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# SUBCHAPTER A—CHILD NUTRITION PROGRAMS

## PART 210—NATIONAL SCHOOL LUNCH PROGRAM

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## Subpart A—General

### § 210.1 General purpose and scope.

(a) *Purpose of the program.* Section 2 of the National School Lunch Act (42 U.S.C. 1751), states: "It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of food and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs." Pursuant to this act, the Department provides States with general and special cash assistance and donations of foods acquired by the Department to be used to assist schools in serving nutritious lunches to children each school day. In furtherance of Program objectives, participating schools shall serve lunches that are nutritionally adequate, as set forth in these regulations, and shall to the extent practicable, ensure that participating children gain a full understanding of the relationship between proper eating and good health.

(b) *Scope of the regulations.* This part sets forth the requirements for participation in the National School Lunch and Commodity School Programs. It specifies Program responsibilities of State and local officials in the areas of program administration, preparation and service of nutritious lunches, payment of funds, use of program funds, program monitoring, and reporting and recordkeeping requirements.

### § 210.2 Definitions.

For the purpose of this part:

*7 CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement certain policies applicable to all Department programs. The applicable provisions deal with competition for discretionary grants and cooperative agreements, costs requiring prior approval, acknowledgement of Department support in publications and audiovisuals produced under Department programs, intergovernmental review of Department programs under Executive Order 12372, and certain miscellaneous Department requirements.

*7 CFR part 3016* means the Department's Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. 7 CFR part 3016 covers requirements for awards and subawards to State and local governmental organizations under Department programs.

*7 CFR part 3018* means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

*7 CFR part 3019* means the Department's Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. 7 CFR part 3019 covers requirements for awards and subawards to nongovernmental, nonprofit organizations under Department programs.

*7 CFR part 3052* means the Department's regulations implementing OMB Circular A–133, "Audits of State, Local Governments, and Non-Profit Organizations." (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

*Act* means the National School Lunch Act, as amended.

*Afterschool care program* means a program providing organized child care services to enrolled school-age children afterschool hours for the purpose of care and supervision of children. Those programs shall be distinct from any extracurricular programs organized primarily for scholastic, cultural or athletic purposes.

*Applicable credits* shall have the meaning established in Office of Management and Budget Circulars A–87, C(4) and A–122, Attachment A, A(5), respectively. For availability of OMB circulars referenced in this definition see 5 CFR 1310.3.

*Attendance factor* means a percentage developed no less than once each school year which accounts for the difference between enrollment and attendance. The attendance factor may be developed by the school food authority, subject to State agency approval, or may be developed by the State agency. In the absence of a local or State attendance factor, the school food authority shall use an attendance factor developed by FNS. When taking the attendance factor into consideration, school food authorities shall assume that all children eligible for free and reduced price lunches attend school at the same rate as the general school population.

*Average Daily Participation* means the average number of children, by eligibility category, participating in the Program each operating day. These numbers are obtained by dividing (a) the total number of free lunches claimed during a reporting period by the number of operating days in the same period; (b) the total number of reduced price lunches claimed during a reporting period by the number of operating days in the same period; and (c) the total number of paid lunches claimed during a reporting period by the number of operating days in the same period.

*Child* means—(a) a student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (a) and (b) of the definition of "School," including students who are mentally or physically disabled as defined by the State and who are participating in a school program established for the mentally or physically disabled; or (b) a person under 21 chronological years of age who is enrolled in an institution or center as described in paragraph (c) of the definition of "School;" or (c) For purposes of reimbursement for meal supplements served in afterschool care programs, an individual enrolled in an afterschool care program

operated by an eligible school who is 12 years of age or under, or in the case of children of migrant workers and children with disabilities, not more than 15 years of age.

*CND* means the Child Nutrition Division of the Food and Nutrition Service of the Department.

*Commodity School Program* means the Program under which participating schools operate a nonprofit lunch program in accordance with this part and receive donated food assistance in lieu of general cash assistance. Schools participating in the Commodity School Program shall also receive special cash and donated food assistance in accordance with §210.4(c).

*Contractor* means a commercial enterprise, public or nonprofit private organization or individual that enters into a contract with a school food authority.

*Cost reimbursable contract* means a contract that provides for payment of incurred costs to the extent prescribed in the contract, with or without a fixed fee.

*Days* means calendar days unless otherwise specified.

*Department* means the United States Department of Agriculture.

*Distributing agency* means a State agency which enters into an agreement with the Department for the distribution to schools of donated foods pursuant to part 250 of this chapter.

*Donated foods* means food commodities donated by the Department for use in nonprofit lunch programs.

*Fiscal year* means a period of 12 calendar months beginning October 1 of any year and ending with September 30 of the following year.

*Fixed fee* means an agreed upon amount that is fixed at the inception of the contract. In a cost reimbursable contract, the fixed fee includes the contractor's direct and indirect administrative costs and profit allocable to the contract.

*FNS* means the Food and Nutrition Service, United States Department of Agriculture.

*FNSRO* means the appropriate Regional Office of the Food and Nutrition Service of the Department.

*Food component* means one of the four food groups which comprise reimbursable meals planned under a food-based menu planning approach. The four food components are: meat/meat alternate; grains/breads; fruits/vegetables; and milk.

*Food item* means one of the five foods offered in lunches under a food-based menu planning approach: meat/meat alternate; grains/breads; two servings of fruits/vegetables; and milk.

*Food service management company* means a commercial enterprise or a nonprofit organization which is or may be contracted with by the school food authority to manage any aspect of the school food service.

*Free lunch* means a lunch served under the Program to a child from a household eligible for such benefits under 7 CFR part 245 and for which neither the child nor any member of the household pays or is required to work.

*Local educational agency* means a public board of education or other public or private nonprofit authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public or private nonprofit elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public or private nonprofit elementary schools or secondary schools. The term also includes any other public or private nonprofit institution or agency having administrative control and direction of a public or private nonprofit elementary school or secondary school, including residential child care institutions, Bureau of Indian Affairs schools, and educational service agencies and consortia of those agencies, as well as the State educational agency in a State or territory in which the State educational agency is the sole educational agency for all public or private nonprofit schools.

*Lunch* means a meal service that meets the applicable nutrition standards and portion sizes in §210.10 for lunches.

*Menu item* means, under Nutrient Standard Menu Planning or Assisted Nutrient Standard Menu Planning, any single food or combination of foods. All

menu items or foods offered as part of the reimbursable meal may be considered as contributing towards meeting the nutrition standards provided in §210.10, except for those foods that are considered as foods of minimal nutritional value as provided for in §210.11(a)(2) which are not offered as part of a menu item in a reimbursable meal. For the purposes of a reimbursable lunch, a minimum of three menu items must be offered, one of which must be an entree (a combination of foods or a single food item that is offered as the main course) and one of which must be fluid milk. Under offer versus serve, a student shall select, at a minimum, an entree and one other menu item. If more than three menu items are offered, the student may decline up to two menu items; however, the entree cannot be declined.

*National School Lunch Program* means the Program under which participating schools operate a nonprofit lunch program in accordance with this part. General and special cash assistance and donated food assistance are made available to schools in accordance with this part.

*Net cash resources* means all monies, as determined in accordance with the State agency's established accounting system, that are available to or have accrued to a school food authority's nonprofit school food service at any given time, less cash payable. Such monies may include, but are not limited to, cash on hand, cash receivable, earnings on investments, cash on deposit and the value of stocks, bonds or other negotiable securities.

*Nonprofit* means, when applied to schools or institutions eligible for the Program, exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1986.

*Nonprofit school food service* means all food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.

*Nonprofit school food service account* means the restricted account in which all of the revenue from all food service operations conducted by the school food authority principally for the benefit of school children is retained and used only for the operation or improvement of the nonprofit school food service.

*Nutrient Standard Menu Planning/Assisted Nutrient Standard Menu Planning* means ways to develop lunch menus based on the analysis for nutrients in the menu items and foods offered over a school week to determine if specific levels for a set of key nutrients and calories were met in accordance with §210.10(i)(5). However, for the purposes of Assisted Nutrient Standard Menu Planning, lunch menu planning and analysis are completed by other entities and must incorporate the production quantities needed to accommodate the specific service requirements of a particular school or school food authority in accordance with §210.10(j).

*OIG* means the Office of the Inspector General of the Department.

*Point of Service* means that point in the food service operation where a determination can accurately be made that a reimbursable free, reduced price or paid lunch has been served to an eligible child.

*Program* means the National School Lunch Program and the Commodity School Program.

*Reduced price lunch* means a lunch served under the Program: (a) to a child from a household eligible for such benefits under 7 CFR part 245; (b) for which the price is less than the school food authority designated full price of the lunch and which does not exceed the maximum allowable reduced price specified under 7 CFR part 245; and (c) for which neither the child nor any member of the household is required to work.

*Reimbursement* means Federal cash assistance including advances paid or payable to participating schools for lunches meeting the requirements of §210.10 and served to eligible children.

*Revenue,* when applied to nonprofit school food service, means all monies received by or accruing to the nonprofit school food service in accordance with the State agency's established accounting system including, but not limited to, children's payments, earnings on investments, other local revenues, State revenues, and Federal cash reimbursements.

*School* means: (a) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (b) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; or (c) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term "residential child care institutions" includes, but is not limited to: homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more.

*School food authority* means the governing body which is responsible for the administration of one or more schools; and has the legal authority to operate the Program therein *or* be otherwise approved by FNS to operate the Program.

*School week* means the period of time used to determine compliance with the nutrition standards and the appropriate calorie and nutrient levels in § 210.10. Further, if applicable, school week is the basis for conducting Nutrient Standard Menu Planning or Assisted Nutrient Standard Menu Planning for lunches as provided in § 210.10(i) and § 210.10(j). The period shall be a normal school week of five consecutive days; however, to accommodate shortened weeks resulting from holidays and other scheduling needs, the period shall be a minimum of three consecutive days and a maximum of seven consecutive days. Weeks in which school lunches are offered less than three times shall be combined with either the previous or the coming week.

*School year* means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

*Secretary* means the Secretary of Agriculture.

*State* means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

*State agency* means (a) the State educational agency; (b) any other agency of the State which has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools, as specified in § 210.3(b); or (c) the FNSRO, where the FNSRO administers the Program as specified in § 210.3(c).

*State educational agency* means, as the State legislature may determine, (a) the chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (b) a board of education controlling the State department of education.

*Student with disabilities* means any child who has a physical or mental impairment as defined in § 15b.3 of the Department's nondiscrimination regulations (7 CFR part 15b).

*Subsidized lunch* (paid lunch) means a lunch served to children who are either not eligible for or elect not to receive the free or reduced price benefits offered under 7 CFR part 245. The Department subsidizes each paid lunch with both general cash assistance and donated foods. Although a paid lunch student pays for a large portion of his or her lunch, the Department's subsidy accounts for a significant portion of the cost of that lunch.

*Yogurt* means commercially prepared coagulated milk products obtained by the fermentation of specific bacteria,

that meet milk fat or milk solid requirements and to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Definition and Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, 21 CFR 131.200, 21 CFR 131.203, and 21 CFR 131.206, respectively.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12580, Mar. 28, 1989; 56 FR 32939, July 17, 1991; 58 FR 42487, Aug. 10, 1993; 60 FR 31207, June 13, 1995; 62 FR 10189, Mar. 6, 1997; 64 FR 50740, Sept. 20, 1999; 65 FR 26912, May 9, 2000; 71 FR 39515, July 13, 2006; 72 FR 10892, Mar. 12, 2007; 72 FR 61490, Oct. 31, 2007; 72 FR 63790, Nov. 13, 2007]

### § 210.3 Administration.

(a) *FNS.* FNS will act on behalf of the Department in the administration of the Program. Within FNS, the CND will be responsible for Program administration.

(b) *States.* Within the States, the responsibility for the administration of the Program in schools, as defined in § 210.2, shall be in the State educational agency. If the State educational agency is unable to administer the Program in public or private nonprofit residential child care institutions or nonprofit private schools, then Program administration for such schools may be assumed by FNSRO as provided in paragraph (c) of this section, or such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer such schools. Each State agency desiring to administer the Program shall enter into a written agreement with the Department for the administration of the Program in accordance with the applicable requirements of this part; parts 235 and 245 of this chapter; parts 15, 15a, 15b, 3015 and 3016 of this title; and FNS instructions.

(c) *FNSRO.* The FNSRO will administer the Program in nonprofit private schools or public or nonprofit private residential child care institutions if the State agency is prohibited by law from disbursing Federal funds paid to such schools. In addition, the FNSRO will continue to administer the Program in those States in which nonprofit private schools or public or nonprofit private residential child care institutions have been under continuous FNS administration since October 1, 1980, unless the administration of the Program in such schools is assumed by the State. The FNSRO will, in each State in which it administers the Program, assume all responsibilities of a State agency as set forth in this part and part 245 of this chapter as appropriate. References in this part to "State agency" include FNSRO, as applicable, when it is the agency administering the Program.

(d) *School food authorities.* The school food authority shall be responsible for the administration of the Program in schools. State agencies shall ensure that school food authorities administer the Program in accordance with the applicable requirements of this part; part 245 of this chapter; parts 15, 15a, 15b, and 3016 or 3019, as applicable, of this title; and FNS instructions.

[53 FR 29147, Aug. 2, 1988, as amended at 71 FR 39515, July 13, 2006]

## Subpart B—Reimbursement Process for States and School Food Authorities

### § 210.4 Cash and donated food assistance to States.

(a) *General.* To the extent funds are available, FNS will make cash assistance available in accordance with the provisions of this section to each State agency for lunches and meal supplements served to children under the National School Lunch and Commodity School Programs. To the extent donated foods are available, FNS will provide donated food assistance to distributing agencies for each lunch served in accordance with the provisions of this part and part 250 of this chapter.

(b) *Assistance for the National School Lunch Program.* The Secretary will make cash and/or donated food assistance available to each State agency and distributing agency, as appropriate, administering the National School Lunch Program, as follows:

(1) *Cash assistance for lunches:* Cash assistance payments are composed of a

*general* cash assistance payment, authorized under section 4 of the Act, and a *special* cash assistance payment, authorized under section 11 of the Act. General cash assistance is provided to each State agency for *all* lunches served to children in accordance with the provisions of the National School Lunch Program. Special cash assistance is provided to each State agency for lunches served under the National School Lunch Program to children determined eligible for free or reduced price lunches in accordance with part 245 of this chapter. The total general cash assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with § 210.5(d)(3) or the total calculated by multiplying the number of lunches reported in accordance with § 210.5(d)(1) for each month of service during the fiscal year, by the applicable national average payment rate prescribed by FNS. The total special assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with § 210.5(d)(3) or the total calculated by multiplying the number of free and reduced price lunches reported in accordance with § 210.5(d)(1) for each month of service during the fiscal year by the applicable national average payment rate prescribed by FNS. In accordance with section 11 of the Act, FNS will prescribe annual adjustments to the per meal national average payment rate (general cash assistance) and the special assistance national average payment rates (special cash assistance) which are effective on July 1 of each year. These adjustments, which reflect changes in the food away from home series of the Consumer Price Index for all Urban Consumers, are annually announced by Notice in July of each year in the FEDERAL REGISTER. FNS will also establish maximum per meal rates of reimbursement within which a State may vary reimbursement rates to school food authorities. These maximum rates of reimbursement are established at the same time and announced in the same Notice as the national average payment rates.

(2) *Donated food assistance.* For each school year, FNS will provide distributing agencies with donated foods for lunches served under the National School Lunch Program as provided under part 250 of this chapter. The per lunch value of donated food assistance is adjusted by the Secretary annually to reflect changes as required under section 6 of the Act. These adjustments, which reflect changes in the Price Index for Foods Used in Schools and Institutions, are effective on July 1 of each year and are announced by Notice in the FEDERAL REGISTER in July of each year.

(3) *Cash assistance for meal supplements.* For those eligible schools (as defined in § 210.10(n)(1)) operating afterschool care programs and electing to serve meal supplements to enrolled children, funds shall be made available to each State agency, each school year in an amount no less than the sum of the products obtained by multiplying:

(i) The number of meal supplements served in the afterschool care program within the State to children from families that do not satisfy the income standards for free and reduced price school meals by 2.75 cents;

(ii) The number of meal supplements served in the afterschool care program within the State to children from families that satisfy the income standard for free school meals by 30 cents;

(iii) The number of meal supplements served in the afterschool care program within the State to children from families that satisfy the income standard for reduced price school meals by 15 cents.

(4) The rates in paragraph (b)(3) are the base rates established in August 1981 for the CACFP. FNS shall prescribe annual adjustments to these rates in the same Notice as the National Average Payment Rates for lunches. These adjustments shall ensure that the reimbursement rates for meal supplements served under this part are the same as those implemented for meal supplements in the CACFP.

(c) *Assistance for the Commodity School Program.* FNS will make special cash assistance available to each State agency for lunches served in commodity schools in the same manner as

special cash assistance is provided in the National School Lunch Program. Payment of such amounts to State agencies is subject to the reporting requirements contained in § 210.5(d). FNS will provide donated food assistance in accordance with part 250 of this chapter. Of the total value of donated food assistance to which it is entitled, the school food authority may elect to receive cash payments of up to 5 cents per lunch served in its commodity school(s) for donated foods processing and handling expenses. Such expenses include any expenses incurred by or on behalf of a commodity school for processing or other aspects of the preparation, delivery, and storage of donated foods. The school food authority may have all or part of these cash payments retained by the State agency for use on its behalf for processing and handling expenses by the State agency or it may authorize the State agency to transfer to the distributing agency all or any part of these payments for use on its behalf for these expenses. Payment of such amounts to State agencies is subject to the reporting requirements contained in § 210.5(d). The total value of donated food assistance is calculated on a school year basis by adding:

(1) The applicable national average payment rate (general cash assistance) prescribed by the Secretary for the period of July 1 through June 30 multiplied by the total number of lunches served during the school year under the Commodity School Program; and

(2) The national per lunch average value of donated foods prescribed by the Secretary for the period of July 1 through June 30 multiplied by the total number of lunches served during the school year under the Commodity School Program.

[53 FR 29147, Aug. 2, 1988, as amended at 58 FR 42487, Aug. 10, 1993; 60 FR 31207, June 13, 1995; 65 FR 26912, May 9, 2000]

### § 210.5 Payment process to States.

(a) *Grant award.* FNS will specify the terms and conditions of the State agency's grant in a grant award document and will generally make payments available by means of a Letter of Credit issued in favor of the State agency. The State agency shall obtain funds for reimbursement to participating school food authorities through procedures established by FNS in accordance with 7 CFR part 3016. State agencies shall limit requests for funds to such times and amounts as will permit prompt payment of claims or authorized advances. The State agency shall disburse funds received from such requests without delay for the purpose for which drawn. FNS may, at its option, reimburse a State agency by Treasury Check. FNS will pay by Treasury Check with funds available in settlement of a valid claim if payment for that claim cannot be made within the grant closeout period specified in paragraph (d) of this section.

(b) *Cash-in-lieu of donated foods.* All Federal funds to be paid to any State in place of donated foods will be made available as provided in part 240 of this chapter.

(c) *Recovery of funds.* FNS will recover any Federal funds made available to the State agency under this part which are in excess of obligations reported at the end of each fiscal year in accordance with the reconciliation procedures specified in paragraph (d) of this section. Such recoveries shall be reflected by a related adjustment in the State agency's Letter of Credit.

(d) *Substantiation and reconciliation process.* Each State agency shall maintain Program records as necessary to support the reimbursement payments made to school food authorities under §§ 210.7 and 210.8 and the reports submitted to FNS under this paragraph. The State agency shall ensure such records are retained for a period of 3 years or as otherwise specified in § 210.23(c).

(1) *Monthly report.* Each State agency shall submit a final Report of School Program Operations (FNS–10) to FNS for each month. The final reports shall be limited to claims submitted in accordance with § 210.8 of this part. For the month of October, the final report shall include the total number of children approved for free lunches, the total number of children approved for reduced price lunches, and the total number of children enrolled in participating public schools, private schools, and residential child care institutions, respectively, as of the last day of operation in October. The final reports

shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments to a State's report shall always be made regardless of when it is determined that such adjustments are necessary. FNS authorization is not required for downward adjustments. Any adjustments to a State's report shall be reported to FNS in accordance with procedures established by FNS.

(2) *Quarterly report.* Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter.

(3) *End of year report.* Each State agency shall submit a final Financial Status Report (SF–269) for each fiscal year. This final fiscal year grant closeout report shall be postmarked and/or submitted to FNS within 120 days after the end of each fiscal year or part thereof that the State agency administered the Program. Obligations shall be reported only for the fiscal year in which they occur. FNS will not be responsible for reimbursing Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred. Grant closeout procedures are to be carried out in accordance with 7 CFR part 3016.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12580, Mar. 28, 1989; 56 FR 32939, July 17, 1991; 71 FR 39516, July 13, 2006]

### § 210.6 Use of Federal funds.

*General.* State agencies shall use Federal funds made available under the Program to reimburse or make advance payments to school food authorities in connection with lunches and meal supplements served in accordance with the provisions of this part; *except that,* with the approval of FNS, any State agency may reserve an amount up to one percent of the funds earned in any fiscal year under this part for use in carrying out special developmental projects. Advance payments to school food authorities may be made at such times and in such amounts as are necessary to meet the current fiscal obligations. All Federal funds paid to any State in place of donated foods shall be used as provided in part 240 of this chapter.

[53 FR 29147, Aug. 2, 1988, as amended at 58 FR 42487, Aug. 10, 1993]

### § 210.7 Reimbursement for school food authorities.

(a) *General.* Reimbursement payments to finance nonprofit school food service operations shall be made only to school food authorities operating under a written agreement with the State agency. Subject to the provisions of § 210.8(c), such payments may be made for lunches and meal supplements served in accordance with provisions of this part and part 245 in the calendar month preceding the calendar month in which the agreement is executed. These reimbursement payments include general cash assistance for all lunches served to children under the National School Lunch Program and special cash assistance payments for free or reduced price lunches served to children determined eligible for such benefits under the National School Lunch and Commodity School Programs. Reimbursement payments shall also be made for meal supplements served to eligible children in afterschool care programs in accordance with the rates established in § 210.4(b)(3). Approval shall be in accordance with part 245 of this chapter.

(b) *Assignment of rates.* At the beginning of each school year, State agencies shall establish the per meal rates of reimbursement for school food authorities participating in the Program. These rates of reimbursement may be assigned at levels based on financial need; *except that,* the rates are not to exceed the maximum rates of reimbursement established by the Secretary under § 210.4(b) and are to permit reimbursement for the total number of lunches in the State from funds available under § 210.4. Within each school food authority, the State agency shall assign the same rate of reimbursement from general cash assistance funds for all lunches served to children under the

Program. Assigned rates of reimbursement may be changed at any time by the State agency, *provided that* notice of any change is given to the school food authority. The total general and special cash assistance reimbursement paid to any school food authority for lunches served to children during the school year are not to exceed the sum of the products obtained by multiplying the total reported number of lunches, by type, served to eligible children during the school year by the applicable maximum per lunch reimbursements prescribed for the school year for each type of lunch.

(c) *Reimbursement limitations.* To be entitled to reimbursement under this part, each school food authority shall ensure that Claims for Reimbursement are limited to the number of free, reduced price and paid lunches and meal supplements that are served to children eligible for free, reduced price and paid lunches and meal supplements, respectively, for each day of operation.

(1) *Lunch count system.* To ensure that the Claim for Reimbursement accurately reflects the number of lunches and meal supplements served to eligible children, the school food authority shall, at a minimum:

(i) Correctly approve each child's eligibility for free and reduced price lunches and meal supplements based on the requirements prescribed under 7 CFR part 245;

(ii) Maintain a system to issue benefits and to update the eligibility of children approved for free or reduced price lunches and meal supplements. The system shall:

(A) Accurately reflect eligibility status as well as changes in eligibility made after the initial approval process due to verification findings, transfers, reported changes in income or household size, etc.; and

(B) Make the appropriate changes in eligibility after the initial approval process on a timely basis so that the mechanism the school food authority uses to identify currently eligible children provides a current and accurate representation of eligible children. Changes in eligibility which result in increased benefit levels shall be made as soon as possible but no later than 3 operating days of the date the school food authority makes the final decision on a child's eligibility status. Changes in eligibility which result in decreased benefit levels shall be made as soon as possible but no later than 10 operating days of the date the school food authority makes the final decision on the child's eligibility status.

(iii) Base Claims for Reimbursement on lunch counts, taken daily at the point of service, which correctly identify the number of free, reduced price and paid lunches served to eligible children;

(iv) Correctly record, consolidate and report those lunch and supplement counts on the Claim for Reimbursement; and

(v) Ensure that Claims for Reimbursement do not request payment for any excess lunches produced, as prohibited in §210.10(a)(2), or non-Program lunches (i.e., a la carte or adult lunches) or for more than one meal supplement per child per day.

(2) *Point of service alternatives.* (i) State agencies may authorize alternatives to the point of service lunch counts provided that such alternatives result in accurate, reliable counts of the number of free, reduced price and paid lunches served, respectively, for each serving day. State agencies are encouraged to issue guidance which clearly identifies acceptable point of service alternatives and instructions for proper implementation. School food authorities may select one of the State agency approved alternatives without prior approval.

(ii) In addition, on a case-by-case basis, State agencies may authorize school food authorities to use other alternatives to the point of service lunch count; provided that such alternatives result in an accurate and reliable lunch count system. Any request to use an alternative lunch counting method which has not been previously authorized under paragraph (2)(i) is to be submitted in writing to the State agency for approval. Such request shall provide detail sufficient for the State agency to assess whether the proposed alternative would provide an accurate and reliable count of the number of lunches, by type, served each day to eligible children. The details of each approved alternative shall be maintained

on file at the State agency for review by FNS.

(d) The State agency shall reimburse the school food authority for meal supplements served in eligible schools (as defined in § 210.10(n)(1)) operating after-school care programs under the NSLP in accordance with the rates established in § 210.4(b).

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12581, Mar. 28, 1989; 56 FR 32939, July 17, 1991; 58 FR 42487, Aug. 10, 1993; 60 FR 31207, June 13, 1995; 65 FR 26912, May 9, 2000]

### § 210.8 Claims for reimbursement.

(a) *Internal controls.* The school food authority shall establish internal controls which ensure the accuracy of lunch counts prior to the submission of the monthly Claim for Reimbursement. At a minimum, these internal controls shall include: an on-site review of the lunch counting and claiming system employed by each school within the jurisdiction of the school food authority; comparisons of daily free, reduced price and paid lunch counts against data which will assist in the identification of lunch counts in excess of the number of free, reduced price and paid lunches served each day to children eligible for such lunches; and a system for following up on those lunch counts which suggest the likelihood of lunch counting problems.

(1) *On-site reviews.* Every school year, each school food authority with more than one school shall perform no less than one on-site review of the lunch counting and claiming system employed by each school under its jurisdiction. The on-site review shall take place prior to February 1 of each school year. Further, if the review discloses problems with a school's meal counting or claiming procedures, the school food authority shall: ensure that the school implements corrective action; and, within 45 days of the review, conducts a follow-up on-site review to determine that the corrective action resolved the problems. Each on-site review shall ensure that the school's claim is based on the counting system authorized by the State agency under § 210.7(c) of this part and that the counting system, as implemented, yields the actual number of reimbursable free, reduced price and paid lunches, respectively, served for each day of operation.

(2) *School food authority claims review process.* Prior to the submission of a monthly Claim for Reimbursement, each school food authority shall review the lunch count data for each school under its jurisdiction to ensure the accuracy of the monthly Claim for Reimbursement. The objective of this review is to ensure that monthly claims include only the number of free, reduced price and paid lunches served on any day of operation to children currently eligible for such lunches.

(i) Any school food authority that was found by its most recent administrative review conducted in accordance with § 210.18, to have no meal counting and claiming violations may:

(A) Develop internal control procedures that ensure accurate meal counts. The school food authority shall submit any internal controls developed in accordance with this paragraph to the State agency for approval and, in the absence of specific disapproval from the State agency, shall implement such internal controls. The State agency shall establish procedures to promptly notify school food authorities of any modifications needed to their proposed internal controls or of denial of unacceptable submissions. If the State agency disapproves the proposed internal controls of any school food authority, it reserves the right to require the school food authority to comply with the provisions of paragraph (a)(3) of this section; or

(B) Comply with the requirements of paragraph (a)(3) of this section.

(ii) Any school food authority that was identified in the most recent administrative review conducted in accordance with § 210.18, or in any other oversight activity, as having meal counting and claiming violations shall comply with the requirements in paragraph (a)(3) of this section.

(3) *Edit checks.* (i) The following procedure shall be followed for school food authorities identified in paragraph (a)(2)(ii) of this section, by other school food authorities at State agency option, or, at their own option, by school food authorities identified in paragraph (a)(2)(i) of this section: the school food authority shall compare each school's

daily counts of free, reduced price and paid lunches against the product of the number of children in that school currently eligible for free, reduced price and paid lunches, respectively, times an attendance factor.

(ii) School food authorities that are identified in subsequent administrative reviews conducted in accordance with §210.18 as not having meal counting and claiming violations and that are correctly complying with the procedures in paragraph (a)(3)(i) of this section have the option of developing internal controls in accordance with paragraph (a)(2)(i) of this section.

(4) *Follow-up activity.* The school food authority shall promptly follow-up through phone contact, on-site visits or other means when the internal controls used by schools in accordance with paragraph (a)(2)(i) of this section or the claims review process used by schools in accordance with paragraphs (a)(2)(ii) and (a)(3) of this section suggest the likelihood of lunch count problems. When problems or errors are identified, the lunch counts shall be corrected prior to submission of the monthly Claim for Reimbursement. Improvements to the lunch count system shall also be made to ensure that the lunch counting system consistently results in lunch counts of the actual number of reimbursable free, reduced price and paid lunches served for each day of operation.

(5) *Recordkeeping.* School food authorities shall maintain on file, each month's Claim for Reimbursement and all data used in the claims review process, by school. Records shall be retained as specified in §210.23(c) of this part. School food authorities shall make this information available to the Department and the State agency upon request.

(b) *Monthly claims.* To be entitled to reimbursement under this part, each school food authority shall submit to the State agency, a monthly Claim for Reimbursement, as described in paragraph (c) of this section.

(1) *Submission timeframes.* A final Claim for Reimbursement shall be postmarked or submitted to the State agency not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless otherwise authorized by FNS.

(2) *State agency claims review process.* The State agency shall review each school food authority's Claim for Reimbursement, on a monthly basis, in an effort to ensure that monthly claims are limited to the number of free and reduced price lunches served, by type, to eligible children.

(i) The State agency shall, at a minimum, compare the number of free and reduced price lunches claimed to the number of children approved for free and reduced price lunches enrolled in the school food authority for the month of October times the days of operation times the attendance factor employed by the school food authority in accordance with paragraph (a)(3) of this section or the internal controls used by schools in accordance with paragraph (a)(2)(i) of this section. At its discretion, the State agency may conduct this comparison against data which reflects the number of children approved for free and reduced price lunches for a more current month(s) as collected pursuant to paragraph (c)(2) of this section.

(ii) In lieu of conducting the claims review specified in paragraph (b)(2)(i) of this section, the State agency may conduct alternative analyses for those Claims for Reimbursement submitted by residential child care institutions. Such alternatives analyses shall meet the objective of ensuring that the monthly Claims for Reimbursement are limited to the numbers of free and reduced price lunches served, by type, to eligible children.

(3) *Follow-up activity.* The State agency shall promptly follow-up through phone contact, on-site visits, or other means when the claims review process suggests the likelihood of lunch count problems.

(4) *Corrective action.* The State agency shall promptly take corrective action with respect to any Claim for Reimbursement which includes more than the number of lunches served, by type, to eligible children. In taking corrective action, State agencies may make adjustments on claims filed within the

60-day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS–10) for the claim month required under § 210.5(d) of this part. Upward adjustments in Program funds claimed which are not reflected in the final FNS–10 for the claim month shall not be made unless authorized by FNS. Except that, upward adjustments for the current and prior fiscal years resulting from any review or audit may be made, at the discretion of the State agency. Downward adjustments in amounts claimed shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(c) *Content of claim.* The Claim for Reimbursement shall include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Report of School Program Operations required under § 210.5(d) of this part. Such data shall include, at a minimum, the number of free, reduced price and paid lunches and meal supplements served to eligible children. The claim shall be signed by a school food authority official.

(1) *Consolidated claim.* The State agency may authorize a school food authority to submit a consolidated Claim for Reimbursement for all schools under its jurisdiction, *provided that*, the data on each school's operations required in this section are maintained on file at the local office of the school food authority and the claim separates consolidated data for commodity schools from data for other schools. Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall include only lunches and meal supplements served in that month except if the first or last month of Program operations for any school year contains 10 operating days or less, such month may be combined with the Claim for Reimbursement for the appropriate adjacent month. However, Claims for Reimbursement may not combine operations occurring in two fiscal years. If a single State agency administers any combination of the Child Nutrition Programs, a school food authority shall be able to use a common claim form with respect to claims for reimbursement for meals served under those programs.

(2) *October data.* For the month of October, the State agency shall also obtain, either through the Claim for Reimbursement or other means, the total number of children approved for free lunches and meal supplements, the total number of children approved for reduced price lunches and meal supplements, and the total number of children enrolled in the school food authority as of the last day of operation in October. The school food authority shall submit this data to the State agency no later than December 31 of each year. State agencies may establish shorter deadlines at their discretion. In addition, the State agency may require school food authorities to provide this data for a more current month if for use in the State agency claims review process under paragraph (c)(2) of this section.

(d) *Advance funds.* The State agency may advance funds available for the Program to a school food authority in an amount equal to the amount of reimbursement estimated to be needed for one month's operation. Following the receipt of claims, the State agency shall make adjustments, as necessary, to ensure that the total amount of payments received by the school food authority for the fiscal year does not exceed an amount equal to the number of lunches and meal supplements by reimbursement type served to children times the respective payment rates assigned by the State in accordance with § 210.7(b). The State agency shall recover advances of funds to any school food authority failing to comply with the 60-day claim submission requirements in paragraph (b) of this section.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12581, Mar. 28, 1989; 56 FR 32940, July 17, 1991; 58 FR 42487, Aug. 10, 1993; 60 FR 31207, June 13, 1995; 64 FR 50740, Sept. 20, 1999]

## Subpart C—Requirements for School Food Authority Participation

### § 210.9 Agreement with State agency.

(a) *Application.* An official of a school food authority shall make written application to the State agency for any

school in which it desires to operate the Program. Applications shall provide the State agency with sufficient information to determine eligibility. The school food authority shall also submit for approval a Free and Reduced Price Policy Statement in accordance with part 245 of this chapter.

(b) *Agreement.* Each school food authority approved to participate in the program shall enter into a written agreement with the State agency that may be amended as necessary. Nothing in the preceding sentence shall be construed to limit the ability of the State agency to suspend or terminate the agreement in accordance with § 210.25. If a single State agency administers any combination of the Child Nutrition Programs, that State agency shall provide each school food authority with a single agreement with respect to the operation of those programs. The agreement shall contain a statement to the effect that the "School Food Authority and participating schools under its jurisdiction, shall comply with all provisions of 7 CFR parts 210 and 245." This agreement shall provide that each school food authority shall, with respect to participating schools under its jurisdiction:

(1) Maintain a nonprofit school food service and observe the limitations on the use of nonprofit school food service revenues set forth in § 210.14(a) and the limitations on any competitive school food service as set forth in § 210.11(b);

(2) Limit its net cash resources to an amount that does not exceed 3 months average expenditures for its nonprofit school food service or such other amount as may be approved in accordance with § 210.19(a);

(3) Maintain a financial management system as prescribed under § 210.14(c);

(4) Comply with the requirements of the Department's regulations regarding financial management (7 CFR part 3015 and 7 CFR part 3016, or 7 CFR part 3019, as applicable);

(5) Serve lunches, during the lunch period, which meet the minimum requirements prescribed in § 210.10;

(6) Price the lunch as a unit;

(7) Serve lunches free or at a reduced price to all children who are determined by the local educational agency to be eligible for such meals under 7 CFR part 245;

(8) Claim reimbursement at the assigned rates only for reimbursable free, reduced price and paid lunches served to eligible children in accordance with 7 CFR part 210. Agree that the school food authority official signing the claim shall be responsible for reviewing and analyzing meal counts to ensure accuracy as specified in § 210.8 governing claims for reimbursement. Acknowledge that failure to submit accurate claims will result in the recovery of an overclaim and may result in the withholding of payments, suspension or termination of the program as specified in § 210.25. Acknowledge that if failure to submit accurate claims reflects embezzlement, willful misapplication of funds, theft, or fraudulent activity, the penalties specified in § 210.26 shall apply;

(9) Count the number of free, reduced price and paid reimbursable meals served to eligible children at the point of service, or through another counting system if approved by the State agency;

(10) Submit Claims for Reimbursement in accordance with § 210.8;

(11) Comply with the requirements of the Department's regulations regarding nondiscrimination (7 CFR parts 15, 15a, 15b);

(12) Make no discrimination against any child because of his or her eligibility for free or reduced price meals in accordance with the approved Free and Reduced Price Policy Statement;

(13) Enter into an agreement to receive donated foods as required by 7 CFR part 250;

(14) Maintain, in the storage, preparation and service of food, proper sanitation and health standards in conformance with all applicable State and local laws and regulations, and comply with the food safety requirements of § 210.13;

(15) Accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department;

(16) Maintain necessary facilities for storing, preparing and serving food;

(17) Upon request, make all accounts and records pertaining to its school

food service available to the State agency and to FNS, for audit or review, at a reasonable time and place. Such records shall be retained for a period of 3 years after the date of the final Claim for Reimbursement for the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the 3 year period as long as required for resolution of the issues raised by the audit;

(18) Maintain files of currently approved and denied free and reduced price applications, respectively, and the names of children approved for free lunches based on documentation certifying that the child is included in a household approved to receive benefits under the Food Stamp Program, Food Distribution Program for Households on Indian Reservations (FDPIR) or Temporary Assistance for Needy Families (TANF). If the applications and/or documentation are maintained at the school food authority level, they shall be readily retrievable by school;

(19) Retain the individual applications for free and reduced price lunches and meal supplements submitted by families for a period of 3 years after the end of the fiscal year to which they pertain or as otherwise specified under paragraph (b)(17) of this section.

(20) No later than March 1, 1997, and no later than December 31 of each year thereafter, provide the State agency with a list of all elementary schools under its jurisdiction in which 50 percent or more of enrolled children have been determined eligible for free or reduced price meals as of the last operating day the preceding October. The State agency may designate a month other than October for the collection of this information, in which case the list must be provided to the State agency within 60 calendar days following the end of the month designated by the State agency. In addition, each school food authority shall provide, when available for the schools under its jurisdiction, and upon the request of a sponsoring organization of day care homes of the Child and Adult Care Food Program, information on the boundaries of the attendance areas for the elementary schools identified as having 50 percent or more of enrolled children certified eligible for free or reduced price meals.

(c) *Afterschool care requirements.* Those school food authorities with eligible schools (as defined in §210.10(n)(1)) that elect to serve meal supplements during afterschool care programs, shall agree to:

(1) Serve meal supplements which meet the minimum requirements prescribed in §210.10;

(2) Price the meal supplement as a unit;

(3) Serve meal supplements free or at a reduced price to all children who are determined by the school food authority to be eligible for free or reduced price school meals under 7 CFR part 245;

(4) If charging for meals, the charge for a reduced price meal supplement shall not exceed 15 cents;

(5) Claim reimbursement at the assigned rates only for meal supplements served in accordance with the agreement;

(6) Claim reimbursement for no more than one meal supplement per child per day;

(7) Review each afterschool care program two times a year; the first review shall be made during the first four weeks that the school is in operation each school year, except that an afterschool care program operating year round shall be reviewed during the first four weeks of its initial year of operation, once more during its first year of operation, and twice each school year thereafter; and

(8) Comply with all requirements of this part, except that, claims for reimbursement need not be based on "point of service" meal supplement counts (as required by §210.9(b)(9)).

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12581, Mar. 28, 1989; 56 FR 32941, July 17, 1991; 58 FR 42488, Aug. 10, 1993; 60 FR 31208, June 13, 1995; 62 FR 901, Jan. 7, 1997; 63 FR 9104, Feb. 24, 1998; 64 FR 50740, Sept. 20, 1999; 64 FR 72471, Dec. 28, 1999; 65 FR 26912, May 9, 2000; 70 FR 34630, June 15, 2005; 71 FR 39516, July 13, 2006; 72 FR 63791, Nov. 13, 2007; 74 FR 66216, Dec. 15, 2009]

**§ 210.10 Nutrition standards and menu planning approaches for lunches and requirements for afterschool snacks.**

(a) *What are the general requirements?*—(1) *General nutrition requirements.* Schools must provide nutritious and well-balanced meals to all the children they serve.

(i) *Requirements for lunch.* For children age 2 or older, schools must offer lunches that meet, at a minimum, the nutrition standards in paragraph (b) of this section. Compliance with the nutrition standards and the appropriate nutrient and calorie levels is determined by averaging lunches planned to be offered over a school week. Under any menu planning approach, schools must plan and produce at least enough food to meet the appropriate calorie and nutrient levels for the ages/grades of the children in the school (see paragraphs (c), (d), (i)(1) or (l) of this section, depending on the menu planning approach used). Also, if schools use one of the food-based menu planning approaches, they must plan and produce at least enough food to offer each child the minimum quantities under the meal pattern (see paragraph (k) of this section). Schools offering lunches to infants must meet the meal pattern requirements in paragraph (o) of this section.

(ii) *Requirements for afterschool snacks.* Schools offering afterschool snacks in afterschool care programs must meet the meal pattern requirements in paragraph (n) of this section. Schools must plan and produce enough food to offer each child the minimum quantities under the meal pattern in paragraph (n) of this section. The component requirements for meal supplements served under the Child and Adult Care Food Program authorized under part 226 of this chapter also apply to afterschool snacks served in accordance with paragraph (n) of this section.

(2) *Unit pricing.* Schools must price each meal as a unit. Schools need to consider participation trends in an effort to provide one reimbursable lunch and, if applicable, one reimbursable afterschool snack for each child every day. If there are leftover meals, schools may offer them to the students but cannot get reimbursement for them.

(3) *Production and menu records.* Schools must keep production and menu records for the meals they produce. These records must show how the meals contribute to the required food components, food items or menu items every day. In addition, for lunches, these records must show how the lunches contribute to the nutrition standards in paragraph (b) of this section and the appropriate calorie and nutrient levels for the ages/grades of the children in the school (see paragraphs (c), (d), or (i)(1) or (l) of this section, depending on the menu planning approach used) over the school week. If applicable, schools or school food authorities must maintain nutritional analysis records to demonstrate that lunches meet, when averaged over each school week:

(i) The nutrition standards provided in paragraph (b) of this section; and

(ii) The nutrient and calorie levels for children for each age or grade group in accordance with paragraphs (c) or (i)(1) of this section or developed under paragraph (l) of this section.

(b) *What are the specific nutrition standards for lunches?* Children age 2 and above must be offered lunches that meet the following nutrition standards for their age/grade group:

(1) Provision of one-third of the Recommended Dietary Allowances (RDAs) for protein, calcium, iron, vitamin A and vitamin C in the appropriate levels for the ages/grades (see paragraphs (c), (d), (i)(1) or (l) of this section, depending on the menu planning approach used);

(2) Provision of the lunchtime energy allowances (calories) in the appropriate levels (see paragraphs (c), (d),(i)(1) or (l) of this section, depending on the menu planning approach used);

(3) These applicable recommendations from the 1995 Dietary Guidelines for Americans:

(i) Eat a variety of foods;

(ii) Limit total fat to 30 percent of total calories;

(iii) Limit saturated fat to less than 10 percent of total calories;

(iv) Choose a diet low in cholesterol;

(v) Choose a diet with plenty of grain products, vegetables, and fruits; and

(vi) Choose a diet moderate in salt and sodium.

(4) These measures of compliance with the applicable recommendations of the 1995 Dietary Guidelines for Americans:

(i) Limit the percent of calories from total fat to 30 percent of the actual number of calories offered;

(ii) Limit the percent of calories from saturated fat to less than 10 percent of the actual number of calories offered;

(iii) Reduce sodium and cholesterol levels; and

(iv) Increase the level of dietary fiber.

(5) School food authorities have several ways to plan menus. The minimum levels of nutrients and calories that lunches must offer depends on the menu planning approach used and the ages/grades served. The menu planning approaches are:

(i) Nutrient standard menu planning (see paragraphs (c) and (i) of this section);

(ii) Assisted nutrient standard menu planning (see paragraphs (c) and (j) of this section);

(iii) Traditional food-based menu planning (see paragraphs (d)(1) and (k) of this section);

(iv) Enhanced food-based menu planning (see paragraphs (d)(2) and (k) of this section); or

(v) Alternate menu planning (see paragraph (l) of this section).

(c) *What are the levels for nutrients and calories for lunches planned under the nutrient standard or assisted nutrient standard menu planning approaches?*—(1) *Required levels.* The required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL LUNCHES
NUTRIENT STANDARD MENU PLANNING APPROACHES (SCHOOL WEEK AVERAGES)

| | MINIMUM REQUIREMENTS | | | OPTIONAL |
|---|---|---|---|---|
| NUTRIENTS AND ENERGY ALLOWANCES | Preschool | Grades K-6 | Grades 7-12 | Grades K-3 |
| Energy allowances (calories) | 517 | 664 | 825 | 633 |
| Total fat (as a percentage of actual total food energy) | [1] | [1, 2] | [2] | [1, 2] |
| Saturated fat (as a percentage of actual total food energy) | [1] | [1, 3] | [3] | [1, 3] |
| RDA for protein (g) | 7 | 10 | 16 | 9 |
| RDA for calcium (mg) | 267 | 286 | 400 | 267 |
| RDA for iron (mg) | 3.3 | 3.5 | 4.5 | 3.3 |
| RDA for Vitamin A (RE) | 150 | 224 | 300 | 200 |
| RDA for Vitamin C (mg) | 14 | 15 | 18 | 15 |

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."

[2] Not to exceed 30 percent over a school week

[3] Less than 10 percent over a school week

(2) *Optional levels.* Optional levels are:

OPTIONAL MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL LUNCHES
NUTRIENT STANDARD MENU PLANNING APPROACHES (SCHOOL WEEK AVERAGES)

| NUTRIENTS AND ENERGY ALLOWANCES | AGES 3-6 | AGES 7-10 | AGES 11-13 | AGES 14 AND ABOVE |
|---|---|---|---|---|
| Energy allowances (calories) | 558 | 667 | 783 | 846 |
| Total fat (as a percentage of actual total food energy) | [1,2] | [2] | [2] | [2] |
| Saturated fat (as a percentage of actual total food energy) | [1,3] | [3] | [3] | [3] |
| RDA for protein (g) | 7.3 | 9.3 | 15.0 | 16.7 |
| RDA for calcium (mg) | 267 | 267 | 400 | 400 |
| RDA for iron (mg) | 3.3 | 3.3 | 4.5 | 4.5 |
| RDA for Vitamin A (RE) | 158 | 233 | 300 | 300 |
| RDA for Vitamin C (mg) | 14.6 | 15 | 16.7 | 19.2 |

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."

[2] Not to exceed 30 percent over a school week

[3] Less than 10 percent over a school week

(3) *Customized levels.* Schools may also develop a set of nutrient and calorie levels for a school week. These levels are customized for the age groups of the children in the particular school or school food authority.

(d) *What are the nutrient and calorie levels for lunches planned under the food-based menu planning approaches?*—(1) *Traditional approach.* For the traditional food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL LUNCHES
TRADITIONAL FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES)

| | MINIMUM REQUIREMENTS | | | RECOMMENDED |
|---|---|---|---|---|
| NUTRIENTS AND ENERGY ALLOWANCES | GROUP II PRESCHOOL AGES 3-4 | GROUP III GRADES K-3 AGES 5-8 | GROUP IV GRADES 4-12 AGES 9 AND OLDER | GROUP V GRADES 7-12 AGES 12 AND OLDER |
| Energy allowances (calories) | 517 | 633 | 785 | 825 |
| Total fat (as a percentage of actual total food energy) | [1] | [1, 2] | [2] | [2] |
| Saturated fat (as a percentage of actual total food energy) | [1] | [1, 3] | [3] | [3] |
| RDA for protein (g) | 7 | 9 | 15 | 16 |
| RDA for calcium (mg) | 267 | 267 | 370 | 400 |
| RDA for iron (mg) | 3.3 | 3.3 | 4.2 | 4.5 |
| RDA for Vitamin A (RE) | 150 | 200 | 285 | 300 |
| RDA for Vitamin C (mg) | 14 | 15 | 17 | 18 |

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week
[3] Less than 10 percent over a school week

(2) *Enhanced approach.* For the enhanced food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL LUNCHES
ENHANCED FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES)

| | MINIMUM REQUIREMENTS | | | OPTIONAL |
|---|---|---|---|---|
| NUTRIENTS AND ENERGY ALLOWANCES | PRESCHOOL | GRADES K-6 | GRADES 7-12 | GRADES K-3 |
| Energy allowances (calories) | 517 | 664 | 825 | 633 |
| Total fat (as a percentage of actual total food energy) | [1] | [1, 2] | [2] | [1,2] |
| Saturated fat (as a percentage of actual total food energy) | [1] | [1, 3] | [3] | [1,3] |
| RDA for protein (g) | 7 | 10 | 16 | 9 |
| RDA for calcium (mg) | 267 | 286 | 400 | 267 |
| RDA for iron (mg) | 3.3 | 3.5 | 4.5 | 3.3 |
| RDA for Vitamin A (RE) | 150 | 224 | 300 | 200 |
| RDA for Vitamin C (mg) | 14 | 15 | 18 | 15 |

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week
[3] Less than 10 percent over a school week

(e) *Must schools offer choices at lunch?* FNS encourages schools to offer children a selection of foods and menu items at lunch. Choices provide variety and encourage consumption. Schools may offer choices of reimbursable lunches or foods within a reimbursable lunch. Children who are eligible for free or reduced price lunches must be allowed to take any reimbursable lunch or any choices offered as part of a reimbursable lunch. Schools may establish different unit prices for each lunch offered provided that the benefits

made available to children eligible for free or reduced price lunches are not affected.

(f) *What are the requirements for lunch periods?*—(1) *Timing.* Schools must offer lunches meeting the requirements of this section during the period the school has designated as the lunch period. Schools must offer lunches between 10:00 a.m. and 2:00 p.m. Schools may request an exemption from these times only from FNS.

(2) *Lunch periods for young children.* With State agency approval, schools are encouraged to serve children ages one through five over two service periods. Schools may divide the quantities and/or the menu items, foods, or food items offered each time any way they wish.

(3) *Adequate lunch periods.* FNS encourages schools to provide sufficient lunch periods that are long enough to give all students enough time to be served and to eat their lunches.

(g) *Exceptions and variations allowed in reimbursable meals*—(1) *Exceptions for disability reasons.* Schools must make substitutions in lunches and afterschool snacks for students who are considered to have a disability under 7 CFR 15b.3 and whose disability restricts their diet. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement must be signed by a licensed physician.

(2) *Exceptions for non-disability reasons.* Schools may make substitutions for students without disabilities who cannot consume the regular lunch or afterschool snack because of medical or other special dietary needs. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Except with respect to substitutions for fluid milk, such a statement must be signed by a recognized medical authority.

(i) *Milk substitutions for non-disability reasons.* Schools may make substitutions for fluid milk for non-disabled students who cannot consume fluid milk due to medical or special dietary needs. A school that selects this option may offer the nondairy beverage(s) of its choice, provided the beverage(s) meets the nutritional standards established under paragraph (m) of this section. Expenses incurred when providing substitutions for fluid milk that exceed program reimbursements must be paid by the school food authority.

(ii) *Requisites for milk substitutions.* (A) A school food authority must inform the State agency if any of its schools choose to offer fluid milk substitutes other than for students with disabilities; and

(B) A medical authority or the student's parent or legal guardian must submit a written request for a fluid milk substitute identifying the medical or other special dietary need that restricts the student's diet.

(iii) *Substitution approval.* The approval for fluid milk substitution must remain in effect until the medical authority or the student's parent or legal guardian revokes such request in writing, or until such time as the school changes its substitution policy for nondisabled students.

(3) *Variations for ethnic, religious, or economic reasons.* Schools should consider ethnic and religious preferences when planning and preparing meals. Variations on an experimental or continuing basis in the food components for the food-based menu planning approaches in paragraphs (k) or (n) of this section may be allowed by FNS. Any variations must be nutritionally sound and needed to meet ethnic, religious, or economic needs.

(4) *Exceptions for natural disasters.* If there is a natural disaster or other catastrophe, FNS may temporarily allow schools to serve meals for reimbursement that do not meet the requirements in this section.

(h) *What must schools do about nutrition disclosure?* To the extent that school food authorities identify foods in a menu, or on the serving line or through other available means of communicating with program participants, school food authorities must identify products or dishes containing more than 30 parts fully hydrated alternate protein products (as specified in appendix A of this part) to less than 70 parts

beef, pork, poultry or seafood on an uncooked basis, in a manner which does not characterize the product or dish solely as beef, pork, poultry or seafood. Additionally, FNS encourages schools to inform the students, parents, and the public about efforts they are making to meet the nutrition standards (see paragraph (b) of this section) for school lunches.

(i) *What are the requirements for lunches under the nutrient standard menu planning approach?*—(1) *Nutrient levels*—(i) *Adjusting nutrient levels for young children.* Schools with children who are age 2 must at least meet the nutrition standards in paragraph (b) of this section and the preschool nutrient and calorie levels in paragraph (c)(1) of this section over a school week. Schools may also use the preschool nutrient and calorie levels in paragraph (c)(2) of this section or may calculate nutrient and calorie levels for two year olds. FNS has a method for calculating these levels in guidance materials for menu planning.

(ii) *Minimum levels for nutrients.* Lunches must at least offer the nutrient and calorie levels for the required grade groups in the table in paragraph (c)(1) of this section. Schools may also offer lunches meeting the nutrient and calorie levels for the age groups in paragraph (c)(2) of this section. If only one grade or age group is outside either of these established levels, schools may follow the levels for the majority of the children. Schools may also customize the nutrient and calorie levels for the children they serve. FNS has a method for calculating these levels in guidance materials for menu planning.

(2) *Reimbursable lunches*—(i) *Contents of a reimbursable lunch.* A reimbursable lunch must include at least three menu items. One of those menu items must be an entree, and one must be fluid milk as a beverage. An entree is a combination of foods or is a single food item offered as the main course. All menu items or foods offered in a reimbursable lunch contribute to the nutrition standards in paragraph (b) of this section and to the levels of nutrients and calories that must be met in paragraphs (c) or (i)(1) of this section. Unless offered as part of a menu item in a reimbursable lunch, foods of minimal nutritional value (see appendix B to part 210) are not included in the nutrient analysis. Reimbursable lunches planned under the nutrient standard menu planning approach must meet the nutrition standards in paragraph (b) of this section and the appropriate nutrient and calorie levels in either paragraph (c) or paragraph (i)(1) of this section.

(ii) *Offer versus serve.* Schools must offer at least three menu items for lunches. Senior high (as defined by the State educational agency) school students must select at least two menu items and are allowed to decline a maximum of two menu items. The student must always take the entree. The price of a reimbursable lunch does not change if the student does not take a menu item or requests smaller portions. At the discretion of the school food authority, students below the senior high level may also participate in offer versus serve.

(3) *Doing the analysis.* Schools using nutrient standard menu planning must conduct the analysis on all menu items and foods offered in a reimbursable lunch. The analysis is conducted over a school week. Unless offered as part of a menu item in a reimbursable lunch, foods of minimal nutritional value (see appendix B to part 210) are not included in the nutrient analysis.

(4) *Software elements*—(i) *The Child Nutrition Database.* The nutrient analysis is based on the Child Nutrition Database. This database is part of the software used to do a nutrient analysis. Software companies or others developing systems for schools may contact FNS for more information about the database.

(ii) *Software evaluation.* FNS or an FNS designee evaluates any nutrient analysis software before it may be used in schools. FNS or its designee determines if the software, as submitted, meets the minimum requirements. The approval of software does not mean that FNS or USDA endorses it. The software must be able to do all functions after the basic data is entered. The required functions include weighted averages and the optional combined analysis of the lunch and breakfast programs.

(5) *Nutrient analysis procedures*—(i) *Weighted averages.* Schools must include all menu items and foods offered in reimbursable lunches in the nutrient analysis. Menu items and foods are included based on the portion sizes and projected serving amounts. They are also weighted based on their proportionate contribution to the lunches offered. This means that menu items or foods more frequently offered are weighted more heavily than those not offered as frequently. Schools calculate weighting as indicated by FNS guidance and by the guidance provided by the software. Through September 30, 2009, schools are not required to conduct a weighted analysis.

(ii) *Analyzed nutrients.* The analysis includes all menu items and foods offered over a school week. The analysis must determine the levels of: Calories, protein, vitamin A, vitamin C, iron, calcium, total fat, saturated fat, sodium, cholesterol and dietary fiber.

(iii) *Combining the analysis of the lunch and breakfast programs.* At their option, schools may combine the analysis of lunches offered under this part and breakfasts offered under part 220 of this Chapter. The analysis is done proportionately to the levels of participation in each program based on FNS guidance.

(6) *Comparing the results of the nutrient analysis.* Once the procedures in paragraph (i)(5) of this section are completed, schools must compare the results of the analysis to the appropriate nutrient and calorie levels, by age/grade groups, in paragraph (c) of this section or those developed under paragraph (i)(1) of this section. This comparison determines the school week's average. Schools must also make comparisons to the nutrition standards in paragraph (b) of this section to determine how well they are meeting the nutrition standards over the school week.

(7) *Adjustments to the menus.* Once schools know the results of the nutrient analysis based on the procedures in paragraphs (i)(5) and (i)(6) of this section, they must adjust future menu cycles to reflect production and how often the menu items and foods are offered. Schools may need to reanalyze menus when the students' selections change and, consequently, production levels change. Schools may need to change the menu items and foods offered given the students' selections and may need to modify the recipes and other specifications to make sure that the nutrition standards in paragraph (b) and either paragraphs (c) or (i)(1) of this section are met.

(8) *Standardized recipes.* If a school follows the nutrient standard menu planning approach, it must develop and follow standardized recipes. A standardized recipe is a recipe that was tested to provide an established yield and quantity using the same ingredients for both measurement and preparation methods. Any standardized recipes developed by USDA/FNS are in the Child Nutrition Database. If a school has its own recipes, they must be standardized and analyzed to determine the levels of calories, nutrients, and dietary components listed in paragraph (i)(5)(ii) of this section. Schools must add any local recipes to their local database as outlined in FNS guidance.

(9) *Processed foods.* The Child Nutrition Database includes a number of processed foods. Schools may use purchased processed foods and menu items that are not in the Child Nutrition Database. Schools or the State agency must add any locally purchased processed foods and menu items to their local database as outlined in FNS guidance. Schools or the State agency must obtain the levels of calories, nutrients, and dietary components listed in paragraph (i)(5)(ii) of this section.

(10) *Menu substitutions.* Schools may need to substitute foods or menu items in a menu that was already analyzed. If the substitution(s) occurs more than two weeks before the planned menu is served, the school must reanalyze the revised menu. If the substitution(s) occurs two weeks or less before the planned menu is served, the school does not need to do a reanalysis. However, schools should always try to substitute similar foods.

(11) *Meeting the nutrition standards.* The school's analysis shows whether their menus are meeting the nutrition standards in paragraph (b) of this section and the appropriate levels of nutrients and calories in paragraph (c) of

this section or customized levels developed under paragraph (i)(1) of this section. If the analysis shows that the menu(s) are not meeting these standards, the school needs to take action to make sure that the lunches meet the nutrition standards and the calorie, nutrient, and dietary component levels. Actions may include technical assistance and training and may be taken by the State agency, the school food authority or by the school as needed.

(12) *Other Child Nutrition Programs and nutrient standard menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare lunches for these programs using the nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrients and calories for adult lunches under the Child and Adult Care Food Program. However, afterschool snacks continue to use the appropriate program's meal pattern.

(j) *What are the requirements for lunches under the assisted nutrient standard menu planning approach?*—(1) *Definition of assisted nutrient standard menu planning.* Some school food authorities may not be able to do all of the procedures necessary for nutrient standard menu planning. The assisted nutrient standard menu planning approach provides schools with menu cycles developed and analyzed by other sources. These sources include the State agency, other school food authorities, consultants, or food service management companies.

(2) *Elements of assisted nutrient standard menu planning.* School food authorities using menu cycles developed under assisted nutrient standard menu planning must follow the procedures in paragraphs (i)(1) through (i)(10) of this section. The menu cycles must also incorporate local food preferences and accommodate local food service operations. The menus cycles must meet the nutrition standards in paragraph (b) of this section and meet the nutrient and calorie levels for nutrient standard menu planning in paragraph (c) or paragraph (i)(1) of this section. The supplier of the assisted nutrient standard menu planning approach must also develop and provide recipes, food product specifications, and preparation techniques. All of these components support the nutrient analysis results of the menus cycles used by the receiving school food authorities.

(3) *State agency approval.* Prior to its use, the State agency must approve the initial menu cycle, recipes and other specifications of the assisted nutrient standard menu planning approach. The State agency needs to ensure that all the steps required for nutrient analysis were followed. School food authorities may also ask the State agency for assistance with implementation of their assisted nutrient standard menu planning approach.

(4) *Required adjustments.* After the initial service of the menu cycle developed under the assisted nutrient standard menu planning approach, the nutrient analysis must be reassessed and appropriate adjustments made as discussed in paragraph (i)(7) of this section.

(5) *Final responsibility for meeting the nutrition standards.* The school food authority using the assisted nutrient standard menu planning approach retains responsibility for meeting the nutrition standards in paragraph (b) of this section and the calorie and nutrient levels in paragraph (c) or paragraph (i)(1) of this section.

(6) *Adjustments to the menus.* If the nutrient analysis shows that the lunches offered are not meeting the nutrition standards in paragraph (b) of this section and the calorie and nutrient levels in paragraph (c) or paragraph (i)(1) of this section, the State agency, school food authority or school must take action to make sure the lunches offered meet these requirements. Actions needed include technical assistance and training.

(7) *Other Child Nutrition Programs and assisted nutrient standard menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare lunches for these programs using the assisted

nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrients and calories for adult lunches under the Child and Adult Care Food Program. However, afterschool snacks continue to use the appropriate program's meal pattern.

(k) *What are the requirements for lunches under the food-based menu planning approaches?* There are two menu planning approaches based on meal patterns, not nutrient analysis. These approaches are the traditional food-based menu planning approach and the enhanced food-based menu planning approach. Schools using one of these approaches offer food components in at least the minimum quantities required for the various grade groups.

(1) *Quantities for the traditional food-based menu planning approach*—(i) *Minimum quantities.* At a minimum, schools must offer five food items in the quantities in the following table:

TRADITIONAL FOOD-BASED MENU PLANNING APPROACH–MEAL PATTERN FOR LUNCHES

| | MINIMUM QUANTITIES | | | | RECOMMENDED QUANTITIES |
|---|---|---|---|---|---|
| FOOD COMPONENTS AND FOOD ITEMS | GROUP I AGES 1-2 PRESCHOOL | GROUP II AGES 3-4 PRESCHOOL | GROUP III, AGES 5-8 GRADES K-3 | GROUP IV AGES 9 AND OLDER GRADES 4-12 | GROUP V AGES 12 AND OLDER GRADES 7-12 |
| Milk (as a beverage) | 6 fluid ounces | 6 fluid ounces | 8 fluid ounces | 8 fluid ounces | 8 fluid ounces |
| Meat or Meat Alternate (quantity of the edible portion as served): | | | | | |
| Lean meat, poultry, or fish | 1 ounce | 1½ ounces | 1½ ounces | 2 ounces | 3 ounces |
| Alternate Protein Products[1] | 1 ounce | 1½ ounces | 1½ ounces | 2 ounces | 3 ounces |
| Cheese | 1 ounce | 1½ ounces | 1½ ounces | 2 ounces | 3 ounces |
| Large egg | ½ | ¾ | ¾ | 1 | 1½ |
| Cooked dry beans or peas | ¼ cup | 3/8 cup | 3/8 cup | ½ cup | ¾ cup |
| Peanut butter or other nut or seed butters | 2 tablespoons | 3 tablespoons | 3 tablespoons | 4 tablespoons | 6 tablespoons |
| Yogurt, plain or flavored, unsweetened or sweetened | 4 ounces or ½ cup | 6 ounces or ¾ cup | 6 ounces or ¾ cup | 8 ounces or 1 cup | 12 ounces or 1½ cups |
| The following may be used to meet no more than 50% of the requirement and must be used in combination with any of the above: | | | | | |
| Peanuts, soynuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternate (1 ounce of nuts/seeds = 1 ounce of cooked lean meat, poultry, or fish) | ½ ounce = 50% | ¾ ounce = 50% | ¾ ounce = 50% | 1 ounce = 50% | 1½ ounces = 50% |
| Vegetable or Fruit: 2 or more servings of vegetables, fruits or both | ½ cup | ½ cup | ½ cup | ¾ cup | ¾ cup |
| Grains/Breads: (servings per week): Must be enriched or whole grain. A serving is a slice of bread or an equivalent serving of biscuits, rolls, etc., or ½ cup of cooked rice, macaroni, noodles, other pasta products or cereal grains | 5 servings per week[2] -- minimum of ½ serving per day | 8 servings per week[2] -- minimum of 1 serving per day | 8 servings per week[2] -- minimum of 1 serving per day | 8 servings per week[2] -- minimum of 1 serving per day | 10 servings per week[2] -- minimum of 1 serving per day |

[1] Must meet the requirements in appendix A of this part.
[2] For the purposes of this table, a week equals five days.

(ii) *Use of Group IV quantities.* Schools that are able to provide quantities of food to children solely on the basis of their ages or grade level should do so. Schools that cannot serve children on the basis of age or grade level must provide all school age children Group IV portions as specified in the table in paragraph (k)(1)(i) of this section. Schools serving children on the basis of age or grade level must plan and produce sufficient quantities of food to provide Groups I-IV no less than the amounts specified for those children in the table in paragraph (k)(1)(i) of this section, and sufficient quantities of food to provide Group V no less than the specified amounts for Group IV. FNS recommends that schools plan and produce sufficient quantities of food to provide Group V children the larger

amounts specified in the table in paragraph (k)(1)(i) of this section. Schools that provide increased portion sizes for Group V may comply with children's requests for smaller portion sizes of the food items; however, schools must plan and produce sufficient quantities of food to at least provide the serving sizes required for Group IV. Schools must ensure that lunches are served with the objective of providing the per lunch minimums for each age and grade level as specified in the table in paragraph (k)(1)(i) of this section.

(2) *Quantities for the enhanced food-based menu planning approach.* Schools must at least offer five food items in the quantities in the following table:

| ENHANCED FOOD-BASED MENU PLANNING APPROACH-MEAL PATTERN FOR LUNCHES | | | | | |
|---|---|---|---|---|---|
| | MINIMUM REQUIREMENTS | | | | OPTION FOR |
| FOOD COMPONENTS AND FOOD ITEMS | AGES 1-2 | PRESCHOOL | GRADES K-6 | GRADES 7-12 | GRADES K-3 |
| Milk (as a beverage) | 6 fluid ounces | 6 fluid ounces | 8 fluid ounces | 8 fluid ounces | 8 fluid ounces |
| Meat or Meat Alternate (quantity of the edible portion as served): | | | | | |
| Lean meat, poultry, or fish | 1 ounce | 1½ ounces | 2 ounces | 2 ounces | 1½ ounces |
| Alternate protein products[1] | 1 ounce | 1½ ounces | 2 ounces | 2 ounces | 1½ ounces |
| Cheese | 1 ounce | 1½ ounces | 2 ounces | 2 ounces | 1½ ounces |
| Large egg | ½ | ¾ | 1 | 1 | ¾ |
| Cooked dry beans or peas | ¼ cup | 3/8 cup | ½ cup | ½ cup | 3/8 cup |
| Peanut butter or other nut or seed butters | 2 tablespoons | 3 tablespoons | 4 tablespoons | 4 tablespoons | 3 tablespoons |
| Yogurt, plain or flavored, unsweetened or sweetened | 4 ounces or ½ cup | 6 ounces or ¾ cup | 8 ounces or 1 cup | 8 ounces or 1 cup | 6 ounces or ¾ cup |
| The following may be used to meet no more than 50% of the requirement and must be used in combination with any of the above: | | | | | |
| Peanuts, soynuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternate (1 ounce of nuts/seeds equals 1 ounce of cooked lean meat, poultry or fish). | ½ ounce =50% | ¾ ounce =50% | 1 ounce =50% | 1 ounce =50% | ¾ ounce =50% |
| Vegetable or Fruit: 2 or more servings of vegetables, fruits or both | ½ cup | ½ cup | ¾ cup plus an extra ½ cup over a week[2] | 1 cup | ¾ cup |
| Grains/Breads (servings per week): Must be enriched or whole grain. A serving is a slice of bread or an equivalent serving of biscuits, rolls, etc., or ½ cup of cooked rice, macaroni, noodles, other pasta products or cereal grains | 5 servings per week[2] – minimum of ½ serving per day | 8 servings per week[2] – minimum of 1 serving per day | 12 servings per week[2] – minimum of 1 serving per day[3] | 15 servings per week[2]– minimum of 1 serving per day[3] | 10 servings per week[2] –minimum of 1 serving per day[3] |

[1] Must meet the requirements in appendix A of this part.
[2] For the purposes of this table, a week equals five days.
[3] Up to one grains/breads serving per day may be a dessert.

(3) *Requirements for the meat/meat alternate component.* The quantity of the meat/meat alternate component must be the edible portion as served. If the portion size of a food item for this component is excessive, the school must reduce that portion and supplement it with another meat/meat alternate to meet the full requirement. This component must be served in a main dish or in a main dish and only one other food item. Schools without daily choices in this component should not serve any one meat alternate or form of meat (for example, ground, diced, pieces) more than three times in the same week.

(i) *Enriched macaroni.* Enriched macaroni with fortified protein as defined in appendix A to this part may be used to meet part of the meat/meat alternate requirement when used as specified in appendix A to this part. An enriched macaroni product with fortified protein as defined in appendix A to this part may be used to meet part of the meat/meat alternate component or the grains/breads component but not as both food components in the same lunch.

(ii) *Nuts and seeds.* Nuts and seeds and their butters are allowed as meat alternates in accordance with program guidance. Acorns, chestnuts, and coconuts must not be used because of their low protein and iron content. Nut and seed meals or flours may be used only as allowed under appendix A to this part. Nuts or seeds may be used to meet no more than one-half of the meat/meat alternate component with another meat/meat alternate to meet the full requirement.

(iii) *Yogurt.* Yogurt may be used to meet all or part of the meat/meat alternate requirement. Yogurt may be either plain or flavored, unsweetened or sweetened. Noncommercial and/or nonstandardized yogurt products, such as frozen yogurt, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruit and/or nuts or similar products are not creditable. Four ounces (weight) or ½ cup (volume) of yogurt equals one ounce of the meat/meat alternate requirement.

(4) *Requirements for the vegetable/fruit component.*

(i) *General.* Full strength vegetable or fruit juice may be used to meet no more than one-half of the vegetable/fruit requirement. Cooked dry beans or peas may be counted as either a vegetable or as a meat alternate but not as both in the same meal.

(ii) *Minimum quantities for the enhanced food-based menu planning.* Under the enhanced food-based menu planning approach, children in kindergarten through grade six are offered vegetables/fruits in minimum daily servings plus an additional one-half cup in any combination over a five day period.

(5) *Requirements for the grains/breads component*—(i) *Enriched or whole grains.* All grains/breads must be enriched or whole grain or made with enriched or whole grain meal or flour.

(ii) *Daily and weekly servings.* The requirement for the grain/bread component is based on minimum daily servings plus total servings over a five day period. Schools serving lunch 6 or 7 days per week should increase the weekly quantity by approximately 20 percent (⅕th) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (⅕th) for each day less than five. The servings for biscuits, rolls, muffins, and other grain/bread varieties are specified in the Food Buying Guide for Child Nutrition Programs (PA 1331), an FNS publication.

(iii) *Minimums under the traditional food-based menu planning approach.* Schools must offer at least one-half serving of the grain/bread component to children in Group I and at least one serving to children in Groups II-V daily. Schools which serve lunch at least 5 days a week shall serve a total of at least five servings of grains/breads to children in Group I and eight servings per week to children in Groups II-V.

(iv) *Desserts under the enhanced food-based menu planning approach.* Under the enhanced food-based menu planning approach, schools may count up to one grain-based dessert per day for children in grades K-12 towards meeting the grains/breads component.

(6) *Offer versus serve.* Schools must offer all five required food items. Senior high (as defined by the State educational agency) school students may decline up to two of the five food items. At the school food authority's option, students below senior high may decline one or two of the five food items. The price of a reimbursable lunch does not change if the student does not take a menu item or requests smaller portions.

(7) *Meal pattern exceptions for outlying areas.* Schools in American Samoa, Puerto Rico and the Virgin Islands may serve a starchy vegetable such as yams, plantains, or sweet potatoes to meet the grain/bread requirement.

(l) *What are the requirements for lunches planned using an alternate menu planning approach?*—(1) *Definition.* Alternate menu planning approaches are those adopted or developed by school food authorities or State agencies that differ from the standard approaches established in paragraphs (i) through (k) of this section. There are two types of alternate approaches. First, there are specific modifications provided in paragraph (l)(2) of this section. Second, there are major changes to the standard menu planning approaches or new menu planning approaches developed

by school food authorities or State agencies (see paragraph (l)(3) of this section).

(2) *Use of modifications.* There are three modifications available to schools using one of the food-based menu planning approaches for lunches. State agencies may or may not require prior approval or may establish guidelines for using these modifications.

(i) *Modification to the meat/meat alternate component.* The required minimum quantities of the meat/meat alternate component in the food-based menu planning approaches may be offered as a weekly total with a one ounce (or its equivalent for certain meat alternates) minimum daily serving size. This modification does not apply if the minimum serving of meat/meat alternate is less than one ounce.

(ii) *Modification to age/grade groups under the traditional food-based menu planning approach.* Schools using the traditional food-based menu planning approach may:

(A) For children in grades K–6, use the portion sizes in Group IV in the table in paragraph (k)(1) of this section and follow the nutrient levels for children in grades K–6 in paragraphs (c)(1) and (d)(2) of this section; and/or

(B) For children in grades 7–12, use the portion sizes in Group IV in the table in paragraph (k)(1) of this section and follow the nutrient levels for children in grades 7–12 in paragraphs (c)(1) and (d)(2) of this section.

(iii) *Modification for the majority of children.* Under the traditional or enhanced food-based menu planning approaches, if only one age or grade is outside the established levels, schools may follow the levels for the majority of children for both quantities (see paragraph (k)) and the nutrition standards in paragraphs (b) and (d) of this section.

(3) *Use and approval of major changes or new alternate approaches.* Within the guidelines established for developing alternate menu planning approaches, school food authorities or State agencies may modify one of the established menu planning approaches in paragraphs (i) through (k) of this section or may develop their own menu planning approach. The alternate menu planning approach must be available in writing for review and monitoring purposes. No formal plan is required; guidance material, a handbook or protocol is sufficient. As appropriate, the material must address how the guidelines in paragraph (l)(4) of this section are met. A State agency that develops an alternate approach that is exempt from FNS approval under paragraph (l)(3)(iii) of this section must notify FNS in writing when implementing the alternate approach.

(i) *Approval of local level approaches.* Any school food authority-developed menu planning approach must have prior State agency review and approval.

(ii) *Approval of State agency approaches.* Unless exempt under paragraph (l)(3)(iii) of this section, any State agency-developed menu planning approach must have prior FNS approval.

(iii) *State agency approaches not subject to approval.* A State agency-developed menu planning approach does not need FNS approval if:

(A) Five or more school food authorities in the State use it; and

(B) The State agency maintains ongoing oversight of the operation and evaluation of the approach and makes any needed adjustments to its policies and procedures to ensure that the appropriate guidelines of paragraph (l)(4) of this section are met.

(4) *Elements for major changes or new approaches.* Any alternate menu planning approach must:

(i) Offer fluid milk, as provided in paragraph (m) of this section;

(ii) Include offer versus serve for senior high students. Alternate menu planning approaches should follow the offer versus serve procedures in paragraphs (i)(2)(ii) and (k)(6) of this section, as appropriate. If these requirements are not followed, the plan must indicate:

(A) The affected age/grade groups;

(B) The number and type of items (and, if applicable, the quantities for the items) that constitute a reimbursable lunch under offer versus serve;

(C) How such procedures will reduce plate waste; and

(D) How a reasonable level of calories and nutrients for the lunch as taken is provided;

(iii) Meet the Recommended Dietary Allowances and lunchtime energy allowances (nutrient levels) and indicate the age/grade groups served and how the nutrient levels are met for those age/grade groups;

(iv) Follow the requirements for competitive foods in § 210.11 and appendix B to this part;

(v) Follow the requirements for counting food items and products towards the meal patterns. These requirements are found in paragraphs (k)(3) through (k)(5) and paragraph (m) of this section, in appendices A through C to this part, and in instructions and guidance issued by FNS. This only applies if the alternate approach is a food-based menu planning approach;

(vi) Identify a reimbursable lunch at the point of service;

(A) To the extent possible, the procedures provided in paragraph (i)(2)(i) of this section for the nutrient standard or assisted nutrient standard menu planning approaches or for food-based menu planning approaches provided in paragraph (k) of this section must be followed. Any instructions or guidance issued by FNS that further defines the elements of a reimbursable lunch must be followed when using the existing regulatory provisions.

(B) Any alternate approach that deviates from the provisions in paragraph (i)(2)(i) or paragraph (k) of this section must indicate what constitutes a reimbursable lunch, including the number and type of items (and, if applicable, the quantities for the items) which comprise the lunch, and how a reimbursable lunch is to be identified at the point of service;

(vii) Explain how the alternate menu planning approach can be monitored under the applicable provisions of §§ 210.18 and 210.19, including a description of the records that will be maintained to document compliance with the program's administrative and nutrition requirements. However, if the procedures under § 210.19 cannot be used to monitor the alternate approach, a description of procedures which will enable the State agency to assess compliance with the nutrition standards in paragraphs (b)(1) through (b)(4) of this section must be included; and

(viii) Follow the requirements for weighted analysis and for approved software for nutrient standard menu planning approaches as required by paragraphs (i)(4) and (i)(5) of this section unless a State agency-developed approach meets the criteria in paragraph (l)(3)(iii) of this section. Through September 30, 2009, schools are not required to conduct a weighted analysis.

(m) *What are the requirements for offering milk?*—(1) *Types of milk.* (i) Under all menu planning approaches for students, schools must offer students fluid milk in a variety of fat contents. Schools may offer flavored or unflavored milk and lactose-free fluid milk.

(ii) All milk served in the Program must be pasteurized fluid milk which meets State and local standards for such milk. However, infants under 1 year of age must be served breast milk or iron-fortified infant formula. All milk must have vitamins A and D at levels specified by the Food and Drug Administration and must be consistent with State and local standards for such milk.

(2) *Inadequate milk supply.* If a school cannot get a supply of milk, it can still participate in the Program under the following conditions:

(i) If emergency conditions temporarily prevent a school that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may allow the school to serve meals during the emergency period with an alternate form of milk or without milk.

(ii) If a school is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may approve the service of meals without fluid milk if the school uses an equivalent amount of canned milk or dry milk in the preparation of the meals. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the Virgin Islands, if a sufficient supply of fluid milk cannot be obtained, "milk" includes reconstituted or recombined milk, or as otherwise allowed by FNS through a written exception.

(3) *Milk substitutes.* If a school chooses to offer one or more substitutes for fluid milk for non-disabled students with medical or special dietary needs,

the nondairy beverage(s) must provide the nutrients listed in the following table. Milk substitutes must be fortified in accordance with fortification guidelines issued by the Food and Drug Administration. A school need only offer the nondairy beverage(s) that it has identified as allowable fluid milk substitutes according to this paragraph (m)(3).

| Nutrient | Per cup |
|---|---|
| Calcium | 276 mg. |
| Protein | 8 g. |
| Vitamin A | 500 IU. |
| Vitamin D | 100 IU. |
| Magnesium | 24 mg. |
| Phosphorus | 222 mg. |
| Potassium | 349 mg. |
| Riboflavin | 0.44 mg. |
| Vitamin B-12 | 1.1 mcg. |

(4) *Restrictions on the sale of milk.* A school participating in the Program, or a person approved by a school participating in the Program, must not directly or indirectly restrict the sale or marketing of fluid milk (as described in paragraph (m)(1)(ii) of this section) at any time or in any place on school premises or at any school-sponsored event.

(n) *Supplemental food.* Eligible schools operating afterschool care programs may be reimbursed for one meal supplement served to an eligible child (as defined in § 210.2) per day.

(1) Eligible schools mean schools that:

(i) Operate school lunch programs under the National School Lunch Act;

(ii) Sponsor afterschool care programs as defined in § 210.2; and

(iii) Were participating in the Child and Adult Care Food Program as of May 15, 1989.

(2) Meal supplements shall contain two different components from the following four:

(i) A serving of fluid milk as a beverage, or on cereal, or used in part for each purpose;

(ii) A serving of meat or meat alternate. Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts are excluded and shall not be used as meat alternates due to their low protein content. Nut or seed meals or flours shall not be used as a meat alternate except as defined under appendix A: Alternate Foods for Meals of this part;

(iii) A serving of vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or an equivalent quantity of any combination of these foods. Juice may not be served when milk is served as the only other component;

(iv) A serving of whole-grain or enriched bread; or an equivalent serving of cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or a serving of cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgur, or corn grits; or an equivalent quantity of any combination of these foods.

(3) Snacks served to infants ages birth through 11 months must meet the requirements described in paragraph (n)(3)(iv) of this section. Foods included in the snack must be of a texture and a consistency that are appropriate for the age of the infant being served. The foods must be served during a span of time consistent with the infant's eating habits. For those infants whose dietary needs are more individualized, exceptions to the meal pattern must be made in accordance with the requirements found in paragraph (g)(1) of this section.

(i) *Breastmilk and iron-fortified formula.* Either breastmilk or iron-fortified infant formula, or portions of both, must be served for the entire first year. Snacks containing breastmilk and snacks containing iron-fortified infant formula supplied by the school are eligible for reimbursement. However, infant formula provided by a parent (or guardian) and breastmilk fed directly by the infant's mother, during a visit to the school, contribute to a reimbursable snack only when the school supplies at least one component of the infant's snack.

(ii) *Fruit juice.* Juice should not be offered to infants until they are 6 months of age and ready to drink from a cup. Feeding fruit juice only from a cup will help develop behaviors that may prevent early childhood caries. Fruit juice served as part of the meal pattern for infants 8 through 11 months must be full-strength.

(iii) *Solid foods.* Solid foods of an appropriate texture and consistency are required only when the infant is developmentally ready to accept them. The school should consult with the infant's parent (or guardian) in making the decision to introduce solid foods. Solid foods should be introduced one at a time, on a gradual basis, with the intent of ensuring the infant's health and nutritional well-being.

(iv) *Infant meal pattern.* Infant snacks must have, at a minimum, breastmilk or iron-fortified infant formula, or portions of both, in the appropriate amount indicated for the infant's age. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered if the infant is still hungry. Some infants may be developmentally ready to accept an additional food component. Snacks are reimbursable when schools provide all of the components in the meal pattern that the infant is developmentally ready to accept.

(A) *Birth through 3 months.* 4 to 6 fluid ounces of breastmilk or iron-fortified infant formula—only breastmilk or iron-fortified formula is required to meet the infant's nutritional needs.

(B) *4 through 7 months.* 4 to 6 fluid ounces of breastmilk or iron-fortified infant formula—only breastmilk or iron-fortified formula is required to meet the infant's nutritional needs.

(C) *8 through 11 months.* 2 to 4 fluid ounces of breastmilk, iron-fortified infant formula, or full strength fruit juice; and 0 to ½ slice of crusty bread (if developmentally ready) or 0 to 2 cracker type products (if developmentally ready), which are made from whole-grain or enriched meal or flour, and suitable as a finger food for an infant.

