



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY  
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[www.nysed.gov/cn/cnms.htm](http://www.nysed.gov/cn/cnms.htm)

April 13, 2011

Julie Brewer, Chief  
Policy and Program Development Branch  
Child Nutrition Division  
Food and Nutrition Service  
U.S. Department of Agriculture  
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 January 13, 2011 publication in the Federal Register of the proposed rule revising the meal patterns and nutrition requirements for the National School Lunch Program (NSLP) and School Breakfast Program (SBP) as required by the Richard B. Russell National School Lunch Act.

We commend USDA for its leadership in implementing this proposed rule to encourage healthier school environments and address childhood overweight and obesity concerns. SED is committed to partnering with USDA to support this initiative and fully understands the necessity to align school lunches and school breakfasts with the 2010 Dietary Guidelines and the Dietary Reference Intakes (DRIs). SED also recognizes the vital role that the Child Nutrition Programs have had and will continue to have to improve the overall health and well-being of New York State's school age children. This very lengthy and complex proposed rule contains many sections which will significantly change the administration of these programs at the federal, State, and local level:

SED strongly acknowledges that schools can offer children the greatest access to excellent sources of required nutrients and calories during the day and that schools have the ability to influence children's food choices and eating habits by providing a safe and nurturing environment. However, the overall intent of the proposed rule, the success of full implementation, will also require maximum support from other vital partners at the federal, State and local levels. For example; the education system must embrace that children will need time to consume the proposed increased quantities of nutritious foods, and need opportunities to learn about the importance of achieving and maintaining good nutrition and participating in routine physical activities throughout their life.

We understand and fully support the philosophy and the importance of the 2009 Institute of Medicine's (IOM) recommendations for improving the diets of our nation's children. IOM and other recognized medical authorities have clearly demonstrated the need for children to; reduce their intake of sodium and fat, and to increase their intake of fruits, vegetables and whole grains. SED

also supports establishing minimum and maximum calorie levels for breakfast and lunch to ensure children have access to nutritious meals that will encourage proper growth and development.

We applaud USDA's action to expeditiously respond to our State's request to allow vegetables to be recognized as a food choice for breakfast. This inclusion will allow a substantial number of New York's schools to continue to serve its children non-starchy vegetables at breakfast, as they have for many years.

Our main concern is that this proposed rule is essentially an unfunded mandate. Many states and school food authorities (SFAs) will not have adequate resources to fully implement the proposed rule as USDA and IOM intended it to be implemented. SED is also concerned that some schools will be forced to end their participation in some or all of the child nutrition programs as they will not risk compromising their integrity by being out of compliance or operating at a deficit. This will result in many free and reduced price students losing access to nutritious meals - a situation that must be avoided at all costs.

Many schools will be unable to implement the requirements of the proposed rule without unintended consequences or outright failure in meeting the ambitious timeframes established. Specifically:

### **Implementation Concerns**

- The increased cost for the breakfast meal is estimated by USDA to be approximately \$.37 cents. However, USDA will not be providing any additional funding for breakfast to support the increased food items and portion sizes that will be required. As USDA and State agencies (SAs) continue to promote the breakfast program, schools serving the most breakfasts to children will incur greater costs and ultimately greater deficits. The opportunity for children to receive breakfast at school is too valuable an educational resource to be placed at risk when schools and families across the country are already struggling financially.
- SFAs with food service management company (FSMC) contracts will be required to go out to bid for the 2012-2013 school year as a result of the required changes in the menu items, increased portion sizes, and modifications to the current "offer versus serve" option. These program improvements are material changes to the contract and will increase the administrative burden of State agencies. New York State will be required to review and approve more than 200 contracts in spring/summer 2012 to prepare for the implementation of the rule.
- SFAs have already declared that they will attempt to delay the implementation of the rule to avoid unfunded costs that they know will put their programs at risk. Many food service directors have reported that their district has a plan to replace them with a FSMC or will terminate the programs altogether if the program cannot support itself. Should schools decide to not participate; children who receive free and reduced priced meals will no longer receive these services. The federal child nutrition programs are an important safety net for children

from low income families. These families rely on this safety net to keep their children healthy.

- State agencies will not have the resources to implement written corrective action plans with hundreds of non-compliant SFAs. The political, media, student and parental fall-out from schools being denied reimbursement because children refuse or are not reminded daily that they have to take fruits and vegetables for each reimbursable meal will also consume a significant amount of State resources. Additionally, the risk of fraud will potentially escalate as a result of the State focusing the majority of its resources on ensuring all schools are complying with the new meal pattern requirements.
- Industry may not be prepared to meet the ambitious time frames for implementing the sodium and whole grain requirements. Consequently, USDA may need to revise its regulations in the future to address this issue in order for schools to achieve compliance.
- SED recommends piloting the new food based menu plan in 2012 -2013 so that the impact on participation levels, costs and menu acceptance can be fully evaluated before it is required to be implemented in all schools.
- Due to the complexity of the rule, we suggest that implementation be delayed until 2013-2014. This would provide schools time to pilot new strategies such as; developing new menus and food procurement specifications, and building customer confidence and participation. The delayed implementation will also allow USDA and the SA to develop comprehensive resources, and to provide the necessary training, technical assistance and guidance so that SFAs can implement the final rule successfully. During this period of time, schools should be able to receive the additional \$ .06 cents reimbursement to assist them with purchasing the additional food components. We recommend using the 2012-2013 school year as an intensive training year as the training is imperative to the new menu plan's success if we are mandated to implement all changes as a result of the final rule.

