



**Billing Code: 3410-30-P**

**DEPARTMENT OF AGRICULTURE**

**Food and Nutrition Service**

**7 CFR Parts 210 and 220**

**RIN 0584-AE25**

**Local School Wellness Policy Implementation under the Healthy, Hunger-Free Kids Act of 2010**

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would require all local educational agencies participating in the National School Lunch Program and/or the School Breakfast Program to meet expanded local school wellness policy requirements consistent with the new requirements set forth in section 204 of the Healthy, Hunger-Free Kids Act of 2010. This proposed rule would establish the framework for the content of the local school wellness policies, ensure stakeholder participation in the development of such policies, and require periodic assessment of compliance and reporting on the progress toward achieving the goals of the local school wellness policy.

This proposed rule would also require local educational agencies, as part of the local school wellness policy, to implement policies for the marketing of foods and beverages on the school campus during the school day consistent with nutrition standards for Smart Snacks.

Additionally, this proposed rule would require each local educational agency to make information about local school wellness policy implementation for all participating schools available to the public on a periodic basis. The provisions of this proposed rulemaking would ensure local educational agencies establish and implement local school wellness policies that

meet minimum standards designed to support a school environment that promotes sound nutrition and student health, reduces childhood obesity, and provides transparency to the public on school wellness policy content and implementation.

**DATES:** To be assured of consideration, written comments must be postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this proposed rule. To be considered for this rulemaking, written comments must be submitted through one of the following methods:

- Preferred method: Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Comments should be addressed to Julie Brewer, Chief, School Programs Branch, Policy and Program Development Division, Child Nutrition Programs, Food and Nutrition Service, PO Box 66740, St. Louis, Missouri 63166-6740.

Duplicate comments are not considered. Therefore, we request that commenters submit comments through only one of the methods listed above. All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities

submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the Internet via <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Debra Nigri, Policy and Program Development Division, or Erika Pijai, Nutrition Promotion and Technical Assistance Division, Child Nutrition Programs, Food and Nutrition Service at (703) 305-2590.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Schools play a critical role in promoting student health, preventing childhood obesity, and combating problems associated with poor nutrition and physical inactivity. To formalize and encourage this role, section 204 of the Child Nutrition and WIC Reauthorization Act of 2004 (P.L. 108-265), required each local educational agency (LEA) participating in the National School Lunch Program (NSLP) and/or the School Breakfast Program (SBP) to establish a local school wellness policy by School Year 2006.

The 2004 legislation placed the responsibility for developing a local school wellness policy at the local level, so the unique needs of each school under the jurisdiction of the LEA could be addressed. Each LEA was required to establish a local school wellness policy that set goals for nutrition education, physical activity, and other school-based activities designed to promote student wellness, and include nutrition guidelines for all foods available on the school campus during the school day. Additionally, LEAs were required to involve a broad group of individuals in the development of the local school wellness policy and to have a plan for measuring wellness policy implementation.

Subsequently, section 204 of the Healthy, Hunger-Free Kids Act of 2010 (HHFKA, P.L. 111–296, December 13, 2010) added a new section 9A to the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1758b) which expands the scope of wellness policies; brings additional stakeholders into the development, implementation, and review of local school wellness policies; and requires public updates on the content and implementation of the wellness policies.

Specifically, section 9A of the NSLA, 42 USC 1758b, as added by the HHFKA, requires LEAs to establish local school wellness policies for all schools under the jurisdiction of the LEA, which, at a minimum, include:

- Goals for nutrition promotion and education, physical activity, and other school-based activities that promote student wellness (section 9A(b)(1) of the NSLA); and
- Nutrition guidelines for all foods available on each school campus during the school day consistent with USDA’s meal pattern requirements and the nutrition standards for competitive foods, and designed to promote student health and reduce childhood obesity (section 9A(b)(2) of the NSLA).

In addition, section 9A requires LEAs to:

- Designate one or more LEA or school official(s), as appropriate, to ensure that each school complies with the local school wellness policy (section 9A(b)(5)(B) of the NSLA);
- Permit parents, students, representatives of the school food authority, teachers of physical education, school health professionals, the school board, school administrators, and the general public to participate in the development,

implementation, and periodic review and update of the local school wellness policy (section 9A(b)(3) of the NSLA); and

- Periodically measure and make available to the public an assessment on the implementation of the local school wellness policy, with specific information to be included (section 9A(b)(5)(A) of the NSLA).

New section 9A, as amended by the HHFKA, requires USDA to promulgate regulations that provide the framework and guidelines for LEAs to establish local school wellness policies. Therefore, this proposed rule would create a new section in the regulations governing NSLP, 7 CFR 210.30 Local school wellness policy, addressing the local school wellness policy requirements. This proposed rule also would amend the regulations governing the SBP, at 7 CFR 220.7, to include a cross reference to the local school wellness policy requirements in the NSLP regulations. The proposed requirements are discussed below.

### **Establishing a Local School Wellness Policy**

#### **Local school wellness policy leadership**

Developing a local school wellness policy that responds to the new NSLA requirements and meets the needs of the LEA requires thought, collaboration, and promotion. First and foremost, each LEA will need to establish local school wellness policy leadership, i.e., one or more LEA or school official(s) who fully understands the local school wellness requirements of the NSLA, who can facilitate the development and updates of the local school wellness policy, and who has the authority and responsibility to ensure that each school complies with the policy.

As required by section 9A(b)(5)(B) of the NSLA, as amended, this proposed rule, at §210.30(e)(1), requires LEAs to designate one or more officials to ensure schools comply with the local school wellness policy. In addition, proposed §210.30(c)(3) requires the LEA to identify within the written local school wellness policy, the position of the LEA or school official(s) responsible for oversight of the local school wellness policy to ensure each school's compliance with the policy.

#### Public Involvement in local school wellness policy development

Once leadership is identified, the next step would be to establish a diverse team made up of committed school and community stakeholders to assess the LEA's needs and develop a policy that both meets the operational realities of the LEA and works toward improved health and wellness outcomes for schoolchildren. This team may be part of an existing group within the LEA, such as a health and wellness committee, coordinated school health council, or other advisory group.

Section 9A(b)(3) of the NSLA, as amended, requires LEAs to allow parents, students, representatives of the school food authority, teachers of physical education, school health professionals, the school board, school administrators, and the general public to participate in the development, implementation, and periodic review and update of the local school wellness policy. This proposed rule, at §210.30(d)(1), Community involvement, includes this requirement. In addition, proposed §210.30(c)(4) would require each LEA to include in its written local school wellness policy, a plan for allowing the above-named individuals to

participate in the development, implementation, and periodic review and update of the local school wellness policy.

While the statute and proposed regulations identify specific categories of stakeholders that must be permitted to participate, LEAs would have discretion in exactly how they implement this requirement. For example, there may not be individuals in each category of stakeholder within a school community, or they may not be willing or able to participate. Conversely, it may not be possible for an LEA to permit every interested individual in a particular category to participate. It may also be the case that there are additional categories of stakeholders within a school community that the LEA would like to include on the local school wellness policy team.

However, in convening a local school wellness policy team, LEAs are expected to actively seek members for the local school wellness policy team that represent each of the categories described in the statute, and to the extent practicable, allow them to participate. There are a variety of individuals to consider when seeking the right combination of representatives. For example, school health professionals may include health education teachers, school health services staff (i.e., nurses, physicians, dentists, health educators, and other allied health personnel who provide school health services), and mental health and social services staff (i.e., school counselors, psychologists, social workers, or psychiatrists). As another example, the general public may include a local dietitian, business representative, physician, medical professional, health care professional, parks and recreation representatives, community or civic leaders, farmer coalitions, or include local representation of organizations interested in children, nutrition, education, health, and physical activity.

LEAs are also encouraged to include Supplemental Nutrition Assistance Program Education (SNAP-Ed) coordinators or educators on the local school wellness policy committee, as appropriate. The Department's Supplemental Nutrition Assistance Program (SNAP) provides grants to State SNAP agencies to make nutrition education and obesity prevention services available to low-income persons to the extent that available resources permit. SNAP-Ed targets SNAP recipients and other low-income individuals defined as persons eligible to receive means-tested Federal assistance. The grants may be used for a variety of strategies and interventions, including supporting and/or providing nutrition education in classrooms and other settings, establishing community or school gardens in low-income areas, or collaborating with other organizations to implement obesity prevention services through public health or community-based approaches with environmental or policy-level strategies. SNAP-Ed providers may also be able to broaden the reach of a school's local school wellness activities through SNAP-Ed collaborative efforts with other publicly or privately funded national, state, and local nutrition education and health promotion initiatives and interventions. For additional information on SNAP-Ed, refer to <http://www.fns.usda.gov/snap/nutrition-education>.

