at least fifty percent their advertising directed to children under age twelve to promote healthier dietary choices and/or messages that encourage good nutrition or healthy lifestyles; (2) reduce the use of third-party licensed characters in advertising primarily directed to children under age twelve; (3) not pay for or actively seek food and beverage product placement in entertainment content directed to young children; (4) change children's interactive games that include the company's food or beverage brands to incorporate better-for-you foods or healthy lifestyle messages; and (5) not to advertise food or beverage products in elementary schools.[141] According to the FTC, the initiative demonstrates "substantial cooperation" by the industry.[142] Yet, the FTC recommends that the BBB strengthen

---

071116pma.pdf (discussing the FTC's continuing efforts to work with federal and local agencies and groups to fight childhood obesity).

137. Jon Leibowitz, Chairman, Fed. Trade Comm'n, Address at FTC-HHS Forum on Childhood Obesity: Childhood Obesity and the Obligations of Food Marketers or Whether or Not You Are Part of the Problem, You Need to Be Part of the Solution (July 18, 2007), *available at* http://www.ftc.gov/speeches/leibowitz/070718Child_Obesity_Speech.pdf.

138. *See* Mello et al., *supra* note 117, at 2604–05.

139. *See* Parnes, *supra* note 64, at 595. When the FTC proposed rules in past years to regulate advertising of high sugar foods targeted at children, the FTC faced four significant challenges: (1) the industry lobbied aggressively against the rule, (2) it was difficult to tailor narrow rules toward achieving the objective, (3) the FTC could not prove that advertising was directly linked to long-term eating habits, and (4) the FTC only has the power to regulate deceptive advertising. Mello et al., *supra* note 117, at 2605.

140. Better Bus. Bureau, Children's Food and Beverage Advertising Initiative, http://www.bbb.org/us/children-food-beverage-advertising-initiative/ (last visited Nov. 28, 2009). Participating companies include: Burger King Corp.; Cadbury Adams, USA, LLC; Campbell Soup Company; The Coca-Cola Company; ConAgra Foods, Inc.; The Dannon Company; General Mills, Inc.; The Hershey Company; Kellogg Company; Kraft Foods Inc.; Mars, Inc.; McDonald's USA; Nestlé USA; PepsiCo, Inc.; and Unilever United States. *Id.*

141. Better Bus. Bureau, About the Initiative, http://www.bbb.org/us/about-children-food-beverage-advertising-initiative/ (last visited Nov. 28, 2009).

142. FED. TRADE COMM'N, *supra* note 64, at 62–63.

the core principles and requirements of the initiative and better monitor participants' compliance with their pledges.[143] The FTC also recognizes that more companies are reformulating foods to be *better-for-you*, promoting messages of healthy living, clarifying nutrition labels, and identifying healthy food choices with symbols and clear messaging on the product packaging.[144]

*4. Food Bans*

A fourth approach suggests an outright ban on undesirable food items. New York City, for example, has banned restaurants from preparing recipes with more than 0.5 grams of *trans* fat per serving[145] because trans fat has been identified as "the worst type of fat."[146] Similar measures were adopted in Philadelphia,[147] Boston,[148] and California.[149] Several states, including California, New Jersey, and Oregon, have recently prohibited trans fat use in school foods.[150] Still, food bans epitomize a *big brother* government and introduce the danger of a slippery slope.[151] Critics of food bans contend that individuals should decide what they eat and choose between savory pleasure now and health consequences later.[152] While an

143. *Id.* at 62–65.

144. *Id.* at 65–75.

145. N.Y. CITY, N.Y., HEALTH CODE tit. 24, § 81.08 (2006).

146. Food & Drug Admin., *Revealing Trans Fats*, FDA CONSUMER, Sept.-Oct. 2003, at 20, 21–22.

> *[T]rans* fat is made when manufacturers add hydrogen to vegetable oil—a process called hydrogenation. Hydrogenation increases the shelf life and flavor stability of foods containing these fats. *Trans* fat can be found in vegetable shortenings, some margarines, crackers, cookies, snack foods, and other foods made with or fried in partially hydrogenated oils. Unlike other fats, the majority of *trans* fat is formed when food manufacturers turn liquid oils into solid fats like shortening and hard margarine. A small amount of *trans* fat is found naturally, primarily in some animal-based foods. *Trans* fat, like saturated fat and dietary cholesterol, raises the LDL cholesterol[, low-density lipoprotein, or "bad cholesterol,"] that increases your risk for CHD[, coronary heart disease].

*Id.*

147. PHILA., PA, HEALTH CODE, § 6-307 (2007); *Philly Looks to Shed Trans Fats After Council Vote*, NATION'S RESTAURANT NEWS, Feb. 19, 2007, at 76.

148. BOSTON, MASS., A Regulation to Restrict Foods Containing Artificial Trans Fat in the City of Boston (2008), *available at* http://www.bphc.org/boardofhealth/regulations/Forms%20%20Documents/regs_transfat-Mar08.pdf; Christine McConville, *Taking It to Heart, Boston Bans Trans Fat*, BOSTON HERALD, Mar. 13, 2008, at 20.

149. CAL. HEALTH & SAFETY CODE § 114377 (2009); Jennifer Steinhauer, *California Bars Restaurant Use of Trans Fats*, N.Y. TIMES, July 26, 2008, at A1.

150. Nat'l Conference of State Legislatures, Childhood Obesity: 2008 Update of Legislative Policy Options, http://www.ncsl.org/IssuesResearch/Health/ChildhoodObesity2008/tabid/13883/Default.aspx (last visited Nov. 28, 2009) [hereinafter Nat'l Conference of State Legislatures 2008 Data]. Similar legislation has been proposed in many additional states. *See* Nat'l Conference of State Legislatures, Trans Fat and Menu Labeling Legislation, http://www.ncsl.org/IssuesResearch/Health/TransFatand MenuLabelingLegislation/tabid/14362/Default.aspx (last visited Nov. 28, 2009).