(4) The minimum amounts of food components to be served as meal supplements as set forth in paragraphs (n)(2) and (n)(3) of this section are as follows. Select two different components from the four listed. (Juice may not be served when milk is served as the only other component.)

SNACK PATTERN FOR INFANTS

| Birth through 3 months | 4 through 7 months | 8 through 11 months |
|---|---|---|
| 4–6 fluid ounces of formula [1] or breastmilk [2,3]. | 4–6 fluid ounces of formula [1] or breastmilk [2,3]. | 2–4 fluid ounces of formula [1], breastmilk [2,3], or fruit juice [4]; and 0–½ slice of bread [5] or 0–2 crackers [5]. |

[1] Infant formula must be iron-fortified.
[2] Breastmilk or iron-fortified formula, or portions of both, may be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered if the infant is still hungry.
[4] Fruit juice must be full-strength.
[5] A serving of this component must be made from whole-grain or enriched meal or flour. It is required only when the infant is developmentally ready to accept it.

SUPPLEMENTS FOR INFANTS

| | Birth through 3 months | 4 through 7 months | 8 through 11 months |
|---|---|---|---|
| Supplement (snack) | 4–6 fl. oz. breast milk [2,3] or formula [1] | 4–6 fl. oz. breast milk [2,3] or formula [1] | 2–4 fl. oz breast milk [2,3], formula [1], or fruit juice [4]; 0–½ bread [5] or 0–2 crackers [5]. |

[1] Infant formula shall be iron-fortified.
[2] It is recommended that breast milk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered with additional breast milk offered if the infant is still hungry.
[4] Fruit juice shall be full-strength.
[5] Bread and bread alternates shall be made from whole-grain or enriched meal or flour. A serving of this component shall be optional.

(o) *What are the requirements for the infant lunch pattern?*—(1) *Definitions.* (i) Infant cereal means any iron-fortified dry cereal especially formulated and generally recognized as cereal for infants which is routinely mixed with breast milk or iron-fortified infant formula prior to consumption.

(ii) Infant formula means any iron-fortified formula intended for dietary

use solely as a food for normal, healthy infants. Formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems are not included in this definition. Infant formula, when served, must be in liquid state at recommended dilution.

(2) *Feeding lunches to infants.* Lunches served to infants ages birth through 11 months must meet the requirements described in paragraph (o)(5) of this section. Foods included in the lunch must be of a texture and a consistency that are appropriate for the age of the infant being served. The foods must be served during a span of time consistent with the infant's eating habits. For those infants whose dietary needs are more individualized, exceptions to the meal pattern must be made in accordance with the requirements found in paragraph (g)(1) of this section.

(3) *Breastmilk and iron-fortified formula.* Either breastmilk or iron-fortified infant formula, or portions of both, must be served for the entire first year. Meals containing breastmilk and meals containing iron-fortified infant formula supplied by the school are eligible for reimbursement. However, infant formula provided by a parent (or guardian) and breastmilk fed directly by the infant's mother, during a visit to the school, contribute to a reimbursable lunch only when the school supplies at least one component of the infant's meal.

(4) *Solid foods.* For infants ages 4 through 7 months, solid foods of an appropriate texture and consistency are required only when the infant is developmentally ready to accept them. The school should consult with the infant's parent (or guardian) in making the decision to introduce solid foods. Solid foods should be introduced one at a time, on a gradual basis, with the intent of ensuring the infant's health and nutritional well-being.

(5) *Infant meal pattern.* Infant lunches must have, at a minimum, each of the food components indicated, in the amount that is appropriate for the infant's age. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered if the infant is still hungry. Lunches may include portions of breastmilk and iron-fortified infant formula as long as the total number of ounces meets, or exceeds, the minimum amount required of this food component. Similarly, to meet the component requirements for vegetables and fruit, portions of both may be served.

(i) *Birth through 3 months.* 4 to 6 fluid ounces of breastmilk or iron-fortified infant formula—only breastmilk or iron-fortified formula is required to meet the infant's nutritional needs.

(ii) *4 through 7 months.* Breastmilk or iron-fortified formula is required. Some infants may be developmentally ready for solid foods of an appropriate texture and consistency. Lunches are reimbursable when schools provide all of the components in the meal pattern that the infant is developmentally ready to accept.

(A) 4 to 8 fluid ounces of breastmilk or iron-fortified infant formula; and

(B) 0 to 3 tablespoons of iron-fortified dry infant cereal; and

(C) 0 to 3 tablespoons of fruit or vegetable.

(iii) *8 through 11 months.* Breastmilk or iron-fortified formula and solid foods of an appropriate texture and consistency are required.

(A) 6 to 8 fluid ounces of breastmilk or iron-fortified infant formula; and

(B) 2 to 4 tablespoons of iron-fortified dry infant cereal; and/or 1 to 4 tablespoons of meat, fish, poultry, egg yolk, or cooked dry beans or peas; or ½ to 2 ounces (weight) of cheese; or 1 to 4 ounces (volume) of cottage cheese; or 1 to 4 ounces (weight) of cheese food or cheese spread; and

(C) 1 to 4 tablespoons of fruit or vegetable.

(6) *Infant meal pattern table.* The minimum amounts of food components to serve to infants, as described in paragraph (o)(5) of this section, are:

LUNCH PATTERN FOR INFANTS

| Birth through 3 months | 4 through 7 months | 8 through 11 months |
|---|---|---|
| 4–6 fluid ounces of formula[1] or breastmilk[2,3]. | 4–8 fluid ounces of formula[1] or breastmilk[2,3]; and<br>0–3 tablespoons of infant cereal[1,4]; and<br>0–3 tablespoons of fruit or vegetable or both[4]. | 6–8 fluid ounces of formula[1] or breastmilk[2,3]; and<br>2–4 tablespoons of infant cereal[1]; and/or<br>1–4 tablespoons of meat, fish, poultry, egg yolk, cooked dry beans or peas; or<br>½–2 ounces of cheese; or<br>1–4 ounces (volume) of cottage cheese; or<br>1–4 ounces (weight) of cheese food or cheese spread; and<br>1–4 tablespoons of fruit or vegetable or both. |

[1] Infant formula and dry infant cereal must be iron-fortified.
[2] Breastmilk or formula, or portions of both, may be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered if the infant is still hungry.
[4] A serving of this component is required only when the infant is developmentally ready to accept it.

[60 FR 31208, June 13, 1995, 60 FR 57146, Nov. 14, 1995, as amended at; 62 FR 10189, Mar. 6, 1997; 64 FR 61773, Nov. 15, 1999; 65 FR 26913, May 9, 2000; 65 FR 31371, May 17, 2000; 65 FR 36317, June 8, 2000; 67 FR 36783, May 28, 2002; 69 FR 70872, Dec. 8, 2004; 70 FR 70033, Nov. 21, 2005; 73 FR 52907, Sept. 12, 2008]

### § 210.11 Competitive food services.

(a) *Definitions.* For the purpose of this section:

(1) *Competitive foods* means any foods sold in competition with the Program to children in food service areas during the lunch periods.

(2) *Food of minimal nutritional value* means: (i) In the case of artificially sweetened foods, a food which provides less than five percent of the Reference Daily Intakes (RDI) for each of eight specified nutrients per serving; and (ii) in the case of all other foods, a food which provides less than five percent of the RDI for each of eight specified nutrients per 100 calories and less than five percent of the RDI for each of eight specified nutrients per serving. The eight nutrients to be assessed for this purpose are—protein, vitamin A, vitamin C, niacin, riboflavin, thiamine, calcium, and iron. All categories of food of minimal nutritional value and petitioning requirements for changing the categories are listed in appendix B of this part.

(b) *General.* State agencies and school food authorities shall establish such rules or regulations as are necessary to control the sale of foods in competition with lunches served under the Program. Such rules or regulations shall prohibit the sale of foods of minimal nutritional value, as listed in appendix B of this part, in the food service areas during the lunch periods. The sale of other competitive foods may, at the discretion of the State agency and school food authority, be allowed in the food service area during the lunch period only if all income from the sale of such foods accrues to the benefit of the nonprofit school food service or the school or student organizations approved by the school. State agencies and school food authorities may impose additional restrictions on the sale of and income from all foods sold at any time throughout schools participating in the Program.

[53 FR 29147, Aug. 2, 1988, as amended at 59 FR 23614, May 6, 1994]

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

(a) *General.* School food authorities shall promote activities to involve students and parents in the Program. Such activities may include menu planning, enhancement of the eating environment, Program promotion, and related student-community support activities. School food authorities are encouraged to use the school food service program to teach students about good nutrition practices and to involve the school faculty and the general community in activities to enhance the Program.

(b) *Food service management companies.* School food authorities contracting with a food service management company shall comply with the provisions of §210.16(a) regarding the establishment of an advisory board of parents, teachers and students.

(c) *Residential child care institutions.* Residential child care institutions shall comply with the provisions of this section, to the extent possible.

### § 210.13 Facilities management.

(a) *Health standards.* The school food authority shall ensure that food storage, preparation and service is in accordance with the sanitation and health standards established under State and local law and regulations.

(b) *Food safety inspections.* Schools shall obtain a minimum of two food safety inspections during each school year conducted by a State or local governmental agency responsible for food safety inspections. They shall post in a publicly visible location a report of the most recent inspection conducted, and provide a copy of the inspection report to a member of the public upon request. Sites participating in more than one child nutrition program shall only be required to obtain two food safety inspections per school year if the nutrition programs offered use the same facilities for the production and service of meals.

(c) *Food safety program.* The school food authority must develop a written food safety program for each of its food preparation and service facilities that meets the requirements in paragraph (c)(1) or paragraph (c)(2) of this section.

(1) A school food authority with a food safety program based on traditional hazard analysis and critical control point (HACCP) principles must:

(i) Perform a hazard analysis;

(ii) Decide on critical control points;

(iii) Determine the critical limits;

(iv) Establish procedures to monitor critical control points;

(v) Establish corrective actions;

(vi) Establish verification procedures; and

(vii) Establish a recordkeeping system.

(2) A school food authority with a food safety program based on the process approach to HACCP must ensure that its program includes:

(i) Standard operating procedures to provide a food safety foundation;

(ii) Menu items grouped according to process categories;

(iii) Critical control points and critical limits;

(iv) Monitoring procedures;

(v) Corrective action procedures;

(vi) Recordkeeping procedures; and

(vii) Periodic program review and revision.

(d) *Storage.* The school food authority shall ensure that the necessary facilities for storage, preparation and service of food are maintained. Facilities for the handling, storage, and distribution of purchased and donated foods shall be such as to properly safeguard against theft, spoilage and other loss.

[54 FR 29147, Aug. 2, 1988, as amended at 64 FR 50740, Sept. 20, 1999; 70 FR 34630, June 15, 2005; 74 FR 66216, Dec. 15, 2009]

### § 210.14 Resource management.

(a) *Nonprofit school food service.* School food authorities shall maintain a nonprofit school food service. Revenues received by the nonprofit school food service are to be used only for the operation or improvement of such food service, *except that*, such revenues shall not be used to purchase land or buildings, unless otherwise approved by FNS, or to construct buildings. Expenditures of nonprofit school food service revenues shall be in accordance with the financial management system established by the State agency under §210.19(a) of this part. School food authorities may use facilities, equipment, and personnel supported with nonprofit school food revenues to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.).

(b) *Net cash resources.* The school food authority shall limit its net cash resources to an amount that does not exceed 3 months average expenditures for its nonprofit school food service or such other amount as may be approved by the State agency in accordance with §210.19(a).

(c) *Financial assurances.* The school food authority shall meet the requirements of the State agency for compliance with § 210.19(a) including any separation of records of nonprofit school food service from records of any other food service which may be operated by the school food authority as provided in paragraph (a) of this section.

(d) *Use of donated foods.* The school food authority shall enter into an agreement with the distributing agency to receive donated foods as required by part 250 of this chapter. In addition, the school food authority shall accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department.

[53 FR 29147, Aug. 2, 1988, as amended at 60 FR 31215, June 13, 1995]

### § 210.15 Reporting and recordkeeping.

(a) *Reporting summary.* Participating school food authorities are required to submit forms and reports to the State agency or the distributing agency, as appropriate, to demonstrate compliance with Program requirements. These reports include, but are not limited to:

(1) A Claim for Reimbursement and, for the month of October and as otherwise specified by the State agency, supporting data as specified in accordance with § 210.8 of this part;

(2) An application and agreement for Program operations between the school food authority and the State agency, and a Free and Reduced Price Policy Statement as required under § 210.9;

(3) A written response to reviews pertaining to corrective action taken for Program deficiencies;

(4) A commodity school's preference whether to receive part of its donated food allocation in cash for processing and handling of donated foods as required under § 210.19(b);

(5) A written response to audit findings pertaining to the school food authority's operation as required under § 210.22;

(6) Information on civil rights complaints, if any, and their resolution as required under § 210.23; and

(7) The number of food safety inspections obtained per school year by each school under its jurisdiction.

(b) *Recordkeeping summary.* In order to participate in the Program, a school food authority or a school, as applicable, must maintain records to demonstrate compliance with Program requirements. These records include but are not limited to:

(1) Documentation of participation data by school in support of the Claim for Reimbursement and data used in the claims review process, as required under § 210.8(a), (b), and (c) of this part;

(2) Production and menu records and, if appropriate, nutrition analysis records as required under § 210.10, whichever is applicable.

(3) Participation records to demonstrate positive action toward providing one lunch per child per day as required under § 210.10(a)(2), whichever is applicable;

(4) Currently approved and denied applications for free and reduced price lunches and a description of the verification activities, including verified applications, and any accompanying source documentation in accordance with 7 CFR 245.6a of this Title; and

(5) Records from the food safety program for a period of six months following a month's temperature records to demonstrate compliance with § 210.13(c), and records from the most recent food safety inspection to demonstrate compliance with § 210.13(b).

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12582, Mar. 28, 1989; 56 FR 32941, July 17, 1991; 60 FR 31215, June 13, 1995; 65 FR 26912, 26922, May 9, 2000; 70 FR 34630, June 15, 2005; 74 FR 66216, Dec. 15, 2009]

### § 210.16 Food service management companies.

(a) *General.* Any school food authority (including a State agency acting in the capacity of a school food authority) may contract with a food service management company to manage its food service operation in one or more of its schools. However, no school or school food authority may contract with a food service management company to operate an a la carte food service unless the company agrees to offer free, reduced price and paid reimbursable

lunches to all eligible children. Any school food authority that employs a food service management company in the operation of its nonprofit school food service shall:

(1) Adhere to the procurement standards specified in §210.21 when contracting with the food service management company;

(2) Ensure that the food service operation is in conformance with the school food authority's agreement under the Program;

(3) Monitor the food service operation through periodic on-site visits;

(4) Retain control of the quality, extent, and general nature of its food service, and the prices to be charged the children for meals;

(5) Retain signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims;

(6) Ensure that all federally donated foods received by the school food authority and made available to the food service management company accrue only to the benefit of the school food authority's nonprofit school food service and are fully utilized therein;

(7) Maintain applicable health certification and assure that all State and local regulations are being met by a food service management company preparing or serving meals at a school food authority facility;

(8) Establish an advisory board composed of parents, teachers, and students to assist in menu planning;

(9) Obtain written approval of invitations for bids and requests for proposals before their issuance when required by the State agency. The school food authority must incorporate all State agency required changes to its solicitation documents before issuing those documents; and

(10) Ensure that the State agency has reviewed and approved the contract terms and that the school food authority has incorporated all State agency required changes into the contract or amendment before any contract or amendment to an existing food service management company contract is executed. Any changes made by the school food authority or a food service management company to a State agency pre-approved prototype contract or State agency approved contract term must be approved in writing by the State agency before the contract is executed. When requested, the school food authority must submit all procurement documents, including responses submitted by potential contractors, to the State agency, by the due date established by the State agency.

(b) *Invitation to bid.* In addition to adhering to the procurement standards under §210.21, school food authorities contracting with food service management companies shall ensure that:

(1) The invitation to bid or request for proposal contains a 21-day cycle menu developed in accordance with the provisions of §210.10, to be used as a standard for the purpose of basing bids or estimating average cost per meal. A school food authority with no capability to prepare a cycle menu may, with State agency approval, require that each food service management company include a 21-day cycle menu, developed in accordance with the provisions of §210.10, with its bid or proposal. The food service management company must adhere to the cycle for the first 21 days of meal service. Changes thereafter may be made with the approval of the school food authority.

(2) Any invitation to bid or request for proposal indicate that nonperformance subjects the food service management company to specified sanctions in instances where the food service management company violates or breaches contract terms. The school food authority shall indicate these sanctions in accordance with the procurement provisions stated in §210.21.

(c) *Contracts.* Contracts that permit all income and expenses to accrue to the food service management company and "cost-plus-a-percentage-of-cost" and "cost-plus-a-percentage-of-income" contracts are prohibited. Contracts that provide for fixed fees such as those that provide for management fees established on a per meal basis are allowed. Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met. Such agreements shall also include the following:

(1) The food service management company shall maintain such records as the school food authority will need to support its Claim for Reimbursement under this part, and shall, at a minimum, report claim information to the school food authority promptly at the end of each month. Such records shall be made available to the school food authority, upon request, and shall be retained in accordance with § 210.23(c).

(2) The food service management company shall have State or local health certification for any facility outside the school in which it proposes to prepare meals and the food service management company shall maintain this health certification for the duration of the contract.

(3) No payment is to be made for meals that are spoiled or unwholesome at time of delivery, do not meet detailed specifications as developed by the school food authority for each food component specified in § 210.10, or do not otherwise meet the requirements of the contract. Specifications shall cover items such a grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

(d) *Duration of contract.* The contract between a school food authority and food service management company shall be of a duration of no longer than 1 year; and options for the yearly renewal of a contract signed after February 16, 1988, may not exceed 4 additional years. All contracts shall include a termination clause whereby either party may cancel for cause with 60-day notification.

[53 FR 29147, Aug. 2, 1988, as amended at 60 FR 31215, June 13, 1995; 65 FR 26912, May 9, 2000; 72 FR 61491, Oct. 31, 2007]

## Subpart D—Requirements for State Agency Participation

### § 210.17 Matching Federal funds.

(a) *State revenue matching.* For each school year, the amount of State revenues appropriated or used specifically by the State for program purposes shall not be less than 30 percent of the funds received by such State under section 4 of the National School Lunch Act during the school year beginning July 1, 1980; *provided that,* the State revenues derived from the operation of such programs and State revenues expended for salaries and administrative expenses of such programs at the State level are not considered in this computation. However, if the per capita income of any State is less than the per capita income of the United States, the matching requirements so computed shall be decreased by the percentage by which the State per capita income is below the per capita income of the United States.

(b) *Private school exemption.* No State in which the State agency is prohibited by law from disbursing State appropriated funds to nonpublic schools shall be required to match general cash assistance funds expended for meals served in such schools, or to disburse to such schools any of the State revenues required to meet the requirements of paragraph (a) of this section. Furthermore, the requirements of this section do not apply to schools in which the Program is administered by a FNSRO.

(c) *Territorial waiver.* American Samoa and the Commonwealth of the Northern Mariana Islands shall be exempted from the matching requirements of paragraph (a) of this section if their respective matching requirements are under $100,000.

(d) *Applicable revenues.* The following State revenues, appropriated or used specifically for program purposes which are expended for any school year shall be eligible for meeting the applicable percentage of the matching requirements prescribed in paragraph (a) of this section for that school year:

(1) State revenues disbursed by the State agency to school food authorities for program purposes, including revenue disbursed to nonprofit private schools where the State administers the program in such schools;

(2) State revenues made available to school food authorities and transferred by the school food authorities to the nonprofit school food service accounts or otherwise expended by the school food authorities in connection with the nonprofit school food service program; and

(3) State revenues used to finance the costs (other than State salaries or other State level administrative costs)

of the nonprofit school food service program, i.e.:

(i) Local program supervision;

(ii) Operating the program in participating schools; and

(iii) The intrastate distribution of foods donated under part 250 of this chapter to schools participating in the program.

(e) *Distribution of matching revenues.* All State revenues made available under paragraph (a) of this section are to be disbursed to school food authorities participating in the Program, *except as* provided for under paragraph (b) of this section. Distribution of matching revenues may be made with respect to a class of school food authorities as well as with respect to individual school food authorities.

(f) *Failure to match.* If, in any school year, a State fails to meet the State revenue matching requirement, as prescribed in paragraph (a) of this section, the general cash assistance funds utilized by the State during that school year shall be subject to recall by and repayment to FNS.

(g) *Reports.* Within 120 days after the end of each school year, each State agency shall submit an Annual Report of Revenues (FNS–13) to FNS. This report identifies the State revenues to be counted toward the State revenue matching requirements specified in paragraph (a) of this section.

(h) *Accounting system.* The State agency shall establish or cause to be established a system whereby all expended State revenues counted in meeting the matching requirements prescribed in paragraph (a) of this section are properly documented and accounted for.

### § 210.18 Administrative reviews.

(a) *Implementation dates.* For the school year beginning July 1, 1992, each State agency shall conduct administrative reviews as prescribed under this section. However, FNS will approve a State agency's written request if FNS determines that the State agency has demonstrated good cause to delay implementation of the provisions specified under this section to January 1, 1993. At State agency discretion, State agencies may begin implementation of the provisions of this section on August 16, 1991. FNS review responsibilities are specified under § 210.29 of this part.

(b) *Definitions.* The following definitions are provided in order to clarify State agency administrative review requirements:

(1) *Administrative reviews* means the initial comprehensive on-site evaluation of all school food authorities participating in the Program in accordance with the provisions of this section. The term "administrative review" is used to reflect a review of both critical and general areas in accordance with paragraphs (g) and (h) of this section, and includes other areas of Program operations determined by the State agency to be important to Program performance.

(2) *Critical areas* means the following two performance standards described in detail in paragraph (g) of this section which serve as measures of compliance with Program regulations:

(i) Performance Standard 1—Certification/Counting/Claiming—All free, reduced price and paid lunches claimed for reimbursement are served only to children eligible for free, reduced price and paid lunches, respectively; and counted, recorded, consolidated and reported through a system which consistently yields correct claims.

(ii) *Performance Standard 2—Meal Elements.* Lunches claimed for reimbursement within the school food authority contain meal elements (food items/components, menu items or other items, as applicable) as required under § 210.10.

(3) *Documented corrective action* means written notification required of the school food authority to certify that the corrective action required for each violation has been completed and to notify the State agency of the dates of completion. Documented corrective action may be provided at the time of the review or may be submitted to the State agency within specified timeframes.

(4) *Follow-up reviews* means any visit(s) to the school food authority subsequent to the administrative review to ensure corrective actions are taken.

(5) *General areas* means the areas of review specified in paragraph (h) of this section.

(6) *Large school food authority* means, in any State:

(i) All school food authorities that participate in the Program and have enrollments of 40,000 children or more each; or

(ii) If there are less than two school food authorities with enrollments of 40,000 or more, the two largest school food authorities that participate in the Program and have enrollments of 2,000 children or more each.

(7) *Participation factor* means the percentages of children approved by the school for free lunches, reduced price lunches, and paid lunches, respectively, who are participating in the Program. The free participation factor is derived by dividing the number of free lunches claimed for any given period by the product of the number of children approved for free lunches for the same period times the operating days in that period. A similar computation is used to determine the reduced price and paid participation factors. The number of children approved for paid lunches is derived by subtracting the number of children approved for free and reduced price lunches for any given period from the total number of children enrolled in the reviewed school for the same period of time, if available. If such enrollment figures are not available, the most recent total number of children enrolled shall be used. If school food authority participation factors are unavailable or unreliable, State-wide data shall be employed.

(8) *Review period* means the period of time covered by the administrative review or follow-up review. The review period is specified in paragraph (f)(2) of this section.

(9) *Review threshold* means the degree of error in a critical area of review which, if exceeded during an administrative review or follow-up review of a school food authority, may trigger a follow-up review of that school food authority.

(10) *Small school food authority* means, in any State, a school food authority that participates in the Program and is not a large school food authority, as defined in this section.

(c) *Timing of reviews.* The first year of the first 5-year review cycle began on July 1, 1992, or as otherwise authorized under paragraph (a) of this section and shall end on June 30, 1994. For each State agency, the first 5-year review cycle shall end on June 30, 1998. Administrative reviews and follow-up reviews shall be conducted as follows:

(1) *Administrative reviews.* At a minimum, State agencies shall conduct administrative reviews of all school food authorities at least once during each 5-year review cycle; provided that each school food authority is reviewed at least once every 6 years. The on-site portion of the administrative review shall be completed during the school year in which the review was begun.

(2) *Expanded review cycle.* State agencies are encouraged to conduct administrative reviews of large school food authorities and of any school food authorities which may benefit from a more frequent interval than the minimum 5-year cycle required in paragraph (c)(1) of this section.

(3) *Exceptions.* FNS may, on an individual school food authority basis, approve written requests for 1-year extensions to the 6-year review interval specified in paragraph (c)(1) of this section if FNS determines this requirement conflicts with efficient State agency management of the Program.

(4) *Follow-up reviews.* The State agency is encouraged to conduct first follow-up reviews in the same school year as the administrative review; but in no event shall first follow-up reviews be conducted later than December 31 of the school year following the administrative review. Subsequent follow-up reviews shall be scheduled in accordance with paragraph (i)(5) of this section.

(d) *Scheduling school food authorities.* The State agency shall use its own criteria to schedule school food authorities for administrative reviews; provided that the requirements of paragraph (c) of this section are met. State agencies are encouraged to take into consideration the findings of the claims review process required under § 210.8(b)(2) of this part in the selection of school food authorities.

(1) *Schedule of reviews.* To ensure no unintended overlap occurs, the State

agency shall inform FNS of the anticipated schedule of school food authority reviews upon request.

(2) *Reporting follow-up review activity.* At such time as the State agency determines that a follow-up review is needed, the State agency shall notify FNS of the names of those large school food authorities exceeding any one of the critical area review thresholds specified in paragraph (i) of this section.

(3) *Exceptions.* In any school year in which FNS or OIG conducts a review or investigation of a school food authority in accordance with §210.19(a)(5) of this part, the State agency shall, unless otherwise authorized by FNS, delay conduct of a scheduled administrative review until the following school year. The State agency shall document any exception authorized under this paragraph.

(e) *Number of schools to review.* The State agency is encouraged to review all schools meeting the school selection criteria specified in paragraph (e)(1) of this section. At a minimum, the State agency shall review the number of schools specified in paragraph (e)(1) of this section and shall select the schools to be reviewed on the basis of the school selection criteria specified in paragraph (e)(2) of this section.

(1) *Minimum number of schools.* Except for residential child care institutions, the State agency shall review all schools with a free average daily participation of 100 or more and a free participation factor of 100 percent or more. In no event shall the State agency review less than the minimum number of schools illustrated in table A:

TABLE A

| No. of schools in the school food authority | Minimum no. of schools to be reviewed |
|---|---|
| 1 to 5 | 1 |
| 6 to 10 | 2 |
| 11 to 20 | 3 |
| 21 to 40 | 4 |
| 41 to 60 | 6 |
| 61 to 80 | 8 |
| 81 to 100 | 10 |
| 101 or more | [1] 12 |

[1] Twelve plus 5 percent of the number of schools over 100. Fractions shall be rounded to the nearest whole number.

(2) *School selection criteria.* (i) Selection of additional schools to meet the minimum number of schools required under paragraph (e)(1) of this section, shall be based on the following criteria:

(A) Elementary schools with a free average daily participation of 100 or more and a free participation factor of 97 percent or more;

(B) Secondary schools with a free average daily participation of 100 or more and a free participation factor of 77 percent or more; and

(C) Combination schools with a free average daily participation of 100 or more and a free participation factor of 87 percent or more. A combination school means a school with a mixture of elementary and secondary grades.

(ii) When the number of schools selected on the basis of the criteria established in paragraph (A) through paragraph (C) of this paragraph are not sufficient to meet the minimum number of schools required under paragraph (e)(1) of this section, the schools selected for review shall be selected on the basis of State agency criteria which may include low participation schools, recommendations from a food service director based on findings from the on-site visits or the claims review process required under §210.8(a) of this part; or any school in which the daily lunch counts appear questionable, e.g., identical or very similar claiming patterns, and/or large changes in free lunch counts.

(3) *Pervasive problems.* If the State agency review finds pervasive problems in a school food authority, FNS may authorize the State agency to cease review activities prior to reviewing the required number of schools under paragraph (e)(1) of this section. Where FNS authorizes the State agency to cease review activity, FNS may either conduct the review activity itself or refer the school food authority to OIG.

(f) *Scope of review.* During the course of an administrative review, each State agency shall monitor compliance with the critical and general areas identified in paragraphs (g) and (h) of this section.

(1) *Review form.* State agencies shall use the administrative review form prescribed by FNS for the critical areas of review specified in paragraph (g) of this section. State agencies may use their own administrative review form

for the general areas of review specified in paragraph (h) of this section.

(2) *Review period.* (i) The review period for administrative reviews and follow-up reviews shall cover, at a minimum, the most recent month for which a Claim for Reimbursement was submitted; provided that such Claim for Reimbursement covers at least 10 operating days.

(ii) Subject to FNS approval, the State agency may conduct a review early in the school year, prior to the submission of a Claim for Reimbursement. In such cases, the review period shall be the prior month of operation in the current school year, provided that such month includes at least 10 operating days.

(3) *Audit findings.* To prevent duplication of effort, the State agency may use any recent and currently applicable findings from Federally-required audit activity or from any State-imposed audit requirements. Such findings may be used only insofar as they pertain to the reviewed school(s) or the overall operation of the school food authority and they are relevant to the review period. The State agency shall document the source and the date of the audit.

(g) *Critical areas of review.* The performance standards listed in this paragraph are deemed critical since compliance in these areas is directly linked to the service of a reimbursable lunch.

(1) *Performance Standard 1 (All free, reduced price and paid lunches claimed for reimbursement are served only to children eligible for free, reduced price and paid lunches, respectively; and are counted, recorded, consolidated and reported through a system which consistently yields correct claims.)* The State agency shall determine that the free and reduced price eligibility determinations are correct. In addition, the State agency shall determine that for each day of operation for the review period, the number of free, reduced price and paid lunches claimed for each reviewed school is not more than the number of lunches served to children eligible for free, reduced price and paid lunches, respectively, in those schools for the review period. The State agency shall also determine that a lunch counting system is being used which accurately counts, records, consolidates and reports the reimbursable lunches served, by type.

(i) For each school reviewed, the State agency shall:

(A) Determine the number of children eligible for free, reduced price and paid lunches, by type, for the review period. To make this determination:

(*1*) The State agency shall:

(*i*) Review all approved free and reduced price applications for children in the reviewed schools back to the beginning of the school year to determine whether each child's application is complete and correctly approved in accordance with all applicable provisions of 7 CFR part 245; or

(*ii*) Review all approved free and reduced price applications effective for the review period for children in the reviewed schools; or

(*iii*) Review all approved free and reduced price applications effective on the day(s) the review is conducted for children in the reviewed schools.

(*2*) In lieu of reviewing all of the free and reduced price applications as required under paragraph (g)(1)(i)(A)(*1*) of this section, the State agency may review a statistically valid sample of those applications. If the State agency chooses to review a statistically valid sample of applications, the State agency shall ensure that the sample size is large enough so that there is a 95 percent chance that the actual error rate for all applications is not less than 2 percentage points less than the error rate found in the sample (i.e., the lower bound of the one-sided 95 percent confidence interval is no more than 2 percentage points less than the point estimate). In addition, the State agency shall determine the need for follow-up reviews and base fiscal action upon the error rate found in the sample.

(*3*) Evaluate whether the previous year's eligibility determinations are used after 30 operating days following the first day of school, or as otherwise established by the State agency; provided that the State agency-developed timeframe does not exceed the 30 operating day limit.

(*4*) In the case where children are determined eligible for free lunches based on documentation from the local food stamp, Food Distribution Program on

Indian Reservations (FDPIR) or Temporary Assistance for Needy Families (TANF) office which certifies that the children are currently members of households receiving benefits under the Food Stamp Program, FDPIR or TANF, determine that the certification from the Food Stamp Program, FDPIR or TANF is official; all the information required under §245.6 of this part is complete; and such children were enrolled in the school under review during the review period.

(B) Evaluate the system for issuing benefits and updating eligibility status by validating the mechanism(s) the reviewed school uses to provide benefits to eligible children, e.g., master list. The State agency shall determine whether the system is adequate and, within the timeframes established in §210.7(c)(1)(ii)(B), reflects changes due to verification findings, transfers, reported changes in household size or income, or from a household's decision to decline school lunch benefits or any notification from the household that it is no longer certified to receive food stamp, Food Distribution Program for Households on Indian Reservations (FDPIR) or Temporary Assistance for Needy Families (TANF) benefits.

(C) Determine whether the lunch counting system yields correct claims. At a minimum, the State agency shall determine whether:

(*1*) The daily lunch counts, by type, for the review period are more than the product of the number of children determined by the school/school food authority to be eligible for free, reduced price, and paid lunches for the review period times an attendance factor. If the lunch count, for any type, appears questionable or significantly exceeds the product of the number of eligibles, for that type, times an attendance factor, documentation showing good cause must be available for review by the State agency.

(*2*) Each type of food service line provides accurate point of service lunch counts, by type, and those lunch counts are correctly counted and recorded. If an alternative counting system is employed (in accordance with §210.7(c)(2)), the State agency shall ensure that it provides accurate counts of reimbursable lunches, by type, and is correctly implemented as approved by the State agency.

(*3*) All lunches are correctly counted, recorded, consolidated and reported for the day they are served.

(ii) For each school food authority reviewed, the State agency shall review lunch count records to ensure that the lunch counts submitted by each reviewed school are correctly consolidated, recorded, and reported by the school food authority on the Claim for Reimbursement.

(2) *Performance Standard 2 (Lunches claimed for reimbursement within the school food authority contain meal elements (food items/components, menu items or other items, as applicable) as required under §210.10.* For each school reviewed, the State agency must:

(i) For the day of the review, observe the serving line(s) to determine whether all required meal elements (food items/components, menu items or other items, as applicable) as required under §210.10 are offered.

(ii) For the day of the review, observe a significant number of the Program lunches counted at the point of service for each type of serving line, to determine whether those lunches contain the required number of meal elements (food items/components, menu items or other items, as applicable) as required under §210.10.

(iii) Review menu records for the review period to determine whether all required meal elements (food items/components, menu items or other items, as applicable) as required under §210.10 have been offered.

(h) *General areas of review.* The general areas listed in this paragraph reflect major Program requirements. The general areas of review shall include, but are not limited to, the following areas:

(1) *Free and reduced price process.* In the course of the review of each school food authority, the State agency shall:

(i) Review the implementation of the free and reduced price policy statement to ensure it is implemented as approved.

(ii) Evaluate whether the required minimum number of applications are verified with respect to the selection method used.

(iii) Determine that applications for verification are selected in accordance with the applicable procedures in § 245.6a(c) of this chapter and that no discrimination exists in the selection process.

(iv) Establish that verification is completed by November 15 (or other date established in accordance with § 245.6a(b)(2)(i) or (b)(2)(ii) of this chapter) including any follow-up activities as required in § 245.6a(f)(6) of this chapter. If the administrative review occurs prior to the November 15 deadline, the State agency shall evaluate the verification activities that have occurred to date and assess whether these activities represent a good faith effort that will result in compliance with the requirements of § 245.6a of this title.

(v) Confirm that the verification process is complete for each application verified by or on behalf of the reviewed schools. Verification is considered complete either when a child's eligibility for the level of benefits for which he or she was approved is confirmed, changed to a higher level of benefit, or a letter of adverse action has been sent.

(vi) Ensure that verification records are maintained as required by § 245.6a(i) of this chapter.

(vii) Determine that, for each reviewed school, the lunch count system does not overtly identify children eligible for free and reduced price lunches.

(viii) Review a representative sample of denied applications to evaluate whether the determining official correctly denied applicants for free and reduced price lunches.

(2) *Food quantities.* For each school reviewed, the State agency must observe a significant number of Program lunches counted at the point of service for each type of serving line to determine whether those lunches appear to provide meal elements (food items/components, menu items or other items, as applicable) in the quantities required under § 210.10. If visual observation suggests that quantities are insufficient, the State agency shall require the reviewed schools to provide documentation demonstrating that the required amounts of food were available for service for each day of the review period.

(3) *Civil rights.* The State agency shall examine the school food authority's compliance with the civil rights provisions specified in § 210.23(b) of this part.

(4) *Monitoring responsibilities.* The State agency shall ensure that the school food authority conducts on-site reviews in accordance with § 210.8(a)(1) of this part and monitors claims in accordance with § 210.8(a)(2) and (a)(3) of this part.

(5) *Reporting and recordkeeping.* The State agency shall determine that the school food authority submits reports and maintains records as required under 7 CFR parts 210 and 245.

(6) *Food safety.* The State Agency must examine records to confirm that each school food authority under its jurisdiction meets the food safety requirements of § 210.13.

(i) *Follow-up reviews.* All school food authorities found to have a critical area violation in excess of any one of the review thresholds specified in this paragraph are subject to follow-up reviews. State agencies shall notify FNS of the names of large school food authorities exceeding critical area review thresholds in accordance with paragraph (d)(2) of this section. The State agency shall conduct a first follow-up review of any large school food authority found on an administrative review to have critical area violations in excess of any one of the review thresholds. State agencies shall also conduct a first follow-up review of at least 25 percent of the small school food authorities found on a review to have critical area violations in excess of any one of the review thresholds. State agencies shall conduct additional follow-up reviews of any school food authority which has a critical area violation exceeding a review threshold on the first follow-up or any subsequent follow-up review regardless of whether such review is conducted by FNS or the State agency.

(1) *Selection of small school food authorities.* In determining which small school food authorities to include in the follow-up review sample, State agencies shall select those school food

authorities which have the most serious problems, including, but not limited to, systemic accountability problems, large overclaims, significant lunch pattern violations, etc.

(2) *Selection of schools.* (i) If the critical area violation(s) responsible for follow-up review activity are limited to school food authority level problems (e.g. centralized application processing or centralized kitchen), the State agency may limit the follow-up review to the school food authority level.

(ii) If the critical area violation(s) responsible for follow-up review activity were identified in the review of a school(s), then State agencies shall review at least the minimum number of schools required under paragraph (e)(1) of this section. State agencies shall meet the minimum number of schools requirement by selecting those schools found, on a previous review, to have significant critical area violations. If any additional schools must be selected to meet the minimum required number, the State agency shall select from those schools which meet State agency-developed criteria identified under paragraph (e)(2)(ii) of this section.

(3) *Review thresholds.* The review thresholds apply only to the critical areas of review and are designed to limit follow-up reviews to those school food authorities with serious problems. The provisions of paragraph (i) of this section apply when:

(i) For Performance Standard 1—

(A) A number of the reviewed schools in a school food authority, as specified in Table B, have an inadequate system for certification, issuing benefits or updating eligibility status; or for counting, recording, consolidating or reporting lunches, by type; or

(B) The school food authority has an inadequate system for consolidating lunch counts, by type, or for reporting claims; or, if applicable, for certification, issuing benefits or updating eligibility status.

(C) At the school and school food authority level, a system for certification, issuing benefits or updating eligibility status is inadequate if 10 percent or more (but not less than 100 lunches) of the free and reduced price lunches claimed for the review period (for any school reviewed) are claimed incorrectly due to errors of certification, benefit issuance or updating of eligibility status.

TABLE B

| Number of schools reviewed | Number of schools violating performance standard 1 |
|---|---|
| 1 to 5 | 1 |
| 6 to 10 | 2 |
| 11 to 20 | 3 |
| 21 to 30 | 4 |
| 31 to 40 | 5 |
| 41 to 50 | 6 |
| 51 to 60 | 7 |
| 61 to 70 | 8 |
| 71 to 80 | 9 |
| 81 to 90 | 10 |
| 91 to 100 | 11 |
| 101 or more | 11* |

*11 plus the number identified above for the appropriate increment.

(ii) For Performance Standard 2—10 percent or more of the total number of Program lunches observed in a school food authority are missing one or more of the required meal elements (food items/components, menu items or other items, as applicable) as required under § 210.10.

(4) *Scope of follow-up reviews.* On any follow-up review, the State agency is encouraged to review all of the critical and general areas of review specified in paragraph (g) and (h) of this section for those schools which were not reviewed during the administrative review. At a minimum, the State agency shall:

(i) For each school selected for review (or for the school food authority, as applicable,) review the critical areas for which the review thresholds were exceeded by the school food authority on a previous review;

(ii) Determine whether the school food authority has satisfactorily completed the corrective actions in accordance with paragraph (k) of this section required for both critical and general areas within the timeframes established by the State agency;

(iii) Evaluate whether these corrective actions resolved the problem(s); and

(iv) If the State agency did not evaluate the certification, count and milk/meal service procedures for the School Breakfast Program (7 CFR part 220) and/or the Special Milk Program for Children (7 CFR part 215) or offering

meal supplements in after hour care programs (7 CFR part 210) in those schools selected for the administrative review and participating in those Programs, the State agency shall do so for those schools selected for the first follow-up review.

(5) *Critical area violations identified in a follow-up review.* Critical area violations identified on a follow-up review shall be addressed as follows:

(i) If, during a follow-up review, the State agency determines, that corrective actions have not been satisfactorily completed in accordance with the documented corrective action, the State agency shall: require the school food authority to resolve the problems and to submit documented corrective action to the State agency ; take fiscal action for critical area violations as specified in paragraph (m) of this section; and withhold Program payments in accordance with paragraph (l) of this section, until such time as a follow-up review, requested by the school food authority, indicates the problem has been corrected. If the State agency determines that the corrective actions have been completed as specified in the documented corrective action, but those corrective actions do not effectively resolve the problem, the State agency shall follow the requirements for new critical area violations specified in paragraphs (i)(5)(ii) and (iii) of this section.

(ii) If new critical area violations are observed that exceed a review threshold, the State agency shall: Require the school food authority to resolve the problems and to submit documented corrective action to the State agency; take fiscal action as specified in paragraph (m) of this section; and conduct a follow-up review within 6 operating months of the first follow-up review.

(iii) If new critical area violations are observed which do not exceed review thresholds, the State agency shall: Require the school food authority to resolve the problem and to submit documented corrective action to the State agency within specified timeframes; and take fiscal action in accordance with paragraph (m) of this section. If adequate documented corrective action is not received within those timeframes, the State agency shall withhold Program payments in accordance with paragraph (l) of this section, until such time as adequate documented corrective action is received.

(6) *General area violations identified in a follow-up review.* General area violations identified in a follow-up review shall be addressed as follows:

(i) If, during a follow-up review, the State agency determines that corrective actions have not been taken in accordance with the documented corrective action, the State agency shall withhold Program payments in accordance with paragraph (l) of this section, until such time as the State agency receives adequate documented corrective action.

(ii) If the State agency determines that the corrective actions taken did not effectively resolve the problem, or if new general area violations are observed on a follow-up review, the State agency shall require the school food authority to resolve the problem and to submit documented corrective action to the State agency within specified timeframes. If adequate documented corrective action is not received within those timeframes, the State agency shall withhold Program payments in accordance with paragraph (l) of this section, until such time as adequate documented corrective action is received.

(7) *Exceptions.* FNS may, on an individual school food authority basis, approve written requests for exceptions to the follow-up review requirement specified in paragraph (i)(1) of this section if FNS determines that the requirement conflicts with efficient State agency management of the program.

(j) *Exit conference and notification.* The State agency shall hold an exit conference at the close of the administrative review and of any subsequent follow-up review to discuss the violations observed, the extent of the violations and a preliminary assessment of the actions needed to correct the violations. The State agency shall discuss an appropriate deadline(s) for completion of corrective action, provided that the deadline(s) results in the completion of corrective action on a timely

basis. After every review, the State agency shall provide written notification of the review findings to the school food authority's Superintendent (or equivalent in a non-public school food authority) or authorized representative. The written notification shall include the review findings, the needed corrective actions, the deadlines for completion of the corrective action, and the potential fiscal action. As a part of the denial of all or a part of a Claim for Reimbursement or withholding payment in accordance with the provisions of this section, the State agency shall provide the school food authority a written notice which details the grounds on which the denial of all or a part of the Claim for Reimbursement or withholding payment is based. This notice, which shall be sent by certified mail, return receipt requested, shall also include a statement indicating that the school food authority may appeal the denial of all or a part of a Claim for Reimbursement or withholding payment and the entity (i.e., FNS or State agency) to which the appeal should be directed. The State agency shall notify the school food authority, in writing, of the appeal procedures as specified in §210.18(q) for appeals of State agency findings, and for appeals of FNS findings, provide a copy of §210.29(d)(3) of the regulations.

(k) *Corrective action.* Corrective action is required for any violation under either the critical or general areas of the review. Corrective action shall be applied to all schools in the school food authority, as appropriate, to ensure that previously deficient practices and procedures are revised system-wide.

Corrective actions may include training, technical assistance, recalculation of data to ensure the correctness of any claim that the school food authority is preparing at the time of the review, or other actions. Fiscal action shall be taken in accordance with paragraph (m) of this section.

(1) *Extensions of the timeframes.* If extraordinary circumstances arise where a school food authority is unable to complete the required corrective action within the timeframes specified by the State agency, the State agency may extend the timeframes upon written request of the school food authority.

(2) *Documented corrective action.* Documented corrective action is required for any degree of violation of general or critical areas identified in an administrative review or on any follow-up review. Documented corrective action may be provided at the time of the review; however, it shall be postmarked or submitted to the State agency no later than 30 days from the deadline for completion of each required corrective action, as specified under paragraph (j) of this section or as otherwise extended by the State agency under paragraph (k)(1) of this section. The State agency shall maintain any documented corrective action on file for review by FNS.

(l) *Withholding payment.* At a minimum, the State agency shall withhold Program payments to a school food authority as follows:

(1) *Cause.* (i) The State agency shall withhold all Program payments to a school food authority if documented corrective action for critical area violation(s) which exceed the review threshold(s) is not provided within the deadlines specified in paragraph (k)(2) of this section; and/or

(ii) The State agency shall withhold all Program payments to a school food authority if, in the event that a follow-up review is not conducted, the State agency finds that corrective action for a critical area violation which exceeded the review threshold was not completed within the deadlines specified in paragraph (j) of this section or as otherwise extended by the State agency under paragraph (k)(1) of this section; and/or

(iii) The State agency shall withhold all Program payments to a school food authority if, on a follow-up review, the State agency finds a critical area violation which exceeded the review threshold on a previous review and continues to exceed the review threshold on a follow-up review.

(iv) The State agency may withhold payments at its discretion, if the State agency finds that documented corrective action is not provided within the deadlines specified in paragraph (k)(2) of this section, that corrective action is not complete or that corrective action was not taken as specified in the

documented corrective action for a general area violation or for a critical area violation which did not exceed the review threshold.

(2) *Duration.* In all cases, Program payments shall be withheld until such time as corrective action is completed, and documented corrective action is received and deemed acceptable by the State agency or as otherwise specified in paragraph (i)(5) of this section. Subsequent to the State agency's acceptance of the corrective actions (and a follow-up review, when required), payments will be released for all lunches served in accordance with the provisions of this part during the period the payments were withheld. In very serious cases, the State agency will evaluate whether the degree of non-compliance warrants termination in accordance with § 210.25 of this part.

(3) *Exceptions.* The State agency may, at its discretion, reduce the amount required to be withheld from a school food authority pursuant to paragraph (l)(1)(i) through (iii) of this section by as much as 60 percent of the total Program payments when it is determined to be in the best interest of the Program. FNS may authorize a State agency to limit withholding of funds to an amount less than 40 percent of the total Program payments, if FNS determines such action to be in the best interest of the Program.

(4) *Failure to withhold payments.* FNS may suspend or withhold Program payments, in whole or in part, to those State agencies failing to withhold Program payments in accordance with paragraph (l)(1) of this section and may withhold administrative funds in accordance with § 235.11(b) of this title. The withholding of Program payments will remain in effect until such time as the State agency documents compliance with paragraph (l)(1) of this section to FNS. Subsequent to the documentation of compliance, any withheld administrative funds will be released and payment will be released for any lunches served in accordance with the provisions of this part during the period the payments were withheld.

(m) *Fiscal action.* For purposes of the critical areas of the administrative review and any follow-up reviews, fiscal action is required for all violations of Performance Standards 1 and 2. Except that, on an administrative review, the State agency may limit fiscal action from the point corrective action occurs back through the beginning of the review period for errors identified under paragraphs (g)(1)(i)(A) and (g)(1)(i)(B) of this section, provided corrective action occurs. Fiscal action shall be taken in accordance with the provisions identified under § 210.19(c) of this part.

(n) *Miscellaneous reporting requirement.* Each State agency shall report to FNS the results of reviews by March 1 of each school year, on a form designated by FNS. In such annual reports, the State agency shall include the results of all administrative reviews and follow-up reviews conducted in the preceding school year.

(o) *Summary of reporting requirements.* Each State agency shall report to FNS:

(1) The names of those large school food authorities exceeding any one of the critical area review thresholds as described in paragraph (d)(2) of this section.

(2) The results of reviews by March 1 of each school year on a form designated by FNS, as specified under paragraph (n) of this section.

(p) *Recordkeeping.* Each State agency shall keep records which document the details of all reviews and demonstrate the degree of compliance with the critical and general areas of review. Records shall be retained by the State agency as specified in § 210.23(c) of this part. Such records shall include documentation of administrative reviews and follow-up reviews. As appropriate, the records shall include documented corrective action, and documentation of withholding of payments and fiscal action, including recoveries made. Additionally, the State agency must have on file:

(1) Criteria for selecting schools on first and follow-up reviews in accordance with paragraphs (e)(2)(ii) and (i)(2)(ii) of this section.

(2) Its system for selecting small school food authorities for follow-up reviews in accordance with paragraph (i)(1) of this section.

(3) Documentation demonstrating compliance with the statistical sampling requirements in accordance with

paragraph (g)(1)(i)(A)(1) of this section, if applicable.

(q) *School food authority appeal of State agency findings.* Except for FNS-conducted reviews authorized under § 210.29(d)(2), each State agency shall establish an appeal procedure to be followed by a school food authority requesting a review of a denial of all or a part of the Claim for Reimbursement or withholding payment arising from administrative or follow-up review activity conducted by the State agency under § 210.18 of this part. State agencies may use their own appeal procedures provided the same procedures are applied to all appellants in the State and the procedures meet the following requirements: appellants are assured of a fair and impartial hearing before an independent official at which they may be represented by legal counsel; decisions are rendered in a timely manner not to exceed 120 days from the date of the receipt of the request for review; appellants are afforded the right to either a review of the record with the right to file written information, or a hearing which they may attend in person; and adequate notice is given of the time, date, place and procedures of the hearing. If the State agency has not established its own appeal procedures or the procedures do not meet the above listed criteria, the State agency shall observe the following procedures at a minimum:

(1) The written request for a review shall be postmarked within 15 calendar days of the date the appellant received the notice of the denial of all or a part of the Claim for Reimbursement or withholding of payment, and the State agency shall acknowledge the receipt of the request for appeal within 10 calendar days;

(2) The appellant may refute the action specified in the notice in person and by written documentation to the review official. In order to be considered, written documentation must be filed with the review official not later than 30 calendar days after the appellant received the notice. The appellant may retain legal counsel, or may be represented by another person. A hearing shall be held by the review official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review. Failure of the appellant school food authority's representative to appear at a scheduled hearing shall constitute the appellant school food authority's waiver of the right to a personal appearance before the review official, unless the review official agrees to reschedule the hearing. A representative of the State agency shall be allowed to attend the hearing to respond to the appellant's testimony and to answer questions posed by the review official;

(3) If the appellant has requested a hearing, the appellant and the State agency shall be provided with at least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time, date and place of the hearing;

(4) Any information on which the State agency's action was based shall be available to the appellant for inspection from the date of receipt of the request for review;

(5) The review official shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section;

(6) The review official shall make a determination based on information provided by the State agency and the appellant, and on Program regulations;

(7) Within 60 calendar days of the State agency's receipt of the request for review, by written notice, sent by certified mail, return receipt requested, the review official shall inform the State agency and the appellant of the determination of the review official. The final determination shall take effect upon receipt of the written notice of the final decision by the school food authority;

(8) The State agency's action shall remain in effect during the appeal process;

(9) The determination by the State review official is the final administrative determination to be afforded to the appellant.

(r) *FNS review activity.* The term "State agency" and all the provisions specified in paragraphs (a)–(h) of this section refer to FNS when FNS conducts administrative reviews or follow-

up reviews in accordance with §210.29(d)(2). FNS will notify the State agency of the review findings and the need for corrective action and fiscal action. The State agency shall pursue any needed follow-up activity.

[56 FR 32942, July 17, 1991; 56 FR 55527, Oct. 28, 1991, as amended at 57 FR 38584, Aug. 26, 1992; 57 FR 40729, Sept. 4, 1992; 59 FR 1894, Jan. 13, 1994; 60 FR 31215, June 13, 1995; 60 FR 57147, Nov. 14, 1995; 64 FR 50740, 50741, Sept. 20, 1999; 64 FR 72471, Dec. 28, 1999; 65 FR 26922, May 9, 2000; 73 FR 76858, Dec. 18, 2008; 74 FR 66216, Dec. 15, 2009]

### §210.19 Additional responsibilities.

(a) *General Program management.* Each State agency shall provide an adequate number of consultative, technical and managerial personnel to administer programs and monitor performance in complying with all Program requirements.

(1) *Compliance with nutrition standards.* (i) Beginning with School Year 1996–1997, State agencies shall evaluate compliance, over the school week, with the nutrition standards for lunches and, as applicable, for breakfasts. Review activity may be confined to lunches served under the Program unless a menu planning approach is used exclusively in the School Breakfast Program or unless the school food authority only offers breakfasts under the School Breakfast Program. For lunches, compliance with the requirements in §210.10(b) and §210.10(c), (d), or (i)(1) or the procedures developed under §210.10(l), as applicable, is assessed. For breakfasts, see §220.13(f)(3) of this chapter.

(A) These evaluations may be conducted at the same time a school food authority is scheduled for an administrative review in accordance with §210.18. State agencies may also conduct these evaluations in conjunction with technical assistance visits, other reviews, or separately.

(B) The type of evaluation conducted by the State agency shall be determined by the menu planning approach chosen by the school food authority. At a minimum, the State agency shall review at least one school for each type of menu planning approach used in the school food authority.

(C) In addition, State agencies are encouraged to review breakfasts offered under the School Breakfast Program as well if the school food authority requires technical assistance from the State agency to meet the nutrition standards or if corrective action is needed. Such review shall determine compliance with the appropriate requirements in §220.13(f)(3) of this chapter and may be done at the time of the initial review or as part of a follow-up to assess compliance with the nutrition standards.

(ii) At a minimum, State agencies shall conduct evaluations of compliance with the nutrition standards in §§210.10 and 220.8 of this Chapter at least once during each 5-year review cycle provided that each school food authority is evaluated at least once every 6 years, *except that* the first cycle shall begin July 1, 1996, and shall end on June 30, 2003. The compliance evaluation for the nutrition standards shall be conducted on the menu for any week of the current school year in which such evaluation is conducted. The week selected must continue to represent the current menu planning approach(es).

(iii) For school food authorities choosing the nutrient standard or assisted nutrient standard menu planning approaches provided in §210.10(i), §210.10(j), §220.8(e) or §220.8(f) of this chapter, or developed under the procedures in §210.10(l) or §220.8(h) of this chapter, the State agency shall assess the nutrient analysis to determine if the school food authority is properly applying the methodology in these paragraphs, as applicable. Part of this assessment shall be an independent review of menus and production records to determine if they correspond to the analysis conducted by the school food authority and if the menu, as offered, over a school week, corresponds to the nutrition standards set forth in §210.10(b) and the appropriate calorie and nutrient levels in §210.10(c) or §210.10(i)(1), whichever is applicable.

(iv) For school food authorities choosing the food-based menu planning approaches provided in §210.10(k) or §220.8(g) of this chapter or developed under the procedures in §210.10(l) or §220.8(h) of this chapter, the State

agency must determine if the nutrition standards in §§ 210.10 and 220.8 of this chapter are met. The State agency shall conduct a nutrient analysis in accordance with the procedures in § 210.10(i) or § 220.8(e) of this chapter, as appropriate, except that the State agency may:

(A) Use the nutrient analysis of any school or school food authority that offers lunches or breakfasts using the food-based menu planning approaches provided in §§ 210.10(k) and 220.8(g) of this chapter and that conducts its own nutrient analysis under the criteria for such analysis established in §§ 210.10 and 220.8 of this chapter for the nutrient standard and assisted nutrient standard menu planning approaches; or

(B) Develop its own method for compliance reviews, subject to USDA approval.

(v) If the menu for the school week fails to comply with the nutrition standards specified in § 210.10(b) and/or § 220.8(a) and the appropriate nutrient levels in either § 210.10(c), § 210.10(d), or § 210.10(i)(1) whichever is applicable, and/or § 220.8(b), § 220.8(c) or § 220.8(e)(1) of this chapter, whichever is applicable, the school food authority shall develop, with the assistance and concurrence of the State agency, a corrective action plan designed to rectify those deficiencies. The State agency shall monitor the school food authority's execution of the plan to ensure that the terms of the corrective action plan are met.

(vi) For school food authorities following an alternate approach as provided under § 210.10(l) or § 220.8(h) of this chapter that does not allow for use of the monitoring procedures in paragraphs (a)(1)(ii) or (a)(1)(iii) of this section, the State agency shall monitor compliance following the procedures developed in accordance with § 210.10(l) or § 220.8(h) of this chapter, whichever is appropriate.

(vii) If a school food authority fails to meet the terms of the corrective action plan, the State agency shall determine if the school food authority is working in good faith towards compliance and, if so, may renegotiate the corrective action plan, if warranted. However, if the school food authority has not been acting in good faith to meet the terms of the corrective action plan and refuses to renegotiate the plan, the State agency shall determine if a disallowance of reimbursement funds as authorized under paragraph (c) of this section is warranted.

(2) *Assurance of compliance for finances.* Each State agency shall ensure that school food authorities comply with the requirements to account for all revenues and expenditures of their nonprofit school food service. School food authorities shall meet the requirements for the allowability of nonprofit school food service expenditures in accordance with this part and, 7 CFR part 3015 and 7 CFR part 3016, or 7 CFR part 3019, as applicable. All costs resulting from contracts that do not meet the requirements of this part are unallowable nonprofit school food service account expenses. When the school food authority fails to incorporate State agency required changes to solicitation or contract documents, all costs resulting from the subsequent contract award are unallowable charges to the nonprofit school food service account. The State agency shall ensure compliance with the requirements to limit net cash resources and shall provide for approval of net cash resources in excess of three months' average expenditures. Each State agency shall monitor, through review or audit or by other means, the net cash resources of the nonprofit school food service in each school food authority participating in the Program. In the event that net cash resources exceed 3 months' average expenditures for the school food authority's nonprofit school food service or such other amount as may be approved in accordance with this paragraph, the State agency may require the school food authority to reduce the price children are charged for lunches, improve food quality or take other action designed to improve the nonprofit school food service. In the absence of any such action, the State agency shall make adjustments in the rate of reimbursement under the Program.

(3) *Improved management practices.* The State agency shall work with the school food authority toward improving the school food authority's management practices where the State agency has found poor food service

management practices leading to decreasing or low child participation and/or poor child acceptance of the Program or of foods served. If a substantial number of children who routinely and over a period of time do not favorably accept a particular item that is offered; return foods; or choose less than all food items/components or foods and menu items, as authorized under §210.10, poor acceptance of certain menus may be indicated.

(4) *Program compliance.* Each State agency shall require that school food authorities comply with the applicable provisions of this part. The State agency shall ensure compliance through audits, administrative reviews, technical assistance, training guidance materials or by other means.

(5) *Investigations.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. State agencies shall maintain on file, evidence of such investigations and actions. FNS and OIG may make reviews or investigations at the request of the State agency or where FNS or OIG determines reviews or investigations are appropriate.

(6) *Food service management companies.* Each State agency shall annually review each contract (including all supporting documentation) between any school food authority and food service management company to ensure compliance with all the provisions and standards set forth in this part before execution of the contract by either party. When the State agency develops a prototype contract for use by the school food authority that meets the provisions and standards set forth in this part, this annual review may be limited to changes made to that contract. Each State agency shall review each contract amendment between a school food authority and food service management company to ensure compliance with all the provisions and standards set forth in this part before execution of the amended contract by either party. The State agency may establish due dates for submission of the contract or contract amendment documents. Each State agency shall perform an on-site review of each school food authority contracting with a food service management company, at least once during each 5-year period. The State agency is encouraged to conduct such a review when performing reviews in accordance with §210.18. Such reviews shall include an assessment of the school food authority's compliance with §210.16 of this part. The State agency may require that all food service management companies that wish to contract for food service with any school food authority in the State register with the State agency. State agencies shall provide assistance upon request of a school food authority to assure compliance with Program requirements.

(b) *Donated food distribution information.* Information on schools eligible to receive donated foods available under section 6 of the National School Lunch Act (42 U.S.C. 1755) shall be prepared each year by the State agency with accompanying information on the average daily number of lunches to be served in such schools. This information shall be prepared as early as practicable each school year and forwarded no later than September 1 to the Distributing agency. The State agency shall be responsible for promptly revising the information to reflect additions or deletions of eligible schools, and for providing such adjustments in participation as are determined necessary by the State agency. Schools shall be consulted by the Distributing agency with respect to the needs of such schools relating to the manner of selection and distribution of commodity assistance.

(c) *Fiscal action.* State agencies are responsible for ensuring Program integrity at the school food authority level. State agencies shall take fiscal action against school food authorities for Claims for Reimbursement that are not properly payable under this part including, if warranted, the disallowance of funds for failure to take corrective action in accordance with paragraph (a)(1) of this section. In taking fiscal action, State agencies shall use their own procedures within the constraints of this part and shall maintain all records pertaining to action taken under this section. The State agency may refer to FNS for assistance in

making a claims determination under this part.

(1) *Definition.* Fiscal action includes, but is not limited to, the recovery of overpayment through direct assessment or offset of future claims, disallowance of overclaims as reflected in unpaid Claims for Reimbursement, submission of a revised Claim for Reimbursement, and correction of records to ensure that unfiled Claims for Reimbursement are corrected when filed. Fiscal action also includes disallowance of funds for failure to take corrective action in accordance with paragraph (a)(1) of this section.

(2) *General principles.* When taking fiscal action, State agencies shall consider the following:

(i) The State agency shall identify the school food authority's correct entitlement and take fiscal action when any school food authority claims or receives more Federal funds than earned under § 210.7 of this part. In order to take fiscal action, the State agency shall identify accurate counts of reimbursable lunches through available data, if possible. In the absence of reliable data, the State agency shall reconstruct the lunch accounts in accordance with procedures established by FNS. Such procedures will be based on the best available information including, participation factors for the review period, data from similar schools in the school food authority, etc.

(ii) Unless otherwise specified under § 210.18(m) of this part, fiscal action shall be extended back to the beginning of the school year or that point in time during the current school year when the infraction first occurred, as applicable. Based on the severity and longevity of the problem, the State agency may extend fiscal action back to previous school years, as applicable. The State agency shall ensure that any Claim for Reimbursement, filed subsequent to the reviews conducted under § 210.18 and prior to the implementation of corrective action, is limited to lunches eligible for reimbursement under this part.

(iii) In taking fiscal action, State agencies shall assume that children determined by the reviewer to be incorrectly approved for free and reduced price lunches participated at the same rate as correctly approved children in the corresponding lunch category.

(3) *Failure to collect.* If a State agency fails to disallow a claim or recover an overpayment from a school food authority, as described in this section, FNS will notify the State agency that a claim may be assessed against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning overpayment. If after considering all available information, FNS determines that a claim is warranted, FNS will assess a claim in the amount of such overpayment against the State agency. If the State agency fails to pay any such demand for funds promptly, FNS will reduce the State agency's Letter of Credit by the sum due in accordance with FNS' existing offset procedures for Letter of Credit. In such event, the State agency shall provide the funds necessary to maintain Program operations at the level of earnings from a source other than the Program.

(4) *Interest charge.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit, interest will be charged against the State agency from the date the demand leter was sent, at the rate established by the Secretary of Treasury.

(5) *Use of recovered payment.* The amounts recovered by the State agency from school food authorities may be utilized during the fiscal year for which the funds were initially available, first, to make payments to school food authorities for the purposes of the Program; and second, to repay any State funds expended in the reimbursement of claims under the Program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of this part.

(6) *Exceptions.* The State agency need not disallow payment or collect an overpayment arising out of the situations described in paragraphs (c)(6) (i) and (ii) of this section; provided that the school food authority corrects the problem(s) to the satisfaction of the State agency:

(i) When any review or audit reveals that a school food authority is failing

to meet the quantities for each meal element (food item/component, menu item or other items, as applicable) as required under § 210.10.

(ii) When any review or audit reveals that a school food authority is approving applications which indicate that the households' incomes are within the Income Eligibility Guidelines issued by the Department or the applications contain food stamp or TANF case numbers or FDPIR case numbers or other FDPIR identifiers but the applications are missing the information specified in paragraph (1)(ii) of the definition of *Documentation* in § 245.2 of this chapter; or

(iii) when any review or audit reveals that a school food authority's failure to meet the nutrition standards of § 210.10 is unintentional and the school food authority is meeting the requirements of a corrective plan developed and agreed to under paragraph (a)(1)(iii) of this section.

(7) *Claims adjustment.* FNS will have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. FNS will also have the authority to waive such claims if FNS determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of title 28, U.S. Code, to conduct litigation on behalf of the United States.

(d) *Management evaluations.* Each State agency shall provide FNS with full opportunity to conduct management evaluations of all State agency Program operations and shall provide OIG with full opportunity to conduct audits of all State agency Program operations. Each State agency shall make available its records, including records of the receipt and disbursement of funds under the Program and records of any claim compromised in accordance with this paragraph, upon a reasonable request by FNS, OIG, or the Comptroller General of the United States. FNS and OIG retain the right to visit schools and OIG also has the right to make audits of the records and operations of any school. In conducting management evaluations, reviews, or audits in a fiscal year, the State agency, FNS, or OIG may disregard an overpayment if the overpayment does not exceed $600. A State agency may establish, through State law, regulation or procedure, an alternate disregard threshold that does not exceed $600. This disregard may be made once per each management evaluation, review, or audit per Program within a fiscal year. However, no overpayment is to be disregarded where there is substantial evidence of violations of criminal law or civil fraud statutes.

(e) *Additional requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provisions of this part.

(f) *Cooperation with the Child and Adult Care Food Program.* On an annual basis, the State agency shall provide the State agency which administers the Child and Adult Care Food Program with a list of all elementary schools in the State participating in the National School Lunch Program in which 50 percent or more of enrolled children have been determined eligible for free or reduced price meals as of the last operating day of the previous October, or other month specified by the State agency. The first list shall be provided by March 15, 1997; subsequent lists shall be provided by February 1 of each year or, if data is based on a month other than October, within 90 calendar days following the end of the month designated by the State agency. The State agency may provide updated free and reduced price enrollment data on individual schools to the State agency which administers the Child and Adult Care Food Program only when unusual circumstances render the initial data obsolete. In addition, the State agency shall provide the current list, upon request, to sponsoring organizations of day care homes participating in the Child and Adult Care Food Program.

[53 FR 29147, Aug. 2, 1988]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 210.19, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 210.20 Reporting and recordkeeping.

(a) *Reporting summary.* Participating State agencies shall submit forms and reports to FNS to demonstrate compliance with Program requirements. The reports include but are not limited to:

(1) Requests for cash to make reimbursement payments to school food authorities as required under § 210.5(a);

(2) Information on the amounts of Federal Program funds expended and obligated to date (SF–269) as required under § 210.5(d);

(3) Statewide totals on Program participation (FNS–10) as required under § 210.5(d);

(4) Information on State funds provided by the State to meet the State matching requirements (FNS–13) specified under § 210.17(g);

(5) The names of school food authorities in need of a follow-up review;

(6) Results of reviews and audits;

(7) Results of the commodity preference survey and recommendations for commodity purchases as required under § 250.13(k) of this chapter; and

(8) Results of the State agency's review of schools' compliance with the food safety inspection requirement in § 210.13(b) by November 15 following each of school years 2005–2006 through 2008–2009, beginning November 15, 2006. The report will be based on data supplied by the school food authorities in accordance with § 210.15(a)(7).

(b) *Recordkeeping summary.* Participating State agencies are required to maintain records to demonstrate compliance with Program requirements. The records include but are not limited to:

(1) Accounting records and source documents to control the receipt, custody and disbursement of Federal Program funds as required under § 210.5(a);

(2) Documentation supporting all school food authority claims paid by the State agency as required under § 210.5(d);

(3) Documentation to support the amount the State agency reported having used for State revenue matching as required under § 210.17(h);

(4) Records supporting the State agency's review of net cash resources as required under § 210.19(a);

(5) Reports on the results of investigations of complaints received or irregularities noted in connection with Program operations as required under § 210.19(a)

(6) Records of all reviews and audits, including records of action taken to correct Program violations; and records of fiscal action taken, including documentation of recoveries made;

(7) State agency criteria for selecting schools for reviews and small school food authorities for follow-up reviews;

(8) Documentation of action taken to disallow improper claims submitted by school food authorities, as required by § 210.19(c) and as determined through claims processing, resulting from actions such as reviews, audits and USDA audits;

(9) Records of USDA audit findings, State agency's and school food authorities' responses to them and of corrective action taken as required by § 210.22(a);

(10) Records pertaining to civil rights responsibilities as defined under § 210.23(b);

(11) Records pertaining to the annual food preference survey of school food authorities as required by § 250.13(k) of this chapter; and

(12) Records supplied by the school food authorities showing the number of food safety inspections obtained by schools for each of school years 2005–2006 through 2008–2009.

[53 FR 29147, Aug. 2, 1988, as amended at 56 FR 32948, July 17, 1991; 56 FR 55527, Oct. 28, 1991; 64 FR 50741, Sept. 20, 1999; 70 FR 34630, June 15, 2005]

## Subpart E—State Agency and School Food Authority Responsibilities

### § 210.21 Procurement.

(a) *General.* State agencies and school food authorities shall comply with the requirements of this part and 7 CFR part 3016 or 7 CFR part 3019, as applicable, which implement the applicable Office of Management and Budget Circulars, concerning the procurement of all goods and services with nonprofit school food service account funds.

(b) *Contractual responsibilities.* The standards contained in this part and 7 CFR part 3015, 7 CFR part 3016 and 7 CFR part 3019, as applicable, do not relieve the State agency or school food

authority of any contractual responsibilities under its contracts. The State agency or school food authority is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State, or Federal authority that has proper jurisdiction.

(c) *Procedures.* The State agency may elect to follow either the State laws, policies and procedures as authorized by §§3016.36(a) and 3016.37(a) of this title, or the procurement standards for other governmental grantees and all governmental subgrantees in accordance with §3016.36(b) through (i) of this title. Regardless of the option selected, States must ensure that all contracts include any clauses required by Federal statutes and executive orders and that the requirements of §3016.60(b) and (c) of this title are followed. A school food authority may use its own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements made with nonprofit school food service account funds adhere to the standards set forth in this part and §§3016.36(b) through 3016.36(i), 3016.60 and 3019.40 through 3019.48 of this title, as applicable, and in the applicable Office of Management and Budget Circulars. School food authority procedures must include a written code of standards of conduct meeting the minimum standards of §3016.36(b)(3) or §3019.42 of this title, as applicable.

(1) *Pre-issuance review requirement.* The State agency may impose a pre-issuance review requirement on a school food authority's proposed procurement. The school food authority must make available, upon request by the State agency, its procurement documents, including but not limited to solicitation documents, specifications, evaluation criteria, procurement procedures, proposed contracts and contract terms. School food authorities shall comply with State agency requests for changes to procurement procedures and solicitation and contract documents to ensure that, to the State agency's satisfaction, such procedures and documents reflect applicable procurement and contract requirements and the requirements of this part.

(2) *Prototype solicitation documents and contracts.* The school food authority must obtain the State agency's prior written approval for any change made to prototype solicitation or contract documents before issuing the revised solicitation documents or execution of the revised contract.

(3) *Prohibited expenditures.* No expenditure may be made from the nonprofit school food service account for any cost resulting from a procurement failing to meet the requirements of this part.

(d) *Buy American*—(1) *Definition of domestic commodity or product.* In this paragraph (d), the term 'domestic commodity or product' means—

(i) An agricultural commodity that is produced in the United States; and

(ii) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

(2) *Requirement.* (i) *In general.* Subject to paragraph (d)(2)(ii) of this section, the Department shall require that a school food authority purchase, to the maximum extent practicable, domestic commodities or products.

(ii) *Limitations.* Paragraph (d)(2)(i) of this section shall apply only to—

(A) A school food authority located in the contiguous United States; and

(B) A purchase of domestic commodity or product for the school lunch program under this part.

(3) *Applicability to Hawaii.* Paragraph (d)(2)(i) of this section shall apply to a school food authority in Hawaii with respect to domestic commodities or products that are produced in Hawaii in sufficient quantities to meet the needs of meals provided under the school lunch program under this part.

(e) *Restrictions on the sale of milk.* A school food authority participating in the Program, or a person approved by a school participating in the Program, must not directly or indirectly restrict the sale or marketing of fluid milk (as described in paragraph (m)(1)(ii) of this

section) at any time or in any place on school premises or at any school-sponsored event.

(f) *Cost reimbursable contracts*—(1) *Required provisions.* The school food authority must include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts:

(i) Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority;

(ii)(A) The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food service account) and the amount that is unallowable (cannot be paid from the nonprofit school food service account); or

(B) The contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;

(iii) The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars;

(iv) The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the school food authority for payment and individually identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State agency, the school food authority may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually;

(v) The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and

(vi) The contractor must maintain documentation of costs and discounts, rebates and other applicable credits, and must furnish such documentation upon request to the school food authority, the State agency, or the Department.

(2) *Prohibited expenditures.* No expenditure may be made from the nonprofit school food service account for any cost resulting from a cost reimbursable contract that fails to include the requirements of this section, nor may any expenditure be made from the nonprofit school food service account that permits or results in the contractor receiving payments in excess of the contractor's actual, net allowable costs.

[53 FR 29147, Aug. 2, 1988, as amended at 64 FR 50741, Sept. 20, 1999; 70 FR 70033, Nov. 21, 2005; 71 FR 39516, July 13, 2006; 72 FR 61491, Oct. 31, 2007]

### § 210.22 Audits.

(a) *General.* Unless otherwise exempt, audits at the State and school food authority levels shall be conducted in accordance with Office of Management and Budget Circular A–133 and the Department's implementing regulations at 7 CFR part 3052. For availability of the OMB Circular mentioned in this paragraph, please refer to 5 CFR 1310.3.

(b) *Audit procedure.* These requirements call for organization-wide financial and compliance audits to ascertain whether financial operations are conducted properly; financial statements are presented fairly; recipients and subrecipients comply with the laws and regulations that affect the expenditures of Federal funds; recipients and subrecipients have established procedures to meet the objectives of federally assisted programs; and recipients and subrecipients are providing accurate and reliable information concerning grant funds. States and school food authorities shall use their own procedures to arrange for and prescribe the scope of independent audits, provided that such audits comply with the

requirements set forth in 7 CFR part 3015.

[53 FR 29147, Aug. 2, 1988, as amended at 71 FR 39516, July 13, 2006]

### § 210.23 Other responsibilities.

(a) *Free and reduced price lunches and meal supplements.* State agencies and school food authorities shall ensure that lunches and meal supplements are made available free or at a reduced price to all children who are determined by the school food authority to be eligible for such benefits. The determination of a child's eligibility for free or reduced price lunches and meal supplements is to be made in accordance with 7 CFR part 245.

(b) *Civil rights.* In the operation of the Program, no child shall be denied benefits or be otherwise discriminated against because of race, color, national origin, age, sex, or disability. State agencies and school food authorities shall comply with the requirements of: Title VI of the Civil Rights Act of 1964; title IX of the Education Amendments of 1972; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a, and 15b); and FNS Instruction 113–6.

(c) *Retention of records.* State agencies and school food authorities may retain necessary records in their original form or on microfilm. State agency records shall be retained for a period of 3 years after the date of submission of the final Financial Status Report for the fiscal year. School food authority records shall be retained for a period of 3 years after submission of the final Claim for Reimbursement for the fiscal year. In either case, if audit findings have not been resolved, the records shall be retained beyond the 3-year period as long as required for the resolution of the issues raised by the audit.

(d) *Data collection related to school food authorities.* (1) Each State agency must collect data related to school food authorities that have an agreement with the State agency to participate in the program for each of Federal fiscal years 2006 through 2009, including those school food authorities that participated only for part of the fiscal year. Such data shall include:

(i) The name of each school food authority;

(ii) The city in which each participating school food authority was headquartered and the name of the state;

(iii) The amount of funds provided to the participating organization, i.e., the amount of federal funds reimbursed to each participating school food authority; and

(iv) The type of participating organization, e.g., government agency, educational institution, non-profit organization/secular, non-profit organization/faith-based, and "other."

(2) On or before August 31, 2007, and each subsequent year through 2010, State agencies must report to FNS data as specified in paragraph (d)(1) of this section for the prior Federal fiscal year. State agencies must submit this data in a format designated by FNS.

[53 FR 29147, Aug. 2, 1988, as amended at 58 FR 42489, Aug. 10, 1993; 64 FR 50741, Sept. 20, 1999; 72 FR 24183, May 2, 2007]

## Subpart F—Additional Provisions

### § 210.24 Withholding payments.

In accordance with Departmental regulations at §§ 3016.43 and 3019.62 of this title, the State agency shall withhold Program payments, in whole or in part, to any school food authority which has failed to comply with the provisions of this part. Program payments shall be withheld until the school food authority takes corrective action satisfactory to the State agency, or gives evidence that such corrective action will be taken, or until the State agency terminates the grant in accordance with § 210.25 of this part. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any lunches served in accordance with the provisions of this part during the period the payments were withheld.

[56 FR 32948, July 17, 1991, as amended at 71 FR 39516, July 13, 2006; 72 FR 61492, Oct. 31, 2007]

### § 210.25 Suspension, termination and grant closeout procedures.

Whenever it is determined that a State agency has materially failed to

comply with the provisions of this part, or with FNS guidelines and instructions, FNS may suspend or terminate the Program in whole, or in part, or take any other action as may be available and appropriate. A State agency may also terminate the Program by mutual agreement with FNS. FNS and the State agency shall comply with the provisions of 7 CFR part 3016 concerning grant suspension, termination and closeout procedures. Furthermore, the State agency shall apply these provisions, or the parallel provisions of 7 CFR part 3019, as applicable, to suspension or termination of the Program in school food authorities.

[53 FR 29147, Aug. 2, 1988. Redesignated at 56 FR 32948, July 17, 1991, and amended at 71 FR 39516, July 13, 2006]

### § 210.26 Penalties.

Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part whether received directly or indirectly from the Department, shall if such funds, assets, or property are of a value of $100 or more, be fined no more than $25,000 or imprisoned not more than 5 years or both; or if such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals, or retains for personal use or gain, funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties.

[53 FR 29147, Aug. 2, 1988. Redesignated at 56 FR 32948, July 17, 1991, as amended at 64 FR 50741, Sept. 20, 1999]

### § 210.27 Educational prohibitions.

In carrying out the provisions of the Act, the Department shall not impose any requirements with respect to teaching personnel, curriculum, instructions, methods of instruction, or materials of instruction in any school as a condition for participation in the Program.

[53 FR 29147, Aug. 2, 1988. Redesignated at 56 FR 32948, July 17, 1991, as amended at 64 FR 50741, Sept. 20, 1999]

### § 210.28 Pilot project exemptions.

Those State agencies or school food authorities selected for the pilot projects mandated under section 18(d) of the Act may be exempted by the Department from some or all of the counting and free and reduced price application requirements of this part and 7 CFR part 245, as necessary, to conduct an approved pilot project. Additionally, those schools selected for pilot projects that also operate the School Breakfast Program (7 CFR part 220) and/or the Special Milk Program for Children (7 CFR part 215), may be exempted from the counting and free and reduced price application requirements mandated under these Programs. The Department shall notify the appropriate State agencies and school food authorities of its determination of which requirements are exempted after the Department's selection of pilot projects.

[55 FR 41504, Oct. 12, 1990. Redesignated at 56 FR 32948, July 17, 1991, And further redesignated at 64 FR 50741, Sept. 20, 1999]

### § 210.29 Management evaluations.

(a) *Management evaluations.* FNS will conduct a comprehensive management evaluation of each State agency's administration of the National School Lunch Program.

(b) *Basis for evaluations.* FNS will evaluate all aspects of State agency management of the Program using tools such as State agency reviews as required under § 210.18 or § 210.18a of this part; reviews conducted by FNS in accordance with § 210.18 of this part; FNS reviews of school food authorities and schools authorized under § 210.19(a)(4) of this part; follow-up reviews and actions taken by the State agency to correct violations found during reviews; FNS observations of State agency reviews; and audit reports.

(c) *Scope of management evaluations.* The management evaluation will determine whether the State agency has

taken steps to ensure school food authority compliance with Program regulations, and whether the State agency is administering the Program in accordance with Program requirements and good management practices.

(1) *Local compliance.* FNS will evaluate whether the State agency has actively taken steps to ensure that school food authorities comply with the provisions of this part.

(2) *State agency compliance.* FNS will evaluate whether the State agency has fulfilled its State level responsibilities, including, but not limited to the following areas: use of Federal funds; reporting and recordkeeping; agreements with school food authorities; review of food service management company contracts; review of the claims payment process; implementation of the State agency's monitoring responsibilities; initiation and completion of corrective action; recovery of overpayments; disallowance of claims that are not properly payable; withholding of Program payments; oversight of school food authority procurement activities; training and guidance activities; civil rights; and compliance with the State Administrative Expense Funds requirements as specified in 7 CFR part 235.

(d) *School food authority reviews.* FNS will examine State agency administration of the Program by reviewing local Program operations. When conducting these reviews under paragraph (d)(2) of this section, FNS will follow all the administrative review requirements specified in § 210.18(a)–(h) of this part. When FNS conducts reviews, the findings will be sent to the State agency to ensure all the needed follow-up activity occurs. The State agency will, in all cases, be invited to accompany FNS reviewers.

(1) *Observation of State agency reviews.* FNS may observe the State agency conduct of any review and/or any follow-up review as required under this part. At State agency request, FNS may assist in the conduct of the review.

(2) *Section 210.18 reviews.* FNS will conduct administrative reviews or follow-up reviews in accordance with § 210.18(a)–(h) of this part which will count toward meeting the State agency responsibilities identified under § 210.18 of this part.

(3) *School food authority appeal of FNS findings.* When administrative or follow-up review activity conducted by FNS in accordance with the provisions of paragraph (d)(2) of this section results in the denial of all or part of a Claim for Reimbursement or withholding of payment, a school food authority may appeal the FNS findings by filing a written request with the Chief, Administrative Review Branch, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia, 22302, in accordance with the appeal procedures specified in this paragraph:

(i) The written request for a review of the record shall be postmarked within 15 calendar days of the date the appellant received the notice of the denial of all or a part of the Claim for Reimbursement or withholding payment and the envelope containing the request shall be prominently marked "REQUEST FOR REVIEW". FNS will acknowledge the receipt of the request for appeal within 10 calendar days. The acknowledgement will include the name and address of the FNS Administrative Review Officer (ARO) reviewing the case. FNS will also notify the State agency of the request for appeal.