The local school wellness policy teams may work at the LEA level, the school level, or both, depending on the size and structure of the LEA. The Department encourages both LEA level and school-level local school wellness teams to strengthen implementation and monitoring of wellness policies.

Once members of the local school wellness policy team are identified, the LEA is encouraged to make available to the public and school community, a list of names and position titles (or relationship to the school) of individuals who are a part of the school wellness policy

team; as well as the name, position title, and contact information of the lead individual(s) or coordinator(s) for the LEA, and for each school as applicable.

## **Content of the Local School Wellness Policy**

### **Nutrition promotion and education, physical activity, and other school-based activities**

The NSLA at section 9A(b)(1) requires that local school wellness policies include goals for nutrition promotion and education, physical activity, and other school based activities that promote student wellness. The proposed rule at §210.30(c)(1) includes this requirement. Each area is discussed in more detail below, including information on these goals and how LEAs may address them.

In developing their local school wellness policy, LEAs should consider that effective policies include strong, clear goals with specific and measurable objectives and benchmarks stating *who* will make *what* change, by *how much*, *where*, and by *when*, with attention to both long- and short-term goals. General statements that do not have the *who*, *what*, *when*, or *where* components are not likely to provide schools clear direction and will compromise efforts to measure the schools' progress towards meeting wellness policy goals. Most measurable goals, objectives, and benchmarks will include numbers. USDA's technical assistance on local school wellness policies, discussed later in this preamble, will include examples of wellness policy goals, objectives and benchmarks for each of these areas.

Under the proposed rule at §210.30(c)(1), LEAs would also be required to review and consider evidence-based strategies and techniques in establishing goals for nutrition promotion

and education, physical activity, and other school based activities that promote student wellness. At a minimum, USDA would expect LEAs to review “Smarter Lunchroom” tools and strategies, which are evidence-based, simple, low-cost and no-cost changes that are shown to improve student participation in the NSLP an SBP while encouraging consumption of more whole grains, fruits, vegetables, and legumes, and decreasing plate waste

(<http://healthymeals.nal.usda.gov/healthierus-school-challenge-resources/smarter-lunchrooms>).

For example, using creative names for fruits and vegetables and targeted entrees, training staff to prompt students to select fruits and vegetables, placing unflavored milk in front of other beverage choices, and bundling “grab and go” meals that include fruit and vegetable items, have all been shown to improve the likelihood that children will make the healthier choice.

Nutrition promotion and education: The primary goal of nutrition promotion and education is to influence lifelong eating behaviors in a positive manner. Nutrition promotion includes evidence-based techniques and scientifically-based nutrition messages targeted to a specific audience to inspire and motivate them to take action and use these techniques and messages to create environments and food service venues (classroom, cafeteria, a la carte, vending machines, school store, snack bars, fundraisers, home, etc.) that encourage healthy nutrition choices, as well as enhance and encourage participation in school meal programs. Nutrition promotion specifically encourages children to participate in the NSLP and SBP. Research indicates that school meals are more healthful than what students eat as alternatives to

school meals.<sup>1</sup> Nutrition promotion also includes the marketing and advertising of nutritious foods and beverages to students and is most effective when implemented consistently through a comprehensive and multi-channel approach by school staff and teachers, parents, students, and the community. Nutrition education teaches behavior-focused skills and may be offered as part of a comprehensive, standards-based program designed to provide students with the knowledge and skills necessary to promote their health and make positive choices regarding food and nutrition.

Local school wellness policy goals related to nutrition promotion and education might include activities such as:

- Including nutrition education as part of health education classes and/or stand-alone courses for all grade levels, including curricula that promote skill development, such as meal planning, recognizing food groups within a meal, understanding health information and food labels to evaluate the nutrient quality and contribution of foods;
- Integrating nutrition education into other core subjects such as math, science, language arts, and social sciences, as well as in non-core and elective subjects;
- Including nutrition and health posters, signage, or displays in the cafeteria food service and dining areas, classrooms, hallways, gymnasium, and/or bulletin boards that are frequently rotated, updated, or changed;

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<sup>1</sup> According to the Student Nutrition and Dietary Assessment III study (SNDA-III), students who consumed NSLP lunches consumed greater amounts of the nutrients recommended in the *Dietary Guidelines for Americans* than students who consumed lunches from home (see SNDA-III pp. 147-150).

- Providing developmentally appropriate and culturally relevant participatory activities, such as contests, surveys, promotions, food demonstrations and taste-testing, voting for school meal recipe names, cafeteria design or décor challenges, farm visits, and school gardens; and
- Offering information to families that encourages them to teach their children about health and nutrition, and assists them in planning nutritious meals for their families (for example: handouts, newsletters, Parent Teacher Association/Organization (PTA/PTO) updates, Web site postings, presentations, workgroups, etc.).

USDA provides grade-appropriate curricula and lessons on nutrition education, as well as nutrition promotion materials through its Team Nutrition initiative. Team Nutrition provides participating schools with nutrition education and promotion materials and strategies that help focus attention on the important role nutritious school meals, nutrition education, and a health-promoting school environment play in helping students learn to enjoy healthy eating and physical activity. Team Nutrition provides a framework for team efforts by school food service personnel, teachers, parents, the media, and other community members, and supports LEA efforts to develop local school wellness policies. For more information on Team Nutrition, visit <http://teamnnutrition.usda.gov/team.html>.

LEAs are also encouraged to include in their local school wellness policy any school-sponsored family wellness activities that include a nutrition component, partnerships with community health agencies or organizations (for example, to operate a school-based health

center), partnerships with SNAP-Ed, and any community use of school facilities for nutrition-related activities.

Physical activity: The primary goals and characteristics of quality physical education and physical activity are to provide opportunities for every student to develop the knowledge and skills for specific physical activities; maintain physical fitness; reduce sedentary time; learn about cooperation, fair play, and responsible participation that meets the needs of all students (at all levels of physical ability); and gain an appreciation for lifelong physical activity through a healthy lifestyle.<sup>2</sup> Physical education and physical activity opportunities complement health education by instilling an understanding of the short-term and long-term benefits of a physically active and healthy lifestyle.

In addition to offering physical education, LEAs are encouraged to provide other opportunities for physical activity, outside of physical education, for every grade level. The Centers for Disease Control and Prevention's (CDC) recommendation for physical activity is 60 minutes each day for children and adolescents. Because children spend many hours at school, it is critical that schools offer time for students to meet the 60 minute goal. As examples, physical activity can include recess (outdoor and indoor) for elementary school students, classroom-based physical activity breaks to increase focus or teach academic content via physical movement, and opportunities for physical activity before and after school, such as intramural programs, interscholastic sports, and extracurricular community or club activities. Physical activity can

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<sup>2</sup> Department of Health and Human Services and the Department of Education. *Promoting Better Health for Young People Through Physical Activity and Sports*, A Report to the President From the Secretary of Health and Human Services and the Secretary of Education, 2000. Available from <http://www2.ed.gov/offices/OSDFS/physedapndc.pdf>.

also be incorporated into core subject areas (e.g. science, math, language, arts, social studies, etc.). LEAs are also encouraged to support teachers in incorporating opportunities for physical activity in the classroom whenever possible and in serving as role models by being physically active alongside the students.

In developing a local school wellness policy, an LEA could include goals, objectives and annual benchmarks for physical education and physical activity such as: physical education amount and frequency requirements (i.e. days per week, and minutes per day/week); student fitness assessments and reporting to parents; policies on adaptive activities for students with physical limitations; waivers or exemptions that allow students to be exempted from taking physical education classes; and activities designed to teach students about a physically active lifestyle. LEAs are encouraged to develop outdoor and indoor recess guidelines or schedules, as well as policies on prohibiting the use of physical activity and withholding of physical education class and other forms of physical activity, such as recess, as punishment.

LEAs are also encouraged to include in their local school wellness policies school-sponsored family wellness activities that include a physical activity component; partnerships with community health agencies; the availability of safe facilities and equipment in sufficient quantities for all students to be active (including the frequency of inspections and replacements, as necessary); the community use of school grounds/facilities for physical activity outside of school hours; and strategies/events to promote safe, active routes to school (for example, “walk to school day,” crossing guards stationed around the school, and bicycle parking). Local public works, public safety, and/or police departments can be valuable partners in some of those efforts.