151. *See* Gostin, *supra* note 22, at 90.

152. *Id.*

increasing number of local governments have proscribed the use of trans fat, prohibition on a national scale is improbable and likely unnecessary.[153]

*5. Taxation*

Taxing junk foods and fatty foods can help reduce unhealthy consumption and lead to better health and decreased obesity rates. Today, healthy foods are often more expensive than junk food, causing many to buy the latter.[154] Taxing unhealthy foods, commonly referred to as a *fat tax* or *twinkie tax*,[155] can alter this buying pattern.[156] The tax typically applies to foods high in fat, sugar, and carbohydrates, and the tax rate hovers at around one percent.[157] Advocates of the tax further promote funneling revenue from the tax into public awareness and anti-obesity programs.[158] Advocates also highlight data showing that food pricing directly affects consumption patterns.[159] Opponents of the tax, however, claim that the tax is paternalistic; will harm poor people, who are the primary consumers of high-fat-content foods; and will create administrative difficulty in deciding which foods merit taxation.[160] Moreover, economists assert that a nominal snack tax would have little effect on buying patterns,[161] furthering the argument of opponents that no evidence supports taxing unhealthy foods to decrease obesity rates.[162] Critics further contend that a snack tax is arbitrary and difficult to administer.[163] States like Minnesota, Texas, and California have taxed snacks for many years at a rate of approximately six to seven percent.[164] Other states, such as Louisiana, Mississippi, and Maryland, have repealed the snack tax in recent years.[165] Since 2005, at least eleven states have proposed legislation to tax foods and beverages of minimal

153. *See* Nanci Hellmich & Bruce Horovitz, *NYC Proposes Ban on Transfat in Restaurant Food*, U.S.A. TODAY, Sept. 27, 2006, at 9D (implementing menu labeling laws and eliminating trans fats "is an unreasonable, one size-fits-all approach" said a spokeswoman for the National Restaurant Association, and it appears that some establishments are phasing out trans fat on their own initiative).

154. *See* Gostin, *supra* note 22, at 89.

155. *Id.* Some scholars differentiate between a tax on junk foods or unhealthful snacks and a tax on fatty foods. Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1224–26 (2005).

156. Strnad, *supra* note 155, at 1224–25; *see also* Mello et al., *supra* note 117, at 2604.

157. Sayward Byrd, *Civil Rights and the "Twinkie" Tax: The 900-pound Gorilla in the War on Obesity*, 65 LA. L. REV. 303, 328 (2004).

158. Strnad, *supra* note 155, at 1225.

159. Mello et al., *supra* note 117, at 2604.

160. Byrd, *supra* note 157, at 329, 333–34.

161. *Id.* at 329.

162. *See id.*

163. *Id.* at 333.

164. *Id.* at 329–30.

165. *Id.* at 330–34.

nutritional value, but these bills were not enacted.[166] The failure of these efforts suggests that taxing foods as a means to curb obesity is either not palatable, not effective, or both.

*6. Land Use and Zoning: The Built Environment*

Land use and zoning have been widely considered as a method to promote community health and encourage physical activity.[167] In recent decades, neighborhood planning has yielded home building in low-density, self-contained areas, where homes are not within walking distance of daily destinations.[168] Further, commercial development has replaced parks and open spaces where children once ran free and burned calories.[169] Additionally, low income neighborhoods suffer from limited access to supermarkets and fresh fruits and vegetables, a high density of fast-food establishments, and high crime rates that discourage outdoor recreation.[170] Built environment reforms, through legislation including building parks, hiking trails, and biking paths, planning central schools, limiting the number of fast-food restaurants permitted in a given zone, increasing safety, and affording easy access to healthful food choices in supermarkets, would all facilitate more active and healthy lifestyles.[171]

A chief purpose of zoning law, as derived from the state police power,[172] is to protect the public health.[173] Recently, in response to "sprawl and poorly controlled development," an *active-living* movement has emerged.[174] Active-living advocates focus on the relationship between health and our physical environment, and they promote land use, transportation, urban redevelopment, and open space and

166. Nat'l Conference of State Legislatures 2008 Data, *supra* note 150 (follow "Overview" links at the top of the page for 2005–2007 data).

167. Gostin, *supra* note 22, at 89; *see also* Fisher, *supra* note 56, at 731.

168. Fisher, *supra* note 56, at 731.

169. *Id.*

170. Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112 PENN. ST. L. REV. 529, 540–41 (2007).

171. *See id.* at 540–41, 574–77; *see also* Gostin, *supra* note 22, at 89.

172. Jackson S. Davis, *Fast Food, Zoning, and the Dormant Commerce Clause: Was It Something I Ate?*, 35 B.C. ENVTL. AFF. L. REV. 259, 260 (2008).

173. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391, 394 (1926); *In re* Opinion of the Justices, 127 N.E. 525, 532 (Mass. 1920); Miller v. Bd. of Pub. Works, 234 P. 381, 388 (Cal. 1925) (emphasizing health and safety concerns in upholding early zoning ordinances); *see also Developments in the Law—Zoning*, 91 HAR. L. REV. 1427, 1445–46 (1978) (stating that almost all early zoning ordinances were upheld at least partially on public health and safety grounds). Based on that power, courts have upheld zoning regulations that limit fast-food restaurants in given zones. JULIA SAMIA MAIR ET AL., THE CITY PLANNER'S GUIDE TO THE OBESITY EPIDEMIC: ZONING AND FAST FOOD 8 (2005), *available at* http://www.publichealthlaw.net/Zoning%20City%20Planners%20Guide.pdf.

