



April 22, 2020

School Programs Branch
Policy and Program Development Division
Food and Nutrition Service
1320 Braddock Place, 4th Floor
Alexandria, Virginia 22314

Re: Docket No. FNS-2019-0007; “Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs”

The Public Health Law Center¹ appreciates this opportunity to comment on the proposed Food and Nutrition Service (hereinafter “the Agency”) Rule entitled “Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs.”² We strongly oppose the proposed Rule, which would weaken the nutritional value of food provided through the National School Lunch Program (NSLP) and School Breakfast Program (NSBP) (hereinafter collectively “school meal programs”).

The proposed changes to the school meal programs are unjustified, contrary to nutritional science, and detrimental to the health of our nation’s children. For these reasons, we share the concerns raised by many others—including specifically the Rudd Center for Food Policy and Obesity at the University of Connecticut—regarding the proposed Rule’s overall impact on nutritional adequacy of school meals.

Moreover, the Agency has failed to adequately assess the discriminatory impact of the proposed changes. If adopted, the Rule changes will be especially detrimental for the millions of children who have heightened need for nutritious school meals because they are at risk of food insecurity. These changes would harm children of color and American Indian and Alaska Native youth in particular. As demonstrated by the Agency’s cursory Civil Rights Impact Analysis and lack of consultation with Tribes, it is clear the Agency has not given these factors the good faith consideration required by law.

¹ The Public Health Law Center is a public interest legal resource center dedicated to improving health through the power of law and policy, grounded in the belief that everyone deserves to be healthy. The Public Health Law Center collaborates with partners to promote healthy food access, support physical activity, reduce and eliminate commercial tobacco, and address other causes of chronic disease. Our belief in health and equity for all is at the core of our work. Our partners include national health advocacy organizations, state and local governments, Tribal leaders, community coalitions, planners, researchers, attorneys, and individuals working on public health issues. Our deep knowledge, thoughtful legal and policy analysis, and individualized approach help these partners create healthier communities around the country.

² 85 Fed. Reg. 4094 (proposed Jan. 23, 2020) (to be codified at 7 C.F.R. pts. 210, 215, 220, 226, and 235) [hereinafter “FNS Proposed Rule”].

For these reasons we urge the Agency to abandon the proposed Rule and to maintain school meal standards informed by science and consistent with the Dietary Guidelines for Americans, as required by law.

We also urge the Agency to provide guidance and technical assistance to support schools in accommodating students' religious, cultural, Tribal, and ethical dietary needs.

I. Current Nutrition Standards for School Meals Should Be Upheld.

The current nutrition standards and meal pattern requirements of the school meal programs are largely the result of major regulatory changes made in 2012, following enactment of the Healthy, Hunger-Free Kids Act of 2010.³ In addition to bringing the standards in line with the Dietary Guidelines for Americans, as required under federal law,⁴ the regulations were informed by evidence-based recommendations by the National Academy of Medicine (formerly, the Institute of Medicine).⁵

These changes have improved the quality of school meals and the health of children.⁶ These improvements—demonstrated by much higher Healthy Eating Index (HEI) scores⁷—are illustrated in the figure reproduced here from the USDA's School Nutrition and Meal Cost Study.⁸

³ Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088 (2012) (codified at 7 C.F.R. pts. 210 and 220).

⁴ Richard B. Russell National School Lunch Act § 9(f)(1), as amended, 42 U.S.C. § 1758(f)(1)(A).

⁵ INSTITUTE OF MEDICINE, SCHOOL MEALS: BUILDING BLOCKS FOR HEALTHY CHILDREN (Oct. 2009), <https://www.nap.edu/download/12751>.

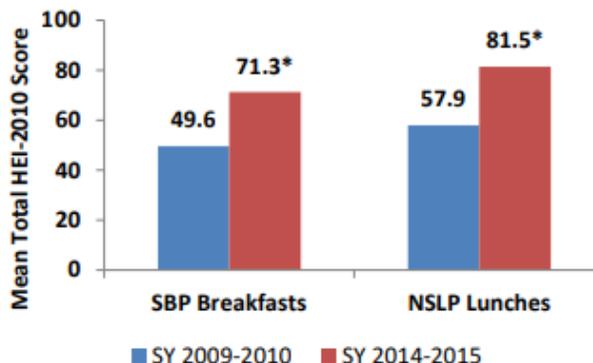
⁶ FOOD & NUTRITION SERVICE, U.S. DEPT. OF AG., SCHOOL NUTRITION AND MEAL COST STUDY, vol. 2, xx, xliii–xlvi, 148, 163 (Apr. 2019), <https://www.fns.usda.gov/school-nutrition-and-meal-cost-study> [hereinafter School Nutrition and Meal Cost Study].