Other school-based activities: While nutrition education and promotion and physical activity are critical components, other school activities supporting nutrition and health are equally important in providing a healthy school nutrition environment. Wellness policy activities can and should be integrated across the entire school setting and are not limited to the cafeteria, other food and beverage venues, and school physical activity facilities. An LEA can take a coordinated approach to developing and implementing a wellness policy by addressing nutrition and physical activity through health education (including tobacco, alcohol and, other substance abuse prevention), physical education, school nutrition services, the physical environment, employee wellness, family engagement, community involvement, health services, and counseling, psychological, and social services. The wellness policy can support academic outcomes through activities that have a demonstrated link to academic performance such as classroom physical activity breaks<sup>3</sup> and breakfast.<sup>4, 5,6,7,8,9,10,11</sup> While the examples listed below are not required, the Department encourages LEAs to address as many other school activities as

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<sup>3</sup> Centers for Disease Control and Prevention. The association between school-based physical activity, including physical education, and academic performance. Atlanta, GA: US Department of Health and Human Services; 2010. Available at [http://www.cdc.gov/healthyyouth/health\\_and\\_academics/pdf/pa-pe\\_paper.pdf](http://www.cdc.gov/healthyyouth/health_and_academics/pdf/pa-pe_paper.pdf).

<sup>4</sup> Rampersaud GC, Pereira MA, Girard BL, Adams J, Metz J. Breakfast habits, nutritional status, body weight, and academic performance in children and adolescents. *J Am Diet Assoc* 2005; 105:743–60.

<sup>5</sup> Taras HL. Nutrition and student performance at school. *J Sch Health* 2005; 75:199–213.

<sup>6</sup> Hoyland A, Dye L, Lawton CL. A systematic review of the effect of breakfast on the cognitive performance of children and adolescents. *Nutr Res Rev* 2009; 22:220–43.

<sup>7</sup> Murphy JM, Pagano MR, Nachmani J, Sperling P, Kane S, Kleinman RR. The relationship of school breakfast to psychosocial and academic functioning. *Arch Pediatr Adolesc Med* 1998; 152:899–07.

<sup>8</sup> Kleinman R, Hall S, Green H, et al. Diet, breakfast, and academic performance in children. *Annals of Nutrition and Metabolism* 2002; 46(Supplement 1): S24–30.

<sup>9</sup> D’Anci KE, Constant F, Rosenberg IH. Hydration and Cognitive Function in Children. *Nutrition Reviews* 2006; 64(10): 457-464.

<sup>10</sup> Popkin BM, D’Anci KE, Rosenberg IH. Water, hydration, and health. *Nutrition Reviews* 2010; 68(8):439-458.

<sup>11</sup> Kempton MJ, Ettinger U, Foster R, Williams SCR, Calvert GA, Hampshire A, Zelaya FO, O’Gorman RL, McMorris T, Owen AM and Smith MS. Dehydration Affects Brain Structure and Function in Healthy Adolescents. *Human Brain Mapping* 2011; 32:71–79.

possible to support a healthy school nutrition environment. For example, other activities that may be reflected into the local school wellness policy could include:

- Offering staff wellness activities and professional development opportunities related to health and nutrition that inspire school staff to serve as role models and practice healthy eating, physical activity, and other activities that support staff and student wellness;
- Applying for or being awarded a HealthierUS School Challenge recognition (more information can be found at <http://teamnutrition.usda.gov/healthierUS/index.html>);
- Completing and reporting the results of the School Health Index self-assessment process to assess the extent to which some or all components of the local school wellness policy are being implemented in schools. The Centers for Disease Control and Prevention's (CDC) free tool helps schools assess their strengths and weaknesses based on a comprehensive list of evidence-based guidelines and strategies that promote physical activity, nutrition, and other health behaviors; prioritize activities; and develop an action plan for improving student health, which can be incorporated into the School Improvement Plan. The *School Health Index* is available at <http://www.cdc.gov/healthyyouth/shi/>;
- Using CDC's *School Health Guidelines to Promote Healthy Eating and Physical Activity* to inform the policy development process, and identify specific evidence-based practices to include in the local school wellness policy. The *Guidelines* are available at: <http://www.cdc.gov/healthyyouth/npao/strategies.htm>;

- Sponsoring health fairs, TV-turnoff week<sup>12</sup>, school-supported races, family wellness activities, or family day activities that promote health and wellness;
- Incorporating school garden, Farm to School or Farm to Cafeteria, or Chefs Move to Schools activities that promote healthy eating;
- Sending families school newsletters or dedicated parts of newsletters or school Web sites promoting healthy eating, healthy recipes, physical activity, etc.;
- Incorporating practical and profitable healthy fundraisers that support nutrition education, physical activity, nutrition education and other wellness related activities (teacher jog-a-thon, fruit sale, recycled art sale); and
- Encouraging and promoting the use of *Let's Move* (<http://www.letsmove.gov/>) and other healthy initiatives that promote physical activity and healthy eating.

#### Nutrition guidelines for all foods

The NSLA, as amended at section 9A(b)(2), also requires that the local school wellness policy include nutrition guidelines for all foods available on each participating school campus under the jurisdiction of the LEA during the school day. These guidelines must be consistent with the regulations governing the meal pattern requirements for reimbursable meals under the NSLP and SBP (7 CFR 210.10 and 7 CFR 220.8) and the regulations governing competitive foods (7 CFR 210.11), which include foods and beverages, and promote student health and reduce obesity. This proposed rule, at §210.30(c)(2), addresses this requirement, which is discussed in more detail below. This proposed rule also includes definitions at §210.30(b) for

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<sup>12</sup> See, for example, <http://www.screenfree.org/screentimefs.pdf> for a discussion of the possible ways TV-turnoff week may affect children.

the terms school campus and school day. These terms are defined in the same manner they are defined for the purpose of competitive foods at §210.11(a). School campus means all areas of the property under the jurisdiction of the school that are accessible to students during the school day. School day means the period from the midnight before to 30 minutes after the end of the official school day.

School meals – Local school wellness policies can serve as a vehicle to explain to the public and the school community the updated nutrition standards for school meals as well as other State or local policies related to school meals. The Department promulgated a final rule, Nutrition Standards in the National School Lunch and School Breakfast Program (77 FR 4088), which updated the meal patterns and nutrition standards to align them with the *Dietary Guidelines for Americans*. The new meal pattern offers both fruits and vegetables each day, more whole grains, and portion sizes and calorie standards designed to maintain a healthy weight. To address school meals, the local school wellness policy could include information such as:

- An indication of whether the LEA is in compliance with the updated meal patterns;
- A description of the nutrition standards for school meals, emphasizing whole-grain offerings, fruit and vegetable offerings, low-fat and fat-free milk offerings, and compliance with the dietary specifications for calories, saturated fat, *trans* fat, and sodium;
- The Web site address (i.e., URL or uniform resource locator) where the school or LEA's current menus are available or the best method to view the current menus, if not posted online;

- A description of the Federal Child Nutrition programs in which the LEA participates (e.g., NSLP, SBP, Fresh Fruit and Vegetable Program, Summer Food Service Program, etc.), as well as any unique school meal activities that are provided, e.g., breakfast in the classroom, mobile breakfast carts, grab-and-go breakfast, breakfast after first period, afterschool snack program cart, etc;
- An indication of how participation in school meals programs will be promoted, how families are notified of the availability of the various Federal Child Nutrition Programs and how to determine students' eligibility to participate or a household's eligibility for free or reduced price meals;
- An indication if school meals are prepared onsite or offsite, and if a food service management company operates the school meal programs, or otherwise highlighting the school's ability to control recipes and ingredients;
- Policies relating to the school lunch and breakfast programs, e.g., substitutions for students with dietary restrictions, any special menus for students with special dietary needs, and any variations for various ethnic and cultural food preferences;
- Policies regarding the timing and duration of school meals that consider evidence-based research to support healthy eating (i.e., the periods or times in which school meals are offered; the amount of time allowed for students to eat breakfast and lunch at school, after being seated; recess before or after lunch); and
- Policies regarding the availability and locations of free drinking water throughout the school day, including during the meal service as required by section 9(a)(5) of the

NSLA and the frequency of regular maintenance on all water fountains to ensure hygiene standards for drinking fountains, water jugs, hydration stations, water jets, and other methods for delivering drinking water.

To assist schools, the Department will develop standard statements for use by LEAs, describing the updated nutrition standards for school meals, as well as standard statements for use by those LEAs indicating the status of compliance with the updated meal patterns. These statements may be used as a part of the local school wellness policy, wellness policy assessments, and the progress reports to the public.

Nutrition standards for other foods available to students: The NSLA at section 9A(b)(2) also requires that the local school wellness policy include nutrition standards for all other foods available on campus, defined as “competitive foods”. This would include foods and beverages that are available for sale to students, which are subject to the interim rule, Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010 (78 FR 39068), also known as the “Smart Snacks in School” rule, as well as any other foods and beverages available (such as in classroom parties, classroom snacks brought by parents, or foods given as incentives) on the school campus during the school day. (For more information on Smart Snacks, refer to the Smart Snacks website at <http://www.fns.usda.gov/school-meals/smart-snacks-schools>).