174. Patricia E. Salkin & Amy Lavine, *Land Use Law and Active Living: Opportunities for States to Assume a Leadership Role in Promoting and Incentivizing Local Options*, 5 RUTGERS J. L. & PUB. POL'Y 317, 317–18 (2008).

recreation policies to increase physical activity and afford access to healthy foods.[175] Smart growth and active living policies should reflect the needs of individual communities.[176] Therefore, states and municipalities must take the reins to decrease obesity prevalence through implementing built environment policies that promote public health.[177]

The federal government recognizes the built environment's influence on community health and is responding. The CDC encourages states to build schools near communities and in ways that promote physical activity, and it recommends planning parks that include playgrounds and sports facilities near residential areas so children can enjoy physical activity.[178] Additionally, federally funded programs include the National Center for Safe Routes to School, funded by the Department of Transportation, which encourages walking and biking to school;[179] the National Clearinghouse for Educational Facilities, funded by the Department of Education, working to build safe, healthy, and productive school environments;[180] and the National Program for Playground Safety, funded through a grant of the CDC, which helps the public to develop safe and developmentally appropriate play environments.[181] The federal government, states, and localities are responding to the active-living movement and are adopting laws that promote access to healthy food and healthy community design.[182]

These measures chip away at childhood obesity and potentially offer positive, long-term effects. Public officials and researchers should continue to study their effectiveness and implement changes accordingly because, unless changes occur, the prevalence of overweight and obesity will continue to increase.[183]

---

175. *Id.* at 318–21.

176. *See id.*

177. *See id.* at 319 (outlining several land use approaches that states may undertake).

178. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, WALKING & BICYCLING TO SCHOOL: TRAIN THE TRAINER LESSON PLAN 1 (2009), *available at* http://www.cdc.gov/nccdphp/dnpa/kidswalk/community_presentation/train_the_trainer_guide_508.pdf; Ed Thompson, Chief, Pubic Health Practice, Ctrs. for Disease Control & Prevention, Dep't of Health & Human Servs., Statement to the Subcommittee on Human Rights and Wellness Committee on Government Reform, Conquering Obesity: The U.S Approach to Combating this National Health Crisis (Sept. 15, 2004), *available at* http://www.hhs.gov/asl/testify/t040915.html.

179. *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act, Pub. L. No. 109-59, §1404, 119 Stat. 1144, 1228–30 (2005); *see also* Nat'l Cent. for Safe Routes to School, About Us, http://www.saferoutesinfo.org/about/ (last visited Nov. 28, 2009).

180. Nat'l Clearinghouse for Educ. Facilities, About NCEF, http://www.edfacilities.org/an/index.cfm (last visited Nov. 28, 2009).

181. Nat'l Program for Playground Safety, Our Mission, http://www.playgroundsafety.org/about/index.htm (last visited Nov. 28, 2009).

182. *See generally* Nat'l Conference of State Legislatures, Healthy Community Design and Access to Healthy Food Legislation Database, http://www.ncsl.org/programs/environ/healthyCommunity/healthycommunity_bills.cfm (last visited Nov. 28, 2009) (providing a database for various federal and state laws concerning "health community design").

183. David Gray, *Help Kids via Junk Food Tax*, BALT. SUN, Aug. 31, 2007, at 19A.

### *B. Litigation*

Issues of public health offer prime examples of blockbuster lawsuits used as tools to propel change.[184] The most famous example is the series of class action suits against the tobacco industry.[185] Now, as America faces the childhood obesity epidemic, some believe that suing food companies and fast-food chains that allegedly contribute to our nation's rampant obesity may generate negative publicity that will shame the food industry to change its practices.[186]

Fast-food litigation exists, but these lawsuits have been unsuccessful.[187] The only reported fast-food case, alleging that the defendant's unhealthy food caused the plaintiffs to gain weight and suffer health problems, is *Pelman v. McDonald's Corp.*, a case brought by obese children in New York City.[188] In this action, the plaintiffs claimed that McDonald's deceptively advertised in violation of New York state law.[189] Specifically, the plaintiffs alleged that: (1) promotion created a false impression that McDonald's food products were nutritionally beneficial and contributed to a healthy lifestyle; (2) McDonald's failed to sufficiently disclose additives and use of certain preparation methods that made the food less wholesome than represented; and (3) McDonald's falsely claimed that it would provide nutrition information in the stores.[190] The United States District Court for the Southern District of New York dismissed the claims,[191] but the United States Court of Appeals for the Second Circuit vacated and remanded.[192] On remand, the District Court denied the defendants' motion to dismiss.[193] The denial was a small victory for the plaintiffs, but no further action has occurred in this suit to date.[194]

---

184. *E.g.*, Cooper v. R. J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956) (upholding the plaintiff's claim that defendant deceived him by advertising that their product is "healthful" and unlikely to cause harm); Nat'l Ass'n of Att'ys Gen., Master Settlement Agreement (1998), *available at* http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/ (follow "Master Settlement Agreement" hyperlink).

185. *See* Nat'l Ass'n of Att'ys Gen., *supra* note 184; Micah L. Berman, *Tobacco Litigation Without the Smoke? Cigarette Companies in the Smokeless Tobacco Industry*, 11 J. HEALTH CARE L. & POL'Y 7, 18–19 (2008) (explaining that the largest manufactures of cigarettes entered into the Master Settlement Agreement "in order to settle litigation brought by the attorneys general of forty-six states").

186. Burnett, *supra* note 37, at 384–86.

187. *Id.* at 365 (noting that fast-food lawsuits are infrequent and unsuccessful in court).

188. 237 F. Supp. 2d 512, 519–20 (S.D.N.Y. 2003). This first action was dismissed with leave to amend the complaint. *Id.* at 543. After the parties amended the complaint, the District Court again dismissed. Pelman v. McDonald's Corp., No. 02 Civ. 7821(RWS), 2003 U.S. Dist. LEXIS 15202, at *1 (S.D.N.Y. Sept. 3, 2003). *See also* Burnett, *supra* note 37, at 376. A similar case, *Barber v. McDonald's Restaurant, Inc.*, No. CA-00-2438-WMN (D. Md. Aug. 17, 2000), was withdrawn. *Id.* at 376, 377 n. 88.

