

# Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Part 220

RIN 0584-AD50

#### School Breakfast Program: Severe Need Assistance

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule addresses and implements amendments made by Section 201 of the Child Nutrition and WIC Reauthorization Act of 2004. The rule amends the School Breakfast Program (SBP) regulations to eliminate the requirement that a school's costs exceed the rate of reimbursement as a criterion for receiving the higher severe need funding available in the SBP. This rule also allows State agencies to provide severe need reimbursements to certain new schools that are beginning participation in the school feeding programs and therefore have no historical second preceding year participation information, as was previously required. This rule is intended to simplify eligibility for severe need reimbursements by removing previous restrictions on receipt of those payments. This rule does not impose new administrative requirements on State or local governmental entities.

**DATES:** *Effective Date:* December 2, 2005.

*Comments Date:* Comments on this rule must be postmarked on or before May 1, 2006 to be assured of consideration. Comments will also be accepted via E-Mail submission, at the address listed below. E-mail submissions must be received no later than 11:59 p.m. on May 1, 2006 to be assured of consideration.

**ADDRESSES:** The Food and Nutrition Service invites interested persons to

submit comments on this interim rule. Comments may be submitted by any of the following methods:

- E-Mail: Send comments to [CNDPROPOSAL@FNS.USDA.GOV](mailto:CNDPROPOSAL@FNS.USDA.GOV) The subject line must contain the phrase "School Breakfast Program Regulations: Severe Need Assistance".

- Fax: Submit comments by facsimile transmission to: (703) 305-2879, attention Mr. Robert Eadie. The subject line must contain the phrase "School Breakfast Program Regulations: Severe Need Assistance".

- Mail: Comments should be addressed to Mr. Robert Eadie, Chief, 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.

- Hand Delivery or Courier: Deliver comments to 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, during normal business hours of 8:30 a.m.-5 p.m.

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

All submissions will be available for public inspection at 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, Monday through Friday, 8:30 a.m.-5 p.m.

**FOR FURTHER INFORMATION CONTACT:** Mr. Christopher Davenport, Child Nutrition Division, Food and Nutrition Service at (703) 305-2590.

#### SUPPLEMENTARY INFORMATION:

##### Background

The rules concerning the amounts to be paid to schools participating in the SBP for providing Program benefits are set forth in Section 4(b) of the Child Nutrition Act of 1966 (CNA), 42 U.S.C. 1773(b) and in 7 CFR 220.9. In addition to the standard SBP rates of reimbursement, schools determined to be in "severe need" are authorized to receive additional funding in order to effectively provide Program benefits.

The requirements for schools to qualify to receive severe need rates of reimbursement under the SBP are described in 7 CFR 220.9(e). The regulation currently establishes the criteria a school is required to meet to be eligible to receive severe need reimbursements under the SBP. The

first criterion is that the normal reimbursement rate established by the Secretary would not provide the school in question with sufficient funds to cover the costs of the breakfast program. The second eligibility criterion is that the school is participating in or desiring to initiate a breakfast program, and the third is that 40 percent or more of the lunches served to students at the school in the second preceding school year were served free or at a reduced price. Under 7 CFR 220.9(d), schools received the lesser of their documented costs for free and reduced price breakfasts or the product of the number of free and reduced price meals times the applicable severe need rate of reimbursement.

On June 30, 2004, the President signed the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265). Section 201 of Public Law 108-265 amended section 4 of the CNA to remove the requirement that the per meal reimbursement rate established by the Secretary be inadequate to cover the costs of the school's breakfast program as a threshold requirement to qualify for severe need funding. The law also allows eligibility for severe need subsidies to be available for breakfasts served in schools in which no reimbursable lunches were served in the second preceding year if the Secretary determines that those schools would have met the requirement of serving 40 percent or more of their lunches free or at a reduced price. The Department will establish through guidance how the Secretary will make this determination. This rule makes changes to the regulations in 7 CFR 220.9(d) and (e) to reflect the changes mandated by Public Law 108-265.

#### What Specific Changes Does This Rule Make?

- Removes 7 CFR 220.9(d) and redesignates current 7 CFR 220.9(e) as 7 CFR 220.9(d).

- Removes the requirement in current 7 CFR 220.9(e) that schools document that the normal per meal reimbursement is insufficient to cover the costs of the SBP.