The Federal Smart Snacks standards are minimum standards. State agencies and LEAs may adopt more stringent standards for the types of food and beverages allowed to be sold, as well as the limited frequency of fundraisers that include foods that do not meet the standards.

A local school wellness policy can be an excellent tool for establishing and communicating these local standards.

The local school wellness policy could include information on the types of foods and beverages available for sale in each elementary, middle, and high school, and as appropriate and applicable, the general or specific nutrient profile of those foods and beverages, as well as a description of the Smart Snacks nutrition standards, an indication if the LEA is in compliance with the Smart Snacks nutrition standards, and policies regarding in-school fundraising activities that involve food and whether in-school fundraisers that involve food and beverages meet the Smart Snacks nutrition standards.

In addition to addressing food and beverages sold to students, the local school wellness policy must also address standards for other foods and beverages available on campus. These would include policies such as those governing classroom parties or school celebrations that involve food, policies governing food-related rewards and incentives, and other State or local policies or nutrition standards for foods and beverages available that promote student health and reduce childhood obesity.

To assist schools in describing the Smart Snacks nutrition standards and the status of compliance with those standards, the Department will develop standard statements for use by LEAs, describing the new Smart Snacks nutrition standards, as well as standard statements for use by those LEAs indicating the status of compliance with the new Smart Snacks nutrition standards. These statements may be used as a part of the local school wellness policy, wellness policy assessments, and progress reports to the public.

## Policies for Food and Beverage Marketing

As discussed above and included in the proposed rule at §210.30(c)(1), LEAs must include goals for nutrition promotion in their local school wellness policies. One important aspect of nutrition promotion is the marketing of food and beverages on the school campus. For the purposes of this proposed rule, marketing is defined as advertising and other promotions in schools. This rule proposes to require, at §210.30(c)(2)(iii), that LEAs include in their local wellness plans policies that allow marketing of only those foods and beverages that may be sold on the school campus during the school day, i.e., those foods and beverages that meet the requirements set forth in the Smart Snacks interim rule (or the more restrictive standards adopted by the LEA, if applicable).

Food marketing commonly includes oral, written, or graphic statements made for the purpose of promoting the sale of a food or beverage product made by the producer, manufacturer, seller, or any other entity with a commercial interest in the product.<sup>13</sup> Food and beverage marketing may be present in areas of the school campus that are owned or leased by the school and used at any time for school-related activities such as the school building or on the school campus, including on the outside of the school building, areas adjacent to the school building, school buses or other vehicles used to transport students, athletic fields and stadiums (e.g. on scoreboards, coolers, cups, and water bottles), or parking lots. USDA is interested in receiving public comment specifically on this proposed requirement, as discussed below, to inform the interim or final rule and help clarify how such policies would apply.

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<sup>13</sup> National Policy & Legal Analysis Network to Prevent Childhood Obesity. District Policy Restricting Food and Beverage Advertising on School Grounds. Available from: <http://changelabsolutions.org/publications/district-policy-school-food-ads>.

The Department is also seeking comment on the definition of food marketing, which commonly includes oral, written, or graphic statements made for the purpose of promoting the sale of a food or beverage product made by the producer, manufacturer, seller, or any other entity with a commercial interest in the product.<sup>10</sup>

Food and beverage marketing is prevalent in schools, and the majority of foods and beverages marketed to children are low in nutritional value and high in sugar and fat.<sup>14,15</sup> Research shows that food marketing influences children's food preferences, dietary intake, and overall health.<sup>16</sup> However, the majority of schools do not have policies restricting food marketing to children. During the 2010-2011 School Year, only 10% of school districts nationwide had a strong policy restricting the marketing of unhealthy foods, where strong policy provisions were defined as those that required action, specified an implementation plan or strategy, and included language such as shall, must, require, comply, and enforce.<sup>17</sup> The 2012 School Health Policies and Practices Study noted that 38% of districts nationwide required and 28% recommended that schools prohibit advertisements for unhealthy foods and fast food restaurants (representing over 8,400 school districts). In addition, 32% of districts required and

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<sup>14</sup> California Project LEAN. *Food and Beverage Marketing on California High School Campuses Survey: Findings and Recommendations*. California: Project LEAN, 2006. Available from: <http://californiaprojectlean.org/doc.asp?id=174&parentid=20>.

<sup>15</sup> Molnar A, Garcia DR, Boninger F, Merrill B. *A National Survey of the Types and Extent of the Marketing of Foods of Minimal Nutritional Value in Schools*. Tempe, AZ: Commercialism in Research Unit, 2006. Available from: <http://nepc.colorado.edu/publication/national-survey-types-and-extent-marketing-foods-minimal-nutritional-value-schools>.

<sup>16</sup> Institute of Medicine. *Food Marketing to Children: Threat or Opportunity?* Washington, DC: National Academies Press, 2005. Available from: <http://www.iom.edu/~media/Files/Report%20Files/2005/Food-Marketing-to-Children-and-Youth-Threat-or-Opportunity/KFMOverviewfinal2906.pdf>.

<sup>17</sup> Chriqui JF, Resnick EA, Schneider L, Schermbeck R, Adcock T, Carrion V, Chaloupka FJ. *School District Wellness Policies: Evaluating Progress and Potential for Improving Children's Health Five Years after the Federal Mandate. School Years 2006-07 through 2010-11*. Volume 3. Chicago, IL: Bridging the Gap Program, Health Policy Center, Institute for Health Research and Policy, University of Illinois at Chicago, 2013. Available from: [http://www.bridgingthegapresearch.org/research/district\\_wellness\\_policies/](http://www.bridgingthegapresearch.org/research/district_wellness_policies/).

26% recommended that schools prohibit the distribution of products promoting unhealthy foods and fast food restaurants.<sup>18</sup> Research has found that the financial impact on schools of prohibiting food marketing in schools would not likely be significant. In 2009, industry spent approximately \$149 million on marketing in schools, with 93% of the funds spent on the marketing of beverages.<sup>19</sup> However, school officials noted that they receive little financial compensation from corporate advertisements, with 67% of school officials reporting no compensation. In addition, 88% of school officials noted that school programs and activities would not be reduced if advertisements of unhealthy food ceased.<sup>20</sup> A study of five large school districts noted that yearly revenues from corporate advertising represented, on average, 0.01% of the schools' yearly operating budgets.<sup>21</sup>

The marketing of products on the exterior of vending machines, through posters, menu boards, coolers, trash cans, and other food service equipment, as well as cups used for beverage dispensing would all be subject to these policies. These policies would not apply to marketing that occurs at events outside of school hours such as after school sporting or other events, but they could at the LEA's discretion. For example, it is not the intent of the Department that an existing scoreboard on a field be replaced to comply with this proposal. However, LEAs are encouraged to consider that, as a scoreboard or other such durable equipment is replaced or

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<sup>18</sup> Centers for Disease Control and Prevention. *Results from the School Health Policies and Practices Study 2012*, 2013. Available from: [http://www.cdc.gov/healthyyouth/shpps/2012/pdf/shpps-results\\_2012.pdf#page=81](http://www.cdc.gov/healthyyouth/shpps/2012/pdf/shpps-results_2012.pdf#page=81).

<sup>19</sup> Federal Trade Commission. *A Review of Food Marketing to Children and Adolescents*, 2012. Available from: <http://ftc.gov/os/2012/12/121221foodmarketingreport.pdf>.

<sup>20</sup> Molnar A, Garcia DR, Boninger F, Merrill B. *A National Survey of the Types and Extent of the Marketing of Foods of Minimal Nutritional Value in Schools*. Tempe, AZ: Commercialism in Research Unit, 2006. Available from: <http://nepc.colorado.edu/publication/national-survey-types-and-extent-marketing-foods-minimal-nutritional-value-schools>.

<sup>21</sup> Public Citizen. *School Commercialism: High Costs, Low Revenues*, 2012. Available from: [http://www.commercialalert.org/PDFs/SchoolCommercialismReport\\_PC.pdf](http://www.commercialalert.org/PDFs/SchoolCommercialismReport_PC.pdf).

updated over time, decisions about the replacement include compliance with the marketing policy.

This proposal is also not intended to establish limits on personal expression or opinions. For example, it is not intended that this proposal would apply to clothing or personal items used by students or staff, or the packaging of products brought from home for personal consumption. It is also not intended to apply to materials used for educational purposes in the classroom, such as teachers' use of soda advertisements as a media education tool, nor would a LEA be limited in implementing a health or nutrition education curriculum that favors the consumption of some foods over others (for example, a curriculum that favors the consumption of dairy vs. dairy-free alternatives, or one that favors a vegetarian diet vs. animal protein foods). It is also not intended to imply that schools must allow food or beverage marketing on campus.