### **Fruits and Vegetables**

- SED supports the increased consumption of a variety of fruits and vegetables and the requirement to include legumes, and dark green and orange selections. However, the requirement to offer specific types of expensive vegetables each week will increase food costs and may have less appeal to students. The rule should not discourage the use or access to locally grown seasonally available fresh produce nor should it limit only one cup of starchy vegetables to be offered only once per week. We suggest that the number of potato servings be increased to twice per week, and allow unlimited quantities of corn, peas, and lima beans to be prepared in soups and salads.

- Instead of limiting potatoes, which are a wholesome food, limit/omit fried or par-fried vegetables. Schools would benefit from being provided with technical assistance and guidance to incorporate a greater variety of vegetables into their menus.
- The current meal patterns and the offer versus serve provision have afforded children that have diabetes the ability to participate in the NSLP and SBP without being overtly identified or having to submit a physician's note to address specific dietary needs. The proposed rule may impact these students as the required fruit component may conflict with their prescribed diet plans.
- SED supports the provision requiring a fruit for breakfast and lunch, but recommends that only ½ cup serving be required. In many instances, depending on the size of a whole fruit, students would be required to select two fruits i.e. pears, oranges, plums to meet the one cup requirement. Requiring young children (grades K-4) to consume two pieces of fruit at breakfast in addition to 8 ounces of fluid milk, a bread/grain and meat component is costly and unnecessary.
- We recommend gradually increasing the fruit portion over a few years at breakfast. Since all reimbursable breakfasts must now contain fruit to be counted, start with one serving (1/2 cup). To meet the requirement, most schools will offer pre-pack four ounce, 100 percent juice and ½ cup whole fruit. Allowing children to take only ½ cup of fruit/vegetable will make the proposed rule less costly, more acceptable and more likely to be consumed.
- USDA is currently stating the each reimbursable breakfast must contain one cup of fruit/vegetable. USDA needs to provide clarification as to the portion requirements for a reimbursable meal for the fruit/vegetable component at breakfast. The proposed rule appears to imply that the child is able to select one serving of a fruit/vegetable or juice regardless of portion size. This language is being interpreted very differently by SAs and SFAs.
- SED recommends that the final rule clarify the serving equivalency of fresh fruit. The portion of the fruit needs to be modified to "serving" rather than "cups." The one cup requirement does not take into consideration the variation in size and difficulty of measuring fresh, whole pieces of fruit. USDA should develop food specifications for all fresh fruit that SFAs can use when purchasing fresh fruits. Using specifications instead of specific food volume measurements will assist SFAs to be in compliance.
- SED recommends a transition phase for high school students allowing an exemption from the requirement to select the fruit/vegetable component at meals. These students are young adults making choices daily and these newly prescribed requirements will not translate to the desired outcome of encouraging high school students to increase their consumption of fruits and vegetables. As younger students progress towards high school their experiences and exposure to the final rule will be much different from current high school students. After a

few years, all students will become familiar with the lunch requirements and will be less apt to challenge the meal pattern requirements.

### **Sodium**

- SED supports the timeframe established for reaching sodium targets over ten years, with intermediate targets set for every two years. USDA will need to provide guidance as to how SFAs and SAs will be able to determine if the SFA is meeting the established targets without completing a nutrient analysis.
- The established sodium requirements should not include the sodium that occurs naturally in foods i.e. fluid milk. The rule should focus on reducing the amount of sodium in processed foods and/or reducing the number of processed foods offered as well as added salt in recipes.

### **Whole Grains**

- USDA will need to define whole grain rich product standards. SFAs and SAs need adequate information to determine if a product meets the “51 percent whole grain rich” requirement.

### **Milk**

- Many schools in New York are no longer offering whole milk. We support the offering of only fat free or low fat milk choices. SED recommends that if SFAs can successfully serve only fat free unflavored milk that it be able to request a waiver from the requirement to offer a variety of milk.
- We suggest that USDA include low-fat milk (half percent or one percent) as acceptable flavored milk choices, which would eliminate the need to extend the time frame for implementing the new fluid milk standard.

### **Potable Water**

- Water fountains available in or near (such as: within 50 feet of) the cafeteria should be a recognized and approved source of potable water.

### **Unintended Consequences**

- Schools may choose not to participate in the NSLP as it will not be cost effective and the reimbursement is insufficient to pay for all of the food items required.
- Paid students will by-pass the reimbursable meal service lines to avoid being forced to purchase a meal where they cannot make 100 percent of their own choices. They will redirect

their revenues to purchase foods from the a-la-carte lines, bring in bag lunches or they will seek to purchase meals off campus. This practice over time will directly impact the SFAs ability to generate enough revenue to maintain sustainable foodservice programs and will threaten the availability of the Program for the free and reduced price students, endangering their access to necessary nutrition for growth and development.

