

October 24, 2012

Chief Julie Brewer
Policy and Program Development Branch
Child Nutrition Division
Food and Nutrition Service
Department of Agriculture
3101 Park Center Drive, Room 640
Alexandria, Virginia 22302-1594

Submitted electronically to <http://www.regulations.gov>

RE: Independent Review of Applications Required by the Healthy, Hunger-Free Kids Act of 2010; 7 CFR Parts 210 and 245. Docket ID: FNS-2011-0028.

Dear Chief Julie Brewer,

My name is Abigail DeMuis and I am a 3L law student at Quinnipiac University School of Law. As a student of law and public policy, I have had the opportunity to study statutory language and have spent time considering how statutory language is ultimately implemented. This proposal is of particular interest to me because next Fall I will be entering the full-time workforce and a portion of my salary will be going towards taxes that fund programs such as the National School Lunch Program. Without strict restrictions and enforcement, I am hesitant about my support for entitlement programs that give money directly to people in need. Except in the case of food stamps or actual food, there are not many restrictions on how social security checks are spent and I fear that a number of individuals receiving public assistance take advantage of the system. In addition to the clerical errors that have been occurring within the Local Educational Agencies ("LEAs"), it is possible that some parties have been attempting to take advantage of this program.

I. Background of National School Lunch Program and Proposed Regulation:

I am in support of this proposed regulation and believe that it coincides with the enabling legislation's purpose to "safeguard the health and well-being of the Nation's children . . . [by] provid[ing] states with general and special cash assistance and donations of food."¹ In order to keep this program effective and open to children truly in need, I think this regulation can help decrease the close to \$129 million net loss related to certification errors out of a total outlay of approximately \$10 billion each year for the National School Lunch Program.² A 2005-2006 study found the total amount paid improperly by the program, including errors in addition to certification errors, was \$860 million or 8.6% "because of errors in the number of meals counted and claimed for reimbursement."³ In 2011, 2.3% of LEAs' eligibility determinations

¹ 7 C.F.R. § 210.1 (2012).

² Independent Review of Applications Required by the Healthy, Hunger-Free Kids Act of 2010, 77 Fed. Reg. 178 (proposed Sept. 13, 2012) (to be codified at 7 C.F.R. pts. 210, 245) (These numbers are from a study conducted on the 2005-2006 school year.).

³ Letter from Kay Brown, Director Education, Workforce and Income Security Issues for US Government Accountability Office to Honorable Herb Kohk, Chairman, Senate Appropriations Committee on Agriculture, and Honorable Rosa L. DeLauro

were incorrect, 63% of those were for more benefits and 37% for less benefits.⁴ About 32 million⁵ students participate in the National School Lunch Program, which means approximately 736,000 students' eligibility determinations are incorrect. I am in support of these regulations because they will help reduce the percentage of errors. It is crucial that these errors decrease, so that the federal government is not overpaying for this program and so that students who are eligible receive the correct classification of benefits: reduced price or free lunch. Some may argue that there is no harm if more kids get to eat nutritional food. On the surface that is true, but when that money could be put towards helping children truly in need or other governmental programs where all taxpayers benefit, there is a problem. In general, I support this program and believe it should continue into the future, provided that these and other errors in the program are reduced.

II. Suggestions for Revision:

a. Overall:

The proposed regulation's guidance is too general and I think that it could be supplemented in one of two ways: (1) including some of the "Overview of the Proposed Rule" language in the actual proposed rule or (2) adding a section regarding independent secondary review to the user-friendly guidance manual on the USDA website.⁶ One of these suggestions should be implemented because the end-users, local and State agency employees who are most likely not lawyers, will likely not know that they can look at the proposed regulation or final rule published in the federal register for further guidance. Thus, by adding the language directly to the regulation or to the manual, these agency employees will have immediate access to the guidance. Below, I discuss each section of the proposed regulation and provide my suggestions and support.

b. State Agency Requirements: Local Educational Agency Selection Process

First, the Department should consider whether a large percentage of the errors come from a small number of LEAs or whether errors are spread out evenly across all agencies. If the errors are spread evenly, it is unlikely that the criteria set forth will be sufficient to solve the problem because most of the LEAs will fall below the 5% threshold proposed, unless they are caught by the provision 2/3 base year or discretionary criterion. Thus, I think statistics regarding this data is crucial. I assume that the Department considered this issue when creating the four criterions. If the Department has not considered this issue, it should consider the relevant statistics and rethink the Criterion 1 and 2 thresholds.