(ii) The appellant may refute the action specified in the notice in person and by written documentation to the ARO. In order to be considered, written documentation must be filed with the ARO not later than 30 calendar days after the appellant received the notice. The appellant may retain legal counsel, or may be represented by another person. A hearing shall be held by the ARO in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review. Failure of the appellant school food authority's representative to appear at a scheduled hearing shall constitute the appellant school food authority's waiver of the right to a personal appearance before the ARO, unless the ARO agrees to reschedule the hearing. A representative of FNS shall be allowed to attend the hearing to respond to the appellant's testimony

and to answer questions posed by the ARO;

(iii) If the appellant has requested a hearing, the appellant shall be provided with a least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time, date, and place of the hearing;

(iv) Any information on which FNS's action was based shall be available to the appellant for inspection from the date of receipt of the request for review;

(v) The ARO shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section;

(vi) The ARO shall make a determination based on information provided by FNS and the appellant, and on Program regulations;

(vii) Within 60 calendar days of the receipt of the request for review, by written notice, sent by certified mail, return receipt requested, the ARO shall inform FNS, the State agency and the appellant of the determination of the ARO. The final determination shall take effect upon receipt of the written notice of the final decision by the school food authority;

(viii) The action being appealed shall remain in effect during the appeal process;

(ix) The determination by the ARO is the final administrative determination to be afforded to the appellant.

(4) *Coordination with State agency.* FNS will coordinate school food authority selection with the State agency to ensure that no unintended overlap exists and to ensure reviews are conducted in a consistent manner.

(e) *Management evaluation findings.* FNS will consider the results of all its review activity within each State, including school food authority reviews, in performing management evaluations and issuing management evaluation reports. FNS will communicate the findings of the management evaluation to appropriate State agency personnel in an exit conference. Subsequent to the exit conference, the State agency will be notified in writing of the management evaluation findings and any needed corrective actions or fiscal sanctions in accordance with the provisions § 210.25 of this part and/or 7 CFR part 235.

[56 FR 32949, July 17, 1991, as amended at 57 FR 38586, Aug. 26, 1992. Redesignated at 64 FR 50741, Sept. 20, 1999]

### § 210.30 Regional office addresses.

School food authorities desiring information concerning the Program should write to their State educational agency or to the appropriate Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

(b) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street SW, Room 8T36, Atlanta, Georgia 30303.

(c) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 West Jackson Boulevard, 20th Floor, Chicago, Illinois 60604–3507.

(d) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242.

(e) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, California 94108.

(f) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(g) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah,

and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

[53 FR 29147, Aug. 2, 1988. Redesignated at 55 FR 41503, Oct. 12, 1990, and further redesignated at 56 FR 32948, July 17, 1991, and further redesignated at 64 FR 50741, Sept. 20, 1999, as amended at 65 FR 12434, Mar. 9, 2000]

### § 210.31 OMB control numbers.

The following control numbers have been assigned to the information collection requirements in 7 CFR part 210 by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511.

| 7 CFR section where requirements are described | Current OMB control No. |
|---|---|
| 210.3(b) | 0584–0327 |
| 210.5(d) | 0584–0006 |
| 210.5(d)(1) | 0584–0002 |
| 210.5(d)(2) | 0584–0341 |
| 210.5(d)(3) | 0584–0341 |
| 210.6(b) | 0584–0006 |
| 210.8 | 0584–0006 |
| | 0584–0284 |
| 210.9 | 0584–0006 |
| | 0584–0026 |
| | 0584–0329 |
| 210.10(b) | 0584–0006 |
| 210.10(i)(1) | 0584–0006 |
| 210.14(c) | 0584–0006 |
| 210.16 | 0584–0006 |
| 210.17 | 0584–0006 |
| 210.17(g) | 0584–0075 |
| 210.18 | 0584–0006 |
| 210.19 | 0584–0006 |
| 210.22 | 0584–0006 |
| 210.23(c) | 0584–0006 |
| 210.24 | 0584–0006 |
| 210.27 | 0584–0006 |

[53 FR 29147, Aug. 2, 1990. Redesignated at 55 FR 41503, Oct. 12, 1990, and further redesignated at 56 FR 32948, July 17, 1991, and further redesignated at 64 FR 50741, Sept. 20, 1999]

## APPENDIX A TO PART 210—ALTERNATE FOODS FOR MEALS

### I. ENRICHED MACARONI PRODUCTS WITH FORTIFIED PROTEIN

1. Schools may utilize the enriched macaroni products with fortified protein defined in paragraph 3 as a food item in meeting the meal requirements of this part under the following terms and conditions:

(a) One ounce (28.35 grams) of a dry enriched macaroni product with fortified protein may be used to meet not more than one-half of the meat or meat alternate requirements specified in §210.10, when served in combination with 1 or more ounces (28.35 grams) of cooked meat, poultry, fish, or cheese. The size of servings of the cooked combination may be adjusted for various age groups.

(b) Only enriched macaroni products with fortified protein that bear a label containing substantially the following legend shall be so utilized: "One ounce (28.35 grams) dry weight of this product meets one-half of the meat or meat alternate requirements of lunch or supper of the USDA child nutrition programs when served in combination with 1 or more ounces (28.35 grams) of cooked meat, poultry, fish, or cheese. In those States where State or local law prohibits the wording specified, a legend acceptable to both the State or local authorities and FNS shall be substituted."

(c) Enriched macaroni product may not be used for infants under 1 year of age.

2. Only enriched macaroni products with fortified protein that have been accepted by FNS for use in the USDA Child Nutrition Programs may be labeled as provided in paragraph 1(b) of this appendix. Manufacturers seeking acceptance of their product shall furnish FNS a chemical analysis, the Protein Digestibility-Corrected Amino Acid Score (PDCAAS), and such other pertinent data as may be requested by FNS, except that prior to November 7, 1994, manufacturers may submit protein efficiency ratio analysis in lieu of the PDCAAS. This information is to be forwarded to: Director, Nutrition and Technical Services Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, room 607, Alexandria, VA 22302. All laboratory analyses are to be performed by independent or other laboratories acceptable to FNS. (FNS prefers an independent laboratory.) All laboratories shall retain the "raw" laboratory data for a period of 1 year. Such information shall be made available to FNS upon request. Manufacturers must notify FNS if there is a change in the protein portion of their product after the original testing. Manufacturers who report such a change in protein in a previously approved product must submit protein data in accordance with the method specified in this paragraph.

3. The product should not be designed in such a manner that would require it to be classified as a Dietary Supplement as described by the Food and Drug Administration (FDA) in 21 CFR part 105. To be accepted by FNS, enriched macaroni products with fortified protein must conform to the following requirements:

(a)(1) Each of these foods is produced by drying formed units of dough made with one or more of the milled wheat ingredients designated in 21 CFR 139.110(a) and 139.138(a), and other ingredients to enable the finished food to meet the protein requirements set out in paragraph 3.(a)(2)(i) under Enriched Macaroni Products with Fortified Protein in

this appendix. Edible protein sources, including food grade flours or meals made from nonwheat cereals or from oilseeds, may be used. Vitamin and mineral enrichment nutrients are added to bring the food into conformity with the requirements of paragraph (b) under Enriched Macaroni Products with Fortified Protein in this appendix. Safe and suitable ingredients, as provided for in paragraph (c) under Enriched Macaroni Products with Fortified Protein in this appendix, may be added. The proportion of the milled wheat ingredient is larger than the proportion of any other ingredient used.

(2) Each such finished food, when tested by the methods described in the pertinent sections of "Official Methods of Analysis of the AOAC International," (formerly the Association of Official Analytical Chemists), 15th Ed. (1990) meets the following specifications. This publication is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the AOAC International, 2200 Wilson Blvd., suite 400, Arlington, VA 22201–3301. This publication may be examined at the Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, room 607, Alexandria, Virginia 22302 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal__register/code__of__federal__regulations/ibr__locations.html*.

(i) The protein content (N×6.25) is not less than 20 percent by weight (on a 13 percent moisture basis) as determined by the appropriate method of analysis in the AOAC manual cited in (a)(2) under Enriched Macaroni Products with Fortified Protein in this appendix. The protein quality is not less than 95 percent that of casein as determined on a dry basis by the PDCAAS method as described below:

(A) The PDCAAS shall be determined by the methods given in sections 5.4.1, 7.2.1. and 8.0 as described in "Protein Quality Evaluation, Report of the Joint FAO/WHO Expert Consultation on Protein Quality Evaluation," Rome, 1990, as published by the Food and Agriculture Organization (FAO) of the United Nations/World Health Organization (WHO). This report is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of this report may be obtained from the Nutrition and Technical Services Division, Food and Nutrition Service, 3101 Park Center Drive, room 607, Alexandria, Virginia 22302. This report may also be inspected at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal__register/code__of__federal__regulations/ibr__locations.html*.

(B) The standard used for assessing protein quality in the PDCAAS method is the amino acid scoring pattern established by FAO/WHO and United Nations University (UNU) in 1985 for preschool children 2 to 5 years of age which has been adopted by the National Academy of Sciences, Recommended Dietary Allowances (RDA), 1989.

(C) To calculate the PDCAAS for an individual food, the test food must be analyzed for proximate analysis and amino acid composition according to AOAC methods.

(D) The PDCAAS may be calculated using FDA's limited data base of published true digestibility values (determined using humans and rats). The true digestibility values contained in the WHO/FAO report referenced in paragraph 3.(a)(2)(i)(A) under Enriched Macaroni Products with Fortified Protein in this appendix may also be used. If the digestibility of the protein is not available from these sources it must be determined by a laboratory according to methods in the FAO/WHO report (sections 7.2.1 and 8.0).

(E) The most limiting essential amino acid (that is, the amino acid that is present at the lowest level in the test food compared to the standard) is identified in the test food by comparing the levels of individual amino acids in the test food with the 1985 FAO/WHO/UNU pattern of essential amino acids established as a standard for children 2 to 5 years of age.

(F) The value of the most limiting amino acid (the ratio of the amino acid in the test food over the amino acid value from the pattern) is multiplied by the percent of digestibility of the protein. The resulting number is the PDCAAS.

(G) The PDCAAS of food mixtures must be calculated from data for the amino acid composition and digestibility of the individual components by means of a weighted average procedure. An example for calculating a PDCAAS for a food mixture of varying protein sources is shown in section 8.0 of the FAO/WHO report cited in paragraph 3.(a)(2)(i)(A) under Enriched Macaroni Products with Fortified Protein in this appendix.

(H) For the purpose of this regulation, each 100 grams of the product (on a 13 percent moisture basis) must contain protein in amounts which is equivalent to that provided by 20 grams of protein with a quality of not less than 95 percent casein. The equivalent grams of protein required per 100 grams of product (on a 13 percent moisture basis) would be determined by the following equation:

$$X = \frac{a \times b}{c}$$

X=grams of protein required per 100 grams of product

a=20 grams (amount of protein if casein)

b=.95 [95% ×1 (PDCAAS of casein)

c=PDCAAS for protein used in formulation

(ii) The total solids content is not less than 87 percent by weight as determined by the methods described in the "Official Methods of Analysis of the AOAC International" cited in paragraph (a)(2) under Enriched Macaroni Products with Fortified Protein in this appendix.

(b)(1) Each pound of food covered by this section shall contain 5 milligrams of thiamine, 2.2 milligrams of riboflavin, 34 milligrams of niacin or niacinamide, and 16.5 milligrams of iron.

(2) Each pound of such food may also contain 625 milligrams of calcium.

(3) Only harmless and assimilable forms of iron and calcium may be added. The enrichment nutrients may be added in a harmless carrier used only in a quantity necessary to effect a uniform distribution of the nutrients in the finished food. Reasonable overages, within the limits of good manufacturing practice, may be used to assure that the prescribed levels of the vitamins and mineral(s) in paragraphs (b)(1) and (2) under Enriched Macaroni Products with Fortified Protein in this appendix are maintained throughout the expected shelf life of the food under customary conditions of distribution.

(c) Ingredients that serve a useful purpose such as to fortify the protein or facilitate production of the food are the safe and suitable ingredients referred to in paragraph (a) under Enriched Macaroni Products with Fortified Protein in this appendix. This does not include color additives, artificial flavorings, artificial sweeteners, chemical preservatives, or starches. Ingredients deemed suitable for use by this paragraph are added in amounts that are not in excess of those reasonably required to achieve their intended purposes. Ingredients are deemed to be safe if they are not food additives within the meaning of section 201(s) of the Federal Food, Drug and Cosmetic Act, or in case they are food additives if they are used in conformity with regulations established pursuant to section 409 of the act.

(d)(1) The name of any food covered by this section is "Enriched Wheat _____ Macaroni Product with Fortified Protein", the blank being filled in with appropriate word(s) such as "Soy" to show the source of any flours or meals used that were made from non-wheat cereals or from oilseeds. In lieu of the words "Macaroni Product" the words "Macaroni", "Spaghetti", or "Vermicelli" as appropriate, may be used if the units conform in shape and size to the requirements of 21 CFR 139.110 (b), (c), or (d).

(2) When any ingredient not designated in the part of the name prescribed in paragraph (d)(1) under Enriched Macaroni Products with Fortified Protein in this appendix, is added in such proportion as to contribute 10 percent or more of the quantity of protein contained in the finished food, the name shall include the statement "Made with _____", the blank being filled in with the name of each such ingredient, e.g. "Made with nonfat milk".

(3) When, in conformity with paragraph (d)(1) or (d)(2) under Enriched Macaroni Products with Fortified Protein in this appendix, two or more ingredients are listed in the name, their designations shall be arranged in descending order of predominance by weight.

(4) If a food is made to comply with a section of 21 CFR part 139, but also meets the compositional requirements of the Enriched Macaroni with Fortified Protein Appendix, it may alternatively bear the name set out in the other section.

(e) Each ingredient used shall declare its common name as required by the applicable section of 21 CFR part 101. In addition, the ingredients statement shall appear in letters not less than one half the size of that required by 21 CFR 101.105 for the declaration of net quantity of contents, and in no case less than one-sixteenth of an inch in height.

## II. Alternate Protein Products

### *A. What Are the Criteria for Alternate Protein Products Used in the National School Lunch Program?*

1. An alternate protein product used in meals planned under the food-based menu planning approaches in §210.10(k), must meet all of the criteria in this section.

2. An alternate protein product whether used alone or in combination with meat or other meat alternates must meet the following criteria:

a. The alternate protein product must be processed so that some portion of the nonprotein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.

b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).

c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. ("When hydrated or formulated" refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).

d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation that the product meets the criteria in paragraphs A2. a through c of this appendix.

e. Manufacturers should provide information on the percent protein contained in the dry alternate protein product and on an as prepared basis.

f. For an alternate protein product mix, manufacturers should provide information on:

(1) the amount by weight of dry alternate protein product in the package;

(2) hydration instructions; and

(3) instructions on how to combine the mix with meat or other meat alternates.

*B. How Are Alternate Protein Products Used in the National School Lunch Program?*

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in §210.10.

2. The following terms and conditions apply:

a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.

b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).

*C. How Are Commercially Prepared Products Used in the National School Lunch Program?*

Schools, institutions, and service institutions may use a commercially prepared meat or meat alternate product combined with alternate protein products or use a commercially prepared product that contains only alternate protein products.

[51 FR 34874, Sept. 30, 1986; 51 FR 41295, Nov. 14, 1986, as amended at 53 FR 29164, Aug. 2, 1988; 59 FR 51086, Oct. 7, 1994; 60 FR 31216; June 13, 1995; 61 FR 37671, July 19, 1996; 65 FR 12434, Mar. 9, 2000; 65 FR 26912, May 9, 2000; 69 FR 18803, Apr. 9, 2004]

## APPENDIX B TO PART 210—CATEGORIES OF FOODS OF MINIMAL NUTRITIONAL VALUE

(a) *Foods of minimal nutritional value*—Foods of minimal nutritional value are:

(1) Soda Water—A class of beverages made by absorbing carbon dioxide in potable water. The amount of carbon dioxide used is not less than that which will be absorbed by the beverage at a pressure of one atmosphere and at a temperature of 60 °F. It either contains no alcohol or only such alcohol, not in excess of 0.5 percent by weight of the finished beverage, as is contributed by the flavoring ingredient used. No product shall be excluded from this definition because it contains artificial sweeteners or discrete nutrients added to the food such as vitamins, minerals and protein.

(2) *Water Ices*—As defined by 21 CFR 135.160 Food and Drug Administration Regulations except that water ices which contain fruit or fruit juices are not included in this definition.

(3) *Chewing Gum*—Flavored products from natural or synthetic gums and other ingredients which form an insoluble mass for chewing.

(4) *Certain Candies*—Processed foods made predominantly from sweeteners or artifical sweeteners with a variety of minor ingredients which characterize the following types:

(i) *Hard Candy*—A product made predominantly from sugar (sucrose) and corn syrup which may be flavored and colored, is characterized by a hard, brittle texture, and includes such items as sour balls, fruit balls, candy sticks, lollipops, starlight mints, after dinner mints, sugar wafers, rock candy, cinnamon candies, breath mints, jaw breakers and cough drops.

(ii) *Jellies and Gums*—A mixture of carbohydrates which are combined to form a stable gelatinous system of jelly-like character, and are generally flavored and colored, and include gum drops, jelly beans, jellied and fruit-flavored slices.

(iii) *Marshmallow Candies*—An aerated confection composed as sugar, corn syrup, invert sugar, 20 percent water and gelatin or egg white to which flavors and colors may be added.

(iv) *Fondant*—A product consisting of microscopic-sized sugar crystals which are separated by thin film of sugar and/or invert sugar in solution such as candy corn, soft mints.

(v) *Licorice*—A product made predominantly from sugar and corn syrup which is flavored with an extract made from the licorice root.

(vi) *Spun Candy*—A product that is made from sugar that has been boiled at high temperature and spun at a high speed in a special machine.

(vii) *Candy Coated Popcorn*—Popcorn which is coated with a mixture made predominantly from sugar and corn syrup.

(b) *Petitioning Procedures*—Reconsideration of the list of foods of minimal nutritional value identified in paragraph (a) of this section may be pursued as follows:

(1) Any person may submit a petition to FNS requesting that an individual food be exempted from a category of foods of minimal nutritional value listed in paragraph (a). In the case of artificially sweetened foods, the petition must include a statement of the percent of Reference Daily Intake (RDI) for the eight nutrients listed in §210.11(a)(2) "Foods of minimal nutritional value," that

the food provides per serving and the petitioner's source of this information. In the case of all other foods, the petition must include a statement of the percent of RDI for the eight nutrients listed in §210.11(a)(2) "Foods of minimal nutritional value," that the food provides per serving and per 100 calories and the petitioner's source of this information. The Department will determine whether or not the individual food is a food of minimal nutritional value as defined in §210.11(a)(2) and will inform the petitioner in writing of such determination, and the public by notice in the FEDERAL REGISTER as indicated below under paragraph (b)(3) of this section. In determining whether an individual food is a food of minimal nutritional value, discrete nutrients added to the food will not be taken into account.

(2) Any person may submit a petition to FNS requesting that foods in a particular category of foods be classified as foods of minimal nutritional value as defined in §210.11(a)(2). The petition must identify and define the food category in easily understood language, list examples of the food contained in the category and include a list of ingredients which the foods in that category usually contain. If, upon review of the petition, the Department determines that the foods in that category should not be classified as foods of minimal nutritional value, the petitioners will be so notified in writing. If, upon review of the petition, the Department determines that there is a substantial likelihood that the foods in that category should be classified as foods of minimal nutritional value as defined in §210.11(a)(2), the Department shall at that time inform the petitioner. In addition, the Department shall publish a proposed rule restricting the sale of foods in that category, setting forth the reasons for this action, and soliciting public comments. On the basis of comments received within 60 days of publication of the proposed rule and other available information, the Department will determine whether the nutrient composition of the foods indicates that the category should be classified as a category of foods of minimal nutritional value. The petitioner shall be notified in writing and the public shall be notified of the Department's final determination upon publication in the FEDERAL REGISTER as indicated under paragraph (b)(3) of this section.

(3) By May 1 and November 1 of each year, the Department will amend appendix B to exclude those individual foods identified under paragraph (b)(1) of this section, and to include those categories of foods identified under paragraph (b)(2) of this section, *provided*, that there are necessary changes. The schedule for amending appendix B is as follows:

| Actions for publication | Publication | |
|---|---|---|
| | May | November |
| Deadline for receipt of petitions by USDA. | Nov. 15 ..... | May 15. |
| USDA to notify petitioners of results of Departmental review and publish proposed rule (if applicable). | Feb. 1 ..... | Aug. 1. |
| 60 Day comment period ..... | Feb. 1 through Apr. 1. | Aug. 1 through Oct. 1. |
| Public notice of amendment of appendix B by. | May 1 ..... | Nov. 1. |

(4) Written petitions should be sent to the Chief, Technical Assistance Branch, Nutrition and Technical Services Division, FNS, USDA, Alexandria, Virginia 22302, on or before November 15 or May 15 of each year. Petitions must include all information specified in paragraph (b) of this appendix and §220.12(b) (1) or (2) as appropriate.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 18465, May 1, 1989; 59 FR 23614, May 6, 1994]

## APPENDIX C TO PART 210—CHILD NUTRITION LABELING PROGRAM

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service in conjunction with the Food Safety and Inspection Service (FSIS), and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture, and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs. This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10, 225.20, and 226.20 and are served in the main dish.

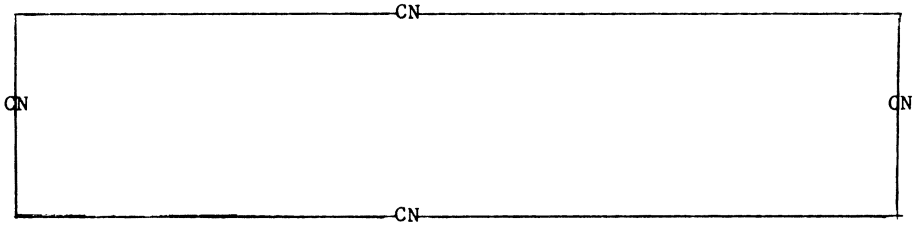
(b) Juice drinks and juice drink products that contain a minimum of 50 percent full-strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) "CN label" is a food product label that contains a CN label statement and CN logo as defined in paragraph 3 (b) and (c) below.

(b) The "CN logo" (as shown below) is a distinct border which is used around the edges

of a "CN label statement" as defined in paragraph 3(c).




(c) The "CN label statement" includes the following:

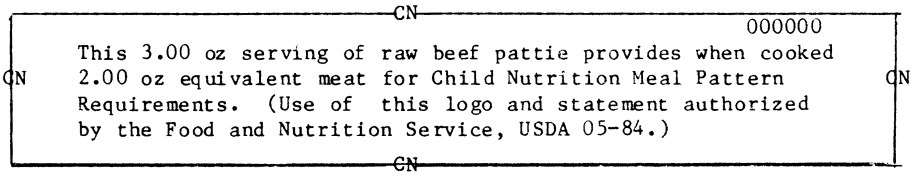
(1) The product identification number (assigned by FNS),

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10, §220.8 or §220.8a, whichever is applicable, §§225.20, and 226.20. The statement shall identify the contribution of a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements,

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:



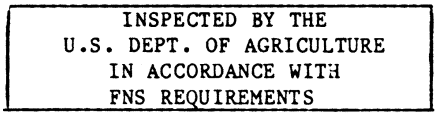

(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by FNS and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate, and the manufacturer's or distributor's name and address. The inspection marking for CN labeled non-meat, non-poultry, and non-seafood products with the exception of juice drinks and juice drink products is established as follows:




(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the *Food Buying Guide for Child Nutrition Programs* (Program AID Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the Child Nutrition Programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10, § 220.8 or § 220.8a, whichever is applicable, §§ 225.20, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report of the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Services of the USDC, Food and Drug Administration, or the Department of Justice for action against the company. Any or all of the following courses of action may be taken:

(a) The company's CN label may be revoked for a specific period of time;

(b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product;

(c) The company's name will be circulated to regional FNS offices;

(d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program. To apply for a CN label and to obtain additional information on CN label application procedures write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

[51 FR 34874, Sept. 30, 1986, as amended at 53 FR 29164, Aug. 2, 1988; 60 FR 31216, June 13, 1995; 65 FR 26912, May 9, 2000]

# PART 215—SPECIAL MILK PROGRAM FOR CHILDREN

Sec.

215.1 General purpose and scope.
215.2 Definitions.
215.3 Administration.
215.4 Payments of funds to States and FNSROs.
215.5 Method of payment to States.
215.6 Use of funds.
215.7 Requirements for participation.
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215.9 Effective date for reimbursement.
215.10 Reimbursement procedures.
215.11 Special responsibilities of State agencies.
215.12 Claims against schools or child-care institutions.
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215.14 Nondiscrimination.
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215.16 Suspension, termination and grant closeout procedures.
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215.18 Information collection/record-keeping—OMB assigned control numbers.

AUTHORITY: 42 U.S.C. 1772 and 1779.

## § 215.1 General purpose and scope.

This part announces the policies and prescribes the general regulations with respect to the Special Milk Program for Children, under the Child Nutrition Act of 1966, as amended, and sets forth the general requirements for participation in the program. The Act reads in pertinent part as follows:

Section 3(a)(1) There is hereby authorized to be appropriated for the fiscal year ending June 30, 1970, and for each succeeding fiscal year such sums as may be necessary to enable the Secretary of Agriculture, under such rules and regulations as he may deem in the public interest, to encourage consumption of fluid milk by children in the United States in (A) nonprofit schools of high school grade and under, except as provided in paragraph (2), which do not participate in a meal service program authorized under this Act or the National School Lunch Act, and (B) nonprofit nursery schools, child care centers, settlement houses, summer camps, and similar nonprofit institutions devoted to the care and training of children, which do not participate in a meal service program authorized under this Act or the National School Lunch Act.

(2) The limitation imposed under paragraph (1)(A) for participation of nonprofit schools in the special milk program shall not apply to split-session kindergarten programs conducted in schools in which children do not have access to the meal service program operating in schools the children attend as authorized under this Act or the National School Lunch Act (42 U.S.C. 1751 et seq.).

(3) For the purposes of this section "United States" means the fifty States, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and the District of Columbia.

(4) The Secretary shall administer the special milk program provided for by this section to the maximum extent practicable in the same manner as he administered the special milk program provided for by Pub. L. 89–

642, as amended, during the fiscal year ending June 30, 1969.

(5) Any school or nonprofit child care institution which does not participate in a meal service program authorized under this Act or the National School Lunch Act shall receive the special milk program upon their request.

(6) Children who qualify for free lunches under guidelines established by the Secretary shall, at the option of the school involved (or of the local educational agency involved in the case of a public school) be eligible for free milk upon their request.

(7) For the fiscal year ending June 30, 1975, and for subsequent school years, the minimum rate of reimbursement for a half-pint of milk served in schools and other eligible institutions shall not be less than 5 cents per half-pint served to eligible children, and such minimum rate of reimbursement shall be adjusted on an annual basis each school year to reflect changes in the Producer Price Index for Fresh Processed Milk published by the Bureau of Labor Statistics of the Department of Labor.

(8) Such adjustment shall be computed to the nearest one-fourth cent.

(9) Notwithstanding any other provision of this section, in no event shall the minimum rate of reimbursement exceed the cost to the school or institution of milk served to children.

[52 FR 7562, Mar. 12, 1987]

### § 215.2 Definitions.

For the purpose of this part, the term:

*7 CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement certain policies applicable to all Department programs. The applicable provisions deal with competition for discretionary grants and cooperative agreements, costs requiring prior approval, acknowledgement of Department support in publications and audiovisuals produced under Department programs, intergovernmental review of Department programs under Executive Order 12372, and certain miscellaneous Department requirements.

*7 CFR part 3016* means the Department's Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. 7 CFR part 3016 covers requirements for awards and subawards to State and local governmental organizations under Department programs.

*7 CFR part 3018* means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

*7 CFR part 3019* means the Department's Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. 7 CFR part 3019 covers requirements for awards and subawards to nongovernmental, nonprofit organizations under Department programs.

*7 CFR part 3052* means the Department's regulations implementing OMB Circular A–133, "Audits of State, Local Governments, and Non-Profit Organizations." (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

*Act* means the Child Nutrition Act of 1966.

*Adults* means those persons not included under the definition of children.

*Applicable credits* shall have the meaning established in Office of Management and Budget Circulars A–87, C(4) and A–122, Attachment A, A(5), respectively. For availability of OMB circulars referenced in this definition, see 5 CFR 1310.3.

*Child and Adult Care Food Program* means the program authorized by section 17 of the National School Lunch Act, as amended.

*Child care institution* means any nonprofit nursery school, child care center, settlement house, summer camp, service institution participating in the Summer Food Program for Children pursuant to part 225 of this chapter, institution participating in the Child and Adult Care Food Program pursuant to part 226 of this chapter, or similar nonprofit institution devoted to the care and training of children. The term "child care institution" also includes a nonprofit agency to which such institution has delegated authority for the operation of a milk program in the institution. It does not include any institution falling within the definition of "School" of this section.

*Child* means

(1) A person under 19 chronological years of age in a Child care institution as defined in this section;

(2) A person under 21 chronological years of age attending a school as defined in paragraphs (3) and (4) of the definition of *School* in this section;

(3) A student of high school grade or under attending school as defined in paragraphs (1) and (2) of the definition of *School* in this section; or

(4) A student who is mentally or physically disabled as determined by the State and who is participating in a school program established for the mentally or physically disabled, of high school grade or under as determined by the State educational agency in paragraphs (1) and (2) of the definition of *School* in this section.

*CND* means the Child Nutrition Division of the Food and Nutrition Service of the Department.

*Contractor* means a commercial enterprise, public or nonprofit private organization or individual that enters into a contract with a school food authority.

*Cost of milk* means the net purchase price paid by the school or child care institution to the milk supplier for milk delivered to the school or child care institution. This shall not include any amount paid to the milk supplier for servicing, rental of or installment purchase of milk service equipment.

*Cost reimbursable contract* means a contract that provides for payment of incurred costs to the extent prescribed in the contract, with or without a fixed fee.

*Department* means the U.S. Department of Agriculture.

*Disclosure* means reveal or use individual children's program eligibility information obtained through the free milk eligibility process for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

*Family* means a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit.

*Fiscal year* means the period of 12 calendar months beginning October 1, 1977, and each October 1 of any calendar year thereafter and ending September 30 of the following calendar year.

*Fixed fee* means an agreed upon amount that is fixed at the inception of the contract. In a cost reimbursable contract, the fixed fee includes the contractor's direct and indirect administrative costs and profit allocable to the contract.

*FNS* means the Food and Nutrition Service of the U.S. Department of Agriculture.

*FNSRO* means Food and Nutrition Services Regional Offices, of the Food and Nutrition Service of the U.S. Department of Agriculture.

*Free milk* means milk for which neither the child nor any member of his family pays or is required to work in the school or child-care institution or in its food service.

*Local educational agency* means a public board of education or other public or private nonprofit authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public or private nonprofit elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public or private nonprofit elementary schools or secondary schools. The term also includes any other public or private nonprofit institution or agency having administrative control and direction of a public or private nonprofit elementary school or secondary school, including residential child care institutions, Bureau of Indian Affairs schools, and educational service agencies and consortia of those agencies, as well as the State educational agency in a State or territory in which the State educational agency is the sole educational agency for all public or private nonprofit schools.

*Medicaid* means the State medical assistance program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.).

*Milk* means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local

standards for such milk. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, and the Virgin Islands, if a sufficient supply of such types of fluid milk cannot be obtained, *milk* shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and consistent with State and local standards for such milk.

*National School Lunch Program* means the program under which general cash-for-food assistance and special cash assistance are made available to schools pursuant to part 210 of this chapter.

*Needy children* means:

(1) Children who attend schools participating in the Program and who meet the School Food Authority's eligibility standards for free milk approved by the State agency, or FNSRO where applicable, under part 245 of this chapter; and

(2) Children who attend child-care institutions participating in the Program and who meet the eligibility standards for free milk approved by the State agency, or FNSRO where applicable, under § 215.13a of this part.

*Nonpricing program* means a program which does not sell milk to children. This shall include any such program in which children are normally provided milk, along with food and other services, in a school or child-care institution financed by a tuition, boarding, camping or other fee, or by private donations or endowments.

*Nonprofit* means, when applied to schools or institutions eligible for the Program, exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1986.

*Nonprofit milk service* means milk service maintained by or on behalf of the school or child-care institution for the benefit of the children, all of the income from which is used solely for the operation or improvement of such milk service.

*Nonprofit school food service account* means the restricted account in which all of the revenue from the nonprofit milk service maintained for the benefit of children is retained and used only for the operation or improvement of the nonprofit milk service.

*OA* means the Office of Audit of the United States Department of Agriculture.

*OIG* means the Office of the Inspector General of the Department.

*Pricing program* means a program which sells milk to children. This shall include any such program in which maximum use is made of Program reimbursement payments in lowering, or reducing to "zero," wherever possible, the price per half pint which children would normally pay for milk.

*Program* means the Special Milk Program for Children.

*Reimbursement* means financial assistance paid or payable to participating schools and child care institutions for milk served to eligible children.

*School* means: (1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (2) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; or (3) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term *residential child care institutions* includes, but is not limited to: Homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more.

*School Breakfast Program* means the program authorized by section 4 of the

Child Nutrition Act of 1966, as amended.

*School Food Authority* means the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a milk program therein. The term "School Food Authority" also includes a nonprofit agency to which such governing body has delegated authority for the operation of a milk program in a school.

*School year* means the period of 12 calendar months beginning July 1, 1977, and each July 1 of any calendar year thereafter and ending June 30 of the following calendar year.

*Split-session* means an educational program operating for approximately one-half of the normal school day.

*State* means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

*State agency* means the State educational agency or any other State agency that has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program.

*State Children's Health Insurance Program (SCHIP)* means the State medical assistance program under title XXI of the Social Security Act (42 U.S.C. 1397aa et seq.).

*Summer Food Service Program for Children* means the program authorized by section 13 of the National School Lunch Act, as amended.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766; sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760; sec. 10(d)), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626; sec. 205, Pub. L. 96–499, The Omnibus Reconciliation Act of 1980, 94 Stat. 2599; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1772, 1784, 1760))

[32 FR 12587, Aug. 31, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 215.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 215.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program. Within FNS, CND shall be responsible for Program administration.

(b) Within the States, to the extent practicable and permissible under State law, responsibility for the administration of the Program in schools and child care institutions shall be in the educational agency of the State: *Provided, however,* That another State agency, upon request by the Governor or other appropriate State executive or legislative authority, may be approved to administer the Program in schools as described in paragraph (3) of the definition of *School* in § 215.2 or in child care institutions.

(c) FNSRO shall administer the Program in any *School* or any *Child care institution* as defined in § 215.2 wherein the State agency is not permitted by law to disburse Federal funds paid to it under the Program; *Provided, however,* That FNSRO shall also administer the Program in all other schools and child-care institutions which have been under continuous FNS administration since October 1, 1980 unless the administration of such schools and institutions is assumed by a State agency. References in this part to "FNSRO where applicable" are to FNSRO as the agency administering the Program to schools or child-care institutions within certain States.

(d) Each State agency desiring to take part in the Program shall enter into a written agreement with the Department for the administration of the Program in the State in accordance with the provisions of this part, 7 CFR parts 235, 245, 15, 15a, 15b and, as applicable, 7 CFR part 3015, 7 CFR part 3016 and 7 CFR part 3019, and with FNS Instructions. Such agreement shall cover the operation of the Program during the period specified therein and may be extended at the option of the Department.

(Secs. 804, 816 and 817, Pub. L. 97–35; 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771 and 1785))

[Amdt. 14, 41 FR 31174, July 27, 1976, as amended by Amdt. 24, 47 FR 14133 Apr. 2, 1982; Amdt. 36, 54 FR 2989, Jan. 23, 1989; 71 FR 39516, July 13, 2006; 72 FR 63791, Nov. 13, 2007]

### § 215.4 Payments of funds to States and FNSROs.

(a) For each fiscal year, the Secretary shall make payments to each State agency at such times as he may determine from the funds appropriated for Program reimbursement. Subject to § 215.11(c)(2), the total of these payments for each State for any fiscal year shall be limited to the amount of reimbursement payable to School Food Authorities and child care institutions under § 215.8 of this part for the total number of half-pints of milk served under the Program to eligible children from October 1 to September 30.

(b) Each State agency shall be responsible for controlling Program reimbursement payments so as to keep within the funds made available to it, and for the timely reporting to FNS of the number of half pints of milk actually served. The Secretary shall increase or decrease the available level of funding by adjusting the State agency's Letter of Credit when appropriate.

(Pub. L. 97–370, 96 Stat. 1806)

[Amdt. 14, 41 FR 31174, July 27, 1976, as amended by Amdt. 30, 49 FR 18986, May 4, 1984]

### § 215.5 Method of payment to States.

(a) Funds to be paid to any State shall be made available by means of Letters of Credit issued by FNS in favor of the State agency. The State agency shall:

(1) Obtain funds needed to reimburse School Food Authorities and child-care institutions through presentation by designated State officials of a Payment Voucher on Letter of Credit (Treasury Form GFO 7578) in accordance with procedures prescribed by FNS and approved by the U.S. Treasury Department; (2) submit requests for funds only at such times and in such amounts as will permit prompt payment of claims; (3) use the funds received from such requests without delay for the purpose for which drawn. Notwithstanding the foregoing provisions, if funds are made available by Congress for the operation of the Program under a continuing resolution, Letters of Credit shall reflect only the amount available for the effective period of the resolution.

(b) [Reserved]

(c) The State agency shall release to FNS any Federal funds made available to it under the Program which are unobligated at the end of each fiscal year. Release of funds by the State agency shall be made as soon as practicable but in no event later than 30 days following demand by FNSRO, and shall be reflected by a related adjustment in the State agency's Letter of Credit.

[Amdt. 13, 39 FR 28416, Aug. 7, 1974, as amended by Amdt. 14, 41 FR 31174, July 27, 1976]

### § 215.6 Use of funds.

(a) Federal funds made available under the Program shall be used to encourage the consumption of milk through reimbursement payments to schools and child-care institutions in connection with the purchase and service of milk to children in accordance with the provisions of this part: *Provided, however,* That, with the approval of FNS, any State agency, or FNSRO where applicable, may reserve for use in carrying out special developmental projects an amount equal to not more than 1 per centum of the Federal funds so made available for any fiscal year.

(b) Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part, whether received directly or indirectly from the Department, shall: (1) If such funds, assets, or property are of a value of $100 or more, be fined not more than $25,000 or imprisoned not more than 5 years or both; or (2) if such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than one year or both.

(c) Whoever receives, conceals, or retains to his use or gain funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject

to the same penalties provided in paragraph (b) of this section.

(Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760; sec. 10(d)(3), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626; 44 U.S.C. 3506))

[Amdt. 14, 41 FR 31174, July 27, 1976, as amended by Amdt. 18, 44 FR 37898, June 29, 1979; 47 FR 746, Jan. 7, 1982; 64 FR 50741, Sept. 20, 1999]

### § 215.7 Requirements for participation.

(a) Any school or nonprofit child care institution shall receive the Special Milk Program upon request provided it does not participate in a meal service program authorized under the Child Nutrition Act of 1966 or the National School Lunch Act; except that schools with such meal service may receive the Special Milk Program upon request only for the children attending split-session kindergarten programs who do not have access to the meal service. Each School Food Authority or child-care institution shall make written application to the State agency, or FNSRO where applicable, for any school or child-care institution in which it desires to operate the Program, if such school or child-care institution did not participate in the Program in the prior fiscal year.

(b) Any School Food Authority or child care institution participating in the Program may elect to serve free milk to children eligible for free meals. Upon application for the Program, each School Food Authority or child care institution:

(1) Shall be required by the State agency, or FNSRO where applicable, to state whether or not it wishes to provide free milk in the schools or institutions participating under its jurisdiction and

(2) If it so wishes to provide free milk, shall also submit for approval a free milk policy statement which, if for a school, shall be in accordance with part 245 of this chapter or, if for a child care institution, shall be in accordance with § 215.13a of this part.

(c) The application shall include information in sufficient detail to enable the State agency, or FNSRO where applicable, to determine whether the School Food Authority or child-care institution is eligible to participate in the Program and extent of the need for Program payments.

(d) Each school food authority or child care institution approved to participate in the program shall enter into a written agreement with the State agency or FNSRO, as applicable, that may be amended as necessary. Nothing in the preceding sentence shall be construed to limit the ability of the State agency to suspend or terminate the agreement in accordance with § 215.15. If a single State agency administers any combination of the Child Nutrition Programs, that State agency shall provide each SFA with a single agreement with respect to the operation of those programs. Such agreement shall provide that the School Food Authority or child-care institution shall, with respect to participating schools and child-care institutions under its jurisdiction:

(1) Operate a nonprofit milk service. However, school food authorities may use facilities, equipment, and personnel supported with funds provided to a school food authority under this part to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.).

(2) If electing to provide free milk (i) serve milk free to all eligible children, at times that milk is made available to nonneedy children under the Program; and (ii) make no discrimination against any needy child because of his inability to pay for the milk.

(3) Comply with the requirements of the Department's regulations respecting nondiscrimination (7 CFR part 15);

(4) Claim reimbursement only for milk as defined in this part and in accordance with the provisions of § 215.8 and § 215.10;

(5) Submit Claims for Reimbursement in accordance with § 215.10 of this part and procedures established by the State agency or FNSRO where applicable;

(6) Maintain a financial management system as prescribed by the State agency, or FNSRO where applicable;

(7) Upon request, make all records pertaining to its milk program available to the State agency and to FNS or OA for audit and administrative review, at any reasonable time and place.

Such records shall be retained for a period of three years after the end of the fiscal year to which they pertain, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit;

(8) Retain the individual applications for free milk submitted by families for a period of three years after the end of the fiscal year to which they pertain, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(e) *State requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provision of this part.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772); secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1759(a), 1773, 1758); 44 U.S.C. 3506)

[Amdt. 13, 39 FR 28416, Aug. 7, 1974, as amended by Amdt. 14, 41 FR 31174, July 27, 1976; Amdt. 16, 43 FR 1059, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979; Amdt. 17, 44 FR 33047, June 8, 1979; 46 FR 51635, Oct. 20, 1981; 47 FR 745, Jan. 7, 1982; Amdt. 30, 49 FR 18986, 18987, May 4, 1984; 52 FR 7562, Mar. 12, 1987; 52 FR 15298, Apr. 28, 1987; 64 FR 50741, Sept. 20, 1999]

### § 215.8 Reimbursement payments.

(a) [Reserved]

(b)(1) The rate of reimbursement per half-pint of milk purchased and (i) served in nonpricing programs to all children; (ii) served to all children in pricing programs by institutions and School Food Authorities not electing to provide free milk; and (iii) served to children other than needy children in pricing programs by institutions and School Food Authorities electing to provide free milk shall be the rate announced by the Secretary for the applicable school year. However, in no event shall the reimbursement for each half-pint (236 ml.) of milk served to children exceed the cost of the milk to the school or child care institution.

(2) The rate of reimbursement for milk purchased and served free to needy children in pricing programs by institutions and School Food Authorities electing to provide free milk shall be the average cost of milk, i.e., the total cost of all milk purchased during the claim period, divided by the total number of purchased half-pints.

(c) Schools and child-care institutions having pricing programs shall use the reimbursement payments received to reduce the price of milk to children.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772); Omnibus Reconciliation Act of 1980, sec. 209, Pub. L. 96–499, 94 Stat. 2599; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; secs. 805 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773))

[Amdt. 13, 39 FR 28416, Aug. 7, 1974, as amended by Amdt. 16, 43 FR 1060, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979; Amdt. 17, 44 FR 33047, June 8, 1979; 46 FR 51365, Oct. 20, 1981; Amdt. 23, 47 FR 14134, Apr. 2, 1982]

### § 215.9 Effective date for reimbursement.

(a) A State Agency, or FNSRO where applicable, may grant written approval to begin operations under the Program prior to the receipt of the application from the School Food Authority or child-care institution. Such written approval shall be attached to the subsequently filed application, and the agreement executed by the School Food Authority or child-care institution shall be effective from the date upon which the School Food Authority or child-care institution was authorized to begin operations: *Provided, however,* That such effective date shall not be earlier than the calendar month preceding the calendar month in which the agreement is executed by the State Agency or by the Department.

(b) Reimbursement payments pursuant to § 215.8 shall be made for milk purchased and served to children at any time during the effective period of an agreement between a School Food Authority or child care institution and the State agency or the Department.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766))

[32 FR 12587, Aug. 31, 1967, as amended by Amdt. 5, 37 FR 14686, July 22, 1972; Amdt. 13, 39 FR 28417, Aug. 7, 1974; Amdt. 16, 43 FR 1060, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979]

**§ 215.10 Reimbursement procedures.**

(a) To be entitled to reimbursement under this part, each School Food Authority shall submit to the State agency, or FNSRO where applicable, a monthly Claim for Reimbursement.

(b) Claims for Reimbursement shall include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Reports of School Program Operations required under § 215.11(c)(2). Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall include only milk served in that month except if the first or last month of Program operations for any year contains 10 operating days or less, such month may be added to the Claim for Reimbursement for the appropriate adjacent month; however, Claims for Reimbursement may not combine operations occurring in two fiscal years. If a single State agency administers any combination of the Child Nutrition Programs, the SFA shall be able to use a common claim form with respect to claims for reimbursement for meals served under those programs. A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency, or FNSRO where applicable, not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency, or FNSRO where applicable, shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS–10) for the claim month which is required under § 215.11(c)(2). Upward adjustments in Program funds claimed which are not reflected in the final FNS–10 for the claim month shall not be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(c) [Reserved]

(d) In submitting a Claim for Reimbursement, each School Food Authority or child-care institution shall certify that the claim is true and correct; that records are available to support the claim; that the claim is in accordance with the existing agreement; and that payment therefor has not been received.

(e) Milk served to adults is not eligible for reimbursement.

(f) Any School Food Authority or child care institution which operates both a nonpricing and pricing milk program in the same school or child care institution, may elect to claim reimbursement for:

(1) All milk purchased and served to children under the Program at the nonpricing rate prescribed in § 215.8(b) (1), or (2) only milk purchased and served to children in the pricing program at the rates prescribed in § 215.8(b) (1) and (2) for pricing programs.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); Pub. L. 97–370, 96 Stat. 1806)

[Amdt. 13, 39 FR 28417, Aug. 7, 1974, as amended by Amdt. 14, 41 FR 31175, July 27, 1976; Amdt. 16, 43 FR 1060, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979; 45 FR 82622, Dec. 16, 1980; 48 FR 20896, May 10, 1983; Amdt. 30, 49 FR 18986, May 4, 1984; 64 FR 50742, Sept. 20, 1999]

**§ 215.11 Special responsibilities of State agencies.**

(a) [Reserved]

(b) *Program assistance.* Each State agency, or FNSRO where applicable, shall provide Program assistance, as follows:

(1) Consultive, technical, and managerial personnel to administer the Program and monitor performance of schools and child-care institutions and to measure progress toward achieving Program goals.

(2) Visits to participating schools and child-care institutions to ensure compliance with Program regulations and with the Department's nondiscrimination regulations (part 15 of this title),

issued under title VI of the Civil Rights Act of 1964. State agencies shall conduct reviews of schools participating in the Program for compliance with the provisions of this part when such schools are being reviewed under the provisions identified under § 210.18(i) of this title. Compliance reviews of participating schools shall focus on the reviewed school's compliance with the required certification, counting and milk service procedures. School food authorities may appeal a denial of all or a part of the Claim for Reimbursement or withholding of payment arising from review activity conducted by the State agency under § 210.18 of this title or by FNS under § 210.30(d)(2) of this title. Any such appeal shall be subject to the procedures set forth under § 210.18(q) of this title or § 210.30(d)(3) of this title, as appropriate.

(3) Documentation of such Program assistance shall be maintained on file by the State agency, or FNSRO where applicable.

(c) *Records and reports.* (1) Each State agency shall maintain Program records as necessary to support the reimbursement payments made to child care institutions or School Food Authorities under §§ 215.8 and 215.10 and the reports submitted to FNS under § 215.11(c)(2). The records may be kept in their original form or on microfilm, and shall be retained for a period of three years after the date of submission of the final Financial Status Report for the fiscal year, except that if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(2) Each State agency shall submit to FNS a final Report of School Program Operations (FNS–10) for each month which shall be limited to claims submitted in accordance with § 215.10(b) and which shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State agency's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary. Adjustments shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. A final Financial Status Report for each fiscal year shall be postmarked and/or submitted to FNS within 120 days after the end of the fiscal year. FNS shall not be responsible for reimbursing unpaid program obligations reported later than 120 days after the close of the fiscal year in which they were incurred.

(d) *Compliance.* State agencies, or FNSROs where applicable, shall require School Food Authorities and child-care institutions to comply with applicable provisions of this part.

(e) *Investigations.* Each State Agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program and shall take appropriate action to correct any irregularities. State Agencies shall maintain on file evidence of such investigations and actions. The Office of Investigation of the Department (OI) shall make investigations at the request of the State Agency or if CND or FNSRO determines investigations by OI are appropriate.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); 44 U.S.C. 3506; sec. 812, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1759a))

[32 FR 12587, Aug. 31, 1967, as amended by Amdt. 13, 39 FR 28417, Aug. 7, 1974; Amdt. 14, 41 FR 31175, July 27, 1976; 47 FR 745, Jan. 7, 1982; Amdt. 25, 47 FR 18564, Apr. 30, 1982; Amdt. 30, 49 FR 18987, May 4, 1984; 56 FR 32949, July 17, 1991; 57 FR 38586, Aug. 26, 1992]

### § 215.12 Claims against schools or child-care institutions.

(a) State agencies, or FNSROs where applicable, shall disallow any portion of a claim and recover any payment made to a School Food Authority or

child-care institution that was not properly payable under this part. State agencies will use their own procedures to disallow claims and recover overpayments already made.

(b) [Reserved]

(c) The State Agency may refer any matter in connection with this section to FNSRO and CND for determination of the action to be taken.

(d) Each State agency shall maintain all records pertaining to action taken under this section. Such records shall be retained for a period of three years after the date of the submission of the final Financial Status Report, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(e) If CND does not concur with the State Agency action in paying a claim or a reclaim, or in failing to collect an overpayment FNSRO shall assert a claim against the State Agency for the amount of such claim, reclaim or overpayment. In all such cases, the State Agency shall have full opportunity to submit to CND evidence or information concerning the action taken. If in the determination of CND, the State Agency's action was unwarranted, the State Agency shall promptly pay to FNS the amount of the claim, reclaim, or overpayment.

(f) The amounts recovered by the State Agency from schools and child-care institutions may be utilized, first, to make reimbursement payments for milk served during the fiscal year for which the funds were initially available, and second, to repay any State funds expended in the reimbursement of claims under the program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of § 215.5(c).

(g) With respect to schools or child-care institutions in which FNSRO administers the Program, when FNSRO disallows a claim or a portion of a claim, or makes a demand for refund of an alleged overpayment, it shall notify the School Food Authority or child-care institutions of the reasons for such disallowance or demand and the School Food Authority or child-care institutions shall have full opportunity to submit evidence or to file reclaim for any amount disallowed or demanded in the same manner afforded in this section to schools or child-care institutions administered by State Agencies.

(h) The Secretary shall have the authority to determine the amount of, to settle, and to adjust any claims arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of Title 28, U.S. Code, to conduct litigation on behalf of the United States.

(47 FR 745, Jan. 7, 1982 (44 U.S.C. 3506; secs. 804, 816 and 817, Pub. L. 97–35; 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771 and 1785))

[32 FR 12587, Aug. 31, 1967, as amended by Amdt. 5, 37 FR 14686, July 22, 1972; Amdt. 13, 39 FR 28418, Aug. 7, 1974; Amdt. 14, 41 FR 31175, July 27, 1976; 47 FR 745, Jan. 7, 1982; Amdt. 24, 47 FR 14133, Apr. 2, 1982]

### § 215.13 Management evaluations and audits.

(a) Unless otherwise exempt, audits at the State and school food authority/child care institution levels shall be conducted in accordance with Office of Management and Budget Circular A–133 and the Department's implementing regulations at 7 CFR part 3052. For availability of the OMB Circular mentioned in this paragraph, please refer to 5 CFR 1310.3.

(b) Each State agency shall provide FNS with full opportunity to conduct management evaluations (including visits to schools and child-care institutions) of any operations of the State agency under the Program and shall provide OIG with full opportunity to conduct audits (including visits to schools and child-care institutions) of all operations of the State agency under the Program. Each State agency shall make available its records, including records of the receipt and expenditure of funds under the Program, upon a reasonable request by FNS or OIG. OIG shall also have the right to

make audits of the records and operations of any school or child-care institution.

(c) In conducting management evaluations, reviews or audits for any fiscal year, the State agency, FNS, or OIG may disregard any overpayment if the total overpayment does not exceed $600 or, in the case of State agency claims in State administered Programs, it does not exceed the amount established under State law, regulations or procedure as a minimum amount for which claim will be made for State losses but not to exceed $600. However, no overpayment is to be disregarded where there is substantial evidence of violations of criminal law or civil fraud statutes.

(Secs. 805 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773); sec. 812, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1759a))

[Amdt. 14, 41 FR 31175, July 27, 1976, as amended at 43 FR 58925, Dec. 22, 1978; Amdt. 23, 47 FR 14135, Apr. 2, 1982; Amdt. 25, 47 FR 18564, Apr. 30, 1982; Amdt. 36, 54 FR 2990, Jan. 23, 1989; 57 FR 38586, Aug. 26, 1992; 59 FR 1894, Jan. 13, 1994; 64 FR 50742, Sept. 20, 1999; 71 FR 39516, July 13, 2006]

### § 215.13a Determining eligibility for free milk in child-care institutions.

(a) *General.* Child care institutions which operate pricing programs may elect to make free milk available, as set forth in § 215.7(d)(2), to children who meet the approved eligibility criteria. Such child care institutions shall determine the children who are eligible for free milk and assure that there is no physical segregation of, or other discrimination against, or overt identification of, children unable to pay the full price for milk.

(b) *Action by State agencies and FNSROs.* Each State agency, or FNSRO where applicable, upon application for the program by a child care institution operating a pricing program, and annually thereafter, shall require the institution to state whether or not it wishes to serve free milk to eligible children at times that milk is provided under the Program. It shall annually require each child care institution electing to provide free milk to submit a free milk policy statement and shall provide such institutions with a prototype free milk policy statement and a copy of the State's family-size income standards for determining eligibility for free meals and milk under the National School Lunch and School Breakfast Programs to assist the institutions in meeting its responsibilities.

(c) *Action by institutions.* Each child care institution which operates a pricing program shall inform the State agency, or FNSRO where applicable, at the time it applies for Program participation and at least annually thereafter, whether or not it wishes to provide free milk. Institutions electing to provide free milk shall annually submit a written free milk policy statement for determining free milk eligibility of children under their jurisdiction, which shall contain the items specified in paragraph (d) of this section. Such institutions shall not be approved for Program participation of their agreements renewed unless the free milk policy has been reviewed and approved. Pending approval or a revision of a policy statement, the existing policy shall remain in effect.

(d) *Policy statement.* A free milk policy statement as required in paragraph (c) of this section shall contain the following:

(1) The specific criteria to be used in determining eligibility for free milk. These criteria shall give consideration to economic need as reflected by family size and income. The criteria used by the child-care institution may not result in the eligibility of children from families whose incomes exceed the State's family-size income standards for determining eligibility for free meals under the National School Lunch and School Breakfast Programs.

(2) The method by which the child-care institution will collect information from families in order to determine a child's eligibility for free milk.

(3) The method by which the child-care institution will collect milk payments so as to prevent the overt identification of children receiving free milk.

(4) A hearing procedure substantially like that outlined in part 245 of this chapter.

(5) An assurance that there will be no discrimination against free milk recipients and no discrimination against any child on the basis of race, color, or national origin.

(e) *Public announcement of eligibility criteria.* Each child care institution which elects to make free milk available under the Program shall annually make a public announcement of the availability of free milk to children who meet the approved eligibility criteria to the information media serving the area from which its attendance is drawn. The public announcement must also state that milk is available to all children in attendance without regard to race, color, or national origin.

(f) *Privacy Act notice requirements.* The free milk application provided to households must include a Privacy Act notice/statement informing households of how the social security number and other information provided on the application will be used. Each free milk application must include substantially the following statement, "The Richard B. Russell National School Lunch Act requires the information on this application. You do not have to give the information, but if you do not, we cannot approve your child for free milk. You must include the social security number of the adult household member who signs the application. The social security number is not required when you apply on behalf of a foster child or you list a Food Stamp, Temporary Assistance for Needy Families (TANF) Program or Food Distribution Program on Indian Reservations (FDPIR) case number for your child or other FDPIR identifier or when you indicate that the adult household member signing the application does not have a social security number. We will use your information to determine if your child is eligible for free milk, and for administration and enforcement of the Program." When the State agency or child care institution, as appropriate, plans to use or disclose children's eligibility information for non-program purposes, additional information, as specified in paragraph (i) of this section must be added to the Privacy Act notice/statement. State agencies and child care institutions are responsible for drafting the appropriate notice and ensuring that the notice complies with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note (Disclosure of Social Security Number)).

(g) *Disclosure of children's free milk eligibility information to certain programs and individuals without parental consent.* The State agency or child care institution, as appropriate, may disclose aggregate information about children eligible for free milk to any party without parental notification and consent when children cannot be identified through release of the aggregate data or by means of deduction. Additionally, the State agency or child care institution may disclose information that identifies children eligible for free milk to the programs and the individuals specified in this paragraph (g) without parent/guardian consent. The State agency or child care institution that makes the free milk eligibility determination is responsible for deciding whether to disclose program eligibility information.

(1) *Persons authorized to receive eligibility information.* Only persons directly connected with the administration or enforcement of a program or activity listed in paragraphs (g)(2) or (g)(3) of this section may have access to children's free milk eligibility information, without parental consent. Persons considered directly connected with administration or enforcement of a program or activity listed in paragraphs (g)(2) or (g)(3) of this section are Federal, State, or local program operators responsible for the ongoing operation of the program or activity or persons responsible for program compliance. Program operators may include persons responsible for carrying out program requirements and monitoring, reviewing, auditing, or investigating the program. Program operators may include contractors, to the extent those persons have a need to know the information for program administration or enforcement. Contractors may include evaluators, auditors, and others with whom Federal or State agencies and program operators contract with to assist in the administration or enforcement of their program on their behalf.

(2) *Disclosure of children's names and free milk eligibility status.* The State agency or child care institution, as appropriate, may disclose, without parental consent, only children's names and

eligibility status (whether they are eligible for free milk) to persons directly connected with the administration or enforcement of:

(i) A Federal education program;

(ii) A State health program or State education program administered by the State or local education agency;

(iii) A Federal, State, or local means-tested nutrition program with eligibility standards comparable to the National School Lunch Program (i.e., food assistance programs for households with incomes at or below 185 percent of the Federal poverty level); or

(iv) A third party contractor assisting in verification of eligibility efforts by contacting households who fail to respond to requests for verification of their eligibility.

(3) *Disclosure of all eligibility information.* In addition to children's names and eligibility status, the State agency or child care institution, as appropriate, may disclose, without parental consent, all eligibility information obtained through the free milk eligibility process (including all information on the application or obtained through direct certification) to:

(i) Persons directly connected with the administration or enforcement of programs authorized under the Richard B. Russell National School Lunch Act or the Child Nutrition Act of 1966. This means that all eligibility information obtained for the Special Milk Program may be disclosed to persons directly connected with administering or enforcing regulations under the National School Lunch Program, School Breakfast Program, Child and Adult Care Food Program, Summer Food Service Program and the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) (Parts 210, 220, 226, 225, and 246, respectively, of this chapter);

(ii) The Comptroller General of the United States for purposes of audit and examination; and

(iii) Federal, State, and local law enforcement officials for the purpose of investigating any alleged violation of the programs listed in paragraphs (g)(2) and (g)(3) of this section.

(4) *Use of free milk eligibility information by programs other than Medicaid or the State Children's Health Insurance Program (SCHIP).* State agencies and child care institutions may use children's free milk eligibility information for administering or enforcing the Special Milk Program. Additionally, any other Federal, State, or local agency charged with administering or enforcing the Special Milk Program may use the information for that purpose. Individuals and programs to which children's free milk eligibility information has been disclosed under this section may use the information only in the administration or enforcement of the receiving program. No further disclosure of the information may be made.

(h) *Disclosure of children's free milk eligibility information to Medicaid and/or SCHIP, unless parents decline.* Children's free milk eligibility information only may be disclosed to Medicaid or SCHIP when both the State agency and the child care institution so elect, the parent/guardian does not decline to have their eligibility information disclosed and the other provisions described in paragraph (h)(1) of this section are met. The State agency or child care institution, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free milk), and any other eligibility information obtained through the free milk application or obtained through direct certification to persons directly connected with the administration of Medicaid or SCHIP. Persons directly connected to the administration of Medicaid and SCHIP are State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations for Medicaid or SCHIP.

(1) The State agency must ensure that:

(i) The child care institution and health insurance program officials have a written agreement that requires the health insurance program agency to use the eligibility information to seek to enroll children in Medicaid and SCHIP; and

(ii) Parents/guardians are notified that their eligibility information may be disclosed to Medicaid or SCHIP and given an opportunity to decline to have

their children's eligibility information disclosed, prior to any disclosure.

(2) *Use of children's free milk eligibility information by Medicaid/SCHIP.* Medicaid and SCHIP agencies and health insurance program operators receiving children's free milk eligibility information must use the information to identify eligible children and enroll them in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP. No further disclosure of the information may be made. Medicaid and SCHIP agencies and health insurance program operators also may verify children's eligibility in a program under the Child Nutrition Act of 1966 or the Richard B. Russell National School Lunch Act.

(i) *Notifying households of potential uses and disclosures of children's free milk eligibility information.* Households must be informed that the information they provide on the free milk application will be used to determine eligibility for free milk and that their eligibility information may be disclosed to other programs.

(1) For disclosures to programs, other than Medicaid or SCHIP, that are permitted access to children's eligibility information without parent/guardian consent, the State agency or child care institution, as appropriate, must notify parents/guardians at the time of application that their children's free milk eligibility information may be disclosed. The State agency or child care institution, as appropriate, must add substantially the following statement to the Privacy Act notice/statement required under paragraph (f) of this section, "We may share your eligibility information with education, health, and nutrition programs to help them evaluate, fund, or determine benefits for their programs; auditors for program reviews; and law enforcement officials to help them look into violations of program rules." For children determined eligible for free milk through direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free milk through direct certification process.

(2) For disclosure to Medicaid or SCHIP, the State agency or child care institution, as appropriate, must notify parents/guardians that their children's free milk eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed and notifies the State agency or child care institution, as appropriate, by a date specified by the State agency or child care institution, as appropriate. Only the parent or guardian who is a member of the household or family for purposes of the free milk application may decline the disclosure of eligibility information to Medicaid or SCHIP. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify eligible children and seek to enroll them in Medicaid or SCHIP, and that their decision will not affect their children's eligibility for free milk. The notification may be included in the letter/notice to parents/guardians that accompanies the free milk application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond if they do not want their information disclosed. The State agency or child care institution, as appropriate, must add substantially the following statement to the Privacy Act notice/statement required under paragraph (f) of this section, "We may share your information with Medicaid or the State Children's Health Insurance Program, unless you tell us not to. The information, if disclosed, will be used to identify eligible children and seek to enroll them in Medicaid or SCHIP." For children determined eligible for free milk through direct certification, the notice of potential disclosure and opportunity to decline the disclosure may be included in the document informing parents/guardians of their children's eligibility for free milk through direct certification.

(j) *Other disclosures.* State agencies and child care institutions that plan to use or disclose identifying information

about children eligible for free milk to programs or individuals not specified in this section must obtain written consent from children's parents or guardians prior to the use or disclosure.

(1) The consent must identify the information that will be shared and how the information will be used.

(2) There must be a statement informing parents and guardians that failing to sign the consent will not affect the child's eligibility for free milk and that the individuals or programs receiving the information will not share the information with any other entity or program.

(3) Parents/guardians must be permitted to limit the consent only to those programs with which they wish to share information.

(4) The consent statement must be signed and dated by the child's parent or guardian who is a member of the household for purposes of the free milk application.

(k) *Agreements with programs/individuals receiving children's free milk eligibility information.* Agreements or Memoranda of Understanding (MOU) are recommended or required as follows:

(1) The State agency or child care institution, as appropriate, should have a written agreement or MOU with programs or individuals receiving eligibility information, prior to disclosing children's free milk eligibility information. The agreement or MOU should include information similar to that required for disclosures to Medicaid and SCHIP specified in paragraph (k)(2) of this section.

(2) For disclosures to Medicaid or SCHIP, the State agency or child care institution, as appropriate, must have a written agreement with the State or local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free milk eligibility information to those agencies. At a minimum, the agreement must:

(i) Identify the health insurance program or health agency receiving children's eligibility information;

(ii) Describe the information that will be disclosed;

(iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must be used to seek to enroll children in Medicaid or SCHIP;

(iv) Require that the Medicaid or SCHIP agency describe how they will use the information obtained;

(v) Describe how the information will be protected from unauthorized uses and disclosures;

(vi) Describe the penalties for unauthorized disclosure; and

(vii) Be signed by both the Medicaid or SCHIP program or agency and the State agency or child care institution, as appropriate.

(l) *Penalties for unauthorized disclosure or misuse of children's free milk eligibility information.* In accordance with section 9(b)(6)(C) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(6)(C)), any individual who publishes, divulges, discloses or makes known in any manner, or to any extent not authorized by statute or this section, any information obtained under this section will be fined not more than $1,000 or imprisoned for up to 1 year, or both.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772))

[Amdt. 14, 41 FR 31176, July 27, 1976, as amended by Amdt. 16, 43 FR 1060, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979; Amdt. 17, 44 FR 33047, June 8, 1979; 66 FR 2201, Jan. 11, 2001; 72 FR 10892, Mar. 12, 2007]

### § 215.14 Nondiscrimination.

The Department's regulations on nondiscrimination in federally assisted programs are set forth in part 15 of this title. The Department's agreements with State agencies, the State agencies' agreements with School Food Authorities and child-care institutions and the FNSRO agreements with School Food Authorities administering nonprofit private schools and with child-care institutions shall contain the assurances required by such regulations. When different types of milk are served to children, (a) a uniform price for each type of milk served shall be charged to all non-needy children in the school or child-care institution

who purchase milk, and (b) needy children shall be given the opportunity to select any type of milk offered.

(44 U.S.C. 3506)

[Amdt. 13, 39 FR 28418, Aug. 7, 1974, as amended at 47 FR 745, Jan. 7, 1982]

### §215.14a Procurement standards.

(a) *General.* State agencies and school food authorities shall comply with the requirements of this part and parts 3015, 3016 and 3019 of this title, as applicable, which implement the applicable Office of Management and Budget Circulars, concerning the procurement of all goods and services with nonprofit school food service account funds.

(b) *Contractual responsibilities.* The standards contained in this part and 7 CFR part 3015, 7 CFR part 3016 and 7 CFR part 3019, as applicable, do not relieve the State agency or School Food Authority of any contractual responsibilities under its contract. The State agency or School Food Authority is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes but is not limited to: Source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State or Federal authority that has proper jurisdiction.

(c) *Procedures.* The State agency may elect to follow either the State laws, policies and procedures as authorized by §§3016.36(a) and 3016.37(a) of this title, or the procurement standards for other governmental grantees and all governmental subgrantees in accordance with §3016.36(b) through (i) of this title. Regardless of the option selected, States must ensure that all contracts include any clauses required by Federal statutes and executive orders and that the requirements of §3016.60(b) and (c) of this title are followed. The school food authority or child care institution may use its own procurement procedures which reflect applicable State or local laws and regulations, provided that procurements made with nonprofit school food service account funds adhere to the standards set forth in this part and §§3016.36(b) through 3016.36(i), 3016.60 and §§3019.40 through 3019.48 of this title, as applicable, and in the applicable Office of Management and Budget Circulars. School food authority procedures must include a written code of standards of conduct meeting the minimum standards of §3016.36(b)(3) or §3019.42 of this title, as applicable.

(1) *Pre-issuance review requirement.* The State agency may impose a pre-issuance review requirement on a school food authority's proposed procurement. The school food authority must make available, upon request of the State agency, its procurement documents, including but not limited to solicitation documents, specifications, evaluation criteria, procurement procedures, proposed contracts and contract terms. School food authorities shall comply with State agency requests for changes to procurement procedures and solicitation and contract documents to ensure that, to the State agency's satisfaction, such procedures and documents reflect applicable procurement and contract requirements and the requirements of this part.

(2) *Prototype solicitation documents and contracts.* The school food authority must obtain the State agency's prior written approval for any change made to prototype solicitation or contract documents before issuing the revised solicitation documents or execution of the revised contract.

(3) *Prohibited expenditures.* No expenditure may be made from the nonprofit school food service account for any cost resulting from a procurement failing to meet the requirements of this part.

(d) *Cost reimbursable contracts*—(1) *Required provisions.* The school food authority must include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts:

(i) Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the

contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority;

(ii)(A) The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food service account) and the amount that is unallowable (cannot be paid from the nonprofit school food service account), or

(B) The contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;

(iii) The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars;

(iv) The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the school food authority for payment and identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State agency, the school food authority may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually;

(v) The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and

(vi) The contractor must maintain documentation of costs and discounts, rebates and other applicable credits, and must furnish such documentation upon request to the school food authority, the State agency, or the Department.

(2) *Prohibited expenditures.* No expenditure may be made from the nonprofit school food service account for any cost resulting from a cost reimbursable contract that fails to include the requirements of this section, nor may any expenditure be made from the nonprofit school food service account that permits or results in the contractor receiving payments in excess of the contractor's actual, net allowable costs.

(Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[Amdt. 27, 48 FR 19355, Apr. 29, 1983, as amended at 71 FR 39516, July 13, 2006; 72 FR 61492, Oct. 31, 2007]

### § 215.15 Withholding payments.

In accordance with Departmental regulations at §§ 3016.43 and 3019.62 of this title, the State agency shall withhold Program payments in whole or in part, to any school food authority which has failed to comply with the provisions of this part. Program payments shall be withheld until the school food authority takes corrective action satisfactory to the State agency, or gives evidence that such corrective actions will be taken, or until the State agency terminates the grant in accordance with § 215.16. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any milk served in accordance with the provisions of this part during the period the payments were withheld.

[72 FR 61493, Oct. 31, 2007]

### § 215.16 Suspension, termination and grant closeout procedures.

Whenever it is determined that a State agency has materially failed to comply with the provisions of this part, or with FNS guidelines and instructions, FNS may suspend or terminate the Program in whole, or in part, or take any other action as may be available and appropriate. A State agency may also terminate the Program by mutual agreement with FNS. FNS and the State agency shall comply with the provisions of 7 CFR part 3016, concerning grant suspension, termination and closeout procedures. Furthermore, the State agency, or FNSRO where applicable, shall apply these provisions, or the parallel provisions of 7

CFR part 3019, as applicable, to suspension or termination of the Program in School Food Authorities.

[Amdt. 30, 49 FR 18987, May 4, 1984, as amended at 71 FR 39517, July 13, 2006. Redesignated at 72 FR 61493, Oct. 31, 2007]

### § 215.17 Program information.

School Food Authorities and child-care institutions desiring information concerning the Program should write to their State educational agency, or the appropriate Food and Nutrition Service Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

(b) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street SW., Room 8T36, Atlanta, Georgia 30303.

(d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 West Jackson Boulevard, 20th Floor, Chicago, Illinois 60604–3507.

(e) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, Texas: Southwest Regional Office, Food and Nutrition Service, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242.

(f) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, The Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, California 94108.

(g) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 10(d)(3), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626); secs. 804, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773 and 1785)

[Amdt. 14, 41 FR 31178, July 27, 1976, as amended by Amdt. 18, 44 FR 37898, June 29, 1979; Amdt. 27, 48 FR 195, Jan. 4, 1983; Amdt. 36, 54 FR 2990, Jan. 23, 1989; 65 FR 12435, Mar. 9, 2000. Redesignated at 72 FR 61493, Oct. 31, 2007]

### § 215.18 Information collection/recordkeeping—OMB assigned control numbers.

| 7 CFR section where requirements are described | Current OMB control number |
|---|---|
| 215.3(d) | 0584–0327 |
| 215.5(a) | 0584–0005 |
| | 0584–0002 |
| 215.5(c) | 0584–0341 |
| 215.7 (a), (c) | 0584–0005 |
| 215.7 (b)(2) | 0584–0026 |
| 215.7(d) | 0584–0329 |
| | 0584–0005 |
| 215.10 (a), (b), (d) | 0584–0005 |
| | 0584–0284 |
| 215.11 (b), (c)(1), (e) | 0584–0005 |
| 215.11(c)(2) | 0584–0002 |
| | 0584–0341 |
| 215.12 (a), (d), (e), (g) | 0584–0005 |
| 215.13(a) | 0584–0005 |
| 215.13a(a)–(e) | 0584–0026 |
| 215.14 | 0584–0005 |
| 215.14a(a)–(c) | 0584–0005 |
| 215.15 | 0584–0005 |

[50 FR 53258, Dec. 31, 1985. Redesignated at 72 FR 61493, Oct. 31, 2007]

## PART 220—SCHOOL BREAKFAST PROGRAM

Sec.

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APPENDIX A TO PART 220—ALTERNATE FOODS FOR MEALS
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APPENDIX C TO PART 220—CHILD NUTRITION (CN) LABELING PROGRAM

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

### § 220.1 General purpose and scope.

This part announces the policies and prescribes the regulations necessary to carry out the provisions of section 4 of the Child Nutrition Act of 1966, as amended, which authorizes payments to the States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.

[Amdt. 25, 41 FR 34758, Aug. 17, 1976]

### § 220.2 Definitions.

For the purpose of this part the term:

*7 CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement certain policies applicable to all Department programs. The applicable provisions deal with competition for discretionary grants and cooperative agreements, costs requiring prior approval, acknowledgement of Department support in publications and audiovisuals produced under Department programs, intergovernmental review of Department programs under Executive Order 12372, and certain miscellaneous Department requirements.

*7 CFR part 3016* means the Department's Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. 7 CFR part 3016 covers requirements for awards and subawards to State and local governmental organizations under Department programs.

*7 CFR part 3018* means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

*7 CFR part 3019* means the Department's Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. 7 CFR part 3019 covers requirements for awards and subawards to nongovernmental, nonprofit organizations under Department programs.

*7 CFR part 3052* means the Department's regulations implementing A–133, "Audits of State, Local Governments, and Non-Profit Organizations." (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

*Act* means the Child Nutrition Act of 1966, as amended.

*Applicable credits* shall have the meaning established in Office of Management and Budget Circulars A–87, C(4) and A–122, Attachment A, A(5), respectively. For availability of OMB circulars referenced in this definition see 5 CFR 1310.3.

*Breakfast* means a meal which meets the nutritional requirements set out in § 220.8, and which is served to a child in the morning hours. The meal shall be served at or close to the beginning of the child's day at school.

*Child* means: (1) A student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (1) and (2) of the definition of "School", including students who are mentally or physically disabled as defined by the State and who are participating in a school program established for the mentally or physically disabled; or (2) a person under 21 chronological years of age who is enrolled in an institution or center as described in paragraph (3) of the definition of *School* in this section.

*Competitive foods* means any foods sold in competition with the School Breakfast Program to children in food

service areas during the breakfast period.

*CND* means the Child Nutrition Division of the Food and Nutrition Service of the Department.

*Contractor* means a commercial enterprise, public or nonprofit private organization or individual that enters into a contract with a school food authority.

*Cost reimbursable contract* means a contract that provides for payment of incurred costs to the extent prescribed in the contract, with or without a fixed fee.

*Department* means the U.S. Department of Agriculture.

*Distributing agency* means a State, Federal, or private agency which enters into an agreement with the Department for the distribution of commodities pursuant to part 250 of this chapter.

*Fiscal year* means the period of 15 calendar months beginning July 1, 1976, and ending September 30, 1977; and the period of 12 calendar months beginning October 1, 1977, and each October 1 of any calendar year thereafter and ending September 30 of the following calendar year.

*Fixed fee* means an agreed upon amount that is fixed at the inception of the contract. In a cost reimbursable contract, the fixed fee includes the contractor's direct and indirect administrative costs and profit allocable to the contract.

*FNS* means the Food and Nutrition Service of the Department.

*FNSRO* means the appropriate Food and Nutrition Service Regional Office of the Food and Nutrition Service of the Department.

*Foods of minimal nutritional value* means: (1) In the case of artificially sweetened foods, a food which provides less than five percent of the Reference Daily Intake (RDI) for each of eight specified nutrients per serving; (2) in the case of all other foods, a food that provides less than five percent of the RDI for each of eight specified nutrients per 100 calories and less than five percent of the RDI for each of eight specified nutrients per serving. The eight nutrients to be assessed for this purpose are: Protein, vitamin A, vitamin C, niacin, riboflavin, thiamin, calcium and iron. Categories of foods of minimal nutritional value are listed in appendix B of this part.

*Free breakfast* means a breakfast for which neither the child nor any member of his family pays or is required to work in the school or in the school's food service.

*Infant cereal* means any iron fortified dry cereal especially formulated and generally recognized as cereal for infants that is routinely mixed with breast milk or iron-fortified infant formula prior to consumption.

*Infant formula* means any iron-fortified infant formula intended for dietary use solely as a food for normal healthy infants excluding those formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems. Infant formula, as served, must be in liquid state at recommended dilution.

*Local educational agency* means a public board of education or other public or private nonprofit authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public or private nonprofit elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public or private nonprofit elementary schools or secondary schools. The term also includes any other public or private nonprofit institution or agency having administrative control and direction of a public or private nonprofit elementary school or secondary school, including residential child care institutions, Bureau of Indian Affairs schools, and educational service agencies and consortia of those agencies, as well as the State educational agency in a State or territory in which the State educational agency is the sole educational agency for all public or private nonprofit schools.

*Menu item* means, under Nutrient Standard Menu Planning or Assisted Nutrient Standard Menu Planning, any single food or combination of foods. All menu items or foods offered as part of the reimbursable meal may be considered as contributing towards meeting

the nutrition standards provided in §220.8, except for those foods that are considered as foods of minimal nutritional value as provided for in the definition of *Foods of minimal nutritional value* in this sectionwhich are not offered as part of a menu item in a reimbursable meal. For the purposes of a reimbursable breakfast, a minimum of three menu items must be offered, one of which shall be fluid milk served as a beverage or on cereal or both; under offer versus serve, a student may decline only one menu item.

*Milk* means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local standards for such milk except that, in the meal pattern for infants (0 to 1 year of age), milk means breast milk or iron-fortified infant formula. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, and the Virgin Islands, if a sufficient supply of such types of fluid milk cannot be obtained, "milk" shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and consistent with State and local standards for such milk.

*National School Lunch Program* means the Program authorized by the National School Lunch Act.

*Net cash resources* means all monies as determined in accordance with the State agency's established accounting system, that are available to or have accrued to a School Food Authority's nonprofit school food service at any given time, less cash payable. Such monies may include but are not limited to, cash on hand, cash receivable, earnings or investments, cash on deposit and the value of stocks, bonds or other negotiable securities.

*Nonprofit* means, when applied to schools or institutions eligible for the Program, exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1986.

*Nonprofit school food service* means all food service operations conducted by the School Food Authority principally for the benefit of school children, all of the revenue from which is used solely for the operation or improvement of such food service.

*Nonprofit school food service account* means the restricted account in which all of the revenue from all food service operations conducted by the school food authority principally for the benefit of school children is retained and used only for the operation or improvement of the nonprofit school food service.

*Nonprofit* when applied to schools or institutions eligible for the Program means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1954, as amended; or in the Commonwealth of Puerto Rico, certified by the Governor.

*Nutrient Standard Menu Planning/Assisted Nutrient Standard Menu Planning* means ways to develop breakfast menus based on the analysis for nutrients in the menu items and foods offered over a school week to determine if specific levels for a set of key nutrients and calories were met in accordance with §220.8(e)(5). However, for the purposes of Assisted Nutrient Standard Menu Planning, breakfast menu planning and analysis are completed by other entities and must incorporate the production quantities needed to accommodate the specific service requirements of a particular school or school food authority in accordance with §220.8(f).

*OA* means the Office of Audit of the Department.

*OI* means the Office of Investigation of the Department.

OIG means the Office of the Inspector General of the Department.

*Program* means the School Breakfast Program.

*Reduced price breakfast* means a breakfast which meets all of the following criteria: (1) The price shall be less than the full price of the breakfast, (2) the price shall be 30 cents or lower, and (3) neither the child nor any member of his family shall be required to supply an equivalent value in work for the school or the school's food service.

*Reimbursement* means financial assistance paid or payable to participating schools for breakfasts meeting the requirements of §220.8 served to eligible children at rates assigned by the State

agency, or FNSRO where applicable. The term "reimbursement" also includes financial assistance made available through advances to School Food Authorities.

*Revenue* when applied to nonprofit school food service means all monies received by or accruing to the nonprofit school food service in accordance with the State agency's established accounting system including, but not limited to, children's payments, earnings on investments, other local revenues, State revenues, and Federal cash reimbursements.

*School* means: (1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (2) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; or (3) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term "residential child care institutions" includes, but is not limited to: Homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is entended for the care of children confined for 30 days or more.

*School Breakfast Program* means the program authorized by section 4 of the Child Nutrition Act of 1966.

*School in severe need* means a school determined to be eligible for rates of reimbursement in excess of the prescribed National Average Payment Factors, based upon the criteria set forth in § 220.9(e).

*School Food Authority* means the governing body which is responsible for the administration of one or more schools and which has legal authority to operate a breakfast program therein.

*School week* means the period of time used to determine compliance with the nutrition standards and the appropriate calorie and nutrient levels in § 220.8. Further, if applicable, school week is the basis for conducting Nutrient Standard Menu Planning or Assisted Nutrient Standard Menu Planning for breakfasts as provided in § 220.8(e) and § 220.8(f). The period shall be a normal school week of five consecutive days; however, to accommodate shortened weeks resulting from holidays and other scheduling needs, the period shall be a minimum of three consecutive days and a maximum of seven consecutive days. Weeks in which school breakfasts are offered less than three times shall be combined with either the previous or the coming week.

*Secretary* means the Secretary of Agriculture.

*State* means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

*State agency* means: (1) The State educational agency or (2) such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools as described in paragraph (3) of the definition of *School* in this section.

*State educational agency* means, as the State legislature may determine: (1) The chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (2) a board of education controlling the State department of education.

*Yogurt* means commercially prepared coagulated milk products obtained by the fermentation of specific bacteria,

that meet milk fat or milk solid requirements and to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Definition and Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, 21 CFR 131.200, 21 CFR 131.203, and 21 CFR 131.206, respectively.

(Sec. 6, Pub. L. 95–627, 92 Stat. 3620 (42 U.S.C. 1760); sec. 205, Pub. L. 96–499, The Omnibus Reconciliation Act of 1980, 94 Stat. 2599; secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1759(a), 1773, 1758; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; sec. 819, Pub. L. 97–35; 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757))

[Amdt. 25, 41 FR 34758, Aug. 17, 1976]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 220.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 220.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program covered by this part. Within FNS, CND shall be responsible for administration of the Program.

(b) Within the States, responsibility for the administration of the Program in schools as described in paragraphs (1) and (2) of the definition of *School* in § 220.2 shall be in the State educational agency, except that FNSRO shall administer the Program with respect to nonprofit private schools and adding in their place the words "as described in paragraph (1) of the definition of *School* in § 220.2 in any State wherein the State educational agency is not permitted by law to disburse Federal funds paid to it under the Program; *Provided, however*, That FNSRO shall also administer the Program in all other nonprofit private schools which have been under continuous FNS administration since October 1, 1980, unless the administration of such private schools is assumed by a State agency.

(c) Within the States, responsibility for the administration of the Program in schools, as described in paragraph (3) of the definition of *School* in § 220.2, shall be in the State educational agency, or if the State educational agency cannot administer the Program in such schools, such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in such schools: *Provided, however*, That FNSRO shall administer the Program in such schools if the State agency is not permitted by law to disburse Federal funds paid to it under the Program to such schools; and *Provided, further*, That FNSRO shall also administer the Program in all other such schools which have been under continuous FNS administration since October 1, 1980, unless the administration of such schools is assumed by a State agency.

(d) References in this part to "FNSRO where applicable" are to FNSRO as the agency administering the Program.

(e) Each State agency desiring to take part in any of the programs shall enter into a written agreement with the Department for the administration of the Program in the State in accordance with the provisions of this part, 7 CFR parts 235, 245, 15, 15a, 15b and, as applicable, 7 CFR part 3015, 7 CFR part 3016 and 7 CFR part 3019, and with FNS Instructions. Such agreement shall cover the operation of the Program during the period specified therein and may be extended at the option of the Department.