In developing this aspect of the proposed rule, the Department conducted a review of published data and research on food and beverage marketing in schools, including some publications that synthesize recent findings on the types of food and beverage policies being adopted, their feasibility, and their impact. The extent of peer-reviewed research in these areas is relatively limited. To ensure all relevant and reliable information available is considered in formulating an interim or final rule on local school wellness policies, the Department invites the public to submit research findings and other descriptive data related to food and beverage advertising or marketing on the school campus during the school day via product sales (e.g., via exclusive contracts, corporate food vending and associated incentives and profits, cash and rebate programs, and fundraising), direct advertising (in school facilities, school buses, school publications, media-based advertising on in-school televisions and radio, food coupons as

incentives), indirect advertising (via corporate sponsored educational materials, teacher training, contests and incentives, grants, gifts, or event sponsorships), and market research (via surveys, internet panels, or internet tracking).

The Department is also seeking information on the current food and beverage marketing environment in schools, as well as information on the fiscal implications for LEAs or schools that have implemented policies regulating the marketing of foods and beverages in schools; the effects of food and beverage marketing on student health, behavior, and academic performance; as well as data on actual and anticipated impacts of limiting school-based food marketing to foods permitted to be sold on the school campus during the school day. Specifically, the Department seeks information on:

- The extent to which food and beverage marketing practices in schools differ by school level (i.e. elementary, middle, and high school);
- The number and/or percentage of schools that currently allow (and/or that currently prohibit, or otherwise restrict) food and beverage marketing in the school and on the school campus: (1) during the school day, and/or (2) at all times;
- The types of food and beverages currently being marketed in school and the extent to which they meet or do not meet the “Smart Snacks in School” nutrition standards;
- The impact of food and beverage marketing on student health, behavior, food choices, food consumption patterns, and academic performance;
- The role of food and beverage marketing on school finances, including its contribution to school food service revenue and overall school revenues;

- The reliance of students, parents, teachers, school staff, and other school-affiliated groups on revenue or donations from product sales, direct advertising, indirect advertising, and market research;
- The extent to which such food and beverage marketing policies could apply to broadcast media conducted by or used in schools, including media used by schools for educational purposes that may be provided by outside entities;
- The use of in-kind rewards, such as coupons from restaurants for children reading a certain number of books, or other donations for student rewards, and the wellness impacts of these in-kind rewards.
- The economic and other impacts of existing State, local, and voluntary policies on allowing marketing only of foods and beverages permitted to be sold on the school campus (as per the Smart Snacks standards, or more stringent competitive foods standards adopted by the school) on the private sector, including, but not limited to, food producers/manufacturers, distributors, and vendors;
- Recently enacted or updated State or local level policies on allowing marketing of food and beverages permitted to be sold on the school campus, their immediate effects on student demand for competitive foods and reimbursable meals and the anticipated long-term effects on school revenue and revenue raised by school-affiliated groups;
- Strategies that have been utilized to implement existing State, local, and voluntary policies that restrict food and beverage marketing, including:
  - o Strategies for mitigating potential adverse financial impacts;

- Strategies for handling prohibited or restricted marketing and exclusive contracts that already exist in schools (e.g. what schools have done about existing scoreboards, signage, or vending machines advertising foods not allowed to be sold on the school campus);
  - Strategies for marketing or displaying company brands, names, logos, or mascots that have some products that meet “Smart Snacks” standards and some products that do not;
  - Details on the specific locations within the school campus where food marketing is present (e.g. in the school building, exterior of school building, areas adjacent to school building, school buses or other vehicles that transport students, athletic fields and stadiums, and parking lots).
- Community and consumer understanding of the impact of the role of food and beverage marketing in schools on children’s diet and health; and
  - Issues associated with compliance and monitoring of existing State and local policies regarding the marketing of food and beverages permitted to be sold on the school campus (as per the “Smart Snacks” standards).

**Informing the public**

Section 9A(b)(4) of the NSLA, as amended, requires the LEA to inform and update the public (including parents, students, and others in the community) about the content and implementation of the local school wellness policy.

Under proposed §210.30(d)(2), LEAs would be required to inform the public about the content of the local school wellness policy and make the local school wellness policy and any updates to the policy available to the public on an annual basis, at a minimum. In addition to the

local school wellness policy, the LEA would be required to make readily available to the public the annual school progress reports and triennial assessments of the local school wellness policy which are discussed in more detail later in this preamble.

LEAs or schools would be required to actively notify households of the availability of the local school wellness policy information, the Web site address (i.e., URL or uniform resource locator) for the information, or other information that would enable interested households to obtain additional information. For example, LEAs could post the local school wellness policy on the school or LEA's Web site and send a message to families notifying them of how they may obtain a copy or otherwise access the policy. Also, as a follow-up to the online posting, the LEA could publicize the content and status of the local school wellness policy by sending a summary report directly home to parents, and could present the information during a meeting with the Parent Teacher Association/Organization, school board, district superintendent, school/district health and wellness committee, school health advisory council, or other interested groups or stakeholders. Other examples of methods for public information sharing with the larger community include notifications through local newspapers or the media, with links to a Web page on the school or LEA's Web site.

Section 209 of the HHFKA amended the NSLA to require USDA to establish requirements for LEAs to report information on the school nutrition environment to the public on a periodic basis, including information pertaining to food safety inspections, meal program participation, the nutritional quality of school meals, and other information. This new requirement complements the public notification requirements set forth in this proposed rule. USDA will address section 209 through a separate proposed rulemaking in the future. Prior to

that rulemaking, USDA strongly encourages LEAs to provide as much information as possible to their communities about the school nutrition environment.

## **Implementation, Assessment, and Updates**

### **Annual Progress Reports**

Sections 9A(b)(4) and 9A(b)(5) of the NSLA, as amended, require the LEA to inform and update the public about the content and implementation of the local school wellness policy, the extent to which schools are in compliance with the policy, and progress made in attaining the goals of the policy. The intent of these requirements is to promote public transparency and ensure parents have easy access to information about the wellness environment of the school their child attends. In developing the proposal, the Department felt it was important to balance the need to inform parents and the community about the implementation of the local school wellness policy with the potential burden of assessing compliance, particularly for LEAs with a large number of schools.

Therefore, this rule proposes, at §210.30(e)(2), that LEAs inform parents and the public each school year of basic information about the local school wellness policy, the progress of each school toward meeting the goals of the policy, and any activities related to the policy that the school conducts. The timing of the notification each year is left to the discretion of the LEA, though it is recommended it occur early in the school year. The local school wellness policy annual progress report must include, at a minimum:

- The Web site address (i.e., URL or uniform resource locator) for the local school wellness policy and/or how the public can receive/access a copy of the local school wellness policy;
- A description of each school’s progress in meeting the local school wellness goals;
- A summary of each school’s events or activities related to local school wellness policy implementation;
- The name, position title, and contact information of the designated local agency official(s) or school official(s) leading/coordinating the school wellness policy team/health advisory council; and
- Information on how individuals and the public can get involved with the school wellness policy team.

The progress report can be written in any format that the LEA chooses, so long as it is written in an accessible and easily understood manner and covers the required elements. LEAs and schools may use any of the aforementioned standard phrases/statements developed by the Department to describe the extent to which schools are in compliance with the local school wellness policy in their assessments and progress reports made available to the public. One way to meet this annual progress reporting requirement is to create a “school wellness report card” that details a school or LEA’s progress in various areas in support of the local school wellness policy, which could be folded into other annual school/district/LEA report card-type ratings that are available to the public.

This rule proposes to require the progress report to be completed and made available to the public every year, at a minimum. However, LEAs can choose to report the progress of their

policies more frequently to communicate school-based wellness activities, events, and opportunities to families and the community. Commenters are encouraged to address whether the annual frequency of the progress reporting would serve to ensure local school wellness policies and school-based activities are communicated to parents and the community without being overly burdensome to LEAs.

The LEA may prepare and make the local school wellness policy progress report available on behalf of each participating school under its jurisdiction, or may allow each school to prepare its own progress report and make the information available to the public. The information may be posted on the LEA or schools' Web site, however, each year the LEA or school must actively notify households of the availability of the information, the Web site address (i.e., URL or uniform resource locator) for the information, or other information that would enable households to obtain additional information.

### Triennial Assessments

Section 9A(b)(5) of the NSLA, as amended, requires LEAs to periodically measure and make available to the public an assessment on the implementation of the local school wellness policy, including:

- An indication of the extent to which schools under the jurisdiction of the LEA are in compliance with the local school wellness policy;
- An indication of the extent to which the local school wellness policy compares to model local school wellness policies; and

- A description of the progress made in attaining the goals of the local school wellness policy.