Second, the regulation should be consistent in its presentation of criterion. In the proposed regulation, Criterion 2 specifies the percentage for at-risk LEAs as 5-10% incorrect

Chairwoman, US House of Representatives Appropriations Committee on Agriculture (Jan. 30, 2009) (located on www.regulations.gov).

⁴ Independent Review of Applications Required by the Healthy, Hunger-Free Kids Act of 2010, 77 Fed. Reg. 178 (proposed Sept. 13, 2012) (to be codified at 7 C.F.R. pts. 210, 245).

⁵ *Id.*

⁶ See Food and Nutrition Service, Eligibility Manual for School Meals: Determining and Verifying Eligibility, found at <http://www.fns.usda.gov/cnd/Guidance/EliMan.pdf> (August 2012).

certifications; however Criterion 1 cross-references another part of the regulations. For clarity and consistency purposes, I think that the regulation should list the percentage needed for Criterion 1, 10% or more (but not less than 100 lunches), as specified in the “Overview of the Proposed Regulation.”

Third, it would be helpful if the Department identified the reason why schools in provision 2/3 base year, Criterion 3, on average experience higher erroneous payment rates than other schools. I agree that this review should only be conducted in each base year; however, I tend to wonder whether the error rate would be lower if the LEAs counted the number of students each year as class size likely fluctuates as students move away or new students enroll.

Last, I have a few suggestions regarding Criterion 4, which gives the State agencies discretion to identify those LEAs at risk for certification error. First, I think that the examples of LEAs that State agencies should include in their review are proper. I would also add to the list LEAs with a major shift in the number or percentage of applicants upward or downward. Perhaps an economic downturn may affect a specific area and cause the volume of applicants to rise. It would be sensible to conduct a second independent review of these applicants, especially if the LEA is not used to reviewing an increased volume of applicants. Second, I think that the Department should add the list of the three examples listed in the “Overview” plus my example in the actual proposed rule under Criterion 4. I would suggest that it state that the list is non-exclusive, but that it merely provides suggestions of when discretion can be exercised to conduct an independent review. Third, I think that the State agencies, in submitting their annual report to the Department, should include a section specific to this Criterion specifying how many LEAs were chosen based on this Criterion and a statement including the reason as to why it chose to conduct a second review. This will ensure that State agencies have valid concerns and reasons for conducting a second review and that no LEAs are being targeted unjustifiably. Additionally, these statements could help the Department gather information about what State agencies consider important in conducting a review and this information could be used to advise other State agencies or could be used in promulgating or amending regulations.

c. Exemptions:

The regulations propose the possibility of whether “State agencies should be able to exempt LEAs that use computerized free and reduced price determination systems, provided that the State agency can attest to the efficacy of those systems.”⁷

First, I think it would be helpful for the Department to specify criteria that State agencies should consider in attesting to the “efficacy of the system.”⁸ By doing so, the agency can ensure consistency and minimization of error. For example, if a system pulls data from a central database loaded with all of the eligibility information it might make sense to exempt

⁷ Independent Review of Applications Required by the Healthy, Hunger-Free Kids Act of 2010, 77 Fed. Reg. 178 (proposed Sept. 13, 2012) (to be codified at 7 C.F.R. pts. 210, 245).

⁸ Food and Nutrition Service, Eligibility Manual for School Meals: Determining and Verifying Eligibility, found at <http://www.fns.usda.gov/cnd/Guidance/EliMan.pdf> (August 2012) (currently the USDA and FNS “do not evaluate, recommend, approve or endorse any software used for certification or verification purposes. There are no Federal specifications for software vendors. . . . the LEA must assure the software used is performing correctly and meets all requirements.”).

LEAs that use these systems.⁹ However, if there is still manual input by a human there is still room for human error. If this were the case, a required criterion by the Department could be that extensive research must be done that shows the margin of human error is greatly reduced by use of the system. Whether input is from a database or from a human, the administrative errors relating to incorrect addition or multiplication or frequency of receipt of household income would likely be solved because the computer would be doing the math. Additionally, if the computer program or online application required certain fields to be filled in prior to allowing submission of the application, much like checking the box to agree to “terms and conditions” or the starred fields in downloading applications or online shopping, the program would solve the problems associated with missing information including “missing adult signature, missing last four digits of social security number, missing amount of income of the adult signing the application, etc.”¹⁰

Second, it may be effective for the Food and Nutrition Service (“FNS”) to approve standardized programs that they find acceptable. Furthermore, as the FNS does so with other programs, such as the food stamp program, “the Service [c]ould explore appropriate ways and means of routinely disseminating to State and local program managers at locations throughout the country” information in order “to correct known program weakness[es] in order to maximize program integrity on a national basis.”¹¹

d. Local Educational Agency Requirements:

First, the proposed rule is unclear when it states, “this individual or entity is not required to be an employee of the LEA, but must be trained.” Does this mean that the secondary review can be outsourced to an independent contractor? If so, although this may be implied, I think that the LEAs should have ultimate responsibility if certification errors are not reduced. The regulations should explicitly state this responsibility. Under current enacted provisions of the National School Lunch Program, when independent contractors are used, “regardless of the duties specified in the contract . . . FNS guidance states that SFAs [local school food authorities] remain responsible for the overall operation of the school meal programs, including overall financial responsibility . . . SFAs are also required to ensure the accuracy of lunch claims through effective internal controls.”¹² Thus, I believe this policy of ultimate responsibility on the LEA should *also* be followed with independent secondary reviews.

⁹ Statement of Robert A. Robinson, Director Food and Agriculture Issues, Resources, Community and Economic Development Division, Observations on Reducing Fraud and Abuse in the Food Stamp Program (April, 23, 1998) (located on www.regulations.gov) (Some states use computer matching and data matching programs amongst databases “as a cost-effective mechanism to accurately and independently identify ineligible participants. . . . The cost for conducting computer matches is relatively low for the return generated, which includes identifying ineligible individuals in the application process before any benefits are issued.”).

¹⁰ Independent Review of Applications Required by the Healthy, Hunger-Free Kids Act of 2010, 77 Fed. Reg. 178 (proposed Sept. 13, 2012) (to be codified at 7 C.F.R. pts. 210, 245).

¹¹ Letter from Richard J. Woods, Associate Director, U.S. General Accounting Office, to Edward J. Hekman, Administrator, Food and Nutrition Service (Aug. 13, 1975) (located on www.regulations.gov).

¹² Letter from Kay Brown, Director Education, Workforce and Income Security Issues for US Government Accountability Office to Honorable Herb Kohk, Chairman, Senate Appropriations Committee on Agriculture, and Honorable Rosa L. DeLauro Chairwoman, US House of Representatives Appropriations Committee on Agriculture (Jan. 30, 2009) (located on www.regulations.gov).

Second, if an outside contractor is already used for other services, it may make sense to use them for the second review as well. In this instance, it might be helpful for the Department to issue, if they do not have one already, a pamphlet or training packet on how to make application determinations so that there is consistency across the nation. A 2008 study showed that, “meal-counting and claiming errors occur at similar or somewhat lower rates when FSMCs [Food Service Management Companies] manage meal services compared to when [LEAs] manage meal services.”¹³ Thus, as long as there is proper monitoring by an LEA, use of an independent contractor will likely be effective and may yield better results than internal reviews.

Third, I think that the Department should consider whether the stated timeframe is long enough. The rule states that the second review must be completed “in a timely manner and not result in the delay of an eligibility determination.” Since the entire eligibility determination must be made in ten days, the second review must be done in ten days or less.¹⁴ This is the same amount of time allowed by the current regulations, and thus LEAs are given no additional time to do twice the amount of work.¹⁵ Due to the lack of information in the proposed regulation regarding the approximate time to conduct an initial and second review of an application, I wonder if ten days is enough time. The Department should consider whether the time provided would require the LEAs to rush in order to complete their reviews because rushing will likely cause more errors, which will not help the overall goal of these proposed regulations: to decrease errors. Depending on these unknowns, perhaps the time should be extended.

Last, I agree with the documentation requirements for the LEAs and State agencies and agree on the four items they are required to report. However, I would add that each State agency should report how many LEAs fell into each Criterion. This would help the Department keep statistics of how many agencies are at high risk, at medium risk, in provision 2/3 base year, and how many the State agency chose at their discretion. These statistics will be helpful in assessing whether improvements have been made.

I hope the Food & Nutrition Service finds these comments helpful in developing the final regulation. Thank you for the opportunity to submit a comment.

Sincerely,

/s/ Abigail DeMuis
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¹³ *Id.*

¹⁴ Independent Review of Applications Required by the Healthy, Hunger-Free Kids Act of 2010, 77 Fed. Reg. 178 (proposed Sept. 13, 2012) (to be codified at 7 C.F.R. pts. 210, 245) (The proposed rule requires that all LEAs notify the household of the children’s eligibility within 10 operating days.).

¹⁵ Food and Nutrition Service, Eligibility Manual for School Meals: Determining and Verifying Eligibility, found at <http://www.fns.usda.gov/cnd/Guidance/EliMan.pdf>, (August 2012).