(Sec. 804, 816 and 817, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771 and 1785); 44 U.S.C. 3506)

[Amdt. 25, 41 FR 34759, Aug. 17, 1976, as amended at 47 FR 745, Jan. 7, 1982; Amdt. 42, 47 FR 14133, Apr. 2, 1982; Amdt. 56, 54 FR 2990, Jan. 23, 1989; 71 FR 39517, July 13, 2006; 72 FR 63792, Nov. 13, 2007]

### § 220.4 Payment of funds to States and FNSROs.

(a) To the extent funds are available, the Secretary shall make breakfast assistance payments to each State agency for breakfasts served to children under the Program. Subject to § 220.13(b)(2), the total of these payments for each State for any fiscal year shall be limited to the total amount of reimbursement payable to eligible schools within the State under this part for the fiscal year.

(b) The Secretary shall prescribe by July 1 of each fiscal year annual adjustments to the nearest one-fourth cent in the national average per breakfast factors for all breakfasts and for free and reduced price breakfasts, that shall reflect changes in the cost of operating a breakfast program.

(c) In addition to the funds made available under paragraph (a) of this section, funds shall be made available to the State agencies, and FNSROs where applicable, in such amounts as are needed to finance reimbursement rates assigned in accordance with the provisions of § 220.9(c).

(Secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1759(a), 1773, 1758); Pub. L. 97–370, 96 Stat. 1806)

[38 FR 35554, Dec. 28, 1973, as amended at 40 FR 30923, July 24, 1975; 46 FR 51367, Oct. 20, 1981; 48 FR 20896, May 10, 1983; Amdt. 49, 49 FR 18987, May 4, 1984]

### § 220.5 Method of payment to States.

Funds to be paid to any State for the School Breakfast Program shall be made available by means of Letters of Credit issued by FNS in favor of the State agency. The State agency shall:

(a) Obtain funds needed for reimbursement to School Food Authorities through presentation by designated State officials of a payment Voucher on Letter of Credit in accordance with procedures prescribed by FNS and approved by the U.S. Treasury Department; (b) submit requests for funds only at such times and in such amounts, as will permit prompt payment of claims or authorized advances; and (c) use the funds received from such requests without delay for the purpose for which drawn.

[Amdt. 25, 41 FR 34759, Aug. 17, 1976]

### § 220.6 Use of funds.

(a) Federal funds made available under the School Breakfast Program shall be used by State agencies, or FNSROs where applicable, to reimburse or make advance payments to School Food Authorities in connection with breakfasts served in accordance with the provisions of this part. However, with the approval of FNS, any State agency, or FNSRO where applicable, may reserve for use in carrying out special developmental projects an amount up to 1 per centum of the funds earned in any fiscal year under the School Breakfast Program. Advance payments to School Food Authorities may be made at such times and in such amounts as are necessary to meet current obligations.

(b) Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part, whether received directly or indirectly from the Department, shall—

(1) If such funds, assets, or property are of a value of $100 or more, be fined not more than $25,000 or imprisoned not more than 5 years or both; or

(2) If such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than one year or both.

(c) Whoever receives, conceals, or retains to his use or gain funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties provided in paragraph (b) of this section.

(Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 10(d)(3), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626)

[40 FR 30923, July 24, 1975, as amended by Amdt. 25, 41 FR 34759, Aug. 17, 1976; Amdt. 28, 44 FR 37899, June 29, 1979; 64 FR 50742, Sept. 20, 1999]

### § 220.7 Requirements for participation.

(a) The School Food Authority shall make written application to the State agency, or FNSRO where applicable, for any school in which it desires to operate the School Breakfast Program, if such school did not participate in the Program in the prior fiscal year. The School Food Authority shall also submit for approval, either with the application or at the request of the State agency, or FNSRO where applicable, a free and reduced price policy statement in accordance with part 245 of this chapter. A School Food Authority which simultaneously makes application for the National School Lunch

Program and the School Breakfast Program shall submit one free and reduced price policy statement which shall provide that the terms, conditions, and eligibility criteria set forth in such policy statement shall apply to the service of free and reduced price lunches and to the service of free and reduced price breakfasts. If, at the time application is made for the School Breakfast Program, a School Food Authority has an approved free and reduced price policy statement on file with the State agency, or FNSRO where applicable, for the National School Lunch Program, it need only confirm in writing that such approved policy statement will also apply to the operation of its School Breakfast Program. Applications for the School Breakfast Program shall not be approved in the absence of an approved free and reduced price policy statement.

(1) A school which also either participates in the National School Lunch Program or only receives donations of commodities for its nonprofit lunch program under the provisions of part 250 of this chapter (commodity only school) shall apply the same set of eligibility criteria so that children who are eligible for free lunches shall also be eligible for free breakfasts and children who are eligible for reduced price lunches shall also be eligible for reduced price breakfasts.

(2) Schools shall obtain a minimum of two food safety inspections per school year conducted by a State or local governmental agency responsible for food safety inspections. Schools participating in more than one child nutrition program shall only be required to obtain a minimum of two food safety inspections per school year if the food preparation and service for all meal programs take place at the same facility. Schools shall post in a publicly visible location a report of the most recent inspection conducted, and provide a copy of the inspection report to a member of the public upon request.

(3) A school food authority must implement a food safety program meeting the requirements of §210.13(c) and §210.15(b)(5) of this chapter at each of the food preparation and service facilities under its jurisdiction serving breakfasts.

(b) Applications shall solicit information in sufficient detail to enable the State agency to determine whether the School Food Authority is eligible to participate in the Program and extent of the need for Program payments.

(c) Within the funds available to them, State agencies, or FNSRO's where applicable, shall approve for participation in the School Breakfast Program any school making application and agreeing to carry out the program in accordance with this part. State agencies, or FNSRO's where applicable, have a positive obligation, however, to extend the benefits of the School Breakfast Program to children attending schools in areas where poor economic conditions exist.

(d)(1) Any school food authority (including a State agency acting in the capacity of a school food authority) may contract with a food service management company to manage its food service operation in one or more of its schools. However, no school or school food authority may contract with a food service management company to operate an a la carte food service unless the company agrees to offer free, reduced price and paid reimbursable breakfasts to all eligible children. Any school food authority that employs a food service management company in the operation of its nonprofit school food service shall:

(i) Adhere to the procurement standards specified in §220.16 when contracting with the food service management company;

(ii) Ensure that the food service operation is in conformance with the school food authority's agreement under the Program;

(iii) Monitor the food service operation through periodic on-site visits;

(iv) Retain control of the quality, extent, and general nature of its food service, and the prices to be charged the children for meals;

(v) Retain signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims;

(vi) Ensure that all federally donated foods received by the school food authority and made available to the food

service management company accrue only to the benefit of the school food authority's nonprofit school food service and are fully utilized therein;

(vii) Maintain applicable health certification and assure that all State and local regulations are being met by a food service management company preparing or serving meals at a school food authority facility;

(viii) Obtain written approval of invitations for bids and requests for proposals before their issuance when required by the State agency. The school food authority must incorporate all State agency required changes to its solicitation documents before issuing those documents; and

(ix) Ensure that the State agency has reviewed and approved the contract terms and the school food authority has incorporated all State agency required changes into the contract or amendment before any contract or amendment to an existing food service management company contract is executed. Any changes made by the school food authority or a food service management company to a State agency pre-approved prototype contract or State agency approved contract term must be approved in writing by the State agency before the contract is executed. When requested, the school food authority must submit all procurement documents, including responses submitted by potential contractors, to the State agency, by the due date established by the State agency.

(2) In addition to adhering to the procurement standards under this part, school food authorities contracting with food service management companies shall ensure that:

(i) The invitation to bid or request for proposal contains a 21-day cycle menu developed in accordance with the provisions of § 220.8, to be used as a standard for the purpose of basing bids or estimating average cost per meal. A school food authority with no capability to prepare a cycle menu may, with State agency approval, require that each food service management company include a 21-day cycle menu, developed in accordance with the provisions of § 220.8, with its bid or proposal. The food service management company must adhere to the cycle for the first 21 days of meal service. Changes thereafter may be made with the approval of the school food authority; and

(ii) Any invitation to bid or request for proposal indicate that nonperformance subjects the food service management company to specified sanctions in instances where the food service management company violates or breaches contract terms. The school food authority shall indicate these sanctions in accordance with the procurement provisions stated in § 220.16.

(3) Contracts that permit all income and expenses to accrue to the food service management company and "cost-plus-a-percentage-of-cost" and "cost-plus-a-percentage-of-income" contracts are prohibited. Contracts that provide for fixed fees such as those that provide for management fees established on a per meal basis are allowed. Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met. Such agreements shall also include the following requirements:

(i) The food service management company shall maintain such records as the school food authority will need to support its Claim for Reimbursement under this part, and shall, at a minimum, report claim information to the school food authority promptly at the end of each month. Such records shall be made available to the school food authority, upon request, and shall be available for a period of 3 years from the date of the submission of the final Financial Status Report, for inspection and audit by representatives of the State agency, of the Department, and of the Government Accountability Office at any reasonable time and place. If audit findings have not been resolved, the records shall be retained beyond the three-year period (as long as required for the resolution of the issues raised by the audit);

(ii) The food service management company shall have State or local health certification for any facility outside the school in which it proposes to prepare meals and the food service management company shall maintain

this health certification for the duration of the contract; and

(iii) No payment is to be made for meals that are spoiled or unwholesome at time of delivery, do not meet detailed specifications as developed by the school food authority for each food component specified in § 220.8, or do not otherwise meet the requirements of the contract. Specifications shall cover items such a grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

(4) The contract between a school food authority and food service management company shall be of a duration of no longer than 1 year and options for the yearly renewal of the contract shall not exceed 4 additional years. All contracts shall include a termination clause whereby either party may cancel for cause with 60-day notification.

(e) Each school food authority approved to participate in the program shall enter into a written agreement with the State agency or the Department through the FNSRO, as applicable, that may be amended as necessary. Nothing in the preceding sentence shall be construed to limit the ability of the State agency or the FNSRO to suspend or terminate the agreement in accordance with § 220.18. If a single State agency administers any combination of the Child Nutrition Programs, that State agency shall provide each SFA with a single agreement with respect to the operation of those programs. Such agreements shall provide that the School Food Authority shall, with respect to participating schools under its jurisdiction:

(1)(i) Maintain a nonprofit school food service;

(ii) In accordance with the financial management system established under § 220.13(i) of this part, use all revenues received by such food service only for the operation or improvement of that food service *Except that*, facilities, equipment, and personnel support with funds provided to a school food authority under this part may be used to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.);

(iii) Revenues received by the nonprofit school food service shall not be used to purchase land or buildings or to contruct buildings;

(iv) Limit its net cash resources to an amount that does not exceed three months average expenditure for its nonprofit school food service or such other amount as may be approved by the State agency; and

(v) Observe the limitations on any competitive food service as set forth in § 220.12 of this part;

(2) Serve breakfasts which meet the minimum requirements prescribed in § 220.8, during a period designated as the breakfast period by the school;

(3) Price the breakfast as a unit;

(4) Supply breakfast without cost or at reduced price to all children who are determined by the School Food Authority to be unable to pay the full price thereof in accordance with the free and reduced price policy statements approved under part 245 of this chapter;

(5) Make no discrimination against any child because of his inability to pay the full price of the breakfasts;

(6) Claim reimbursement at the assigned rates only for breakfasts served in accordance with the agreement;

(7) Submit Claims for Reimbursement in accordance with § 220.11 of this part and procedures established by the State agency, or FNSRO where applicable;

(8) Maintain, in the storage, preparation and service of food, proper sanitation and health standards in conformance with all applicable State and local laws and regulations, and comply with the food safety requirements in paragraph (a)(2) and paragraph (a)(3) of this section;

(9) Purchase, in as large quantities as may be efficiently utilized in its nonprofit school food service, foods designated as plentiful by the State Agency, or CFPDO, where applicable;

(10) Accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department;

(11) Maintain necessary facilities for storing, preparing, and serving food;

(12) Maintain a financial management system as prescribed by the State agency, or FNSRO where applicable;

(13) Upon request, make all accounts and records pertaining to its nonprofit school food service available to the State agency, to FNS and to OA for audit or review at a reasonable time and place. Such records shall be retained for a period of three years after the end of the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit;

(14) Retain the individual application for free and reduced price breakfasts submitted by families for a period of three years after the end of the fiscal year to which they pertain; and

(15) Comply with the requirements of the Department's regulations respecting nondiscrimination (7 CFR part 15).

(f) Nothing contained in this part shall prevent the State Agency from imposing additional requirements for participation in the program which are not inconsistent with the provisions of this part.

(44 U.S.C. 3506; sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757); Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–647, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[32 FR 34, Jan. 5, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 220.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 220.8 Nutrition standards and menu planning approaches for breakfasts.

(a) *What are the nutrition standards for breakfasts for children age 2 and over?* School food authorities must ensure that participating schools provide nutritious and well-balanced breakfasts. For children age 2 and over, breakfasts, when averaged over a school week, must meet the nutrition standards and the appropriate nutrient and calorie levels in this section. The nutrition standards are:

(1) Provision of one-fourth of the Recommended Dietary Allowances (RDA) for protein, calcium, iron, vitamin A and vitamin C in the appropriate levels (see paragraphs (b), (c), (e)(1), or (h) of this section);

(2) Provision of the breakfast energy allowances (calories) for children in the appropriate levels (see paragraphs (b), (c), (e)(1), or (h) of this section);

(3) These applicable recommendations of the 1995 Dietary Guidelines for Americans:

(i) Eat a variety of foods;

(ii) Limit total fat to 30 percent of total calories;

(iii) Limit saturated fat to less than 10 percent of total calories;

(iv) Choose a diet low in cholesterol;

(v) Choose a diet with plenty of grain products, vegetables, and fruits; and

(vi) Choose a diet moderate in salt and sodium.

(4) These measures of compliance with the applicable recommendations of the 1995 Dietary Guidelines for Americans:

(i) Limit the percent of calories from total fat to 30 percent of the actual number of calories offered;

(ii) Limit the percent of calories from saturated fat to less than 10 percent of the actual number of calories offered;

(iii) Reduce sodium and cholesterol levels; and

(iv) Increase the level of dietary fiber.

(5) School food authorities have several ways to plan menus. The minimum levels of nutrients and calories that breakfasts must offer depends on the menu planning approach used and the age/grades served. The menu planning approaches are:

(i) Nutrient standard menu planning (see paragraphs (b) and (e) of this section);

(ii) Assisted nutrient standard menu planning (see paragraphs (b) and (f) of this section);

(iii) Traditional food-based menu planning (see paragraphs (c) and (g)(1) of this section);

(iv) Enhanced food-based menu planning (see paragraphs (c) and (g)(2) of this section); or

(v) Alternate menu planning as provided for in paragraph (h) of this section.

(6) Schools must keep production and menu records for the breakfasts they produce. These records must show how

the breakfasts contribute to the required food components, food items or menu items every day. In addition, these records must show how the breakfasts contribute to the nutrition standards in paragraph (a) of this section and the appropriate calorie and nutrient levels (see paragraphs (c), (d) or (h) of this section, depending on the menu planning approach used) over the school week. If applicable, schools or school food authorities must maintain nutritional analysis records to demonstrate that breakfasts, when averaged over each school week, meet:

(i) The nutrition standards provided in paragraph (a) of this section; and

(ii) The nutrient and calorie levels for children for each age or grade group in accordance with paragraphs (b), (e)(1) of this section or developed under paragraph (h) of this section.

(b) *What are the levels for nutrients and calories for breakfasts planned under the nutrient standard or assisted nutrient standard menu planning approaches?* (1) The required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS
NUTRIENT STANDARD MENU PLANNING APPROACHES (SCHOOL WEEK AVERAGES)

| | MINIMUM REQUIREMENTS | | OPTIONAL |
|---|---|---|---|
| NUTRIENTS AND ENERGY ALLOWANCES | PRESCHOOL | GRADES K-12 | GRADES 7-12 |
| Energy allowances (calories) | 388 | 554 | 618 |
| Total fat (as a percentage of actual total food energy) | [1] | [1,2] | [2] |
| Saturated fat (as a percentage of actual total food energy) | [1] | [1,3] | [3] |
| RDA for protein (g) | 5 | 10 | 12 |
| RDA for calcium (mg) | 200 | 257 | 300 |
| RDA for iron (mg) | 2.5 | 3 | 3.4 |
| RDA for Vitamin A (RE) | 113 | 197 | 225 |
| RDA for Vitamin C (mg) | 11 | 13 | 14 |

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week
[3] Less than 10 percent over a school week

(2) Optional levels are:

OPTIONAL MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS
NUTRIENT STANDARD MENU PLANNING APPROACHES (SCHOOL WEEK AVERAGES)

| NUTRIENTS AND ENERGY ALLOWANCES | AGES 3-6 | AGES 7-10 | AGES 11-13 | AGES 14 AND ABOVE |
|---|---|---|---|---|
| Energy allowances (calories) | 419 | 500 | 588 | 625 |
| Total fat (as a percentage of actual total food energy) | [1,2] | [2] | [2] | [2] |
| Saturated fat (as a percentage of actual total food energy) | [1,3] | [3] | [3] | [3] |
| RDA for protein (g) | 5.5 | 7 | 11.25 | 12.5 |
| RDA for calcium (mg) | 200 | 200 | 300 | 300 |
| RDA for iron (mg) | 2.5 | 2.5 | 3.4 | 3.4 |
| RDA for Vitamin A (RE) | 119 | 175 | 225 | 225 |
| RDA for Vitamin C (mg) | 11.00 | 11.25 | 12.5 | 14.4 |

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week
[3] Less than 10 percent over a school week

(3) Schools may also develop a set of nutrient and calorie levels for a school week. These levels are customized for the age groups of the children in the particular school.

(c) *What are the nutrient and calorie levels for breakfasts planned under the food-based menu planning approaches?*—(1) *Traditional approach.* For the traditional food-based menu planning approach, the required levels are:

| MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS TRADITIONAL FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES) | | | |
|---|---|---|---|
| NUTRIENTS AND ENERGY ALLOWANCES | AGE 2 | AGES 3,4,5 | GRADES K-12 |
| Energy allowances (calories) | 325 | 388 | 554 |
| Total fat (as a percentage of actual total food energy) | [1] | [1] | [1,2] |
| Saturated fat (as a percentage of actual total food energy) | [1] | [1] | [1,3] |
| RDA for protein (g) | 4 | 5 | 10 |
| RDA for calcium (mg) | 200 | 200 | 257 |
| RDA for iron (mg) | 2.5 | 2.5 | 3 |
| RDA for Vitamin A (RE) | 100 | 113 | 197 |
| RDA for Vitamin C (mg) | 10 | 11 | 13 |

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week.
[3] Less than 10 percent over a school week.

(2) *Enhanced approach.* For the enhanced food-based menu planning approach, the required levels are:

| MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS ENHANCED FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES) | | | |
|---|---|---|---|
| | REQUIRED FOR | | OPTION FOR |
| NUTRIENTS AND ENERGY ALLOWANCES | PRESCHOOL | GRADES K-12 | GRADES 7-12 |
| Energy allowances (calories) | 388 | 554 | 618 |
| Total fat (as a percentage of actual total food energy) | [1] | [1,2] | [2] |
| Saturated fat (as a percentage of actual total food energy) | [1] | [1, 3] | [3] |
| RDA for protein (g) | 5 | 10 | 12 |
| RDA for calcium (mg) | 200 | 257 | 300 |
| RDA for iron (mg) | 2.5 | 3 | 3.4 |
| RDA for Vitamin A (RE) | 113 | 197 | 225 |
| RDA for Vitamin C (mg) | 11 | 13 | 14 |

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week.
[3] Less than 10 percent over a school week.

(d) *Exceptions and variations allowed in reimbursable breakfasts*—(1) *Exceptions for disability reasons.* Schools must make substitutions in breakfasts for students who are considered to have a disability under 7 CFR part 15b.3 and whose disability restricts their diet. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement must be signed by a licensed physician.

(2) *Exceptions for non-disability reasons.* Schools may make substitutions for students without disabilities who cannot consume the breakfast because of medical or other special dietary needs. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Except

with respect to substitutions for fluid milk, such statement must be signed by a recognized medical authority.

(i) *Milk substitutions for non-disability reasons.* Schools may make substitutions for fluid milk for non-disabled students who cannot consume fluid milk due to medical or special dietary needs. A school that selects this option may offer the nondairy beverage(s) of its choice, provided the beverage(s) meet the nutritional standards established in paragraph (i)(3) of this section. Expenses incurred in providing substitutions for fluid milk that exceed program reimbursements must be paid by the school food authority.

(ii) *Requisites for milk substitutions.* (A) A school food authority must inform the State agency if any of its schools choose to offer fluid milk substitutes other than for students with disabilities; and

(B) A medical authority or the student's parent or legal guardian must submit a written request for a fluid milk substitute, identifying the medical or other special dietary need that restricts the student's diet.

(iii) *Substitution approval.* The approval for fluid milk substitution must remain in effect until the medical authority or the student's parent or legal guardian revokes such request in writing, or until such time as the school changes its substitution policy for non-disabled students.

(3) *Variations for ethnic, religious, or economic reasons.* Schools should consider ethnic and religious preferences when planning and preparing breakfasts. Variations on an experimental or continuing basis in the food components for the food-based menu planning approaches in paragraph (g) may be allowed by FNS. Any variations must be nutritionally sound and needed to meet ethnic, religious, or economic needs.

(4) *Exceptions for natural disasters.* If there is a natural disaster or other catastrophe, FNS may temporarily allow schools to serve breakfasts for reimbursement that do not meet the requirements in this section.

(e) *What are the requirements for the nutrient standard menu planning approach?*—(1) *Nutrient levels*—(i) *Adjusting nutrient levels for young children.* Schools with children who are age 2 must at least meet the nutrition standards in paragraph (a) of this section and the preschool nutrient and calorie levels in paragraph (b)(1) of this section over a school week. Schools may also use the preschool nutrient and calorie levels in paragraph (b)(2) of this section or may calculate nutrient and calorie levels for two year olds. FNS has a method for calculating these levels in menu planning guidance materials.

(ii) *Minimum levels for nutrients.* Breakfasts must at least offer the nutrient and calorie levels for the required grade groups in the table in paragraph (b)(1) of this section. Schools may also offer breakfasts meeting the nutrient and calorie levels for the age groups in paragraph (b)(2) of this section. If only one grade or age group is outside the established levels, schools may follow the levels for the majority of the children. Schools may also customize the nutrient and calorie levels for the children they serve. FNS has a method for calculating these levels in guidance materials for menu planning.

(2) *Reimbursable breakfasts*—(i) *Contents of a reimbursable breakfast.* A reimbursable breakfast must include at least three menu items. All menu items or foods offered in a reimbursable breakfast contribute to the nutrition standards in paragraph (a) of this section and to the levels of nutrients and calories that must be met in paragraphs (c) or (e)(1) of this section. Unless offered as part of a menu item in a reimbursable breakfast, foods of minimal nutritional value (see appendix B to part 220) are not included in the nutrient analysis. Reimbursable breakfasts planned under the nutrient standard menu planning approach must meet the nutrition standards in paragraph (a) of this section and the appropriate nutrient and calorie levels in paragraph (b) or (e)(1) of this section.

(ii) *Offer versus serve.* Schools must offer at least three menu items. At their option, school food authorities may allow students to select only two menu items and to decline a maximum of one menu item. The price of a reimbursable breakfast does not change if the student does not take a menu item or requests smaller portions.

(3) *Doing the analysis.* Schools using nutrient standard menu planning must conduct the analysis on all menu items and foods offered in a reimbursable breakfast. The analysis is conducted over a school week. Unless offered as part of a menu item in a reimbursable breakfast, foods of minimal nutritional value (see appendix B to part 220) are not included in the nutrient analysis.

(4) *Software elements*—(i) *The Child Nutrition Database.* The nutrient analysis is based on the Child Nutrition Database. This database is part of the software used to do a nutrient analysis. Software companies or others developing systems for schools may contact FNS for more information about the database.

(ii) *Software evaluation.* FNS or an FNS designee evaluates any nutrient analysis software before it may be used in schools. FNS or its designee determines if the software, as submitted, meets the minimum requirements. The approval of software does not mean that FNS or USDA endorses it. The software must be able to do all functions after the basic data is entered. The required functions include weighted averages and the optional combined analysis of the lunch and breakfast programs.

(5) *Nutrient analysis procedures*—(i) *Weighted averages.* Schools must include all menu items and foods offered in reimbursable breakfasts in the nutrient analysis. Menu items and foods are included based on the portion sizes and projected serving amounts. They are also weighted based on their proportionate contribution to the breakfasts offered. This means that menu items or foods more frequently offered are weighted more heavily than those not offered as frequently. Schools calculate weighting as indicated by FNS guidance and by the guidance provided by the software. Through September 30, 2009, schools are not required to conduct a weighted analysis.

(ii) *Analyzed nutrients.* The analysis includes all menu items and foods offered over a school week. The analysis must determine the levels of: Calories, protein, vitamin A, vitamin C, iron, calcium, total fat, saturated fat, sodium, cholesterol and dietary fiber.

(iii) *Combining the analysis of the lunch and breakfast programs.* At their option, schools may combine the analysis of breakfasts offered under this part and lunches offered under part 210 of this chapter. The analysis is done proportionately to the levels of participation in each program based on FNS guidance.

(6) *Comparing the results of the nutrient analysis.* Once the procedures in paragraph (i)(5) of this section are completed, schools must compare the results of the analysis to the appropriate nutrient and calorie levels, by age/grade groups, in paragraph (b) of this section or those developed under paragraph (e)(1) of this section. This comparison determines the school week's average. Schools must also make comparisons to the nutrition standards in paragraph (a) of this section to determine how well they are meeting the nutrition standards over the school week.

(7) *Adjustments to the menus.* Once schools know the results of the nutrient analysis based on the procedures in paragraphs (e)(5) and (e)(6) of this section, they must adjust future menu cycles to reflect production and how often the menu items and foods are offered. Schools may need to reanalyze menus when the students' selections and, consequently, production levels change. Schools may need to change the menu items and foods offered given the students' selections and may need to modify the recipes and other specifications to make sure that the nutrition standards in paragraph (a) and either paragraph (b) or (e)(1) of this section are met.

(8) *Standardized recipes.* If a school follows the nutrient standard menu planning approach, it must develop and follow standardized recipes. A standardized recipe is a recipe that was tested to provide an established yield and quantity using the same ingredients for both measurement and preparation methods. Any standardized recipes developed by USDA/FNS are in the Child Nutrition Database. If a school has its own recipes, they must be standardized and analyzed to determine the levels of calories, nutrients, and dietary components listed in paragraph (e)(5)(ii) of this section. Schools must add any

local recipes to their local database as outlined in FNS guidance.

(9) *Processed foods.* The Child Nutrition Database includes a number of processed foods. Schools may use purchased processed foods and menu items that are not in the Child Nutrition Database. Schools or the State agency must add any locally purchased processed foods and menu items to their local database as outlined in FNS guidance. Schools or State agencies must obtain the levels of calories, nutrients, and dietary components listed in paragraph (e)(5)(ii) of this section.

(10) *Menu substitutions.* Schools may need to substitute foods or menu items in a menu that was already analyzed. If the substitution(s) occurs more than two weeks before the planned menu is served, the school must reanalyze the revised menu. If the substitution(s) occurs two weeks or less before the planned menu is served, the school does not need to do a reanalysis. However, schools should always try to substitute similar foods.

(11) *Meeting the nutrition standards.* The school's analysis shows whether their menus are meeting the nutrition standards in paragraph (a) of this section and the appropriate levels of nutrients and calories in paragraph (b) of this section or customized levels developed under paragraph (e)(1) of this section. If the analysis shows that the menu(s) are not meeting these standards, the school needs to take action to make sure that the breakfasts meet the nutrition standards and the calorie, nutrient, and dietary component levels. Actions may include technical assistance and training and may be taken by the State agency, the school food authority or by the school as needed.

(12) *Other Child Nutrition Programs and nutrient standard analysis menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare breakfasts for these programs using the nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrient and calories for adult breakfasts offered under the Child and Adult Care Food Program.

(f) *What are the requirements for the assisted nutrient standard menu planning approach?*—(1) *Definition of assisted nutrient standard menu planning.* Some school food authorities may not be able to do all of the procedures necessary for nutrient standard menu planning. The assisted nutrient standard menu planning approach provides schools with menu cycles developed and analyzed by other sources. These sources include the State agency, other schools, consultants, or food service management companies.

(2) *Elements of assisted nutrient standard menu planning.* School food authorities using menu cycles developed under assisted nutrient standard menu planning must follow the procedures in paragraphs (e)(1) through (e)(10) of this section. The menu cycles must also incorporate local food preferences and accommodate local food service operations. The menu cycles must meet the nutrition standards in paragraph (a) of this section and meet the applicable nutrient and calorie levels for nutrient standard menu planning in paragraphs (b) or (e)(1) of this section. The supplier of the assisted nutrient standard menu planning approach must also develop and provide recipes, food product specifications, and preparation techniques. All of these components support the nutrient analysis results of the menu cycles used by the receiving school food authorities.

(3) *State agency approval.* Prior to its use, the State agency must approve the initial menu cycle, recipes and other specifications of the assisted nutrient standard menu planning approach. The State agency needs to make sure all the steps required for nutrient analysis were followed. School food authorities may also ask the State agency for assistance with implementation of their assisted nutrient standard menu planning approach.

(4) *Required adjustments.* After the initial service of the menu cycle developed under the assisted nutrient standard menu planning approach, the nutrient analysis must be reassessed and appropriate adjustments made as discussed in paragraph (e)(7) of this section.

(5) *Final responsibility for meeting the nutrition standards.* The school food authority using the assisted nutrient standard menu planning approach retains final responsibility for meeting the nutrition standards in paragraph (a) of this section and the applicable calorie and nutrient levels in paragraphs (b) or (e)(1) of this section.

(6) *Adjustments to the menus.* If the nutrient analysis shows that the breakfasts offered are not meeting the nutrition standards in paragraph (a) of this section and the applicable calorie and nutrient levels in paragraphs (b) or (e)(1) of this section, the State agency, school food authority or school must take action to make sure the breakfasts offered meet these requirements. Actions needed include technical assistance and training.

(7) *Other Child Nutrition Programs and assisted nutrient analysis menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare breakfasts for these programs using the assisted nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrients and calories for adult breakfasts offered under the Child and Adult Care Food Program.

(g) *What are the requirements for the food-based menu planning approaches?*—(1) *Food items.* There are two menu planning approaches based on meal patterns, not nutrient analysis. These approaches are the traditional food-based menu planning approach and the enhanced food-based menu planning approach. Schools using one of these approaches must offer these food items in at least the portions required for various age/grade groups:

(i) A serving of fluid milk as a beverage or on cereal or used partly for both;

(ii) A serving of fruit or vegetable or both, or full-strength fruit or vegetable juice; and

(iii) Two servings from one of the following components or one serving from each component:

(A) Grains/breads; and/or

(B) Meat/meat alternate.

(2) *Quantities for the traditional food-based menu planning approach.* At a minimum, schools must offer the food items in the quantities specified for the appropriate age/grade group in the following table:

| TRADITIONAL FOOD-BASED MENU PLANNING APPROACH-MEAL PATTERN FOR BREAKFASTS | | | |
|---|---|---|---|
| FOOD COMPONENTS AND FOOD ITEMS | AGES 1-2 | AGES 3,4 AND 5 | GRADES K-12 |
| MILK (fluid) (as a beverage, on cereal or both) | 4 fluid ounces | 6 fluid ounces | 8 fluid ounces |
| JUICE/FRUIT/VEGETABLE: Fruit and/or vegetable; or full-strength fruit juice or vegetable juice | ¼ cup | ½ cup | ½ cup |
| SELECT ONE SERVING FROM EACH OF THE FOLLOWING COMPONENTS, TWO FROM ONE COMPONENT, OR AN EQUIVALENT COMBINATION: | | | |
| GRAINS/BREADS : | | | |
| Whole-grain or enriched bread | ½ slice | ½ slice | 1 slice |
| Whole-grain or enriched biscuit, roll, muffin, etc. | ½ serving | ½ serving | 1 serving |
| Whole-grain, enriched or fortified cereal | ¼ cup or 1/3 ounce | 1/3 cup or ½ ounce | ¾ cup or 1 ounce |
| MEAT OR MEAT ALTERNATES: | | | |
| Meat/poultry or fish | ½ ounce | ½ ounce | 1 ounce |
| Alternate protein products[1] | ½ ounce | ½ ounce | 1 ounce |
| Cheese | ½ ounce | ½ ounce | 1 ounce |
| Large egg | ½ | ½ | ½ |
| Peanut butter or other nut or seed butters | 1 tablespoon | 1 tablespoon | 2 tablespoons |
| Cooked dry beans and peas | 2 tablespoons | 2 tablespoons | 4 tablespoons |
| Nuts and/or seeds (as listed in program guidance)[2] | ½ ounce | ½ ounce | 1 ounce |
| Yogurt, plain or flavored, unsweetened or sweetened | 2 ounces or ¼ cup | 2 ounces or ¼ cup | 4 ounces or ½ cup |

[1] Must meet the requirements in appendix A of this part.

[2] No more than 1 ounce of nuts and/or seeds may be served in any one breakfast.

(3) *Quantities for the enhanced food-based menu planning approach.* At a minimum, schools must offer the food items in the quantities specified for the appropriate age/grade group in the following table:

| ENHANCED FOOD-BASED MENU PLANNING APPROACH-MEAL PATTERN FOR BREAKFASTS | | | | |
|---|---|---|---|---|
| FOOD COMPONENTS AND FOOD ITEMS | REQUIRED FOR | | | OPTION FOR |
| | AGES 1-2 | PRESCHOOL | GRADES K-12 | GRADES 7-12 |
| Milk (fluid) (as a beverage, on cereal or both) | 4 fluid ounces | 6 fluid ounces | 8 fluid ounces | 8 fluid ounces |
| JUICE/FRUIT/VEGETABLE: Fruit and/or vegetable; or full-strength fruit juice or vegetable juice | ¼ cup | ½ cup | ½ cup | ½ cup |
| SELECT ONE SERVING FROM EACH OF THE FOLLOWING COMPONENTS, TWO FROM ONE COMPONENT OR AN EQUIVALENT COMBINATION: | | | | |
| GRAINS/BREADS: | | | | |
| Whole-grain or enriched bread | ½ slice | ½ slice | 1 slice | 1 slice |
| Whole-grain or enriched biscuit, roll, muffin, etc. | ½ serving | ½ serving | 1 serving | 1 serving |
| Whole-grain, enriched or fortified cereal | ¼ cup or 1/3 ounce | 1/3 cup or ½ ounce | ¾ cup or 1 ounce | ¾ cup or 1 ounce plus an additional serving of one of the Grains/Breads above. |
| MEAT OR MEAT ALTERNATES: | | | | |
| Meat/poultry or fish | ½ ounce | ½ ounce | 1 ounce | 1 ounce |
| Alternate protein products[1] | ½ ounce | ½ ounce | 1 ounce | 1 ounce |
| Cheese | ½ ounce | ½ ounce | 1 ounce | 1 ounce |
| Large egg | ½ | ½ | ½ | ½ |
| Peanut butter or other nut or seed butters | 1 tablespoon | 1 tablespoon | 2 tablespoons | 2 tablespoons |
| Cooked dry beans and peas | 2 tablespoons | 2 tablespoons | 4 tablespoons | 4 tablespoons |
| Nuts and/or seeds (as listed in program guidance)[2] | ½ ounce | ½ ounce | 1 ounce | 1 ounce |
| Yogurt, plain or flavored, unsweetened or sweetened | 2 ounces or ¼ cup | 2 ounces or ¼ cup | 4 ounces or ½ cup | 4 ounces or ½ cup |

[1] Must meet the requirements in appendix A of this part.

[2] No more than 1 ounce of nuts and/or seeds may be served in any one breakfast.

(4) *Offer versus serve.* Each school must offer all four required food items listed in paragraph (g)(1) of this section. At the option of the school food authority, each school may allow students to refuse one food item from any component. The refused food item may be any of the four items offered to the student. A student's decision to accept all four food items or to decline one of the four food items must not affect the charge for a reimbursable breakfast.

(5) *Meal pattern exceptions for outlying areas.* Schools in American Samoa, Puerto Rico and the Virgin Islands may serve a starchy vegetable such as yams, plantains, or sweet potatoes to meet the grain/bread requirement.

(h) *What are the requirements for alternate menu planning approaches?*—(1) *Definition.* Alternate menu planning approaches are those adopted or developed by school food authorities or State agencies that differ from the standard approaches established in paragraphs (e) through (g) of this section.

(2) *Use and approval of major changes or new alternate approaches.* Within the guidelines established for developing alternate menu planning approaches, school food authorities or State agencies may modify one of the established

menu planning approaches in paragraphs (e) through (g) of this section or may develop their own menu planning approach. The alternate menu planning approach must be available in writing for review and monitoring purposes. No formal plan is required; guidance material, a handbook or protocol is sufficient. As appropriate, the material must address how the guidelines in paragraph (h)(3) of this section are met. A State agency that develops an alternate approach that is exempt from FNS approval under paragraph (h)(2)(iii) of this section must notify FNS in writing when implementing the alternate approach.

(i) *Approval of local level plans.* Any school food authority-developed menu planning approach must have prior State agency review and approval.

(ii) *Approval of State agency plans.* Unless exempt under paragraph (h)(2)(iii) of this section, any State agency-developed menu planning approach must have prior FNS approval.

(iii) *State agency plans not subject to approval.* A State agency-developed menu planning approach does not need FNS approval if:

(A) Five or more school food authorities in the State use it; and

(B) The State agency maintains ongoing oversight of the operation and evaluation of the approach and makes any needed adjustments to its policies and procedures to ensure that the appropriate guidelines in paragraph (h)(3) of this section are met.

(3) *Elements for major changes or new approaches.* Any alternate menu planning approach must:

(i) offer fluid milk, as provided in paragraph (i) of this section;

(ii) include the procedures for offer versus serve if the school food authority chooses to implement the offer versus serve option. Alternate approaches should follow the offer versus serve procedures in paragraphs (e)(2)(ii) and (g)(4) of this section, as appropriate. If these requirements are not followed, the approach must indicate:

(A) The affected age/grade groups;

(B) The number and type of items (and, if applicable, the quantities for the items) that constitute a reimbursable breakfast under offer versus serve;

(C) How such procedures will reduce plate waste; and

(D) How a reasonable level of calories and nutrients for the breakfast as taken is provided.

(iii) Meet the Recommended Dietary Allowances and breakfast energy allowances (nutrient levels) and indicate the age/grade groups served and how the nutrient levels are met for those age/grade groups;

(iv) Follow the requirements for competitive foods in the definition of *Foods of minimal nutritional value* in § 220.2, in § 220.12 and in appendix B of this part;

(v) Follow the requirements for counting food items and products towards meeting the meal patterns. These requirements are found in paragraphs (g) and (i) of this section, in appendices A through C to this part, and in instructions and guidance issued by FNS. This only applies if the alternate approach is a food-based menu planning approach.

(vi) Identify a reimbursable breakfast at the point of service.

(A) To the extent possible, the procedures provided in paragraph (e)(2)(i) of this section for nutrient standard or assisted nutrient standard menu planning approaches or for food-based menu planning approaches provided in paragraph (g) of this section must be followed. Any instructions or guidance issued by FNS that further defines the elements of a reimbursable breakfast must be followed when using the existing regulatory provisions.

(B) Any alternate approach that deviates from the provisions in paragraph (e)(2)(i) or paragraph (g) of this section must indicate what constitutes a reimbursable breakfast, including the number and type of items (and, if applicable, the quantities for the items) which comprise the breakfast, and how a reimbursable breakfast is to be identified at the point of service.

(vii) explain how the alternate menu planning approach can be monitored under the applicable provisions of §§ 210.18 and 210.19 of this chapter, including a description of the records that will be maintained to document compliance with the program's administrative and nutrition requirements. However, if the procedures under § 210.19 of this chapter cannot be used

to monitor the alternate approach, a description of review procedures which will enable the State agency to assess compliance with the nutrition standards in paragraphs (a)(1) through (a)(4) of this section must be included; and

(viii) follow the requirements for weighted analysis and for approved software for nutrient standard menu planning as required by paragraphs (e)(4) and (e)(5) of this section unless a State agency-developed approach meets the criteria in paragraph (h)(2)(iii) of this section. Through September 30, 2009, schools are not required to conduct a weighted analysis.

(i) *What are the requirements for offering milk?*—(1) *Serving milk.* A serving of milk as a beverage or on cereal or used in part for each purpose must be offered for breakfasts.

(2) *Inadequate milk supply.* If a school cannot get a supply of milk, it can still participate in the Program under the following conditions:

(i) If emergency conditions temporarily prevent a school that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may allow the school to serve breakfasts during the emergency period with an alternate form of milk or without milk.

(ii) If a school is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may allow schools to substitute canned or dry milk in the required quantities in the preparation of breakfasts. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the Virgin Islands, if a sufficient supply of fluid milk cannot be obtained, "milk" includes reconstituted or recombined milk, or otherwise as allowed by FNS through a written exception.

(3) *Milk substitutes.* If a school chooses to offer one or more substitutes for fluid milk for non-disabled students with medical or special dietary needs, the nondairy beverage(s) must provide the nutrients listed in the following table. Milk substitutes must be fortified in accordance with fortification guidelines issued by the Food and Drug Administration. A school need only offer the nondairy beverage(s) that it has identified as allowable fluid milk substitutes according to this paragraph (i)(3).

| Nutrient | Per cup |
|---|---|
| Calcium | 276 mg. |
| Protein | 8 g. |
| Vitamin A | 500 IU. |
| Vitamin D | 100 IU. |
| Magnesium | 24 mg. |
| Phosphorus | 222 mg. |
| Potassium | 349 mg. |
| Riboflavin | 0.44 mg. |
| Vitamin B-12 | 1.1 mcg. |

(j) *What are the requirements for the infant breakfast pattern?*—(1) *Feeding breakfasts to infants.* Breakfasts served to infants ages birth through 11 months must meet the requirements described in paragraph (j)(4) of this section. Foods included in the breakfast must be of a texture and a consistency that are appropriate for the age of the infant being served. The foods must be served during a span of time consistent with the infant's eating habits. For those infants whose dietary needs are more individualized, exceptions to the meal pattern must be made in accordance with the requirements found in paragraph (d)(1) of this section.

(2) *Breastmilk and iron-fortified formula.* Either breastmilk or iron-fortified infant formula, or portions of both, must be served for the entire first year. Meals containing breastmilk and meals containing iron-fortified infant formula supplied by the school are eligible for reimbursement. However, infant formula provided by a parent (or guardian) and breastmilk fed directly by the infant's mother, during a visit to the school, contribute to a reimbursable breakfast only when the school supplies at least one component of the infant's meal.

(3) *Solid foods.* For infants ages 4 through 7 months, solid foods of an appropriate texture and consistency are required only when the infant is developmentally ready to accept them. The school should consult with the infant's parent (or guardian) in making the decision to introduce solid foods. Solid foods should be introduced one at a time, on a gradual basis, with the intent of ensuring the infant's health and nutritional well-being.

(4) *Infant meal pattern.* Infant breakfasts must have, at a minimum, each of the food components indicated, in the

amount that is appropriate for the infant's age. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered if the infant is still hungry. Breakfasts may include portions of breastmilk and iron-fortified infant formula as long as the total number of ounces meets, or exceeds, the minimum amount required of this food component. Similarly, to meet the component requirement for vegetables and fruit, portions of both may be served.

(i) *Birth through 3 months.* 4 to 6 fluid ounces of breastmilk or iron-fortified infant formula—only breastmilk or iron-fortified formula is required to meet the infant's nutritional needs.

(ii) *4 through 7 months.* Breastmilk or iron-fortified formula is required. Some infants may be developmentally ready for solid foods of an appropriate texture and consistency. Breakfasts are reimbursable when schools provide all of the components in the meal pattern that the infant is developmentally ready to accept.

(A) 4 to 8 fluid ounces of breastmilk or iron-fortified infant formula; and

(B) 0 to 3 tablespoons of iron-fortified dry infant cereal.

(iii) *8 through 11 months.* Breastmilk or iron-fortified formula and solid foods of an appropriate texture and consistency are required.

(A) 6 to 8 fluid ounces of breastmilk or iron-fortified infant formula; and

(B) 2 to 4 tablespoons of iron-fortified dry infant cereal; and

(C) 1 to 4 tablespoons of fruit or vegetable.

(5) *Infant meal pattern table.* The minimum amounts of food components to serve to infants, as described in paragraph (j)(4) of this section, are:

BREAKFAST PATTERN FOR INFANTS

| Birth through 3 months | 4 through 7 months | 8 through 11 months |
|---|---|---|
| 4–6 fluid ounces of formula [1] or breastmilk [2,3]. | 4–8 fluid ounces of formula [1] or breastmilk [2,3]; and.<br>0–3 tablespoons of infant cereal [1,4]. | 6–8 fluid ounces of formula [1] or breastmilk [2,3]; and<br>2–4 tablespoons of infant cereal [1]; and |
| | | 1–4 tablespoons of fruit or vegetable or both. |

[1] Infant formula and dry infant cereal must be iron-fortified.
[2] Breastmilk or formula, or portions of both, may be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered if the infant is still hungry.
[4] A serving of this component is required only when the infant is developmentally ready to accept it.

(k) *What about serving additional foods?* Schools may offer additional foods with breakfasts to children over one year of age.

(l) *Must schools offer choices at breakfast?* FNS encourages schools to offer children a selection of foods and menu items at breakfast. Choices provide variety and encourage consumption. Schools may offer choices of reimbursable breakfasts or foods within a reimbursable breakfast. When a school offers a selection of more than one type of breakfast or when it offers a variety of food components, menu items or foods and milk for choice as a reimbursable breakfast, the school must offer all children the same selection(s) regardless of whether the child is eligible for free or reduced price breakfasts or must pay the designated full price. The school may establish different unit prices for each type of breakfast offered provided that the benefits made available to children eligible for free or reduced price breakfasts are not affected.

(m) *What must schools do about nutrition disclosure?* To the extent that school food authorities identify foods in a menu, or on the serving line or through other available means of communicating with program participants, school food authorities must identify products or dishes containing more than 30 parts fully hydrated alternate protein products (as specified in appendix A of this part) to less than 70 parts beef, pork, poultry or seafood on an uncooked basis, in a manner which does not characterize the product or dish solely as beef, pork, poultry or seafood. Additionally, FNS encourages schools to inform the students, parents, and the public about efforts they

are making to meet the nutrition standards (see paragraph (a) of this section) for school breakfasts.

[65 FR 26923, May 9, 2000, as amended at 65 FR 36317, June 8, 2000; 67 FR 36785, May 28, 2002; 69 FR 70874, Dec. 8, 2004; 72 FR 63792, Nov. 13, 2007; 73 FR 52907, Sept. 12, 2008]

### § 220.9 Reimbursement payments.

(a) State agencies, or FNSRO's where applicable, shall make reimbursement payments to schools only in connection with breakfasts meeting the requirements of § 220.8, and reported in accordance with § 220.11(b) of this part. School Food Authorities shall plan for and prepare breakfasts on the basis of participation trends, with the objective of providing one breakfast per child per day. Production and participation records shall be maintained to demonstrate positive action toward this objective. In recognition of the fluctuation in participation levels which makes it difficult to precisely estimate the number of breakfasts needed and to reduce the resultant waste, any excess breakfasts that are prepared may be served to eligible children and may be claimed for reimbursement unless the State agency, or FNSRO where applicable, determines that the School Food Authority has failed to plan and prepare breakfasts with the objective of providing one breakfast per child per day. In no event shall the School Food Authority claim reimbursement for free and reduced price breakfasts in excess of the number of children approved for free and reduced price meals.

(b) The rates of reimbursement for breakfasts served to eligible children in schools not in severe need are the applicable national average payment factors for breakfasts. The maximum rates of reimbursement for breakfasts served to eligible children in schools determined to be in severe need are those prescribed by the Secretary. National average payment factors and maximum rates of reimbursement for the School Breakfast Program shall be prescribed annually by the Secretary in the FEDERAL REGISTER.

(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.

(Sec. 6, Pub. L. 95–627, 92 Stat. 3620 (42 U.S.C. 1776; secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1753, 1759(a), 1758, 1773; sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757); 44 U.S.C. 3506))

[Amdt. 25, 41 FR 34760, Aug. 17, 1976, as amended by Amdt. 29, 44 FR 48159, Aug. 17, 1979; Amdt. No. 38, 46 FR 50928, Oct. 16, 1981; 46 FR 51368, Oct. 20, 1981; 47 FR 746, Jan. 7, 1982; 47 FR 31375, July 20, 1982; 48 FR 40196, 40197, Sept. 6, 1983; 60 FR 31222, June 13, 1995; 65 FR 26923, May 9, 2000; 70 FR 66249, Nov. 2, 2005]

### § 220.10 Effective date for reimbursement.

Reimbursement payments under the School Breakfast Program may be made only to School Food Authorities operating under an agreement with the State Agency or the Department, and may be made only after execution of the agreement. Such payments may include reimbursement in connection with breakfasts served in accordance with provisions of the program in the calendar month preceding the calendar

month in which the agreement is executed.

[32 FR 35, Jan. 5, 1967, as amended by Amdt. 9, 37 FR 9613, May 13, 1972]

### § 220.11 Reimbursement procedures.

(a) To be entitled to reimbursement under this part, each School Food Authority shall submit to the State agency, or FNSRO where applicable, a monthly Claim for Reimbursement.

(b) Claims for Reimbursement shall include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Reports of School Program Operations required under § 220.13(b)(2). Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall include only breakfasts served in that month except if the first or last month of Program operations for any year contains 10 operating days or less, such month may be added to the Claim for Reimbursement for the appropriate adjacent month; however, Claims for Reimbursement may not combine operations occurring in two fiscal years. If a single State agency administers any combination of the Child Nutrition Programs, the SFA shall be able to use a common claim form with respect to claims for reimbursement for meals served under those programs. A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency, or FNSRO where applicable, not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency, or FNSRO where applicable, shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS–10) for the claim month which is required under § 220.13(b)(2). Upward adjustments in Program funds claimed which are not reflected in the final FNS–10 for the claim month shall not be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(c) Where a school participates in both the National School Lunch Program and the School Breakfast Program, the State agency or FNSRO, where applicable, may authorize the submission of one claim for reimbursement to cover both programs.

(d) [Reserved]

(e) Notwithstanding any other provision of this section, the State agency, or FNSRO where applicable, may advance funds available for the School Breakfast Program to a School Food Authority in an amount equal to the reimbursement estimated for the total number of breakfasts, including free and reduced price breakfasts, to be served to children for 1 month. The State agency, or FNSRO where applicable, shall require School Food Authorities who receive advances of funds under the provisions of this paragraph to make timely submissions of claims for reimbursement on a monthly basis and shall suspend advances of funds in the absence of such timely submissions. Following the receipt of claims the State agency, or FNSRO where applicable, shall make such adjustments as are necessary in such advances of funds to insure that the total amount of reimbursement received by a School Food Authority for the fiscal year will not exceed an amount equal to the number of breakfasts, including free and reduced price breakfast, served to children times the respective rates of reimbursement assigned by the State

agency, or FNSRO where applicable, in accordance with § 220.9.

(Title 1, Chapter I, Pub. L. 96–38, 93 Stat. 98 (42 U.S.C. 1776a); secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773, 1757); Pub. L. 97–370, 96 Stat. 1806)

[32 FR 35, Jan. 5, 1967, as amended by Amdt. 9, 37 FR 9613, May 13, 1972; 40 FR 30924, July 24, 1975; 45 FR 82622, Dec. 16, 1980; 47 FR 31376, July 20, 1982; 48 FR 40196, Sept. 6, 1983; Amdt. 49, 49 FR 18987, May 4, 1984; 64 FR 50742, Sept. 20, 1999]

### § 220.12 Competitive food services.

(a) State agencies and School Food Authorities shall establish such rules or regulations as are necessary to control the sale of foods in competition with breakfasts served under the Program. Such rules or regulations shall prohibit the sale of foods of minimal nutritional value, as listed in appendix B of this part, in the food service areas during the breakfast periods. The sale of other competitive foods may, at the discretion of the State agency and the School Food Authority, be allowed in the food service area during the breakfast period only if all income from the sale of such foods accrues to the benefit of the nonprofit school food service or the school or student organizations approved by the school. State agencies and School Food Authorities may impose additional restrictions on the sale of and income from all foods sold at any time throughout schools participating in the School Breakfast Program.

(b)(1) Any person may submit a petition to FNS requesting that an individual food be exempted from a category of foods of minimal nutritional value listed in appendix B. In the case of artificially sweetened foods, the petition must include a statement of the percent of RDI for the eight nutrients listed in the definition of *Foods of minimal nutritional value* in § 220.2 that the food provides per serving and the petitioner's source of this information. In the case of all other foods, the petition must include a statement of the percent of RDI for the eight nutrients listed in the definition of *Foods of minimal nutritional value* in § 220.2 that the food provides per serving and per 100 calories and the petitioner's source of this information. The Department will determine whether or not the individual food is a food of minimal nutritional value as defined the definition of *Foods of minimal nutritional value* in § 220.2, and will inform the petitioner in writing of such determination, and the public by notice in the FEDERAL REGISTER as indicated under paragraph (b)(3) of this section. In determining whether an individual food is a food of minimal nutritional value, discrete nutrients added to the food will not be taken into account.

(2) Any person may submit a petition to FNS requesting that foods in a particular category of foods be classified as meeting the definition of *Foods of minimal nutritional value* in § 220.2. The petition must identify and define the food category in easily understood language, list examples of the foods contained in the category and include a list which the foods in that category usually contain. If, upon review of the petition, the Department determines that the foods in that category should not be classified as foods of minimal nutritional value, the petitioner will be so notified in writing. If upon review of the petition, the Department determines that there is a substantial likelihood that the foods in that category should be classified as meeting the definition of *Foods of minimal nutritional value* in § 220.2, the Department shall at that time inform the petitioner. In addition, the Department shall publish a proposed rule restricting the sale of the foods in that category, setting forth the reasons for this action, and soliciting public comments. On the basis of comments received within 60 days of publication of the proposed rule and other available information, the Department will determine whether the nutrient composition of the foods indicates that the category should be classified as a category of foods of minimal nutritional value.

The petitioner shall be notified in writing and the public shall be notified of the Department's final determination upon publication in the FEDERAL REGISTER as indicated under section (b)(3) of this section.

(3) By May 1 and November 1 of each year, the Department shall amend appendix B to exclude those individual

foods identified under paragraph (b)(1) of this section, and to include those categories of foods identified under paragraph (b)(2) of this section, *Provided* That there are necessary changes.

(Sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757))

[Amdt. 32, 45 FR 6771, Jan. 29, 1980, as amended by Amdt. 34, 45 FR 76937, Nov. 21, 1980; 50 FR 20547, May 17, 1985; 59 FR 23614, May 6, 1994; 72 FR 63792, Nov. 13, 2007]

### § 220.13 Special responsibilities of State agencies.

(a) [Reserved]

(a–1) Each State agency, or FNSRO where applicable, shall require each School Food Authority of a school participating in the School Breakfast Program to develop and file for approval a free and reduced price policy statement in accordance with paragraph (a) of § 220.7.

(b) *Records and reports.* (1) Each State agency shall maintain Program records as necessary to support the reimbursement payments made to School Food Authorities under § 220.9 and the reports submitted to FNS under § 220.13(b)(2). The records may be kept in their original form or on microfilm, and shall be retained for a period of three years after the date of submission of the final Financial Status Report for the fiscal year, except that if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(2) Each State agency shall submit to FNS a final Report of School Program Operations (FNS–10) for each month which shall be limited to claims submitted in accordance with § 220.11(b) and which shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State agency's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary. Adjustments shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. A final Financial Status Report for each fiscal year shall be postmarked and/or submitted to FNS within 120 days after the end of the fiscal year. FNS shall not be responsible for reimbursing unpaid Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred.

(3) For each of school years 2005–2006 through 2008–2009, each State agency shall monitor school food authority compliance with the food safety inspection requirement in § 220.7(a)(2) and submit an annual report to FNS documenting school compliance based on data supplied by the school food authorities. The report must be filed by November 15 following each of school years 2005–2006 through 2008–2009, beginning November 15, 2006. The State agency shall keep the records supplied by the school food authorities showing the number of food safety inspections obtained by schools for each of school years 2005–2006 through 2008–2009.

(c) Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of either program, and shall take appropriate action to correct any irregularities. State Agencies shall maintain on file evidence of such investigations and actions. FNS or OI shall make investigations at the request of the State Agency or where FNS or OI determines investigations are appropriate.

(d) The State agency shall release to FNS any Federal funds made available to it under the Act which are unobligated at the end of each fiscal year. Any such funds shall remain available to FNS for the purposes of the programs authorized by the Act until expended. Release of funds by the State

Agency shall be made as soon as practicable, but in any event not later than 30 days following demand by FNSRO and shall be reflected by related adjustment in the State Agency's Letter of Credit.

(e) State agencies shall provide School Food Authorities with monthly information on foods available in plentiful supply, based on information provided by the Department.

(f) Each State agency shall provide program assistance as follows:

(1) Each State agency or FNSRO where applicable shall provide consultative, technical, and managerial personnel to administer programs, monitor performance, and measure progress toward achieving program goals.

(2) State agencies shall conduct reviews of schools participating in the Program for compliance with the provisions of this part when such schools are being reviewed under the provisions identified under § 210.18(i) of this title. Compliance reviews of participating schools shall focus on the reviewed school's compliance with the required certification, counting and breakfast service procedures. School food authorities may appeal a denial of all or a part of the Claim for Reimbursement or withholding of payment arising from review activity conducted by the State agency under § 210.18 of this title or by FNS under § 210.30(d)(2) of this title. Any such appeal shall be subject to the procedures set forth under § 210.18(q) of this title or § 210.30(d)(3) of this title, as appropriate.

(3) For the purposes of compliance with the nutrition standards in § 220.8(a) and the nutrient and calorie levels in § 220.8(b) or (c) or those developed under § 220.8(e)(1) or (h), the State agency shall follow the provisions specified § 210.19(a)(1) of this chapter.

(4) Such assistance shall include visits to participating schools to ensure compliance with program regulations and with the Department's nondiscrimination regulations (part 15 of this title), issued under title VI, of the Civil Rights Act of 1964.

(5) Documentation of such assistance shall be maintained on file by the State agency, or FNSRO where applicable.

(g) State agencies shall adequately safeguard all assets and assure that they are used solely for authorized purposes.

(h) [Reserved]

(i) Each State agency, or FNS where applicable, shall establish a financial management system under which School Food Authorities shall account for all revenues and expenditures of their nonprofit school food service. The system shall prescribe the allowability of nonprofit school food service expenditures in accordance with this part and 7 CFR part 3015, and 7 CFR part 3016 or 7 CFR part 3019, as applicable. The system shall permit determination of school food service net cash resources, and shall include any criteria for approval of net cash resources in excess of three months average expenditures. In addition, School Food Authorities shall be required to account separately for other food services which are operated by the School Food Authority.

(j) During audits, supervisory assistance reviews, or by other means, State agencies, or FNSROs where applicable, shall be responsible for monitoring the net cash resources of the nonprofit school food service of each School Food Authority participating in the Program. In the event that such resources exceed three months average expenditures for the School Food Authority's nonprofit school food service, or such amount as may be approved by the State agency or FNSRO where applicable, the State agency or FNSRO where applicable, may require the School Food Authority to reduce children's prices, improve food quality or take other actions designed to improve the nonprofit school food service. In the absence of any such action, adjustments in the rates of reimbursement under the Program shall be made.

(k)State agencies shall require compliance by School Food Authorities with applicable provisions of this part.

(l) *Data collection related to school food authorities.* (1) Each State agency must collect data related to school food authorities that have an agreement with the State agency to participate in the program for each of Federal fiscal years 2006 through 2009, including those

school food authorities that participated only for part of the fiscal year. Such data shall include:

(i) The name of each school food authority;

(ii) The city in which each participating school food authority was headquartered and the name of the state;

(iii) The amount of funds provided to the participating organization, i.e., the amount of federal funds reimbursed to each participating school food authority; and

(iv) The type of participating organization, e.g., government agency, educational institution, non-profit organization/secular, non-profit organization/faith-based, and "other."

(2) On or before August 31, 2007, and each subsequent year through 2010, State agencies must report to FNS data as specified in paragraph (l)(1) of this section for the prior Federal fiscal year. State agencies must submit this data in a format designated by FNS.

(44 U.S.C. 3506; sec. 812, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1759a); sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757); Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[32 FR 37, Jan. 5, 1967. Redesignated by Amdt. 2, 33 FR 14513, Sept. 27, 1968]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 220.13, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 220.14 Claims against school food authorities.

(a) State agencies shall disallow any portion of a claim and recover any payment made to a School Food Authority that was not properly payable under this part. State agencies will use their own procedures to disallow claims and recover overpayments already made.

(b) [Reserved]

(c) The State agency may refer to CND through the FNSRO for determination any action it proposes to take under this section.

(d) The State agency shall maintain all records pertaining to action taken under this section. Such records shall be retained for a period of 3 years after the end of the fiscal year to which they pertain.

(e) If CND does not concur with the State agency's action in paying a claim or a reclaim, or in failing to collect an overpayment, CND shall assert a claim against the State agency for the amount of such claim, reclaim, or overpayment. In all such cases the State agency shall have full opportunity to submit to CND evidence or information concerning the action taken. If, in the determination of CND, the State agency's action was unwarranted, the State agency shall promptly pay to FNS the amount of the claim, reclaim, or overpayment.

(f) The amounts recovered by the State agency from Schools may be utilized, first, to make payments to School Food Authorities for the purposes of the related program during the fiscal year for which the funds were initially available, and second to repay any State funds expended in the reimbursement of claims under the program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of this part.

(g) With respect to School Food Authorities of schools in which the program is administered by FNSRO, when FNSRO disallows a claim or a portion of a claim, or makes a demand for refund of an alleged overpayment, it shall notify the School Food Authority of the reasons for such disallowance or demand and the School Food Authority shall have full opportunity to submit evidence or to file reclaims for any amounts disallowed or demanded in the same manner as that afforded in this section to School Food Authorities of schools in which the program is administered by State agencies.

(h) In the event that the State agency or FNSRO, where applicable, finds that a school is failing to meet the requirements of § 220.8(g), § 220.8(i)(2) and (i)(3), whichever is applicable, the State agency or FNSRO need not disallow payment or collect an overpayment arising out of such failure, if the State agency or FNSRO takes such other action as, in its opinion, will have a corrective effect.

(i) The Secretary shall have the authority to determine the amount of, to

settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of Title 28, U.S. Code, to conduct litigation on behalf of the United States.

(44 U.S.C. 3506; secs. 804, 816 and 817, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771 and 1785))

[32 FR 37, Jan. 5, 1967. Redesignated by Amdt. 2, 33 FR 14513, Sept. 27, 1968, and amended by Amdt. 9, 37 FR 9614, May 13, 1972; 40 FR 30925, July 24, 1975. Redesignated and amended by Amdt. 25, 41 FR 34757, 34760, Aug. 17, 1976; 47 FR 746, Jan. 7, 1982; Amdt. 42, 47 FR 14134, Apr. 2, 1982; 60 FR 31222, June 13, 1995; 65 FR 26931, May 9, 2000]

### § 220.15 Management evaluations and audits.

(a) Unless otherwise exempt, audits at the State and institution levels shall be conducted in accordance with Office of Management and Budget Circular A–133 and the Department's implementing regulations at 7 CFR part 3052. For availability of the OMB Circular mentioned in this paragraph, please refer to 5 CFR 1310.3.

(b) Each State agency shall provide FNS with full opportunity to conduct management evaluations (including visits to schools) of all operations of the State agency under the programs covered by this part and shall provide OIG with full opportunity to conduct audits (including visits to schools) of all operations of the State agency under such programs. Each State agency shall make available its records, including records of the receipt and expenditure of funds under such programs, upon a reasonable request by FNS or OIG. OIG shall also have the right to make audits of the records and operations of any school.

(c) In conducting management evaluations, reviews, or audits in a fiscal year, the State agency, FNS, or OIG may disregard an overpayment if the overpayment does not exceed $600. A State agency may establish, through State law, regulation or procedure, an alternate disregard threshold that does not exceed $600. This disregard may be made once per each management evaluation, review, or audit per Program within a fiscal year. However, no overpayment is to be disregarded where there is substantial evidence of violations of criminal law or civil fraud statutes.

(Secs. 805 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773); sec. 812, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1759a))

[40 FR 30925, July 24, 1975. Redesignated and amended by Amdt. 25, 41 FR 34757, 34760, Aug. 17, 1976; 43 FR 59825, Dec. 22, 1978; Amdt. 41, 47 FR 14135, Apr. 2, 1982; Amdt. 43, 47 FR 18564, Apr. 30, 1982; Amdt. 56, 54 FR 2990, Jan. 23, 1989; 57 FR 38587, Aug. 26, 1992; 59 FR 1894, Jan. 13, 1994; 64 FR 50742, Sept. 20, 1999; 71 FR 30563, May 30, 2006; 71 FR 39517, July 13, 2006]

### § 220.16 Procurement standards.

(a) *General.* State agencies and school food authorities shall comply with the requirements of this part and parts 3015, 3016 and 3019 of this title, as applicable, which implement the applicable Office of Management and Budget Circulars, concerning the procurement of all goods and services with nonprofit school food service account funds.

(b) *Contractual responsibilities.* The standards contained in 7 CFR part 3016 or 7 CFR part 3019, as applicable, do not relieve the State agency or School Food Authority of any contractual responsibilities under its contract. The State agency or School Food Authority is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes but is not limited to: source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State or Federal authority that has proper jurisdiction.

(c) *Procedures.* The State agency may elect to follow either the State laws, policies and procedures as authorized by §§ 3016.36(a) and 3016.37(a) of this title, or the procurement standards for other governmental grantees and all governmental subgrantees in accordance with § 3016.36(b) through (i) of this

title. Regardless of the option selected, States must ensure that all contracts include any clauses required by Federal statutes and executive orders and that the requirements of §3016.60(b) and (c) of this title are followed. The school food authority may use its own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements made with nonprofit school food service account funds adhere to the standards set forth in this part and §§3016.36(b) through 3016.36(i), 3016.60 and §§3019.40 through 3019.48 of this title, as applicable, and the applicable Office of Management and Budget Circulars. School food authority procedures must include a written code of standards of conduct meeting the minimum standards of §3016.36(b)(3) or §3019.42 of this title, as applicable.

(1) *Pre-issuance review requirement.* The State agency may impose a pre-issuance review requirement on a school food authority's proposed procurement. The school food authority must make available, upon request of the State agency, its procurement documents, including but not limited to solicitation documents, specifications, evaluation criteria, procurement procedures, proposed contracts and contract terms. School food authorities shall comply with State agency requests for changes to procurement procedures and solicitation and contract documents to ensure that, to the State agency's satisfaction, such procedures and documents reflect applicable procurement and contract requirements and the requirements of this part.

(2) *Prototype solicitation documents and contracts.* The school food authority must obtain the State agency's prior written approval for any change made to prototype solicitation or contract documents before issuing the revised solicitation documents or execution of the revised contract.

(3) *Prohibited expenditures.* No expenditure may be made from the nonprofit school food service account for any cost resulting from a procurement failing to meet the requirements of this part.

(d) *Buy American*—(1) *Definition of domestic commodity or product.* In this paragraph (d), the term "domestic commodity or product" means—

(i) An agricultural commodity that is produced in the United States; and

(ii) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

(2) *Requirement*—(i) *In general.* Subject to paragraph (d)(2)(ii) of this section, the Department shall require that a school food authority purchase, to the maximum extent practicable, domestic commodities or products.

(ii) *Limitations.* Paragraph (d)(2)(i) of this section shall apply only to—

(A) A school food authority located in the contiguous United States; and

(B) A purchase of domestic commodity or product for the school breakfast program under this part.

(3) *Applicability to Hawaii.* Paragraph (d)(2)(i) of this section shall apply to a school food authority in Hawaii with respect to domestic commodities or products that are produced in Hawaii in sufficient quantities to meet the needs of meals provided under the school breakfast program under this part.

(e) *Cost reimbursable contracts*—(1) *Required provisions.* The school food authority must include the following provisions in all cost reimbursable contracts, including contracts with cost reimbursable provisions, and in solicitation documents prepared to obtain offers for such contracts:

(i) Allowable costs will be paid from the nonprofit school food service account to the contractor net of all discounts, rebates and other applicable credits accruing to or received by the contractor or any assignee under the contract, to the extent those credits are allocable to the allowable portion of the costs billed to the school food authority;

(ii)(A) The contractor must separately identify for each cost submitted for payment to the school food authority the amount of that cost that is allowable (can be paid from the nonprofit school food service account) and the amount that is unallowable (cannot be paid from the nonprofit school food service account), or;

(B) The contractor must exclude all unallowable costs from its billing documents and certify that only allowable costs are submitted for payment and records have been established that maintain the visibility of unallowable costs, including directly associated costs in a manner suitable for contract cost determination and verification;

(iii) The contractor's determination of its allowable costs must be made in compliance with the applicable Departmental and Program regulations and Office of Management and Budget cost circulars;

(iv) The contractor must identify the amount of each discount, rebate and other applicable credit on bills and invoices presented to the school food authority for payment and identify the amount as a discount, rebate, or in the case of other applicable credits, the nature of the credit. If approved by the State agency, the school food authority may permit the contractor to report this information on a less frequent basis than monthly, but no less frequently than annually;

(v) The contractor must identify the method by which it will report discounts, rebates and other applicable credits allocable to the contract that are not reported prior to conclusion of the contract; and

(vi) The contractor must maintain documentation of costs and discounts, rebates, and other applicable credits, and must furnish such documentation upon request to the school food authority, the State agency, or the Department.

(2) *Prohibited expenditures.* No expenditure may be made from the nonprofit school food service account for any cost resulting from a cost reimbursable contract that fails to include the requirements of this section, nor may any expenditure be made from the nonprofit school food service account that permits or results in the contractor receiving payments in excess of the contractor's actual, net allowable costs.

(Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[Amdt. 45, 48 FR 19355, Apr. 29, 1983, as amended at 64 FR 50743, Sept. 20, 1999; 71 FR 39517, July 13, 2006; 72 FR 61494, Oct. 31, 2007]

### § 220.17 Prohibitions.

(a) In carrying out the provisions of this part, the Department shall not impose any requirements with respect to teaching personnel, curriculum, instructions, methods of instruction, and materials of instruction in any school as a condition for participation in the Program.

(b) The value of assistance to children under the Act shall not be considered to be income or resources for any purposes under any Federal or State laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs. Expenditure of funds from State and local sources for the maintenance of food programs for children shall not be diminished as a result of funds received under the Act.

[32 FR 37, Jan. 5, 1967. Redesignated by Amdt. 2, 33 FR 14513, Sept. 27, 1968. Redesignated and amended by Amdt. 25, 41 FR 34757, 34760, Aug. 17, 1976; 64 FR 50743, Sept. 20, 1999]

### § 220.18 Withholding payments.

In accordance with Departmental regulations at §§ 3016.43 and 3019.62 of this title, the State agency shall withhold Program payments, in whole or in part, to any school food authority which has failed to comply with the provisions of this part. Program payments shall be withheld until the school food authority takes corrective action satisfactory to the State agency, or gives evidence that such corrective actions will be taken, or until the State agency terminates the grant in accordance with § 220.19. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any breakfasts served in accordance with the provisions of this part during the period the payments were withheld.

[72 FR 61495, Oct. 31, 2007]

### § 220.19 Suspension, termination and grant closeout procedures.

Whenever it is determined that a State agency has materially failed to comply with the provisions of this part, or with FNS guidelines and instructions, FNS may suspend or terminate the Program in whole, or in part, or take any other action as may be

available and appropriate. A State agency may also terminate the Program by mutual agreement with FNS. FNS and the State agency shall comply with the provisions of 7 CFR part 3016 concerning grant suspension, termination and closeout procedures. Furthermore, the State agency or FNSRO were applicable, shall apply these provisions, or the parallel provisions of 7 CFR part 3019, as applicable, to suspension or termination of the Program in School Food Authorities.

[Amdt. 49, 49 FR 18988, May 4, 1984, as amended at 71 FR 39517, July 13, 2006. Redesignated at 72 FR 61495, Oct. 31, 2007]

### § 220.20 Free and reduced price breakfasts.

The determination of the children to whom free and reduced price breakfasts are to be served because of inability to pay the full price thereof, and the serving of the breakfasts to such children, shall be effected in accordance with part 245 of this chapter.

[Amdt. 25, 41 FR 34760, Aug. 17, 1976. Redesignated at 72 FR 61495, Oct. 31, 2007]

### § 220.21 Program information.

School Food Authorities desiring information concerning the program should write to their State educational agency or to the appropriate Food and Nutrition Service Regional Office as indicated below:

(a) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(b) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 161 Forsyth Street SW., Room 8T36, Atlanta, Georgia 30303.

(c) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 West Jackson Boulevard, 20th Floor, Chicago, Illinois 60604–3507.

(d) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242.

(e) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, California 94108.

(f) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

(g) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

(Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 10(d)(3), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626; secs. 804, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773, and 1785))

[32 FR 37, Jan. 5, 1967. Redesignated at 49 FR 18988, May 4, 1984, and further redesignated at 72 FR 61495, Oct. 31, 2007]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 220.20, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 220.22 Information collection/recordkeeping—OMB assigned control numbers.

| 7 CFR section where requirements are described | Current OMB control number |
|---|---|
| 220.3(e) | 0584–0327 |
| 220.5 | 0584–0012 |
| 220.7(a)–(e) | 0584–0329 |
| | 0584–0012 |
| | 0584–0026 |
| 220.8(f) | 0584–0012 |
| 220.9(a) | 0584–0012 |
| 220.11 (a), (b), (e) | 0584–0012 |
| | 0584–0002 |
| | 0584–0341 |
| 220.12(b) | 0584–0012 |
| 220.13 (a–1)–(c), (f) | 0584–0026 |
| | 0584–0002 |
| | 0584–0341 |
| | 0584–0012 |
| 220.14(d) | 0584–0012 |

| 7 CFR section where requirements are described | Current OMB control number |
|---|---|
| 220.15 | 0584–0012 |

[Amdt. 56, 54 FR 2990, Jan. 23, 1989. Redesignated at 72 FR 61495, Oct. 31, 2007]

## APPENDIX A TO PART 220—ALTERNATE FOODS FOR MEALS

### I. FORMULATED GRAIN-FRUIT PRODUCTS

1. Schools may utilize the formulated grain-fruit products defined in paragraph 3 as a food component in meeting the meal requirements of this part under the following terms and conditions:

(a) Formulated grain-fruit products may be used to meet *one* bread/bread alternate and the fruit/vegetable requirement in the breakfast pattern specified in §220.8.

(b) Only individually wrapped formulated grain-fruit products which bear a label conforming to the following legend shall be utilized. "This product conforms to U.S.D.A. Child Nutrition Program specifications. For breakfast, it meets the requirements for fruit/vegetable/juice and one bread/bread alternate."

2. Only formulated grain-fruit products that have been accepted by the Food and Nutrition Service (FNS) for use in the USDA child nutrition programs may be labeled as provided in paragraph 1.(b) of this appendix. Manufacturers seeking acceptance of their product shall furnish FNS a chemical analysis, protein efficiency ratio analysis, and such other pertinent data as may be requested by FNS. This information shall be forwarded to: Director, Nutrition and Technical Services Staff, Food and Nutrition Service, U.S. Department of Agriculture, Alexandria, Virginia 22302. All laboratory analyses are to be performed by independent or other laboratories acceptable to FNS. (FNS prefers an independent laboratory.) All laboratories shall retain the "raw" laboratory data for a period of one year. Such information shall be made available to FNS upon request.

3. To be accepted by FNS, products must have the following characteristics and meet the following nutritional specifications:

(a) Types. There are two types of products: one is a grain-type product and the other a grain-fruit type product.

(b) Ingredients. A grain-type product shall have grain as its primary ingredient. A grain-fruit type product shall have fruit as its primary ingredient. Both types of products must have at least 25 percent of their weight derived from grain. All ingredients and/or components shall comply with pertinent requirements or standards of the USDA and the Food, Drug, and Cosmetic Act, as amended, and any regulations issued thereunder.

(c) Nutritional specifications. Each serving of the product shall meet the minimum compositional requirements in the following table. The requirements as specified for those nutrients not limited by maximum values will be deemed to have been met if reasonable overages of the vitamins and minerals, within the limits of good manufacturing practice, are present to insure that the required levels are maintained throughout the expected shelf life under customary conditions of distribution and storage. An exception will be made for vitamins or minerals which occur naturally in an ingredient at such concentration that the level specified will be substantially exceeded in the final product. Such excess will be permitted but no lable claim of nutritional advantage can be made for overages for any nutrients. Analytical methods employed should be according to the standard procedures defined in the Association of Official Analytical Chemists, 1970, "Official Methods of Analysis," 11th edition, Washington, DC or by appropriate analytical procedures FNS considers reliable.

NUTRITIONAL LEVELS OF GRAIN-FRUIT PRODUCTS [1]

| Nutrient | Unit | Minimum | Maximum |
|---|---|---|---|
| Weight | Ounce | 2 | 4.0 |
| PER | Casein=2.5 | 2.0 | |
| Moisture | Percent weight | | 40.0 |
| Fat [2] | do | | 22.0 |
| Fiber | do | | 0.8 |
| Protein (N×6.25) | Gram | 5.0 | |
| Energy | Kilocalorie | 250 | |
| Vitamin A [3] | International unit | 1,115 | 1,675.0 |
| Vitamin E | do | 5 | |
| Vitamin $B_{12}$ | Microgram | 1.25 | |
| Thiamin | Milligram | .26 | |
| Riboflavin | do | .13 | |
| Vitamin $B_6$ | do | .26 | |
| Vitamin C | do | 20 | |
| Niacin | do | 2.65 | |
| Folacin | do | .04 | |
| Iron [4] | do | 4.4 | |
| Calcium | do | 120 | |
| Phosphorus | do | 120 | |
| Magnesium | do | 30 | |

[1] These specifications are based on a nutrient level for acceptable products plus ½ pint of fluid milk (as defined in §220.2 of the regulations (7 CFR part 220)) to provide at least 25 percent of the Recommended Dietary Allowances (RDA), 1968, for 10– to 12–year-old boys and girls for specified nutrients except magnesium and kilocalories. Magnesium and kilocalories—at least 13 percent of this RDA.

[2] Although the maximum fat in these specifications is 22 percent, consideration should be given to the development of formulated items containing less fat. Most medical authorities recommend keeping the dietary intake of fats at about ⅓ of the day's calories. At least 5 percent of the total calories shall be from linoleic acid.

[3] Vitamin A levels above the maximum of 1,675 I.U. will be allowed in products containing this nutrient as a natural food, and if the vitamin has not been added to the ingredients or foods.

[4] Recommended sources of iron are ferric ammonium citrate, ferrous fumarate, ferrous sulfates ($FeSO_4$ or $FeSO_4$ $7H_2O$), ferrous gluconate, reduced iron, or other sources known to have a similar relative biological value.

II. ALTERNATE PROTEIN PRODUCTS

*A. What Are the Criteria for Alternate Protein Products Used in the School Breakfast Program?*

1. An alternate protein product used in meals planned under the food-based menu planning approaches in §220.8(g), must meet all of the criteria in this section.

2. An alternate protein product whether used alone or in combination with meat or other meat alternates must meet the following criteria:

a. The alternate protein product must be processed so that some portion of the nonprotein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.

b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).

c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. ("When hydrated or formulated" refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).

d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation that the product meets the criteria in paragraphs A.2. a through c of this appendix.

e. Manufacturers should provide information on the percent protein contained in the dry alternate protein product and on an as prepared basis.

f. For an alternate protein product mix, manufacturers should provide information on:

(1) The amount by weight of dry alternate protein product in the package;

(2) Hydration instructions; and

(3) instructions on how to combine the mix with meat or other meat alternates.

*B. How Are Alternate Protein Products Used in the School Breakfast Program?*

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in §220.8. The following terms and conditions apply:

a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.

b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).

*C. How Are Commercially Prepared Products Used in the School Breakfast Program?*

Schools, institutions, and service institutions may use a commercially prepared meat or other meat alternate products combined with alternate protein products or use a commercially prepared product that contains only alternate protein products.

(Secs. 804, 816, 817, and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773 and 1785))

[Amdt. 18, 39 FR 11249, Mar. 27, 1974, as amended at 40 FR 37027, Aug. 25, 1975; Amdt. 45, 48 FR 195, Jan. 4, 1983; Amdt. 57, 54 FR 13048, Mar. 30, 1989; 60 FR 31222, June 13, 1995; 65 FR 12436, Mar. 9, 2000; 65 FR 26923, May 9, 2000. Redesignated at 72 FR 61495, Oct. 31, 2007]

## APPENDIX B TO PART 220—CATEGORIES OF FOODS OF MINIMAL NUTRITIONAL VALUE

(1) Soda Water—A class of beverages made by absorbing carbon dioxide in potable water. The amount of carbon dioxide used is not less than that which will be absorbed by the beverage at a pressure of one atmosphere and at a temperature of 60 °F. It either contains no alcohol or only such alcohol, not in excess of 0.5 percent by weight of the finished beverage, as is contributed by the flavoring ingredient used. No product shall be excluded from this definition because it contains artificial sweeteners or discrete nutrients added to the food such as vitamins, minerals and protein.

(2) *Water ices.* As defined by 21 CFR 135.160 Food and Drug Administration Regulations except that water ices which contain fruit or fruit juices are not included in this definition.

(3) *Chewing gum.* Flavored products from natural or synthetic gums and other ingredients which form an insoluble mass for chewing.

(4) *Certain candies.* Processed foods made predominantly from sweeteners or artificial sweeteners with a variety of minor ingredients which characterize the following types: (a) *Hard candy.* A product made predominantly from sugar (sucrose) and corn syrup

which may be flavored and colored, is characterized by a hard, brittle texture, and includes such items as sour balls, fruit balls, candy sticks, lollipops, starlight mints, after dinner mints, sugar wafers, rock candy, cinnamon candies, breath mints, jaw breakers and cough drops.

(b) *Jellies and gums.* A mixture of carbohydrates which are combined to form a stable gelatinous system of jelly-like character, and are generally flavored and colored, and include gum drops, jelly beans, jellied and fruit-flavored slices.

(c) *Marshmallow candies.* An aerated confection composed of sugar, corn syrup, invert sugar, 20% water and gelatin or egg white to which flavors and colors may be added.

(d) *Fondant.* A product consisting of microscopic-sized sugar crystals which are separated by a thin film of sugar and/or invert sugar in solution such as candy corn, soft mints.

(e) *Licorice.* A product made predominantly from sugar and corn syrup which is flavored with an extract made from the licorice root.

(f) *Spun candy.* A product that is made from sugar that has been boiled at high temperature and spun at a high speed in a special machine.

(g) *Candy coated popcorn.* Popcorn which is coated with a mixture made predominantly from sugar and corn syrup.

SCHEDULE FOR AMENDING APPENDIX B

| Actions for publication | Publication | |
|---|---|---|
| | May | November |
| Deadline for receipt of petitions by USDA. | Nov. 15 ..... | May 15. |
| USDA to notify petitioners of results of Departmental review and publish proposed rule (if applicable). | Feb. 1 ..... | Aug. 1. |
| 60 Day Comment Period. | Feb 1 through Apr. 1. | Aug. 1 through Oct. 1. |
| Public Notice of Amendment of Appendix B by. | May 1 ..... | Nov. 1. |

Written petitions should be sent to the Chief, Technical Assistance Branch, Nutrition and Technical Services Divisions, FNS, USDA, Alexandria, Virginia 22302 on or before November 15 or May 15 of each year. Petitions must include all information specified in §§210.15b(b) (1) or (2), and 220.12(b) (1) or (2) as appropriate.

