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Julie Brewer, Chief
United States Department of Agriculture
Child Nutrition Division, FNS
3101 Park Center Drive, Room 640
Alexandria, Virginia 22302-1594

Dear Ms. Brewer:

The New York State Education Department (SED) is pleased to submit the following comments in response to the April 27, 2012 publication in the Federal Register of the interim rule amending the National School Lunch Meal Pattern regulations. The interim rule describes the process/procedures school food authorities (SFAs) must follow to conform to requirements contained in the Healthy Hunger-Free Kids Act of 2010 regarding performance-based cash assistance to be certified as compliant with meal pattern and nutrition standards. The rule requires State agencies to evaluate submissions from SFAs to ascertain compliance with the new daily and weekly nutrition standards so that SFAs can receive an additional \$.06 per lunch available beginning October 1, 2012 and adjusted annually thereafter.

We support USDA's efforts to encourage healthier school environments and address childhood overweight and obesity concerns. It is no longer optional or sound practice to ignore the long term fiscal costs resulting from an unhealthy population.

The rule is very prescriptive and complex as USDA must assure Congress and the public that the nutritional quality of school meals has improved sufficiently to warrant the allocation of additional federal funds.

The Healthy Hunger-Free Kids Act of 2010 requires all SFAs to be in compliance with the new meal pattern and standards effective July 1, 2012. In order to receive the additional \$.06 for each meal, SFAs can choose from one of three options. Two of the options require SFAs to submit a nutritional analysis of a weekly menu for each grade group, K-5, 6-8 and 9-12, with an optional K-8, for each lunch and breakfast. If schools in the SFA use different menus, a complete and separate menu analysis for the different breakfasts and lunches must be provided to the State agency. While only a relatively small number of SFAs previously used Nutrient Standard Menu Planning (NSMP) and NSMP is no longer a menu planning option, a nutritional analysis completed by the SFA is required in order to be certified. This is a confusing and mixed message to send to SFAs. In

actuality, SFAs that do not conduct a nutritional analysis of their weekly menus will not know if the planned menus meet the caloric standards.

A nutrient assessment conducted for Option 1 will vary in comparison to a nutrient assessment conducted for Option 2. Option 1 assesses fruits and vegetables more precisely than Option 2 as it is based on a weighted average. It is a requirement for SFAs to use USDA approved software to conduct nutrient analysis with Option 1, therefore SFAs should be required to gather nutrient information from an approved nutrient database. USDA should provide, on their website, a web-based demonstration of the simplified nutrient assessment tool which could be available for SFAs to view prior to submitting their certification materials.

Option 3, which is a State agency option, requires the State agency to complete the analysis. Again, the interim rule requires an analysis, because it is the most reliable means to ascertain compliance, but only allows a single food based menu plan with very narrow caloric standards/ranges that must be attained for compliance. In addition, if a State agency does not opt to implement this option; all SFAs must complete the analysis tools in order to be eligible for the additional \$.06.

The entire process for planning and evaluating compliance with the school meal pattern is very intense. It requires daily as well as weekly minimums and maximums. In reality, even hospitals do not adhere to such narrow daily compliance standards. While the goal to increase consumption of fruits, vegetables, whole grain products and low fat or fat free milk is commendable, it should not require completion of a complex, detailed tool (software program) to ascertain if the meal served meets nutritional standards. The evaluation tool can and will be manipulated so SFAs can receive the additional \$.06 per lunch as soon as possible.

The \$.06 certification tool has been programmed to flag problem areas in the menu in order that these areas may be addressed and fixed prior to submission to the State agency. The tool provides calorie contributions for fruits, vegetables and milk at a level that may not be 'real' upon validation or subsequent nutrient evaluation. The \$.06 menu certification package submitted by SFAs will include the menu worksheets and, in most cases, a simplified nutrient evaluation, conducted by the SFA. The nutrient data that has been entered into the simplified nutrient analysis is subject to confirmation upon a State agency validation review, or in subsequent administrative reviews.

There are no SFAs that will submit menu worksheets and simplified nutrient analysis data that contain any errors, because they would not be approved for the \$.06. This process may inadvertently encourage SFAs to misrepresent their data in order to get a simplified nutrient analysis outcome that meets the narrow calorie minimums and maximums. Upon validation or subsequent nutrient analysis during an administrative review, State agencies will be forced to 'turn-off' the \$.06 when the State-conducted nutrient analysis does not support the \$.06 certification materials, or when comparing projected numbers of students served as articulated on the simplified nutrient analysis with actual SFA production records.

