

December 28, 2020

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

RE: Comments on Docket ID FNS-2020-0038

Dear Ms. Namain:

The Vermont Agency of Education, Child Nutrition Programs welcomes the opportunity to comment in response to USDA's proposed rule on the Restoration of Milk, Whole Grains, and Sodium Flexibilities. We are the State agency in Vermont responsible for the National School Lunch Program (NSLP), School Breakfast Program (SBP), Summer Food Service Program (SFSP), the Child and Adult Care Food Program (CACFP), and USDA Foods Distribution.

First, we would like to raise concerns regarding the timing of the comment period for the proposed rule. These proposed changes to the meal pattern have long been controversial, as evidenced by the 86,247 comments received by FNS on the 2017 Interim Final Rule and multiple related legal challenges. Therefore, we find it very concerning that FNS issued this proposed rule the day before Thanksgiving, with comments due on the first working day after Christmas. This timing right in the middle of the holiday season likely suppresses the public's ability to hear about and respond to the proposed rule. In addition, the added challenges faced by program operators, families, and state agencies as a result of the COVID-19 global pandemic mean that many impacted parties are unlikely to have the bandwidth to read the rule and submit comments. We urge FNS to consider extending the comment period for a further 30 days.

Second, we would like to address the proposed changes to the whole grain rich requirement. We do not support the changes to this requirement proposed by FNS. In 2019, when USDA relaxed the whole grain-rich requirement nationally, the Vermont State agency chose not to implement these flexibilities in Vermont for the NSLP and SBP. At the time we wrote:

"In 2012, USDA implemented new requirements for the nutritional value of foods served through the National School Lunch Program (NSLP) and School Breakfast Program (SBP). One of the changes to the "Meal Pattern" was a requirement that



all grain items offered in the NSLP and SBP be whole grain-rich. This means that the grain item contains at least 50 percent whole grains, and the remaining grain content comes from enriched flour. The requirement was phased-in. In the first years of implementation, only ½ of the grain items served had to be whole grain-rich. Starting in 2014-2015, all grains were required to be whole grain-rich.

Implementation of the whole grain-rich requirement was initially challenging. Students were used to white flour products, and the food industry had not yet innovated to supply a wide variety of high-quality items that met the requirements. Items like whole grain-rich pasta required new preparation methods, which took additional training. However, these requirements have now been in effect for five years, and in Vermont we see very high rates of compliance. Food service managers have developed the recipes and skills to meet the new requirements. The food industry has developed a wide variety of quality whole grain-rich products. Local Vermont companies have been especially innovative and numerous Vermont bakeries produce bread, bagel and pizza items that meet the requirements. The Vermont New School Cuisine Cookbook includes kid-tested foodservice recipes for whole grain-rich biscuits, muffins, pancakes, pizza-dough, corn bread and many whole grain-based salads. In addition to publishing the cookbook, Vermont Child Nutrition Programs has provided numerous trainings on cooking with whole grains at our annual Summer Institute trainings and our annual TriState conference. Students are now familiar with the whole grain-rich products and we see high rates of student acceptance with the new products. For students in grades PreK-4, whole grain rich products are the only grain items they've ever seen on their trays. Over the period since the new meal pattern went into effect, the overall number of lunches served in Vermont has decreased slightly, but the overall number of breakfasts has increased. During this same time period student population was declining, and we have not analyzed the data to see if the decline in enrollment accounts for some or all of the decline in number of lunches served."

Vermont has continued to maintain this requirement in the years since, meaning children and industry have had even more time to adjust.

From a monitoring perspective, our state agency staff feel the proposed rule will be more difficult to monitor than the existing 100% whole grain rich requirement. In order to prove compliance with the proposed requirement, SFAs will need to track which grain items on their menu are whole grain rich and which are enriched. They would then need to calculate the percentage of the grains served over the course of the week that are whole grain rich. This is another administrative burden for School Food Authorities, and another piece that State agency reviewers will need to review during administrative reviews. To verify compliance with the whole grain rich requirement, our reviewers currently look at a sample of products in the storeroom and labels for products served during the week of review. Currently, our reviewers are able to easily determine whether the whole grain requirement is being met by observing whether all labels and items are whole grain rich. Under the proposed rule, our reviewers will need to spend more time counting the number of whole grain rich and enriched items and doing calculations to ensure that the minimum number of whole grain items are being served. This added work means that this rule change would actually add administrative burden, rather than easing it.

