



Consumer Federation of America

Jan. 29, 2018

Brandon Lipps
Administrator
Food and Nutrition Service
3101 Park Center Drive
Alexandria, Virginia 22302

Re: Docket No. FNS-2017-0021; Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements

Dear Mr. Lipps,

Consumer Federation of America writes to oppose the U.S. Department of Agriculture's (USDA) interim final rule, "Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements." As we explain in our joint comments with members of the National Alliance for Nutrition Activity, this rule will weaken school nutrition and exacerbate the country's crisis of childhood obesity and diet-related disease. We write separately here to respond to USDA's rationale for these rules, including the implicit suggestion that this rule conforms to congressional intent by anticipating the continuation of delays and exemptions previously enacted through appropriations riders.

USDA should build on the tremendous progress that the National School Lunch and Breakfast Programs have made in serving healthier meals with less salt, less fat (and no trans fat), fewer added sugars, and more fruits, vegetables, and whole grains. Unfortunately, this interim final rule will foist more products laden with excessive salt, added sugars, and refined carbohydrates onto the nation's children. With this rule, USDA has announced three steps backwards, without the benefit of public comment. First, this rule allows schools to serve more sugar-sweetened chocolate and other "flavored" milk. Second, it extends exemptions for a small minority of school food authorities that continue to serve bread, pasta and other "grain products" that contain less than 50% whole grains, even though these authorities have had over six years since USDA promulgated the final rule announcing these standards, and three years since the standards went into effect, to manage their transition to healthier foods. Third, it proposes a three-year delay on sodium limits. All of these changes would result in more school meals falling out of line with the most recent Dietary Guidelines for Americans (DGAs).

Under 42 U.S.C. § 1758(a)(4)(B), USDA "shall promulgate rules, based on the most recent Dietary Guidelines for Americans," that prescribe the nutritional content of school meals. USDA does not claim that the delays and exemptions announced in this rule will bring school nutrition into better alignment with the DGAs. Rather, USDA argues in its federal register notice

that the changes are necessary “to accommodate menu planning and procurement challenges, local operational differences, and community preferences,” as well as give “food manufacturers the certainty they need to engage in product development and reformulation in support of the whole grain-rich and sodium requirements.” These justifications are undercut by the long history of the nutrition standards—finalized in January of 2012—and the success with which the vast majority of schools are already complying with the standards.

Even more problematically, USDA’s notice indicates that the agency’s rule simply carries out the intent of Congress. However, rather than tying this argument to the application of an existing law, USDA points to laws that have expired, and the prospect of similar ones that have yet to be passed. The notice reasons that “Congress recognized the challenges” posed by the nutrition standards, and for that reason, it passed a series of appropriations riders that provided carve-outs for flavored milk, whole grains, and sodium requirements. According to the notice, “[t]his repetitive legislative action manifests a clear Congressional message to USDA: The current regulatory provisions limiting fluid milk, whole grain-rich, and sodium options in the [Child Nutrition Programs] are causing operational challenges and need further consideration.”

As the notice points out, the most recent of the riders, enacted September 8, 2017, extended the carve-outs “through December 8, 2017.” Now, USDA is taking over: “This interim final rule provides optional flexibilities for SY 2018–2019 in a manner that is consistent with appropriations legislation in effect for SY 2017–2018 and previous administrative actions.” In other words, Congress passed legislation to prevent these standards from going into full effect last year, and now USDA has decided, without the benefit of public comment, to take administrative action to prevent the standards from going into full effect next year.

As a result, Congress no longer needs to pass an appropriations rider, or other legislation, to obstruct the standards. USDA suggests that this is unimportant, because Congress *would have* passed a law. In particular, USDA’s notice points out that Congress “drafted bills granting flexibilities in the three areas addressed by this rule—milk, whole grains and sodium,” when it began the child nutrition program reauthorization process, and those *draft* bills “reflected Congress’ interest in providing stakeholders with additional flexibility in these areas.” But of course, Congress has not passed a child nutrition program reauthorization bill, or a long-term spending bill, and were it to do so, a majority of members might have conceivably voted against granting these “flexibilities” again. Even members that previously supported the carve-outs might have determined that they were no longer necessary, or deferred to constituent concerns, or calculated that supporting such legislation would do too much to hurt their reelection prospects.

USDA regulators are not elected. As an Executive Branch agency, the Department executes the laws passed by Congress. It must ground its actions in statutory authority granted by Congress, and that statutory authority must still be in force. Under current law, USDA has the duty to promulgate and enforce school nutrition standards “based on the most recent Dietary Guidelines for Americans.” 42 U.S.C. § 1758(a)(4)(B). That legislative mandate provided a clear basis for USDA’s 2012 rule establishing the nutrition standards. What is the legislative basis for this Interim Final Rule rolling back those standards without the benefit of public comment? The Department’s Federal Register notice has not made that clear.

Nor has USDA grounded its decision in sound science. “Product development challenges” motivate the Department’s abdication on sodium and whole wheat standards, but the Department cites only “informal conversations” with food manufacturers as evidence of industry’s need for more flexibility. In defense of chocolate milk, USDA cites declining milk consumption, but offers only speculation that the nutrition standards’ restrictions on flavored milk caused the decline, or that the health benefits of drinking more milk offset the harm from consuming more added sugars. For a 7-year-old child, one carton of chocolate milk accounts for half the daily limit of sugar recommended by the World Health Organization.¹ On sodium, the Department paradoxically writes off the feasibility of lower sodium in school meals because “approximately 92 percent of school-age children in the United States exceeded the 2015-2020 Dietary Guidelines upper intake level for dietary sodium,” and “sodium reduction in school meals must be consistent with broader, overall reductions in the food supply and reductions in children’s consumption patterns outside of school.” In other words, USDA cannot make school meals healthier until children adopt healthier diets.

Parents should not have to worry about whether school meals are undermining healthy eating habits. The law directs USDA to develop school nutrition standards on the basis of the most recent Dietary Guidelines. The Department did just that in 2012. Congress passed laws to obstruct the new standards, but those laws have expired. Now, USDA should support the progress that schools across the country are making towards healthier eating, and fully implement school nutrition standards.

Sincerely,

Thomas Gremillion
Director, Food Policy Institute
Consumer Federation of America

¹ See New York City Center for Health Equity. “Choose Plain Milk, not Chocolate Milk, for your School,” <https://www1.nyc.gov/assets/doh/downloads/pdf/dpho/chocolate-milk-guide.pdf>