189. *Pelman*, 237 F. Supp. 2d at 520.

190. *Pelman*, 2003 U.S. Dist. LEXIS 15202, at *6.

191. *Id.* at *42.

192. Pelman v. McDonald's Corp., 396 F.3d 508, 512 (2d Cir. 2005).

193. Pelman v. McDonald's Corp., 452 F. Supp. 2d 320, 328 (S.D.N.Y. 2006). The Plaintiffs brought four claims; two claims were dismissed. *Id* at 324–26.

194. *See id.*

Generally, few have filed cases against fast-food restaurants, and few have alleged direct causation of obesity.[195]

Product liability litigation involving obesity is difficult for plaintiffs who must prove that the food or corporate practice caused injury and that "the dangers were not 'open and obvious' to the ordinary consumer."[196] Overweight or obesity usually results from several factors, including food choice, food portion, amount of physical activity, and other social factors, making it difficult for plaintiffs to prove causation against food manufacturers or fast-food establishments. Additionally, as of 2007, twenty-three states have passed laws that protect the fast-food industry against tort liability for weight gain, obesity, or any associated health condition.[197] Similar legislation has not succeeded on the federal level, and advocates of a federal bill prohibiting suits assert that people should accept personal liability for their weight condition and that the burden should not fall on the food industry.[198] Opponents of the federal legislation claim that obesity is a community problem and cannot be narrowly defined by personal responsibility.[199] They argue that food choices are "strongly influenced by environmental factors such as 'the availability and cost of food, portion sizes in restaurants, food advertising, access to information about ingredients and nutrition, cultural upbringing, and other factors,'" and that litigation would raise public awareness and compel industry reform.[200] Indeed, threat of litigation has encouraged some fast-food chains to offer more healthful options, by way of self-regulation.[201]

Other variations of *obesity litigation* are negligent misrepresentation and consumer fraud cases advanced against food manufacturers for inaccurate fat and calorie information on product packaging.[202] For example, in *Elias v. Ungar's Food Products Inc.*,[203] plaintiffs sued for common law negligent misrepresentation, breach of express warranty, and consumer fraud, alleging false nutrition

195. *Id.* at 376. Two cases were brought against food manufacturers for understating the calorie and fat content in their product; both settled. *Id.*

196. Mello et al., *supra* note 117, at 2603.

197. Hershberger, *supra* note 21, at 82. Due to concerns about the frivolity of tort suits against the food industry, the House and Senate introduced bills in 2005 seeking to limit civil actions brought based upon cumulative acts of consumption. *See* Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005); Commonsense Consumption Act of 2005, S. 908, 109th Cong. (2005).

198. *See* Hershberger, *supra* note 21, at 82–83. *See also* Commonsense Consumption Act of 2009, H.R. 812, 111th Cong. (2009); Commonsense Consumption Act of 2007, H.R. 2183, 110th Cong. (2007); Commonsense Consumption Act of 2007, S. 1323, 110th Cong. (2007).

199. Hershberger, *supra* note 21, at 83.

200. *Id.* (quoting Burnett, *supra* note 37, at 375).

201. Burnett, *supra* note 37, at 385–86.

202. *See id.* at 376.

203. Elias v. Ungar's Food Prod. Inc., 252 F.R.D. 233 (D.N.J. 2008).

information on the defendant's frozen food products.[204] Similarly, in *Reyes v. McDonald's Corp.*, the plaintiff brought four claims against McDonald's for misrepresenting the nutrition information of its french fries.[205] The court dismissed all claims except the claim for consumer fraud under Illinois state law, but no further action is reported.[206] Two other frequently discussed examples of nutrition content misrepresentation are Big Daddy ice cream and Pirate's Booty rice snack.[207] In both class action cases, the manufacturers settled for millions of dollars.[208] Based on the nominal success of suits filed in the past few years, neither consumer fraud/negligent misrepresentation nor tort liability appear likely to compel significant changes in the food industry.[209] Legal scholars assert that similar future cases will likely continue to fail on the merits.[210]

## IV. FIGHTING FAT WITH SCHOOL-BASED SOLUTIONS

Comprehensive school-based legislation is a wholesome ingredient in the fight against childhood obesity.[211] Because children attend school through their late-teen years, and eat one or two meals per day in school, school cafeterias should offer healthy foods and school curricula should offer courses that help students to understand the mechanics of nutrition and food consumption, the health effects of weight gain, and the benefits of regular exercise.[212] Reinforcing the benefits of a healthy body from an early age can establish lifelong healthy habits.[213] Through communication with the decision-makers in the home, schools can also influence behaviors there and promote healthy choices around the clock, in all settings.[214]

---

204. *Id.* at 236–37. On June 30, 2008, the District Court certified a class for the breach of warranty and the consumer fraud claims. *Id.* at 237.

205. Case Nos. 06 C 1604, 06 C 2813, 2006 U.S. Dist. LEXIS 81684, at *1, 4–8 (N.D. Ill. Nov. 8, 2006).

206. *Id.* at *4, *6, *8, *24. The court found that claims for Illinois consumer fraud were pleaded with specificity, but dismissed claims for (1) breach of express warranty, (2) breach of implied warranty, and (3) New York consumer fraud. *Id.*

207. Burnett, *supra* note 37, at 376.

208. *Id.* at 376 n.80. De Conna settled the Big Daddy ice cream case for $1.2 million. Kate Zernike, *Lawyers Shift Focus from Big Tobacco to Big Food*, N.Y. TIMES, Apr. 9, 2004, at A15. The second case involved snack foods Pirates Booty, Fruity Booty, and Veggie Booty. Berkman v. Robert's Am. Gourmet Food, Inc., 841 N.Y.S.2d 825, 825 (2007). While the court initially certified a class, in June of 2007 the class certification was denied upon remand. *Id.*

209. *See* Burnett, *supra* note 37, at 380 (highlighting the legal community's skepticism of obesity litigation's likelihood to succeed on the merits).