This rule proposes, at §210.30(e)(3), to require an assessment, as described above, of the local school wellness policy to be conducted, at a minimum, every 3 years. However, LEAs can choose to assess their policies more frequently to ensure goals and objectives are being met and to refine the policy as needed. The results of this periodic assessment must be made available to the public to showcase the wellness efforts being made by the LEA. Commenters are encouraged to address whether the 3-year frequency of the assessment would serve to ensure local school wellness policies are kept up-to-date without being overly burdensome to LEAs.

There are a variety of methods an LEA may employ to assess compliance by schools and determine progress toward benchmarks, objectives and goals. Developing a plan with measureable objectives, and realistic annual benchmarks will help when it is time to evaluate progress. Additionally, the local school wellness policy team and leadership can be assets in conducting periodic assessments. Commenters are encouraged to provide input on the specific areas that should be included in the components of an effective assessment. The Department will continue to work with the Department of Education and the Department of Health and Human Services to identify resources and provide technical assistance on this area.

### Updates

Section 9A(b)(3) of NSLA, as amended, requires that LEAs periodically update the local school wellness policy. As community needs change, as goals are met and as new health science, information, and technology emerge, it is important for LEAs assess the local school

wellness policy and update as appropriate. The proposed rule at §210.30(e)(4) requires that LEAs update or modify the local school wellness policy as appropriate, particularly as information is gathered through the annual progress reports or triennial assessments. The frequency of updates to the local school wellness policy is not specified, as the need to update will vary based on the content and structure of the plan. For example, a comprehensive plan that establishes benchmarks toward a measurable goal over the course of several years may not need frequent updates, while other plans may need to be revisited more frequently. The local school wellness policy team and leadership can be assets in determining when updates are needed.

#### Recordkeeping

The proposed rule at §210.30(f) would require each LEA to retain basic records demonstrating compliance with the local school wellness requirements set forth under §210.30. In order to minimize burden, the records required to be retained would include:

- The written local school wellness policy;
- Documentation demonstrating compliance with community involvement requirements;
- Documentation of the triennial assessment of the local school wellness policy;
- Annual local school wellness policy progress reports for each school under its jurisdiction; and
- Documentation to demonstrate compliance with the public notification requirements (consistent with the section on Informing the public).

### Monitoring and Oversight

State agencies conduct administrative reviews of LEAs, at least once every three years. The proposed rule at §210.18(h)(6) would require State agencies to include, as part of the general areas of the administrative review, compliance with the local school wellness policy requirements set forth under proposed §210.30, Local school wellness policy. Information on the content of the review and methods States can use to assess compliance will be provided within the School Meals Administrative Review guidance.

### Technical Assistance and Best Practices

In addition to describing requirements of LEAs for the local school wellness policy, section 9A of the NSLA, requires USDA, in consultation with the Department of Education and the Centers for Disease Control and Prevention of the Department of Health and Human Services, to provide information and technical assistance to LEAs, school food authorities and State agencies to support local school wellness policies. The law specifies several types of technical assistance that USDA must provide, including resources and training, model school wellness policies and best practices, and other technical assistance that promotes sound nutrition and healthy school environments and is consistent with the specific needs of LEAs. In April 2011, the Food and Nutrition Service, Department of Education, and Centers for Disease Control convened an interagency workgroup and conducted several needs assessment activities to help determine the training and technical needs of LEAs. Based on this assessment the workgroup developed a five-year technical assistance plan. The workgroup is prepared to identify best practices and success stories for local school wellness policy implementation as well as other

technical assistance resources that will support LEAs in developing, updating and assessing their policies.

In order to assist LEAs in implementing these requirements, the Department will continue to provide technical assistance. The Team Nutrition Web site hosts resources on designing, implementing, promoting, disseminating, and evaluating local school wellness policies and overcoming barriers to the adoption of local school wellness policies. For more information, refer to <http://teammnutrition.usda.gov/healthy/wellnesspolicy.html>.

The “School Nutrition Environment and Wellness Resources” Web site, operated by USDA National Agricultural Library’s Healthy Meals Resource System (Team Nutrition’s training and technical assistance component), helps LEAs find the resources they need to meet the local school wellness policy requirements and recommendations to establish a healthier school nutrition environment (<http://healthymeals.nal.usda.gov/school-wellness-resources>). The “School Nutrition Environment and Wellness Resources” Web site has information and resources on:

- Local School Wellness Policy Process steps to put the policy into action.
- Required Wellness Policy Elements to meet the federal requirements.
- Healthy School Nutrition Environment improvements related to food and physical activity.
- Samples, Stories, and Guidance ideas for schools.
- Research Reports on school wellness.
- Grants and funding opportunities related to child nutrition and physical activity.

FNS will continue to identify, develop, and post to the Team Nutrition and “School Nutrition Environment and Wellness Resources” Web sites model local school wellness policies that will help local educational agencies assess the extent to which the local school wellness policy compares to model local school wellness policies, as required under the triennial assessment, as well as best practices and any other technical assistance as needed to develop, implement, assess, and report on local school wellness policies that promote healthy school nutrition environments.

## **II. Procedural Matters**

### Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been determined to be significant under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget.

### Regulatory Flexibility Act Summary

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA) of 1980, (5 U.S.C. 601-612). It has been certified that this rule will have a significant impact on a substantial number of small entities. A summary is presented below. The complete RFA is included in the docket for this rule at [www.regulations.gov](http://www.regulations.gov) (docket #FNS-2014-0010).

The requirements established by this proposed rule will apply to LEAs which meet the definitions of “small governmental jurisdiction” and “small entity” in the Regulatory Flexibility Act. The regulatory flexibility analysis considers the impact of the proposed rule on small businesses. The proposed rule has the potential to affect approximately 21,000 local educational agencies and some 105,000 schools operating in the U.S. We estimate that the administrative cost for schools will be on average about \$48 per school per year. The marketing limitations in the proposed rule could affect vending machine operators and marketing companies as they change existing marketing to meet the requirements. Because of the changes in products available in schools due to the Smart Snacks in Schools interim rule, we believe that much of that change will already have occurred, but there may still be some labor costs associated with changing the marketing campaigns.

#### Regulatory Impact Analysis Summary

As required for all rules that have been designated significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this proposal. A summary is presented below. The complete RIA is included in the docket for this rule at [www.regulations.gov](http://www.regulations.gov). The docket number is FNS-2014-0010.

## Need for Action

The proposed rule updates the regulations governing the administration of USDA's child nutrition programs in response to statutory changes made by The Healthy, Hunger-Free Kids Act of 2010.<sup>22</sup> Section 204 of the Healthy, Hunger-Free Kids Act of 2010 added section (9A) to the Richard B. Russell National School Lunch Act. This new section requires local educational agencies (LEAs) to establish more comprehensive local wellness policies and expands the scope of existing wellness policies; brings additional stakeholders into the development, implementation, and review of local school wellness policies; and requires public updates on the content and implementation of the wellness policies.

## Benefits

The proposed rule adds to the scope of existing wellness policies and provides guidelines for local educational agencies and the Department regarding their roles in these policies, as required by the Healthy, Hunger-Free Kids Act of 2010.

As documented in the Bridging the Gap study,<sup>23</sup> there is substantial variability in local wellness policies, in the strength of those policies, and in policy enforcement, meaning that not all school children are benefitting from the policies in their schools.

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<sup>22</sup> Public Law 111-296.

<sup>23</sup> Chiqui JF, Resnick EA, Schneider L, Schermbeck R, Adcock T, Carrion V, Chaloupka FJ. *School District Wellness Policies: Evaluating Progress and Potential for Improving Children's Health Five Years after the Federal Mandate. School Years 2006–07 through 2010-11*. Volume 3. Chicago, IL: Bridging the Gap Program, Health Policy Center, Institute for Health Research and Policy, University of Illinois at Chicago, 2013, [www.bridgingthegapresearch.org](http://www.bridgingthegapresearch.org).

The proposed rule strengthens the requirements for the local wellness policies and puts more emphasis on policy implementation. Under the proposed rule, LEAs and schools are encouraged to identify specific, measurable objectives with attention to both long- and short-term goals. The wellness committee responsibilities have also been expanded to include oversight on policy implementation. LEAs must now designate at least one LEA official to be responsible for periodically determining the extent to which schools are in compliance with their wellness policies and the extent to which the policy compares with model policy.

The proposed rule also includes a provision that allows schools to permit in-school marketing of only those foods and beverages that meet the standards in the Smart Snacks in Schools interim rule. The new marketing rules will mean that children are presented with images and signs that promote healthier foods and beverages and that the products that are marketed will match the foods and beverages that will be available in schools.

Under the proposed rule, schools must also inform and update the public about the content of their policies and the status of policy implementation. LEAs must also formally assess their policies to ensure that goals and objectives are being met. With greater transparency on the effectiveness of these policies, parents and other community stakeholders will be better informed and positioned to improve the school nutrition and wellness environment.