- Forcing children to take items they will not consume will only result in “healthier garbage cans.” This practice will also result in a negative perception of meal times and a public relations problem at the national level for these programs. Additionally, some children will be intimidated and emotionally distressed by being coerced to take foods they do not intend to consume and may decide not to participate in the child nutrition programs.
- SFAs may offer fewer condiments as a cost savings measure that will affect the quality and acceptability of foods served.
- SFAs may not have adequate storage facilities to accommodate the increased volume of food purchases required to meet the proposed meal patterns.
- SFAs may also be required to pay increased delivery charges due to more deliveries required to meet the increased food requirements.
- Schools may not have the necessary equipment to assist them in preparing foods in a manner to be compliant with the proposed meal patterns.
- The proposed rule will create additional barriers for SFAs that serve breakfast in the classroom (a successful but vulnerable alternative to providing children access to breakfast). As these meals generally are required to be pre-packaged to facilitate classroom distribution, the increased fruit serving and the required meat/meat alternate may require a larger bag/container or multiple bags/containers because the meat/ meat alternate is served hot and will need to be packaged separately from the cold items or schools may opt to only serve cold meals. The pre-packaged meals will also be subject to increased costs and food waste as children will not be able to decline food items and/or will not have enough time to consume the entire meal. These issues alone may cause an SFA, school administrator and teachers to spontaneously terminate this initiative as the perceived implementation will quickly overshadow the benefits.
- From an environmental perspective, this rule will have a significant impact for local communities in terms of the increased number of cans and boxes and increased food waste SFAs will need to dispose of. In addition, the schools’ refuse budgets will experience a significant increase as the need for more garbage bag liners, dumpsters, and frequency of waste hauling is inevitable.

### **Compliance/Monitoring**

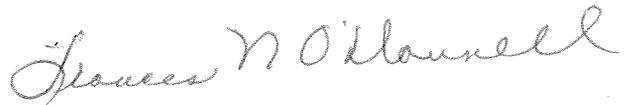
- We recommend that USDA provide comprehensive guidance to assist SAs to properly evaluate menus and other documentation supporting that the SFA has met all criteria for receiving the maximum reimbursement available from USDA. This guidance would need to include clarification regarding whether schools would be in violation if they serve food items with no trans fat listed on the label but contain hydrogenated oils.
- Many SFAs would benefit from USDA developing cycle menus and corresponding nutrient analyses that would qualify SFAs for the additional \$.06 cents if these menus were used. SFAs opting to use these cycle menus would not only reduce their administrative burden, but the SA responsible for ensuring compliance and for conducting an analysis would also benefit from this initiative.
- SED agrees that schools should not have to conduct a nutrient analysis to determine if its menus meet the established standards for calories, saturated fat, sodium and trans fat. USDA intends to develop practical tools to help schools calculate the levels of calories, saturated fat and sodium in school meals. These tools will need to provide specific guidelines and define “practical calculation methods” so that SAs and SFAs are compliant with USDA expectations.
- USDA will need to develop and distribute comprehensive training materials in order to implement the final rule to ensure consistency and accuracy. SA and SFA staff will need to be retrained on the new requirements.
- There will be an increased burden on the State agency to conduct a nutrient analysis for each SFA. In addition, the SA will need to monitor each SFA for compliance and certify that each SFA is meeting the nutrient targets to receive the increased reimbursement.
- We suggest that USDA develop other reasonable approaches for SAs to use to evaluate/monitor SFA compliance with the meal pattern. The proposed two week breakfast and lunch analyses adds an unreasonable administrative burden for both the schools and the State agencies. The time would be better spent providing technical assistance and guidance, resolving performance deficiencies and partnering with schools to improve quality and acceptability of meals served to children.
- SED recommends that USDA develop clear standards and guidance for SAs conducting the monitoring activities. SAs will be required to apply immediate fiscal action if the meals offered are completely missing one of the food components established in the new meal pattern.

- SAs will need a consistent format to use if we are required to take fiscal action for repeated violations of the vegetable subgroups and milk type requirements when technical assistance has been provided and corrective action has not resolved these specific violations.
- State agencies will be required to conduct monitoring reviews every three years instead of the current five year cycle. In New York, the overall number of annual reviews will increase to 412 from the current 247 when the rule is implemented. Many of our SFAs have more than five school buildings that will require us to review multiple buildings for these school districts.
- Current law requires state agencies to conduct additional administrative reviews each year. For 2010-2011, New York must conduct an extra 13 SFA reviews whose aggregate reimbursement totals \$16,167,115. This requirement should be eliminated as staffing resources are limited and these reviews would be unnecessary under the proposed accelerated monitoring review schedule.

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

If you have any questions or require additional information, please call me at (518) 473-8781.

Sincerely,



Frances N. O'Donnell  
Coordinator

cc: John Delaney