- Makes technical changes to 7 CFR 220.9(c)(2) and current 7 CFR 220.9(e)(3) to remove outdated references to severe need reimbursement for schools in States that are required by law to serve breakfasts.

- Adds an exception to the criterion, established in redesignated 7 CFR 220.9(d), which allows States, in accordance with guidance provided by the Secretary, in schools which did not serve meals in the second preceding school year, to determine if 40 percent or more of the meals served to students would have otherwise been served free or at a reduced rate.

#### **Why Is This Rule Being Issued as an Interim Rule and Not a Proposed Rule?**

Section 501(b) of Public Law 108–265 states that FNS may promulgate interim regulations to implement the requirements of Section 201 discussed above. The Secretary has deemed the requirements of this provision sufficient to warrant an interim regulation, without regard to the Administrative Procedure Act's prior notice and comment provisions at 5 U.S.C. 553; the Statement of Policy of the Secretary of Agriculture effective July 24, 1971 (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking; and the Paperwork Reduction Act at 44 U.S.C. Chapter 35. However, issuance of these program changes also allows FNS to request and consider public comment that may assist in future amendments to this rule. FNS intends to issue a final rule after consideration of comments received on this rule.

#### **When Does This Rule Take Effect?**

Section 201 of Public Law 108–265 became effective on July 1, 2004. Beginning with School Year 2004–2005, otherwise qualified schools no longer have to justify SBP costs or maintain cost records to receive the severe need reimbursement rate for the SBP. However, any claims outstanding from School Year 2003–2004 are still subject to the cost-accounting procedures for severe need assistance. FNS informed State agencies of these provisions immediately after the law was signed.

#### **Executive Order 12866**

This interim rule has been determined to be non-significant and is not subject to review by the Office of Management and Budget under Executive Order 12866.

#### **Regulatory Flexibility Act**

This interim rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Roberto Salazar, Administrator of the Food and Nutrition Service, has certified that it will not have a significant economic impact on a substantial number of small entities.

This interim rule reduces administrative burdens for school food authorities operating the SBP that wish to apply for severe need funding.

#### **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, FNS generally prepares a written statement, including a cost-benefit analysis. This is done for rules that have “Federal mandates” which may result in expenditures of \$100 million or more in any one year by State, local, or tribal governments, in the aggregate, or by the private sector. When this statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives. It must then adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This interim rule contains no Federal mandates of \$100 million or more in any one year (under regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this interim rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### **Executive Order 12372**

The School Breakfast Program is listed in the Catalog of Federal Domestic Assistance under No. 10.553. This program is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V, and interim rule related notice at 48 FR 29115, June 24, 1983).

#### **Federalism Summary Impact Statement**

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. FNS 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 interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. It 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 impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of this preamble. Before any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

#### **Civil Rights Impact Analysis**

Under USDA Regulation 4300–4, Civil Rights Impact Analysis, FNS has reviewed this interim rule to identify and address any major civil rights impacts the interim 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 interim rule will not in any way limit or reduce participants' ability to participate in the Child Nutrition Programs on the basis of an individual's or group's race, color, national origin, sex, age, or disability (the Child Nutrition Programs' nondiscrimination policy can be found at 7 CFR 210.23(b)). FNS found no factors that would negatively and disproportionately affect any group of individuals.

#### **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. Information collections in this interim rule have been previously approved under OMB #0584–0012. This interim rule contains information collections that are subject to review and approval by OMB; therefore, FNS is submitting for public comment the changes in the information collection burden that would result from adoption of the provisions in the rule.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have

practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All responses to this Notice will be summarized and included in the request for OMB approval, and will become a matter of public record. Comments may be sent to Katherine Astrich, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503. A copy may also be sent to Mr. Robert Eadie at the address below. For further information, or for copies of the information collection, please contact Mr. Robert Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 634, Alexandria, Virginia 22302-1594.

Comments will also be accepted via E-Mail submission if sent to [CNDPROPOSAL@FNS.USDA.GOV](mailto:CNDPROPOSAL@FNS.USDA.GOV). When submitting comments via E-Mail, you must include "School Breakfast Program Regulations: Severe Need Assistance" in the subject line.

Comments and recommendations on the proposed information collection must be received by January 3, 2006. All responses to this information collection will be summarized and included in the request for OMB approval and will become a matter of public record.