(Sec. 17, Pub. L. 95–166, 91 Stat. 1345 (42 U.S.C. 1779); secs. 804, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773 and 1785))

[Amdt. 32, 45 FR 6772, Jan. 29, 1980, as amended at 45 FR 72081, Oct. 31, 1980; 45 FR 76937, Nov. 21, 1980; Amdt. 45, 48 FR 195, Jan. 4, 1983; 54 FR 18466, May 1, 1989]

## APPENDIX C TO PART 220—CHILD NUTRITION (CN) LABELING PROGRAM

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service (FNS) in conjunction with the Food Safety and Inspection Service (FSIS), and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA), and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs. This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

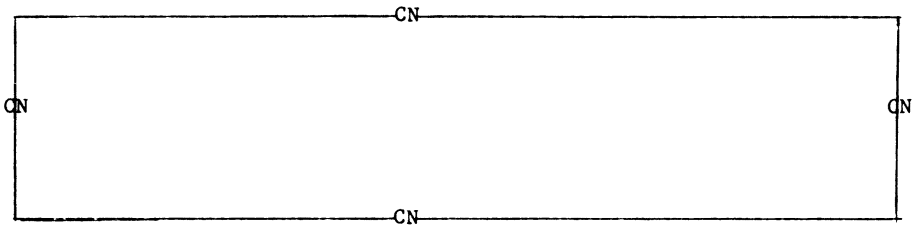
(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10 or 210.10a, whichever is applicable, 225.21, and 226.20 and are served in the main dish.

(b) Juice drinks and juice drink products that contain a minimum of 50 percent full-strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) "CN label" is a food product label that contains a CN label statement and CN logo as defined in paragraph 3 (b) and (c) below.

(b) The "CN logo" (as shown below) is a distinct border which is used around the edges of a "CN label statement" as defined in paragraph 3(c).




(c) The "CN label statement" includes the following:

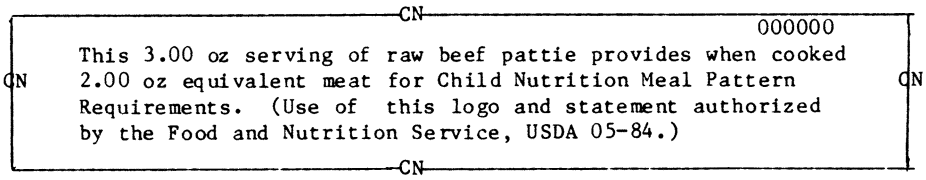
(1) The product identification number (assigned by FNS),

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10 or 210.10a, whichever is applicable, 220.8, 225.21, and 226.20. The statement shall identify the contribution of a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements,

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:




(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

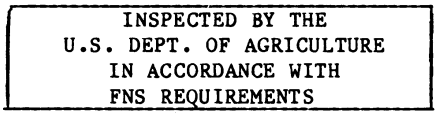
4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by the Food and Nutrition Service and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate, and the manufacturer's or distributor's name and address.

(1) The inspection marking for CN labeled non-meat, non-poultry, and non-seafood products with the exception of juice drinks and juice drink products is established as follows:




(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the *Food Buying Guide for Child Nutrition Programs* (Program Aid Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the child nutrition programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it

for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10 or 210.10a, whichever is applicable, 220.8, 225.21, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report of the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Services of the USDC, Food and Drug Administration, or the Department of Justice for action against the company.

Any or all of the following courses of action may be taken:

(a) The company's CN label may be revoked for a specific period of time;

(b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product;

(c) The company's name will be circulated to regional FNS offices;

(d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program.

To apply for a CN label and to obtain additional information on CN label application procedures write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

(National School Lunch Act, secs. 9, 13, 17; 42 U.S.C. 1758, 1761, 1766; 7 CFR 210.10, 220.8, 225.21, 226.20)

[49 FR 18457, May 1, 1984; 49 FR 45109, Nov. 15, 1984; 60 FR 31222, June 13, 1995; 65 FR 26923, May 9, 2000]

# PART 225—SUMMER FOOD SERVICE PROGRAM

## Subpart A—General

Sec.

225.1 General purpose and scope.
225.2 Definitions.
225.3 Administration.

## Subpart B—State Agency Provisions

225.4 Program management and administration plan.
225.5 Payments to State agencies and use of Program funds.
225.6 State agency responsibilities.
225.7 Program monitoring and assistance.
225.8 Records and reports.
225.9 Program assistance to sponsors.
225.10 Audits and management evaluations.
225.11 Corrective action procedures.
225.12 Claims against sponsors.
225.13 Appeal procedures.

## Subpart C—Sponsor and Site Provisions

225.14 Requirements for sponsor participation.
225.15 Management responsibilities of sponsors.
225.16 Meal service requirements.

## Subpart D—General Administrative Provisions

225.17 Procurement standards.
225.18 Miscellaneous administrative provisions.
225.19 Regional office addresses.
225.20 Information collection/recordkeeping—OMB assigned control numbers.

APPENDIX A TO PART 225—ALTERNATE FOODS FOR MEALS

APPENDIX B TO PART 225 [RESERVED]

APPENDIX C TO PART 225—CHILD NUTRITION (CN) LABELING PROGRAM

AUTHORITY: Secs. 9, 13 and 14, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1761 and 1762a).

SOURCE: 54 FR 18208, Apr. 27, 1989, unless otherwise noted.

## Subpart A—General

### § 225.1 General purpose and scope.

This part establishes the regulations under which the Secretary will administer a Summer Food Service Program. Section 13 of the Act authorizes the Secretary to assist States through grants-in-aid to conduct nonprofit food service programs for children during the summer months and at other approved times. The primary purpose of the Program is to provide food service to children from needy areas during periods when area schools are closed for vacation.

### § 225.2 Definitions.

*Act* means the National School Lunch Act, as amended.

*Administrative costs* means costs incurred by a sponsor related to planning, organizing, and managing a food service under the Program, and excluding interest costs and operating costs.

*Adult* means, for the purposes of the collection of social security numbers as a condition of eligibility for Program meals, any individual 21 years of age or older.

*Advance payments* means financial assistance made available to a sponsor for its operating costs and/or administrative costs prior to the end of the month in which such costs will be incurred.

*Areas in which poor economic conditions exist* means:

(a) The local areas from which an open site and restricted open site draw their attendance in which at least 50 percent of the children are eligible for free or reduced-price school meals under the National School Lunch Program and the School Breakfast Program, as determined:

(1) By information provided from departments of welfare and education, zoning commissions, census tracts, and organizations determined by the State agency to be migrant organizations;

(2) By the number of free and reduced-price lunches or breakfasts served to children attending public and nonprofit private schools located in the areas of Program sites; or

(3) From other appropriate sources; or

(b) A closed enrolled site.

*Camps* means residential summer camps and nonresidential day camps which offer a regularly scheduled food service as part of an organized program for enrolled children. Nonresidential camp sites shall offer a continuous schedule of organized cultural or recreational programs for enrolled children between meal services.

*Children* means (a) persons 18 years of age and under, and (b) persons over 18 years of age who are determined by a State educational agency or a local public educational agency of a State to be mentally or physically handicapped and who participate in a public or nonprofit private school program established for the mentally or physically handicapped.

*Closed enrolled site* means a site which is open only to enrolled children, as opposed to the community at large, and in which at least 50 percent of the enrolled children at the site are eligible for free or reduced price school meals under the National School Lunch Program and the School Breakfast Program, as determined by approval of applications in accordance with § 225.15(f).

*Continuous school calendar* means a situation in which all or part of the student body of a school is (a) on a vacation for periods of 15 continuous school days or more during the period October through April and (b) in attendance at regularly scheduled classes during most of the period May through September.

*Costs of obtaining food* means costs related to obtaining food for consumption by children. Such costs may include, in addition to the purchase price of agricultural commodities and other food, the cost of processing, distributing, transporting, storing, or handling any food purchased for, or donated to, the Program.

*Current income* means income, as defined in § 225.15(f)(4)(vi), received during the month prior to application for free meals. If such income does not accurately reflect the household's annual income, income must be based on the projected annual household income. If the prior year's income provides an accurate reflection of the household's current annual income, the prior year may be used as a base for the projected annual income.

*Department* means the U.S. Department of Agriculture.

*Disclosure* means reveal or use individual children's program eligibility information obtained through the free and reduced price meal eligibility process for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

*Documentation* means:

(a) The completion of the following information on a free meal application:

(1) Names of all household members;

(2) Income received by each household member, identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security and other cash income);

(3) The signature of an adult household member; and

(4) The social security number of the adult household member who signs the application, or an indication that he/

she does not possess a social security number; or

(b) For a child who is a member of a household receiving food stamp, FDPIR, or TANF benefits, "documentation" means completion of only the following information on a free meal application:

(1) The name(s) and appropriate food stamp, FDPIR, or TANF case number(s) for the child(ren); and

(2) the signature of an adult member of the household.

*Experienced site* means a site which, as determined by the State agency, has successfully participated in the Program in the prior year.

*Experienced sponsor* means a sponsor which, as determined by the State agency, has successfully participated in the Program in the prior year.

*Family* means a group of related or nonrelated individuals who are not residents of an institution or boarding house but who are living as one economic unit.

*FDPIR household* means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Distribution Program on Indian Reservations.

*Fiscal year* means the period beginning October 1 of any calendar year and ending September 30 of the following calendar year.

*FNS* means the Food and Nutrition Service of the Department.

*FNSRO* means the appropriate FNS Regional Office.

*Food service management company* means any commercial enterprise or nonprofit organization with which a sponsor may contract for preparing unitized meals, with or without milk, for use in the Program, or for managing a sponsor's food service operations in accordance with the limitations set forth in § 225.15. Food service management companies may be: (a) Public agencies or entities; (b) private, nonprofit organizations; or (c) private, for-profit companies.

*Food stamp household* means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Stamp Program.

*Household* means "family," as defined in this section.

*Income accruing to the program* means all funds used by a sponsor in its food service program, including but not limited to all monies, other than program payments, received from Federal, State and local governments, from food sales to adults, and from any other source including cash donations or grants. Income accruing to the Program will be deducted from combined operating and administrative costs.

*Income standards* means the family-size and income standards prescribed annually by the Secretary for determining eligibility for reduced price meals under the National School Lunch Program and the School Breakfast Program.

*Meals* means food which is served to children at a food service site and which meets the nutritional requirements set out in this part.

*Medicaid* means the State medical assistance program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.).

*Milk* means whole milk, lowfat milk, skim milk, and buttermilk. All milk must be fluid and pasteurized and must meet State and local standards for the appropriate type of milk. Milk served may be flavored or unflavored. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, and the Virgin Islands of the United States, if a sufficient supply of such types of fluid milk cannot be obtained, reconstituted or recombined milk may be used. All milk should contain Vitamins A and D at the levels specified by the Food and Drug Administration and at levels consistent with State and local standards for such milk.

*Needy children* means children from families whose incomes are equal to or below the Secretary's Guidelines for Determining Eligibility for Reduced Price School Meals.

*New site* means a site which did not participate in the Program in the prior year, or, as determined by the State agency, a site which has experienced significant staff turnover from the prior year.

*New sponsor* means a sponsor which did not participate in the Program in the prior year, or, as determined by the State agency, a sponsor which has experienced significant staff turnover from the prior year.

*NYSP* means the National Youth Sports Program administered by the National Collegiate Athletic Association.

*NYSP feeding site* means a site at which all of the children receiving Program meals are enrolled in the NYSP and which qualifies for Program participation on the basis of documentation that the site meets the definition of "areas in which poor economic conditions exist" as provided in this section.

*OIG* means the Office of the Inspector General of the Department.

*Open site* means a site at which meals are made available to all children in the area and which is located in an area in which at least 50 percent of the children are from households that would be eligible for free or reduced price school meals under the National School Lunch Program and the School Breakfast Program, as determined in accordance with paragraph (a) of the definition of *Areas in which poor economic conditions exist*.

*Operating costs* means the cost of operating a food service under the Program,

(a) Including the (1) cost of obtaining food, (2) labor directly involved in the preparation and service of food, (3) cost of nonfood supplies, (4) rental and use allowances for equipment and space, and (5) cost of transporting children in rural areas to feeding sites in rural areas, but

(b) Excluding (1) the cost of the purchase of land, acquisition or construction of buildings, (2) alteration of existing buildings, (3) interest costs, (4) the value of in-kind donations, and (5) administrative costs.

*Private nonprofit* means tax exempt under the Internal Revenue Code of 1986, as amended.

*Private nonprofit organization* means an organization (other than private nonprofit residential camps, school food authorities, or colleges or universities participating in the NYSP) which meets the definition of "private nonprofit" in this section and which:

(a) Administers the Program:

(1) At no more than 25 sites, with not more than 300 children being served at any approved meal service at any one site; or

(2) With a waiver granted by the State in accordance with § 225.6(b)(ii), not more than 500 children being served at any approved meal service at any one site;

(b) Operates in areas where a school food authority has not indicated that it will operate the Program in the current year;

(c) Exercises full control and authority over the operation of the Program at all sites under its sponsorship;

(d) Provides ongoing year-round activities for children or families;

(e) Demonstrates that it possesses adequate management and the fiscal capacity to operate the Program; and

(f) Meets applicable State and local health, safety, and sanitation standards.

*Program* means the Summer Food Service Program for Children authorized by Section 13 of the Act.

*Program funds* means Federal financial assistance made available to State agencies for the purpose of making Program payments.

*Program payments* means financial assistance in the form of start-up payments, advance payments, or reimbursement paid to sponsors for operating and administrative costs.

*Restricted open site* means a site which is initially open to broad community participation, but at which the sponsor restricts or limits attendance for reasons of security, safety or control. Site eligibility for a restricted open site shall be documented in accordance with paragraph (a) of the definition of *Areas in which poor economic conditions exist*.

*Rural* means (a) any area in a county which is not a part of a Metropolitan Statistical Area or (b) any "pocket" within a Metropolitan Statistical Area which, at the option of the State agency and with FNSRO concurrence, is determined to be geographically isolated from urban areas.

*School food authority* means the governing body which is responsible for the administration of one or more

schools and which has the legal authority to operate a lunch program in those schools. In addition, for the purpose of determining the applicability of food service management company registration and bid procedure requirements, "school food authority" also means any college or university which participates in the Program.

*Secretary* means the Secretary of Agriculture.

*Self-preparation sponsor* means a sponsor which prepares the meals that will be served at its site(s) and does not contract with a food service management company for unitized meals, with or without milk, or for management services.

*Session* means a specified period of time during which an enrolled group of children attend camp.

*Site* means a physical location at which a sponsor provides a food service for children and at which children consume meals in a supervised setting.

*Special account* means an account which a State agency may require a vended sponsor to establish with the State agency or with a Federally insured bank. Operating costs payable to the sponsor by the State agency are deposited in the account and disbursement of monies from the account must be authorized by both the sponsor and the food service management company.

*Sponsor* means a public or private nonprofit school food authority, a public or private nonprofit residential summer camp, a unit of local, municipal, county or State government, a public or private nonprofit college or university currently participating in the NYSP, or a private nonprofit organization which develops a special summer or other school vacation program providing food service similar to that made available to children during the school year under the National School Lunch and School Breakfast Programs and which is approved to participate in the Program. Sponsors are referred to in the Act as "service institutions".

*Start-up payments* means financial assistance made available to a sponsor for administrative costs to enable it to effectively plan a summer food service, and to establish effective management procedures for such a service. These payments shall be deducted from subsequent administrative cost payments.

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

*State agency* means the State educational agency or an alternate agency that has been designated by the Governor or other appropriate executive or legislative authority of the State and which has been approved by the Department to administer the Program within the State, or, in States where FNS administers the Program, FNSRO.

*State Children's Health Insurance Program (SCHIP)* means the State medical assistance program under title XXI of the Social Security Act (42 U.S.C. 1397aa et seq.).

*TANF* means the State funded program under part A of title IV of the Social Security Act that the Secretary determines complies with standards established by the Secretary that ensure that the standards under the State program are comparable to or more restrictive than those in effect on June 1, 1995. This program is commonly referred to as Temporary Assistance for Needy Families, although States may refer to the program by another name.

*Unit of local, municipal, county or State government* means an entity which is so recognized by the State constitution or State laws, such as the State administrative procedures act, tax laws, or other applicable State laws which delineate authority for government responsibility in the State.

*Vended sponsor* means a sponsor which purchases from a food service management company the unitized meals, with or without milk, which it will serve at its site(s), or a sponsor which purchases management services, subject to the limitations set forth in § 225.15, from a food service management company.

*Yogurt* means commercially prepared coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements and to which flavoring foods or ingredients may be added. These products are covered by the Food

and Drug Administration's Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, (21 CFR 131.200), (21 CFR 131.203), (21 CFR 131.206), respectively.

*7 CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement certain policies applicable to all Department programs. The applicable provisions deal with competition for discretionary grants and cooperative agreements, costs requiring prior approval, acknowledgement of Department support in publications and audiovisuals produced under Department programs, intergovernmental review of Department programs under Executive Order 12372, and certain miscellaneous Department requirements.

*7 CFR part 3016* means the Department's Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. 7 CFR part 3016 covers requirements for awards and subawards to State and local governmental organizations under Department programs.

*7 CFR part 3019* means the Department's Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. 7 CFR part 3019 covers requirements for awards and subawards to nongovernmental, nonprofit organizations under Department programs.

*7 CFR part 3052* means the Department's regulations implementing OMB Circular A–133. (To obtain the OMB circular referenced in this definition, see 5 CFR 1310.3.)

[54 FR 18208, Apr. 27, 1989, as amended at 54 FR 27153, June 28, 1989; 55 FR 13466, Apr. 10, 1990; 61 FR 25553, May 22, 1996; 64 FR 72483, Dec. 28, 1999; 64 FR 72895, Dec. 29, 1999; 66 FR 2202, Jan. 11, 2001; 71 FR 39518, July 13, 2006; 72 FR 10895, Mar. 12, 2007]

### § 225.3 Administration.

(a) *Responsibility within the Department.* FNS shall act on behalf of the Department in the administration of the Program.

(b) *State administered programs.* Within the State, responsibility for the administration of the Program shall be in the State agency. Each State agency must notify the Department by November 1 of the fiscal year regarding its intention to administer the Program. Each State agency desiring to take part in the Program shall enter into a written agreement with FNS for the administration of the Program in accordance with the provisions of this part. The agreement shall cover the operation of the Program during the period specified therein and may be extended by written consent of both parties. The agreement shall contain an assurance that the State agency will comply with the Department's nondiscrimination regulations (7 CFR part 15) issued under title VI of the Civil Rights Act of 1964, and any Instructions issued by FNS pursuant to those regulations, title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973. However, if a State educational agency is not permitted by law to disburse funds to any of the nonpublic schools in the State, the Secretary shall disburse the funds directly to such schools within the State for the same purposes and subject to the same conditions as the disbursements to public schools within the State by the State educational agency.

(c) *Regional office administered programs.* The Secretary shall not administer the Program in the States, except that if a FNSRO has continuously administered the Program in any State since October 1, 1980, FNS shall continue to administer the Program in that State. In States in which FNSRO administers the Program, it shall have all of the responsibilities of a State agency and shall earn State administrative and Program funds as set forth in this part. A State in which FNS administers the Program may, upon request to FNS, assume administration of the Program.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13466, Apr. 10, 1990; 64 FR 72483, Dec. 28, 1999]

## Subpart B—State Agency Provisions

### § 225.4 Program management and administration plan.

(a) Not later than February 15 of each year, each State agency shall submit to FNSRO a Program management

and administration plan for that fiscal year.

(b) Each plan shall be acted on or approved by March 15 or, if it is submitted late, within 30 calendar days of receipt of the plan. If the plan initially submitted is not approved, the State agency and FNS shall work together to ensure that changes to the plan, in the form of amendments, are submitted so that the plan can be approved within 60 calendar days following the initial submission of the plan. Upon approval of the plan, the State agency shall be notified of the level of State administrative funding which it is assured of receiving under § 225.5(a)(3).

(c) Approval of the Plan by FNS shall be a prerequisite to the withdrawal of Program funds by the State from the Letter of Credit and to the donation by the Department of any commodities for use in the State's Program.

(d) The Plan must include, at a minimum, the following information:

(1) The State's administrative budget for the fiscal year, and the State's plan to comply with any standards prescribed by the Secretary for the use of these funds;

(2) The State's plan for use of Program funds and funds from within the State to the maximum extent practicable to reach needy children;

(3) The State's plans for providing technical assistance and training to eligible sponsors;

(4) The State's plans for monitoring and inspecting sponsors, feeding sites, and food service management companies and for ensuring that such companies do not enter into contracts for more meals than they can provide effectively and efficiently;

(5) The State's plan for timely and effective action against Program violators;

(6) The State's plan for ensuring the fiscal integrity of sponsors not subject to auditing requirements prescribed by the Secretary;

(7) The State's plan for ensuring compliance with the food service managment company procurement monitoring requirements set forth at § 225.6(h); and

(8) An estimate of the State's need, if any, for monies available to pay for the cost of conducting health inspections and meal quality tests.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13466, Apr. 10, 1990; 64 FR 72483, Dec. 28, 1999]

### § 225.5 Payments to State agencies and use of Program funds.

(a) *State administrative funds*—(1) *Administrative funding formula.* For each fiscal year, FNS shall pay to each State agency for administrative expenses incurred in the Program an amount equal to

(i) 20 percent of the first $50,000 in Program funds properly payable to the State in the preceding fiscal year;

(ii) 10 percent of the next $100,000 in Program funds properly payable to the State in the preceding fiscal year;

(iii) 5 percent of the next $250,000 in Program funds properly payable to the State in the preceding fiscal year; and

(iv) 2½ percent of any remaining Program funds properly payable to the State in the preceding fiscal year,

*Provided, however,* That FNS may make appropriate adjustments in the level of State administrative funds to reflect changes in Program size from the preceding fiscal year as evidenced by information submitted in the State Program management and administration plan and any other information available to FNS. If a State agency fails to submit timely and accurate reports under § 225.8(c) of this part, State administrative funds payable under this paragraph shall be subject to sanction. For such failure, FNS may recover, withhold, or cancel payment of up to one hundred percent of the funds payable to the State agency under this paragraph during the fiscal year.

(2) *Use of State administrative funds.* State administrative funds paid to any State shall be used by State agencies to employ personnel, including travel and related expenses, and to supervise and give technical assistance to sponsors in their initiation, expansion, and conduct of any food service for which Program funds are made available. State agencies may also use administrative funds for such other administrative expenses as are set forth in their approved Program management and administration plan.

(3) *Funding assurance.* At the time FNS approves the State's management and administration plan, the State shall be assured of receiving State administrative funding equal to the lesser of the following amounts: 80 percent of the amount obtained by applying the formula set forth in paragraph (a)(1) of this section to the total amount of Program payments made within the State during the prior fiscal year; or, 80 percent of the amount obtained by applying the formula set forth in paragraph (a)(1) to the amount of Program funds estimated to be needed in the management and administration plan. The State agency shall be assured that it will receive no less than this level unless FNS determines that the State agency has failed or is failing to meet its responsibilities under this part.

(4) *Limitation.* In no event may the total payment for State administrative costs in any fiscal year exceed the total amount of expenditures incurred by the State agency in administering the Program.

(b) *State administrative funds Letter of Credit.* (1) At the beginning of each fiscal year, FNS shall make available to each participating State agency by Letter of Credit an initial allocation of State administrative funds for use in that fiscal year. This allocation shall not exceed one-third of the administrative funds provided to the State in the preceding fiscal year. For State agencies which did not receive any Program funds during the preceding fiscal year, the amount to be made available shall be determined by FNS.

(2) Additional State administrative funds shall be made available upon the receipt and approval by FNS of the State's Program management and administration plan. The amount of such funds, plus the initial allocation, shall not exceed 80 percent of the State administrative funds determined by the formula set forth in paragraph (a)(1) of this section and based on the estimates set forth in the approved Program management and administration plan.

(3) Any remaining State administrative funds shall be paid to each State agency as soon as practicable after the conduct of the funding assessment described in paragraph (c) of this section. However, regardless of whether such assessment is made, the remaining administrative funds shall be paid no later than September 1. The remaining administrative payment shall be in an amount equal to that determined to be needed during the funding evaluation or, if such evaluation is not conducted, the amount owed the State in accordance with paragraph (a)(1) of this section, less the amounts paid under paragraphs (b) (1) and (2) of this section.

(c) *Administrative funding evaluation.* FNSRO shall conduct data on the need for Program and State administrative funding within any State agency *if* the funding needs estimated in a State's management and administration plan are no longer accurate. Based on this data, FNS may make adjustments in the level of State administrative funding paid or payable to the State agency under paragraph (b) of this section to reflect changes in the size of the State's Program as compared to that estimated in its management and administration plan. The data shall be based on approved Program participation levels and shall be collected during the period of Program operations. As soon as possible following this data collection, payment of any additional administrative funds owed shall be made to the State agency. The payment may reflect adjustments made to the level of State administrative funding based on the information collected during the funding assessment. However, FNS shall not decrease the amount of a State's administrative funds as a result of this assessment unless the State failed to make reasonable efforts to administer the Program as proposed in its management and administration plan or the State incurred unnecessary expenses.

(d) *Letter of Credit for Program payments.* (1) Not later than April 15 of each fiscal year, FNS shall make available to each participating State in a Letter of Credit an amount equal to 65 percent of the preceding fiscal year's Program payments for operating costs plus 65 percent of the preceding fiscal year's Program payments for administrative costs in the State. This amount may be adjusted to reflect changes in reimbursement rates made pursuant to § 225.9(d)(8). However, the State shall not withdraw funds from this Letter of

Credit until its Program management and administration plan is approved by FNS.

(2) Based on the State agency's approved management and administration plan, FNS shall, if necessary, adjust the State's Letter of Credit to ensure that 65 percent of estimated current year Program operating and administrative funding needs is available. Such adjustment shall be made no later than May 15, or within 90 days of FNS receipt of the State agency's management and administration plan, whichever date is later.

(3) Subsequent to the adjustment provided for in paragraph (d)(2) of this section, FNS will, if necessary, make one additional adjustment to ensure that the State agency's Letter of Credit contains at least 65 percent of the Program operating and administrative funds needed during the current fiscal year. Such adjustment may be based on the administrative funding assessment provided for in paragraph (c) of this section, if one is conducted, or on any additional information which demonstrates that the funds available in the Letter of Credit do not equal at least 65 percent of current year Program needs. In no case will such adjustments be made later than September 1. Funds made available in the Letter of Credit shall be used by the State agency to make Program payments to sponsors.

(4) The Letter of Credit shall include sufficient funds to enable the State agency to make advance payments to sponsors serving areas in which schools operate under a continuous school calendar. These funds shall be made available no later than the first day of the month prior to the month during which the food service will be conducted.

(5) FNS shall make available any remaining Program funds due within 45 days of the receipt of valid claims for reimbursement from sponsors by the State agency. However, no payment shall be made for claims submitted later than 60 days after the month covered by the claim unless an exception is granted by FNS.

(6) Each State agency shall release to FNS any Program funds which it determines are unobligated as of September 30 of each fiscal year. Release of funds by the State agency shall be made as soon as practicable, but in no event later than 30 calendar days following demand by FNS, and shall be accomplished by an adjustment in the State agency's Letter of Credit.

(e) *Adjustment to Letter of Credit.* Prior to May 15 of each fiscal year, FNS shall make any adjustments necessary in each State's Letter of Credit to reflect actual expenditures in the preceding fiscal year's Program.

(f) *Health inspection funds.* If the State agency's approved management and administration plan estimates a need for health inspection funding, FNS shall make available by letter of credit an amount up to one percent of Program funds estimated to be needed in the management and administration plan. Such amount may be adjusted, based on the administrative funding assessment provided for in paragraph (c) of this section, if such assessment is conducted. Health inspection funds shall be used solely to enable State or local health departments or other governmental agencies charged with health inspection functions to carry out health inspections and meal quality tests, provided that if these agencies cannot perform such inspections or tests, the State agency may use the funds to contract with an independent agency to conduct the inspection or meal quality tests. Funds so provided but not expended or obligated shall be returned to the Department by September 30 of the same fiscal year.

### § 225.6 State agency responsibilities.

(a) *General responsibilities.* (1) The State agency shall provide sufficient qualified consultative, technical, and managerial personnel to administer the Program, monitor performance, and measure progress in achieving Program goals. The State agency shall assign Program responsibilities to personnel to ensure that all applicable requirements under this part are met.

(2) By February 1 of each fiscal year, each State agency shall announce the purpose, eligibility criteria, and availability of the Program throughout the State, through appropriate means of communication. As part of this effort, each State agency shall identify rural areas, Indian tribal territories, and

areas with a concentration of migrant farm workers which qualify for the Program and actively seek eligible applicant sponsors to serve such areas. State agencies shall identify priority outreach areas in accordance with FNS guidance and target outreach efforts in these areas. State agencies shall identify priority outreach areas in accordance with FNS guidance and target outreach efforts in these areas.

(3) Each State agency shall require applicant sponsors submitting Program application site information sheets, Program agreements, or a request for advance payments, and sponsors submitting claims for reimbursement to certify that the information submitted on these forms is true and correct and that the sponsor is aware that deliberate misrepresentation or withholding of information may result in prosecution under applicable State and Federal statutes.

(4) In addition to the warnings specified in paragraph (a)(3) of this section, State agencies may include the following information on applications and pre-application materials distributed to prospective sponsors:

(i) The criminal penalties and provisions established in section 12(g) of the National School Lunch Act (42 U.S.C. 1760(g)) that states substantially: Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this Act or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.), whether received directly or indirectly from the United States Department of Agriculture, or whoever receives, conceals, or retains such funds, assets, or property to personal use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets, or property are of the value of $100 or more, be fined not more than $25,000 or imprisoned not more than five years, or both, or, if such funds, assets, or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(ii) The procedures for termination from Program participation of any site or sponsor which is determined to be seriously deficient in its administration of the Program. In addition, the application may also state that appeals of sponsor or site terminations will follow procedures mandated by the State agency and will also meet the minimum requirements of 7 CFR 225.13.

(b) *Approval of sponsor applications.* (1) Each State agency must inform all of the previous year's sponsors which meet current eligibility requirements and all other potential sponsors of the deadline date for submitting a written application for participation in the Program. The State agency must require that all applicant sponsors submit written applications for Program participation to the State agency by June 15. However, the State agency may establish an earlier deadline for the Program application submission. Sponsors applying for participation in the Program due to an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar) shall be exempt from the application submission deadline.

(2) Each State agency shall inform potential sponsors of the procedure for applying for advance operating and administrative costs payments as provided for in § 225.9(c). Where applicable, each State agency shall inform sponsors of the procedure for applying for start-up payments provided for in § 225.9(a).

(3) Within 30 days of receiving a complete and correct application, the State agency shall notify the applicant of its approval or disapproval. If an incomplete application is received, the State agency shall so notify the applicant within 15 days and shall provide technical assistance for the purpose of completing the application. Any disapproved applicant shall be notified of its right to appeal under § 225.13.

(4) The State agency shall determine the eligibility of sponsors applying for participation in the Program in accordance with the applicant sponsor eligibility criteria outlined in § 225.14. However, State agencies may approve the application of an otherwise eligible applicant sponsor which does not provide a year-round service to the community which it proposes to serve under the

Program only if it meets one or more of the following criteria: It is a residential camp; it proposes to provide a food service for the children of migrant workers; a failure to do so would deny the Program to an area in which poor economic conditions exist; a significant number of needy children will not otherwise have reasonable access to the Program; or it proposes to serve an area affected by an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar). In addition, the State agency may approve a sponsor for participation during an unanticipated school closure without a prior application if the sponsor participated in the program at any time during the current year or in either of the prior two calendar years.

(5) The State agency must use the following priority system in approving applicants to operate sites that propose to serve the same area or the same enrolled children:

(i) Public or nonprofit private school food authorities;

(ii) Public agencies and private nonprofit organizations that have demonstrated successful program performance in a prior year;

(iii) New public agencies; and

(iv) New private nonprofit organizations.

(v) If two or more sponsors that qualify under paragraph (b)(5)(ii) of this section apply to serve the same area, the State agency must determine on a case-by-case basis which sponsor or sponsors it will select to serve the needy children in the area. The State agency should consider the resources and capabilities of each applicant.

(6) The following limitations apply on the number of sites and children that may be served per day:

(i) The State agency must not approve any school food authority or public agency to operate more than 200 sites or to serve more than an average of 50,000 children per day. However, the State agency may approve exceptions if the applicant can demonstrate that it has the capability of managing a program larger than these limits.

(ii) The State agency must not approve any private nonprofit organization to operate more than 25 sites. In addition, the State agency must not approve any private nonprofit organization to serve more than 300 children at any one site for any approved meal service. However, the State agency may grant a waiver to allow up to 500 children served at any one site operated by a private nonprofit organization. To be approved for the waiver, the private nonprofit organization must demonstrate that it is fully capable of managing a site with more than 300 children and that there are no other sponsors capable of serving the children in excess of 300.

(7) The State agency shall review each applicant's administrative budget as a part of the application approval process in order to assess the applicant's ability to operate in compliance with these regulations within its projected reimbursement. In approving the applicant's administrative budget, the State agency shall take into consideration the number of sites and children to be served, as well as any other relevant factors. A sponsor's administrative budget shall be subject to review for adjustments by the State agency if the sponsor's level of site participation or the number of meals served to children changes significantly.

(8) Applicants which qualify as camps shall be approved for reimbursement only for meals served free to enrolled children who meet the Program's eligibility standards.

(9) The State agency shall not approve the application of any applicant sponsor identifiable through its organization or principals as a sponsor which has been determined to be seriously deficient as described in § 225.11(c). However, the State agency may approve the application of a sponsor which has been disapproved or terminated in prior years in accordance with this paragraph if the applicant demonstrates to the satisfaction of the State agency that it has taken appropriate corrective actions to prevent recurrence of the deficiencies.

(10) If the sponsor's application to participate is denied, the official making the determination of denial must notify the applicant sponsor in writing stating all of the grounds on which the

State agency based the denial. Pending the outcome of a review of a denial, the State agency shall proceed to approve other applicants in accordance with its responsibilities under paragraph (b)(5) of this section, without regard to the application under review.

(11) The State agency shall not approve the application of any applicant sponsor which submits fraudulent information or documentation when applying for Program participation or which knowingly withholds information that may lead to the disapproval of its application. Complete information regarding such disapproval of an applicant shall be submitted by the State agency through FNSRO to OIG.

(c) *Content of sponsor application*—(1) *Application forms.* The applicant shall submit a written application to the State agency for participation in the Program as a sponsor. Sponsors proposing to serve an area affected by an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar) may be exempt, at the discretion of the State agency, from submitting a new application if they have participated in the program at any time during the current year or in either of the prior two calendar years. The State agency may use the application form developed by FNS, or it may develop an application form, for use in the Program. Application shall be made on a timely basis in accordance with the deadline date established under § 225.6(b)(1).

(2) *Requirements for new sponsors, new sites, and, as determined by the State agency, sponsors and sites which have experienced significant operational problems in the prior year*—(i) *Site information sheets.* At a minimum, the application submitted by new sponsors and by sponsors which, in the determination of the State agency, have experienced significant operational problems in the prior year shall include a site information sheet, as developed by the State agency, for each site where a food service operation is proposed. The site information sheet for new sponsors and new sites, and for sponsors and sites which, in the determination of the State agency, have experienced significant operational problems in the current year must demonstrate or describe the following:

(A) An organized and supervised system for serving meals to attending children;

(B) The estimated number and types of meals to be served and the times of service;

(C) Arrangements, within standards prescribed by the State or local health authorities, for delivery and holding of meals until time of service, and arrangements for storing and refrigerating any leftover meals until the next day;

(D) Arrangements for food service during periods of inclement weather;

(E) Access to a means of communication for making necessary adjustments in the number of meals delivered in accordance with the number of children attending daily at each site;

(F) Whether the site is rural, as defined in § 225.2, or non-rural, and whether the site's food service will be self-prepared or vended;

(G) For open sites and restricted open sites, documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist. However, for sites that a sponsor proposes to serve during an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar), any site which has participated in the Program at any time during the current year or in either of the prior two calendar years shall be considered eligible without new documentation;

(H) For closed enrolled sites, the projected number of children enrolled and the projected number of children eligible for free and reduced price meals for each of these sites;

(I) For NYSP sites, certification from the sponsor that all of the children who will receive Program meals are enrolled participants in the NYSP;

(J) For camps, the number of children enrolled in each session who meet the Program's income standards. If such information is not available at the time of application, it shall be submitted as soon as possible thereafter and in no case later than the filing of the camp's claim for reimbursement for each session;

(K) For those sites at which applicants will serve children of migrant workers, certification from a migrant organization which attests that the site serves children of migrant worker families. If the site also serves non-migrant children, the sponsor shall certify that the site predominantly serves migrant children; and

(L) For a site that serves homeless children, information sufficient to demonstrate that the site is not a residential child care institution, as defined in paragraph (c) of the definition of *school* in § 210.2 of this chapter. If cash payments, food stamps, or any in-kind service are required of any meal recipient at these sites, sponsors must describe the method(s) used to ensure that no such payments or services are received for any Program meal served to children. In addition, sponsors must certify that such sites employ meal counting methods which ensure that reimbursement is claimed only for meals served to children.

(ii) *Other application requirements.* New sponsors and sponsors which in the determination of the State agency have experienced significant operational problems in the prior year shall also include in their applications:

(A) Information in sufficient detail to enable the State agency to determine whether the applicant meets the criteria for participation in the Program as set forth in § 225.14; the extent of Program payments needed, including a request for advance payments and start-up payments, if applicable; and a staffing and monitoring plan;

(B) A complete administrative and operating budget for State agency review and approval. The administrative budget shall contain the projected administrative expenses which a sponsor expects to incur during the operation of the Program, and shall include information in sufficient detail to enable the State agency to assess the sponsor's ability to operate the Program within its estimated reimbursement. A sponsor's approved administrative budget shall be subject to subsequent review by the State agency for adjustments in projected administrative costs;

(C) A summary of how meals will be obtained (e.g., self-prepared at each site, self-prepared and distributed from a central kitchen, purchased from a school food authority, competitively procured from a food service management company, etc.). If an invitation for bid is required under § 225.15(h), sponsors shall also submit a schedule for bid dates, and a copy of their invitation for bid; and

(D) For each applicant which seeks approval under § 225.14(b)(3) as a unit of local, municipal, county or State government, or under § 225.14(b)(5) as a private nonprofit organization, certification that it will directly operate the Program in accordance with § 225.14(d)(3).

(3) *Requirements for experienced sponsors and experienced sites*—(i) *Site information sheets.* At a minimum, the application submitted by experienced sponsors shall include a site information sheet, as developed by the State agency, for each site where a food service operation is proposed. The site information sheet for experienced sponsors and experienced sites must demonstrate or describe the information below. The State agency also may require experienced sponsors and experienced sites to provide any of the information required in paragraph (c)(2) of this section.

(A) The estimated number and types of meals to be served and the times of service;

(B) For open sites and restricted open sites, new documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist shall be submitted. Such documentation shall be submitted every three years when school data are used. When census data are used, such documentation shall be submitted when new census data are available, or earlier if the State agency believes that an area's socioeconomic status has changed significantly since the last census. For sites that a sponsor proposes to serve during an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar), any site which has participated in the Program at any time during the current year or in either of the prior two calendar years shall be considered eligible without

new documentation of serving an area in which poor economic conditions exist;

(C) For closed enrolled sites, the projected number of children enrolled and the projected number of children eligible for free and reduced price school meals for each of these sites; and

(D) For camps, the number of children enrolled in each session who meet the Program's income standards. If such information is not available at the time of application, it shall be submitted as soon as possible thereafter and in no case later than the filing of the camp's claim for reimbursement for each session.

(ii) *Other application requirements.* Experienced sponsors shall also include on their applications:

(A) The extent of Program payments needed, including a request for advance payments and start-up payments, if applicable, and a staffing and monitoring plan;

(B) A complete administrative and operating budget for State agency review and approval. The administrative budget shall contain the projected administrative expenses which a sponsor expects to incur during the operation of the Program, and shall include information in sufficient detail to enable the State agency to assess the sponsor's ability to operate the Program within its estimated reimbursement. A sponsor's approved administrative budget shall be subject to subsequent review by the State agency for adjustments in projected administrative costs; and

(C) If an invitation for bid is required under § 225.15(g), a schedule for bid dates. Sponsors shall also submit a copy of the invitation for bid if it is changed from the previous year. If the method of procuring meals is changed, sponsors shall submit a summary of how meals will be obtained (e.g., self-prepared at each site, self-prepared and distributed from a central kitchen, purchased from a school food authority, competitively procured from a food service management company, etc.).

(4) *Free meal policy statement.* (i) Each applicant must submit a statement of nondiscrimination in its policy for serving meals to children. The statement must consist of an assurance that all children are served the same meals and that there is no discrimination in the course of the food service. A school sponsor must submit the policy statement only once, with the initial application to participate as a sponsor. However, if there is a substantive change in the school's free and reduced price policy, a revised policy statement must be provided at the State agency's request. In addition to the policy of service/nondiscrimination statement described in paragraph (c)(3) of this section, all applicants except camps must include a statement that the meals served are free at all sites.

(ii) In addition to the policy of service/nondiscrimination statement described in paragraph (c)(3) of this section, all applicants that are camps that charge separately for meals must include the following:

(A) A statement that the eligibility standards conform to the Secretary's family size and income standards for reduced price school meals;

(B) A description of the method or methods to be used in accepting applications from families for Program meals. Such methods must ensure that households are permitted to apply on behalf of children who are members of households receiving food stamp, FDPIR, or TANF benefits using the categorical eligibility procedures described in § 225.15(f);

(C) A description of the method used by camps for collecting payments from children who pay the full price of the meal while preventing the overt identification of children receiving a free meal;

(D) An assurance that the camp will establish a hearing procedure for families wishing to appeal a denial of an application for free meals. Such hearing procedures shall meet the requirements set forth in paragraph (c)(5) of this section;

(E) An assurance that, if a family requests a hearing, the child shall continue to receive free meals until a decision is rendered; and

(F) An assurance that there will be no overt identification of free meal recipients and no discrimination against any child on the basis of race, color, national origin, sex, age, or handicap.

(5) *Hearing procedures statement.*Each applicant that is a camp shall submit with its application a copy of its hearing procedures. At a minimum, these procedures shall provide:

(i) That a simple, publicly announced method will be used for a family to make an oral or written request for a hearing;

(ii) That the family will have the opportunity to be assisted or represented by an attorney or other person;

(iii) That the family will have an opportunity to examine the documents and records supporting the decision being appealed both before and during the hearing;

(iv) That the hearing will be reasonably prompt and convenient for the family;

(v) That adequate notice will be given to the family of the time and place of the hearing;

(vi) That the family will have an opportunity to present oral or documentary evidence and arguments supporting its position;

(vii) That the family will have an opportunity to question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses;

(viii) That the hearing shall be conducted and the decision made by a hearing official who did not participate in the action being appealed;

(ix) That the decision shall be based on the oral and documentary evidence presented at the hearing and made a part of the record;

(x) That the family and any designated representative shall be notified in writing of the decision;

(xi) That a written record shall be prepared for each hearing which includes the action being appealed, any documentary evidence and a summary of oral testimony presented at the hearing, the decision and the reasons for the decision, and a copy of the notice sent to the family; and

(xii) That the written record shall be maintained for a period of three years following the conclusion of the hearing, during which it shall be available for examination by the family or its representatives at any reasonable time and place.

(d) *Approval of sites.* (1) When evaluating a proposed food service site, the State agency shall ensure that:

(i) If not a camp, the proposed site serves an area in which poor economic conditions exist, as defined by § 225.2;

(ii) The area which the site proposes to serve is not or will not be served in whole or in part by another site, unless it can be demonstrated to the satisfaction of the State agency that each site will serve children not served by any other site in the same area for the same meal;

(iii) The site is approved to serve no more than the number of children for which its facilities are adequate and;

(iv) If it is a site proposed to operate during an unanticipated school closure, it is a non-school site.

(2) When approving the application of a site which will serve meals prepared by a food service management company, the State agency shall establish for each meal service an approved level for the maximum number of children's meals which may be served under the Program. These approved levels shall be established in accordance with the following provisions:

(i) The initial maximum approved level shall be based upon the historical record of attendance at the site if such a record has been established in prior years and the State agency determines that it is accurate. The State agency shall develop a procedure for establishing initial maximum approved levels for sites when no accurate record from prior years is available.

(ii) The maximum approved level shall be adjusted, if warranted, based upon information collected during site reviews. If attendance at the site on the day of the review is significantly below the site's approved level, the State agency should consider making a downward adjustment in the approved level with the objective of providing only one meal per child.

(iii) The sponsor may seek an upward adjustment in the approved level for its sites by requesting a site review or by providing the State agency with evidence that attendance exceeds the sites' approved levels.

(iv) Whenever the State agency establishes or adjusts approved levels of

meal service for a site, it shall document the action in its files, and it shall provide the sponsor with immediate written confirmation of the approved level.

(v) Upon approval of its application or any adjustment to its maximum approved levels, the sponsor shall inform the food service management company with which it contracts of the approved level for each meal service at each site served by the food service management company. This notification of any adjustments in approved levels shall take place within the time frames set forth in the contract for adjusting meal orders. Whenever the sponsor notifies the food service management company of the approved levels or any adjustments to these levels for any of its sites, the sponsor shall clearly inform the food service management company that an approved level of meal service represents the maximum number of meals which may be served at a site and is not a standing order for a specific number of meals at that site. When the number of children attending is below the site's approved level, the sponsor shall adjust meal orders with the objective of serving only one meal per child as required under § 225.15(b)(3).

(e) *State-Sponsor Agreement.* A sponsor approved for participation in the Program must enter into a written agreement with the State agency. If the sponsor is a school food authority that operates more than one child nutrition program (e.g., the National School Lunch Program, the School Breakfast Program, or the Child and Adult Care Food Program) under a single State agency, a single permanent agreement that includes all the child nutrition programs must be executed with the State agency, as described in § 210.9(b) of this chapter. All sponsors must agree in writing to:

(1) Operate a nonprofit food service during the period specified, as follows:

(i) From May through September for children on school vacation;

(ii) At any time of the year, in the case of sponsors administering the Program under a continuous school calendar system; or

(iii) During the period from October through April, if it serves an area affected by an unanticipated school closure due to a natural disaster, major building repairs, court orders relating to school safety or other issues, labor-management disputes, or, when approved by the State agency, a similar cause.

(2) For school food authorities, offer meals which meet the requirements and provisions set forth in § 225.16 during times designated as meal service periods by the sponsor, and offer the same meals to all children;

(3) For all other sponsors, serve meals which meet the requirements and provisions set forth in § 225.16 during times designated as meal service periods by the sponsor, and serve the same meals to all children;

(4) Serve meals without cost to all children, except that camps may charge for meals served to children who are not served meals under the Program;

(5) Issue a free meal policy statement in accordance with § 225.6(c);

(6) Meet the training requirement for its administrative and site personnel, as required under § 225.15(d)(1);

(7) Claim reimbursement only for the type or types of meals specified in the agreement and served without charge to children at approved sites during the approved meal service period, except that camps shall claim reimbursement only for the type or types of meals specified in the agreement and served without charge to children who meet the Program's income standards. The agreement shall specify the approved levels of meal service for the sponsor's sites if such levels are required under § 225.6(d)(2). No permanent changes may be made in the serving time of any meal unless the changes are approved by the State agency;

(8) Submit claims for reimbursement in accordance with procedures established by the State agency, and those stated in § 225.9;

(9) In the storage, preparation and service of food, maintain proper sanitation and health standards in conformance with all applicable State and local laws and regulations;

(10) Accept and use, in quantities that may be efficiently utilized in the Program, such foods as may be offered as a donation by the Department;

(11) Have access to facilities necessary for storing, preparing, and serving food;

(12) Maintain a financial management system as prescribed by the State agency;

(13) Maintain on file documentation of site visits and reviews in accordance with § 225.15(d) (2) and (3);

(14) Upon request, make all accounts and records pertaining to the Program available to State, Federal, or other authorized officials for audit or administrative review, at a reasonable time and place. The records shall be retained for a period of 3 years after the end of the fiscal year to which they pertain, unless audit or investigative findings have not been resolved, in which case the records shall be retained until all issues raised by the audit or investigation have been resolved;

(15) Maintain children on site while meals are consumed; and

(16) Retain final financial and administrative responsibility for its program.

(f) *Special Account.* In addition, the State agency may require any vended sponsor to enter into a special account agreement with the State agency. The special account agreement shall stipulate that the sponsor shall establish a special account with a State agency or Federally insured bank for operating costs payable to the sponsor by the State. The agreement shall also stipulate that any disbursement of monies from the account must be authorized by both the sponsor and the food service management company. The special account agreement may contain such other terms, agreed to by both the sponsor and the food service management company, which are consistent with the terms of the contract between the sponsor and the food service management company. A copy of the special account agreement shall be submitted to the State agency and another copy maintained on file by the sponsor. Any charges made by the bank for the account described in this section shall be considered an allowable sponsor administrative cost.

(g) *Food service management company registration.* A State agency may require each food service management company, operating within the State, to register based on State procedures. A State agency may further require the food service management company to certify that the information submitted on its application for registration is true and correct and that the food service management company is aware that misrepresentation may result in prosecution under applicable State and Federal statutes.

(h) *Monitoring of food service management company procurements.* (1) The State agency shall ensure that sponsors' food service management company procurements are carried out in accordance with §§ 225.15(h) and 225.17 of this part.

(2) Each State agency shall develop a standard form of contract for use by sponsors in contracting with food service management companies. Sponsors which are public entities, sponsors with exclusive year-round contracts with a food service management company, and sponsors whose food service management company contract(s) do not exceed $10,000 in aggregate value may use their existing or usual form of contract, provided that such form of contract has been submitted to and approved by the State agency. The standard contract developed by the State agency shall expressly and without exception provide that:

(i) All meals prepared by a food service management company shall be unitized, with or without milk or juice, unless the State agency has approved, pursuant to paragraph (h)(3) of this section, a request for exceptions to the unitizing requirement for certain components of a meal;

(ii) A food service management company entering into a contract with a sponsor under the Program shall not subcontract for the total meal, with or without milk, or for the assembly of the meal;

(iii) The sponsor shall provide to the food service management company a list of State agency approved food service sites, along with the approved level for the number of meals which may be claimed for reimbursement for each site, established under § 225.6(d)(2), and shall notify the food service management company of all sites which have been approved, cancelled, or terminated subsequent to the submission of the initial approved site list and of any

changes in the approved level of meal service for a site. Such notification shall be provided within the time limits mutually agreed upon in the contract;

(iv) The food service management company shall maintain such records (supported by invoices, receipts, or other evidence) as the sponsor will need to meet its responsibilities under this part, and shall submit all required reports to the sponsor promptly at the end of each month, unless more frequent reports are required by the sponsor;

(v) The food service management company must have State or local health certification for the facility in which it proposes to prepare meals for use in the Program. It must ensure that health and sanitation requirements are met at all times. In addition, the food service management company must ensure that meals are inspected periodically to determine bacteria levels present in the meals and that the bacteria levels found to be present in the meals conform with the standards set by local health authorities. The results of the inspections must be submitted promptly to the sponsor and to the State agency.

(vi) The meals served under the contract shall conform to the cycle menus and meal quality standards and food specifications approved by the State agency and upon which the bid was based;

(vii) The books and records of the food service management company pertaining to the sponsor's food service operation shall be available for inspection and audit by representatives of the State agency, the Department and the U.S. General Accounting Office at any reasonable time and place for a period of 3 years from the date of receipt of final payment under the contract, except that, if audit or investigation findings have not been resolved, such records shall be retained until all issues raised by the audit or investigation have been resolved;

(viii) The sponsor and the food service management company shall operate in accordance with current Program regulations;

(ix) The food service management company shall be paid by the sponsor for all meals delivered in accordance with the contract and this part. However, neither the Department nor the State agency assumes any liability for payment of differences between the number of meals delivered by the food service management company and the number of meals served by the sponsor that are eligible for reimbursement;

(x) Meals shall be delivered in accordance with a delivery schedule prescribed in the contract;

(xi) Increases and decreases in the number of meals ordered shall be made by the sponsor, as needed, within a prior notice period mutually agreed upon;

(xii) All meals served under the Program shall meet the requirements of § 225.16;

(xiii) In cases of nonperformance or noncompliance on the part of the food service management company, the company shall pay the sponsor for any excess costs which the sponsor may incur by obtaining meals from another source;

(xiv) If the State agency requires the sponsor to establish a special account for the deposit of operating costs payments in accordance with the conditions set forth in § 225.6(f), the contract shall so specify;

(xv) The food service management company shall submit records of all costs incurred in the sponsor's food service operation in sufficient time to allow the sponsor to prepare and submit the claim for reimbursement to meet the 60-day submission deadline; and

(xvi) The food service management company shall comply with the appropriate bonding requirements, as set forth in § 225.15(h)(6) through (h)(8).

(3) All meals prepared by a food service management company shall be unitized, with or without milk or juice, unless the sponsor submits to the State agency a request for exceptions to the unitizing requirement for certain components of a meal. These requests shall be submitted to the State agency in writing in sufficient time for the State agency to respond prior to the sponsor's advertising for bids. The State agency shall notify the sponsor in writing of its determination in a timely manner.

(4) Each State agency shall have a representative present at all food service management company procurement bid openings when sponsors are expected to receive more than $100,000 in Program payments.

(5) Copies of all contracts between sponsors and food service management companies, along with a certification of independent price determination, shall be submitted to the State agency prior to the beginning of Program operations. Sponsors shall also submit to the State agency copies of all bids received and their reason for selecting the food service management company chosen.

(6) All bids in an amount which exceeds the lowest bid shall be submitted to the State agency for approval before acceptance. All bids totaling $100,000 or more shall be submitted to the State agency for approval before acceptance. State agencies shall respond to a request for approval of such bids within 5 working days of receipt.

(7) Failure by a sponsor to comply with the provisions of this paragraph or § 225.15(h)(1) shall be sufficient grounds for the State agency to terminate participation by the sponsor in accordance with § 225.18(b).

(i) *Meal pattern exceptions.* The State agency shall review and act upon requests for exceptions to the meal pattern in accordance with the guidelines and limitations set forth in § 225.16.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13467, Apr. 10, 1990; ; 64 FR 72484, Dec. 28, 1999; 64 FR 72896, Dec. 29, 1999; 72 FR 10895, Mar. 12, 2007]

### § 225.7 Program monitoring and assistance.

(a) *Training.* Prior to the beginning of Program operations, each State agency shall make available training in all necessary areas of Program administration to sponsor personnel, food service management company representatives, auditors, and health inspectors who will participate in the Program in that State. Prior to Program operations, the State agency shall ensure that the sponsor's supervisory personnel responsible for the food service receive training in all necessary areas of Program administration and operations. This training shall reflect the fact that individual sponsors or groups of sponsors require different levels and areas of Program training. State agencies are encouraged to utilize in such training, and in the training of site personnel, sponsor personnel who have previously participated in the Program. Training should be made available at convenient locations. State agencies are not required to conduct this training for sponsors operating the Program during unanticipated school closures during the period from October through April (or at any time of the year in an area with a continuous school calendar).

(b) *Program materials.* Each State agency shall develop and make available all necessary Program materials in sufficient time to enable applicant sponsors to prepare adequately for the Program.

(c) *Food specifications and meal quality standards.* With the assistance of the Department, each State agency shall develop and make available to all sponsors minimum food specifications and model meal quality standards which shall become part of all contracts between vended sponsors and food service management companies.

(d) *Program monitoring and assistance.* The State agency shall conduct Program monitoring and provide Program assistance according to the following provisions:

(1) *Pre-approval visits.* The State agency shall conduct pre-approval visits of sponsors and sites, as specified below, to assess the applicant sponsor's or site's potential for successful Program operations and to verify information provided in the application. The State agency shall visit prior to approval:

(i) All applicant sponsors which did not participate in the program in the prior year. However, if a sponsor is a school food authority, has been reviewed by the State agency under the National School Lunch Program during the preceding 12 months, and had no significant deficiencies noted in that review, a pre-approval visit may be conducted at the discretion of the State agency. In addition, pre-approval visits of sponsors proposing to operate the Program during unanticipated school closures during the period from October through April (or at any time

of the year in an area with a continuous school calendar) may be conducted at the discretion of the State agency;

(ii) All applicant sponsors which, as a result of operational problems noted in the prior year, the State agency has determined need a pre-approval visit; and

(iii) All sites which the State agency has determined need a pre-approval visit.

(2) *Sponsor and site reviews*—(i) *General.* The State agency must review sponsors and sites to ensure compliance with Program regulations, the Department's non-discrimination regulations (7 CFR part 15) and any other applicable instructions issued by the Department. In determining which sponsors and sites to review, the State agency must, at a minimum, consider the sponsors' and sites' previous participation in the Program, their current and previous Program performance, and the results of previous reviews of the sponsor and sites. When the same school food authority personnel administer this Program as well as the National School Lunch Program (7 CFR part 210), the State agency is not required to conduct a review of the Program in the same year in which the National School Lunch Program operations have been reviewed and determined to be satisfactory. Reviews shall be conducted as follows:

(ii) *Frequency and number of required reviews.* State agencies shall:

(A) Conduct a review of every new sponsor at least once during the first year of operation;

(B) Annually review a number of sponsors whose program reimbursements, in the aggregate, accounted for at least one-half of the total program meal reimbursements in the State in the prior year;

(C) Annually review every sponsor which experienced significant operational problems in the prior year;

(D) Review each sponsor at least once every three years; and

(E) As part of each sponsor review, conduct reviews of at least 10 percent of each sponsor's sites, or one site, whichever number is greater.

(3) *Follow-up reviews.* The State agency shall conduct follow-up reviews of sponsors and sites as necessary.

(4) *Monitoring system.* Each State agency shall develop and implement a monitoring system to ensure that sponsors, including site personnel, and the sponsor's food service management company, if applicable, immediately receive a copy of any review reports which indicate Program violations and which could result in a Program disallowance.

(5) *Records.* Documentation of Program assistance and the results of such assistance shall be maintained on file by the State agency.

(6) *Food service management company facility visits.* As a part of the review of any vended sponsor which contracts for the preparation of meals, the State agency shall inspect the food service management company's facilities. Each State agency shall establish an order of priority for visiting facilities at which food is prepared for the Program. The State agency shall respond promptly to complaints concerning facilities. If a food service management company fails to correct violations noted by the State agency during a review, the State agency shall notify the sponsor and the food service management company that reimbursement shall not be paid for meals prepared by the food service management company after a date specified in the notification. Funds provided for in § 225.5(f) may be used for conducting food service management company facility inspections.

(7) *Forms for reviews by sponsors.* Each State agency shall develop and provide monitor review forms to all approved sponsors. These forms shall be completed by sponsor monitors. The monitor review form shall include, but not be limited to, the time of the reviewer's arrival and departure, the site supervisor's signature, a certification statement to be signed by the monitor, the number of meals prepared or delivered, the number of meals served to children, the deficiencies noted, the corrective actions taken by the sponsor, and the date of such actions.

(8) *Statistical monitoring.* State agencies may use statistical monitoring

procedures in lieu of the site monitoring requirements prescribed in paragraph (d)(2) of this section to accomplish the monitoring and technical assistance aspects of the Program. State agencies which use statistical monitoring procedures may use the findings in evaluating claims for reimbursement. Statistical monitoring may be used for some or all of a State's sponsors. Use of statistical monitoring does not eliminate the requirements for reviewing sponsors as specified in paragraph (d)(2) of this section.

(9) *Corrective actions.* Corrective actions which the State agency may take when Program violations are observed during the conduct of a review are discussed in § 225.11. The State agency shall conduct follow-up reviews as appropriate when corrective actions are required.

(e) *Other facility inspections and meal quality tests.* In addition to those inspections required by paragraph (d)(6) of this section, the State agency may also conduct, or arrange to have conducted: inspections of self-preparation and vended sponsors' food preparation facilities; inspections of food service sites; and meal quality tests. The procedures for carrying out these inspections and tests shall be consistent with procedures used by local health authorities. For inspections of food service management companies' facilities not conducted by State agency personnel, copies of the results shall be provided to the State agency. The company and the sponsor shall also immediately receive a copy of the results of these inspections when corrective action is required. If a food service management company fails to correct violations noted by the State agency during a review, the State agency shall notify the sponsor and the food service management company that reimbursement shall not be paid for meals prepared by the food service management company after a date specified in the notification. Funds provided for in § 225.5(f) may be used for conducting these inspections and tests.

(f) *Financial management.* Each State agency shall establish a financial management system, in accordance with 7 CFR part 3015, and 7 CFR part 3016 or 7 CFR part 3019, as applicable, and FNS guidance, to identify allowable Program costs and to establish standards for sponsor recordkeeping and reporting. The State agency shall provide guidance on these financial management standards to each sponsor.

(g) *Nondiscrimination.* (1) Each State agency shall comply with all requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Department's regulations concerning nondiscrimination (7 CFR parts 15, 15a and 15b), including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and reviews to assure compliance with such policy, to the end that no person shall, on the grounds of race, color, national origin, sex, age, or handicap, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, the Program.

(2) Complaints of discrimination filed by applicants or participants shall be referred to FNS or the Secretary of Agriculture, Washington, DC 20250. A State agency which has an established grievance or complaint handling procedure may resolve sex and handicap discrimination complaints before referring a report to FNS.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13468, Apr. 10, 1990; 64 FR 72485, Dec. 28, 1999; 64 FR 72898, Dec. 29, 1999; 71 FR 39518, July 13, 2006]

### § 225.8 Records and reports.

(a) Each State agency shall maintain complete and accurate current accounting records of its Program operations which will adequately identify funds authorizations, obligations, unobligated balances, assets, liabilities, income, claims against sponsors and efforts to recover overpayments, and expenditures for administrative and operating costs. These records shall be retained for a period of three years after the date of the submission of the final Program Operations and Financial Status Report (SF–269), except that, if audit findings have not been resolved, the affected records shall be retained beyond the three year period until such time as any issues raised by the audit

findings have been resolved. The State agency shall also retain a complete record of each review or appeal conducted, as required under §225.13, for a period of three years following the date of the final determination on the review or appeal. Records may be kept in their original form or on microfilm.

(b) Each State agency shall submit to FNS a final report on the Summer Food Service Program Operations (FNS–418) for each month no more than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not postmarked and/or submitted within this time limit unless FNS grants an exception. Upward adjustments to a State's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made without FNS authorization, regardless of when it is determined that such adjustments need to be made. Adjustments to a State's report shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. Action may be taken against the State agency, in accordance with §225.5(a)(1), for failure to submit accurate and timely reports.

(c) The State agency must submit to FNS a final Financial Status Report no later than 120 days after the end of the fiscal year, on a form (SF–269) provided by FNS. Any requested increase in reimbursement levels for a fiscal year resulting from corrective action taken after submission of the final Program Operations and Financial Status Reports shall be submitted to FNS for approval. The request shall be accompanied by a written explanation of the basis for the adjustment and the actions taken to minimize the need for such adjustments in the future. If FNS approves such an increase, it will make payment, subject to availability of funds. Any reduction in reimbursement for that fiscal year resulting from corrective action taken after submission of the final fiscal year Program Operations and Financial Status Reports shall be handled in accordance with the provisions of §225.12(d), except that amounts recovered may not be used to make Program payments.

(d)(1) By May 1 of each year, State agencies must submit to the appropriate FNSRO a list of potential private nonprofit organization sponsors. The list must include the following information for each applicant sponsor:

(i) Name and address;

(ii) Geographical area(s) proposed to be served;

(iii) Proposed number of sites; and

(iv) Any available details of each proposed site including address, dates of operation, and estimated daily attendance.

(2) State agencies must also notify the appropriate FNSRO within 5 working days after they approve each private nonprofit organization to participate as a SFSP sponsor. When State agencies notify the FNSRO of sponsor approval, they must provide the following information:

(i) Any changes to site locations, dates of operation, and estimated daily attendance that was previously provided;

(ii) The hours and type(s) of approved meal service at each site;

(iii) The type of site approval—open, restricted open, closed enrolled, or camp; and

(iv) Any other important details about each site that would help the FNSRO plan reviews, including whether the site is rural or urban, or vended or self-preparation.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13469, Apr. 10, 1990; 64 FR 72485, Dec. 28, 1999; 65 FR 82251, Dec. 28, 2000]

### § 225.9 Program assistance to sponsors.

(a) *Start-up payments.* At their discretion, State agencies may make start-up payments to sponsors which have executed Program agreements. Start-up payments shall not be made more than two months before the sponsor is scheduled to begin food service operations and shall not exceed 20 percent of the sponsor's approved administrative budget. The amount of the start-

up payment shall be deducted from the first advance payment for administrative costs or, if the sponsor does not receive advance payments, from the first administrative reimbursement.

(b) *Commodity assistance.* (1) Sponsors eligible to receive commodities under the Program include: Self-preparation sponsors; sponsors which have entered into an agreement with a school or school food authority for the preparation of meals; and sponsors which are school food authorities and have competitively procured Program meals from the same food service management company from which they competitively procured meals for the National School Lunch Program during the last period in which school was in session. The State agency shall make available to these sponsors information on available commodities. Sponsors shall use in the Program food donated by the Department and accepted by sponsors.

(2) Not later than June 1 of each year, State agencies shall prepare a list of the sponsors which are eligible to receive commodities and the average daily number of eligible meals to be served by each of these sponsors. If the State agency does not handle the distribution of commodities donated by the Department, this list shall be forwarded to the agency of the State responsible for the distribution of commodities. The State agency shall be responsible for promptly revising the list to reflect additions or terminations of sponsors and for adjusting the average daily participation data as it deems necessary.

(c) *Advance payments.* At the sponsor's request, State agencies shall make advance payments to sponsors which have executed Program agreements in order to assist these sponsors in meeting operating costs and administrative expenses. For sponsors operating under a continuous school calendar, all advance payments shall be forwarded on the first day of each month of operation. Advance payments shall be made by the dates specified in paragraphs (c) (1) and (2) of this section for all other sponsors whose requests are received at least 30 days prior to those dates. Requests received less than 30 days prior to those dates shall be acted upon within 30 days of receipt. When making advance payments, State agencies shall observe the following criteria:

(1) *Operating costs.* (i) State agencies shall make advance payments for operating costs by June 1, July 15, and August 15. Except for school food authorities, sponsors must conduct training sessions before receiving the second advance payment. Training sessions must cover Program duties and responsibilities for the sponsor's staff and for site personnel. A sponsor shall not receive advance operating cost payments for any month in which it will participate in the Program for less than ten days.

(ii) To determine the amount of the advance payment to any sponsor, the State agency shall employ whichever of the following methods will result in the larger payment:

(A) The total operating costs paid to the sponsor for the same calendar month in the preceding year; or

(B) For vended sponsors, 50 percent of the amount determined by the State agency to be needed that month for meals, and, for self-preparation sponsors, 65 percent of the amount determined by the State agency to be needed that month for meals.

(2) *Administrative costs.* (i) State agencies shall make advance payments for administrative costs by June 1 and July 15. To be eligible for the second advance payment, the sponsor must certify that it is operating the number of sites for which the administrative budget was approved and that its projected administrative costs do not differ significantly from the approved budget. A sponsor shall not receive advance administrative costs payments for any month in which it will participate in the Program for less than 10 days. However, if a sponsor operates for less than 10 days in June but for at least 10 days in August, the second advance administrative costs payment shall be made by August 15.

(ii) Each payment shall equal one-third of the total amount which the State agency determines the sponsor will need to administer its program. For sponsors which will operate for 10 or more days in only one month and, therefore, will qualify for only one advance administrative costs payment,

the payment shall be no less than one-half, and no more than two-thirds, of the total amount which the State agency determines the sponsor will need to administer its program.

(3) *Advance payment estimates.* When determining the amount of advance payments payable to the sponsor, the State agency shall make the best possible estimate based on the sponsor's request and any other available data. Under no circumstances may the amount of the advance payment for operating or administrative costs exceed the amount estimated by the State agency to be needed by the sponsor to meet operating or administrative costs, respectively.

(4) *Limit.* The sum of the advance operating and administrative costs payments to a sponsor for any one month shall not exceed $40,000 unless the State agency determines that a larger payment is necessary for the effective operation of the Program and the sponsor demonstrates sufficient administrative and managerial capability to justify a larger payment.

(5) *Deductions from advance payments.* The State agency shall deduct from either advance operating payments or advance administrative payments the amount of any previous payment which is under dispute or which is part of a demand for recovery under § 225.12.

(6) *Withholding of advance payments.* If the State agency has reason to believe that a sponsor will not be able to submit a valid claim for reimbursement covering the month for which advance payments have already been made, the subsequent month's advance payment shall be withheld until a valid claim is received.

(7) *Repayment of excess advance payments.* Upon demand of the State agency, sponsors shall repay any advance Program payments in excess of the amount cited on a valid claim for reimbursement.

(d) *Reimbursements.* Sponsors shall not be eligible for reimbursements for operating and administrative costs unless they have executed an agreement with the State agency. All reimbursements shall be in accordance with the terms of this agreement. Reimbursements shall not be paid for meals served at a site before the sponsor has received written notification that the site has been approved for participation in the Program. Income accruing to a sponsor's program shall be deducted from combined operating and administrative costs. The State agency may make full or partial reimbursement upon receipt of a claim for reimbursement, but shall first make any necessary adjustments in the amount to be paid. The following requirements shall be observed in submitting and paying claims:

(1) School food authorities that operate the Program, and operate more than one child nutrition program under a single State agency, must use a common claim form (as provided by the State agency) for claiming reimbursement for meals served under those programs.

(2) No reimbursement may be issued until the sponsor certifies that it operated all sites for which it is approved and that there has been no significant change in its projected administrative costs since its preceding claim and, for a sponsor receiving an advance payment for only one month, that there has been no significant change in its projected administrative costs since its initial advance administrative costs payment.

(3) Sponsors which operate less than 10 days in the final month of operations shall submit a combined claim for the final month and the immediate preceding month within 60 days of the last day of operation.

(4) The State agency shall forward reimbursements within 45 days of receiving valid claims. If a claim is incomplete or invalid, the State agency shall return the claim to the sponsor within 30 days with an explanation of the reason for disapproval. If the sponsor submits a revised claim, final action shall be completed within 45 days of receipt.

(5) Claims for reimbursement shall report information in accordance with the financial management system established by the State agency, and in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Reports of Summer Food Service Program Operations required under § 225.8(b). In submitting a claim for reimbursement, each sponsor shall certify that the

claim is correct and that records are available to support this claim. Failure to maintain such records may be grounds for denial of reimbursement for meals served and/or administrative costs claimed during the period covered by the records in question. The costs of meals served to adults performing necessary food service labor may be included in the claim. Under no circumstances may a sponsor claim the cost of any disallowed meals as operating costs.

(6) A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency not later than 60 days after the last day of the month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not filed within the 60 day deadline shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the month covered by the claim and are reflected in the final Program Operations Report (FNS–418). Upward adjustments in Program funds claimed which are not reflected in the final FNS–418 for the month covered by the claim cannot be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(7) Payments to a sponsor for operating costs must equal the lesser of the following totals:

(i) The actual operating costs incurred by the sponsor; or

(ii) The sum of the amounts derived by multiplying the number of meals, by type, actually served under the sponsor's program to eligible children by the current rates for each meal type, as adjusted in accordance with paragraph (d)(9) of this section.

(8) Payments to a sponsor for administrative costs must equal the lowest of the following totals:

(i) The amount estimated in the sponsor's approved administrative budget (taking into account any amendments);

(ii) The actual administrative costs incurred by the sponsor; or

(iii) The sum of the amounts derived by multiplying the number of meals, by type, actually served under the sponsor's program to eligible children by the current administrative rates for each meal type, as adjusted in accordance with paragraph (d)(9) of this section. Sponsors must be eligible to receive additional administrative reimbursement for each meal served to participating children at rural or self-preparation sites, and the rates for such additional administrative reimbursement must be adjusted in accordance with paragraph (d)(9) of this section.

(9) On each January 1, or as soon thereafter or as practicable, FNS will publish a notice in the FEDERAL REGISTER announcing any adjustment to the reimbursement rates described in paragraphs (d)(7)(ii) and (d)(8)(iii) of this section. Adjustments will be based upon changes in the series for food away from home of the Consumer Price Index(CPI) for all urban consumers since the establishment of the rates. Higher rates will be established for Alaska and Hawaii, based on the CPI for those States.

(10) Sponsors of camps shall be reimbursed only for meals served to children in camps whose eligibility for Program meals is documented. Sponsors of NYSP sites shall only claim reimbursement for meals served to children enrolled in the NYSP.

(11) If a State agency has reason to believe that a sponsor or food service management company has engaged in unlawful acts in connection with Program operations, evidence found in audits, reviews, or investigations shall be a basis for nonpayment of the applicable sponsor's claims for reimbursement.

(e) The sponsor may claim reimbursement for any meals which are examined for meal quality by the State

agency, auditors, or local health authorities and found to meet the meal pattern requirements.

(f) The sponsor shall not claim reimbursement for meals served to children at any site in excess of the site's approved level of meal service, if one has been established under § 225.6(d)(2). However, the total number of meals for which operating costs are claimed may exceed the approved level of meal service if the meals exceeding this level were served to adults performing necessary food service labor in accordance with paragraph (d)(5) of this section. In reviewing a sponsor's claim, the State agency shall ensure that reimbursements for second meals are limited to the percentage tolerance established in § 225.15(b)(4).

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13469, Apr. 10, 1990; 64 FR 72485, Dec. 28, 1999]

### § 225.10 Audits and management evaluations.

(a) *Audits.* State agencies shall arrange for audits of their own operations to be conducted in accordance with the Department's Uniform Federal Assistance Regulations (7 CFR part 3015). Unless otherwise exempt, sponsors shall arrange for audits to be conducted in accordance with 7 CFR part 3015. State agencies shall provide OIG with full opportunity to audit the State agency and sponsors. Unless otherwise exempt, audits at the State and sponsor levels shall be conducted in accordance with OMB Circular A–133 and the Department's implementing regulations at 7 CFR part 3052. (To obtain the OMB circular referenced in this paragraph, see 5 CFR 1310.3.) While OIG shall rely to the fullest extent feasible upon State-sponsored audits of sponsors, it shall, when considered necessary, (1) make audits on a State-wide basis, (2) perform on-site test audits, and (3) review audit reports and related working papers of audits performed by or for State agencies.

(b) *Management evaluations.* (1) State agencies shall provide FNS with full opportunity to conduct management evaluations (including visits to sponsors) of all operations of the State agency. Each State agency shall make available its records, including records of the receipts and expenditures of funds, upon a reasonable request by FNS.

(2) The State agency shall fully respond to any recommendations made by FNSRO pursuant to the management evaluation.

(3) FNSRO may require the State agency to submit on 20 days notice a corrective action plan regarding serious problems observed during any phase of the management evaluation.

(c) *Disregards.* In conducting management evaluations or audits for any fiscal year, the State agency, FNS or OIG may disregard overpayment which does not exceed $100 or, in the case of State agency administered programs, does not exceed the amount established by State law, regulations or procedures as a minimum for which claims will be made for State losses generally. No overpayment shall be disregarded, however, when there are unpaid claims for the same fiscal year from which the overpayment can be deducted or when there is substantial evidence of violation of criminal law or civil fraud statutes.

[54 FR 18208, Apr. 27, 1989, as amended at 71 FR 39518, July 13, 2006]

### § 225.11 Corrective action procedures.

(a) *Purpose.* The provisions in this section shall be used by the State agency to improve Program performance.

(b) *Investigations.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. The State agency shall maintain on file all evidence relating to such investigations and actions. The State agency shall inform the appropriate FNSRO of any suspected fraud or criminal abuse in the Program which would result in a loss or misuse of Federal funds. The Department may make investigations at the request of the State agency, or where the Department determines investigations are appropriate.

(c) *Denial of applications and termination of sponsors.* Except as specified below, the State agency shall not enter into an agreement with any applicant

sponsor identifiable through its corporate organization, officers, employees, or otherwise, as an institution which participated in any Federal child nutrition program and was seriously deficient in its operation of any such program. The State agency shall terminate the Program agreement with any sponsor which it determines to be seriously deficient. However, the State agency shall afford a sponsor reasonable opportunity to correct problems before terminating the sponsor for being seriously deficient. The State agency may approve the application of a sponsor which has been disapproved or terminated in prior years in accordance with this paragraph if the sponsor demonstrates to the satisfaction of the State agency that the sponsor has taken appropriate corrective actions to prevent recurrence of the deficiencies. Serious deficiencies which are grounds for disapproval of applications and for termination include, but are not limited to, any of the following:

(1) Noncompliance with the applicable bid procedures and contract requirements of Federal child nutrition program regulations;

(2) The submission of false information to the State agency;

(3) Failure to return to the State agency any start-up or advance payments which exceeded the amount earned for serving meals in accordance with this part, or failure to submit all claims for reimbursement in any prior year, provided that failure to return any advance payments for months for which claims for reimbursement are under dispute from any prior year shall not be grounds for disapproval in accordance with this paragraph; and

(4) Program violations at a significant proportion of the sponsor's sites. Such violations include, but are not limited to, the following:

(i) Noncompliance with the meal service time restrictions set forth at § 225.16(c);

(ii) Failure to maintain adequate records;

(iii) Failure to adjust meal orders to conform to variations in the number of participating children;

(iv) The simultaneous service of more than one meal to any child;

(v) The claiming of Program payments for meals not served to participating children;

(vi) Service of a significant number of meals which did not include required quantities of all meal components;

(vii) Excessive instances of off-site meal consumption;

(viii) Continued use of food service management companies that are in violation of health codes.

(d) *Meal service restriction.* With the exception for residential camps set forth at § 225.16(b)(1)(ii), the State agency shall restrict to one meal service per day:

(1) Any food service site which is determined to be in violation of the time restrictions for meal service set forth at § 225.16(c) when corrective action is not taken within a reasonable time as determined by the State agency; and

(2) All sites under a sponsor if more than 20 percent of the sponsor's sites are determined to be in violation of the time restrictions set forth at § 225.16(c).

If this action results in children not receiving meals under the Program, the State agency shall make reasonable effort to locate another source of meal service for these children.

(e) *Meal disallowances.* (1) If the State agency determines that a sponsor has failed to plan, prepare, or order meals with the objective of providing only one meal per child at each meal service at a site, the State agency shall disallow the number of children's meals prepared or ordered in excess of the number of children served.

(2) If the State agency observes meal service violations during the conduct of a site review, the State agency shall disallow as meals served to children all of the meals observed to be in violation.

(3) The State agency shall also disallow children's meals which are in excess of a site's approved level established under § 225.6(d)(2).

(f) *Corrective action and termination of sites.* (1) Whenever the State agency observes violations during the course of a site review, it shall require the sponsor to take corrective action. If the State agency finds a high level of meal service violations, the State agency shall require a specific immediate corrective

action plan to be followed by the sponsor and shall either conduct a follow-up visit or in some other manner verify that the specified corrective action has been taken.

(2) The State agency shall terminate the participation of a sponsor's site if the sponsor fails to take action to correct the Program violations noted in a State agency review report within the timeframes established by the corrective action plan.

(3) The State agency shall immediately terminate the participation of a sponsor's site if during a review it determines that the health or safety of the participating children is imminently threatened.

(4) If the site is vended, the State agency shall within 48 hours notify the food service management company providing meals to the site of the site's termination.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13469, Apr. 10, 1990]

### § 225.12 Claims against sponsors.

(a) The State agency shall disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable under this part, except as provided for in § 225.10(c). State agencies may consider claims for reimbursement not properly payable if a sponsor's records do not justify all costs and meals claimed. However, the State agency shall notify the sponsor of the reasons for any disallowance or demand for repayment.

(b) Minimum State agency collection procedures for unearned payments shall include:

(1) Written demand to the sponsor for the return of improper payments;

(2) If after 30 calendar days the sponsor fails to remit full payment or agree to a satisfactory repayment schedule, a second written demand for the return of improper payments, sent by certified mail, return receipt requested;

(3) If after 60 calendar days following the original written demand, the sponsor fails to remit full payment or agree to a satisfactory repayment schedule, a third written demand for the return of improper payments, sent by certified mail, return receipt requested;

(4) If after 90 calendar days following the original written demand, the sponsor fails to remit full payment or agree to a satisfactory repayment schedule, the State agency shall refer the claim against the sponsor to the appropriate State or Federal authorities for pursuit of legal remedies.

(c) If FNS does not concur with the State agency's action in paying a sponsor or in failing to collect an overpayment, FNS shall notify the State agency of its intention to assert a claim against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning the action taken. The State agency shall be liable to FNS for failure to collect an overpayment unless FNS determines that the State agency has conformed with this part in issuing the payment and has exerted reasonable efforts in accordance with paragraph (b) of this section to recover the improper payment.

(d) The amounts recovered by the State agency from sponsors may be utilized to make Program payments to sponsors for the period for which the funds were initially available and/or to repay the State for any of its own funds used to make payments on claims for reimbursement. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of this part.

### § 225.13 Appeal procedures.

(a) Each State agency shall establish a procedure to be followed by an applicant appealing: A denial of an application for participation; a denial of a sponsor's request for an advance payment; a denial of a sponsor's claim for reimbursement (except for late submission under § 225.9(d)(5)); a State agency's refusal to forward to FNS an exception request by the sponsor for payment of a late claim or a request for an upward adjustment to a claim; a claim against a sponsor for remittance of a payment; the termination of the sponsor or a site; a denial of a sponsor's application for a site; a denial of a food service management company's application for registration, if applicable; or the revocation of a food service management company's registration, if applicable. Appeals shall not be allowed on decisions made by FNS with respect

to late claims or upward adjustments under § 225.9(d)(5).

(b) At a minimum, appeal procedures shall provide that:

(1) The sponsor or food service management company be advised in writing of the grounds upon which the State agency based the action. The notice of action, which shall be sent by certified mail, return receipt requested, shall also state that the sponsor or food service management company has the right to appeal the State's action;

(2) The sponsor or food service management company be advised in writing that the appeal must be made within a specified time and must meet the requirements of paragraph (b)(4) of this section. The State agency shall establish this period of time at not less than one week nor more than two weeks from the date on which the notice of action is received;

(3) The appellant be allowed the opportunity to review any information upon which the action was based;

(4) The appellant be allowed to refute the charges contained in the notice of action either in person or by filing written documentation with the review official. To be considered, written documentation must be submitted by the appellant within seven days of submitting the appeal, must clearly identify the State agency action being appealed, and must include a photocopy of the notice of action issued by the State agency;

(5) A hearing be held by the review official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter appealing the action. The appellant may retain legal counsel or may be represented by another person. Failure of the appellant's representative to appear at a scheduled hearing shall constitute the appellant's waiver of the right to a personal appearance before the review official, unless the review official agrees to reschedule the hearing. A representative of the State agency shall be allowed to attend the hearing to respond to the appellant's testimony and written information and to answer questions from the review official;

(6) If the appellant has requested a hearing, the appellant and the State agency shall be provided with at least 5 days advance written notice, sent by certified mail, return receipt requested, of the time and place of the hearing;

(7) The hearing be held within 14 days of the date of the receipt of the request for review, but, where applicable, not before the appellant's written documentation is received in accordance with paragraphs (b) (4) and (5) of this section;

(8) The review official be independent of the original decision-making process;

(9) The review official make a determination based on information provided by the State agency and the appellant, and on Program regulations;

(10) Within 5 working days after the appellant's hearing, or within 5 working days after receipt of written documentation if no hearing is held, the reviewing official make a determination based on a full review of the administrative record and inform the appellant of the determination of the review by certified mail, return receipt requested;

(11) The State agency's action remain in effect during the appeal process. However, participating sponsors and sites may continue to operate the Program during an appeal of termination, and if the appeal results in overturning the State agency's decision, reimbursement shall be paid for meals served during the appeal process. However, such continued Program operation shall not be allowed if the State agency's action is based on imminent dangers to the health or welfare of children. If the sponsor or site has been terminated for this reason, the State agency shall so specify in its notice of action; and

(12) The determination by the State review official is the final administrative determination to be afforded to the appellant.