As noted in the Bridging the Gap study, strong evidence is emerging that demonstrates the links between healthy nutrition, physical activity, improved academic performance, and improved classroom behavior.<sup>24</sup> For example Rampey, Dion, and Donahue (2008) found that

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<sup>24</sup> Chriqui et al., 2013, p. 4.

children who are more physically fit are more likely to perform better on reading and math tests, even if the additional time for physical activity decreases the time available for classroom instruction.<sup>25</sup> Similar outcomes have been found in Texas among students in grades 3-12, among Massachusetts middle school students, and among Illinois 3<sup>rd</sup> and 5<sup>th</sup> graders.<sup>26</sup> The Bridging the Gap study also notes that there is increasing evidence showing that “school-based policies regarding foods, beverages, and physical activity are significantly related to calories consumed and expended by school age children, and to their weight and body mass index levels.”<sup>27</sup> Therefore, there is a high likelihood that strengthening local wellness policies will have real positive effects on the health outcomes for students, though these benefits cannot be quantified nationally with precision using existing data.

Finally, the rule requires LEAs to give increased attention to their implementation of the new school meal pattern requirements and the Smart Snacks in Schools requirements. As described in the regulatory impact analysis published with the school meals rule,<sup>28</sup> the benefits of the new school meal pattern requirements include improved nutrition and diets to students and likely improved health outcomes. Furthermore, as described in the regulatory impact analysis published with the Smart Snacks in Schools rule,<sup>29</sup> the benefits of the Smart Snacks in Schools

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<sup>25</sup> Rampey, B, Dion, G and Donahue, P., *NAEP 2008 Trends in Academic Progress*, Washington, DC: U.S. Department of Education, 2008.

<sup>26</sup> Troust, SG, Active Living Research, “Active education: physical education, physical activity, and academic performance.” Available online at [http://activelivingresearch.org/files/ALR\\_Brief\\_ActiveEducation\\_Summer2009.pdf](http://activelivingresearch.org/files/ALR_Brief_ActiveEducation_Summer2009.pdf).

<sup>27</sup> Chriqui et al., 2013, p. 4.

<sup>28</sup> *Federal Register*, Vol. 77, No. 17, pp. 4088-4167.

<sup>29</sup> *Federal Register*, Vol. 78, No. 125, pp. 39068-39120.

rule likely include decreased consumption of solid fats and added sugars and decreased obesity rates.

Although we do not estimate new direct benefits in these areas from this proposed rule, we expect that the consistent reinforcing influence of local wellness policies will likely cause a number of LEAs to reexamine and improve their implementation of both the school meals rule and the Smart Snacks rule. To the extent that this proposed rule causes LEAs to implement the school meals rule or Smart Snacks rule more quickly or with more stringent requirements, this rule could cause LEAs to realize the benefits of those rules more quickly or to a greater extent than they might have done in the absence of this proposed rule.

Costs / Administrative Impact

There are no transfers as a result of this rule, and we estimate that there is no quantifiable economic impact beyond the new public disclosure and recordkeeping requirements for LEAs established as a result of this rule. LEAs will face increased public disclosure and recordkeeping burdens in order to establish and implement the policies, conduct annual and triennial assessments of wellness policies, track policy implementation, and retain documentation of these assessments. We estimate these costs to be approximately \$5 million per year across the entire United States. A summary table of the estimated costs of the proposed rule is provided below.

**Record and Reporting Requirement Costs for Local School Wellness Policies**

Administrative Burden on LEAs	Fiscal Year (millions)					
	2014	2015	2016	2017	2018	Total
<b>Additional Public Disclosure Burden on LEAs</b>						
Each LEA must establish a local wellness policy for all participating schools	\$2.64	\$2.73	\$2.82	\$2.92	\$3.01	<b>\$14.13</b>

LEAs are required to report schools annual progress towards meeting wellness policy goals, objectives, and benchmarks; make report available to public	\$1.32	\$1.37	\$1.41	\$1.46	\$1.51	<b>\$7.06</b>
LEAs are required to conduct triennial assessments; make results available to public; and make updates and modifications to policies as needed	\$0.09	\$0.09	\$0.09	\$0.10	\$0.10	<b>\$0.47</b>
<b>Total Estimated Public Disclosure Burden</b>	<b>\$4.06</b>	<b>\$4.19</b>	<b>\$4.33</b>	<b>\$4.47</b>	<b>\$4.62</b>	<b>\$21.66</b>
<b>Additional Recordkeeping Burden on LEAs</b>						
LEAs must retain records demonstrating compliance with the local school wellness requirements	\$0.66	\$0.68	\$0.71	\$0.73	\$0.75	<b>\$3.53</b>
<b>Total Additional Administrative Burden on LEAs</b>	<b>\$4.72</b>	<b>\$4.87</b>	<b>\$5.03</b>	<b>\$5.20</b>	<b>\$5.37</b>	<b>\$25.19</b>

\*The BLS, FY2012 employer cost for State and local government public administration employee wage rate is used in this estimate and inflated on a fiscal year basis by the State and Local Expenditure Index used and prepared by OMB for use in developing the President's FY 2014 President's Budget.

We request comments on the costs discussed above, specifically for information to better inform their estimation. Ongoing technical assistance for local school wellness policies has been provided by FNS since 2004, therefore, —there will be minimal impact for FNS.

### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local

or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### Executive Order 12372

The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance Programs under 10.555. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

#### Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. USDA has considered the impact of this

rule on State and local governments and has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

#### Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

#### Civil Rights Impact Analysis

FNS has reviewed this proposed rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact Analysis", and 1512-1, "Regulatory Decision Making Requirements" to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this rule is not intended to limit or reduce in any way the ability of protected classes of individuals to receive benefits on the basis of their race, color, national origin, sex, age or disability, nor is it intended to have a differential impact on minority-owned or -operated business establishments, and women-owned or -operated business

establishments that participate in the Child Nutrition Programs. The proposed rule affects only the State agencies and the LEAs, requiring the establishment of local school wellness policies, assessment of those policies, and establishment of a means to communicate information related to local school wellness policies to households of all children.

### Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320), requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. This is a new collection. The proposed provisions in this rule create new burden which will be merged into a currently approved information collection titled “National School Lunch Program” (NSLP), OMB Number 0584-0006 which expires on February 29, 2016. These changes are contingent upon OMB approval under the Paperwork Reduction Act of 1995. When the information collection requirements have been approved, FNS will publish a separate action in the *Federal Register* announcing OMB’s approval.

Comments on the information collection in this proposed rule must be received by [insert date 60 days after publication in the FEDERAL REGISTER]. Send comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to Lynn Rodgers, Chief, Program Monitoring Branch, Child Nutrition Programs, 3101 Park Center Drive, Alexandria, VA 22302. For further information, or for copies of the information collection requirements, please contact Lynn

Rodgers at the address indicated above. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the proposed information collection burden, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this request for comments will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Title: Local School Wellness Policy Implementation under the Healthy, Hunger-Free Kids Act of 2010

OMB Number: 0584-New

Expiration Date: Not Yet Determined

Type of Request: New Collection

This proposed rule would increase the recordkeeping and public disclosure burden for local educational agencies. As the State agencies conduct administrative reviews of local education agencies once every three years, burden associated with local wellness policy implementation is captured as a part of administrative review process. Hence, no new burden is assessed for State agencies as a part of this proposed rule. The average burden per response and the annual burden hours are explained and summarized below.

Affected Public: Local Educational Agencies

Estimated Number of Respondents: 20,858

Estimated Number of Responses per Respondent: 15.3333

Estimated Total Annual Responses: 319,822

Estimate Time Per Response: 0.7554

Estimated Total Annual Burden: 241,604.5

Refer to the table below for estimated total annual burden.

Affected Public	Section	Est. No. of Respondents	No. of Responses per Respondent	Total Annual Responses*	Est. Total Hours per Response	Est. Total Burden Hours
<b>Public Disclosure</b>						
Each LEA must establish a local wellness policy for all participating schools	210.30(a)	20,858	5	104,290	1.0	104,290
LEAs are required to report schools' annual progress towards meeting wellness policy goals; make report available to public	210.30 (e)(2), (d)(2), & (d)(3)	20,858	5	104,290	1.0	104,290
LEAs are required to conduct triennial assessments; make results available to public; and make updates and	210.30 (e)(3), (d)(3), & (e)(4)	6,952	1	6,952	1.0	6,952

modifications to policies as needed						
Total Estimated Public Disclosure Burden		20,858	10.3333	215,532	1.0	215,532
<b>Recordkeeping</b>						
LEAs must retain records demonstrating compliance with the local school wellness requirements.	210.30(f)	20,858	5	104,290	0.25	26,072.5
Total Estimated Recordkeeping Burden		20,858	5	104,290	0.25	26,072.5
<b>Total of Public Disclosure and Recordkeeping for Local School Wellness Policies</b>						
		<b>Est. No. of Respondents</b>	<b>No. of Responses per Respondent</b>	<b>Total Annual Responses</b>	<b>Est. Total Hours per Response</b>	<b>Est. Total Burden</b>
Public Disclosure		20,858	10.3333	215,532	1.0	215,532
Recordkeeping		20,858	5	104,290	0.25	26,072.5
<b>Total</b>		<b>20,858</b>	<b>15.33</b>	<b>319,822</b>	<b>.75</b>	<b>241,604.5</b>

\*The Number of Responses per Respondent reflects a rounded average of the number of participating schools split among the number of LEAs. As such, the Total Annual Responses figure is higher than the actual number of participating schools.