⁷ The Healthy Eating Index reflects a diet's nutritional quality by measuring its adherence to the Dietary Guidelines for Americans. U.S. DEPT. OF HEALTH & HUMAN SERVICES & U.S. DEPT. OF AG., 2015-2020 DIETARY GUIDELINES FOR AMERICANS, at 93 (8th ed. 2015), https://health.gov/sites/default/files/2019-09/2015-2020_Dietary_Guidelines.pdf.

⁸ SCHOOL NUTRITION AND MEAL COST STUDY, *supra* note 6, at vol. 2 summary.

Based on the USDA's own research, HEI scores for NSLP meals rose at least 23 points across all school types after implementation of the 2012 nutrition standards.⁹ Overall, the score increased from 57.9 to 81.5 (out of 100).¹⁰ Similarly, the HEI scores for NSBP meals rose at least 21 points across all school types.¹¹ Lowering school nutrition standards in disregard of the Dietary Guidelines for Americans will lower the HEI scores for school meals to the detriment of our nation's children.

Figure 1. Mean Healthy Eating Index (HEI)-2010 Total Scores in SY 2009-2010 and SY 2014-2015: All Schools



School meals have improved because of the 2012 improvements in nutrition standards, many of which the Agency now seeks to roll back. Those standards should be maintained to ensure that children's health is not negatively affected.

II. The Proposed Rule Changes Will Be Especially Harmful for Children at Risk of Food Insecurity.

Rule changes that would undo the nutritional gains of the last decade are unacceptable for any of our children. They would be especially devastating for the millions of children facing food insecurity, including the 60% of students in the NSLP and 71% of students in the NSBP who are members of low-income households.¹²

In fact, school meals are the primary source of nutrition for many kids.¹³ When school meals are nutritionally inadequate, the implications for children who rely on them can extend far beyond hunger or even physical health, and can also lead to behavioral and mental health issues and lowered academic performance.¹⁴

If adopted, the proposed changes would have particularly negative impacts on the development and wellbeing of children at risk of food insecurity.

⁹ *Id.* at vol. 2, xliii, 148.

¹⁰ *Id.*

¹¹ *Id.* at xlvi, 163.

¹² SCHOOL NUTRITION AND MEAL COST STUDY, *supra* note 6, at vol. 4, xxvi, 27-29 (defining low-income as at or below 185% of the federal poverty guidelines).

¹³ 33% of students participating in the NSLP also participate in the NSBP. *Id.* at 28. Food insecurity affects 33% of NSBP participants and 26% of NSLP participants. *Id.* at 27, 29, 31.

¹⁴ Shilpa Pai & Kandy Bahadur, *The Impact of Food Insecurity on Child Health*, 67 PEDIATR. CLIN. N. AM. 387-96 (2020), <https://doi.org/10.1016/j.pcl.2019.12.004>.

III. The Civil Rights Impact Analysis in the Proposed Rule Fails to Consider Disparate Impacts on Protected Classes.

Strikingly, the Agency has failed to consider the adverse and disproportionate impact of the proposed rule change on the civil rights of children of color.

USDA policy requires its agencies to analyze the civil rights impacts of actions that will affect federally assisted programs.¹⁵ Civil rights impacts are defined as “consequences of policies, actions, and decisions which impact the civil rights and opportunities of protected groups or classes of persons who are USDA . . . program beneficiaries.”¹⁶ One purpose of the analysis is to identify the effects of “Agency-imposed requirements that may adversely and disproportionately impact . . . program beneficiaries based on their membership in a protected group.”¹⁷

In its Civil Rights Impact Analysis for the proposed Rule, the Agency concludes that “this rule is not expected to limit or reduce the ability of protected classes of individuals to participate in the [covered programs] or have a disproportionate adverse impact on the protected classes.”¹⁸ This conclusory statement is not a substitute for good faith reasoned analysis.