210. *Id.* ("Although fast-food lawsuits have provoked much public speculation about whether obese plaintiffs could recover against fast-food companies, the legal community has concluded thus far that obesity lawsuits will continue to fail on the merits.").

211. HASKINS ET AL., *supra* note 9, at 2 ("We believe that the policies and programs implemented in the public schools hold the greatest promise.").

212. *Id.* at 2–3.

213. *Id.* at 2.

214. *Id.* at 3.

The Institute of Medicine's Committee on Prevention of Childhood Obesity (the Committee) explains that obesity prevention requires "environmental-behavioral synergy."[215] The Committee clarifies that meaningful changes to children's diet and exercise behaviors require both lessons about food, diet, and exercise, and schools that reflect these values.[216] Schools can achieve this dual objective by reforming school meal programs and changing vending machine choices, actively promoting health, diet, and exercise, and providing more opportunities for physical activity.[217] Federal legislation setting nationwide standards would ensure that schools work to address the obesity epidemic.[218]

The U.S. Constitution reserves education policymaking for the states.[219] Congress, however, may condition federal grants on implementation of federal programs.[220] The federal government has traditionally used this funding leverage to mandate or encourage certain state actions.[221] Currently, the National School Lunch Program (NSLP) operates in this way in more than 101,000 public and nonprofit private schools across the nation, serving low-cost or free meals to more than thirty million children daily.[222] The NSLA formally established the NSLP in 1946.[223] At

---

215. Peterson & Fox, *supra* note 5, at 117.

216. *Id.*

217. Recently, schools have shifted from team-oriented physical activity to a health club-style model where students are trained on free-standing equipment such as treadmills, ellipticals, bikes, and weight machines. *See* Linda Saslow, *Moving from Team Sport to Lifelong Fitness*, N.Y. TIMES, Jan. 11, 2009, at LI. Educators hope that students will continue the fitness routine forward after high school and college, when team sports often discontinue. *See id.*

218. *See* CTR. FOR SCIENCE IN THE PUB. INTEREST, UPDATE USDA'S SCHOOL NUTRITION STANDARDS: VOTE YES ON SCHOOL NUTRITION AMENDMENT TO THE FARM BILL 1–4 (n.d.), *available at* http://www.cspinet.org/new/pdf/fedfactsheet.pdf (arguing that the USDA should update school nutrition standards to address the obesity epidemic).

219. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Because the power to oversee education is not explicitly granted to Congress in Article I, nor does Article I deny the states this power, it is a reserved power of the states. *Cf.* U.S. CONST. art. I, §§ 8, 10.

220. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 205, 212 (1987) (holding that it is constitutionally permissible for the United States to condition federal state highway funding on the states' adoption of a minimum drinking age of 21). "Incident to [the Spending Clause], Congress may attach conditions to receipt of federal funds. . . . [O]bjectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through use of spending power and conditional grant of federal funds." *Id.* at 206–07 (quoting United States v. Butler, 297 U.S. 1, 65 (1936)).

221. *See* HASKINS ET AL., *supra* note 9, at 4 (noting that it is likely that the federal government could condition funding on the removal of vending machines in schools).

222. FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM (2008), *available at* http://www.fns.usda.gov/cnd/Lunch/AboutLunch/NSLPFactSheet.pdf; *see also* Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (codified at 42 U.S.C. § 1758 (2006)).

223. National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946); FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., *supra* note 222. This was during the Truman administration.

the time, malnutrition plagued the nation, children arrived at school hungry, and their ability to learn suffered.[224] The NSLP addressed these problems and also reduced an agricultural surplus caused by the Great Depression and rampant poverty.[225] Today, however, the pendulum has swung from malnutrition to obesity, and policymakers are discussing how the NSLP can plot a course against childhood obesity.[226]

### *A. The National School Lunch Act*

In 2004, Congress passed the Child Nutrition and WIC Reauthorization Act, requiring schools serving meals under the NSLP to adopt local wellness policies to advance children's health.[227] This was Congress's first step in amending the NSLA to make nutritious food choices, increasing nutrition education, and increasing physical activity mandatory components of the NSLP.[228] This section explores the NSLA, while the next section reviews the recent implementation of local wellness policies and explores the need for additional comprehensive school-based legislation.

In 1946, Congress created the NSLP to promote nutrition through a grant-in-aid program for the establishment of a nonprofit school lunch program.[229] Under this program, school districts and independent schools choose to participate in the lunch program and receive cash subsidies and donated commodities from the

---

Whitehouse.gov, Biography of Harry S. Truman, http://www.whitehouse.gov/about/presidents/HarrySTruman/ (last visited Nov. 28, 2009).

224. GORDON W. GUNDERSON, THE NATIONAL SCHOOL LUNCH PROGRAM BACKGROUND AND DEVELOPMENT 15 (2003). In the late 1800s, school lunch programs operated in various capacities in European nations. Lunch programs came to the United States in the early 1890s. *Id.* at 8. Initially, states coordinated school lunch programs. *Id.* at 8–15. By the 1930s, the federal government became involved, providing aid for school lunch programs under the Works Progress Administration and the National Youth Administration on a year-to-year basis. *Id.* at 24. In 1946, the federal government instituted a formal federal program operating on a continuous basis. *Id.* at 29–30.

225. *Id.* at 21–22. As a result of the Great Depression, much of the produce did not find a market because these commodities were not affordable to the average consumer. *Id.* at 21. The USDA bought the surplus and provided it to needy children at a discounted rate through the NSLP. *Id.* at 22.

226. *See* HASKINS ET AL., *supra* note 9, at 3–4.

227. Child Nutrition and WIC Reauthorization Act of 2004 § 204, 118 Stat. at 780–81. WIC is an abbreviation for "women, infants, and children" and is a program established under the USDA's Food and Nutrition Service. Food & Nutrition Serv., U.S. Dep't of Agric., Women, Infants, and Children, http://www.fns.usda.gov/wic/ (last visited Nov. 28, 2009).