According to the 2015-2020 Dietary Guidelines for Americans, the average American diet does not meet the daily recommended intake levels for whole grains and exceeds the recommended levels for refined grains. Children ages 1-



13 consume two times more refined grains when compared to whole grains. The 2015-2020 Dietary Guidelines for Americans recommends a diet that includes whole grains and limits the intake of refined grains and products made with refined grains, especially those high in saturated fats, added sugars, and/or sodium. Whole grains such as brown rice, oats and quinoa, contain the entire grain kernel, which includes the endosperm, bran, and germ. Whole grains are rich in dietary fiber, iron, zinc, manganese, folate, magnesium, copper, thiamin, niacin, vitamin B6, phosphorus, selenium, riboflavin, and vitamin A. Refined grains have gone through the refining process, which removes the nutrient dense parts of the grain kernel (bran and germ), dietary fiber, iron, and other important nutrients. Typically, these refined grains only include the endosperm and lack nutritional value. Some refined grains may be enriched to replace some of the nutrients lost during the refining process, however, fiber, Potassium, Vitamins E and K, Selenium, and Magnesium are completely lost through this process.

The health benefits of requiring whole grain rich foods are clear, and we do not feel that the USDA has justified the negative impacts on children's health that this rule change would have, given that our experience in Vermont has shown that schools are largely able to comply with the requirement, and that when the requirements are consistent over a longer period of time, children and industry are both easily able to adjust.

Finally, we want to raise an issue of inconsistency in USDA's argument in this proposed rule and their informal guidance to State agencies on whether states have authority to impose stricter requirements. In the 2017 Interim Final Rule, the 2018 Final Rule, and in this proposed rule change, FNS wrote that utilizing these meal pattern flexibilities is optional, and that under 7 CFR 210.19(e) state agencies have the discretion to set stricter requirements that are not inconsistent with the minimum nutrition standards for school meal. Vermont has done this, as described above, using the authority under 7 CFR 210.19(e). However, in response to Vermont and several other states choosing to continue the stricter whole grain rich requirement in the school meals programs, in an email to state agencies on April 23, 2019, a representative of the FNS Northeast Regional Office wrote:

"Hello everyone, we reached out to FNS/HQ and here is the response for additional State Agency Requirements –

The regulations for NSLP, SMP, SBP, CACFP, and SFSP states that - *State agencies have discretion to set stricter requirements that are not inconsistent with the minimum nutrition standards for meals.*

The regulations however further state - *In order to claim Federal reimbursement, Child Nutrition Program operators must serve meals and snacks that meet the minimum meal pattern requirements of the respective Program. (NSLP lunch 7 CFR 210.10(a)(i); NSLP snack 210.10(o)(2); SMP 215.6(a); SBP 220.8(a)(1); CACFP snack 226.20(a), (c)(3) and (d)).*

Per these regulations, additional requirements are at the State agencies discretion that are not inconsistent with the minimum nutrition standards for school meals. This is a long-standing regulatory provision in the school meals programs. However, a State agency must reimburse school food authorities for meals and meal supplements served in accordance with the Federal requirements. While stricter State standards are allowed, a State agency cannot withhold Federal program funds or take back reimbursement for meals that meet



the minimum Federal requirements. The State can only withhold any additional state funds that they provide.

We have attached two memos that references additional state agency requirements for CACAFP and SFSP [CACFP09-2013 and SFSP06-2013]. The guidance for NSLP based programs can be found on Page 239 of the SY 18-19 Administrative Review Manual provides additional guidance:

The State Agency may not impose Federal fiscal action for federally allowable actions that are violations of State law. However, if a State opts to impose a State violation, they may do so, but they must make clear to the SFA that the fiscal action associated with the violations is State-imposed, not federally imposed. Any financial penalty resulting from a State-imposed requirement that is otherwise compliant with Federal standards must not be paid by the Non-Profit School Food Service Account.

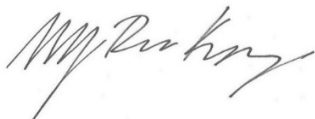
At this time, FNS will not be issuing additional guidance on the allow ability and restrictions of State level requirements. We want to get this information out to you to make sure that we are all on the same page and correctly implementing federal regulations.”

The Vermont State agency has not been in a position to need to withhold any reimbursement as a result of failure of an SFA to meet the stricter whole grain requirements, so we have not pursued this discrepancy further. However, we wish to point out that the two policy memos referenced in the email from FNS were for CACFP and SFSP (entirely different programs with different sets of regulations). CACFP and SFSP regulations are irrelevant to the NSLP/SBP. The School Meals administrative review manual is a more relevant reference; however this is a guidance documents that has not gone through a regulatory rule making process.

We observe that in citing 7 CFR 210.19(e) in the rulemaking process, USDA is implying that the potential harm to children’s nutrition is reduced because they are not preventing states like Vermont from imposing the stricter requirement if it makes sense for their state – as it does. However, in the informal guidance provided to the State agencies, USDA is removing any teeth that the state agency may have in enforcing the requirement, and is clearly discouraging state’s from implementing stricter requirements. This discrepancy between the rulemaking process and informal guidance is concerning and we believe it should be considered before moving forward.

Thank you for the opportunity to provide comments. We hope this will be helpful as USDA considers whether these rule changes are in the best interest of the public.

Sincerely,



Mary Rose Krueger  
State Director of Child Nutrition Programs  
Vermont Agency of Education