(c) The State agency shall send written notification of the complete appeal procedures and of the actions which are appealable, as specified in paragraph (a) of this section, to each potential sponsor applying to participate and to

each food service management company applying to register in accordance with § 225.6(g).

(d) A record regarding each review shall be kept by the State agency, as required under § 225.8(a). The record shall document the State agency's compliance with these regulations and shall include the basis for its decision.

[54 FR 18208, Apr. 27, 1989, as amended at 64 FR 72486, Dec. 28, 1999]

## Subpart C—Sponsor and Site Provisions

### § 225.14 Requirements for sponsor participation.

(a) *Applications.* Sponsors shall make written application to the State agency to participate in the Program. Such application shall be made on a timely basis in accordance with the requirements of § 225.6(b)(1). Sponsors proposing to operate a site during an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar) may be exempt, at the discretion of the State agency, from submitting a new application if they have participated in the program at any time during the current year or in either of the prior two calendar years.

(b) *Sponsor eligibility.* Applicants eligible to sponsor the Program include:

(1) Public or nonprofit private school food authorities;

(2) Public or nonprofit private residential summer camps;

(3) Units of local, municipal, county, or State governments;

(4) Public or private nonprofit colleges or universities which are currently participating in the National Youth Sports Program; and

(5) Private nonprofit organizations as defined in § 225.2.

(c) *General requirements.* No applicant sponsor shall be eligible to participate in the Program unless it:

(1) Demonstrates financial and administrative capability for Program operations and accepts final financial and administrative responsibility for total Program operations at all sites at which it proposes to conduct a food service;

(2) Has not been seriously deficient in operating the Program;

(3) Will conduct a regularly scheduled food service for children from areas in which poor economic conditions exist, or qualifies as a camp;

(4) Has adequate supervisory and operational personnel for overall monitoring and management of each site, including adequate personnel to conduct the visits and reviews required in §§ 225.15(d) (2) and (3);

(5) Provides an ongoing year-round service to the community which it proposes to serve under the Program, except as provided for in § 225.6(b)(4);

(6) Certifies that all sites have been visited and have the capability and the facilities to provide the meal service planned for the number of children anticipated to be served; and

(7) Enters into a written agreement with the State agency upon approval of its application, as required in § 225.6(e).

(d) *Requirements specific to sponsor types.* (1) If the sponsor is a camp, it must certify that it will collect information on participants' eligibility to support its claim for reimbursement.

(2) If the sponsor administers the Program at sites that provide summer school sessions, it must ensure that these sites are open to children enrolled in summer school and to all children residing in the area served by the site.

(3) Sponsors which are units of local, municipal, county or State government, and sponsors which are private nonprofit organizations, will only be approved to administer the Program at sites where they have direct operational control. Operational control means that the sponsor shall be responsible for:

(i) Managing site staff, including the hiring, terminating, and determining conditions of employment for site staff; and

(ii) Exercising management control over Program operations at sites throughout the period of Program participation by performing the functions specified in § 225.15.

(4) If the sponsor administers homeless feeding sites, it must:

(i) Document that the site is not a residential child-care institution as defined in paragraph (c) of the definition

of 'School' contained in § 210.2 of this chapter;

(ii) Document that the primary purpose of the homeless feeding site is to provide shelter and meals to homeless families; and

(iii) Certify that these sites employ meal counting methods to ensure that reimbursement is claimed only for meals served to homeless and non-homeless children.

(5) If the sponsor administers NYSP sites, it must ensure that all children at these sites are enrolled participants in the NYSP.

(6) If the sponsor is a private nonprofit organization, it must certify that it:

(i) Administers the Program:

(A) At no more than 25 sites, with not more than 300 children being served at any approved meal service at any one site, or

(B) With a waiver granted by the State agency in accordance with § 225.6(b)(6)(ii), not more than 500 children being served at any approved meal service at any one site;

(ii) Operates in areas where a school food authority has not indicated that it will operate the Program in the current year;

(iii) Exercises full control and authority over the operation of the Program at all sites under its sponsorship;

(iv) Provides ongoing year-round activities for children or families;

(v) Demonstrates that it possesses adequate management and the fiscal capacity to operate the Program; and

(vi) Meets applicable State and local health, safety, and sanitation standards.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13469, Apr. 10, 1990; 64 FR 72486, Dec. 28, 1999; 64 FR 72898, Dec. 29, 1999; 65 FR 50128, Aug. 17, 2000]

### § 225.15 Management responsibilities of sponsors.

(a) *General.* (1) Sponsors shall operate the food service in accordance with: the provisions of this part; any instructions and handbooks issued by FNS under this part; and any instructions and handbooks issued by the State agency which are not inconsistent with the provisions of this part.

(2) Sponsors shall not claim reimbursement under parts 210, 215, 220, or 226 of this chapter. In addition, the sponsor must ensure that records of any site serving homeless children accurately reflect commodity allotments received as a "charitable institution", as defined in §§ 250.3 and 250.41 of this chapter. Commodities received for Program meals must be based only on the number of eligible children's meals served. Sponsors may use funds from other Federally-funded programs to supplement their meal service but must, in calculating their claim for reimbursement, deduct such funds from total operating and administrative costs in accordance with the definition of "income accruing to the Program" at § 225.2 and with the regulations at § 225.9(d). Sponsors which are school food authorities may use facilities, equipment and personnel supported by funds provided under this part to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.).

(3) No sponsor may contract out for the management responsibilities of the Program described in this section.

(b) *Meal Ordering.* (1) Each sponsor shall, to the maximum extent feasible, utilize either its own food service facilities or obtain meals from a school food service facility. If the sponsor obtains meals from a school food service facility, the applicable requirements of this part shall be embodied in a written agreement between the sponsor and the school.

(2) Upon approval of its application or any adjustment in the approved levels of meal service for its sites established under § 225.6(d)(2), vended sponsors shall inform their food service management company of the approved level at each site for which the food service management company will provide meals.

(3) Sponsors shall plan for and prepare or order meals on the basis of participation trends with the objective of providing only one meal per child at each meal service. The sponsor shall make the adjustments necessary to achieve this objective using the results from its monitoring of sites. For sites

for which approved levels of meal service have been established in accordance with § 225.6(d)(2), the sponsor shall adjust the number of meals ordered or prepared with the objective of providing only one meal per child whenever the number of children attending the site is below the approved level. The sponsor shall not order or prepare meals for children at any site in excess of the site's approved level, but may order or prepare meals above the approved level if the meals are to be served to adults performing necessary food service labor in accordance with § 225.9(d)(4). Records of participation and of preparation or ordering of meals shall be maintained to demonstrate positive action toward meeting this objective.

(4) In recognition of the fluctuation in participation levels which makes it difficult to estimate precisely the number of meals needed and to reduce the resultant waste, sponsors may claim reimbursement for a number of second meals which does not exceed two percent of the number of first meals served to children for each meal type (i.e., breakfasts, lunches, supplements, or suppers) during the claiming period. The State agency shall disallow all claims for second meals if it determines that the sponsor failed to plan and prepare or order meals with the objective of providing only one meal per child at each meal service. Second meals shall be served only after all participating children at the site's meal service have been served a meal.

(c) *Records and claims.* (1) Sponsors shall maintain accurate records which justify all costs and meals claimed. Failure to maintain such records may be grounds for denial of reimbursement for meals served and/or administrative costs claimed during the period covered by the records in question. The sponsor's records shall be available at all times for inspection and audit by representatives of the Secretary, the Comptroller General of the United States, and the State agency for a period of three years following the date of submission of the final claim for reimbursement for the fiscal year.

(2) Sponsors shall submit claims for reimbursement in accordance with this part. All final claims must be submitted to the State agency within 60 days following the last day of the month covered by the claim.

(d) *Training and monitoring.* (1) Each sponsor shall hold Program training sessions for its administrative and site personnel and shall allow no site to operate until personnel have attended at least one of these training sessions. The State agency may waive these training requirements for operation of the Program during unanticipated school closures during the period from October through April (or at any time of the year in an area with a continuous school calendar). Training of site personnel shall, at a minimum, include: the purpose of the Program; site eligibility; recordkeeping; site operations; meal pattern requirements; and the duties of a monitor. Each sponsor shall ensure that its administrative personnel attend State agency training provided to sponsors, and sponsors shall provide training throughout the summer to ensure that administrative personnel are thoroughly knowledgeable in all required areas of Program administration and operation and are provided with sufficient information to enable them to carry out their Program responsibilities. Each site shall have present at each meal service at least one person who has received this training.

(2) Sponsors shall visit each of their sites at least once during the first week of operation under the Program and shall promptly take such actions as are necessary to correct any deficiencies.

(3) Sponsors shall review food service operations at each site at least once during the first four weeks of Program operations, and thereafter shall maintain a reasonable level of site monitoring. Sponsors shall complete a monitoring form developed by the State agency during the conduct of these reviews.

(e) *Media Release.* Each sponsor shall annually announce in the media serving the area from which it draws its attendance the availability of free meals. Camps and other programs not eligible under § 225.2 (paragraph (a) of "areas in which poor economic conditions exist") shall annually announce to all participants the availability of free meals for

eligible children. All media releases issued by camps and other programs not eligible under § 225.2 (paragraph (a) of "areas in which poor economic conditions exist") shall include: the Secretary's family-size and income standards for reduced price school meals labelled "SFSP Income Eligibility Standards"; a statement that children who are members of households receiving food stamp, FDPIR, or TANF benefits are automatically eligible to receive free meal benefits at eligible program sites; and a statement that meals are available without regard to race, color, national origin, sex, age, or handicap.

(f) *Application for free Program meals*—(1) *Purpose of application form.* The application is used to determine the eligibility of children attending camps and the eligibility of sites that are not open sites as defined in paragraph (a) of the definition of "areas in which poor economic conditions exist", in § 225.2. In these situations, parents or guardians of children enrolled in camps or these other sites must be given application forms to provide information described in paragraph (f)(2) or (f)(3) of this section, as applicable. Applications are not necessary if other information sources are available and can be used to determine eligibility of individual children in camps or sites.

(2) *Application procedures based on household income.* The household member completing the application on behalf of the child enrolled in the Program must provide the following information:

(i) The names of all children for whom application is made;

(ii) The names of all other household members;

(iii) The social security number of the adult household member who signs the application or an indication that the household member does not have a social security number;

(iv) The income received by each household member identified by source of income;

(v) The signature of an adult household member;

(vi) The date the application is completed and signed.

(3) *Application based on the household's receipt of food stamp, FDPIR, or TANF benefits.* Households may apply on the basis of receipt of food stamp, FDPIR, or TANF benefits by providing the following information:

(i) The name(s) and food stamp, FDPIR, or TANF case number(s) of the child(ren) who are enrolled in the Program; and

(ii) The signature of an adult household member.

(4) *Information or notices required on application forms.* Application forms or descriptive materials given to households about applying for free meals must contain the following information:

(i) The family-size and income levels for reduced price school meal eligibility with an explanation that households with incomes less than or equal to these values are eligible for free Program meals (NOTE: The income levels for free school meal eligibility must not be included on the application or in other materials given to the household).

(ii) A statement that a child who is a member of a household that receives food stamp, FDPIR, or TANF benefits is automatically eligible to receive free meals in the Program;

(iii) A statement that reads, "In certain cases, foster children are eligible for free meals regardless of household income. If such children are living with you and you wish to apply for such meals, please contact us.";

(iv) A Privacy Act notice informing households of how the social security number and other information provided on the application will be used. Each free and reduced price meal application must include substantially the following statement, "The Richard B. Russell National School Lunch Act requires the information on this application. You do not have to give the information, but if you do not, we cannot approve your child for free or reduced price meals. You must include the social security number of the adult household member who signs the application. The social security number is not required when you apply on behalf of a foster child or you list a Food Stamp, Temporary Assistance for Needy Families (TANF) Program or Food Distribution Program on Indian Reservations (FDPIR) case number for

your child or other (FDPIR) identifier or when you indicate that the adult household member signing the application does not have a social security number. We will use your information to determine if your child is eligible for free or reduced price meals, and for administration and enforcement of the Program." When the State agency or sponsor, as appropriate, plans to use or disclose children's eligibility information for non-program purposes, additional information, as specified in paragraph (i) of this section, must be added to the Privacy Act notice/statement. State agencies and sponsors are responsible for drafting the appropriate notice and ensuring that the notice complies with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note (Disclosure of Social Security Number)).

(v) The statement used to inform the household about the use of social security numbers must comply with the Privacy Act of 1974 (Pub. L. 93–579). If a State or local agency plans to use the social security numbers for uses not described in paragraph (f)(4)(iv) of this section, the notice must be revised to explain those uses.

(vi) Examples of income that should be provided on the application, including: Earnings, wages, welfare benefits, pensions, support payments, unemployment compensation, social security, and other cash income;

(vii) A notice placed immediately above the signature block stating that the person signing the application certifies that all information provided is correct, that the household is applying for Federal benefits in the form of free Program meals, that Program officials may verify the information on the application, and that purposely providing untrue or misleading statements may result in prosecution under State or Federal criminal laws; and

(viii) A statement that if food stamp, FDPIR, or TANF case numbers are provided, they may be used to verify the current food stamp, FDPIR, or TANF certification for the children for whom free meals benefits are claimed.

(5) *Verifying information on Program applications.* Households selected to verify information on their Program applications must be notified in writing. State agencies must ensure that the notice of information about the use of social security numbers provided on applications complies with section 7 of Pub. L. 93–579 (Privacy Act of 1974). Households must be informed of the following:

(i) They must provide a social security number for each adult household member, or indicate that an adult household member does not have a social security number, or provide proof that they are receiving food stamp, FDPIR, or TANF benefits;

(ii) They will lose Program benefits or be terminated from participation if they do not cooperate with the verification process;

(iii) Social security numbers may be used to determine the correctness of information on applications and continued eligibility for Program benefits;

(iv) They will be given the name and phone number of an official who can assist in the verification process;

(v) Verification may occur during program reviews, audits, and investigations;

(vi) Verification may include contacting employers, food stamp or welfare offices, or State employment offices to determine the accuracy of statements on the application about income, receipt of food stamp, FDPIR, TANF, or unemployment benefits; and

(vii) They may lose benefits or face claims or legal action if incorrect information is reported on the application.

(g) *Disclosure of children's free and reduced price meal eligibility information to certain programs and individuals without parental consent.* The State agency or sponsor, as appropriate, may disclose aggregate information about children eligible for free and reduced price meals to any party without parental notification and consent when children cannot be identified through release of the aggregate data or by means of deduction. Additionally, the State agency or sponsor may disclose information that identifies children eligible for free and reduced price meals to the programs and the individuals specified in this paragraph (g) without parent/guardian consent. The State agency or

sponsor that makes the free and reduced price meal eligibility determination is responsible for deciding whether to disclose program eligibility information.

(1) *Persons authorized to receive eligibility information.* Only persons directly connected with the administration or enforcement of a program or activity listed in paragraphs (g)(2) or (g)(3) of this section may have access to children's free and reduced price meal eligibility information, without parental consent. Persons considered directly connected with administration or enforcement of a program or activity listed in paragraphs (g)(2) or (g)(3) of this section are Federal, State, or local program operators responsible for the ongoing operation of the program or activity or persons responsible for program compliance. Program operators may include persons responsible for carrying out program requirements and monitoring, reviewing, auditing, or investigating the program. Program operators may include contractors, to the extent those persons have a need to know the information for program administration or enforcement. Contractors may include evaluators, auditors, and others with whom Federal or State agencies and program operators contract with to assist in the administration or enforcement of their program in their behalf.

(2) *Disclosure of children's names and free or reduced price meal eligibility status.* The State agency or sponsor, as appropriate, may disclose, without parental consent, only children's names and eligibility status (whether they are eligible for free meals or reduced price meals) to persons directly connected with the administration or enforcement of:

(i) A Federal education program;

(ii) A State health program or State education program administered by the State or local education agency;

(iii) A Federal, State, or local means-tested nutrition program with eligibility standards comparable to the National School Lunch Program (i.e., food assistance programs for households with incomes at or below 185 percent of the Federal poverty level); or

(3) *Disclosure of all eligibility information.* In addition to children's names and eligibility status, the State agency or sponsor, as appropriate, may disclose, without parental consent, all eligibility information obtained through the free and reduced price meal eligibility process (including all information on the application or obtained through direct certification) to:

(i) Persons directly connected with the administration or enforcement of programs authorized under the Richard B. Russell National School Lunch Act or the Child Nutrition Act of 1966. This means that all eligibility information obtained for the Summer Food Service Program may be disclosed to persons directly connected with administering or enforcing regulations under the National School Lunch Program, Special Milk Program, School Breakfast Program, Child and Adult Care Food Program, and the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) (parts 210, 215, 220, 226 and 246, respectively, of this chapter);

(ii) The Comptroller General of the United States for purposes of audit and examination; and

(iii) Federal, State, and local law enforcement officials for the purpose of investigating any alleged violation of the programs listed in paragraphs (g)(2) and (g)(3) of this section.

(4) *Use of free and reduced price meals eligibility information by programs other than Medicaid or the State Children's Health Insurance Program (SCHIP).* State agencies and sponsors may use children's free and reduced price meal eligibility information for administering or enforcing the Summer Food Service Program. Additionally, any other Federal, State, or local agency charged with administering or enforcing the Summer Food Service Program may use the information for that purpose. Individuals and programs to which children's free or reduced price meal eligibility information has been disclosed under this section may use the information only in the administration or enforcement of the receiving program. No further disclosure of the information may be made.

(h) *Disclosure of children's free or reduced price meal eligibility information to Medicaid and/or SCHIP, unless parents decline.* Children's free or reduced price

meal eligibility information only may be disclosed to Medicaid or SCHIP when both the State agency and the sponsor so elect, the parental/guardian does not decline to have their eligibility information disclosed and the other provisions described in paragraph (h)(1) of this section are met. The State agency or sponsor, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free or reduced price meals), and any other eligibility information obtained through the free and reduced price meal applications or obtained through direct certification to persons directly connected with the administration of Medicaid or SCHIP. Persons directly connected to the administration of Medicaid and SCHIP are State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations for Medicaid or SCHIP.

(1) The State agency must ensure that:

(i) The sponsors and health insurance program officials have a written agreement that requires the health insurance program agency to use the eligibility information to seek to enroll children in Medicaid and SCHIP; and

(ii) Parents/guardians are notified that their eligibility information may be disclosed to Medicaid or SCHIP and given an opportunity to decline to have their children's eligibility information disclosed, prior to any disclosure.

(2) *Use of children's free and reduced price meal eligibility information by Medicaid/SCHIP.* Medicaid and SCHIP agencies and health insurance program operators receiving children's free and reduced price meal eligibility information must use the information to seek to enroll children in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP. No further disclosure of the information may be made. Medicaid and SCHIP agencies and health insurance program operators also may verify children's eligibility in a program under the Child Nutrition Act of 1966 or the Richard B. Russell National School Lunch Act.

(i) *Notifying households of potential uses and disclosures of children's free and reduced price meal eligibility information.* Households must be informed that the information they provide on the free and reduced price meal application will be used to determine eligibility for free or reduced price meals and that their eligibility information may be disclosed to other programs.

(1) For disclosures to programs, other than Medicaid or the State Children's Health Insurance Program (SCHIP), that are permitted access to children's eligibility information, without parental/guardian consent, the State agency or sponsor, as appropriate, must notify parents/guardians at the time of application that their children's free or reduced price meal eligibility information may be disclosed. The State agency or sponsor, as appropriate, must add substantially the following statement to the Privacy Act notice/statement required under paragraph (f)(4)(iv) of this section, "We may share your eligibility information with education, health, and nutrition programs to help them evaluate, fund, or determine benefits for their programs; auditors for program reviews; and law enforcement officials to help them look into violations of program rules." For children determined eligible for free meals through the direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals through direct certification.

(2) For disclosure to Medicaid or SCHIP, the State agency or sponsor, as appropriate, must notify parents/guardians that their children's free or reduced price meal eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed and notifies the State agency or sponsor, as appropriate, by a date specified by the State agency or sponsor, as appropriate. Only the parent or guardian who is a member of the household or family for purposes of the free and reduced price meal application

may decline the disclosure of eligibility information to Medicaid or SCHIP. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify eligible children and seek to enroll them in Medicaid or SCHIP, and that their decision will not affect their children's eligibility for free or reduced price meals. The notification may be included in the letter/notice to parents/guardians that accompanies the free and reduced price meal application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond if they do not want their information disclosed. The State agency or sponsor, as appropriate, must add substantially the following statement to the Privacy Act notice/statement required under paragraph (f) of this section, "We may share your information with Medicaid or the State Children's Health Insurance Program, unless you tell us not to. The information, if disclosed, will be used to identify eligible children and seek to enroll them in Medicaid or SCHIP." For children determined eligible for free meals through direct certification, the notice of potential disclosure and opportunity to decline the disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals through direct certification process.

(j) *Other disclosures.* State agencies and sponsors that plan to use or disclose information about children eligible for free and reduced price meals in ways not specified in this section must obtain written consent from children's parents or guardians prior to the use or disclosure.

(1) The consent must identify the information that will be shared and how the information will be used.

(2) There must be a statement informing parents and guardians that failing to sign the consent will not affect the child's eligibility for free meals and that the individuals or programs receiving the information will not share the information with any other entity or program.

(3) Parents/guardians must be permitted to limit the consent only to those programs with which they wish to share information.

(4) The consent statement must be signed and dated by the child's parent or guardian who is a member of the household for purposes of the free and reduced price meal application.

(k) *Agreements with programs/individuals receiving children's free or reduced price meal eligibility information.* Agreements or Memoranda of Understanding (MOU) are recommended or required as follows:

(1) The State agency or sponsor, as appropriate, should have a written agreement or MOU with programs or individuals receiving eligibility information, prior to disclosing children's free and reduced price meal eligibility information. The agreement or MOU should include information similar to that required for disclosures to Medicaid and SCHIP specified in paragraph (k)(2) of this section.

(2) For disclosures to Medicaid or SCHIP, the State agency or sponsor, as appropriate, must have a written agreement with the State or local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free or reduced price meal eligibility information to those agencies. At a minimum, the agreement must:

(i) Identify the health insurance program or health agency receiving children's eligibility information;

(ii) Describe the information that will be disclosed;

(iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must be used to seek to enroll children in Medicaid or SCHIP;

(iv) Require that the Medicaid or SCHIP agency describe how they will use the information obtained;

(v) Describe how the information will be protected from unauthorized uses and disclosures;

(vi) Describe the penalties for unauthorized disclosure; and

(vii) Be signed by both the Medicaid or SCHIP program or agency and the State agency or sponsor, as appropriate.

(l) *Penalties for unauthorized disclosure or misuse of children's free and reduced*

*price meal eligibility information*. In accordance with section 9(b)(6)(C) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(6)(C)), any individual who publishes, divulges, discloses or makes known in any manner, or to any extent not authorized by statute or this section, any information obtained under this section will be fined not more than $1,000 or imprisoned for up to 1 year, or both.

(m) *Food service management companies*. (1) Failure by a sponsor to comply with the provisions of this section shall be sufficient grounds for the State agency to terminate that sponsor's participation in accordance with § 225.18.

(2) Any sponsor may contract with a food service management company to manage the sponsor's food service operations and/or for the preparation of unitized meals with or without milk or juice. Exceptions to the unitizing requirement may only be made in accordance with the provisions set forth at § 225.6(h)(3).

(3) Any vended sponsor shall be responsible for ensuring that its food service operation is in conformity with its agreement with the State agency and with all the applicable provisions of this part.

(4) In addition to any applicable State or local laws governing bid procedures, and with the exceptions identified in this paragraph, each sponsor which contracts with a food service management company shall comply with the competitive bid procedures described in this paragraph. Sponsors which are schools or school food authorities and which have an exclusive contract with a food service management company for year-round service, and sponsors whose total contracts with food service management companies will not exceed $10,000, shall not be required to comply with these procedures. These exceptions do not relieve the sponsor of the responsibility to ensure that competitive procurement procedures are followed in contracting with any food service management company. Each sponsor whose proposed contract is subject to the specific bid procedures set forth in this paragraph shall ensure, at a minimum, that:

(i) All proposed contracts are publicly announced at least once, not less than 14 calendar days prior to the opening of bids, and the announcement includes the time and place of the bid opening;

(ii) The bids are publicly opened;

(iii) The State agency is notified, at least 14 calendar days prior to the opening of the bids, of the time and place of the bid opening;

(iv) The invitation to bid does not specify a minimum price;

(v) The invitation to bid contains a cycle menu approved by the State agency upon which the bid is based;

(vi) The invitation to bid contains food specifications and meal quality standards approved by the State agency upon which the bid is based;

(vii) The invitation to bid does not specify special meal requirements to meet ethnic or religious needs unless such special requirements are necessary to meet the needs of the children to be served;

(viii) Neither the invitation to bid nor the contract provides for loans or any other monetary benefit or term or condition to be made to sponsors by food service management companies;

(ix) Nonfood items are excluded from the invitation to bid, except where such items are essential to the conduct of the food service;

(x) Copies of all contracts between sponsors and food service management companies, along with a certification of independent price determination, are submitted to the State agency prior to the beginning of Program operations;

(xi) Copies of all bids received are submitted to the State agency, along with the sponsor's reason for choosing the successful bidder; and

(xii) All bids in an amount which exceeds the lowest bid and all bids totaling $100,000 or more are submitted to the State agency for approval before acceptance. State agencies shall respond to a request for approval of such bids within 5 working days of receipt.

(5) Each food service management company which submits a bid over $100,000 shall obtain a bid bond in an amount not less than five (5) percent nor more than ten (10) percent, as determined by the sponsor, of the value

of the contract for which the bid is made. A copy of the bid bond shall accompany each bid.

(6) Each food service management company which enters into a food service contract for over $100,000 with a sponsor shall obtain a performance bond in an amount not less than ten (10) percent nor more than twenty-five (25) percent of the value of the contract, as determined by the State agency, of the value of the contract for which the bid is made. Any food service management company which enters into more than one contract with any one sponsor shall obtain a performance bond covering all contracts if the aggregate amount of the contracts exceeds $100,000. Sponsors shall require the food service management company to furnish a copy of the performance bond within ten days of the awarding of the contract.

(7) Food service management companies shall obtain bid bonds and performance bonds only from surety companies listed in the current Department of the Treasury Circular 570. No sponsor or State agency shall allow food service management companies to post any "alternative" forms of bid or performance bonds, including but not limited to cash, certified checks, letters of credit, or escrow accounts.

(n) *Other responsibilities.* Sponsors shall comply with all of the meal service requirements set forth in § 225.16.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13470, Apr. 10, 1990; 61 FR 25553, May 22, 1996; 64 FR 72486, Dec. 28, 1999; 64 FR 72898, Dec. 29, 1999; 65 FR 82251, Dec. 28, 2000; 66 FR 2202, Jan. 11, 2001; 72 FR 10895, Mar. 12, 2007]

### § 225.16 Meal service requirements.

(a) *Sanitation.* Sponsors shall ensure that in storing, preparing, and serving food, proper sanitation and health standards are met which conform with all applicable State and local laws and regulations. Sponsors shall ensure that adequate facilities are available to store food or hold meals. Within two weeks of receiving notification of their approval, but in any case prior to commencement of Program operation, sponsors shall submit to the State agency a copy of their letter advising the appropriate health department of their intention to provide a food service during a specific period at specific sites.

(b) *Meal services.* The meals which may be served under the Program are breakfast, lunch, supper, and supplements, referred to from this point as "snacks". No sponsor may be approved to provide more than two snacks per day. A sponsor may only be reimbursed for meals served in accordance with this section.

(1) *Camps.* Sponsors of camps shall only be reimbursed for meals served in camps to children from families which meet the eligibility standards for this Program. The sponsor shall maintain a copy of the documentation establishing the eligibility of each child receiving meals under the Program. Meal service at camps shall be subject to the following provisions:

(i) Each day a camp may serve up to three meals or two meals and one snack;

(ii) Residential camps are not subject to the time restrictions for meal service set forth at paragraphs (c) (1) and (2) of this section; and

(iii) A camp shall be approved to serve these meals only if it has the administrative capability to do so; if the service period of the different meals does not coincide or overlap; and, where applicable, if it has adequate food preparation and holding facilities.

(2) *NYSP Sites.* Sponsors of NYSP sites shall only be reimbursed for meals served to enrolled NYSP participants at these sites.

(3) *Restrictions on the number and type of meals served.* Food service sites other than camps and sites that primarily serve migrant children may serve either:

(i) One meal each day, a breakfast, a lunch, or snack; or

(ii) Two meals each day, if one is a lunch and the other is a breakfast or a snack.

(4) *Sites which serve children of migrant families.* Food service sites that primarily serve children from migrant families may be approved to serve each day up to three meals or two meals and one snack. These sites shall serve children in areas where poor economic conditions exist as defined in § 225.2. A sponsor which operates in accordance

with this part shall receive reimbursement for all meals served to children at these sites. A site which primarily serves children from migrant families shall only be approved to serve more than one meal each day if it has the administrative capability to do so; if the service period of the different meals does not coincide or overlap; and, where applicable, if it has adequate food preparation and holding facilities.

(c) *Time restrictions for meal service.* (1) Three hours must elapse between the beginning of one meal service, including snacks, and the beginning of another, except that 4 hours must elapse between the service of a lunch and supper when no snack is served between lunch and supper. The service of supper shall begin no later than 7 p.m., unless the State agency has granted a waiver of this requirement due to extenuating circumstances. These waivers shall be granted only when the State agency and the sponsor ensure that special arrangements shall be made to monitor these sites. In no case may the service of supper extend beyond 8 p.m. The time restrictions in this paragraph shall not apply to residential camps.

(2) The duration of the meal service shall be limited to two hours for lunch or supper and one hour for all other meals.

(3) Meals served outside of the period of approved meal service shall not be eligible for Program payments.

(4) Any permanent or planned changes in meal service periods must be approved by the State agency.

(5) Meals which are not prepared at the food service site shall be delivered no earlier than one hour prior to the beginning of the meal service (unless the site has adequate facilities for holding hot or cold meals within the temperatures required by State or local health regulations) and no later than the beginning of the meal service.

(6) The sponsor shall claim for reimbursement only the type(s) of meals for which it is approved under its agreement with the State agency.

(d) *Meal patterns.* The meal requirements for the Program are designed to provide nutritious and well-balanced meals to each child. Sponsors shall ensure that meals served meet all of the requirements. Except as otherwise provided in this section, the following tables present the minimum requirements for meals served to children in the Program. Children age 12 and up may be served larger portions based on the greater food needs of older boys and girls.

(1) *Breakfast.* The minimum amount of food components to be served as breakfast are as follows:

| Food components | Minimum amount |
|---|---|
| **Vegetables and Fruits** | |
| Vegetable(s) and/or fruit(s) or | ½ cup.[1] |
| Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruits(s), and juice. | ½ cup (4 fluid ounces). |
| **Bread and Bread Alternates[2]** | |
| Bread or | 1 slice. |
| Cornbread, biscuits, rolls, muffins, etc. or | 1 serving.[3] |
| Cold dry cereal or | ¾ cup or 1 ounce.[4] |
| Cooked cereal or cereal grains or | ½ cup. |
| Cooked pasta or noodle products or an equivalent quantity of any combination of bread/bread alternate. | ½ cup. |
| **Milk[5]** | |
| Milk, fluid | 1 cup (½ pint, 8 fluid ounces). |
| **Meat and Meat Alternates (Optional)** | |
| Lean meat or poultry or fish or | 1 ounce. |
| Alternate protein product[6] or | 1 ounce. |
| Cheese or | 1 ounce. |
| Egg (large) or | ½. |
| Cooked dry beans or peas or | ¼ cup. |
| Peanut butter or an equivalent quantity of any combination of meat/meat alternate or | 2 tablespoons. |

| Food components | Minimum amount |
|---|---|
| Yogurt, plain or flavored, unsweetened or sweetened | 4 ounces or ½ cup. |

[1] For the purposes of the requirement outlined in this table, a cup means a standard measuring cup.
[2] Bread, pasta or noodle products, and cereal grains (such as rice, bulgur, or corn grits) shall be whole-grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole-grain or enriched meal or flour; cereal shall be whole-grain, enriched or fortified.
[3] Serving sizes and equivalents will be in guidance materials to be distributed by FNS to State agencies.
[4] Either volume (cup) or weight (ounces), whichever is less.
[5] Milk shall be served as a beverage or on cereal or used in part for each purpose.
[6] Must meet the requirements in appendix A of this part.

(2) *Lunch or supper*. The minimum amounts of food components to be served as lunch or supper are as follows:

| Food components | Minimum amount |
|---|---|
| **Meat and Meat Alternates** | |
| Lean meat or poultry or fish or | 2 ounces. |
| Alternate protein products [1] or | 2 ounces. |
| Cheese or | 2 ounces. |
| Egg (large) or | 1. |
| Cooked dry beans or peas or | ½ cup. [2] |
| Peanut butter or soynut butter or other nut or seed butters or | 4 tablespoons. |
| Peanuts or soynuts or tree nuts or seed [3] or | 1 ounce=50%. [4] |
| Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates. | 8 ounces or 1 cup. |
| **Vegetables and Fruits** | |
| Vegetable(s) and/or fruit(s) [5] | ¾ cup total. |
| **Bread and Bread Alternatives [6]** | |
| Bread or | 1 slice. |
| Cornbread, biscuits, rolls, muffins, etc. or | 1 serving. [7] |
| Cooked pasta or noodle products or | ½ cup. |
| Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate | ½ cup. |
| **Milk** | |
| Milk, fluid, served as a beverage | 1 cup (½ pint, 8 fluid ounces). |

[1] Must meet the requirements of appendix A of this part.
[2] For the purposes of the requirement outlined in this table, a cup means a standard measuring cup.
[3] Tree nuts and seeds that may be used as meat alternate are listed in program guidance.
[4] No more than 50% of the requirement shall be met with nuts or seeds. Nuts or seeds shall be combined with another meat/meat alternate to fulfill the requirement. For purposes of determining combinations, 1 ounce of nuts or seeds is equal to 1 ounce of cooked lean meat, poultry or fish.
[5] Serve 2 or more kinds of vegetable(s) and/or fruits or a combination of both. Full strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement.
[6] Bread, pasta or noodle products, and cereal grains (such as rice, bulgur, or corn grits) shall be whole-grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole-grain or enriched meal or flour; cereal shall be whole-grain, enriched or fortified.
[7] Serving sizes and equivalents will be in guidance materials to be distributed by FNS to State agencies.

(3) *Snacks*. The minimum amounts of food components to be served as snacks are as follows. Select two of the following four components. (Juice may not be served when milk is served as the only other component.)

| Food components | Minimum amount |
|---|---|
| **Meat and Meat Alternates** | |
| Lean meat or poultry or fish or | 1 ounce. |
| Alternate protein products [1] or | 1 ounce. |
| Cheese or | 1 ounce. |
| Egg (large) or | ½. |
| Cooked dry beans or peas or | ¼ cup [2]. |
| Peanut butter or soynut butter or other nut or seed butters or | 2 tablespoons. |
| Peanuts or soynuts or tree nuts or seeds [3] or | 1 ounce. |

| Food components | Minimum amount |
|---|---|
| Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates. | 4 ounce or ½ cup. |
| **Vegetables and Fruits** | |
| Vegetable(s) and/or fruit(s) or | ¾ cup. |
| Full-strength vegetable or fruit juice or an equivalent quantity or any combination of vegetable(s), fruits(s) and juice. | ¾ cup (6 fluid ounces). |
| **Bread and Bread Alternates** [4] | |
| Bread or | 1 slice. |
| Cornbread, biscuits, rolls, muffins, etc. or | 1 serving. [5] |
| Cold dry cereal or | ¾ cup or 1 ounce. [6] |
| Cooked cereal or | ½ cup. |
| Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate | ½ cup. |
| **Milk** [7] | |
| Milk, fluid | 1 cup (½ pint, 8 fluid ounces). |

[1] Must meet the requirements in appendix A of this part.
[2] For the purposes of the requirement outlined in this table, a cup means a standard measuring cup.
[3] Tree nuts and seeds that may be used as meat alternates are listed in program guidance.
[4] Bread, pasta or noodle products, and cereal grains (such as rice, bulgur, or corn grits) shall be whole-grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole-grain or enriched meal or flour; cereal shall be whole-grain, enriched or fortified.
[5] Serving sizes and equivalents will be in guidance materials to be distributed by FNS to State agencies.
[6] Either volume (cup) or weight (ounces), whichever is less.
[7] Milk should be served as a beverage or on cereal, or used in part for each purpose.

(e) *Meat or meat alternate.* Meat or meat alternates served under the Program are subject to the following requirements and recommendations.

(1) The required quantity of meat or meat alternate shall be the quantity of the edible portion as served. These foods must be served in a main dish, or in a main dish and one other menu item.

(2) Cooked dry beans or peas may be used as a meat alternate or as a vegetable, but they may not be used to meet both component requirements in a meal.

(3) Enriched macaroni with fortified protein may be used to meet part but not all of the meat/meat alternate requirement. The Department will provide guidance to State agencies on the part of the meat/meat alternate requirement which these foods may be used to meet. If enriched macaroni with fortified protein is served as a meat alternate it shall not be counted toward the bread requirement.

(4) If the sponsor believes that the recommended portion size of any meat or meat alternate is too large to be appealing to children, the sponsor may reduce the portion size of that meat or meat alternate and supplement it with another meat or meat alternate to meet the full requirement.

(5) Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts shall not be used as meat alternates due to their low protein content. Nut and seed meals or flours shall not be used as a meat alternate except as defined in this section under paragraph (e)(3) and in this part under Appendix A: Alternate Foods for Meals. As noted in paragraph (d)(2) of this section, nuts or seeds may be used to meet no more than one-half of the meat/meat alternate requirement for lunch or supper. Therefore, nuts or seeds must be combined with another meat/meat alternate to fulfill the requirement. For the supplemental food pattern, nuts or seeds may be used to fulfill all of the meat/meat alternate requirement.

(f) *Exceptions to and variations from the meal pattern*—(1) *Meals provided by school food authorities*—(i) *Meal pattern substitution.* School food authorities that are Program sponsors and that participate in the National School Lunch or School Breakfast Program

during any time of the year may substitute the meal pattern requirements of the regulations governing those programs (Parts 210 and 220 of this chapter, respectively) for the meal pattern requirements in this section.

(ii) *Offer versus serve.* School food authorities that are Program sponsors may permit a child to refuse one or more items that the child does not intend to eat. The school food authority must apply this "offer versus serve" option under the rules followed for the National School Lunch Program, as described in part 210 of this chapter. The reimbursements to school food authorities for Program meals served under the "offer versus serve" must not be reduced because children choose not to take all components of the meals that are offered.

(2) *Children under 6.* The State agency may authorize the sponsor to serve food in smaller quantities than are indicated in paragraph (d) of this section to children under six years of age if the sponsor has the capability to ensure that variations in portion size are in accordance with the age levels of the children served. Sponsors wishing to serve children under one year of age shall first receive approval to do so from the State agency. In both cases, the sponsor shall follow the age-appropriate meal pattern requirements contained in the Child and Adult Care Food Program regulations (7 CFR part 226).

(3) *Statewide substitutions.* In American Samoa, Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands, the following variations from the meal requirements are authorized: A serving of a starchy vegetable—such as ufi, tanniers, yams, plantains, or sweet potatoes—may be substituted for the bread requirements.

(4) *Individual substitutions.* Substitutions may be made by sponsors in food listed in paragraph (d) of this section if individual participating children are unable, because of medical or other special dietary needs, to consume such foods. Such substitutions shall be made only when supported by a statement from a recognized medical authority which includes recommended alternate foods. Such statement shall be kept on file by the sponsor.

(5) *Special variations.* FNS may approve variations in the food components of the meals on an experimental or a continuing basis for any sponsor where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, economic, or physical needs.

(6) *Temporary unavailability of milk.* If emergency conditions prevent a sponsor normally having a supply of milk from temporarily obtaining milk deliveries, the State agency may approve the service of breakfasts, lunches or suppers without milk during the emergency period.

(7) *Continuing unavailability of milk.* The inability of a sponsor to obtain a supply of milk on a continuing basis shall not bar it from participation in the Program. In such cases, the State agency may approve service of meals without milk, provided that an equivalent amount of canned, whole dry or nonfat dry milk is used in the preparation of the milk components set forth in paragraph (d) of this section. In addition, the State agency may approve the use of nonfat dry milk in meals served to children participating in activities which make the service of fluid milk impracticable, and in locations which are unable to obtain fluid milk. Such authorization shall stipulate that nonfat dry milk be reconstituted at normal dilution and under sanitary conditions consistent with State and local health regulations.

(8) *Additional foods.* To improve the nutrition of participating children, additional foods may be served with each meal.

[54 FR 18208, Apr. 27, 1989, as amended at 54 FR 27153, June 28, 1989; Amdt. 2, 55 FR 1377, Jan. 14, 1990; 55 FR 13470, Apr. 10, 1990; 61 FR 37672, July 19, 1996; 62 FR 10191, Mar. 6, 1997; 64 FR 72487, Dec. 28, 1999; 64 FR 72487, Dec. 28, 1999; 65 FR 12437, Mar. 9, 2000; 65 FR 82251, Dec. 28, 2000]

## Subpart D—General Administrative Provisions

### § 225.17 Procurement standards.

(a) State agencies and sponsors shall comply with the requirements of 7 CFR

part 3016 or 7 CFR part 3019, as applicable, concerning the procurement of supplies, food, equipment and other services with Program funds. These requirements ensure that such materials and services are obtained for the program efficiently and economically and in compliance with applicable laws and executive orders. Sponsors may use their own procedures for procurement with Program funds to the extent that:

(1) Procurements by public sponsors comply with applicable State or local laws and the standards set forth in 7 CFR part 3016; and

(2) Procurements by private nonprofit sponsors comply with standards set forth in 7 CFR part 3019.

(b) The State agency shall make available to sponsors information on 7 CFR part 3016 or 7 CFR part 3019, as applicable.

(c) Sponsors may use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements made with Program funds conform with provisions of this section, as well as with procurement requirements which may be established by the State agency, with approval of FNS, to prevent fraud, waste, and Program abuse.

(d) The State agency shall ensure that each sponsor is aware of the following practices specified in 7 CFR part 3016 or 7 CFR part 3019, as applicable, with respect to minority business enterprises:

(1) Including qualified minority business enterprises on solicitation lists,

(2) Soliciting minority business enterprises whenever they are potential sources,

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum participation by minority business enterprises,

(4) Establishing delivery schedules which will assist minority business enterprises to meet deadlines, and

(5) Using the services and assistance of the Small Business Administration, and the Office of Minority Business Enterprise of the Department of Commerce as required.

[54 FR 18208, Apr. 27, 1989, as amended at 71 FR 39518, July 13, 2006]

### § 225.18 Miscellaneous administrative provisions.

(a) *Grant closeout procedures.* Grant closeout procedures for the Program shall be in accordance with 7 CFR part 3016 or 7 CFR part 3019, as applicable.

(b) *Termination for cause.* (1) FNS may terminate a State agency's participation in the Program in whole, or in part, whenever it is determined that the State agency has failed to comply with the conditions of the Program. FNS shall promptly notify the State agency in writing of the termination and reason for the termination, together with the effective date, and shall allow the State 30 calendar days to respond. In instances where the State does respond, FNS shall inform the State of its final determination no later than 30 calendar days after the State responds.

(2) A State agency shall terminate a sponsor's participation in the Program by written notice whenever it is determined by the State agency that the sponsor has failed to comply with the conditions of the Program.

(3) When participation in the Program has been terminated for cause, any funds paid to the State agency or a sponsor or any recoveries by FNS from the State agency or by the State agency from a sponsor shall be in accordance with the legal rights and liabilities of the parties.

(c) *Termination for convenience.* FNS and the State agency may agree to terminate the State agency's participation in the Program in whole, or in part, when both parties agree that the continuation of the Program would not produce beneficial results commensurate with the further expenditure of funds. The two parties shall agree upon the termination conditions, including the effective date, and in the case of partial termination, the portion to be terminated. The State agency shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. The Department shall allow full credit to the State agency for the Federal share of the noncancellable obligation properly incurred by the State agency prior to

termination. A State agency may terminate a sponsor's participation in the manner provided for in this paragraph.

(d) *Maintenance of effort.* Expenditure of funds from State and local sources for the maintenance of food programs for children shall not be diminished as a result of funds received under the Act and a certification to this effect shall become part of the agreement provided for in § 225.3(c).

(e) *Program benefits.* The value of benefits and assistance available under the Program shall not be considered as income or resources of recipients and their families for any purpose under Federal, State or local laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs.

(f) *State requirements.* Nothing contained in this part shall prevent a State agency from imposing additional operating requirements which are not inconsistent with the provisions of this part, provided that such additional requirements shall not deny the Program to an area in which poor economic conditions exist, and shall not result in a significant number of needy children not having access to the Program. Prior to imposing any additional requirements, the State agency must receive approval from FNSRO.

(g) *Fraud penalty.* Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this part, whether received directly or indirectly from the Department, or whoever receives, conceals, or retains such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen or obtained by fraud shall, if such funds, assets, or property are of the value of $100 or more, be fined not more than $100,000 or imprisoned not more than five years, or both, or if such funds, assets, or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(h) *Claims adjustment authority.* The Secretary shall have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of title 28, U.S. Code, to conduct litigation on behalf of the United States.

(i) *Data collection related to sponsors.* (1) Each State agency must collect data related to sponsors that have an agreement with the State agency to participate in the program for each of Federal fiscal years 2006 through 2009, including those sponsors that participated only for part of the fiscal year. Such data shall include:

(i) The name of each sponsor;

(ii) The city in which each participating sponsor was headquartered and the name of the state;

(iii) The amount of funds provided to the participating organization, i.e., the sum of the amount of federal funds reimbursed for operating and administrative cost; and

(iv) The type of participating organization, e.g., government agency, educational institution, non-profit organization/secular, non-profit organization/faith-based, and "other."

(2) On or before August 31, 2007, and each subsequent year through 2010, State agencies must report to FNS data as specified in paragraph (i)(1) of this section for the prior Federal fiscal year. State agencies must submit this data in a format designated by FNS.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13471, Apr. 10, 1990; 64 FR 72488, Dec. 28, 1999; 71 FR 39518, July 13, 2006; 72 FR 24183, May 2, 2007]

### § 225.19 Regional office addresses.

Persons desiring information concerning the Program may write to the appropriate State agency or Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, MA 02222–1065.

(b) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, NJ 08691–1598.

(c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street, SW., Room 8T36, Atlanta, GA 30303–3415.

(d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 West Jackson Boulevard, 20th Floor, Chicago, IL 60604–3507.

(e) In the States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, TX 75242–9980.

(f) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, CO 80204–3581.

(g) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearney Street, Room 400, San Francisco, CA 94108–2518.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13471, Apr. 10, 1990; 65 FR 12439, Mar. 9, 2000; 65 FR 82251, Dec. 28, 2000]

### § 225.20 Information collection/recordkeeping—OMB assigned control numbers.

| 7 CFR section where requirements are described | Current OMB control No. |
|---|---|
| 225.3–225.4. | 0584–0280 |
| 225.6–225.10 | 0584–0280 |
| 225.12–225.13 | 0584–0280 |
| 225.15–225.18 | 0584–0280 |

[61 FR 25554, May 22, 1996]

## APPENDIX A TO PART 225—ALTERNATE FOODS FOR MEALS

### ALTERNATE PROTEIN PRODUCTS

*A. What Are the Criteria for Alternate Protein Products Used in the Summer Food Service Program?*

1. An alternate protein product used in meals planned under the provisions in § 225.16 must meet all of the criteria in this section.

2. An alternate protein product whether used alone or in combination with meat or other meat alternates must meet the following criteria:

a. The alternate protein product must be processed so that some portion of the nonprotein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.

b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).

c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. ("When hydrated or formulated" refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).

d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation that the product meets the criteria in paragraphs A. 2. a through c of this appendix.

e. Manufacturers should provide information on the percent protein contained in the dry alternate protein product and on an as prepared basis.

f. For an alternate protein product mix, manufacturers should provide information on:

(1) The amount by weight of dry alternate protein product in the package;

(2) Hydration instructions; and

(3) Instructions on how to combine the mix with meat or other meat alternates.

*B. How Are Alternate Protein Products Used in the Summer Food Service Program?*

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in § 225.20.

2. The following terms and conditions apply:

a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.

b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).

*C. How Are Commercially Prepared Products Used in the Summer Food Service Program?*

Schools, institutions, and service institutions may use a commercially prepared meat or meat alternate products combined with alternate protein products or use a commercially prepared product that contains only alternate protein products.

[65 FR 12439, Mar. 9, 2000]

## APPENDIX B TO PART 225 [RESERVED]

## APPENDIX C TO PART 225—CHILD NUTRITION (CN) LABELING PROGRAM

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service (FNS) in conjunction with the Food Safety and Inspection Service (FSIS) and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA), and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs. This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

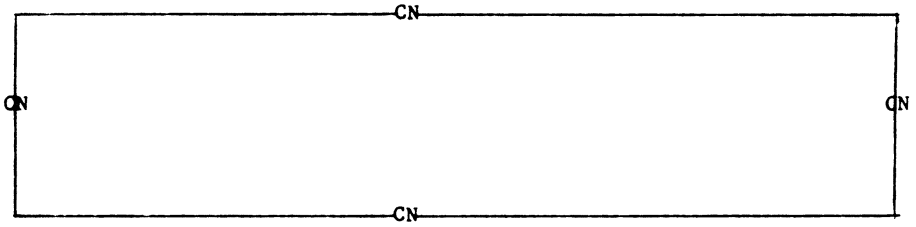
(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10, 225.16, and 226.20 and are served in the main dish.

(b) Juice drinks and juice drink products that contain a minimum of 50 percent full strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) *CN label* is a food product label that contains a CN label statement and CN logo as defined in paragraph 3(b) and (c) below.

(b) The *CN logo* (as shown below) is a distinct border which is used around the edges of a "CN label statement" as defined in paragraph 3(c).




(c) The *CN label statement* includes the following:

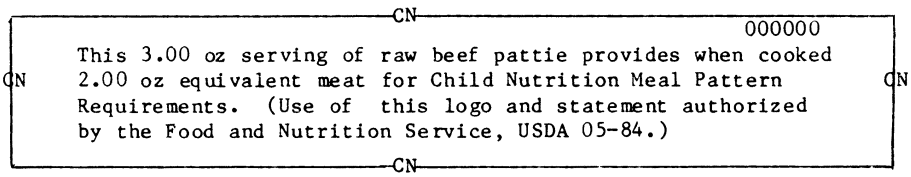
(1) The product identification number (assigned by FNS);

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10, 220.8, 225.16, and 226.20. The statement shall identify the contribution of a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements.

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:




(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by the Food and Nutrition Service and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate and the manufacturer's or distributor's name and address.

(1) The inspection marking for CN labeled non-meat, non-poultry, and non-seafood products with the exception of juice drinks and juice drink products is established as follows:

INSPECTED BY THE
U.S. DEPT. OF AGRICULTURE
IN ACCORDANCE WITH
FNS REQUIREMENTS

(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the Food Buying Guide for Child Nutrition Programs (Program Aid Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the child nutrition programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10, 220.8, 225.16, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report on the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Service of the USDC, Food and Drug Administration, or the Department of Justice for action against the company. Any or all of the following courses of action may be taken: (a) The company's CN label may be revoked for a specific period of time; (b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product; (c) The company's name will be circulated to regional FNS offices; and (d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program. To apply for a CN label and to obtain additional information on CN label application procedures, write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

# PART 226—CHILD AND ADULT CARE FOOD PROGRAM

## Subpart A—General

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APPENDIX A TO PART 226—ALTERNATE FOODS FOR MEALS
APPENDIX B TO PART 226 [RESERVED]
APPENDIX C TO PART 226—CHILD NUTRITION (CN) LABELING PROGRAM

AUTHORITY: Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

SOURCE: 47 FR 36527, Aug. 20, 1982, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 226 appear at 70 FR 43261, July 27, 2005.

## Subpart A—General

### § 226.1 General purpose and scope.

This part announces the regulations under which the Secretary of Agriculture will carry out the Child and Adult Care Food Program. Section 17 of the National School Lunch Act, as amended, authorizes assistance to States through grants-in-aid and other means to initiate, maintain, and expand nonprofit food service programs for children or adult participants in nonresidential institutions which provide care. The Program is intended to enable such institutions to integrate a nutritious food service with organized care services for enrolled participants. Payments will be made to State agencies or FNS Regional Offices to enable them to reimburse institutions for food service to enrolled participants.

[53 FR 52587, Dec. 28, 1988, as amended by Amdt. 22, 55 FR 1377, Jan. 14, 1990]

### § 226.2 Definitions.

*Act* means the National School Lunch Act, as amended.

*Administrative costs* means costs incurred by an institution related to planning, organizing, and managing a food service under the Program, and allowed by the State agency financial management instruction. These administrative costs may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

*Administrative review* means the fair hearing provided upon request to:

(a) An institution that has been given notice by the State agency of any action or proposed action that will affect their participation or reimbursement under the Program, in accordance with § 226.6(k);

(b) A principal or individual responsible for an institution's serious deficiency after the responsible principal or responsible individual has been given a notice of intent to disqualify them from the Program; and

(c) A day care home that has been given a notice of proposed termination for cause.

*Administrative review official* means the independent and impartial official who conducts the administrative review held in accordance with § 226.6(k).

*Adult* means, for the purposes of the collection of social security numbers as a condition of eligibility for free or reduced-price meals, any individual 21 years of age or older.

*Adult day care center* means any public or private nonprofit organization or

any for-profit center (as defined in this section) which (a) is licensed or approved by Federal, State or local authorities to provide nonresidential adult day care services to functionally impaired adults (as defined in this section) or persons 60 years of age or older in a group setting outside their homes or a group living arrangement on a less than 24-hour basis and (b) provides for such care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services. Such centers shall provide a structured, comprehensive program that provides a variety of health, social and related support services to enrolled adult participants through an individual plan of care.

*Adult day care facility* means a licensed or approved adult day care center under the auspices of a sponsoring organization.

*Adult participant* means a person enrolled in an adult day care center who is functionally impaired (as defined in this section) or 60 years of age or older.

*Advanced payments* means financial assistance made available to an institution for its Program costs prior to the month in which such costs will be incurred.

*At-risk afterschool care center* means a public or private nonprofit organization that is participating or is eligible to participate in the CACFP as an institution or as a sponsored facility and that provides nonresidential child care to children after school through an approved afterschool care program located in an eligible area. However, an *Emergency shelter*, as defined in this section, may participate as an at-risk afterschool care center without regard to location.

*At-risk afterschool meal* means a meal that meets the requirements described in § 226.20(b)(6) and/or (c)(1), (c)(2), or (c)(3), that is reimbursed at the appropriate free rate and is served by an *At-risk afterschool care center* as defined in this section, which is located in a State designated by law or selected by the Secretary as directed by law.

*At-risk afterschool snack* means a snack that meets the requirements described in § 226.20(b)(6) and/or (c)(4) that is reimbursed at the free rate for snacks and is served by an *At-risk afterschool care center* as defined in this section.

*Block claim* means a claim for reimbursement submitted by a facility on which the number of meals claimed for one or more meal type (breakfast, lunch, snack, or supper) is identical for 15 consecutive days within a claiming period.

*CACFP child care standards* means the Child and Adult Care Food Program child care standards developed by the Department for alternate approval of child care centers, and day care homes by the State agency under the provisions of § 226.6(d)(3) and (4).

*Center* means a child care center, at-risk afterschool care center, an adult day care center, an emergency shelter, or an outside-school-hours care center.

*Child care center* means any public or private nonprofit institution or facility (except day care homes), or any for-profit center, as defined in this section, that is licensed or approved to provide nonresidential child care services to enrolled children, primarily of preschool age, including but not limited to day care centers, settlement houses, neighborhood centers, Head Start centers and organizations providing day care services for children with disabilities. Child care centers may participate in the Program as independent centers or under the auspices of a sponsoring organization.

*Child care facility* means a licensed or approved child care center, at-risk afterschool care center, day care home, emergency shelter, or outside-school-hours care center under the auspices of a sponsoring organization.

*Children* means:

(a) Persons age 12 and under;

(b) Persons age 15 and under who are children of migrant workers;

(c) *Persons with disabilities* as defined in this section;

(d) For emergency shelters, persons age 18 and under; and

(e) For at-risk afterschool care centers, persons age 18 and under at the start of the school year.

*Claiming percentage* means the ratio of the number of enrolled participants in an institution in each reimbursement category (free, reduced-price or

paid) to the total of enrolled participants in the institution.

*Current income* means income received during the month prior to application for free or reduced-price meals. If such income does not accurately reflect the household's annual income, income shall be based on the projected annual household income. If the prior year's income provides an accurate reflection of the household's current annual income, the prior year may be used as a base for the projected annual income.

*Day care home* means an organized nonresidential child care program for children enrolled in a private home, licensed or approved as a family or group day care home and under the auspices of a sponsoring organization.

*Days* means calendar days unless otherwise specified.

*Department* means the U.S. Department of Agriculture.

*Disclosure* means reveal or use individual children's program eligibility information obtained through the free and reduced price meal eligibility process for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

*Disqualified* means the status of an institution, a responsible principal or responsible individual, or a day care home that is ineligible for participation.

*Documentation* means:

(a) The completion of the following information on a free and reduced-price application:

(1) Names of all household members;

(2) Income received by each household member, identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security and other cash income);

(3) The signature of an adult household member; and

(4) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number; or

(b) For a child who is a member of a food stamp or FDPIR household or who is a TANF recipient, "documentation" means the completion of only the following information on a free and reduced price application:

(1) The name(s) and appropriate food stamp, FDPIR or TANF case number(s) for the child(ren); and

(2) The signature of an adult member of the household; or

(c) For a child in a tier II day care home who is a member of a household participating in a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free or reduced price meals:

(1) The name(s), appropriate case number(s) (if the program utilizes case numbers), and name(s) of the qualifying program(s) for the child(ren), and the signature of an adult member of the household; or

(2) If the sponsoring organization or day care home possesses it, official evidence of the household's participation in a qualifying program (submission of a free and reduced price application by the household is not required in this case); or

(d) For an adult participant who is a member of a food stamp or FDPIR household or is an SSI or Medicaid participant, as defined in this section, "documentation" means the completion of only the following information on a free and reduced price application:

(1) The name(s) and appropriate food stamp or FDPIR case number(s) for the participant(s) or the adult participant's SSI or Medicaid identification number, as defined in this section; and

(2) The signature of an adult member of the household; or

(e) For a child who is a Head Start participant, the Head Start statement of income eligibility issued upon initial enrollment in the Head Start Program or, if such statement is unavailable, other documentation from Head Start officials that the child's family meets the Head Start Program's low-income criteria.

*Eligible area* means:

(a) For the purpose of determining the eligibility of at-risk afterschool care centers, the attendance area of an

elementary, middle, or high school in which at least 50 percent of the enrolled children are certified eligible for free or reduced-price school meals; or

(b) For the purpose of determining the tiering status of day care homes, the area served by an elementary school in which at least 50 percent of the total number of children are certified eligible to receive free or reduced-price meals, or the area based on census data in which at least 50 percent of the children residing in the area are members of households that meet the income standards for free or reduced-price meals.

*Emergency shelter* means a public or private nonprofit organization or its site that provides temporary shelter and food services to homeless children, including a residential child care institution (RCCI) that serves a distinct group of homeless children who are not enrolled in the RCCI's regular program.

*Enrolled child* means a child whose parent or guardian has submitted to an institution a signed document which indicates that the child is enrolled for child care. In addition, for the purposes of calculations made by sponsoring organizations of family day care homes in accordance with §§ 226.13(d)(3)(ii) and 226.13(d)(3)(iii), "enrolled child" (or "child in attendance") means a child whose parent or guardian has submitted a signed document which indicates that the child is enrolled for child care; who is present in the day care home for the purpose of child care; and who has eaten at least one meal during the claiming period. For at-risk afterschool care centers, outside-school-hours care centers, or emergency shelters, the term "enrolled child" or "enrolled participant" does not apply.

*Enrolled participant* means an "Enrolled child" (as defined in this section) or "Adult participant" (as defined in this section).

*Expansion payments* means financial assistance made available to a sponsoring organization for its administrative expenses associated with expanding a food service program to day care homes located in low-income or rural areas. These expansion payments may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

*Facility* means a sponsored center or a family day care home.

*Family* means, in the case of children, a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit or, in the case of adult participants, the adult participant, and if residing with the adult participant, the spouse and dependent(s) of the adult participant.

*FDPIR household* means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Distribution Program on Indian Reservations.

*Fiscal Year* means a period of 12 calendar months beginning October 1 of any year and ending with September 30 of the following year.

*FNS* means the Food and Nutrition Service of the Department.

*FNSRO* means the appropriate Regional Office of the Food and Nutrition Service.

*Food service equipment assistance* means Federal financial assistance formerly made available to State agencies to assist institutions in the purchase or rental of equipment to enable institutions to establish, maintain or expand food service under the Program.

*Food service management company* means an organization other than a public or private nonprofit school, with which an institution may contract for preparing and, unless otherwise provided for, delivering meals, with or without milk for use in the Program.

*Food Stamp household* means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Stamp Program.

*For-profit center* means a child care center, outside-school-hours care center, or adult day care center providing nonresidential care to adults or children that does not qualify for tax-exempt status under the Internal Revenue Code of 1986. For-profit centers serving adults must meet the criteria described in paragraph (a) of this definition. For-profit centers serving children must meet the criteria described

in paragraphs (b)(1) or (b)(2) of this definition, except that children who only participate in the at-risk afterschool snack and/or meal component of the Program must not be considered in determining the percentages under paragraphs (b)(1) or (b)(2) of this definition.

(a) A for-profit center serving adults must meet the definition of *Adult day care center* as defined in this section and, during the calendar month preceding initial application or reapplication, the center receives compensation from amounts granted to the States under title XIX or title XX and twenty-five percent of the adults enrolled in care are beneficiaries of title XIX, title XX, or a combination of titles XIX and XX of the Social Security Act.

(b) A for-profit center serving children must meet the definition of *Child care center* or *Outside-school-hours care center* as defined in this section and one of the following conditions during the calendar month preceding initial application or reapplication:

(1) Twenty-five percent of the children in care (enrolled or licensed capacity, whichever is less) are eligible for free or reduced-price meals; or

(2) Twenty-five percent of the children in care (enrolled or licensed capacity, whichever is less) receive benefits from title XX of the Social Security Act and the center receives compensation from amounts granted to the States under title XX.

*Free meal* means a meal served under the Program to a participant from a family which meets the income standards for free school meals; or to a child who is automatically eligible for free meals by virtue of food stamp, FDPIR, or TANF recipiency; or to a child who is a Head Start participant; or to a child who is receiving temporary housing and meal services from an approved emergency shelter; a child participating in an approved at-risk afterschool care program; or to an adult participant who is automatically eligible for free meals by virtue of food stamp or FDPIR recipiency or is a SSI or Medicaid participant. Regardless of whether the participant qualified for free meals by virtue of meeting one of the criteria of this definition, neither the participant nor any member of their family shall be required to pay or to work in the food service program in order to receive a free meal.

*Functionally impaired adult* means chronically impaired disabled persons 18 years of age or older, including victims of Alzheimer's disease and related disorders with neurological and organic brain dysfunction, who are physically or mentally impaired to the extent that their capacity for independence and their ability to carry out activities of daily living is markedly limited. Activities of daily living include, but are not limited to, adaptive activities such as cleaning, shopping, cooking, taking public transportation, maintaining a residence, caring appropriately for one's grooming or hygiene, using telephones and directories, or using a post office. Marked limitations refer to the severity of impairment, and not the number of limited activities, and occur when the degree of limitation is such as to seriously interfere with the ability to function independently.

*Group living arrangement* means residential communities which may or may not be subsidized by federal, State or local funds but which are private residences housing an individual or a group of individuals who are primarily responsible for their own care and who maintain a presence in the community but who may receive on-site monitoring.

*Head Start participant* means a child currently receiving assistance under a Federally-funded Head Start Program who is categorically eligible for free meals in the CACFP by virtue of meeting Head Start's low-income criteria.

*Household* means "family", as defined in § 226.2 ("Family").

*Household contact* means a contact made by a sponsoring organization or a State agency to an adult member of a household with a child in a family day care home or a child care center in order to verify the attendance and enrollment of the child and the specific meal service(s) which the child routinely receives while in care.

*Income standards* means the family-size and income standards prescribed annually by the Secretary for determining eligibility for free and reduced-price meals under the National School Lunch Program and the School Breakfast Program.

*Income to the program* means any funds used in an institution's food service program, including, but not limited to all monies, other than Program payments, received from other Federal, State, intermediate, or local government sources; participant's payments for meals and food service fees; income from any food sales to adults; and other income, including cash donations or grants from organizations or individuals.

*Independent center* means a child care center, at-risk afterschool care center, emergency shelter, outside-school-hours care center or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

*Infant cereal* means any iron-fortified dry cereal specially formulated for and generally recognized as cereal for infants that is routinely mixed with breast milk or iron-fortified infant formula prior to consumption.

*Infant formula* means any iron-fortified formula intended for dietary use solely as a food for normal, healthy infants; excluding those formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems. Infant formula, as served, must be in liquid state at recommended dilution.

*Institution* means a sponsoring organization, child care center, at-risk afterschool care center, outside-school-hours care center, emergency shelter or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

*Internal controls* means the policies, procedures, and organizational structure of an institution designed to reasonably assure that:

(a) The Program achieves its intended result;

(b) Program resources are used in a manner that protects against fraud, abuse, and mismanagement and in accordance with law, regulations, and guidance; and

(c) Timely and reliable Program information is obtained, maintained, reported, and used for decision-making.

*Key Element Reporting System* (KERS) means a comprehensive national system for reporting critical key element performance data on the operation of the program in institutions.

*Low-income area* means a geographical area in which at least 50 percent of the children are eligible for free or reduced price school meals under the National School Lunch Program and the School Breakfast Program, as determined in accordance with paragraphs (b) and (c), definition of tier I day care home.

*Meals* means food which is served to enrolled participants at an institution, child care facility or adult day care facility and which meets the nutritional requirements set forth in this part. However, children participating in at-risk afterschool care centers, emergency shelters, or outside-schools-hours care centers do not have to be enrolled.

*Medicaid* means *Title XIX* of the Social Security Act.

*Medicaid participant* means an adult participant who receives assistance under title XIX of the Social Security Act, the Grant to States for Medical Assistance Programs—Medicaid.

*Milk* means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local standards for such milk, except that, in the meal pattern for infants (0 to 1 year of age), milk means breast milk or iron-fortified infant formula. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, and the Virgin Islands if a sufficient supply of such types of fluid milk cannot be obtained, "milk" shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and be consistent with State and local standards for such milk.

*National disqualified list* means the list, maintained by the Department, of institutions, responsible principals and responsible individuals, and day care homes disqualified from participation in the Program.

*New institution* means an institution applying to participate in the Program

for the first time, or an institution applying to participate in the Program after a lapse in participation.

*Nonpricing program* means an institution, child care facility, or adult day care facility in which there is no separate identifiable charge made for meals served to participants.

*Nonprofit food service* means all food service operations conducted by the institution principally for the benefit of enrolled participants, from which all of the Program reimbursement funds are used solely for the operations or improvement of such food service.

*Nonresidential* means that the same participants are not maintained in care for more than 24 hours on a regular basis.

*Notice* means a letter sent by certified mail, return receipt (or the equivalent private delivery service), by facsimile, or by email, that describes an action proposed or taken by a State agency or FNS with regard to an institution's Program reimbursement or participation. Notice also means a letter sent by certified mail, return receipt (or the equivalent private delivery service), by facsimile, or by email, that describes an action proposed or taken by a sponsoring organization with regard to a day care home's participation. The notice must specify the action being proposed or taken and the basis for the action, and is considered to be received by the institution or day care home when it is delivered, sent by facsimile, or sent by email. If the notice is undeliverable, it is considered to be received by the institution, responsible principal or responsible individual, or day care home five days after being sent to the addressee's last known mailing address, facsimile number, or email address.

*OIG* means the Office of the Inspector General of the Department.

*Operating costs* means expenses incurred by an institution in serving meals to participants under the Program, and allowed by the State agency financial management instruction.

*Outside-school-hours care center* means a public or private nonprofit institution or facility (except day care homes), or a *For-profit center* as defined in this section, that is licensed or approved in accordance with § 226.6(d)(1) to provide organized nonresidential child care services to children during hours outside of school. Outside-school-hours care centers may participate in the Program as independent centers or under the auspices of a sponsoring organization.

*Participants* means "Children" or "Adult participants" as defined in this section.

*Personal property* means property of any kind except real property. It may be tangible—having physical existence—or intangible—having no physical existence such as patents, inventions, and copyrights.

*Persons with disabilities* means persons of any age who have one or more disabilities, as determined by the State, and who are enrolled in an institution or child care facility serving a majority of persons who are age 18 and under.

*Pricing program* means an institution, child care facility, or adult day care facility in which a separate identifiable charge is made for meals served to participants.

*Principal* means any individual who holds a management position within, or is an officer of, an institution or a sponsored center, including all members of the institution's board of directors or the sponsored center's board of directors.

*Program* means the Child and Adult Care Food Program authorized by section 17 of the National School Lunch Act, as amended.

*Program payments* means financial assistance in the form of start-up payments, expansion payments, advance payments, or reimbursement paid or payable to institutions for operating costs and administrative costs.

*Reduced-price meal* means a meal served under the Program to a participant from a family that meets the income standards for reduced-price school meals. Any separate charge imposed must be less than the full price of the meal, but in no case more than 40 cents for a lunch or supper, 30 cents for a breakfast, and 15 cents for a snack. Neither the participant nor any member of his family may be required to work in the food service program for a reduced-price meal.

*Reimbursement* means Federal financial assistance paid or payable to institutions for Program costs within the rates assigned by the State agency.

*Renewing institution* means an institution that is participating in the Program at the time it submits a renewal application.

*Responsible principal or responsible individual* means:

(a) A principal, whether compensated or uncompensated, who the State agency or FNS determines to be responsible for an institution's serious deficiency;

(b) Any other individual employed by, or under contract with, an institution or sponsored center, who the State agency or FNS determines to be responsible for an institution's serious deficiency; or

(c) An uncompensated individual who the State agency or FNS determines to be responsible for an institution's serious deficiency.

*Rural area* means any geographical area in a county which is not a part of a Metropolitan Statistical Area or any "pocket" within a Metropolitan Statistical Area which, at the option of the State agency and with FNSRO concurrence, is determined to be geographically isolated from urban areas.

*SSI participant* means an adult participant who receives assistance under title XVI of the Social Security Act, the Supplemental Security Income (SSI) for the Aged, Blind and Disabled Program.

*School year* means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

*Seriously deficient* means the status of an institution or a day care home that has been determined to be non-compliant in one or more aspects of its operation of the Program.

*Snack* means a meal supplement that meets the meal pattern requirements specified in §226.20(b)(6) or (c)(4).

*Sponsoring organization* means a public or nonprofit private organization that is entirely responsible for the administration of the food program in:

(a) One or more day care homes;

(b) A child care center, emergency shelter, at-risk afterschool care center, outside-school-hours care center, or adult day care center which is a legally distinct entity from the sponsoring organization;

(c) Two or more child care centers, emergency shelters, at-risk afterschool care centers, outside-school-hours care center, or adult day care centers; or

(d) Any combination of child care centers, emergency shelters, at-risk afterschool care centers, outside-school-hours care centers, adult day care centers, and day care homes. The term "sponsoring organization" also includes an organization that is entirely responsible for administration of the Program in any combination of two or more child care centers, at-risk afterschool care centers, adult day care centers or outside-school-hours care centers, which meet the definition of *For-profit center* in this section and are part of the same legal entity as the sponsoring organization.

*Start-up payments* means financial assistance made available to a sponsoring organization for its administrative expenses associated with developing or expanding a food service program in day care homes and initiating successful Program operations. These start-up payments may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

*State agency* means the State educational agency or any other State agency that has been designated by the Governor or other appropriate executive, or by the legislative authority of the State, and has been approved by the Department to administer the Program within the State or in States in which FNS administers the Program, FNSRO. This also may include a State agency other than the existing CACFP State Agency, when such agency is designated by the Governor of the State to administer only the adult day care component of the CACFP.

*State agency list* means an actual paper or electronic list, or the retrievable paper records, maintained by the

State agency, that includes a synopsis of information concerning seriously deficient institutions and providers terminated for cause in that State. The list must be made available to FNS upon request, and must include the following information:

(a) Institutions determined to be seriously deficient by the State agency, including the names and mailing addresses of the institutions, the basis for each serious deficiency determination, and the status of the institutions as they move through the possible subsequent stages of corrective action, proposed termination, suspension, agreement termination, and/or disqualification, as applicable;

(b) Responsible principals and responsible individuals who have been disqualified from participation by the State agency, including their names, mailing addresses, and dates of birth; and

(c) Day care home providers whose agreements have been terminated for cause by a sponsoring organization in the State, including their names, mailing addresses, and dates of birth.

*State Children's Health Insurance Program (SCHIP)* means the State medical assistance program under title XXI of the Social Security Act ( 42 U.S.C. 1397aa et seq.).

*Suspended* means the status of an institution or day care home that is temporarily ineligible for participation (including Program payments).

*Suspension review* means the review provided, upon the institution's request, to an institution that has been given a notice of intent to suspend participation (including Program payments), based on a determination that the institution has knowingly submitted a false or fraudulent claim.

*Suspension review official* means the independent and impartial official who conducts the suspension review.

*Termination for cause* means the termination of a day care home's Program agreement by the sponsoring organization due to the day care home's violation of the agreement.

*TANF recipient* means an individual or household receiving assistance (as defined in 45 CFR 260.31) under a State-administered Temporary Assistance to Needy Families program.

*Termination for convenience* means termination of a day care home's Program agreement by either the sponsoring organization or the day care home, due to considerations unrelated to either party's performance of Program responsibilities under the agreement.

*Tier I day care home* means (a) a day care home that is operated by a provider whose household meets the income standards for free or reduced-price meals, as determined by the sponsoring organization based on a completed free and reduced price application, and whose income is verified by the sponsoring organization of the home in accordance with § 226.23(h)(6);

(b) A day care home that is located in an area served by a school enrolling elementary students in which at least 50 percent of the total number of children enrolled are certified eligible to receive free or reduced price meals; or

(c) A day care home that is located in a geographic area, as defined by FNS based on census data, in which at least 50 percent of the children residing in the area are members of households which meet the income standards for free or reduced price meals.

*Tier II day care home* means a day care home that does not meet the criteria for a *Tier I day care home*.

*Title XVI* means Title XVI of the Social Security Act which authorizes the Supplemental Security Income for the Aged, Blind, and Disabled Program—SSI.

*Title XIX* means Title XIX of the Social Security Act which authorizes the Grants to States for Medical Assistance Programs—Medicaid.

*Title XX* means Title XX of the Social Security Act.

*Unannounced review* means an on-site review for which no prior notification is given to the facility or institution.

*Verification* means a review of the information reported by institutions to the State agency regarding the eligibility of participants for free or reduced-price meals, and, in addition, for a pricing program, confirmation of eligibility for free or reduced-price benefits under the program. Verification for a pricing program shall include confirmation of income eligibility and, at

State discretion, any other information required on the application which is defined as documentation in § 226.2. Such verification may be accomplished by examining information (e.g., wage stubs, etc.) provided by the household or other sources of information as specified in § 226.23(h)(2)(iv). However, if a food stamp, FDPIR or TANF case number is provided for a child, verification for such child shall include only confirmation that the child is included in a currently certified food stamp or FDPIR household or is a TANF recipient. If a Head Start statement of income eligibility is provided for a child, verification for such child shall include only confirmation that the child is a Head Start participant. For an adult participant, if a food stamp or FDPIR case number or SSI or Medicaid assistance identification number is provided, verification for such participant shall include only confirmation that the participant is included in a currently certified food stamp or FDPIR household or is a current SSI or Medicaid participant.

*Yogurt* means commercially coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, (21 CFR 131.200), (21 CFR 131.203), (21 CFR 131.206), respectively.

*7 CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement certain policies applicable to all Department programs. The applicable provisions deal with competition for discretionary grants and cooperative agreements, costs requiring prior approval, acknowledgement of Department support in publications and audiovisuals produced under Department programs, intergovernmental review of Department programs under Executive Order 12372, and certain miscellaneous Department requirements.

*7 CFR part 3016* means the Department's Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. 7 CFR part 3016 covers requirements for awards and subawards to State and local governmental organizations under USDA programs.

*7 CFR part 3019* means the Department's Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. 7 CFR part 3019 covers requirements for awards and subawards to nongovernmental, nonprofit organizations.

*7 CFR part 3052* means the Department's regulations implementing OMB Circular A–133. (To obtain the OMB circular referenced in this definition, see 5 CFR 1310.3.)

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 226.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 226.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program.

(b) Within the States, responsibility for the administration of the Program shall be in the State agency, except that if FNS has continuously administered the Program in any State since October 1, 1980, FNS shall continue to administer the Program in that State. A State in which FNS administers the Program may, upon request to FNS, assume administration of the Program.

(c) Each State agency desiring to take part in the Program shall enter into a written agreement with the Department for the administration of the Program in the State in accordance with the provisions of this part. This agreement shall cover the operation of the Program during the period specified therein and may be extended by consent of both parties.

(d) FNSRO shall, in each State in which it administers the Program, have available all funds and assume all responsibilities of a State agency as set forth in this part.

## Subpart B—Assistance to States

### § 226.4 Payments to States and use of funds.

(a) *Availability of funds.* For each fiscal year based on funds provided to the Department, FNS must make funds available to each State agency to reimburse institutions for their costs in connection with food service operations, including administrative expenses, under this part. Funds must be made available in an amount no less than the sum of the totals obtained under paragraphs (b), (c), (d), (e), (f), (g), and (j) of this section. However, in any fiscal year, the aggregate amount of assistance provided to a State under this part must not exceed the sum of the Federal funds provided by the State to participating institutions within the State for that fiscal year and any funds used by the State under paragraphs (j) and (l) of this section.

(b) *Center funds.* For meals served to participants in child care centers, adult day care centers and outside-school-hours care centers, funds shall be made available to each State agency in an amount no less than the sum of the products obtained by multiplying:

(1) The number of breakfasts served in the Program within the State to participants from families that do not satisfy the eligibilty standards for free and reduced-price school meals enrolled in institutions by the national average payment rate for breakfasts for such participants under section 4 of the Child Nutrition Act of 1966;

(2) The number of breakfasts served in the Program within the State to participants from families that satisfy the eligibilty standards for free school meals enrolled in institutions by the national average payment rate for free breakfasts under section 4 of the Child Nutrition Act of 1966;

(3) The number of breakfasts served to participants from families that satisfy the eligibilty standard for reduced-price school meals enrolled in institutions by the national average payment rate for reduced-price school breakfasts under section 4 of the Child Nutrition Act of 1966;

(4) The number of lunches and suppers served in the Program within the State by the national average payment rate for lunches under section 4 of the National School Lunch Act. (All lunches and suppers served in the State are funded under this provision);

(5) The number of lunches and suppers served in the Program within the State to participants from families that satisfy the eligibilty standard for free school meals enrolled in institutions by the national average payment rate for free lunches under section 11 of the National School Lunch Act;

(6) The number of lunches and suppers served in the Program within the State to participants from families that satisfy the eligibilty standard for reduced-price school meals enrolled in institutions by the national average payment rate for reduced-price lunches under section 11 of the National School Lunch Act;

(7) The number of snacks served in the Program within the State to participants from families that do not satisfy the eligibilty standards for free and reduced-price school meals enrolled in institutions by 2.75 cents;

(8) The number of snacks served in the Program within the State to participants from families that satisfy the eligibilty standard for free school meals enrolled in institutions by 30 cents;

(9) The number of snacks served in the Program within the State to participants from families that satisfy the eligibilty standard for reduced-price school meals enrolled in institutions by 15 cents.

(c) *Emergency shelter funds.* For meals and snacks served to children in emergency shelters, funds will be made available to each State agency in an amount equal to the total calculated by multiplying the number of meals and snacks served in the Program within the State to such children by the national average payment rate for free meals and free snacks under section 11 of the National School Lunch Act.

(d) *At-risk afterschool care center funds.* For snacks served to children in at-risk afterschool care centers, funds will be made available to each State agency in an amount equal to the total calculated by multiplying the number of snacks served in the Program within

the State to such children by the national average payment rate for free snacks under section 11 of the National School Lunch Act. For at-risk afterschool meals and at-risk afterschool snacks served to children, funds will be made available to each eligible State agency in an amount equal to the total calculated by multiplying the number of at-risk afterschool meals and the number of at-risk afterschool snacks served in the Program within the State by the national average payment rate for free meals and free snacks, respectively, under section 11 of the Richard B. Russell National School Lunch Act.

(e) *Day care home funds.* For meals served to children in day care homes, funds shall be made available to each State agency in an amount no less than the sum of products obtained by multiplying:

(1) The number of breakfasts served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for breakfasts;

(2) The number of breakfasts served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for breakfasts;

(3) The number of breakfasts served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for breakfasts;

(4) The number of lunches and suppers served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for lunches/suppers;

(5) The number of lunches and suppers served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for lunches/suppers;

(6) The number of lunches and suppers served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for lunches/suppers;

(7) The number of snacks served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for snacks;

(8) The number of snacks served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for snacks; and

(9) The number of snacks served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for snacks.

(f) *Administrative funds.* For administrative payments to day care home sponsoring organizations, funds shall be made available to each State agency in an amount not less than the product obtained each month by multiplying the number of day care homes participating under each sponsoring organization within the State by the applicable rates specified in § 226.12(a)(3).

(g) *Start-up and expansion funds.* For start-up and expansion payments to eligible sponsoring organizations, funds shall be made available to each State agency in an amount equal to the total amount of start-up and expansion payments made in the most recent period for which reports are available for that State or on the basis of estimates by FNS.

(h) *Funding assurance.* FNS shall ensure that, to the extent funds are appropriated, each State has sufficient Program funds available for providing start-up, expansion and advance payments in accordance with this part.

(i) *Rate adjustments.* FNS shall publish a notice in the FEDERAL REGISTER to announce each rate adjustment. FNS shall adjust the following rates on the specified dates:

(1) The rates for meals, including snacks, served in tier I and tier II day

care homes shall be adjusted annually, on July 1 (beginning July 1, 1997), on the basis of changes in the series for food at home of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be rounded to the nearest lower cent based on changes measured over the most recent twelve-month period for which data are available. The adjustments shall be computed using the unrounded rate in effect for the preceding school year.

(2) The rates for meals, including snacks, served in child care centers, emergency shelters, at-risk afterschool care centers, adult day care centers and outside-school-hours care centers will be adjusted annually, on July 1, on the basis of changes in the series for food away from home of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustment must be rounded to the nearest lower cent, based on changes measured over the most recent twelve-month period for which data are available. The adjustment to the rates must be computed using the unrounded rate in effect for the preceding year.

(3) The rate for administrative payments to day care home sponsoring organizations shall be adjusted annually, on July 1, on the basis of changes in the series for all items of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be made to the nearest dollar based on changes measured over the most recent twelve-month period for which data are available.

(j) *Audit funds.* For the expense of conducting audits and reviews under § 226.8, funds shall be made available to each State agency in an amount equal to one and one-half percent of the Program reimbursement provided to institutions within the State during the second fiscal year preceding the fiscal year for which these funds are to be made available. In fiscal years 2005–2007, for the expense of conducting audits and reviews under § 226.8, funds shall be made available to each State agency in an amount equal to one percent of the Program reimbursement provided to institutions within the State during the second fiscal year preceding the fiscal year for which these funds are to be made available. The amount of assistance provided to a State under this paragraph in any fiscal year may not exceed the State's expenditures under § 226.8 during such fiscal year.

(k) *Method of funding.* FNS shall authorize funds for State agencies in accordance with 7 CFR part 3016.