228. *See* GUNDERSON, *supra* note 224, at 39–41 (detailing the amendments to the National School Lunch Act prior to 2004, which did not include mandates to increase nutritious food choices, nutrition education, or physical activity). The Child Nutrition Act of 1966 expanded the NSLA. *See* Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (codified as amended 42 U.S.C. §§ 1751–1770 (2006)).

229. National School Lunch Act, 79 Pub. L. No. 79-396, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C. §§ 1751–1769).

USDA for each meal served.[230] The meals must comply with federal requirements and must be free or reduced in price for eligible students.[231] Foods served must "meet minimum nutritional requirements," a standard set by the USDA.[232]

The USDA has promulgated regulations outlining nutrition standards and menu planning for schools participating in the NSLP.[233] Schools generally "must provide nutritious and well-balanced meals."[234] Specifically: (1) students should eat a variety of foods; (2) the total fat of a lunch may only account for thirty percent of total calories; (3) saturated fat in lunch must be less than ten percent of total calories; (4) schools must provide a low cholesterol diet; (5) schools must supply a diet of grain products, vegetables, and fruits; (6) schools must provide a diet moderate in salt and sodium; and (7) schools must offer foods rich in dietary fiber.[235] Additionally, school lunches must contain one-third of the recommended, age-appropriate dietary allowances for protein, calcium, iron, vitamin A, and

---

230. FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., *supra* note 222. Participation in the NSLP is voluntary, but, if a school or school district participates, full compliance is required. Shaw v. Governing Bd., 310 F. Supp. 1282, 1286 (E.D. Cal. 1970).

> Within the States, the responsibility for the administration of the Program in schools . . .[], shall be in the State educational agency. If the State educational agency is unable to administer the Program in public or private nonprofit residential child care institutions or nonprofit private schools, then Program administration for such schools may be assumed by [Food and Nutrition Services Regional Office] as provided in paragraph (c) of this section, or such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer such schools. Each State agency desiring to administer the Program shall enter into a written agreement with the Department for the administration of the Program in accordance with the applicable requirements . . . .

7 C.F.R. § 210.3(b) (2008).

231. FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., *supra* note 222.

> Any child at a participating school may purchase a meal through the National School Lunch Program. Children from families with incomes at or below 130 percent of the poverty level are eligible for free meals. Those with incomes between 130 percent and 185 percent of the poverty level are eligible for reduced-price meals, for which students can be charged no more than 40 cents. (For the period July 1, 2008, through June 30, 2009, 130 percent of the poverty level is $27,560 for a family of four; 185 percent is $39,220.) Children from families with incomes over 185 percent of poverty pay a full price, though their meals are still subsidized to some extent. Local school food authorities set their own prices for full-price (paid) meals, but must operate their meal services as non-profit programs.

*Id.*

232. 42 U.S.C. § 1758(a)(1)(A). The Food and Nutrition Service, a division of the USDA administers the program at the federal level. *See* FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., *supra* note 222. At the state level, the National School Lunch Program is usually administered by state education agencies via agreements with school food authorities. *Id.*

233. 7 C.F.R. § 210.10.

234. *Id.* § 210.10(a). Nutrition values are calculated based on the Dietary Guidelines for Americans, which is published every five years by HHS and USDA. U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S DEP'T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 2005, at 1–3 (2005), *available at* http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf.

235. 7 C.F.R. § 210.10(b).

vitamin C.[236] Within these parameters, school authorities have menu planning options.[237]

While these rules apply directly to the meal programs, Congress has continuously expanded the WIC Reauthorization Act. In 1966, the Child Nutrition Act extended, expanded, and strengthened the school lunch program, and later a special milk program and a school breakfast program were added.[238] Over the years, Congress provided for additional food and related programs to cater to public health concerns, including NSLP,[239] the School Breakfast Program,[240] Preschool Food Programs,[241] programs for women, infants, and children (WIC),[242] Summer Food Services,[243] child care and adult care food programs,[244] and breastfeeding

---

236. *Id.* § 210.10(b)(1).

237. *Id.* § 210.10(b)(5).

238. Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (codified as amended at 42 U.S.C. §§ 1751–1770 (2006)); 7 C.F.R. § 215.1 (detailing the history of the addition of the Special Milk Program in 1970 to the Child Nutrition Act of 1966). At the time, addressing malnutrition remained the foremost goal of Congress in adding these programs. *See* GUNDERSON, *supra* note 224, at 15, 21–22.

239. National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946), *amended by* the Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (2004) (codified as amended at 42 U.S.C. §§ 1751–1769).

240. Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (1966), *amended by* the Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (2004) (codified as amended at 42 U.S.C. §§ 1771–1791 (2006)). The School Breakfast Program (SBP) provides "cash subsidies" to States to "serve breakfasts that meet Federal requirements." FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., THE SCHOOL BREAKFAST PROGRAM (2009), http://www.fns.usda.gov/cnd/Breakfast/ (follow "Program Fact Sheet" hyperlink). The program "is administered at the Federal level by FNS." *Id.* State education agencies administer the SBP at the state level through agreements with local school food authorities. *Id.* The program operates in 85,000 schools. "Any child at a participating school may purchase a meal through the SBP. Children from families with incomes at or below 130 percent of the Federal poverty level are eligible for free meals. Those with incomes between 130 percent and 185 percent of the poverty level are eligible for reduced-price meals." *Id.*

241. Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (1966), *amended by* the Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (2004) (codified as amended at 42 U.S.C. § 1781).

242. Amendments to National School Lunch Act, Pub. L. No. 92-433, 86 Stat. 724 (1972) (codified as amended at 42 U.S.C. § 1768). "WIC provides Federal grants to States for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk." Food & Nutrition Serv., U.S. Dep't of Agric., *supra* note 227.