Black and Hispanic students participate in both the NSLP and NSBP at higher rates than white students.¹⁹ Moreover, students of color constitute the majority of participants in the FNS’s school lunch and breakfast programs.²⁰ American Indian and Alaska Native children and children of color are also among those most affected by food insecurity.²¹

¹⁵ U.S. DEPT. OF AG., DEPARTMENTAL REGULATION 4300-4, Section 4, <https://www.ocio.usda.gov/document/departmental-regulation-4300-004>.

¹⁶ *Id.* at Section 5(g).

¹⁷ *Id.* at Section 5(h).

¹⁸ FNS Proposed Rule, *supra* note 2, at 4123 (analyzing the “civil rights impacts the rule might have on Program participants on the basis of age, race, color, national origin, sex, or disability.”).

¹⁹ SCHOOL NUTRITION AND MEAL COST STUDY, *supra* note 6, at vol. 4, 12, 15.

²⁰ More than half of NSLP participants and nearly two thirds of NSBP participants are children of color. SCHOOL NUTRITION AND MEAL COST STUDY, *supra* note 6, at vol. 4, 28, 30.

²¹ 25% of American Indians and Alaska Natives are food insecure, and they are twice as likely to be food insecure compared to whites. Valarie Blue Bird Jernigan, et al., *Food Insecurity among American Indians and Alaska Natives: A National Profile using the Current Population Survey–Food Security Supplement*, 12 J. HUNGER & ENVIRON. NUTR. 1 (2017). Food insecurity is also more likely to be experienced in communities of color, affecting 21% of Black households and 16% of Hispanic households, as compared with the national average of 11%. ALISHA COLEMAN-JENSEN ET AL., USDA ECONOMIC RESEARCH SERVICE, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2018, at 14 (2019), <https://www.ers.usda.gov/webdocs/publications/94849/err-270.pdf>.

Many food-insecure children of color and American Indian and Alaska Native children rely on school meals to meet their nutritional needs, and these children are most impacted when the nutritional quality of these meals are undermined. The Agency has failed to address these important factors.

The proposed Rule's Civil Rights Impact Analysis is legally inadequate because it does not address the disparate adverse impact on children of color who are particularly reliant on school meals for the nutrition they need to grow and thrive.

IV. FNS Should Provide Guidance to Schools Regarding Accommodation of Religious, Cultural, Ethical, and Tribal Dietary Requirements.

We commend the Agency for proposing stronger language relating to accommodation of religious, cultural, Tribal, and ethical dietary needs, as provided in the example given in the new section on dietary preferences (i.e. “[s]chool food authorities should consider cultural, ethical, Tribal, and religious preferences when planning and preparing meals”).²² School meals designed to meet students’ religious and ethical requirements, and that are culturally appropriate, encourage and support participation in school meal programs and help to reduce food waste.

To make this language meaningful, however, we urge the Agency to go farther and provide schools with adequate and easily accessible information and support to accommodate students’ dietary needs in these areas. We recognize that accommodating these requests can require changes in how food is purchased, prepared, and served and that schools may need help in identifying and navigating their options. The Public Health Law Center recommends that the Agency provide technical assistance and create a guidance document to help schools better meet these requests, similar to the guidance it provides on accommodating disabilities.²³

Although students are not legally required to eat meals provided by these programs, poor students have few alternatives, and students should not be forced to choose between participating in school meal programs and their religious requirements or ethical mores. This choice poses special hardships for students who rely on the school meal programs as their primary source of nutrition. Additionally, American Indian and Alaska Native children, as well as children from the many cultures that make up the U.S., deserve to have access to healthy food that is also culturally appropriate. As stated above, many students experiencing food insecurity rely on these programs for basic nutrition and do not realistically have the option *not* to participate in the school meal programs.

We recommend the Agency provide technical assistance to support schools in accommodating students’ religious, cultural, ethical, and Tribal dietary requirements

²² FNS Proposed Rule, *supra* note 2, at 4129.