(l) *Special developmental projects.* The State agency may use in carrying out special developmental projects an amount not to exceed one percent of Program funds used in the second prior fiscal year. Special developmental projects shall conform to FNS guidance and be approved in writing by FNS.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36906, Oct. 2, 1987; 53 FR 52588, Dec. 28, 1988; 62 FR 902, Jan. 7, 1997; 63 FR 9728, Feb. 26, 1998; 69 FR 53536, Sept. 1, 2004; 71 FR 4, Jan. 3, 2006; 71 FR 39518, July 13, 2006; 72 FR 41603, 41604, July 31, 2007; 75 FR 16327, Apr. 1, 2010]

EDITORIAL NOTE: At 75 FR 16327, Apr. 1, 2010, § 226 was amended in paragraph (d) by inserting "Richard B. Russell" before "National School Lunch Program" in the first sentence;; however, the amendment could not be incorporated due to inaccurate amendatory instruction.

### § 226.5 Donation of commodities.

(a) USDA foods available under section 6 of this Act, section 416 of the Agricultural Act of 1949 (7 U.S.C. 1431) or purchased under section 32 of the Act of August 24, 1935 (7 U.S.C. 1431), section 709 of the Food and Agriculture Act of 1965 (7 U.S.C. 1446a–1), or other authority, and donated by the Department shall be made available to each State.

(b) The value of such commodities donated to each State for each school year shall be, at a minimum, the amount obtained by multiplying the number of reimbursable lunches and suppers served in participating institutions in that State during the preceding school year by the rate for commodities established under section 6(e) of the Act for the current school year. Adjustments shall be made at the end of each school year to reflect the difference between the number of reimbursable lunches and suppers served during the preceding year and the number served during the current year, and

subsequent commodity entitlement shall be based on the adjusted meal counts. At the discretion of FNS, current-year adjustments may be made for significant variations in the number of reimbursable meals served. Such current-year adjustments will not be routine and will only be made for unusual problems encountered in a State, such as a disaster that necessitates institutional closures for a prolonged period of time. CACFP State agencies electing to receive cash-in-lieu of commodities will receive payments based on the number of reimbursable meals actually served during the current school year.

[47 FR 36527, Aug. 20, 1982, as amended at 62 FR 23618, May 1, 1997]

## Subpart C—State Agency Provisions

### § 226.6 State agency administrative responsibilities.

(a) *State agency personnel.* Each State agency must provide sufficient consultative, technical, and managerial personnel to:

(1) Administer the Program;

(2) Provide sufficient training and technical assistance to institutions;

(3) Monitor Program performance;

(4) Facilitate expansion of the Program in low-income and rural areas; and

(5) Ensure effective operation of the Program by participating institutions.

(b) *Program applications and agreements.* Each State agency must establish application review procedures, in accordance with paragraphs (b)(1) through (b)(3) of this section, to determine the eligibility of new institutions, renewing institutions, and facilities for which applications are submitted by sponsoring organizations. The State agency must enter into written agreements with institutions in accordance with paragraph (b)(4) of this section.

(1) *Application procedures for new institutions.* Each State agency must establish application procedures to determine the eligibility of new institutions under this part. At a minimum, such procedures must require that institutions submit information to the State agency in accordance with paragraph (f) of this section. For new private nonprofit and proprietary child care institutions, such procedures must also include a pre-approval visit by the State agency to confirm the information in the institution's application and to further assess its ability to manage the Program. The State agency must establish factors, consistent with § 226.16(b)(1), that it will consider in determining whether a new sponsoring organization has sufficient staff to perform required monitoring responsibilities at all of its sponsored facilities. As part of the review of the sponsoring organization's management plan, the State agency must determine the appropriate level of staffing for each sponsoring organization, consistent with the staffing range of monitors set forth at § 226.16(b)(1) and the factors it has established. The State agency must ensure that each new sponsoring organization applying for participation after July 29, 2002 meets this requirement. In addition, the State agency's application review procedures must ensure that the following information is included in a new institution's application:

(i) *Participant eligibility information.* Centers must submit current information on the number of enrolled participants who are eligible for free, reduced-price and paid meals;

(ii) *Enrollment information.* Sponsoring organizations of day care homes must submit current information on:

(A) The total number of children enrolled in all homes in the sponsorship;

(B) An assurance that day care home providers' own children whose meals are claimed for reimbursement in the Program are eligible for free or reduced-price meals;

(C) The total number of tier I and tier II day care homes that it sponsors;

(D) The total number of children enrolled in tier I day care homes;

(E) The total number of children enrolled in tier II day care homes; and

(F) The total number of children in tier II day care homes that have been identified as eligible for free or reduced-price meals;

(iii) *Nondiscrimination statement.* Institutions must submit their nondiscrimination policy statement and a media release, unless the State agency

has issued a Statewide media release on behalf of all institutions;

(iv) *Management plan*. Sponsoring organizations must submit a complete management plan that includes:

(A) Detailed information on the organization's management and administrative structure;

(B) A list or description of the staff assigned to Program monitoring, in accordance with the requirements set forth at § 226.16(b)(1);

(C) An administrative budget that includes projected CACFP administrative earnings and expenses;

(D) The procedures to be used by the organization to administer the Program in, and disburse payments to, the child care facilities under its sponsorship; and

(E) For sponsoring organizations of family day care homes, a description of the system for making tier I day care home determinations, and a description of the system of notifying tier II day care homes of their options for reimbursement;

(v) *Budget*. An institution must submit a budget that the State agency must review in accordance with § 226.7(g);

(vi) *Documentation of licensing/approval*. All centers and family day care homes must document that they meet Program licensing/approval requirements;

(vii) *Documentation of tax-exempt status*. All private nonprofit institutions must document their tax-exempt status;

(viii) *At-risk afterschool care centers*. Institutions (independent at-risk afterschool care centers and sponsoring organizations of at-risk afterschool care centers) must submit documentation sufficient to determine that each at-risk afterschool care center meets the program eligibility requirements in § 226.17a(a), and sponsoring organizations must submit documentation that each sponsored at-risk afterschool care center meets the area eligibility requirements in § 226.17a(i).

(ix) *Documentation of for-profit center eligibility*. Institutions must document that each for-profit center for which application is made meets the definition of a *For-profit center*, as set forth at § 226.2;

(x) *Preference for commodities/cash-in-lieu of commodities*. Institutions must state their preference to receive commodities or cash-in-lieu of commodities;

(xi) *Providing benefits to unserved facilities or participants*—(A) *Criteria*. The State agency must develop criteria for determining whether a new sponsoring organization's participation will help ensure the delivery of benefits to otherwise unserved facilities or participants, and must disseminate these criteria to new sponsoring organizations when they request information about applying to the Program; and

(B) *Documentation*. The new sponsoring organization must submit documentation that its participation will help ensure the delivery of benefits to otherwise unserved facilities or participants in accordance with the State agency's criteria;

(xii) *Presence on National disqualified list*. If an institution or one of its principals is on the National disqualified list and submits an application, the State agency must deny the application. If a sponsoring organization submits an application on behalf of a facility, and either the facility or any of its principals is on the National disqualified list, the State agency must deny the application;

(xiii) *Ineligibility for other publicly funded programs*—(A) *General*. A State agency is prohibited from approving an institution's application if, during the past seven years, the institution or any of its principals have been declared ineligible for any other publicly funded program by reason of violating that program's requirements. However, this prohibition does not apply if the institution or the principal has been fully reinstated in, or determined eligible for, that program, including the payment of any debts owed;

(B) *Certification*. Institutions must submit:

(*1*) A statement listing the publicly funded programs in which the institution and its principals have participated in the past seven years; and

(*2*) A certification that, during the past seven years, neither the institution nor any of its principals have been declared ineligible to participate in any other publicly funded program by

reason of violating that program's requirements; or

(*3*) In lieu of the certification, documentation that the institution or the principal previously declared ineligible was later fully reinstated in, or determined eligible for, the program, including the payment of any debts owed; and

(C) *Follow-up.* If the State agency has reason to believe that the institution or its principals were determined ineligible to participate in another publicly funded program by reason of violating that program's requirements, the State agency must follow up with the entity administering the publicly funded program to gather sufficient evidence to determine whether the institution or its principals were, in fact, determined ineligible;

(xiv) *Information on criminal convictions.* (A) A State agency is prohibited from approving an institution's application if the institution or any of its principals has been convicted of any activity that occurred during the past seven years and that indicated a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency; and

(B) Institutions must submit a certification that neither the institution nor any of its principals has been convicted of any activity that occurred during the past seven years and that indicated a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency;

(xv) *Certification of truth of applications and submission of names and addresses.* Institutions must submit a certification that all information on the application is true and correct, along with the name, mailing address, and date of birth of the institution's executive director and chairman of the board of directors;

(xvi) *Outside employment policy.* Sponsoring organizations must submit an outside employment policy. The policy must restrict other employment by employees that interferes with an employee's performance of Program-related duties and responsibilities, including outside employment that constitutes a real or apparent conflict of interest. Sponsoring organizations that are participating on July 29, 2002, must submit an outside employment policy not later than September 27, 2002. The policy will be effective unless disapproved by the State agency;

(xvii) *Bond.* Sponsoring organizations applying for initial participation on or after June 20, 2000, must submit a bond, if such bond is required by State law, regulation, or policy. If the State agency requires a bond for sponsoring organizations pursuant to State law, regulation, or policy, the State agency must submit a copy of that requirement and a list of sponsoring organizations posting a bond to the appropriate FNSRO on an annual basis; and

(xviii) *Compliance with performance standards.* Each new institution must submit information sufficient to document that it is financially viable, is administratively capable of operating the Program in accordance with this part, and has internal controls in effect to ensure accountability. To document this, any new institution must demonstrate in its application that it is capable of operating in conformance with the following performance standards. The State agency must only approve the applications of those new institutions that meet these performance standards, and must deny the applications of those new institutions that do not meet the standards.

(A) *Performance Standard 1—Financial viability and financial management.* The new institution must be financially viable. Program funds must be expended and accounted for in accordance with the requirements of this part, FNS Instruction 796–2 ("Financial Management in the Child and Adult Care Food Program"), and parts 3015, 3016, and 3019 of this title. To demonstrate financial viability, the new institution

must document that it meets the following criteria:

(*1*) *Description of need/recruitment.* A new sponsoring organization must demonstrate in its management plan that its participation will help ensure the delivery of Program benefits to otherwise unserved facilities or participants, in accordance with criteria developed by the State agency pursuant to paragraph (b)(1)(x) of this section. A new sponsoring organization must demonstrate that it will use appropriate practices for recruiting facilities, consistent with paragraph (p) of this section and any State agency requirements;

(*2*) *Fiscal resources and financial history.* A new institution must demonstrate that it has adequate financial resources to operate the CACFP on a daily basis, has adequate sources of funds to withstand temporary interruptions in Program payments and/or fiscal claims against the institution, and can document financial viability (for example, through audits, financial statements, etc.); and

(*3*) *Budgets.* Costs in the institution's budget must be necessary, reasonable, allowable, and appropriately documented;

(B) *Performance Standard 2—Administrative capability.* The new institution must be administratively capable. Appropriate and effective management practices must be in effect to ensure that the Program operates in accordance with this part. To demonstrate administrative capability, the new institution must document that it meets the following criteria:

(*1*) Has an adequate number and type of qualified staff to ensure the operation of the Program in accordance with this part;

(*2*) If a sponsoring organization, documents in its management plan that it employs staff sufficient to meet the ratio of monitors to facilities, taking into account the factors that the State agency will consider in determining a sponsoring organization's staffing needs, as set forth in § 226.16(b)(1); and

(*3*) If a sponsoring organization, has Program policies and procedures in writing that assign Program responsibilities and duties, and ensure compliance with civil rights requirements; and

(C) *Performance Standard 3—Program accountability.* The new institution must have internal controls and other management systems in effect to ensure fiscal accountability and to ensure that the Program will operate in accordance with the requirements of this part. To demonstrate Program accountability, the new institution must document that it meets the following criteria:

(*1*) *Board of directors.* Has adequate oversight of the Program by its governing board of directors;

(*2*) *Fiscal accountability.* Has a financial system with management controls specified in writing. For new sponsoring organizations, these written operational policies must assure:

(*i*) Fiscal integrity and accountability for all funds and property received, held, and disbursed;

(*ii*) The integrity and accountability of all expenses incurred;

(*iii*) That claims will be processed accurately, and in a timely manner;

(*iv*) That funds and property are properly safeguarded and used, and expenses incurred, for authorized Program purposes; and

(*v*) That a system of safeguards and controls is in place to prevent and detect improper financial activities by employees;

(*3*) *Recordkeeping.* Maintains appropriate records to document compliance with Program requirements, including budgets, accounting records, approved budget amendments, and, if a sponsoring organization, management plans and appropriate records on facility operations;

(*4*) *Sponsoring organization operations.* If a new sponsoring organization, documents in its management plan that it will:

(*i*) Provide adequate and regular training of sponsoring organization staff and sponsored facilities in accordance with §§ 226.15(e)(12) and (e)(14) and 226.16(d)(2) and (d)(3);

(*ii*) Perform monitoring in accordance with § 226.16(d)(4), to ensure that sponsored facilities accountably and appropriately operate the Program;

(*iii*) If a sponsor of family day care homes, accurately classify day care

homes as tier I or tier II in accordance with § 226.15(f); and

(*iv*) Have a system in place to ensure that administrative costs funded from Program reimbursements do not exceed regulatory limits set forth at §§ 226.12(a) and 226.16(b)(1); and

(*5*) *Meal service and other operational requirements.* Independent centers and facilities will follow practices that result in the operation of the Program in accordance with the meal service, recordkeeping, and other operational requirements of this part. These practices must be documented in the independent center's application or in the sponsoring organization's management plan and must demonstrate that independent centers or sponsored facilities will:

(*i*) Provide meals that meet the meal patterns set forth in § 226.20;

(*ii*) Comply with licensure or approval requirements set forth in paragraph (d) of this section;

(*iii*) Have a food service that complies with applicable State and local health and sanitation requirements;

(*iv*) Comply with civil rights requirements;

(*v*) Maintain complete and appropriate records on file; and

(*vi*) Claim reimbursement only for eligible meals.

(2) *Application procedures for renewing institutions.* Each State agency must establish application procedures to determine the eligibility of renewing institutions under this part. Renewing institutions must not be required to submit a free and reduced-price policy statement or a nondiscrimination statement unless they make substantive changes to either statement. The State agency must require each renewing institution participating in the Program to reapply for participation at a time determined by the State agency, except that no institution may be allowed to participate for less than 12 or more than 36 calendar months under an existing application, except when the State agency determines that unusual circumstances warrant reapplication in less than 12 months. The State agency must establish factors, consistent with § 226.16(b)(1), that it will consider in determining whether a renewing sponsoring organization has sufficient staff to perform required monitoring responsibilities at all of its sponsored facilities. As part of the review of the renewing sponsoring organization's management plan, the State agency must determine the appropriate level of staffing for the sponsoring organization, consistent with the staffing range of monitors set forth at § 226.16(b)(1) and the factors it has established. The State agency must ensure that each currently participating sponsoring organization meets this requirement no later than July 29, 2003. At a minimum, the application review procedures established by the State agency must require that renewing institutions submit information to the State agency in accordance with paragraph (f) of this section. In addition, the State agency's application review procedures must ensure that the following information is included in a renewing institution's application:

(i) *Management plan.* For renewing sponsoring organizations, a complete management plan that meets the requirements of paragraphs (b)(1)(iv), (b)(1)(v), (f)(1)(vi), and (f)(3)(i) of this section and § 226.7(g);

(ii) *Presence on National disqualified list.* A renewing institution is prohibited from submitting a renewal application if it or any of its principals is currently on the National disqualified list. If such an institution submits an application, the State agency must deny the application. A renewing sponsoring organization is also prohibited from submitting a renewal application on behalf of a facility if the facility or any of its principals is on the National disqualified list. If a renewing sponsoring organization submits an application on behalf of such a facility, the State agency must deny the facility's application;

(iii) *Ineligibility for other publicly funded programs*—(A) *General.* A State agency is prohibited from approving a renewing institution's application if, during the past seven years, the institution or any of its principals have been declared ineligible for any other publicly funded program by reason of violating that program's requirements. However, this prohibition does not apply if the institution or the principal

has been fully reinstated in, or determined eligible for, that program, including the payment of any debts owed;

(B) *Certification.* Renewing institutions must submit:

(*1*) A statement listing the publicly funded programs in which the institution and its principals have participated in the past seven years; and

(*2*) A certification that, during the past seven years, neither the institution nor any of its principals have been declared ineligible to participate in any other publicly funded program by reason of violating that program's requirements; or

(*3*) In lieu of the certification, documentation that the institution or the principal previously declared ineligible was later fully reinstated in, or determined eligible for, the program, including the payment of any debts owed; and

(C) *Follow-up.* If the State agency has reason to believe that the renewing institution or any of its principals were determined ineligible to participate in another publicly funded program by reason of violating that program's requirements, the State agency must follow up with the entity administering the publicly funded program to gather sufficient evidence to determine whether the institution or its principals were, in fact, determined ineligible;

(iv) *Information on criminal convictions.* (A) A State agency is prohibited from approving a renewing institution's application if the institution or any of its principals have been convicted of any activity that occurred during the past seven years and that indicated a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency; and

(B) Renewing institutions must submit a certification that neither the institution nor any of its principals have been convicted of any activity that occurred during the past seven years and that indicated a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency;

(v) *Certification of truth of applications and submission of names and addresses.* Renewing institutions must submit a certification that all information on the application is true and correct, along with the name, mailing address, and date of birth of the institution's executive director and chairman of the board of directors;

(vi) *Outside employment policy.* Renewing sponsoring organizations must submit an outside employment policy. The policy must restrict other employment by employees that interferes with an employee's performance of Program-related duties and responsibilities, including outside employment that constitutes a real or apparent conflict of interest. Sponsoring organizations that are participating on July 29, 2002, must submit an outside employment policy not later than September 27, 2002. The policy will be effective unless disapproved by the State agency;

(vii) *Compliance with performance standards.* Each renewing institution must submit information sufficient to document that it is financially viable, is administratively capable of operating the Program in accordance with this part, and has internal controls in effect to ensure accountability. To document this, any renewing institution must demonstrate in its application that it is capable of operating in conformance with the following performance standards. The State agency must only approve the applications of those renewing institutions that meet these performance standards, and must deny the applications of those that do not meet the standards.

(A) *Performance Standard 1—Financial viability and financial management.* The renewing institution must be financially viable. Program funds must be expended and accounted for in accordance with the requirements of this part, FNS Instruction 796–2 ("Financial Management in the Child and Adult Care Food Program"), and parts 3015,

3016 and 3019 of this title. To demonstrate financial viability, the renewing institution must document that it meets the following criteria:

(*1*) *Description of need/recruitment.* A renewing sponsoring organization must demonstrate that it will use appropriate practices for recruiting facilities, consistent with paragraph (p) of this section and any State agency requirements;

(*2*) *Fiscal resources and financial history.* A renewing institution must demonstrate that it has adequate financial resources to operate the CACFP on a daily basis, has adequate sources of funds to withstand temporary interruptions in Program payments and/or fiscal claims against the institution, and can document financial viability (for example, through audits, financial statements, etc.); and

(*3*) *Budgets.* Costs in the renewing institution's budget must be necessary, reasonable, allowable, and appropriately documented;

(B) *Performance Standard 2—Administrative capability.* The renewing institution must be administratively capable. Appropriate and effective management practices must be in effect to ensure that the Program operates in accordance with this part. To demonstrate administrative capability, the renewing institution must document that it meets the following criteria:

(*1*) Has an adequate number and type of qualified staff to ensure the operation of the Program in accordance with this part;

(*2*) If a sponsoring organization, documents in its management plan that it employs staff sufficient to meet the ratio of monitors to facilities, taking into account the factors that the State agency will consider in determining a sponsoring organization's staffing needs, as set forth in § 226.16(b)(1); and

(*3*) If a sponsoring organization, has Program policies and procedures in writing that assign Program responsibilities and duties, and ensure compliance with civil rights requirements; and

(C) *Performance Standard 3—Program accountability.* The renewing institution must have internal controls and other management systems in effect to ensure fiscal accountability and to ensure that the Program operates in accordance with the requirements of this part. To demonstrate Program accountability, the renewing institution must document that it meets the following criteria:

(*1*) *Board of directors.* Has adequate oversight of the Program by its governing board of directors;

(*2*) *Fiscal accountability.* Has a financial system with management controls specified in writing. For sponsoring organizations, these written operational policies must assure:

(*i*) Fiscal integrity and accountability for all funds and property received, held, and disbursed;

(*ii*) The integrity and accountability of all expenses incurred;

(*iii*) That claims are processed accurately, and in a timely manner;

(*iv*) That funds and property are properly safeguarded and used, and expenses incurred, for authorized Program purposes; and

(*v*) That a system of safeguards and controls is in place to prevent and detect improper financial activities by employees;

(*3*) *Recordkeeping.* Maintains appropriate records to document compliance with Program requirements, including budgets, accounting records, approved budget amendments, and, if a sponsoring organization, management plans and appropriate records on facility operations;

(*4*) *Sponsoring organization operations.* A renewing sponsoring organization must document in its management plan that it will:

(*i*) Provide adequate and regular training of sponsoring organization staff and sponsored facilities in accordance with §§ 226.15(e)(12) and (e)(14) and 226.16(d)(2) and (d)(3);

(*ii*) Perform monitoring in accordance with § 226.16(d)(4), to ensure that sponsored facilities accountably and appropriately operate the Program;

(*iii*) If a sponsor of family day care homes, accurately classify day care homes as tier I or tier II in accordance with § 226.15(f); and

(*iv*) Have a system in place to ensure that administrative costs funded from Program reimbursements do not exceed regulatory limits set forth at §§ 226.12(a) and 226.16(b)(1); and

(*5*) *Meal service and other operational requirements.* All independent centers and facilities must follow practices that result in the operation of the Program in accordance with the meal service, recordkeeping, and other operational requirements of this part. These practices must be documented in the independent center's application or in the sponsoring organization's management plan and must demonstrate that independent centers or sponsored facilities:

(*i*) Provide meals that meet the meal patterns set forth in § 226.20;

(*ii*) Comply with licensure or approval requirements set forth in paragraph (d) of this section;

(*iii*) Have a food service that complies with applicable State and local health and sanitation requirements;

(*iv*) Comply with civil rights requirements;

(*v*) Maintain complete and appropriate records on file; and

(*vi*) Claim reimbursement only for eligible meals.

(3) *State agency notification requirements.* Any new or renewing institution applying for participation in the Program must be notified in writing of approval or disapproval by the State agency, within 30 calendar days of the State agency's receipt of a complete application. Whenever possible, State agencies should provide assistance to institutions that have submitted an incomplete application. Any disapproved applicant institution or family day care home must be notified of the reasons for its disapproval and its right to appeal under paragraph (k) or (l), respectively, of this section.

(4) *Program agreements.* (i) The State agency must require each institution that has been approved for participation in the Program to enter into an agreement governing the rights and responsibilities of each party. The State agency may allow a renewing institution to amend its existing Program agreement in lieu of executing a new agreement. The existence of a valid agreement, however, does not eliminate the need for an institution to comply with the reapplication and related provisions at paragraphs (b) and (f) of this section.

(ii) State agencies may elect to enter into permanent agreements with institutions. However, if they elect not to enter into permanent agreements with institutions, the length of time during which such agreements are in effect must be no less than one and no more than three years, except that:

(A) The State agency and an institution that is a school food authority must enter into a single permanent agreement for all child nutrition programs administered by the school food authority and the State agency;

(B) If a State agency denies the application of a renewing institution, it must temporarily extend its agreement with that institution in accordance with paragraph (c)(2)(iii)(D) of this section;

(C) If the State agency determines that unusual circumstances warrant reapplication in less than 12 months, the State agency may approve the agreement with the institution for a period of less than one year.

(iii) Any agreement that extends from one fiscal year into the following fiscal year must stipulate that, in subsequent years, the agreement is in effect contingent upon the availability of Program funds. However, this does not limit the State agency's ability to terminate the agreement in accordance with paragraph (c) of this section.

(iv) The Program agreement must provide that the institution accepts final financial and administrative responsibility for management of a proper, efficient, and effective food service, and will comply with all requirements under this part. In addition, the agreement must state that the sponsor must comply with all requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and the Department's regulations concerning nondiscrimination (parts 15, 15a and 15b of this title), including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and reviews to assure compliance with such policy, to the end that no person may, on the grounds of race, color, national origin, sex, age, or disability, be excluded from

participation in, be denied the benefits of, or be otherwise subjected to discrimination under, the Program.

(v) The Program agreement must also notify the institution of the right of the State agency, the Department, and other State or Federal officials to make announced or unannounced reviews of their operations during the institution's normal hours of child or adult care operations, and that anyone making such reviews must show photo identification that demonstrates that they are employees of one of these entities.

(c) *Denial of applications and termination of agreements*—(1) *Denial of a new institution's application*—(i) *General.* If a new institution's application does not meet all of the requirements in paragraph (b) of this section and in §§ 226.15(b) and 226.16(b), the State agency must deny the application. If, in reviewing a new institution's application, the State agency determines that the institution has committed one or more serious deficiency listed in paragraph (c)(1)(ii) of this section, the State agency must initiate action to:

(A) Deny the new institution's application; and

(B) Disqualify the new institution and the responsible principals and responsible individuals (e.g., the person who signs the application).

(ii) *List of serious deficiencies for new institutions.* The list of serious deficiencies is not identical for each category of institution (new, renewing, participating) because the type of information likely to be available to the State agency is different, depending on whether the State agency is reviewing a new or renewing institution's application or is conducting a review of a participating institution. Serious deficiencies for new institutions are:

(A) Submission of false information on the institution's application, including but not limited to a determination that the institution has concealed a conviction for any activity that occurred during the past seven years and that indicates a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency; or

(B) Any other action affecting the institution's ability to administer the Program in accordance with Program requirements.

(iii) *Serious deficiency notification procedures for new institutions.* If the State agency determines that a new institution has committed one or more serious deficiency listed in paragraph (c)(1)(ii) of this section, the State agency must use the following procedures to provide the institution and the responsible principals and responsible individuals with notice of the serious deficiency(ies) and an opportunity to take corrective action.

(A) *Notice of serious deficiency.* The State agency must notify the institution's executive director and chairman of the board of directors that the institution has been determined to be seriously deficient. The notice must identify the responsible principals and responsible individuals (e.g., for new institutions, the person who signed the application) and must be sent to those persons as well. The State agency may specify in the notice different corrective action, and time periods for completing the corrective action, for the institution and the responsible principals and responsible individuals. At the same time the notice is issued, the State agency must add the institution to the State agency list, along with the basis for the serious deficiency determination, and provide a copy of the notice to the appropriate FNSRO. The notice must also specify:

(*1*) The serious deficiency(ies);

(*2*) The actions to be taken to correct the serious deficiency(ies);

(*3*) The time allotted to correct the serious deficiency(ies) in accordance with paragraph (c)(4) of this section.

(*4*) That the serious deficiency determination is not subject to administrative review;

(*5*) That failure to fully and permanently correct the serious deficiency(ies) within the allotted time will result in denial of the institution's application and the disqualification of the institution and the responsible

principals and responsible individuals; and

(*6*) That the State agency will not pay any claims for reimbursement for eligible meals served or allowable administrative expenses incurred until the State agency has approved the institution's application and the institution has signed a Program agreement.

(B) *Successful corrective action.* (*1*) If corrective action has been taken to fully and permanently correct the serious deficiency(ies) within the allotted time and to the State agency's satisfaction, the State agency must:

(*i*) notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the State agency has rescinded its serious deficiency determination; and

(*ii*) offer the new institution the opportunity to resubmit its application. If the new institution resubmits its application, the State agency must complete its review of the application within 30 days after receiving a complete and correct application.

(*2*) If corrective action is complete for the institution but not for all of the responsible principals and responsible individuals (or vice versa), the State agency must:

(*i*) continue with the actions (as set forth in paragraph (c)(1)(iii)(C) of this section) against the remaining parties;

(*ii*) at the same time the notice is issued, the State agency must also update the State agency list to indicate that the serious deficiency(ies) has(ve) been corrected and provide a copy of the notice to the appropriate FNSRO; and

(*iii*) if the new institution has corrected the serious deficiency(ies), offer it the opportunity to resubmit its application. If the new institution resubmits its application, the State agency must complete its review of the application within 30 days after receiving a complete and correct application.

(C) *Application denial and proposed disqualification.* If timely corrective action is not taken to fully and permanently correct the serious deficiency(ies), the State agency must notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the institution's application has been denied. At the same time the notice is issued, the State agency must also update the State agency list and provide a copy of the notice to the appropriate FNSRO. The notice must also specify:

(*1*) That the institution's application has been denied and the State agency is proposing to disqualify the institution and the responsible principals and responsible individuals;

(*2*) The basis for the actions; and

(*3*) The procedures for seeking an administrative review (in accordance with paragraph (k) of this section) of the application denial and proposed disqualifications.

(D) *Program payments.* The State agency is prohibited from paying any claims for reimbursement from a new institution for eligible meals served or allowable administrative expenses incurred until the State agency has approved its application and the institution and State agency have signed a Program agreement.

(E) *Disqualification.* When the time for requesting an administrative review expires or when the administrative review official upholds the State agency's denial and proposed disqualifications, the State agency must notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals that the institution and the responsible principal and responsible individuals have been disqualified. At the same time the notice is issued, the State agency must also update the State agency list and provide a copy of the notice and the mailing address and date of birth for each responsible principal and responsible individual to the appropriate FNSRO.

(2) *Denial of a renewing institution's application*—(i) *General.* If a renewing institution's application does not meet all of the requirements in paragraph (b) of this section and in §§ 226.15(b) and 226.16(b), the State agency must deny the application. If, in reviewing a renewing institution's application, the State agency determines that the institution has committed one or more serious deficiency listed in paragraph

(c)(2)(ii) of this section, the State agency must *initiate* action to deny the renewing institution's application and *initiate* action to disqualify the renewing institution and the responsible principals and responsible individuals.

(ii) *List of serious deficiencies for renewing institutions.* The list of serious deficiencies is not identical for each category of institution (new, renewing, participating) because the type of information likely to be available to the State agency is different, depending on whether the State agency is reviewing a new or renewing institution's application or is conducting a review of a participating institution. Serious deficiencies for renewing institutions are:

(A) Submission of false information on the institution's application, including but not limited to a determination that the institution has concealed a conviction for any activity that occurred during the past seven years and that indicates a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency;

(B) Failure to operate the Program in conformance with the performance standards set forth in paragraphs (b)(1)(xviii) and (b)(2)(vii) of this section;

(C) Failure to comply with the bid procedures and contract requirements of applicable Federal procurement regulations;

(D) Use of a food service management company that is in violation of health codes;

(E) Failure by a sponsoring organization of day care homes to properly classify day care homes as tier I or tier II in accordance with §226.15(f);

(F) Failure by a sponsoring organization to properly train or monitor sponsored facilities in accordance with §226.16(d);

(G) Failure to perform any of the other financial and administrative responsibilities required by this part;

(H) Failure to properly implement and administer the day care home termination and administrative review provisions set forth at paragraph (l) of this section and §226.16(l); or

(I) any other action affecting the institution's ability to administer the Program in accordance with Program requirements.

(iii) *Serious deficiency notification procedures for renewing institutions.* If the State agency determines that a renewing institution has committed one or more serious deficiency listed in paragraph (c)(2)(ii) of this section, the State agency must use the following procedures to provide the institution and the responsible principals and responsible individuals notice of the serious deficiency(ies) and an opportunity to take corrective action.

(A) *Notice of serious deficiency.* The State agency must notify the institution's executive director and chairman of the board of directors that the institution has been determined to be seriously deficient. The notice must identify the responsible principals and responsible individuals and must be sent to those persons as well. The State agency may specify in the notice different corrective action, and time periods for completing the corrective action, for the institution and the responsible principals and responsible individuals. At the same time the notice is issued, the State agency must add the institution to the State agency list, along with the basis for the serious deficiency determination, and provide a copy of the notice to the appropriate FNSRO. The notice must also specify:

(*1*) The serious deficiency(ies);

(*2*) The actions to be taken to correct the serious deficiency(ies);

(*3*) The time allotted to correct the serious deficiency(ies) in accordance with paragraph (c)(4) of this section;

(*4*) That the serious deficiency determination is not subject to administrative review.

(*5*) That failure to fully and permanently correct the serious deficiency(ies) within the allotted time will result in the State agency's denial of the institution's application, the proposed termination of the institution's agreement (if the State agency has temporarily extended the agreement pursuant to paragraph

(c)(2)(iii)(D) of this section) and the proposed disqualification of the institution and the responsible principals and responsible individuals; and

(*6*) That the institution's voluntary termination of its agreement with the State agency after having been notified that it is seriously deficient will still result in the instituion's formal termination by the State agency and placement of the institution and its responsible principals and responsible individuals on the National disqualified list.

(B) *Successful corrective action.* (*1*) If corrective action has been taken to fully and permanently correct the serious deficiency(ies) within the allotted time and to the State agency's satisfaction, the State agency must:

(*i*) Notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the State agency has rescinded its serious deficiency determination; and

(*ii*) Offer the renewing institution the opportunity to resubmit its application. If the renewing institution resubmits its application, the State agency must complete its review of the application within 30 days after receiving a complete and correct application.

(*2*) If corrective action is complete for the institution but not for all of the responsible principals and responsible individuals (or vice versa), the State agency must:

(*i*) continue with the actions (as set forth in paragraph (c)(2)(iii)(C) of this section) against the remaining parties;

(*ii*) at the same time the notice is issued, the State agency must also update the State agency list to indicate that the serious deficiency(ies) has(ve) been corrected and provide a copy of the notice to the appropriate FNSRO; and

(*iii*) if the renewing institution has corrected the serious deficiency(ies), offer it the opportunity to resubmit its application. If the renewing institution resubmits its application, the State agency must complete its review of the application within 30 days after receiving a complete and correct application.

(C) *Application denial and proposed disqualification.* If timely corrective action is not taken to fully and permanently correct the serious deficiency(ies), the State agency must notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the institution's application has been denied. At the same time the notice is issued, the State agency must update the State agency list and provide a copy of the notice to the appropriate FNSRO. The notice must also specify:

(*1*) That the institution's application has been denied and the State agency is proposing to terminate the institution's temporarily-extended agreement and to disqualify the institution and the responsible principals and responsible individuals;

(*2*) The basis for the actions;

(*3*) That, if the institution voluntarily terminates its agreement after receiving the notice of the proposed termination, the institution and the responsible principals and responsible individuals will be disqualified;

(*4*) The procedures for seeking an administrative review (in accordance with paragraph (k) of this section) of the application denial and proposed disqualifications; and

(*5*) That the institution may continue to participate in the Program and receive Program reimbursement for eligible meals served and allowable administrative costs incurred until its administrative review is completed.

(D) *Program payments and extended agreement.* If the renewing institution's agreement expires before the end of the time allotted for corrective action, and/or the conclusion of any administrative review requested by the renewing institution:

(*1*) The State agency must temporarily extend its current agreement with the renewing institution and continue to pay any valid unpaid claims for reimbursement for eligible meals served and allowable administrative expenses incurred; and

(*2*) The actions set forth in paragraph (c)(2)(iii)(D)9*1*) of this section must be taken either until the serious deficiency(ies) is corrected or until the institution's agreement is terminated, including the period of any administrative review;

(E) *Agreement termination and disqualification.* When the time for requesting an administrative review expires or when the administrative review official upholds the State agency's denial of the institution's application, the proposed termination, and the proposed disqualifications, the State agency must:

(*1*) Notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the temporarily-extended agreement has been terminated and that the institution and the responsible principals and responsible individuals have been disqualified;

(*2*) Update the State agency list at the time such notice is issued; and

(*3*) Provide a copy of the notice and the mailing address and date of birth for each responsible principal and responsible individual to the appropriate FNSRO.

(3) *Termination of a participating institution's agreement.* (i) *General.* If the State agency holds an agreement with an institution operating in more than one State that has been disqualified from the Program by another State agency and placed on the National disqualified list, the State agency must terminate the institution's agreement effective no later than 45 days of the date of the institution's disqualification by the other State agency. At the same time the notice of termination is issued, the State agency must add the institution to the State agency list and indicate that the institution's agreement has been terminated and provide a copy of the notice to the appropriate FNSRO. If the State agency determines that a participating institution has committed one or more serious deficiency listed in paragraph (c)(3)(ii) of this section, the State agency must *initiate* action to terminate the agreement of a participating institution and *initiate* action to disqualify the institution and any responsible principals and responsible individuals.

(ii) *List of serious deficiencies for participating institutions.* The list of serious deficiencies is not identical for each category of institution (new, renewing, participating) because the type of information likely to be available to the State agency is different, depending on whether the State agency is reviewing a new or renewing institution's application or is conducting a review of a participating institution. Serious deficiencies for participating institutions are:

(A) Submission of false information on the institution's application, including but not limited to a determination that the institution has concealed a conviction for any activity that occurred during the past seven years and that indicates a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency;

(B) Permitting an individual who is on the National disqualified list to serve in a principal capacity with the institution or, if a sponsoring organization, permitting such an individual to serve as a principal in a sponsored center or as a day care home;

(C) Failure to operate the Program in conformance with the performance standards set forth in paragraphs (b)(1)(xviii) and (b)(2)(vii) of this section;

(D) Failure to comply with the bid procedures and contract requirements of applicable Federal procurement regulations;

(E) Failure to return to the State agency any advance payments that exceeded the amount earned for serving eligible meals, or failure to return disallowed start-up or expansion payments;

(F) Failure to maintain adequate records;

(G) Failure to adjust meal orders to conform to variations in the number of participants;

(H) Claiming reimbursement for meals not served to participants;

(I) Claiming reimbursement for a significant number of meals that do not meet Program requirements;

(J) Use of a food service management company that is in violation of health codes;

(K) Failure of a sponsoring organization to disburse payments to its facilities in accordance with the regulations at § 226.16(g) and (h) or in accordance with its management plan;

(L) Claiming reimbursement for meals served by a for-profit child care center or a for-profit outside-school-hours care center during a calendar month in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced-price meals or were title XX beneficiaries;

(M) Claiming reimbursement for meals served by a for-profit adult day care center during a calendar month in which less than 25 percent of its enrolled adult participants were title XIX or title XX beneficiaries;

(N) Failure by a sponsoring organization of day care homes to properly classify day care homes as tier I or tier II in accordance with § 226.15(f);

(O) Failure by a sponsoring organization to properly train or monitor sponsored facilities in accordance with § 226.16(d);

(P) Use of day care home funds by a sponsoring organization to pay for the sponsoring organization's administrative expenses;

(Q) Failure to perform any of the other financial and administrative responsibilities required by this part;

(R) Failure to properly implement and administer the day care home termination and administrative review provisions set forth at paragraph (l) of this section and § 226.16(l);

(S) The fact the institution or any of the institution's principals have been declared ineligible for any other publicly funded program by reason of violating that program's requirements. However, this prohibition does not apply if the institution or the principal has been fully reinstated in, or is now eligible to participate in, that program, including the payment of any debts owed;

(T) Conviction of the institution or any of its principals for any activity that occurred during the past seven years and that indicates a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency; or

(U) Any other action affecting the institution's ability to administer the Program in accordance with Program requirements.

(iii) *Serious deficiency notification procedures for participating institutions.* If the State agency determines that a participating institution has committed one or more serious deficiency listed in paragraph (c)(3)(ii) of this section, the State agency must use the following procedures to provide the institution and the responsible principals and responsible individuals notice of the serious deficiency(ies) and an opportunity to take corrective action. However, if the serious deficiency(ies) constitutes an imminent threat to the health or safety of participants, or the institution has engaged in activities that threaten the public health or safety, the State agency must follow the procedures in paragraph (c)(5)(i) of this section instead of the procedures below. Further, if the serious deficiency is the submission of a false or fraudulent claim, in addition to the procedures below, the State agency may suspend the institution's participation in accordance with paragraph (c)(5)(ii) of this section.

(A) *Notice of serious deficiency.* The State agency must notify the institution's executive director and chairman of the board of directors that the institution has been determined seriously deficient. The notice must identify the responsible principals and responsible individuals and must be sent to those persons as well. The State agency may specify in the notice different corrective action and time periods for completing the corrective action for the institution and the responsible principals and responsible individuals. At the same time the notice is issued, the State agency must add the institution to the State agency list, along with the basis for the serious deficiency determination, and provide a copy of the notice to the appropriate FNSRO. The notice must also specify:

(*1*) The serious deficiency(ies);

(*2*) The actions to be taken to correct the serious deficiency(ies);

(*3*) The time allotted to correct the serious deficiency(ies) in accordance with paragraph (c)(4) of this section;

(*4*) That the serious deficiency determination is not subject to administrative review.

(*5*) That failure to fully and permanently correct the serious deficiency(ies) within the allotted time will result in the State agency's proposed termination of the institution's agreement and the proposed disqualification of the institution and the responsible principals and responsible individuals; and

(*6*) That the institution's voluntary termination of its agreement with the State agency after having been notified that it is seriously deficient will still result in the instituion's formal termination by the State agency and placement of the institution and its responsible principals and responsible individuals on the National disqualified list.

(B) *Successful corrective action.* (*1*) If corrective action has been taken to fully and permanently correct the serious deficiency(ies) within the allotted time and to the State agency's satisfaction, the State agency must:

(*i*) Notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the State agency has rescinded its serious deficiency determination; and

(*ii*) Offer the renewing institution the opportunity to resubmit its application. If the renewing institution resubmits its application, the State agency must complete its review of the application within 30 days after receiving a complete and correct application.

(*2*) If corrective action is complete for the institution but not for all of the responsible principals and responsible individuals (or vice versa), the State agency must:

(*i*) Continue with the actions (as set forth in paragraph (c)(3)(iii)(C) of this section) against the remaining parties;

(*ii*) At the same time the notice is issued, the State agency must also update the State agency list to indicate that the serious deficiency(ies) has(ve) been corrected and provide a copy of the notice to the appropriate FNSRO; and

(*iii*) If the renewing institution has corrected the serious deficiency(ies), offer it the opportunity to resubmit its application. If the renewing institution resubmits its application, the State agency must complete its review of the application within 30 days after receiving a complete and correct application.

(C) *Proposed termination and proposed disqualification.* If timely corrective action is not taken to fully and permanently correct the serious deficiency(ies), the State agency must notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the State agency is proposing to terminate the institution's agreement and to disqualify the institution and the responsible principals and responsible individuals. At the same time the notice is issued, the State agency must also update the State agency list and provide a copy of the notice to the appropriate FNSRO. The notice must also specify:

(*1*) That the State agency is proposing to terminate the institution's agreement and to disqualify the institution and the responsible principals and responsible individuals;

(*2*) The basis for the actions;

(*3*) That, if the institution voluntarily terminates its agreement after receiving the notice of proposed termination, the institution and the responsible principals and responsible individuals will be disqualified.

(*4*) The procedures for seeking an administrative review (in accordance with paragraph (k) of this section) of the application denial and proposed disqualifications; and

(*5*) That, unless participation has been suspended, the institution may continue to participate and receive Program reimbursement for eligible meals served and allowable administrative costs incurred until its administrative review is completed.

(D) *Program payments.* Unless participation has been suspended, the State agency must continue to pay any valid unpaid claims for reimbursement for eligible meals served and allowable administrative expenses incurred until the serious deficiency(ies) is corrected

or the institution's agreement is terminated, including the period of any administrative review.

(E) *Agreement termination and disqualification.* When the time for requesting an administrative review expires or when the administrative review official upholds the State agency's proposed termination and disqualifications, the State agency must:

(*1*) Notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the institution's agreement has been terminated and that the institution and the responsible principals and responsible individuals have been disqualified;

(*2*) Update the State agency list at the time such notice is issued; and

(*3*) Provide a copy of the notice and the mailing address and date of birth for each responsible principal and responsible individual to the appropriate FNSRO.

(4) *Corrective action timeframes*—(i) *General.* Except as noted in this paragraph (c)(4), the State agency is prohibited from allowing more than 90 days for corrective action from the date the institution receives the serious deficiency notice.

(ii) *Unlawful practices.* If the State agency determines that the institution has engaged in unlawful practices, submitted false or fraudulent claims or other information to the State agency, or been convicted of or concealed a criminal background, the State agency is prohibited from allowing more than 30 days for corrective action.

(iii) *Long-term changes.* For serious deficiencies requiring the long-term revision of management systems or processes, the State agency may permit more than 90 days to complete the corrective action as long as a corrective action plan is submitted to and approved by the State agency within 90 days (or such shorter deadline as the State agency may establish). The corrective action must include milestones and a definite completion date that the State agency will monitor. The determination of serious deficiency will remain in effect until the State agency determines that the serious deficiency(ies) has(ve) been fully and permanently corrected within the allotted time.

(5) *Suspension of an institution's participation.* A State agency is prohibited from suspending an institution's participation (including all Program payments) except for the reasons set forth in this paragraph (c)(5).

(i) *Public health or safety*—(A) *General.* If State or local health or licensing officials have cited an institution for serious health or safety violations, the State agency must immediately suspend the institution's Program participation, initiate action to terminate the institution's agreement, and initiate action to disqualify the institution and the responsible principals and responsible individuals prior to any formal action to revoke the institution's licensure or approval. If the State agency determines that there is an imminent threat to the health or safety of participants at an institution, or that the institution has engaged in activities that threaten the public health or safety, the State agency must immediately notify the appropriate State or local licensing and health authorities and take action that is consistent with the recommendations and requirements of those authorities. An imminent threat to the health or safety of participants and engaging in activities that threaten the public health or safety constitute serious deficiencies; however, the State agency must use the procedures in this paragraph (c)(5)(i) (instead of the procedures in paragraph (c)(3) of this section) to provide the institution notice of the suspension of participation, serious deficiency, proposed termination of the institution's agreement, and proposed disqualification of the responsible principals and responsible individuals.

(B) *Notice of suspension, serious deficiency, proposed termination, and proposed disqualification.* The State agency must notify the institution's executive director and chairman of the board of directors that the institution's participation (including Program payments) has been suspended, that the institution has been determined to be seriously deficient, and that the State agency proposes to terminate the institution's agreement and to disqualify the institution and the responsible

principals and responsible individuals. The notice must also identify the responsible principals and responsible individuals and must be sent to those persons as well. At the same time this notice is sent, the State agency must add the institution and the responsible principals and responsible individuals to the State agency list, along with the basis for the serious deficiency determination and provide a copy of the notice to the appropriate FNSRO. The notice must also specify:

(*1*) That the State agency is suspending the institution's participation (including Program payments), proposing to terminate the institution's agreement, and proposing to disqualify the institution and the responsible principals and responsible individuals;

(*2*) The serious deficiency(ies);

(*3*) That, if the institution voluntary terminates its agreement with the State agency after having been notified of the proposed termination, the institution and the responsible principals and responsible individuals will be disqualified;

(*4*) That the serious deficiency determination is not subject to administrative review;

(*5*) The procedures for seeking an administrative review (consistent with paragraph (k) of this section) of the suspension, proposed termination, and proposed disqualifications; and

(*6*) That, if the administrative review official overturns the suspension, the institution may claim reimbursement for eligible meals served and allowable administrative costs incurred during the suspension period.

(C) *Agreement termination and disqualification.* When the time for requesting an administrative review expires or when the administrative review official upholds the State agency's proposed termination and disqualifications, the State agency must:

(*1*) Notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the institution's agreement has been terminated and that the institution and the responsible principals and responsible individuals have been disqualified;

(*2*) update the State agency list at the time such notice is issued; and

(*3*) provide a copy of the notice and the mailing address and date of birth for each responsible principal and responsible individual to the appropriate FNSRO.

(D) *Program payments.* The State agency is prohibited from paying any claims for reimbursement from a suspended institution. However, if the suspended institution prevails in the administrative review of the proposed termination, the State agency must pay any claims for reimbursement for eligible meals served and allowable administrative costs incurred during the suspension period.

(ii) *False or fraudulent claims*—(A) *General.* If the State agency determines that an institution has knowingly submitted a false or fraudulent claim, the State agency *may* initiate action to suspend the institution's participation and must *initiate* action to terminate the institution's agreement and initiate action to disqualify the institution and the responsible principals and responsible individuals (in accordance with paragraph (c)(3) of this section). The submission of a false or fraudulent claim constitutes a serious deficiency as set forth in paragraph (c)(3)(ii) of this section, which lists serious deficiencies for participating institutions. If the State agency wishes to suspend the institution's participation, it must use the following procedures to issue the notice of proposed suspension of participation *at the same time* it issues the serious deficiency notice, which must include the information described in paragraph (c)(3)(iii)(A) of this section.

(B) *Proposed suspension of participation.* If the State agency decides to propose to suspend an institution's participation due to the institution's submission of a false or fraudulent claim, it must notify the institution's executive director and chairman of the board of directors that the State agency intends to suspend the institution's participation (including all Program payments) unless the institution requests a review of the proposed suspension. At the same time the notice is issued, the State agency must also update the State agency list and provide a copy of

the notice to the appropriate FNSRO. The notice must identify the responsible principals and responsible individuals and must be sent to those persons as well. The notice must also specify:

(*1*) That the State agency is proposing to suspend the institution's participation;

(*2*) That the proposed suspension is based on the institution's submission of a false or fraudulent claim, as described in the serious deficiency notice;

(*3*) The effective date of the suspension (which may be no earlier than 10 days after the institution receives the suspension notice);

(*4*) The name, address and telephone number of the suspension review official who will conduct the suspension review; and

(*5*) That if the institution wishes to have a suspension review, it must request a review and submit to the suspension review official written documentation opposing the proposed suspension within 10 days of the institution's receipt of the notice.

(C) *Suspension review.* If the institution requests a review of the State agency's proposed suspension of participation, the suspension review must be heard by a suspension review official who must:

(*1*) Be an independent and impartial person other than, and not accountable to, any person involved in the decision to initiate suspension proceedings;

(*2*) Immediately notify the State agency that the institution has contested the proposed suspension and must obtain from the State agency its notice of proposed suspension of participation, along with all supporting documentation; and

(*3*) Render a decision on suspension of participation within 10 days of the deadline for receiving the institution's documentation opposing the proposed suspension.

(D) *Suspension review decision.* If the suspension review official determines that the State agency's proposed suspension is not appropriate, the State agency is prohibited from suspending participation. If the suspension review official determines, based on a preponderance of the evidence, that the State agency's action was appropriate, the State agency must suspend the institution's participation (including all Program payments), effective on the date of the suspension review decision. The State agency must notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the institution's participation has been suspended. At the same time the notice is issued, the State agency must also update the State agency list and provide a copy of the notice to the appropriate FNSRO. The notice must also specify:

(*1*) That the State agency is suspending the institution's participation (including Program payments);

(*2*) The effective date of the suspension (the date of the suspension review decision);

(*3*) The procedures for seeking an administrative review (in accordance with paragraph (k) of this section) of the suspension; and

(*4*) That if the administrative review official overturns the suspension, the institution may claim reimbursement for eligible meals served and allowable administrative costs incurred during the suspension period.

(E) *Program payments.* A State agency is prohibited from paying any claims for reimbursement submitted by a suspended institution. However, if the institution suspended for the submission of false or fraudulent claims is a sponsoring organization, the State agency must ensure that sponsored facilities continue to receive reimbursement for eligible meals served during the suspension period. If the suspended institution prevails in the administrative review of the proposed termination, the State agency must pay any valid unpaid claims for reimbursement for eligible meals served and allowable administrative costs incurred during the suspension period.

(F) *Maximum time for suspension.* Under no circumstances may the suspension of participation remain in effect for more than 120 days following the suspension review decision.

(6) *FNS determination of serious deficiency.* (i) *General.* FNS may determine independently that a participating institution has committed one or more serious deficiency listed in paragraph

(c)(3)(ii) of this section, which lists serious deficiencies for participating institutions.

(ii) *Serious deficiency notification procedures.* If FNS determines that an institution has committed one or more serious deficiency listed in paragraph (c)(3)(ii) of this section (the list of serious deficiencies for participating institutions), FNS will use the following procedures to provide the institution and the responsible principals and responsible individuals with notice of the serious deficiency(ies) and an opportunity to take corrective action.

(A) *Notice of serious deficiency.* FNS will notify the institution's executive director and chairman of the board of directors that the institution has been found to be seriously deficient. The notice will identify the responsible principals and responsible individuals and will be sent to them as well. FNS may specify in the notice different corrective action and time periods for completing the corrective action, for the institution and the responsible principals and responsible individuals. The notice will also specify:

(*1*) The serious deficiency(ies);

(*2*) The actions to be taken to correct the serious deficiency(ies);

(*3*) The time allotted to correct the serious deficiency(ies) in accordance with paragraph (c)(4) of this section;

(*4*) That failure to fully and permanently correct the serious deficiency(ies) within the allotted time, or the institution's voluntary termination of its agreement(s) with any State agency after having been notified that it is seriously deficient, will result in the proposed disqualification of the institution and the responsible principals and responsible individuals and the termination of its agreement(s) with all State agencies; and

(*5*) That the serious deficiency determination is not subject to administrative review.

(B) *Suspension of participation.* If FNS determines that there is an imminent threat to the health or safety of participants at an institution, or that the institution has engaged in activities that threaten the public health or safety, any State agency that holds an agreement with the institution must suspend the participation of the institution. If FNS determines that the institution has submitted a false or fraudulent claim, it may require any State agency that holds an agreement with the institution to initiate action to suspend the institution's participation for false or fraudulent claims in accordance with paragraph (c)(5)(ii) of this section (which deals with an institution's suspension by a State agency for submission of false or fraudulent claims). In both cases, FNS will provide the State agency the information necessary to support these actions and, in the case of a false and fraudulent claim, will provide an individual to serve as the suspension review official if requested by the State agency.

(C) *Successful corrective action.* (*1*) If corrective action has been taken to fully and permanently correct the serious deficiency(ies) within the allotted time and to FNS's satisfaction, FNS will notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that it has rescinded its serious deficiency determination; and

(*2*) If corrective action is complete for the institution but not for all of the responsible principals and responsible individuals (or vice versa), FNS will continue with the actions (as set forth in paragraph (c)(6)(ii)(D) of this section) against the remaining parties.

(D) *Proposed disqualification.* If timely corrective action is not taken to fully and permanently correct the serious deficiency(ies), FNS will notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that FNS is proposing to disqualify them. The notice will also specify:

(*1*) That FNS is proposing to disqualify the institution and the responsible principals and responsible individuals;

(*2*) The basis for the actions;

(*3*) That, if the institution seeks to voluntarily terminate its agreement after receiving the notice of proposed disqualification, the institution and the responsible principals and responsible individuals will be disqualified;

(*4*) The procedures for seeking an administrative review (in accordance

with paragraph (k) of this section) of the proposed disqualifications;

(*5*) That unless participation has been suspended, the institution may continue to participate and receive Program reimbursement for eligible meals served and allowable administrative costs incurred until its administrative review is completed; and

(*6*) That if the institution does not prevail in the administrative review, any State agency holding an agreement with the institution will be required to terminate that agreement and the institution is prohibited from seeking an administrative review of the termination of the agreement by the State agency(ies).

(E) *Disqualification.* When the time for requesting an administrative review expires or when the administrative review official upholds FNS's proposed disqualifications, FNS will notify the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, that the institution and the responsible principal or responsible individual have been disqualified.

(F) *Program payments.* If the State agency holds an agreement with an institution that FNS has determined to be seriously deficient, the State agency must continue to pay any valid unpaid claims for reimbursement for eligible meals served and allowable administrative expenses incurred until the serious deficiency(ies) is corrected or the State agency terminates the institution's agreement, including the period of any administrative review, unless participation has been suspended.

(G) *Required State agency action.* (*1*) *Disqualified institutions.* If the State agency holds an agreement with an institution that FNS determines to be seriously deficient and subsequently disqualifies, the State agency must terminate the institution's agreement effective no later than 45 days after the date of the institution's disqualification by FNS. As noted in paragraph (k)(3)(iv) of this section, the termination is not subject to administrative review. At the same time the notice of termination is issued, the State agency must add the institution to the State agency list and provide a copy of the notice to the appropriate FNSRO.

(*2*) *Disqualified principals.* If the State agency holds an agreement with an institution whose principal FNS determines to be seriously deficient and subsequently disqualifies, the State agency must determine the institution to be seriously deficient and initiate action to terminate and disqualify the institution in accordance with the procedures in paragraph (c)(3) of this section. The State agency must initiate these actions no later than 45 days after the date of the principal's disqualification by FNS.

(7) *National disqualified list*—(i) *Maintenance and availability of list.* FNS will maintain the National disqualified list and make it available to all State agencies and all sponsoring organizations.

(ii) *Effect on institutions.* No organization on the National disqualified list may participate in the Program as an institution. As noted in paragraphs (b)(1)(xii) and (b)(2)(ii) of this section, the State agency must deny the application of a new or renewing institution if the institution is on the National disqualified list. In addition, as noted in paragraphs (c)(3)(i) and (c)(6)(ii)(G)(*1*) of this section, the State agency must terminate the agreement of any participating institution that is disqualified by another State agency or by FNS.

(iii) *Effect on sponsored centers.* No organization on the National disqualified list may participate in the Program as a sponsored center. As noted in § 226.16(b) and paragraphs (b)(1)(xii) and (b)(2)(ii) of this section, a sponsoring organization is prohibited from submitting an application on behalf of a sponsored facility (and a State agency is prohibited from approving such an application) if the facility is on the National disqualified list.

(iv) *Effect on individuals.* No individual on the National disqualified list may serve as a principal in any institution or facility or as a day care home provider.

(A) *Principal for an institution or a sponsored facility.* As noted in paragraphs (b)(1)(xii) and (b)(2)(ii) of this section, the State agency must deny the application of a new or renewing

institution if any of the institution's principals is on the National disqualified list. As noted in paragraphs (c)(3)(ii)(B) and (c)(6)(ii)(G)(*2*) of this section, the State agency must declare an institution seriously deficient and initiate action to terminate the institution's agreement and disqualify the institution if the institution permits an individual who is on the National disqualified list to serve in a principal capacity for the institution or one of its facilities.

(B) *Principal for a sponsored facility.* As noted in §226.16(b) and paragraphs (b)(1)(xii) and (b)(2)(ii) of this section, a sponsoring organization is prohibited from submitting an application on behalf of a sponsored facility (or a State agency from approving such an application) if any of the facility's principals are on the National disqualified list.

(C) *Serving as a day care home.* As noted in §226.16(b) and paragraphs (b)(1)(xii) and (b)(2)(ii) of this section, a sponsoring organization is prohibited from submitting an application on behalf of a sponsored facility (and a State agency is prohibited from approving such an application) if the facility is on the National disqualified list.

(v) *Removal of institutions, principals, and individuals from the list.* Once included on the National disqualified list, an institution and responsible principals and responsible individuals remain on the list until such time as FNS, in consultation with the appropriate State agency, determines that the serious deficiency(ies) that led to their placement on the list has(ve) been corrected, or until seven years have elapsed since they were disqualified from participation. However, if the institution, principal or individual has failed to repay debts owed under the Program, they will remain on the list until the debt has been repaid.

(vi) *Removal of day care homes from the list.* Once included on the National disqualified list, a day care home will remain on the list until such time as the State agency determines that the serious deficiency(ies) that led to its placement on the list has(ve) been corrected, or until seven years have elapsed since its agreement was terminated for cause. However, if the day care home has failed to repay debts owed under the Program, it will remain on the list until the debt has been repaid.

(8) *State agency list.* (i) *Maintenance of the State agency list.* The State agency must maintain a State agency list (in the form of an actual paper or electronic list or retrievable paper records). The list must be made available to FNS upon request, and must include the following information:

(A) Institutions determined to be seriously deficient by the State agency, including the names and mailing addresses of the institutions and the status of the institutions as they move through the possible subsequent stages of corrective action, proposed termination, suspension, agreement termination, and/or disqualification, as applicable;

(B) Responsible principals and individuals who have been disqualified from participation by the State agency, including their names, mailing addresses, and dates of birth; and

(C) Day care home providers whose agreements have been terminated for cause by a sponsoring organization in the State, including their names, mailing addresses, and dates of birth.

(ii) *Referral of disqualified day care homes to FNS.* Within 10 days of receiving a notice of termination and disqualification from a sponsoring organization, the State agency must provide the appropriate FNSRO the name, mailing address, and date of birth of each day care home provider whose agreement is terminated for cause on or after July 29, 2002.

(iii) *Prior lists of disqualified day care homes.* If on July 29, 2002 the State agency maintains a list of day care homes that have been disqualified from participation, the State agency may continue to prohibit participation by those day care homes. However, the State agency must remove a day care home from its prior list no later than the time at which the State agency determines that the serious deficiency(ies) that led to the day care home's placement on the list has(ve) been corrected or July 29, 2009 (unless the day care home has failed to repay debts owed under the Program). If the day care home has failed to repay its debt, the State agency may keep the

day care home on its prior list until the debt has been repaid.

(d) *Licensing/approval for institutions or facilities providing child care.* This section prescribes State agency responsibilities to ensure that child care centers, at-risk afterschool care centers, outside-school-hours care centers, and day care homes meet the licensing/approval criteria set forth in this part. Emergency shelters are exempt from licensing/approval requirements contained in this section but must meet the requirements of paragraph (d)(2) to be eligible to participate in the Program. Independent centers shall submit such documentation to the State agency on their own behalf.

(1) *General.* Each State agency must establish procedures to annually review information submitted by institutions to ensure that all participating child care centers, at-risk afterschool care centers, outside-school hours care centers, and day care homes:

(i) Are licensed or approved by Federal, State, or local authorities, provided that institutions that are approved for Federal programs on the basis of State or local licensing are not eligible for the Program if their licenses lapse or are terminated; or

(ii) Are complying with applicable procedures to renew licensing or approval in situations where the State agency has no information that licensing or approval will be denied; or

(iii) Demonstrate compliance with applicable State or local child care standards to the State agency, if licensing is not available; or

(iv) Demonstrate compliance with CACFP child care standards to the State agency, if licensing or approval is not available; or

(v) If Federal, State or local licensing or approval is not otherwise required, at-risk afterschool care centers and outside-school-hours care centers must meet State or local health and safety standards. When State or local health and safety standards have not been established, State agencies are encouraged to work with appropriate State and local officials to create such standards. Meeting these standards will remain a precondition for any afterschool center's eligibility for CACFP nutrition benefits.

(2) *Health and safety requirements for emergency shelters.* To be eligible to participate in the Program, emergency shelters must meet applicable State or local health and safety standards.

(3) *CACFP child care standards.* When licensing or approval is not available, independent child care centers, and sponsoring organizations on behalf of their child care centers or day care homes, may elect to demonstrate compliance, annually, with the following CACFP child care standards or other standards specified in paragraph (d)(4) of this section:

(i) *Staff/child ratios.* (A) Day care homes provide care for no more than 12 children at any one time. One home caregiver is responsible for no more than 6 children ages 3 and above, or no more than 5 children ages 0 and above. No more than 2 children under the age of 3 are in the care of 1 caregiver. The home provider's own children who are in care and under the age of 14 are counted in the maximum ratios of caregivers to children.

(B) Child care centers do not fall below the following staff/child ratios:

(*1*) For children under 6 weeks of age—1:1;

(*2*) For children ages 6 weeks up to 3 years—1:4;

(*3*) For children ages 3 years up to 6 years—1:6;

(*4*) For children ages 6 years up to 10 years—1:15; and

(*5*) For children ages 10 and above—1:20.

(ii) *Nondiscrimination.* Day care services are available without discrimination on the basis of race, color, national origin, sex, age, or handicap.

(iii) *Safety and sanitation.* (A) A current health/sanitation permit or satisfactory report of an inspection conducted by local authorities within the past 12 months shall be submitted.

(B) A current fire/building safety permit or satisfactory report of an inspection conducted by local authorities within the past 12 months shall be submitted.

(C) Fire drills are held in accordance with local fire/building safety requirements.

(iv) *Suitability of facilities.* (A) Ventilation, temperature, and lighting are

adequate for children's safety and comfort.

(B) Floors and walls are cleaned and maintained in a condition safe for children.

(C) Space and equipment, including rest arrangements for preschool age children, are adequate for the number of age range of participating children.

(v) *Social services.* Independent centers, and sponsoring organizations in coordination with their facilities, have procedures for referring families of children in care to appropriate local health and social service agencies.

(vi) *Health services.* (A) Each child is observed daily for indications of difficulties in social adjustment, illness, neglect, and abuse, and appropriate action is initiated.

(B) A procedure is established to ensure prompt notification of the parent or guardian in the event of a child's illness or injury, and to ensure prompt medical treatment in case of emergency.

(C) Health records, including records of medical examinations and immunizations, are maintained for each enrolled child. (Not applicable to day care homes.)

(D) At least one full-time staff member is currently qualified in first aid, including artificial respiration techniques. (Not applicable to day care homes.)

(E) First aid supplies are available.

(F) Staff members undergo initial and periodic health assessments.

(vii) *Staff training.* The institution provides for orientation and ongoing training in child care for all caregivers.

(viii) *Parental involvement.* Parents are afforded the opportunity to observe their children in day care.

(ix) *Self-evaluation.* The institution has established a procedure for periodic self-evaluation on the basis of CACFP child care standards.

(4) *Alternate approval procedures.* Each State agency shall establish procedures to review information submitted by institutions for centers or homes for which licensing or approval is not available in order to establish eligibility for the Program. Licensing or approval is not available when (i) no Federal, State, or local licensing/approval standards have been established for child care centers, or day care homes; or (ii) no mechanism exists to determine compliance with licensing/approval standards. In these situations, independent centers, and sponsoring organizations on behalf of their facilities, may choose to demonstrate compliance with either CACFP child care standards, applicable State child care standards, or applicable local child care standards. State agencies shall provide information about applicable State child care standards and CACFP child care standards to institutions, but may require institutions electing to demonstrate compliance with applicable local child care standards to identify and submit these standards. The State agency may permit independent centers, and sponsoring organizations on behalf of their facilities, to submit self-certification forms, and may grant approval without first conducting a compliance review at the center or facility. But the State agency shall require submission of health/sanitation and fire/safety permits or certificates for all independent centers and facilities seeking alternate child care standards approval. Compliance with applicable child care standards are subject to review in accordance with § 226.6(o).

(e) *Licensing/approval for adult day care centers.* This paragraph prescribes State agency responsibilities to ensure that adult day care centers meet the licensing/approval criteria set forth in this part. Sponsoring organizations shall submit to the State agency documentation that facilities under their jurisdiction are in compliance with licensing/approval requirements. Independent adult day care centers shall submit such documentation to the State agency on their own behalf. Each State agency shall establish procedures to annually review information submitted by institutions to ensure that all participating adult day care centers either:

(1) Are licensed or approved by Federal, State or local authorities, provided that institutions which are approved for Federal programs on the basis of State or local licensing shall not be eligible for the Program if their licenses lapse or are terminated; or

(2) Are complying with applicable procedures to renew licensing or approval in situations where the State agency has no information that licensing or approval will be denied.

(f) *Miscellaneous responsibilities.* State agencies must require institutions to comply with the applicable provisions of this part and must provide or collect the information specified in this paragraph (f).

(1) *Annual responsibilities.* In addition to its other responsibilities under this part, each State agency must annually:

(i) Inform institutions that are pricing programs of their responsibility to ensure that free and reduced-price meals are served to participants unable to pay the full price;

(ii) Provide to all institutions a copy of the income standards to be used by institutions for determining the eligibility of participants for free and reduced-price meals under the Program;

(iii) Require centers to submit current eligibility information on enrolled participants, in order to calculate a blended rate or claiming percentage in accordance with § 226.9(b);

(iv) Require each sponsoring organization to submit an administrative budget with sufficiently detailed information concerning projected CACFP administrative earnings and expenses, as well as other non-Program funds to be used in Program administration, for the State agency to determine the allowability, necessity, and reasonableness of all proposed expenditures, and to assess the sponsoring organization's capability to manage Program funds. The administrative budget must demonstrate that the sponsoring organization will expend and account for funds in accordance with regulatory requirements, FNS Instruction 796–2 ("Financial Management in the Child and Adult Care Food Program"), parts 3015, 3016, and 3019 of this title, and applicable Office of Management and Budget circulars. In addition, the administrative budget submitted by a sponsor of centers must demonstrate that the administrative costs to be charged to the Program do not exceed 15 percent of the meal reimbursements estimated or actually earned during the budget year, unless the State agency grants a waiver in accordance with § 226.7(g);

(v) Require each institution to issue a media release, unless the State agency has issued a Statewide media release on behalf of all its institutions;

(vi) Require each independent center to provide information concerning its licensing/approval status, and require each sponsoring organization to provide information concerning the licensing/approval status of its facilities, unless the State agency has other means of confirming the licensing/approval status of any independent center or facility providing care;

(vii) Require each sponsoring organization to submit verification that all facilities under its sponsorship have adhered to the training requirements set forth in Program regulations; and

(viii) Comply with the following requirements for tiering of day care homes:

(A) Coordinate with the State agency that administers the National School Lunch Program (the NSLP State agency) to ensure the receipt of a list of elementary schools in the State in which at least one-half of the children enrolled are certified eligible to receive free or reduced-price meals. The State agency must provide the list of elementary schools to sponsoring organizations of day care homes by February 15 each year unless the NSLP State agency has elected to base data for the list on a month other than October. In that case, the State agency must provide the list to sponsoring organizations of day care homes within 15 calendar days of its receipt from the NSLP State agency.

(B) For tiering determinations of day care homes that are based on school or census data, the State agency must ensure that sponsoring organizations of day care homes use the most recent available data, as described in § 226.15(f).

(C) For tiering determinations of day care homes that are based on the provider's household income, the State agency must ensure that sponsoring organizations annually determine the eligibility of each day care home, as described in § 226.15(f).

(D) The State agency must provide all sponsoring organizations of day care homes in the State with a listing

of State-funded programs, participation in which by a parent or child will qualify a meal served to a child in a tier II home for the tier I rate of reimbursement.

(E) The State agency must require each sponsoring organization of family day care homes to submit to the State agency a list of family day care home providers receiving tier I benefits on the basis of their participation in the Food Stamp Program. Within 30 days of receiving this list, the State agency will provide this list to the State agency responsible for the administration of the Food Stamp Program.

(ix) Comply with the following requirements for determining the eligibility of at-risk afterschool care centers:

(A) Coordinate with the NSLP State agency to ensure the receipt of a list of elementary, middle, and high schools in the State in which at least one-half of the children enrolled are certified eligible to receive free or reduced-price meals. The State agency must provide the list of elementary, middle, and high schools to independent at-risk afterschool care centers and sponsoring organizations of at-risk afterschool care centers upon request. The list must represent data from the preceding October, unless the NSLP State agency has elected to base data for the list on a month other than October. If the NSLP State agency chooses a month other than October, it must do so for the entire State.

(B) The State agency must determine the area eligibility for each independent at-risk afterschool care center. The State agency must use the most recent data available, as described in §226.6(f)(1)(ix)(A). The State agency must use attendance area information that it has obtained, or verified with the appropriate school officials to be current, within the last school year.

(C) The State agency must determine the area eligibility of each sponsored at-risk afterschool care center based on the documentation submitted by the sponsoring organization in accordance with §226.15(g).

(D) The State agency must determine whether the afterschool care programs of at-risk afterschool care centers meet the requirements of §226.17a(b) before the centers begin participating in the Program.

(2) *Triennial Responsibilities*—(i) *General reapplication requirements.* At intervals not to exceed 36 months, each State agency must require participating institutions to reapply to continue their participation and must require sponsoring organizations to submit a management plan with the elements set forth in §226.6(b)(1)(iv).

(ii) *Redeterminations of afterschool program eligibility.* The State agency must determine whether institutions reapplying as at-risk afterschool care centers continue to meet the eligibility requirements, as described in §226.17a(b).

(3) *Responsibilities at other time intervals*—(i) *Day care home tiering redeterminations based on school data.* As described in §226.15(f), tiering determinations are valid for five years if based on school data. The State agency must ensure that the most recent available data is used if the determination of a day care home's eligibility as a tier I day care home is made using school data. The State agency must not routinely require annual redeterminations of the tiering status of tier I day care homes based on updated elementary school data. However, a sponsoring organization, the State agency, or FNS may change the determination if information becomes available indicating that a day care home is no longer in a qualified area.

(ii) *Area eligibility redeterminations for at-risk afterschool care centers.* Area eligibility determinations are valid for five years for at-risk afterschool care centers that are already participating in the Program. The State agency may determine the date in the fifth year when the next five-year cycle of area eligibility will begin. The State agency must redetermine the area eligibility for each independent at-risk afterschool care center in accordance with §226.6(f)(1)(ix)(B). The State agency must redetermine the area eligibility of each sponsored at-risk afterschool care center based on the documentation submitted by the sponsoring organization in accordance with §226.15(g). The State agency must not routinely require annual redeterminations of area eligibility based on updated

school data during the five-year period, except in cases where the State agency has determined it is most efficient to incorporate area eligibility decisions into the three-year application cycle. However, a sponsoring organization, the State agency, or FNS may change the determination if information becomes available indicating that an at-risk afterschool care center is no longer area eligible.

(iii) *State agency transmittal of census data.* Upon receipt of census data from FNS (on a decennial basis), the State agency must provide each sponsoring organization of day care homes with census data showing areas in the State in which at least 50 percent of the children are from households meeting the income standards for free or reduced-price meals.

(iv) *Additional institution requirements.* At intervals and in a manner specified by the State agency, but not more frequently than annually, the State agency may:

(A) Require independent centers to submit a budget with sufficiently detailed information and documentation to enable the State agency to make an assessment of the independent center's qualifications to manage Program funds. Such budget must demonstrate that the independent center will expend and account for funds in accordance with regulatory requirements, FNS Instruction 796–2 ("Financial Management in the Child and Adult Care Food Program"), and parts 3015, 3016, and 3019 of this title and applicable Office of Management and Budget circulars;

(B) Request institutions to report their commodity preference;

(C) Require a private nonprofit institution to submit evidence of tax exempt status in accordance with § 226.16(a);

(D) Require for-profit institutions to submit documentation on behalf of their centers of:

(*1*) Eligibility of at least 25 percent of children in care (enrolled or licensed capacity, whichever is less) for free or reduced-price meals; or

(*2*) Compensation received under title XX of the Social Security Act of nonresidential day care services and certification that at least 25 percent of children in care (enrolled or licensed capacity, whichever is less) were title XX beneficiaries during the most recent calendar month.

(E) Require for-profit adult care centers to submit documentation that they are currently providing nonresidential day care services for which they receive compensation under title XIX or title XX of the Social Security Act, and certification that not less than 25 percent of enrolled participants in each such center during the most recent calendar month were title XIX or title XX beneficiaries;

(F) Request each institution to indicate its choice to receive all, part or none of advance payments, if the State agency chooses to make advance payments available; and

(G) Perform verification in accordance with § 226.23(h) and paragraph (m)(4) of this section. State agencies verifying the information on free and reduced-price applications must ensure that verification activities are conducted without regard to the participant's race, color, national origin, sex, age, or disability.

(g) *Program expansion.* Each State agency must take action to expand the availability of benefits under this Program, and must conduct outreach to potential sponsoring organizations of family day care homes that might administer the Program in low-income or rural areas.

(h) *Commodity distribution.* The State agency must require new institutions to state their preference to receive commodities or cash-in-lieu of commodities when they apply, and may periodically inquire as to participating institutions' preference to receive commodities or cash-in-lieu of commodities. State agencies must annually provide institutions with information on foods available in plentiful supply, based on information provided by the Department. Each institution electing cash-in-lieu of commodities shall receive such payments. Each institution which elects to receive commodities shall have commodities provided to it unless the State agency, after consultation with the State commodity distribution agency, demonstrates to FNS that distribution of commodities to the number of such institutions

would be impracticable. The State agency may then, with the concurrence of FNS, provide cash-in-lieu of commodities for all institutions. A State agency request for cash-in-lieu of all commodities shall be submitted to FNS not later than May 1 of the school year preceding the school year for which the request is made. The State agency shall, by June 1 of each year, submit a list of institutions which have elected to receive commodities to the State commodity distribution agency, unless FNS has approved a request for cash-in-lieu of commodities for all institutions. The list shall be accompanied by information on the average daily number of lunches and suppers to be served to participants by each such institution.

(i) *Standard contract.* Each State agency shall develop a standard contract in accordance with § 226.21 and provide for its use between institutions and food service management companies. The contract shall expressly and without exception stipulate:

(1) The institution shall provide the food service management company with a list of the State agency approved child care centers, day care homes, adult day care centers, and outside-school-hours care centers to be furnished meals by the food service management company, and the number of meals, by type, to be delivered to each location;

(2) The food service management company shall maintain such records (supported by invoices, receipts or other evidence) as the institution will need to meet its responsibilities under this part, and shall promptly submit invoices and delivery reports to the institution no less frequently than monthly;

(3) The food service management company shall have Federal, State or local health certification for the plant in which it proposes to prepare meals for use in the Program, and it shall ensure that health and sanitation requirements are met at all times. In addition, the State agency may require the food service management company to provide for meals which it prepares to be periodically inspected by the local health department or an independent agency to determine bacteria levels in the meals being prepared. These bacteria levels shall conform to the standards which are applied by the local health authority with respect to the level of bacteria which may be present in meals prepared or served by other establishments in the locality. Results of these inspections shall be submitted to the institution and to the State agency;

(4) The meals served under the contract shall conform to the cycle menus upon which the bid was based, and to menu changes agreed upon by the institution and food service management company;

(5) The books and records of the food service management company pertaining to the institution's food service operation shall be available for inspection and audit by representatives of the State agency, of the Department, and of the U.S. General Accounting Office at any reasonable time and place, for a period of 3 years from the date of receipt of final payment under the contract, or in cases where an audit requested by the State agency or the Department remains unresolved, until such time as the audit is resolved;

(6) The food service management company shall operate in accordance with current Program regulations;

(7) The food service management company shall not be paid for meals which are delivered outside of the agreed upon delivery time, are spoiled or unwholesome at the time of delivery, or do not otherwise meet the meal requirements contained in the contract;

(8) Meals shall be delivered in accordance with a delivery schedule prescribed in the contract;

(9) Increases and decreases in the number of meal orders may be made by the institution, as needed, within a prior notice period mutually agreed upon in the contract;

(10) All meals served under the Program shall meet the requirements of § 226.20;

(11) All breakfasts, lunches, and suppers delivered for service in outside-school-hours care centers shall be unitized, with or without milk, unless the State agency determines that unitization would impair the effectiveness of

food service operations. For meals delivered to child care centers and day care homes, the State agency may require unitization, with or without milk, of all breakfasts, lunches, and suppers only if the State agency has evidence which indicates that this requirement is necessary to ensure compliance with § 226.20.

(j) *Procurement provisions.* State agencies must require institutions to adhere to the procurement provisions set forth in § 226.22 and must determine that all meal procurements with food service management companies are in conformance with bid and contractual requirements of § 226.22.

(k) *Administrative reviews for institutions and responsible principals and responsible individuals*—(1) *General.* The State agency must develop procedures for offering administrative reviews to institutions and responsible principals and responsible individuals. The procedures must be consistent with paragraph (k) of this section.

(2) *Actions subject to administrative review.* Except as provided in § 226.8(g), the State agency must offer an administrative review for the following actions:

(i) *Application denial.* Denial of a new or renewing institution's application for participation (see paragraph (b) of this section, on State agency review of an institution's application; and paragraphs (c)(1) and (c)(2) of this section, on State agency denial of a new or renewing institution's application);

(ii) *Denial of sponsored facility application.* Denial of an application submitted by a sponsoring organization on behalf of a facility;

(iii) *Notice of proposed termination.* Proposed termination of an institution's agreement (see paragraphs (c)(2)(iii)(C), (c)(3)(iii)(C), and (c)(5)(i)(B) of this section, dealing with proposed termination of agreements with renewing institutions, participating institutions, and participating institutions suspended for health or safety violations);

(iv) *Notice of proposed disqualification of a responsible principal or responsible individual.* Proposed disqualification of a responsible principal or responsible individual (see paragraphs (c)(1)(iii)(C), (c)(2)(iii)(C), (c)(3)(iii)(C), and (c)(5)(i)(B) of this section, dealing with proposed disqualification of responsible principals or responsible individuals in new, renewing, and participating institutions, and participating institutions suspended for health or safety violations);

(v) *Suspension of participation.* Suspension of an institution's participation (see paragraphs (c)(5)(i)(B) and (c)(5)(ii)(D) of this section, dealing with suspension for health or safety reasons or submission of a false or fraudulent claim);

(vi) *Start-up or expansion funds denial.* Denial of an institution's application for start-up or expansion payments (see § 226.7(h));

(vii) *Advance denial.* Denial of a request for an advance payment (see § 226.10(b));

(viii) *Recovery of advances.* Recovery of all or part of an advance in excess of the claim for the applicable period. The recovery may be through a demand for full repayment or an adjustment of subsequent payments (see § 226.10(b)(3));

(ix) *Claim denial.* Denial of all or a part of an institution's claim for reimbursement (except for a denial based on a late submission under § 226.10(e)) (see §§ 226.10(f) and 226.14(a));

(x) *Claim deadline exceptions and requests for upward adjustments to a claim.* Decision by the State agency not to forward to FNS an exception request by an institution for payment of a late claim, or a request for an upward adjustment to a claim (see § 226.10(e));

(xi) *Overpayment demand.* Demand for the remittance of an overpayment (see § 226.14(a)); and

(xii) *Other actions.* Any other action of the State agency affecting an institution's participation or its claim for reimbursement.

(3) *Actions not subject to administrative review.* The State agency is prohibited from offering administrative reviews of the following actions:

(i) *FNS decisions on claim deadline exceptions and requests for upward adjustments to a claim.* A decision by FNS to deny an exception request by an institution for payment of a late claim, or for an upward adjustment to a claim (see § 226.10(e));

(ii) *Determination of serious deficiency.* A determination that an institution is

seriously deficient (see paragraphs (c)(1)(iii)(A), (c)(2)(iii)(A), (c)(3)(iii)(A), and (c)(5)(i)(B) of this section, dealing with proposed disqualification of responsible principals or responsible individuals in new, renewing, and participating institutions, and participating institutions suspended for health or safety violations);

(iii) *Disqualification and placement on State agency list and National disqualified list.* Disqualification of an institution or a responsible principal or responsible individual, and the subsequent placement on the State agency list and the National disqualified list (see paragraphs (c)(1)(iii)(E), (c)(2)(iii)(E), (c)(3)(iii)(E), and (c)(5)(i)(C) of this section, dealing with proposals to disqualify related to new, renewing, and participating institutions, and in institutions suspended for health or safety violations); or

(iv) *Termination.* Termination of a participating institution's agreement, including termination of a participating institution's agreement based on the disqualification of the institution by another State agency or FNS (see paragraphs (c)(3)(i) and (c)(7)(ii) of this section).

(4) *Provision of administrative review procedures to institutions and responsible principals and responsible individuals.* The State agency's administrative review procedures must be provided:

(i) Annually to all institutions;

(ii) To an institution and to each responsible principal and responsible individual when the State agency takes any action subject to an administrative review as described in paragraph (k)(2) of this section; and

(iii) Any other time upon request.

(5) *Procedures.* Except as described in paragraph (k)(9) of this section, which sets forth the circumstances under which an abbreviated administrative review is held, the State agency must follow the procedures in this paragraph (k)(5) when an institution or a responsible principal or responsible individual appeals any action subject to administrative review as described in paragraph (k)(2) of this section.

(i) *Notice of action.* The institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, must be given notice of the action being taken or proposed, the basis for the action, and the procedures under which the institution and the responsible principals or responsible individuals may request an administrative review of the action.

(ii) *Time to request administrative review.* The request for administrative review must be submitted in writing not later than 15 days after the date the notice of action is received, and the State agency must acknowledge the receipt of the request for an administrative review within 10 days of its receipt of the request.

(iii) *Representation.* The institution and the responsible principals and responsible individuals may retain legal counsel, or may be represented by another person.

(iv) *Review of record.* Any information on which the State agency's action was based must be available to the institution and the responsible principals and responsible individuals for inspection from the date of receipt of the request for an administrative review.

(v) *Opposition.* The institution and the responsible principals and responsible individuals may refute the findings contained in the notice of action in person or by submitting written documentation to the administrative review official. In order to be considered, written documentation must be submitted to the administrative review official not later than 30 days after receipt of the notice of action.