*Title:* School Breakfast Program Regulations.

*OMB Number:* 0584-0012.

*Expiration Date:* August 31, 2007.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* The School Breakfast Program (SBP) regulations are being amended to implement section 201 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265) regarding severe need in the program. Specifically, section 201 of Public Law 108-265 eliminates the requirement to document costs in order to receive the severe need reimbursement rate. Consequently, this rule will remove the requirement that schools maintain records to support the cost of producing breakfasts in order to receive federal reimbursement at the severe need rates.

The severe need cost accounting requirements are being removed by revising 7 CFR 220.9(d) and (e). Therefore, the reporting and recordkeeping requirements are also being removed.

*Estimate of Burden:* The current inventory for School Breakfast Program, OMB 0584-0012 collection is 4,564,772 burden hours. Consequently, when this rule is published and the burden package is approved, the reporting burden will decrease by 70,034 hours and the recordkeeping will decrease by 2,098,273 hours. The total reduction in burden hours for School Breakfast Program, OMB 0584-0012 will be 2,170,307 hours; the new burden hours will be 150,988 for reporting and 2,287,710 for recordkeeping for a total of 2,438,698 burden hours.

*Number of Respondents:* 84,138 respondents.

*Average Number of Responses per Respondent:* 10 responses.

*Estimated Total Annual Responses:* 872,915 responses.

*Estimated Time per Response:* .17 hours/response.

*Estimated Annual Reporting Burden Hours:*—150,988 hours.

*Number of Recordkeepers:* 84,138 respondents.

*Estimated Annual Hours per Recordkeeper:* 27.19 hours.

*Estimated Annual Recordkeeping Hours:* 2,287,710 hours.

*Total Request—Annual Reporting and Recording Burden Hours:* 2,438,698 hours.

#### **Government Paperwork Elimination Act**

The Food and Nutrition Service makes every effort to comply with the Government Paperwork Elimination Act by providing electronic submission in lieu of paper submission whenever it is feasible. School food authorities demonstrate their eligibility for severe need reimbursements by applying to their State agency. State agencies have the option of accepting and reviewing these applications electronically. The Food and Consumer Service encourages State agencies to provide electronic submission in lieu of paper submission where feasible.

#### **Public Participation**

FNS has determined, in accordance with 5 U.S.C. 553(b), that a Notice of Proposed Rulemaking and the opportunity for public comments is unnecessary and contrary to the public interest and, in accordance with 5 U.S.C. 553(d), finds that good cause exists for making this action effective without prior public comment. In

Section 501(b) of Public Law 108-265, Congress specifically afforded the Secretary the option of implementing this rulemaking without prior notice and comment. In addition, the provisions of this interim rule reflect mandatory statutory requirements which are non-discretionary. The Department, however, wishes to receive comments that might improve the administration of these mandatory requirements.

#### **List of Subjects in 7 CFR Part 220**

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

■ Accordingly, 7 CFR part 220 is amended as follows:

#### **PART 220—SCHOOL BREAKFAST PROGRAM**

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

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

■ 2. In § 220.9,

■ a. Paragraph (c) is revised; and  
 ■ b. Paragraph (d) is removed and paragraph (e) is redesignated as paragraph (d) and revised.

The revisions read as follows:

#### **§ 220.9 Reimbursement payments.**

\* \* \* \* \*

(c) The total reimbursement for breakfasts served to eligible children in schools not in severe need, and schools in severe need during the school year shall not exceed the sum of the products obtained by multiplying the total numbers of such free, reduced price and paid breakfasts, respectively, by the applicable rate of reimbursement for each type of breakfast as prescribed for the school year.

(d) The State agency, or FNSRO where applicable, shall determine whether a school is in severe need based on the following eligibility criteria:

(1) The school is participating in or desiring to initiate a breakfast program; and

(2) At least 40 percent of the lunches served to students at the school in the second preceding school year were served free or at a reduced price. Schools that did not serve lunches in the second preceding year and that would like to receive reimbursement at the severe need rate may apply to their administering State agency. The administering State agency shall approve or deny such requests in accordance with guidance, issued by the

Secretary, that determines that the second preceding school year requirement would otherwise have been met.

Dated: October 20, 2005.

**Roberto Salazar,**

*Administrator, Food and Nutrition Service.*

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**BILLING CODE 3410-30-P**

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