E-Government Act Compliance

The Food and Nutrition Service is committed to complying with the E-Government Act, 2002 to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the federal government and Indian Tribes. In spring 2011, FNS offered five opportunities for consultation with Tribal officials or their designees to discuss the impact of the Healthy, Hunger-Free Kids Act of 2010 on tribes or Indian Tribal governments. FNS followed up with conference calls on February 13, 2013; May 22, 2013; August 21, 2013; and November 6, 2013. These consultation sessions have provided and will continue to provide the opportunity to address Tribal concerns related to school meals. No concerns about the local school wellness policy have been expressed by the Indian Tribal governments.

The impact of this proposed rule on Tribal members is expected to be positive. The rule expands the scope of wellness policies; brings in additional stakeholders in the development, implementation, and review of local school wellness policies; and requires public updates on the content and implementation of the wellness policies. The local school wellness policies would support Tribal efforts to reduce obesity and diabetes in their communities by providing a school

environment that promotes sound nutrition and student health, reduces childhood obesity, provides transparency to the public on school wellness policy content and implementation, and promotes healthy eating and physical activities through campaigns such as *Let's Move in Indian Country*.

USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences with Tribal officials or their designees concerning ways to improve this rule in Indian country. We are unaware of any current Tribal laws that would be in conflict with the proposed rule. We request that commenters address any concerns in this regard in their responses.

#### **List of Subjects**

##### 7 CFR 210

Grant programs - education; Grant programs – health; Infants and children; Nutrition; Reporting and recordkeeping requirements; School breakfast and lunch programs.

##### 7 CFR 220

Grant programs - education; Grant programs – health; Infants and children; Nutrition; Reporting and recordkeeping requirements; School breakfast and lunch programs.

Accordingly, 7 CFR parts 210 and 220 are proposed to be amended as follows:

#### **PART 210 – NATIONAL SCHOOL LUNCH ACT**

1. The authority citation for part 210 continues to read as follows:

**Authority:** 42 U.S.C. 1751-1760, 1779

2. In §210.12, revise the section heading and add new paragraph (e) to read as follows:

**§210.12 Student, parent, and community involvement.**

\* \* \* \* \*

(e) Local school wellness policies. Local educational agencies must comply with the provisions of §210.30(c) regarding student, parent, and community involvement in the development, implementation, and periodic review and update of the local school wellness policy. Additionally, local educational agencies must make information about the content and implementation of the local school wellness policy available to the public, as required under §210.30(c).

3. In §210.15, add new paragraph (b)(8) to read as follows:

**§210.15 Reporting and recordkeeping.**

\* \* \* \* \*

(b) \* \* \*

(8) Records to document compliance with the local school wellness policy requirements as set forth in §210.30(h).

4. In §210.18, add new paragraph (h)(7) to read as follows:

**§210.18 Administrative reviews.**

\* \* \* \* \*

(h) \* \* \*

(7) Local school wellness. The State agency shall ensure the school food authority complies with the local school wellness requirements set forth in §210.30.

§§210.30 and 210.31 [Redesignated as §§210.31 and 210.32]

5. Redesignate §210.30 and §210.31 as §210.31 and §210.32, respectively.

6. Add new §210.30 to read as follows:

**§210.30 Local school wellness policy.**

(a) General. Each local educational agency must establish a local school wellness policy for all schools participating in the National School Lunch Program and/or School Breakfast Program under the jurisdiction of the local educational agency. The local school wellness policy is a written plan that includes methods to promote student wellness, prevent and reduce childhood obesity, and provide assurance that school meals and other food and beverages sold on the school campus during the school day meet the minimum Federal standards.

(b) Definitions. For the purposes of this section:

(1) School campus means the term as defined in §210.11(a)(4).

(2) School day means the term as defined in §210.11(a)(5).

(c) Content of the plan. At a minimum, local school wellness policies must contain:

- (1) Specific goals for nutrition promotion and education, physical activity, and other school-based activities that promote student wellness. In developing these goals, local educational agencies must review and consider evidence based strategies and techniques;
- (2) Standards and nutrition guidelines for all foods and beverages available during the school day on each participating school campus under the jurisdiction of the local educational agency that:
  - (i) Are consistent with the meal pattern requirements set forth under §§210.10 and 220.8 of this chapter, as applicable;
  - (ii) Are consistent with the nutrition standards set forth under §210.11;
  - (iii) Permit marketing on the school campus during the school day of only those foods and beverages that meet the requirements under §210.11; and
  - (iv) Promote student health and reduce childhood obesity.
- (3) Identification of the position of the LEA official(s) or school official(s) responsible for the oversight of the local school wellness policy to ensure each school's compliance with the policy;
- (4) A description of the manner in which parents, students, representatives of the school food authority, teachers of physical education, school health professions, the school board, school administrators, and the general public are provided an opportunity to participate in the development, implementation, and periodic review and update of the local school wellness policy; and
- (5) A description of the plan for measuring the implementation of the local school wellness policy and for reporting local school wellness policy content and implementation issues to the public, as required in paragraphs (d) and (e) of this section.

(d) Community involvement. Each local educational agency must:

(1) Permit parents, students, representatives of the school food authority, teachers of physical education, school health professionals, the school board, school administrators, and the general public to participate in the development, implementation, and periodic review and update of the local school wellness policy.

(2) Inform the public about the content of the local school wellness policy and make the local school wellness policy and any updates to the policy available to the public on an annual basis.

(3) Inform the public about progress toward meeting the goals of the local school wellness policy and compliance with the local school wellness policy by making the annual report, as required in paragraph (e)(2) of this section, and the triennial assessment, as required in paragraph (e)(3) of this section, available to the public in an accessible and easily understood manner.

(e) Implementation, assessments and updates. Each local educational agency must:

(1) Designate 1 or more local educational agency officials or school officials to ensure that each participating school complies with the local school wellness policy.

(2) Annually report, for each school under the jurisdiction of the local educational agency, the school's progress toward meeting the local school wellness policy's goals over the previous school year and include:

(i) The Web site address (i.e., URL or uniform resource locator) for the local school wellness policy and/or how the public can receive/access a copy of the local school wellness policy;

(ii) A description of each school's progress in meeting the local school wellness goals;

(iii) A summary of each school's events or activities related to local school wellness policy implementation;

(iv) The name, position title, and contact information of the designated local agency official(s) or school official(s) leading/coordinating the school wellness policy team/health advisory council; and

(v) Information on how individuals and the public can get involved with the school wellness policy team.

(3) At least once every three years, assess compliance with the local school wellness policy. The assessment must measure the implementation of the local school wellness policy, and include:

(i) The extent to which schools under the jurisdiction of the local educational agency are in compliance with their local school wellness policy;

(ii) The extent to which the local educational agency's local school wellness policy compares to model local school wellness policies; and

(iii) A description of the progress made in attaining the goals of the local school wellness policy.

(4) Make appropriate updates or modifications to the local school wellness policy, based on the triennial assessment and annual progress reports.

(f) Recordkeeping requirement. Each local educational agency must retain records to document compliance with the requirements of this section. These records include but are not limited to:

(1) The written local school wellness policy;

(2) Documentation demonstrating compliance with community involvement requirements, including requirements to make the local school wellness policy, annual progress reports, and triennial assessments available to the public as required in paragraph (d) of this section;

(3) Documentation of the triennial assessment of the local school wellness policy for each school under its jurisdiction; and

(4) Documentation of annual local school wellness policy progress reports for each school under its jurisdiction.

## **PART 220 – SCHOOL BREAKFAST PROGRAM**

7. The authority citation for part 220 continues to read as follows:

**Authority:** 42 U.S.C. 1773, 1779, unless otherwise noted.

8. In §220.7, add paragraph (h) to read as follows:

### **§220.7 Requirements for participation.**

\* \* \* \* \*

(h) Local educational agencies must comply with the provisions of §210.30 of this chapter regarding the development, implementation and periodic review and update of the local school wellness policy.

Janey Thornton,  
Acting Under Secretary,  
Food, Nutrition and Consumer Services.

Dated: February 20, 2014,

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