²³ *See, e.g.* FOOD AND NUTRITION SERVICE, ACCOMMODATING DISABILITIES IN THE SCHOOL MEAL PROGRAMS: GUIDANCE AND QUESTIONS AND ANSWERS (Q&As) (Apr. 25, 2017), <https://fns-prod.azureedge.net/sites/default/files/cn/SP26-2017os.pdf>.

because school food authorities deserve clear guidance and help in providing nutritious meals that meet all children’s health and developmental needs in a nondiscriminatory fashion that respects their rights and cultures.

V. The Agency Should Engage in Tribal Consultation Given the Implications for the Health of American Indian and Alaska Native Youth.

In discussion with representatives of the Native Farm Bill Coalition²⁴ (hereinafter “the Coalition”), our review of the Rule indicates that the Agency has not conducted adequate Tribal consultation on these policies. Based on this analysis, the Agency must engage in meaningful consultation with Tribes on policies that have Tribal implications under Executive Order 13175.

The Agency must engage in meaningful consultation with Tribes on policies that have Tribal implications under Executive Order 13175. In this case, the Agency determined that Tribal consultation was not necessary because the proposed rule “did not . . . have Tribal implications.”²⁵ The Agency’s determination that the proposed rule lacks Tribal implications fails to consider that an estimated 878,000 American Indian and Alaska Native students rely on free or reduced-priced school meals to support their nutrition needs.²⁶

In highlighting this key area of oversight, we support the Coalition’s position that:

“FNS should seek Tribal consultation on the proposed rule changes to ensure that all changes are addressed in a way that maintains consistency in how school meals are delivered across state lines, which is an important consideration for Indian Country, where twelve Tribes maintain reservation boundaries that cross state lines, and since school meal service is a critical part of the Indian Country food security network. Engaging in government-to-government consultation with Tribal Nations on this proposed rule change will ensure that Tribal sovereignty and parity are respected, and that the flexibilities developed by this proposed rule change have a positive impact on School Food Authorities serving American Indian and Alaska Native students.

²⁴ The Native Farm Bill Coalition centers its work around advocacy to advance Native American interests in the Farm Bill and is a joint project of the Shakopee Mdewakanton Sioux Community’s Seeds of Native Health campaign, the Intertribal Agricultural Council, the National Congress of American Indians, and the Indigenous Food and Agriculture Initiative. See Native Farm Bill Coalition, SEEDS OF NATIVE HEALTH, <https://seedsofnativehealth.org/native-farm-bill-coalition/>.

²⁵ USDA Proposed Rule, *supra* note 2 at 4123 (“FNS has assessed the impact of this proposed rule on Indian Tribes and determined that this rule does not, to the best of its knowledge, have Tribal implications that require Tribal consultation under E.O. 13175.”).

²⁶ MATHEMATICA POLICY RESEARCH, ADDRESSING CHILD HUNGER AND OBESITY IN INDIAN COUNTRY: REPORT TO CONGRESS, at vi (Jan. 2012).

“Consultation should be undertaken on the proposed changes as a whole, with specific attention to the following:

- Promoting administrative flexibility that supports Tribal school authorities without creating an undue burden;
- Including parity for Tribal Nations in audit and integrity-process improvements; and
- Ensuring adequate meal calorie requirements and safe food access for American Indian and Alaska Native students.”²⁷

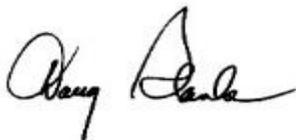
The Agency errantly proposed this rule without undertaking Tribal Consultation despite the clear impacts this rule will have on American Indian and Alaska Native students and Tribal Nations. Rule changes should not be made to the school meals program without undertaking this important and necessary consultation.

VI. Our Recommendations

In conclusion, we recommend the following changes to the proposed Rule:

- Eliminate proposed changes that would roll back nutrition standards and disproportionately harm students from low-income households.
- Conduct a Civil Rights Impact Analysis that carefully evaluates the impact of the proposed changes on the health of students of color and American Indian and Alaska Native students.
- Provide agency guidance and related technical assistance to school food authorities regarding religious, cultural, Tribal, and ethical accommodations.
- Conduct meaningful consultation with Tribes on the proposed rule and its impacts on American Indian and Alaska Native youth.

Sincerely,



Doug Blanke
Executive Director
doug.blanke@mitchellhamline.edu

²⁷ This statement was provided to Public Health Law Center by representatives of the Native Farm Bill Coalition on April 22, 2020.