243. National School Lunch Act and Child Nutrition Act of 1966, Amendments of 1975, Pub. L. No. 94-105, 89 Stat. 511, *amended by* the Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (2004) (codified as amended at 42 U.S.C. § 1761).

> The Summer Food Service Program (SFSP) helps children get the nutrition they need to learn, play, and grow throughout the summer . . . . SFSP sponsors receive payments for serving healthy meals and snacks to children and teenagers, 18 years and younger, at approved sites in low-income areas. Schools, public agencies, and private nonprofit organizations may apply to sponsor the program.

Food & Nutrition Serv., U.S. Dep't of Agric., SFSP About the Program, http://www.fns.usda.gov/cnd/Summer/about/index.html (last visited Nov. 28, 2009).

education programs.[245] Today, as overweight and obesity present the most pressing nutrition concern, the federal government recognizes that schools receiving NSLA funding should meet higher nutrition standards and incorporate a more robust physical education requirement.[246]

### *B. Local Wellness Policies and Additional School-Based Legislation*

The 2004 reauthorization law required that by June 2006, schools participating in programs under the NSLA and CNA adopt local wellness policies.[247] The policies must: (1) include goals for nutrition education, physical activity, and other school-based activities designed to promote student wellness; (2) include nutrition guidelines selected by the local educational agencies for all foods available on campus under the local educational agencies; (3) assure that guidelines for reimbursable school meals are not less restrictive than regulations and guidance issued by the Secretary; (4) establish plans for measuring implementation of local wellness policy; and (5) involve parents, students, school officials, and the public in developing the school wellness policies.[248] While the law encourages states to focus on nutrition, the standards are vague and there is no enforcement mechanism.[249] Therefore, although the law is "theoretically mandatory" for all schools receiving federal funding for school meals, participation is, in reality, voluntary.[250]

Early research indicates that implementation of local wellness policies has encountered significant challenges.[251] Only about half of approved policies met the minimum statutory guidelines, forty percent of the policies did not identify who was in charge of implementation, and few policies indicated a timeline or

---

244. Child Nutrition and WIC Reauthorization Act of 1989, Pub. L. No. 101-147, 103 Stat. 877, *amended by* Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (codified as amended at 42 U.S.C. § 1766). "The Child and Adult Care Food Program provides nutritious meals to low-income children and adults who receive daycare outside of their home." Food & Nutrition Serv., U.S. Dep't of Agric., Food Assistance, http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?parentnav=FOOD_NUTRITION&navid=FOOD_ASSISTANCE&navtype=RT (last visited Nov. 28, 2009).

245. Child Nutrition Amendments of 1992, Pub. L. No. 102-342, 106 Stat. 911, *amended by* Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (2004) (codified as amended at 42 U.S.C. § 1790).

246. *See* Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 780 (2004); *see also* 7 C.F.R. § 210.10 (2008) (detailing the government requirements for nutritious meals for children).

247. Child Nutrition and WIC Reauthorization Act of 2004, § 204, 118 Stat. at 780.

248. *Id.* § 204(a).

249. *See* Sally Hubbard, *Taking Roll: An Assessment of State and Local Governance of School Wellness Policies*, 5 IND. HEALTH L. REV. 201, 207–08 (2008).

250. Ellen Fried & Michele Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 DUKE L.J. 1491, 1528 (2007).

251. *Id.* at 1529.

measurable objectives.[252] The Illinois State Board of Education identified twenty-seven barriers to the implementation of local wellness policies, including the distraction of academic priorities; lack of resources, including time, staff, and money; and fear of losing revenue generated by sales in vending machines, a la carte lines, and school stores.[253] Although it is too early to gauge the effects of local wellness policies, it appears that they are only one small step in the right direction.

Students access food in schools through many channels: the NSLP, the School Breakfast Program, food sold a la carte, vending machines, snack bars, and school stores.[254] Under federal law, competitive food items are currently exempt from nutrition standards.[255] In an effort to control consumption of unhealthy foods during school hours, the federal government has banned the sale of foods of "minimal nutritional value" in school cafeterias during meal time hours.[256] Still, these food items remain widely available in schools.[257] The federal government cannot demand that schools remove vending machines or mandate that machines and stores only stock certain foods because those controls may overstep federal authority.[258] The federal government may, however, condition the receipt of grant monies for federal food programs on compliance with more restrictive nutrition requirements, and provided that the federal government enforces these standards, the power of the purse can change the foods our children access in schools.[259]

Second, nutrition education also plays a key role in addressing the childhood obesity crisis. Professionals identify prevention as the treatment of choice in dealing with childhood obesity.[260] Schools can improve nutrition education in several ways. One approach might require participating schools to devote time each day to nutrition, health, and physical activity education and promotion.[261] Alternatively, schools may incorporate health and wellness courses into their curricula, as a new course, or as workshops conducted periodically.[262]

---

252. *Id.*

253. *See id.* at 1529–30.

254. Peterson & Fox, *supra* note 5, at 117.

255. HASKINS ET AL., *supra* note 9, at 3. Competitive foods are only loosely regulated. *Id.*

256. *Id.* at 3. This category includes soda, water ices, candy, chewing gum, spun candy, sugared popcorn, fondant, licorice, marshmallow candies, jellies, and gummies. 7 C.F.R. § 210 app. B (2008).

257. HASKINS ET AL., *supra* note 9, at 3. Congress has been attentive to the issue of unhealthy foods available in schools, but legislation has not succeeded. *Id.* at 3–4. This is partially a result of the powerful lobby of the food and beverage industry. *Id.* at 4.

258. *Id.* at 4.

259. *Id.*

260. Shiriki K. Kumanyika et al., *Population-Based Prevention of Obesity: The Need for Comprehensive Promotion of Healthful Eating, Physical Activity, and Energy Balance*, 118 CIRCULATION 428 (2008).