In addition, the State agency should have the authority to request production records and/or other supporting documentation to approve the certification submission when the State agency cannot make a reasonable determination that the menus are compliant.

Problems will surface and negative press will occur following the validation reviews and the subsequent administrative review monitoring cycle when many schools will be found to be noncompliant. Menu substitutions, condiments, the service of leftovers and excessive meat/meat alternate and grains portion sizes will result in excess calories which result in a turn off of the \$.06.

We are concerned about the SFA-wide turn off of the \$.06 when a single school is found to be noncompliant during a validation or administrative review. This especially impacts large city school districts where, for example, a single school could cause the loss of the \$.06 for 1,600 schools (the entire SFA – the NYC Department of Education, for example). According to the interim rule, if a building is found to be out of compliance with the \$.06 certification documentation either on validation review, or during a subsequent administrative review, the \$.06 needs to be turned off SFA-wide.

Therefore, USDA should establish a threshold of error in large SFAs and allow State agencies to determine if the errors found during validation reviews or subsequent administrative reviews are isolated versus systemic. If problems are found with menus during a validation review, the State agency should be able to review other buildings with the same menu to assess whether the problem found is isolated or systemic. If it is found that the problem is isolated, the \$.06 should not be turned-off SFA-wide. The SFA should be required to fix the isolated problem in the building where it was found, and to articulate business rules that will ensure that this problem does not become a systemic problem. If it is found that the problem is systemic, then the State agency should determine the severity and longevity of the violation and should take fiscal action accordingly, in addition to turning off the \$.06 SFA-wide.

Another potential consequence is that some children from low income families will no longer have access to the federal Child Nutrition Programs as some schools, especially high schools, will decide not to participate because of the complex burdensome regulations and the high costs incurred to be in compliance. Small private schools, jails, residential child care institutions and schools with low percentages of needy students may decide the cost of compliance far exceeds the federal and State reimbursement provided. Conversely, these specialized SFAs depend on these federal and state funds as part of their annual budget, and if they cannot comply with the regulations, will be forced to end participation and these children will not have access to nutritious foods.

SFAs could receive \$.06 for all lunches for three years (validation year plus the first two years of the new review cycle) until the State agency conducts the monitoring review and finds that the SFA has not been compliant. States will be required to, depending on the longevity and severity of the noncompliance, apply fiscal action for the \$.06 for all meals or for the full reimbursement. The new process clearly will leave SFAs vulnerable unless they complete a detailed nutritional

analysis weekly, they would not know that their meals are not in compliance with the narrow caloric requirements for the specific age/grade groups.

USDA should be clear about how the annually required attestation statement should be used to validate that the SFA is in compliance years after the validation year. The State agency needs language and guidance to comply.

SFAs will need time to experiment with the new complex system to ensure they get it right. They will need to learn which foods in the vegetable subgroups will be consumed by their student population, how to serve leftovers without compromising their meat/meat alternate and grain allocations, and how to ensure that schools that accommodate students outside the K-5, 6-8, and 9-12 configurations are serving the appropriate meals to students.

There are many remaining issues to be addressed of which the USDA is not yet aware, such as radically changing the meal pattern for emotionally disturbed children who will over-react when changes occur in their environment.

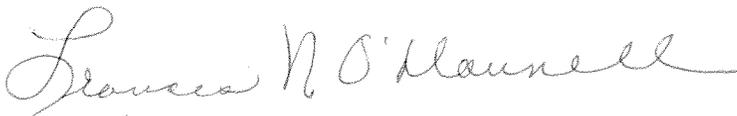
Some cultures/religions are unable to cost-effectively be in compliance. For example, the dark green vegetables included may not be able to be cleaned sufficiently to be consumable.

In summary, we think the 2012-13 school year should be used to pilot the meal pattern in order to ascertain compliance with the changes. Issues/barriers/successes should be collected and addressed/shared.

Only those SFAs that do not apply for certification should be visited in 2013-14. That is the year to conduct validation reviews. The new review cycle should begin in 2014-15. That extension will provide SFAs time to train staff, iron out the kinks, and be confident that the meals they serve meet the new standards.

Again, we appreciate the opportunity to submit these comments for your review. We look forward to working with USDA to successfully implement the revised meal pattern in New York State schools.

Sincerely,



Frances N. O'Donnell
Coordinator

c: John Delaney