261. *See* H.B. 400, 2006 Leg., Reg. Sess. (Ala. 2006). The Alabama legislature proposed a requirement for ten minutes of nutrition education daily.

262. *See* H.B. 185, 189th Gen. Assem., Reg. Sess. (Pa. 2005–06) (enacted); H. 456, 2005–06 Leg., Reg. Sess. (Vt. 2005–06) (enacted).

The third important element of a comprehensive school-based legislative solution entails promoting physical activity[263] and incorporating it into school curricula.[264] Emphasis on physical activity is especially crucial today because society has become increasingly inactive.[265] The Institute of Medicine recommends that children engage in thirty minutes of exercise daily, and the Dietary Guidelines for Americans recommends sixty minutes each day.[266] Despite these recommendations, only one third of adolescents participate in physical education classes for more than twenty minutes per day for three or more days a week.[267] Only 8% of elementary schools, 6.4% of middle and junior high schools, and 5.8% of senior high schools offer daily physical education classes.[268] Moreover, the percentage of students who participated in high school physical education dropped from 41.6% in 1991 to 28.4% in 2003.[269] In late 2008, HHS issued new physical activity guidelines recommending one hour of moderate to vigorous exercise daily for children and adolescents.[270]

Schools stand in a unique position to comprehensively address the childhood obesity epidemic.[271] The states recognize this, and as the federal government fails to demand meaningful changes in the schools, all fifty states have considered legislation to improve school nutrition or physical activity standards in the past three years.[272] These legislative reforms create conflicting interests for struggling school districts that need increased revenue to improve educational and extracurricular activities while at the same time heightening nutrition standards and

263. HASKINS ET AL., *supra* note 9, at 5 (identifying exercise as an integral component of obesity prevention).

264. *See id.* at 5–6 (highlighting the difficulties and stressing the importance of incorporating physical exercise into the school curricula).

265. *See id.* at 5. Haskins explains that cars and buses have replaced walking to any destination. *Id.* People are less inclined to spend time in parks and playgrounds because of fear of crime and unsafe neighborhoods. *Id.* Additionally, television viewing has increased and most children prefer forms of electronic amusement over physical activity. *Id.*

266. Peterson & Fox, *supra* note 5, at 118 & n.68.

267. HASKINS ET AL., *supra* note 9, at 6.

268. Back to School: Improving Standards for Nutrition and Physical Education in Schools Act of 2007, S. 2066, 110th Cong. § 2(7) (2007).

269. Richard Lowry et al., *Participation in High School Physical Education—United States, 1991–2003*, 53 MORBIDITY & MORTALITY WKLY. REP. 844, 845 (2004), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5336.pdf.

270. Press Release, Dep't of Health & Human Servs., HHS Announces Physical Activity Guidelines for Americans (Oct. 7, 2008), *available at* http://www.hhs.gov/news/press/2008pres/10/20081007a.html.

271. Peterson & Fox, *supra* note 5, at 113.

272. *See* Nat'l Conference of State Legislatures, *supra* note 28; Nat'l Conference of State Legislatures, Childhood Obesity: 2007 Update of Legislative Policy Options (2007), http://www.ncsl.org/programs/health/ChildhoodObesity-2007.htm (last visited Nov. 28, 2009) [hereinafter Nat'l Conference of State Legislatures 2007 Data]; Nat'l Conference of State Legislatures 2008 Data, *supra* note 150.

thereby reducing competitive food revenues.[273] In 2007 and 2008 combined, thirteen states enacted school nutrition standards; three states passed nutrition education requirements; and seventeen states amended the requirements for physical activity.[274] The states have taken a lead, but the result is a patchwork of legislation that leaves many of our nation's youth without school environments that sufficiently promote healthy diet and daily exercise.

## CONCLUSION

In 1946, when Congress first passed the NSLA, it declared that the legislation sought to "safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food . . . ."[275] At the time, malnutrition concerned the nation's leaders.[276] Today, however, childhood obesity and overweight loom large as one of the nation's greatest public health concerns.[277] Thus, Congress should protect the health of the nation by addressing the childhood obesity epidemic.

The legal mechanisms outlined in this Comment play an important role in making our environment more conducive to healthy behaviors. Regulating nutrition packages and food advertising, prohibiting certain harmful ingredients, and perhaps even litigation have a place in the fight against childhood obesity. In addition, the federal government has significant leverage to decrease childhood obesity and propel the development of a healthier nation by conditioning NSLP funding upon enhanced nutrition standards, implementation of health education, and expansion of physical education programs in all schools. While there is no panacea for a nation submerged in excess grease and wedged in a world of electronic entertainment, Congress can immediately utilize the NSLA framework to facilitate needed change.

---

273. *See* Letter from Katie Wilson, President, Sch. Nutrition Ass'n, to Fred Lesnett, Contracting Officer's Representative, Food & Nutrition Servs., U.S. Dep't of Agric. (May 1, 2009), *available at* http://www.mdsna.org/pdf/SCNDA-IV%20May%202009.pdf.

274. Nat'l Conference of State Legislatures 2007 Data, *supra* note 272; Nat'l Conference of State Legislatures 2008 Data, *supra* note 150. Specifically, in 2007, twenty-one states considered school nutrition standards and seven passed legislation; thirteen considered nutrition education requirements and one passed legislation; thirty-one considered physical education requirements and eleven passed legislation. Nat'l Conference of State Legislatures 2007 Data, *supra* note 150. In 2008, seventeen states considered school nutrition standards and six passed legislation; nine states considered nutrition education requirements and two passed legislation; twenty-four considered physical education requirements and six passed legislation. Nat'l Conference of State Legislatures 2008 Data, *supra* note 150.

275. National School Lunch Act, Pub. L. No. 79-396, § 2, 60 Stat. 230, 230 (1946) (codified as amended in 42 U.S.C. § 1751 (2006)).

276. *See generally* GUNDERSON, *supra* note 224.

277. *See* Gostin, *supra* note 22, at 87.