(vi) *Hearing.* A hearing must be held by the administrative review official in addition to, or in lieu of, a review of written information only if the institution or the responsible principals and responsible individuals request a hearing in the written request for an administrative review. If the institution's representative, or the responsible principals or responsible individuals or their representative, fail to appear at a scheduled hearing, they waive the right to a personal appearance before the administrative review official, unless the administrative review official agrees to reschedule the hearing. A representative of the State agency must be allowed to attend the hearing to respond to the testimony of the institution and

the responsible principals and responsible individuals and to answer questions posed by the administrative review official. If a hearing is requested, the institution, the responsible principals and responsible individuals, and the State agency must be provided with at least 10 days advance notice of the time and place of the hearing.

(vii) *Administrative review official.* The administrative review official must be independent and impartial. This means that, although the administrative review official may be an employee of the State agency, he/she must not have been involved in the action that is the subject of the administrative review, or have a direct personal or financial interest in the outcome of the administrative review. The institution and the responsible principals and responsible individuals must be permitted to contact the administrative review official directly if they so desire.

(viii) *Basis for decision.* The administrative review official must make a determination based solely on the information provided by the State agency, the institution, and the responsible principals and responsible individuals, and based on Federal and State laws, regulations, policies, and procedures governing the Program.

(ix) *Time for issuing a decision.* Within 60 days of the State agency's receipt of the request for an administrative review, the administrative review official must inform the State agency, the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals, of the administrative review's outcome. This timeframe is an administrative requirement for the State agency and may not be used as a basis for overturning the State agency's action if a decision is not made within the specified timeframe.

(x) *Final decision.* The determination made by the administrative review official is the final administrative determination to be afforded the institution and the responsible principals and responsible individuals.

(6) *Federal audit findings.* FNS may assert a claim against the State agency, in accordance with the procedures set forth in § 226.14(c), when an administrative review results in the dismissal of a claim against an institution asserted by the State agency based upon Federal audit findings.

(7) *Record of result of administrative reviews.* The State agency must maintain searchable records of all administrative reviews and their disposition.

(8) *Combined administrative reviews for responsible principals and responsible individuals.* The State agency must conduct the administrative review of the proposed disqualification of the responsible principals and responsible individuals as part of the administrative review of the application denial, proposed termination, and/or proposed disqualification of the institution with which the responsible principals or responsible individuals are associated. However, at the administrative review official's discretion, separate administrative reviews may be held if the institution does not request an administrative review or if either the institution or the responsible principal or responsible individual demonstrates that their interests conflict.

(9) *Abbreviated administrative review.* The State agency must limit the administrative review to a review of written submissions concerning the accuracy of the State agency's determination if the application was denied or the State agency proposes to terminate the institution's agreement because:

(i) The information submitted on the application was false (see paragraphs (c)(1)(ii)(A), (c)(2)(ii)(A), and (c)(3)(ii)(A) of this section);

(ii) The institution, one of its sponsored facilities, or one of the principals of the institution or its facilities is on the national disqualified list (see paragraph (b)(12) of this section);

(iii) The institution, one of its sponsored facilities, or one of the principals of the institution or its facilities is ineligible to participate in any other publicly funded program by reason of violation of the requirements of the program (see paragraph (b)(13) and (c)(3)(ii)(S) of this section); or

(iv) The institution, one of its sponsored facilities, or one of the principals of the institution or its facilities has been convicted for any activity that indicates a lack of business integrity (see paragraphs (b)(14) and (c)(3)(ii)(T) of this section).

(10) *Effect of State agency action.* The State agency's action must remain in effect during the administrative review. The effect of this requirement on particular State agency actions is as follows.

(i) *Overpayment demand.* During the period of the administrative review, the State agency is prohibited from taking action to collect or offset the overpayment. However, the State agency must assess interest beginning with the initial demand for remittance of the overpayment and continuing through the period of administrative review unless the administrative review official overturns the State agency's action.

(ii) *Recovery of advances.* During the administrative review, the State agency must continue its efforts to recover advances in excess of the claim for reimbursement for the applicable period. The recovery may be through a demand for full repayment or an adjustment of subsequent payments.

(iii) *Program payments.* The availability of Program payments during an administrative review of the denial of a new institution's application, denial of a renewing institution's application, proposed termination of a participating institution's agreement, and suspension of an institution are addressed in paragraphs (c)(1)(iii)(D), (c)(2)(iii)(D), (c)(3)(iii)(D), (c)(5)(i)(D), and (c)(5)(ii)(E), respectively, of this section.

(l) *Administrative reviews for day care homes*—(1) *General.* The State agency must ensure that, when a sponsoring organization proposes to terminate its Program agreement with a day care home for cause, the day care home is provided an opportunity for an administrative review of the proposed termination. The State agency may do this either by electing to offer a State-level administrative review, or by electing to require the sponsoring organization to offer an administrative review. The State agency must notify the appropriate FNSRO of its election under this option, or any change it later makes under this option, by September 25, 2002 or within 30 days of any subsequent change under this option. The State agency must make the same election with regard to who offers the administrative review to any day care home in the Program in that State. The State agency or the sponsoring organization must develop procedures for offering and providing these administrative reviews, and these procedures must be consistent with this paragraph (l).

(2) *Actions subject to administrative review.* The State agency or sponsoring organization must offer an administrative review to a day care home that appeals a notice of intent to terminate their agreement for cause or a suspension of their participation (see §§ 226.16(l)(3)(iii) and (l)(4)(ii)).

(3) *Actions not subject to administrative review.* Neither the State agency nor the sponsoring organization is required to offer an administrative review for reasons other than those listed in paragraph (l)(2) of this section.

(4) *Provision of administrative review procedures to day care homes.* The administrative review procedures must be provided:

(i) Annually to all day care homes;

(ii) To a day care home when the sponsoring organization takes any action subject to an administrative review as described in paragraph (l)(2) of this section; and

(iii) Any other time upon request.

(5) *Procedures.* The State agency or sponsoring organization, as applicable (depending on the State agency's election pursuant to paragraph (l)(1) of this section) must follow the procedures in this paragraph (l)(5) when a day care home requests an administrative review of any action described in paragraph (l)(2) of this section.

(i) *Uniformity.* The same procedures must apply to all day care homes.

(ii) *Representation.* The day care home may retain legal counsel, or may be represented by another person.

(iii) *Review of record and opposition.* The day care home may review the record on which the decision was based and refute the action in writing. The administrative review official is not required to hold a hearing.

(iv) *Administrative review official.* The administrative review official must be independent and impartial. This means that, although the administrative review official may be an employee of the State agency or an employee or board

member of the sponsoring organization, he/she must not have been involved in the action that is the subject of the administrative review or have a direct personal or financial interest in the outcome of the administrative review;

(v) *Basis for decision.* The administrative review official must make a determination based on the information provided by the sponsoring organization and the day care home and on Federal and State laws, regulations, polices, and procedures governing the Program.

(vi) *Time for issuing a decision.* The administrative review official must inform the sponsoring organization and the day care home of the administrative review's outcome within the period of time specified in the State agency's or sponsoring organization's administrative review procedures. This timeframe is an administrative requirement for the State agency or sponsoring organization and may not be used as a basis for overturning the termination if a decision is not made within the specified timeframe.

(vii) *Final decision.* The determination made by the administrative review official is the final administrative determination to be afforded the day care home.

(m) *Program assistance*—(1) *General.* The State agency must provide technical and supervisory assistance to institutions and facilities to facilitate effective Program operations, monitor progress toward achieving Program goals, and ensure compliance with all requirements of title VI of the Civil Rights Act of 1964, title IX of the Education amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Department's regulations concerning nondiscrimination (parts 15, 15a, and 15b of this title). The State agency must maintain documentation of supervisory assistance activities, including reviews conducted, corrective actions prescribed, and follow-up efforts.

(2) *Review priorities.* In choosing institutions for review, in accordance with paragraph (m)(6) of this section, the State agency must target for more frequent review institutions whose prior review included a finding of serious deficiency.

(3) *Review content.* As part of its conduct of reviews, the State agency must assess each institution's compliance with the requirements of this part pertaining to:

(i) Recordkeeping;

(ii) Meal counts;

(iii) Administrative costs;

(iv) Any applicable instructions and handbooks issued by FNS and the Department to clarify or explain this part, and any instructions and handbooks issued by the State agency which are not inconsistent with the provisions of this part;

(v) Facility licensing and approval;

(vi) Compliance with the requirements for annual updating of enrollment forms;

(vii) If an independent center, observation of a meal service;

(viii) If a sponsoring organization, training and monitoring of facilities;

(ix) If a sponsoring organization of day care homes, implementation of the serious deficiency and termination procedures for day care homes and, if such procedures have been delegated to sponsoring organizations in accordance with paragraph (l)(1) of this section, the administrative review procedures for day care homes;

(x) If a sponsoring organization, implementation of the household contact system established by the State agency pursuant to paragraph (m)(5) of this section;

(xi) If a sponsoring organization of day care homes, the requirements for classification of tier I and tier II day care homes; and

(xii) All other Program requirements.

(4) *Review of sponsored facilities.* As part of each required review of a sponsoring organization, the State agency must select a sample of facilities, in accordance with paragraph (m)(6) of this section. As part of such reviews, the State agency must conduct verification of Program applications in accordance with § 226.23(h) and must compare available enrollment and attendance records and the sponsoring organization's review results for that facility to meal counts submitted by those facilities for five days.

(5) *Household contacts.* As part of their monitoring of institutions, State agencies must establish systems for

making household contacts to verify the enrollment and attendance of participating children. Such systems must specify the circumstances under which household contacts will be made, as well as the procedures for conducting household contacts. In addition, State agencies must establish a system for sponsoring organizations to use in making household contacts as part of their review and oversight of participating facilities. Such systems must specify the circumstances under which household contacts will be made, as well as the procedures for conducting household contacts. State agencies must submit to FNSROs, no later than April 1, 2005, the policies and procedures they have developed governing household contacts conducted by both the State agency, as part of institution and facility reviews conducted in accordance with this paragraph (m), and by sponsoring organizations as part of the facility review process described in § 226.16(d)(5).

(6) *Frequency and number of required institution reviews.* The State agency must annually review at least 33.3 percent of all institutions. At least 15 percent of the total number of facility reviews required must be unannounced. The State agency must review institutions according to the following schedule:

(i) Independent centers and sponsoring organizations of 1 to 100 facilities must be reviewed at least once every three years. A review of such a sponsoring organization must include reviews of 10 percent of the sponsoring organization's facilities;

(ii) Sponsoring organizations with more than 100 facilities must be reviewed at least once every two years. These reviews must include reviews of 5 percent of the first 1,000 facilities and 2.5 percent of the facilities in excess of 1,000; and

(iii) New institutions that are sponsoring organizations of five or more facilities must be reviewed within the first 90 days of Program operations.

(n) *Program irregularities.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. State agencies shall maintain on file evidence of such investigations and actions. FNS and OIG may make investigations at the request of the State agency, or whenever FNS or OIG determines that investigations are appropriate.

(o) *Child care standards compliance.* The State agency shall, when conducting administrative reviews of child care centers, and day care homes approved by the State agency under paragraph (d)(3) of this section, determine compliance with the child care standards used to establish eligibility, and the institution shall ensure that all violations are corrected and the State shall ensure that the institution has corrected all violations. If violations are not corrected within the specified timeframe for corrective action, the State agency must issue a notice of serious deficiency in accordance with paragraph (c) of this section or § 226.16(l), as appropriate. However, if the health or safety of the children is imminently threatened, the State agency or sponsoring organization must follow the procedures set forth at paragraph (c)(5)(i) of this section, or § 226.16(l)(4), as appropriate. The State agency may deny reimbursement for meals served to attending children in excess of authorized capacity.

(p) *Sponsoring organization agreement.* Each State agency shall develop and provide for the use of a standard form of written permanent agreement between each day care home sponsoring organization and all day care homes participating in the Program under such organization. Nothing in the preceding sentence shall be construed to limit the ability of the sponsoring organization to suspend or terminate the permanent agreement in accordance with § 226.16(l). The State agency must also include in this agreement its policy to restrict transfers of day care homes between sponsoring organizations. The policy must restrict the transfers to no more frequently than once per year, except under extenuating circumstances, such as termination of the sponsoring organization's agreement or other circumstances defined by the State agency. However, the State agency may, at the request of the sponsor, approve an agreement

developed by the sponsor. State agencies may develop a similar form for use between sponsoring organizations and other types of facilities.

(q) Following its reviews of institutions and facilities under §§ 226.6(m) and 226.23(h) conducted prior to July 1, 1988, the State agency shall report data on key elements of program operations on a form designated by FNS. These key elements include but are not limited to the program areas of meal requirements, determination of eligibility for free and reduced price meals, and the accuracy of reimbursement claims. These forms shall be submitted within 90 days of the completion of the data collection for the institutions except that, if the State has elected to conduct reviews of verification separate from its administrative reviews, the State shall retain data until all key elements have been reviewed and shall report all data for each institution on one form within 90 days of the completion of the data collection for all key elements for that institution. States shall ensure that all key element data for an institution is collected during a 12-month period.

(r) *WIC program information.* State agencies must provide information on the importance and benefits of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) and WIC income eligibility guidelines, to participating institutions. In addition, the State agency must ensure that:

(1) Participating family day care homes and sponsored child care centers receive this information, and periodic updates of this information, from their sponsoring organizations or the State agency; and

(2) The parents of enrolled children also receive this information.

[47 FR 36527, Aug. 20, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 226.6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 226.7 State agency responsibilities for financial management.

(a) This section prescribes standards of financial management systems in administering Program funds by the State agency and institutions.

(b) Each State agency shall maintain an acceptable financial management system, adhere to financial management standards and otherwise carry out financial management policies in accordance with 7 CFR part 3015, 7 CFR part 3016 and 7 CFR part 3019, as applicable. State agencies or FNSRO's, where applicable, shall also have a system in place for monitoring and reviewing the institutions' documentation of their nonprofit status to ensure that all Program reimbursement funds are used: (1) Solely for the conduct of the food service operation; or (2) to improve such food service operations, principally for the benefit of the participants.

(c) *Management evaluations and audits.* State agencies shall provide FNS with full opportunity to conduct management evaluations (including visits to institutions and facilities) of all operations of the State agency under the Program and shall provide OIG with full opportunity to conduct audits (including visits to institutions and facilities) of all operations of the State agency under the Program. Within 60 calendar days of receipt of each management evaluation report, the State agency shall submit to FNSRO a written plan for correcting serious deficiencies, including specific timeframes for accomplishing corrective actions and initiating follow-up efforts. If a State agency makes a showing of good cause, however, FNS may allow more than 60 days in which to submit a plan. Each State agency shall make available its records, including records of the receipt and expenditure of funds, upon request by FNS or OIG. OIG shall also have the right to make audits of the records and operation of any institution.

(d) *Reports.* Each State agency shall submit to FNS the final Report of the Child and Adult Care Food Program (FNS 44) for each month which shall be limited to claims submitted in accordance with § 226.10(e) and which shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds

for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State agency's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary. Adjustments shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. A final Financial Status Report for each fiscal year shall be postmarked and/or submitted to FNS within 120 days after the end of the fiscal year. FNS shall not be responsible for reimbursing unpaid Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred.

(e) *Annual plan.* Each State shall submit to the Secretary for approval by August 15 of each year an annual plan for the use of State administrative expense funds, including a staff formula for State personnel.

(f) *Rate assignment.* Each State agency must require institutions (other than emergency shelters, at-risk afterschool care centers, and sponsoring organizations of emergency shelters, at-risk afterschool care centers, or day care homes) to submit, not less frequently than annually, information necessary to assign rates of reimbursement as outlined in § 226.9.

(g) *Budget approval.* The State agency must review institution budgets and must limit allowable administrative claims by each sponsoring organization to the administrative costs approved in its budget. The budget must demonstrate the institution's ability to manage Program funds in accordance with this part, FNS Instruction 796–2 ("Financial Management in the Child and Adult Care Food Program"), parts 3015, 3016, and 3019 of this title, and applicable Office of Management and Budget circulars. Sponsoring organizations must submit an administrative budget to the State agency annually, and independent centers must submit budgets as frequently as required by the State agency. Budget levels may be adjusted to reflect changes in Program activities. For sponsoring organizations of centers, the State agency is prohibited from approving the sponsoring organization's administrative budget, or any amendments to the budget, if the administrative budget shows the Program will be charged for administrative costs in excess of 15 percent of the meal reimbursements estimated to be earned during the budget year. However, the State agency may waive this limit if the sponsoring organization provides justification that it requires Program funds in excess of 15 percent to pay its administrative costs and if the State agency is convinced that the institution will have adequate funding to provide meals meeting the requirements of § 226.20. The State agency must document all waiver approvals and denials in writing, and must provide a copy of all such letters to the appropriate FNSRO.

(h) *Start-up and expansion payments.* Each State agency shall establish procedures for evaluating requests for start-up and expansion payments, issuing these payments to eligible sponsoring organizations, and monitoring the use of these payments.

(i) *Advance payments.* Each State agency shall establish procedures for issuing advance payments by the first day of each month and comparing these payments with earned reimbursement on a monthly basis. The State agency shall maintain on file a statement of the State's law and policy governing the use of interest earned on advanced funds by sponsors, institutions, child care facilities and adult day care facilities.

(j) *Recovery of overpayments.* Each State agency shall establish procedures to recover outstanding start-up, expansion and advance payments from institutions which, in the opinion of the State agency, will not be able to earn these payments.

(k) *Claims processing.* Each State agency shall establish procedures for institutions to properly submit claims

for reimbursement. Such procedures must include State agency edit checks, including but not limited to ensuring that payments are made only for approved meal types and that the number of meals for which reimbursement is provided does not exceed the product of the total enrollment times operating days times approved meal types. All valid claims shall be paid within 45 calendar days of receipt. Within 15 calendar days of receipt of any incomplete or incorrect claim which must be revised for payment, the State agency shall notify the institution as to why and how such claim must be revised. If the State agency disallows partial or full payment for a claim for reimbursement, it shall notify the institution which submitted the claim of its right to appeal under §226.6(k). State agencies may permit disallowances to be appealed separately from claims for reimbursement.

(l) *Participation controls.* The State agency may establish control procedures to ensure that payment is not made for meals served to participants attending in excess of the authorized capacity of each independent center, adult day care facility or child care facility.

(m) *Financial management system.* Each State agency shall establish a financial management system in accordance with 7 CFR part 3015, 7 CFR part 3016 and 7 CFR part 3019, as applicable, and FNS guidance to identify allowable Program costs and establish standards for institutional recordkeeping and reporting. These standards shall (1) prohibit claiming reimbursement for meals provided by a participant's family, except as authorized by §226.18(e) and (2) allow the cost of meals served to adults who perform necessary food service labor under the Program, except in day care homes. The State agency shall provide guidance on financial management requirements to each institution.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; Amdt. 5, 49 FR 18988, May 4, 1984; 50 FR 8580, Mar. 4, 1985; 50 FR 26975, July 1, 1985; 53 FR 52589, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 63 FR 9728, Feb. 26, 1998; 67 FR 43490, June 27, 2002; 69 FR 53542, Sept. 1, 2004; 71 FR 5, Jan. 3, 2006; 71 FR 39518, July 13, 2006; 72 FR 41606, July 31, 2007]

**§ 226.8 Audits.**

(a) Unless otherwise exempt, audits at the State and institution levels must be conducted in accordance with Office of Management and Budget circular A–133 and the Department's implementing regulations at part 3052 of this title. State agencies must establish audit policy for for-profit institutions. However, the audit policy established by the State agency must not conflict with the authority of the State agency or the Department to perform, or cause to be performed, audits, reviews, agreed-upon procedures engagements, or other monitoring activities.

(b) The funds provided to the State agency under §226.4(j) may be made available to institutions to fund a portion of organization-wide audits made in accordance with part 3052 of this title. The funds provided to an institution for an organization-wide audit must be determined in accordance with §3052.230(a) of this title.

(c) Funds provided under §226.4(j) may be used by the State agency to conduct program-specific audits of institutions not subject to organization-wide audits, or for which the State agency considers program specific audits to be needed. The State agency may use any funds remaining after all required program-specific audits have been performed to conduct administrative reviews or agreed-upon procedures engagements of institutions.

(d) Funds provided under §226.4(j) may only be obligated during the fiscal year for which those funds are allocated. If funds provided under §226.4(i) are not sufficient to meet the requirements of this section, the State agency may then use available State administrative expense funds to conduct audits, provided that the State agency is arranging for the audits and has not passed the responsibility down to the institution.

(e) In conducting management evaluations, reviews, or audits in a fiscal year, the State agency, FNS, or OIG may disregard an overpayment if the overpayment does not exceed $600. A State agency may establish, through State law, regulation or procedure, an alternate disregard threshold that does not exceed $600. This disregard may be

made once per each management evaluation, review, or audit per Program within a fiscal year. However, no overpayment is to be disregarded where there is substantial evidence of violations of criminal law or civil fraud statutes.

(f) While OIG shall rely to the fullest extent feasible upon State sponsored audits, OIG may, whenever it considers necessary:

(1) Make audits on a statewide basis;

(2) Perform on-site test audits;

(3) Review audit reports and related working papers of audits performed by or for State agencies.

(g) State agencies are not required to provide a hearing to an institution for State actions taken on the basis of a Federal audit determination. If a State agency does not provide a hearing in such situations, FNS will provide a hearing, upon request, in accordance with procedures set forth in § 226.6(k).

[47 FR 36527, Aug. 20, 1982, as amended at 50 FR 8580, Mar. 4, 1985; 51 FR 4295, Feb. 4, 1986; 52 FR 5526, Feb. 25, 1987; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 67 FR 43490, June 27, 2002; 69 FR 53543, Sept. 1, 2004; 70 FR 43261, July 27, 2005; 71 FR 5, Jan. 3, 2006; 71 FR 30563, May 30, 2006; 72 FR 41607, July 31, 2007]

## Subpart D—Payment Provisions

### § 226.9 Assignment of rates of reimbursement for centers.

(a) The State agency shall assign rates of reimbursement, not less frequently than annually, on the basis of family-size and income information reported by each institution. However, no rates should be assigned for emergency shelters and at-risk afterschool care centers. Assigned rates of reimbursement may be changed more frequently than annually if warranted by changes in family-size and income information. Assigned rates of reimbursement shall be adjusted annually to reflect changes in the national average payment rates.

(b) Except for emergency shelters and at-risk afterschool care centers, the State agency must either:

(1) Require that institutions submit each month's figures for meals served daily to participants from families meeting the eligibility standards for free meals, to participants from families meeting the eligibility standards for reduced-price meals, and to participants from families not meeting such guidelines; or

(2) Establish claiming percentages, not less frequently than annually, for each institution on the basis of the number of enrolled participants eligible for free, reduced-price, and paid meals, except that children who only participate in emergency shelters or the at-risk afterschool care component of the Program must not be considered to be enrolled participants for the purpose of establishing claiming percentages; or

(3) Determine a blended per-meal rate of reimbursement, not less frequently than annually, by adding the products obtained by multiplying the applicable national average payment rate of reimbursement for each category (free, reduced-price, paid) by the claiming percentage for that category.

(c) States have two methods of reimbursing institutions. The method chosen by the State agency must be applied to all institutions participating in the Program in that State. These methods are:

(1) Meals times rates payment, which involves reimbursing an institution for meals served at the assigned rate for each meal. This method entails no comparison to the costs incurred by the institution for the meal service; and,

(2) Meals times rates or actual costs, whichever is the lesser, which involves reimbursing an institution for meals served at the assigned rate for each meal or at the level of the costs actually incurred by the institution for the meal service. This method does entail a comparison of the costs incurred to the meal rates, with the costs being a limiting factor on the level of reimbursement an institution may receive.

(d) In those States where the State agency has chosen the option to implement a meals times rates payment system State-wide, the State agency may elect to pay an institution's final claim for reimbursement for the fiscal year at higher reassigned rates of reimbursement for lunches and suppers; however, the reassigned rates may not exceed the applicable maximum rates

of reimbursement established under §210.11(b) of the National School Lunch Program regulations. In those States which use the method of comparing meals times rates or actual costs, whichever is lesser, the total payments made to an institution shall not exceed the total net costs incurred for the fiscal year.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 71 FR 5, Jan. 3, 2006; 72 FR 41607, July 31, 2007; 75 FR 16327, Apr. 1, 2010]

### § 226.10 Program payment procedures.

(a) If a State agency elects to issue advance payments to all or some of the participating institutions in the State, it must provide such advances no later than the first day of each month to those eligible institutions electing to receive advances in accordance with §226.6 (f)(3)(iv)(F). Advance payments shall equal the full level of claims estimated by the State agency to be submitted in accordance with paragraph (c) of this section, considering prior reimbursement claims and other information such as fluctuations in enrollment. The institution may decline to receive all or any part of the advance.

(b) For each fiscal year, the amount of payment made, including funds advanced to an institution, shall not exceed the amount of valid reimbursement claimed by that institution. To ensure that institutions do not receive excessive advance payments, the State agency shall observe the following procedures:

(1) After three advance payments have been made to an institution, the State agency shall ensure that no subsequent advance is made until the State agency has validated the institution's claim for reimbursement for the third month prior to the month for which the next advance is to be paid.

(2) If the State agency has audit or monitoring evidence of extensive program deficiencies or other reasons to believe that an institution will not be able to submit a valid claim for reimbursement, advance payments shall be withheld until the claim is received or the deficiencies are corrected.

(3) Each month the State agency shall compare incoming claims against advances to ensure that the level of funds authorized under paragraph (a) of this section does not exceed the claims for reimbursement received from the institution. Whenever this process indicates that excessive advances have been authorized, the State agency shall either demand full repayment or adjust subsequent payments, including advances.

(4) If, as a result of year end reconciliation as required by 7 CFR part 3016 or 7 CFR part 3019, as applicable, the State agency determines that reimbursement earned by an institution during a fiscal year is less than the amount paid, including funds advanced to that institution, the State agency shall demand repayment of the outstanding balance or adjust subsequent payments.

(c) Claims for Reimbursement shall report information in accordance with the financial management system established by the State agency, and in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the final Report of the Child and Adult Care Food Program (FNS 44) required under §226.7(d). In submitting a Claim for Reimbursement, each institution shall certify that the claim is correct and that records are available to support that claim. For each month in which independent for-profit child care centers and independent for-profit outside-school-hours care centers claim reimbursement, they must submit the number and percentage of children in care (enrolled or licensed capacity, whichever is less) that documents at least 25 percent are eligible for free or reduced-price meals or are title XX beneficiaries. However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be considered in determining this eligibility. Sponsoring organizations of for-profit child care centers or for-profit outside-school-hours care centers must submit the number and percentage of children in care (enrolled or licensed capacity, whichever is less) that documents that at least 25 percent are eligible for free or reduced-price meals or are title XX beneficiaries. Sponsoring organizations of such centers must not submit a claim for any for-profit center

in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) during the claim month were eligible for free or reduced-price meals or were title XX beneficiaries. Independent for-profit adult day care centers shall submit the percentages of enrolled adult participants receiving title XIX or title XX benefits for the month claimed for months in which not less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries. Sponsoring organizations of such adult day care centers shall submit the percentage of enrolled adult participants receiving title XIX or title XX benefits for each center for the claim. Sponsoring organizations of such centers shall not submit claims for adult day care centers in which less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries for the month claimed. Prior to submitting its consolidated monthly claim to the State agency, each sponsoring organization must perform edit checks on each facility's meal claim. At a minimum, the sponsoring organization's edit checks must:

(1) Verify that each facility has been approved to serve the types of meals claimed;

(2) Compare the number of children enrolled for care at each facility, multiplied by the number of days on which the facility is approved to serve meals, to the total number of meals claimed by the facility for that month. Discrepancies between the facility's meal claim and its enrollment must be subjected to more thorough review to determine if the claim is accurate; and

(3) Detect block claiming (as defined in §226.2) by any facility. If block claiming is detected, the sponsoring organization must not include that facility among those facilities receiving less than three reviews during the current year, in accordance with §226.16(d)(4), and must ensure that any facility submitting a block claim receives an unannounced review within 60 days of the discovery of the block claim. If, in the course of conducting this review, the sponsoring organization determines that there is a logical explanation for the facility to regularly submit a block claim, the sponsoring organization must note this in the facility's review file and is not required to conduct an unannounced visit after other block claims detected during the current year. In addition, if a State agency determines that the conduct of all required unannounced reviews within 60 days will impose unwarranted burdens on a particular sponsoring organization, the State agency may provide that sponsoring organization with up to 30 additional days to complete the required unannounced reviews.

(d) All records to support the claim shall be retained for a period of three years after the date of submission of the final claim for the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the end of the three year period as long as may be required for the resolution of the issues raised by the audit. All accounts and records pertaining to the Program shall be made available, upon request, to representatives of the State agency, of the Department, and of the U.S. General Accounting Office for audit or review, at a reasonable time and place.

(e) Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall cover only Program operations for that month except if the first or last month of Program operations in any fiscal year contains 10 operating days or less, such month may be added to the Claim for Reimbursement for the appropriate adjacent month; however, Claims for Reimbursement may not combine operations occurring in two fiscal years. A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective

action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of the Child and Adult Care Food Programs (FNS–44) for the claim month which is required under 226.7(d). Upward adjustments in Program funds claimed which are not reflected in the final FNS–44 for the claim month shall not be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made without FNS authorization regardless of when it is determined that such adjustments are necessary.

(f) If, based on the results of audits, investigations, or other reviews, a State agency has reason to believe that an institution, child or adult care facility, or food service management company has engaged in unlawful acts with respect to Program operations, the evidence found in audits, investigations, or other reviews is a basis for non-payment of claims for reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended by Amdt. 5, 49 FR 18988, May 4, 1984; 50 FR 26975, July 1, 1985; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 62 FR 23618, May 1, 1997; 69 FR 53543, Sept. 1, 2004; 70 FR 43261, July 27, 2005; 71 FR 39519, July 13, 2006; 72 FR 41607, July 31, 2007; 75 FR 16327, Apr. 1, 2010]

### § 226.11 Program payments for centers.

(a) *Requirement for agreements.* Payments must be made only to institutions operating under an agreement with the State agency for the meal types specified in the agreement served at approved child care centers, at-risk afterschool care centers, adult day care centers, emergency shelters, and outside-school-hours care centers. A State agency may develop a policy under which centers are reimbursed for meals served in accordance with provisions of the Program in the calendar month preceding the calendar month in which the agreement is executed, or the State agency may develop a policy under which centers receive reimbursement only for meals served in approved centers on and after the effective date of the Program agreement. If the State agency's policy permits centers to earn reimbursement for meals served prior to the execution of a Program agreement, program reimbursement must not be received by the center until the agreement is executed.

(b) *Institutions*—(1) *Edit checks of sponsored centers.* Prior to submitting its consolidated monthly claim to the State agency, each sponsoring organization must conduct reasonable edit checks on the sponsored centers' meal claims, which at a minimum, must include those edit checks specified at § 226.10(c).

(2) *Child and adult care institutions.* Each child care institution and each adult day care institution must report each month to the State agency the total number of Program meals, by type (breakfasts, lunches, suppers, and snacks), served to children or adult participants, respectively, except as provided in paragraph (b)(3) of this section.

(3) *For-profit center exception.* For-profit child care centers, including for-profit at-risk afterschool care centers and outside-school-hours care centers, must provide the reports required in paragraph (b)(2) of this section only for calendar months during which at least 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced-price meals or were title XX beneficiaries. However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be considered in determining this eligibility. For-profit adult day care centers must provide the reports required in paragraph (b)(2) of this section only for calendar months during which at least 25 percent of enrolled adult participants were beneficiaries of title XIX, title XX, or a combination of titles XIX and XX.

(c) *Reimbursement*—(1) *Child and adult care institutions.* Each State agency must base reimbursement to each approved child care institution and adult day care institution on actual time of service meal counts of meals, by type, served to children or adult participants multiplied by the assigned rates of reimbursement, except as provided in paragraph (c)(4) of this section.

(2) *At-risk afterschool care institutions.* Except as provided in paragraph (c)(4) of this section, State agencies must base reimbursement to each at-risk afterschool care center on the number of at-risk afterschool snacks and/or at-risk afterschool meals that are served to children.

(3) *Emergency shelters.* Each State agency must base reimbursement to each emergency shelter on the number of meals served to children multiplied by the free rates for meals and snacks.

(4) *For-profit center exception.* For-profit child care centers, including for-profit at-risk and outside-school-hours care centers, must be reimbursed only for the calendar months during which at least 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced-price meals or were title XX beneficiaries. However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be considered in determining this eligibility. For-profit adult day care centers must be reimbursed only for the calendar months during which at least 25 percent of enrolled adult participants were beneficiaries of title XIX, title XX, or a combination of titles XIX and XX.

(5) *Computation of reimbursement.* Except for at-risk afterschool care centers and emergency shelters, the State agency must compute reimbursement by either:

(i) *Actual counts.* Base reimbursement to institutions on actual time of service counts of meals served, and multiply the number of meals, by type, served to participants that are eligible to receive free meals, participants eligible to receive reduced-price meals, and participants not eligible for free or reduced-price meals by the applicable national average payment rate; or

(ii) *Claiming percentages.* Apply the applicable claiming percentage or percentages to the total number of meals, by type, served to participants and multiply the product or products by the assigned rate of reimbursement for each meal type; or

(iii) *Blended rates.* Multiply the assigned blended per meal rate of reimbursement by the total number of meals, by type, served to participants.

(d) *Limits on reimbursement.* If the State agency elects to reimburse its institutions according to the lesser of rates or actual costs, total Program payments to an institution during any fiscal year, including any cash payments in lieu of commodities, shall not exceed allowable Program operating and administrative costs, less income to the Program. The State agency may limit payments for administrative costs to the amount approved in the annual administrative budget of the institution. The State agency may prohibit an institution from using payments for operating costs to pay for administrative expenses.

(e) *Institution recordkeeping.* Each institution shall maintain records as prescribed by the State agency's financial management system.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; 52 FR 36907, Oct. 2, 1987; 53 FR 52590, Dec. 28, 1988; 62 FR 23618, May 1, 1997; 69 FR 53543, Sept. 1, 2004; 70 FR 43262, July 27, 2005; 71 FR 5, Jan. 3, 2006; 72 FR 41607, July 31, 2007; 75 FR 16327, Apr. 1, 2010]

### § 226.12 Administrative payments to sponsoring organizations for day care homes.

(a) *General.* Sponsoring organizations for day care homes shall receive payments for administrative costs. During any fiscal year, administrative costs payments to a sponsoring organization may not exceed the lesser of (1) actual expenditures for the costs of administering the Program less income to the Program, or (2) the amount of administrative costs approved by the State agency in the sponsoring organization's budget, or (3) the sum of the products obtained by multiplying each month the sponsoring organization's:

(i) Initial 50 day care homes by 42 dollars;

(ii) Next 150 day care homes by 32 dollars;

(iii) Next 800 day care homes by 25 dollars; and

(iv) Additional day care homes by 22 dollars.

During any fiscal year, administrative payments to a sponsoring organization may not exceed 30 percent of the total amount of administrative payments and food service payments for day care home operations.

(b) *Start-up and expansion payments.* (1) Prospective sponsoring organizations of day care homes, participating sponsoring organizations of child care centers or outside-school-hours care centers, independent centers, and participating sponsoring organizations of less than 50 homes which meet the criteria in paragraph (b)(2) of this section shall be entitled to receive start-up payments to develop or expand successful Program operations in day care homes. Participating sponsoring organizations of day care homes which meet the criteria in paragraph (b)(2) of this section shall be entitled to receive expansion payments to initiate or expand Program operations in day care homes in low-income or rural areas. The State agency shall approve start-up payments only once for any eligible sponsoring organization, but may approve expansion payments for any eligible sponsoring organization more than once, provided that: the request must be for expansion into an area(s) other than that specified in their initial or prior request; and 12 months has elapsed since the sponsoring organization has satisfied all obligations under its initial or prior expansion agreement. Eligible sponsoring organizations which have received start-up payments shall be eligible to apply for expansion payments at a date no earlier than 12 months after it has satisfied all its obligations under its start-up agreement with the State agency.

(2) Sponsoring organizations which apply for start-up or expansion payments shall evidence:

(i) Public status or tax exempt status under the Internal Revenue Code of 1986;

(ii) An organizational history of managing funds and ongoing activities (i.e., administering public or private programs);

(iii) An acceptable and realistic plan for recruiting day care homes to participate in the Program (such as the method of contacting providers), which may be based on estimates of the number of day care homes to be recruited and information supporting their existence, and in the case of sponsoring organizations applying for expansion payments, documentation that the day care homes to be recruited are located in low-income or rural areas; and

(iv) An acceptable preliminary sponsoring organization management plan including, but not limited to, plans for preoperational visits and training.

(3) The State agency shall deny start-up and expansion payments to applicant sponsoring organizations which fail to meet the criteria of paragraph (b)(2) of this section or which have not been financially responsible in the operation of other programs funded by Federal, State, or local governments. The State agency shall notify the sponsoring organization of the reasons for denial and allow the sponsoring organization full opportunity to submit evidence on appeal as provided for in § 226.6(k). Any sponsoring organization applying for start-up or expansion funds shall be notified of approval or disapproval by the State agency in writing within 30 calendar days of filing a complete and correct application. If a sponsoring organization submits an incomplete application, the State agency shall notify the sponsoring organization within 15 calendar days of receipt of the application and shall provide technical assistance, if necessary, to the sponsoring organization for the purpose of completing its application.

(4) Sponsoring organizations which apply for and meet the criteria for start-up or expansion payments shall enter into an agreement with the State agency. The agreement shall specify:

(i) Activities which the sponsoring organization will undertake to initiate or expand Program operations in day care homes;

(ii) The amount of start-up or expansion payments to be issued to the sponsoring organization, together with an administrative budget detailing the costs which the sponsoring organization shall incur, document, and claim;

(iii) The time allotted to the sponsoring organization for the initiation or expansion of Program operations in family day care homes;

(iv) The responsibility of the applicant sponsoring organization to repay, upon demand by the State agency, start-up or expansion payments not expended in accordance with the agreement.

(5) Upon execution of the agreement, the State agency shall issue a start-up or expansion payment to the sponsoring organization in an amount equal to not less than one, but not more than two month's anticipated administrative reimbursement to the sponsoring organization as determined by the State agency. However, no sponsoring organization may receive start-up or expansion payments for more than 50 day care homes. Eligible sponsoring organizations with fewer than 50 homes under their jurisdiction at the time of application for start-up payments may receive such payments for up to 50 homes, less the number of homes under their jurisdiction. Eligible sponsoring organizations applying for expansion funds may receive at a maximum such payments for up to 50 homes at the currently assigned administrative payment for the first 50 homes. In determining the amount of start-up or expansion payments to be made to a sponsoring organization, the State agency shall consider the anticipated level of start-up or expansion costs to be incurred by the sponsoring organization and alternate sources of funds available to the sponsoring organization.

(6) Upon expiration of the time allotted to the sponsoring organization for initiating or expanding Program operations in day care homes, the State agency shall obtain and review documentation of activities performed and costs incurred by the sponsoring organization under the terms of the start-up or expansion agreement. If the sponsoring organization has not made every reasonable effort to carry out the activities specified in the agreement, the State agency shall demand repayment of all or part of the payment. The sponsoring organization may retain start-up or expansion payments for all day care homes which initiate Program operations. However, no sponsoring organization may retain any start-up or expansion payments in excess of its actual costs for the expenditures specified in the agreement.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 53 FR 52590, Dec. 28, 1988; 63 FR 9728, Feb. 26, 1998; 67 FR 43490, June 27, 2002]

### § 226.13 Food service payments to sponsoring organizations for day care homes.

(a) Payments shall be made only to sponsoring organizations operating under an agreement with the State agency for the meal types specified in the agreement served to enrolled nonresident children and eligible enrolled children of day care home providers, at approved day care homes.

(b) Each sponsoring organization shall report each month to the State agency the total number of meals, by type (breakfasts, lunches, suppers, and snacks) and by category (tier I and tier II), served to children enrolled in approved day care homes. Prior to submitting its consolidated monthly claim to the State agency, each sponsoring organization must conduct reasonable edit checks on the day care homes' meal claims which, at a minimum, include those edit checks specified at § 226.10(c).

(c) Each sponsoring organization shall receive payment for meals served to children enrolled in approved day care homes at the tier I and tier II reimbursement rates, as applicable based on daily meal counts taken in the home, and as established by law and adjusted in accordance with § 226.4. However, the rates for lunches and suppers shall be reduced by the value of commodities established under § 226.5(b) for all sponsoring organizations for day care homes which have elected to receive commodities. For tier I day care homes, the full amount of food service payments shall be disbursed to each day care home on the basis of the number of meals served, by type, to enrolled children. For tier II day care homes, the full amount of food service payments shall be disbursed to each day care home on the basis of the number of meals served to enrolled children by type, and by category (tier I and tier II) as determined in accordance with paragraphs (d)(2) and (d)(3) of this section. However, the sponsoring organization may withhold from Program payments to each home an amount equal to costs incurred for the provision of Program foodstuffs or meals by the sponsoring organization on behalf of the home and with the home provider's written consent.

(d) As applicable, each sponsoring organization for day care homes shall:

(1) Require that tier I day care homes submit the number of meals served, by type, to enrolled children.

(2) Require that tier II day care homes in which the provider elects not to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals submit the number of meals served, by type, to enrolled children.

(3) Not more frequently than annually, select one of the methods described in paragraphs (d)(3) (i)–(iii) of this section for all tier II day care homes in which the provider elects to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals. In such homes, the sponsoring organization shall either:

(i) Require that such day care homes submit the number and types of meals served each day to each enrolled child by name. The sponsoring organization shall use the information submitted by the homes to produce an actual count, by type and by category (tier I and tier II), of meals served in the homes; or

(ii) Establish claiming percentages, not less frequently than semiannually, for each such day care home on the basis of one month's data concerning the number of enrolled children determined eligible for free or reduced-price meals. Sponsoring organizations shall obtain one month's data by collecting either enrollment lists (which show the name of each enrolled child in the day care home), or attendance lists (which show, by days or meals, the rate of participation of each enrolled child in the day care home). The State agency may require a sponsoring organization to recalculate the claiming percentage for any of its day care homes before the required semiannual calculation if the State agency has reason to believe that a home's percentage of income-eligible children has changed significantly or was incorrectly established in the previous calculation. Under this system, day care homes shall be required to submit the number of meals served, by type, to enrolled children; or

(iii) Determine a blended per-meal rate of reimbursement, not less frequently than semiannually, for each such day care home by adding the products obtained by multiplying the applicable rates of reimbursement for each category (tier I and tier II) by the claiming percentage for that category, as established in accordance with paragraph (d)(3)(ii) of this section. The State agency may require a sponsoring organization to recalculate the blended rate for any of its day care homes before the required semiannual calculation if the State agency has reason to believe that a home's percentage of income-eligible children has changed significantly or was incorrectly established in the previous calculation. Under this system, day care homes shall be required to submit the number of meals served, by type, to enrolled children.

[47 FR 36527, Aug. 20, 1982, as amended at 62 FR 903, Jan. 7, 1997; 62 FR 5519, Feb. 6, 1997; 63 FR 9105, Feb. 24, 1998; 69 FR 53544, Sept. 1, 2004; 72 FR 41603, July 31, 2007]

### § 226.14 Claims against institutions.

(a) State agencies shall disallow any portion of a claim for reimbursement and recover any payment to an institution not properly payable under this part. State agencies may consider claims for reimbursement not properly payable if an institution does not comply with the recordkeeping requirements contained in this part. The State agency may permit institutions to pay overclaims over a period of one or more years. However, the State agency must assess interest beginning with the initial demand for remittance. Further, when an institution requests and is granted an administrative review of the State agency's overpayment demand, the State agency is prohibited from taking action to collect or offset the overpayment until the administrative review is concluded. The State agency must maintain searchable records of funds recovery activities. If the State agency determines that a sponsoring organization of centers has spent more than 15 percent of its meal reimbursements for a budget year for administrative costs (or more than any higher limit established pursuant to a waiver granted under § 226.7(g)), the State agency must take appropriate fiscal action. In addition,

except with approval from the appropriate FNSRO, State agencies shall consider claims for reimbursement not payable when an institution fails to comply with the recordkeeping requirements that pertain to records directly supporting claims for reimbursement. Records that directly support claims for reimbursement include, but are not limited to, daily meal counts, menu records, and enrollment and attendance records, as required by §226.15(e). State agencies shall assert overclaims against any sponsoring organization of day care homes which misclassifies a day care home as a tier I day care home unless the misclassification is determined to be inadvertent under guidance issued by FNS. However, the State agency shall notify the institution of the reasons for any disallowance or demand for repayment, and allow the institution full opportunity to submit evidence on appeal as provided for in §226.6(k). Miminum State agency collection procedures for unearned payments shall include:

(1) Written demand to the institution for the return of improper payments; (2) if, after 30 calendar days, the institution fails to remit full payment or agree to a satisfactory repayment schedule, a second written demand for the return of improper payments sent by certified mail return receipt requested; and (3) if, after 60 calendar days, the institution fails to remit full payment or agree to a satisfactory repayment schedule, the State agency shall refer the claim against the institution to appropriate State or Federal authorities for pursuit of legal remedies.

(b) In the event that the State agency finds that an institution which prepares its own meals is failing to meet the meal requirements of §226.20, the State agency need not disallow payment or collect an overpayment arising out of such failure if the institution takes such other action as, in the opinion of the State agency, will have a corrective effect. However, the State agency shall not disregard any overpayments or waive collection action arising from the findings of Federal audits.

(c) If FNS does not concur with the State agency's action in paying an institution or in failing to collect an overpayment, FNS shall notify the State agency of its intention to assert a claim against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning the action taken. The State agency shall be liable to FNS for failure to collect an overpayment, unless FNS determines that the State agency has conformed with this part in issuing the payment and has exerted reasonable efforts to recover the improper payment.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 50 FR 8580, Mar. 4, 1985; 53 FR 52590, Dec. 28, 1988; 62 FR 903, Jan. 7, 1997; 64 FR 72260, Dec. 27, 1999; 67 FR 43490, June 27, 2002; 69 FR 53544, Sept. 1, 2004]

## Subpart E—Operational Provisions

### § 226.15 Institution provisions.

(a) *Tax exempt status.* Except for for-profit centers and sponsoring organizations of such centers, institutions must be public, or have tax exempt status under the Internal Revenue Code of 1986.

(b) *New applications and renewals.* Each institution must submit to the State agency with its application all information required for its approval as set forth in §226.6(b) and 226.6(f). Such information must demonstrate that a new institution has the administrative and financial capability to operate the Program in accordance with this part and with the performance standards set forth in §226.6(b)(1)(xviii), and that a renewing institution has the administrative and financial capability to operate the Program in accordance with this part and with the performance standards set forth in §226.6(b)(2)(vii).

(c) *Responsibility.* Each institution shall accept final administrative and financial responsibility for Program operations. No institution may contract out for management of the Program.

(d) *Staffing.* Each institution shall provide adequate supervisory and operational personnel for management and monitoring of the Program.

(e) *Recordkeeping.* Each institution shall establish procedures to collect

and maintain all program records required under this part, as well as any records required by the State agency. Failure to maintain such records shall be grounds for the denial of reimbursement for meals served during the period covered by the records in question and for the denial of reimbursement for costs associated with such records. At a minimum, the following records shall be collected and maintained:

(1) Copies of all applications and supporting documents submitted to the State agency;

(2) Documentation of the enrollment of each participant at centers (except for outside-school-hours care centers, emergency shelters, and at-risk afterschool care centers). All types of centers, except for emergency shelters and at-risk afterschool care centers, must maintain information used to determine eligibility for free or reduced-price meals in accordance with § 226.23(e)(1). For child care centers, such documentation of enrollment must be updated annually, signed by a parent or legal guardian, and include information on each child's normal days and hours of care and the meals normally received while in care.

(3) Documentation of: The enrollment of each child at day care homes; information used to determine the eligibility of enrolled providers' children for free or reduced price meals; information used to classify day care homes as tier I day care homes, including official source documentation obtained from school officials when the classification is based on elementary school data; and information used to determine the eligibility of enrolled children in tier II day care homes that have been identified as eligible for free or reduced price meals in accordance with § 226.23(e)(1). Such documentation of enrollment must be updated annually, signed by a parent or legal guardian, and include information on each child's normal days and hours of care and the meals normally received while in care.

(4) Daily records indicating the number of participants in attendance and the daily meal counts, by type (breakfast, lunch, supper, and snacks), served to family day care home participants, or the time of service meal counts, by type (breakfast, lunch, supper, and snacks), served to center participants. State agencies may require family day care homes to record meal counts at the time of meal service only in day care homes providing care for more than 12 children in a single day, or in day care homes that have been found seriously deficient due to problems with their meal counts and claims.

(5) Except at day care homes, daily records indicating the number of meals, by type, served to adults performing labor necessary to the food service;

(6) Copies of invoices, receipts, or other records required by the State agency financial management instruction to document:

(i) Administrative costs claimed by the institution;

(ii) Operating costs claimed by the institution except sponsoring organizations of day care homes; and

(iii) Income to the Program.

(7) Copies of all claims for reimbursement submitted to the State agency;

(8) Receipts for all Program payments received from the State agency;

(9) If applicable, information concerning the dates and amounts of disbursement to each child care facility or adult day care facility under its auspices;

(10) Copies of menus, and any other food service records required by the State agency;

(11) If applicable, information concerning the location and dates of each child care or adult day care facility review, any problems noted, and the corrective action prescribed and effected;

(12) Information on training session date(s) and location(s), as well as topics presented and names of participants; and

(13) Documentation of nonprofit food service to ensure that all Program reimbursement funds are used: (i) Solely for the conduct of the food service operation; or (ii) to improve such food service operations, principally for the benefit of the enrolled participants.

(14) For sponsoring organizations, records documenting the attendance at training of each staff member with monitoring responsibilities. Training must include instruction, appropriate

to the level of staff experience and duties, on the Program's meal patterns, meal counts, claims submission and claim review procedures, recordkeeping requirements, and an explanation of the Program's reimbursement system.

(f) *Day care home classifications.* Each sponsoring organization of day care homes shall determine which of the day care homes under its sponsorship are eligible as tier I day care homes. A sponsoring organization may use current school or census data provided by the State agency or free and reduced price applications collected from day care home providers in making a determination for each day care home. When using elementary school or census data for making tier I day care home determinations, a sponsoring organization shall first consult school data, except in cases in which busing or other bases of attendance, such as magnet or charter schools, result in school data not being representative of an attendance area's household income levels. In these cases, census data should generally be consulted instead of school data. A sponsoring organization may also use census data if, after reasonable efforts are made, as defined by the State agency, the sponsoring organization is unable to obtain local elementary school attendance area information. A sponsoring organization may also consult census data after having consulted school data which fails to support a tier I day care home determination for rural areas with geographically large elementary school attendance areas, for other areas in which an elementary school's free and reduced price enrollment is above 40 percent, or in other cases with State agency approval. However, if a sponsoring organization believes that a segment of an otherwise eligible elementary school attendance area is above the criteria for free or reduced price meals, then the sponsoring organization shall consult census data to determine whether the homes in that area qualify as tier I day care homes based on census data. If census data does not support a tier I classification, then the sponsoring organization shall reclassify homes in segments of such areas as tier II day care homes unless the individual providers can document tier I eligibility on the basis of their household income. When making tier I day care home determinations based on school data, a sponsoring organization shall use attendance area information that it has obtained, or verified with appropriate school officials to be current, within the last school year. Determinations of a day care home's eligibility as a tier I day care home shall be valid for one year if based on a provider's household income, five years if based on school data, or until more current data are available if based on census data. However, a sponsoring organization, State agency, or FNS may change the determination if information becomes available indicating that a home is no longer in a qualified area. The State agency shall not routinely require annual redeterminations of the tiering status of tier I day care homes based on updated elementary school data.

(g) *Area eligibility determinations for at-risk afterschool care centers.* Sponsoring organizations of at-risk afterschool care centers must provide information, as required by the State agency, which permits the State agency to determine whether the centers they sponsor are located in eligible areas. Such information may include the most recent free and reduced-price school data available pursuant to § 226.6(f)(1)(ix) and attendance area information that it has obtained, or verified with the appropriate school officials to be current, within the last school year.

(h) *Payment to employees.* No institution that is a sponsoring organization of family day care homes and that employs more than one person is permitted to base payment (including bonuses or gratuities) to its employees, contractors, or family day care home providers solely on the number of new family day care homes recruited for the sponsoring organization's Program.

(i) *Claims submission.* Each institution shall submit claims for reimbursement to the State agency in accordance with § 226.10.

(j) *Program agreement.* Each institution shall enter into a Program agreement with the State agency in accordance with § 226.6(b)(4).

(k) *Commodities.* Each institution receiving commodities shall ensure proper commodity utilization.

(l) *Special Milk Program.* No institution may participate in both the Child and Adult Care Food Program and the Special Milk Program at the same time.

(m) *Elderly feeding programs.* Institutions which are school food authorities (as defined in part 210 of this chapter) may use facilities, equipment and personnel supported by funds provided under this part to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.).

(n) *Regulations and guidance.* Each institution must comply with all regulations issued by FNS and the Department, all instructions and handbooks issued by FNS and the Department to clarify or explain existing regulations, and all regulations, instructions and handbooks issued by the State agency that are consistent with the provisions established in Program regulations.

(o) *Information on WIC.* Each institution must ensure that parents of enrolled children are provided with current information on the benefits and importance of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) and the eligibility requirements for WIC participation.

[47 FR 36527, Aug. 20, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 226.15, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 226.16 Sponsoring organization provisions.

(a) Each sponsoring organization shall comply with all provisions of § 226.15.

(b) Each sponsoring organization must submit to the State agency with its application all information required for its approval, and the approval of the facilities under its jurisdiction, as set forth in §§ 226.6(b) and 226.6(f). The application must demonstrate that the institution has the administrative and financial capability to operate the Program in accordance with the Program regulations. In addition to the information required in §§ 226.6(b) and 226.6(f), the application must include:

(1) A sponsoring organization management plan and administrative budget, in accordance with §§ 226.6(b)(1)(iv), 226.6(b)(1)(v), 226.6(b)(2)(i), 226.6(f)(2)(i), and 226.7(g), which includes information sufficient to document the sponsoring organization's compliance with the performance standards set forth at § 226.6(b)(1)(xviii) and 226.6(b)(2)(vii). As part of its management plan, a sponsoring organization of day care homes must document that, to perform monitoring, it will employ the equivalent of one full-time staff person for each 50 to 150 day care homes it sponsors. As part of its management plan, a sponsoring organization of centers must document that, to perform monitoring, it will employ the equivalent of one full-time staff person for each 25 to 150 centers it sponsors. It is the State agency's responsibility to determine the appropriate level of staffing for monitoring for each sponsoring organization, consistent with these specified ranges and factors that the State agency will use to determine the appropriate level of monitoring staff for each sponsor. The monitoring staff equivalent may include the employee's time spent on scheduling, travel time, review time, follow-up activity, report writing, and activities related to the annual updating of children's enrollment forms. Sponsoring organizations that were participating in the Program on July 29, 2002, were to have submitted, no later than July 29, 2003, a management plan or plan amendment that meets the monitoring staffing requirement. For sponsoring organizations of centers, the portion of the administrative costs to be charged to the Program may not exceed 15 percent of the meal reimbursements estimated or actually earned during the budget year, unless the State agency grants a waiver in accordance with § 226.7(g). A sponsoring organization of centers must include in the administrative budget all administrative costs, whether incurred by the sponsoring organization or its sponsored centers. If at any point a sponsoring organization determines that the meal reimbursements estimated to be earned during the budget year will

be lower than that estimated in its administrative budget, the sponsoring organization must amend its administrative budget to stay within the 15 percent limitation (or any higher limit established pursuant to a waiver granted under § 226.7(g)) or seek a waiver. Failure to do so will result in appropriate fiscal action in accordance with § 226.14(a).

(2) An application for participation, or renewal materials, for each child care and adult day care facility accompanied by all necessary supporting documentation;

(3) Timely information concerning the eligibility status of child care and adult day care facilities (such as licensing/approval actions);

(4) For sponsoring organizations applying for initial participation on or after June 20, 2000, if required by State law, regulation, or policy, a bond in the form prescribed by such law, regulation, or policy;

(5) A copy of the sponsoring organization's notice to parents, in a form and, to the maximum extent practicable, language easily understandable by the participant's parents or guardians. The notice must inform them of their facility's participation in CACFP, the Program's benefits, the name and telephone number of the sponsoring organization, and the name and telephone number of the State agency responsible for administration of CACFP;

(6) If the sponsoring organization chooses to establish procedures for determining a day care home seriously deficient that supplement the procedures in paragraph (l) of this section, a copy of those supplemental procedures. If the State agency has made the sponsoring organization responsible for the administrative review of a proposed termination of a day care home's agreement for cause, pursuant to § 226.6(l)(1), a copy of the sponsoring organization's administrative review procedures. The sponsoring organization's supplemental serious deficiency and administrative review procedures must comply with paragraph (l) of this section and § 226.6(l);

(7) A copy of their outside employment policy. The policy must restrict other employment by employees that interferes with an employee's performance of Program-related duties and responsibilities, including outside employment that constitutes a real or apparent conflict of interest; and

(8) For sponsoring organizations of day care homes, the name, mailing address, and date of birth of each provider.

(c) Each sponsoring organization shall accept final administrative and financial responsibility for food service operations in all child care and adult day care facilities under its jurisdiction.

(d) Each sponsoring organization must provide adequate supervisory and operational personnel for the effective management and monitoring of the program at all facilities it sponsors. Each sponsoring organization must employ monitoring staff sufficient to meet the requirements of paragraph (b)(1) of this section. At a minimum, Program assistance must include:

(1) Pre-approval visits to each child care and adult day care facility for which application is made to discuss Program benefits and verify that the proposed food service does not exceed the capability of the child care facility;

(2) Training on Program duties and responsibilities to key staff from all sponsored facilities prior to the beginning of Program operations. At a minimum, such training must include instruction, appropriate to the level of staff experience and duties, on the Program's meal patterns, meal counts, claims submission and review procedures, recordkeeping requirements, and reimbursement system. Attendance by key staff, as defined by the State agency, is mandatory;

(3) Additional mandatory training sessions for key staff from all sponsored child care and adult day care facilities not less frequently than annually. At a minimum, such training must include instruction, appropriate to the level of staff experience and duties, on the Program's meal patterns, meal counts, claims submission and review procedures, recordkeeping requirements, and reimbursement system. Attendance by key staff, as defined by the State agency, is mandatory;

(4)(i) *Review elements.* Reviews that assess whether the facility has corrected problems noted on the previous review(s), a reconciliation of the facility's meal counts with enrollment and attendance records for a five-day period, as specified in paragraph (d)(4)(ii) of this section, and an assessment of the facility's compliance with the Program requirements pertaining to:

(A) The meal pattern;

(B) Licensing or approval;

(C) Attendance at training;

(D) Meal counts;

(E) Menu and meal records; and

(F) The annual updating and content of enrollment forms (if the facility is required to have enrollment forms on file, as specified in §§ 226.15(e)(2) and 226.15(e)(3)).

(ii) *Reconciliation of meal counts.* Reviews must examine the meal counts recorded by the facility for five consecutive days during the current and/or prior claiming period. For each day examined, reviewers must use enrollment and/or attendance records to determine the number of children in care during each meal service and attempt to reconcile those numbers to the numbers of breakfasts, lunches, suppers, and/or snacks recorded in the facility's meal count for that day. Based on that comparison, reviewers must determine whether the meal counts were accurate. If there is a discrepancy between the number of children enrolled or in attendance on the day of review and prior meal counting patterns, the reviewer must attempt to reconcile the difference and determine whether the establishment of an overclaim is necessary.

(iii) *Frequency and type of required facility reviews.* Sponsoring organizations must review each facility three times each year, except as described in paragraph (d)(4)(iv) of this section. In addition:

(A) At least two of the three reviews must be unannounced;

(B) At least one unannounced review must include observation of a meal service;

(C) At least one review must be made during each new facility's first four weeks of Program operations; and

(D) Not more than six months may elapse between reviews.

(iv) *Averaging of required reviews.* If a sponsoring organization conducts two unannounced reviews of a facility in a year and finds no serious deficiencies (as described in paragraph (l)(2) of this section, regardless of the type of facility), the sponsoring organization may choose not to conduct a third review of the facility that year, provided that the sponsoring organization conducts an average of three reviews of all of its facilities that year. When the sponsoring organization uses this averaging provision, and a specific facility receives two reviews in one review year, its first review in the next review year must occur no more than nine months after the previous review. Sponsoring organizations may not review a sponsored facility fewer than three times per year if the facility has submitted a block claim during the year.

(v) *Follow-up reviews.* If, in conducting a facility review, a sponsoring organization detects one or more serious deficiency, the next review of that facility must be unannounced. Serious deficiencies are those described at paragraph (l)(2) of this section, regardless of the type of facility.

(vi) *Notification of unannounced reviews.* Sponsoring organizations of centers must provide each center with written notification of the right of the sponsoring organization, the State agency, the Department, and other State and Federal officials to make announced or unannounced reviews of its operations during the center's normal hours of operation, and must also notify sponsored centers that anyone making such reviews must show photo identification that demonstrates that they are employees of one of these entities. For sponsored centers participating on July 29, 2002, the sponsoring organization was to have provided this notice no later than August 29, 2002. For sponsored centers that are approved after July 29, 2002, the sponsoring organization must provide the notice before meal service under the Program begins. Sponsoring organizations must provide day care homes notification of unannounced visits in accordance with § 226.18(b)(1).

(vii) *Other requirements pertaining to unannounced reviews.* Unannounced reviews must be made only during the facility's normal hours of operation, and monitors making such reviews must show photo identification that demonstrates that they are employees of the sponsoring organization, the State agency, the Department, or other State and Federal agencies authorized to audit or investigate Program operations.

(viii) *Imminent threat to health or safety.* Sponsoring organizations that discover in a facility conduct or conditions that pose an imminent threat to the health or safety of participating children or the public, must immediately notify the appropriate State or local licensing or health authorities and take action that is consistent with the recommendations and requirements of those authorities.

(5) For sponsoring organizations, as part of their monitoring of facilities, compliance with the household contact requirements established pursuant to § 226.6(m)(5) of this part.

(e) Each sponsoring organization shall comply with the recordkeeping requirements established in §§ 226.10(d) and 226.15(e) and any recordkeeping requirements established by the State agency in order to justify the administrative payments made in accordance with § 226.12(a). Failure to maintain such records shall be grounds for the denial of reimbursement.

(f) The State agency may require a sponsoring organization to enter into separate agreements for the administration of separate types of facilities (child care centers, day care homes, adult day care centers, emergency shelters, at-risk afterschool care centers, and outside-school-hours care centers). However, if a school food authority provides child care and is applying to participate in the Program, the State agency must enter into a single permanent agreement, as specified in § 226.6(b)(4)(ii)(A).

(g) Each sponsoring organization electing to receive advance payments of program funds for day care homes shall disburse the full amount of such payments within five working days of receipt from the State agency. If the sponsor requests the full operating advance to which it is entitled, the advances to day care homes shall be the full amount which the sponsor expects the home to earn based on the number of meals projected to be served to enrolled children during the period covered by the advance multiplied by the applicable payment rate as specified in § 226.13(c). If a sponsor elects to receive only a part of the operating advance to which it is entitled, or if the full operating advance is insufficient to provide a full advance to each home, the advance shall be disbursed to its homes in a manner and an amount the sponsor deems appropriate. Each sponsor shall disburse any reimbursement payments for food service due to each day care home within five working days of receipt from the State agency. Such payment shall be based on the number of meals served to enrolled children at each day care home, less any payments advanced to such home. However, the sponsoring organization may withhold from Program payments to each home an amount equal to food service operating costs incurred by the sponsoring organization in behalf of the home and with the home provider's written consent. If payments from the State agency are not sufficient to provide all day care homes under the sponsoring organization's jurisdiction with advance payments and reimbursement payments, available monies shall be used to provide all due reimbursement payments before advances are disbursed.

(h) Sponsoring organizations shall make payments of program funds to child care centers, adult day care centers, emergency shelters, at-risk afterschool care centers, or outside-school-hours care centers within five working days of receipt from the State agency, on the basis of the management plan approved by the State agency, and may not exceed the Program costs documented at each facility during any fiscal year; except in those States where the State agency has chosen the option to implement a meals times rates payment system. In those States which implement this optional method of reimbursement, such disbursements may not exceed the rates times the number of meals documented at each facility during any fiscal year.

(i) Disbursements of advance payments may be withheld from child and adult day care facilities which fail to submit reports required by § 226.15(e).

(j) A for-profit organization shall be eligible to serve as a sponsoring organization for for-profit centers which have the same legal identity as the organization, but shall not be eligible to sponsor for-profit centers which are legally distinct from the organization, day care homes, or public or private nonprofit centers.

(k) Before sponsoring organizations expend administrative funds to assist family day care homes in becoming licensed, they shall obtain the following information from each such home: a completed free and reduced price application which documents that the provider meets the Program's income standards; evidence of its application for licensing and official documentation of the defects that are impeding its licensing approval; and a completed CACFP application. These funding requests are limited to $300 per home and are only available to each home once.

(l) *Termination of agreements for cause*—(1) *General.* The sponsoring organization must initiate action to terminate the agreement of a day care home for cause if the sponsoring organization determines the day care home has committed one or more serious deficiency listed in paragraph (l)(2) of this section.

(2) *List of serious deficiencies for day care homes.* Serious deficiencies for day care homes are:

(i) Submission of false information on the application;

(ii) Submission of false claims for reimbursement;

(iii) Simultaneous participation under more than one sponsoring organization;

(iv) Non-compliance with the Program meal pattern;

(v) Failure to keep required records;

(vi) Conduct or conditions that threaten the health or safety of a child(ren) in care, or the public health or safety;

(vii) A determination that the day care home has been convicted of any activity that occurred during the past seven years and that indicated a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency, or the concealment of such a conviction;

(viii) Failure to participate in training; or

(ix) Any other circumstance related to non-performance under the sponsoring organization-day care home agreement, as specified by the sponsoring organization or the State agency.

(3) *Serious deficiency notification procedures.* If the sponsoring organization determines that a day care home has committed one or more serious deficiency listed in paragraph (l)(2) of this section, the sponsoring organization must use the following procedures to provide the day care home notice of the serious deficiency(ies) and offer it an opportunity to take corrective action. However, if the serious deficiency(ies) constitutes an imminent threat to the health or safety of participants, or the day care home has engaged in activities that threaten the public health or safety, the sponsoring organization must follow the procedures in paragraph (l)(4) of this section instead of those in this paragraph (l)(3).

(i) *Notice of serious deficiency.* The sponsoring organization must notify the day care home that it has been found to be seriously deficient. The sponsoring organization must provide a copy of the serious deficiency notice to the State agency. The notice must specify:

(A) The serious deficiency(ies);

(B) The actions to be taken by the day care home to correct the serious deficiency(ies);

(C) The time allotted to correct the serious deficiency(ies) (as soon as possible, but not to exceed 30 days);

(D) That the serious deficiency determination is not subject to administrative review.

(E) That failure to fully and permanently correct the serious deficiency(ies) within the allotted time will result in the institution's proposed

termination of the day care home's agreement and the proposed disqualification of the day care home and its principals; and

(F) That the day care home's voluntary termination of its agreement with the institution after having been notified that it is seriously deficient will still result in the day care home's formal termination by the State institution and placement of the day care home and its principals on the National disqualified list.

(ii) *Successful corrective action.* If the day care home corrects the serious deficiency(ies) within the allotted time and to the sponsoring organization's satisfaction, the sponsoring organization must notify the day care home that it has rescinded its determination of serious deficiency. The sponsoring organization must also provide a copy of the notice to the State agency.

(iii) *Proposed termination of agreement and proposed disqualification.* If timely corrective action is not taken to fully and permanently correct the serious deficiency(ies) cited, the sponsoring organization must issue a notice proposing to terminate the day care home's agreement for cause. The notice must explain the day care home's opportunity for an administrative review of the proposed termination in accordance with § 226.6(l). The sponsoring organization must provide a copy of the notice to the State agency. The notice must:

(A) Inform the day care home that it may continue to participate and receive Program reimbursement for eligible meals served until its administrative review is concluded;

(B) Inform the day care home that termination of the day care home's agreement will result in the day care home's termination for cause and disqualification; and

(C) State that if the day care home seeks to voluntarily terminate its agreement after receiving the notice of intent to terminate, the day care home will still be placed on the National disqualified list.

(iv) *Program payments.* The sponsoring organization must continue to pay any claims for reimbursement for eligible meals served until the serious deficiency(ies) is corrected or the day care home's agreement is terminated, including the period of any administrative review.

(v) *Agreement termination and disqualification.* The sponsoring organization must immediately terminate the day care home's agreement and disqualify the day care home when the administrative review official upholds the sponsoring organization's proposed termination and proposed disqualification, or when the day care home's opportunity to request an administrative review expires. At the same time the notice is issued, the sponsoring organization must provide a copy of the termination and disqualification letter to the State agency.

(4) *Suspension of participation for day care homes.*

(i) *General.* If State or local health or licensing officials have cited a day care home for serious health or safety violations, the sponsoring organization must immediately suspend the home's CACFP participation prior to any formal action to revoke the home's licensure or approval. If the sponsoring organization determines that there is an imminent threat to the health or safety of participants at a day care home, or that the day care home has engaged in activities that threaten the public health or safety, and the licensing agency cannot make an immediate onsite visit, the sponsoring organization must immediately notify the appropriate State or local licensing and health authorities and take action that is consistent with the recommendations and requirements of those authorities. An imminent threat to the health or safety of participants and engaging in activities that threaten the public health or safety constitute serious deficiencies; however, the sponsoring organization must use the procedures in this paragraph (l)(4) (and not the procedures in paragraph (l)(3) of this section) to provide the day care home notice of the suspension of participation, serious deficiency, and proposed termination of the day care home's agreement.

(ii) *Notice of suspension, serious deficiency, and proposed termination.* The sponsoring organization must notify the day care home that its participation has been suspended, that the day

care home has been determined seriously deficient, and that the sponsoring organization proposes to terminate the day care home's agreement for cause, and must provide a copy of the notice to the State agency. The notice must:

(A) Specify the serious deficiency(ies) found and the day care home's opportunity for an administrative review of the proposed termination in accordance with § 226.6(l);

(B) State that participation (including all Program payments) will remain suspended until the administrative review is concluded;

(C) Inform the day care home that if the administrative review official overturns the suspension, the day care home may claim reimbursement for eligible meals served during the suspension;

(D) Inform the day care home that termination of the day care home's agreement will result in the placement of the day care home on the National disqualified list; and

(E) State that if the day care home seeks to voluntarily terminate its agreement after receiving the notice of proposed termination, the day care home will still be terminated for cause and disqualified.

(iii) *Agreement termination and disqualification.* The sponsoring organization must immediately terminate the day care home's agreement and disqualify the day care home when the administrative review official upholds the sponsoring organization's proposed termination, or when the day care home's opportunity to request an administrative review expires.

(iv) *Program payments.* A sponsoring organization is prohibited from making any Program payments to a day care home that has been suspended until any administrative review of the proposed termination is completed. If the suspended day care home prevails in the administrative review of the proposed termination, the sponsoring organization must reimburse the day care home for eligible meals served during the suspension period.

(m) Sponsoring organizations of family day care homes must not make payments to employees or contractors solely on the basis of the number of homes recruited. However, such employees or contractors may be paid or evaluated on the basis of recruitment activities accomplished.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 48 FR 21530, May 13, 1983; 50 FR 8580, Mar. 4, 1985; 50 FR 26975, July 1, 1985; 53 FR 52591, Dec. 28, 1988; 63 FR 9729, Feb. 26, 1998; 64 FR 72260, Dec. 27, 1999; 67 FR 43490, June 27, 2002; 69 FR 53544, Sept. 1, 2004; 71 FR 5, Jan. 3, 2006; 72 FR 41608, July 31, 2007]

### § 226.17 Child care center provisions.

(a) Child care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; provided, however, that public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Child care centers participating as independent centers shall comply with the provisions of § 226.15.

(b) All child care centers, independent or sponsored, shall meet the following requirements

(1) Child care centers must have Federal, State, or local licensing or approval to provide day care services to children. Child care centers, which are complying with applicable procedures to renew licensing or approval, may participate in the Program during the renewal process, unless the State agency has information that indicates that renewal will be denied. If licensing or approval is not available, a child care center may participate if it demonstrates compliance with the CACFP child care standards or any applicable State or local child care standards to the State agency.

(2) Except for for-profit centers, child care centers shall be public, or have tax exempt status under the Internal Revenue Code of 1986.

(3) Each child care center participating in the Program must serve one or more of the following meal types—breakfast; lunch; supper; and snack. Reimbursement must not be claimed for more than two meals and one snack or one meal and two snacks provided daily to each child.

(4) Each child care center participating in the Program shall claim only the meal types specified in its approved

application in accordance with the meal pattern requirements specified in § 226.20. For-profit child care centers may not claim reimbursement for meals served to children in any month in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries. However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be included in this percentage.. Menus and any other nutritional records required by the State agency shall be maintained to document compliance with such requirements.

(5) A child care center with preschool children may also be approved to serve a breakfast, snack, and supper to school-age children participating in an outside-school-hours care program meeting the criteria of § 226.19(b) that is distinct from its day care program for preschool-age children. The State agency may authorize the service of lunch to such participating children who attend a school that does not offer a lunch program, provided that the limit of two meals and one snack, or one meal and two snacks, per child per day is not exceeded.

(6) A child care center with preschool children may also be approved to serve a snack to school age children participating in an afterschool care program meeting the requirements of § 226.17a that is distinct from its day care program for preschool children, provided that the limit of two meals, and one snack, or one meal and two snacks, per child per day is not exceeded.

(7) A child care center may utilize existing school food service facilities or obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the child care center and school. The center shall maintain responsibility for all Program requirements set forth in this part.

(8) Child care centers shall collect and maintain documentation of the enrollment of each child, including information used to determine eligibility for free and reduced price meals in accordance with § 226.23(e)(1). In addition, Head Start participants need only have a Head Start statement of income eligibility, or a statement of Head Start enrollment from an authorized Head Start representative, to be eligible for free meal benefits under the CACFP. Such documentation of enrollment must be updated annually, signed by a parent or legal guardian, and include information on each child's normal days and hours of care and the meals normally received while in care.

(9) Each child care center must maintain daily records of time of service meal counts by type (breakfast, lunch, supper, and snacks) served to enrolled children, and to adults performing labor necessary to the food service.

(10) Each child care center must require key staff, as defined by the State agency, to attend Program training prior to the center's participation in the Program, and at least annually thereafter, on content areas established by the State agency.

(c) Each child care center shall comply with the recordkeeping requirements established in § 226.10(d), in paragraph (b) of this section and, if applicable, in § 226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.

(d) If so instructed by its sponsoring organization, a sponsored center must distribute to parents a copy of the sponsoring organization's notice to parents.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36907, Oct. 2, 1987; 53 FR 52591, Dec. 28, 1988; 54 FR 26724, June 26, 1989; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 63 FR 9729, Feb. 26, 1998; 64 FR 72261, Dec. 27, 1999; 67 FR 43493, June 27, 2002; 69 FR 53546, Sept. 1, 2004; 70 FR 43262, July 27, 2005; 72 FR 41608, July 31, 2007; 75 FR 16328, Apr. 1, 2010]

### § 226.17a At-risk afterschool care center provisions.

(a) *Organizations eligible to receive reimbursement for at-risk afterschool snacks and at-risk afterschool meals.* (1) *Eligible organizations.* To receive reimbursement for at-risk afterschool snacks, organizations must meet the criteria in paragraphs (a)(1)(i) through (a)(1)(iv) of this section. To receive reimbursement

for at-risk afterschool meals, organizations must meet the criteria in paragraphs (a)(1)(i) through (a)(1)(v) of this section.

(i) Organizations must meet the definition of an *At-risk afterschool care center* in § 226.2. An organization may participate in the Program either as an independent center or as a child care facility under the auspices of a sponsoring organization. Public and private nonprofit centers may not participate under the auspices of a for-profit sponsoring organization.

(ii) Organizations must operate an eligible afterschool care program, as described in paragraph (b) of this section.

(iii) Organizations must meet the licensing/approval requirements in § 226.6(d)(1).

(iv) Except for for-profit centers, at-risk afterschool care centers must be public, or have tax-exempt status under the Internal Revenue Code of 1986 or be currently participating in another Federal program requiring nonprofit status.

(v) Organizations eligible to be reimbursed for at-risk afterschool meals must be located in one of the eligible States designated by law or selected by the Secretary as directed by law.

(2) *Limitations.* (i) To be reimbursed for at-risk afterschool snacks and/or at-risk afterschool meals, all organizations must:

(A) Serve the at-risk afterschool snacks and/or at-risk afterschool meals to children who are participating in an approved afterschool care program; and

(B) Not exceed the authorized capacity of the at-risk afterschool care center.

(ii) In any calendar month, a for-profit center must be eligible to participate in the Program as described in the definition of For-profit center in § 226.2. However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be considered in determining this eligibility.

(b) *Eligible at-risk afterschool care programs*—(1) *Eligible programs.* To be eligible for reimbursement, an afterschool care program must:

(i) Be organized primarily to provide care for children after school or on weekends, holidays, or school vacations during the regular school year (an at-risk afterschool care center may not claim snacks during summer vacation, unless it is located in the attendance area of a school operating on a year-round calendar);

(ii) Have organized, regularly scheduled activities (i.e., in a structured and supervised environment);

(iii) Include education or enrichment activities; and

(iv) Except for *Emergency shelters* as defined in § 226.2, be located in an eligible area, as described in paragraph (i) of this section.

(2) *Eligibility limitation.* Organized athletic programs engaged in interscholastic or community level competitive sports are not eligible afterschool care programs.

(c) *Eligibility requirements for children.* At-risk afterschool snacks and/or at-risk afterschool meals are reimbursable only if served to children who are participating in an approved afterschool care program and who either are age 18 or under at the start of the school year or meet the definition of *Persons with disabilities* in § 226.2.

(d) *Licensing requirements for at-risk afterschool care centers.* In accordance with § 226.6(d)(1), if Federal, State or local licensing or approval is not otherwise required, at-risk afterschool care centers must meet State or local health and safety standards. When State or local health and safety standards have not been established, State agencies are encouraged to work with appropriate State and local officials to create such standards. Meeting these standards will remain a precondition for any afterschool center's eligibility for CACFP nutrition benefits. In cases where Federal, State or local licensing or approval is required, at-risk afterschool care centers that are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information that indicates the renewal will be denied.

(e) *Application procedures*—(1) *Application.* An official of the organization must make written application to the State agency for any afterschool care program that it wants to operate as an at-risk afterschool care center.

(2) *Required information.* At a minimum, an organization must submit:

(i) An indication that the applicant organization meets the eligibility criteria for organizations as specified in paragraph (a) of this section;

(ii) A description of how the afterschool care program(s) meets the eligibility criteria in paragraph (b) of this section;

(iii) In the case of a sponsoring organization, a list of all applicant afterschool care centers;

(iv) Documentation that permits the State agency to confirm that all applicant afterschool care centers are located in an eligible area, as described in paragraph (i) of this section; and

(v) Other information required as a condition of eligibility in the CACFP must be submitted with an application for participation in accordance with §226.6(b)(1).

(f) *State agency action on applications*—(1) *State agency approval.* The State agency must determine the eligibility of the afterschool care program for each sponsored afterschool care center based on the information submitted by the sponsoring organization in accordance with §§226.6(b)(1) and 226.15(g) and the requirements of this section. The State agency must determine the eligibility of the afterschool care programs of independent afterschool care centers based on the information submitted by the independent center in accordance with §226.6(b)(1) and the requirements of this section. The State agency must determine the area eligibility of independent at-risk afterschool care centers in accordance with the requirements of §226.6(f)(1)(ix)(B). An approved organization must enter into an agreement with the State agency as described in paragraph (f)(2) of this section.

(2) *Agreement.* The State agency must enter into an agreement or amend an existing agreement with an institution approved to operate one or more at-risk afterschool care centers pursuant to §226.6(b)(4). The agreement must describe the approved afterschool care program(s) and list the approved center(s). The agreement must also require the institution to comply with the applicable requirements of this part. If the institution is a school food authority that is applying to participate as an at-risk afterschool care center, the State agency must enter into a single permanent agreement, as specified in §226.6(b)(4)(ii)(A).

(g) *Application process in subsequent years.* To continue participating in the Program, independent at-risk afterschool care centers or sponsoring organizations of at-risk afterschool care centers must reapply at time intervals required by the State agency, as described in §226.6(b)(3) and (f)(2). Sponsoring organizations of at-risk afterschool care centers must provide area eligibility data in compliance with the provisions of §226.15(g). In accordance with §226.6(f)(3)(ii), State agencies must determine the area eligibility of each independent at-risk afterschool care center that is reapplying to participate in the Program.

(h) *Changes to participating centers.* Independent at-risk afterschool care centers or sponsors of at-risk afterschool care centers must advise the State agency of any substantive changes to the afterschool care program. Sponsoring organizations that want to add new at-risk afterschool care centers must provide the State agency with the information sufficient to demonstrate that the new centers meet the requirements of this section.

(i) *Area eligibility.* Except for emergency shelters, at-risk afterschool care centers must be located in an area described in paragraph (a) of the *Eligible area* definition in §226.2 and in paragraph (i)(1) of this section.

(1) *Definition.* An at-risk afterschool care center is in an eligible area if it is located in the attendance area of an elementary, middle, or high school in which at least 50 percent of the enrolled children are certified eligible for free or reduced-price school meals.

(2) *Data used.* Area eligibility determinations must be based on the total number of children approved for free and reduced-price school meals for the preceding October, or another month designated by the State agency that administers the National School Lunch Program (the NSLP State agency). If the NSLP State agency chooses a month other than October, it must do so for the entire State.

(3) *Frequency of area eligibility determinations.* Area eligibility determinations are valid for five years. The State agency may determine the date in the fifth year in which the next five-year cycle of area eligibility will begin. The State agency must not routinely require redeterminations of area eligibility based on updated school data during the five-year period, except in cases where the State agency has determined it is most efficient to incorporate area eligibility decisions into the three-year application cycle. However, a sponsoring organization, the State agency, or FNS may change the determination of area eligibility if information becomes available indicating that an at-risk afterschool care center is no longer area eligible.

(j) *Cost of at-risk afterschool snacks and meals.* All at-risk afterschool snacks and at-risk afterschool meals served under this section must be provided at no charge to participating children.

(k) *Limit on daily reimbursements.* Only one at-risk afterschool snack and, in eligible States, one at-risk afterschool meal per child per day may be claimed for reimbursement. An at-risk afterschool care center that provides care to a child under another component of the Program during the same day may not claim reimbursement for more than two meals and one snack, or one meal and two snacks, per child per day, including the at-risk afterschool snack and the at-risk afterschool meal. All meals and snacks must be claimed in accordance with the requirements for the applicable component of the Program.

(l) *Meal pattern requirements for at-risk afterschool snacks and at-risk afterschool meals.* At-risk afterschool snacks must meet the meal pattern requirements for snacks in § 226.20(b)(6) and/or (c)(4); at-risk afterschool meals must meet the meal pattern requirements for meals in § 226.20(b)(6) and/or (c)(1), (c)(2), or (c)(3).

(m) *Time periods for snack and meal services*—(1) *At-risk afterschool snacks.* When school is in session, the snack must be served after the child's school day. With State agency approval, the snack may be served at any time on weekends and vacations during the regular school year. Afterschool snacks may not be claimed during summer vacation, unless an at-risk afterschool care center is located in the attendance area of a school operating on a year-round calendar.

(2) *At-risk afterschool meals.* When school is in session, the meal must be served after the child's school day. With State agency approval, any one meal may be served (breakfast, lunch, or supper) per day on weekends and vacations during the regular school year. Afterschool meals may not be claimed during summer vacation, unless an at-risk afterschool care center is located in the attendance area of a school operating on a year-round calendar.

(n) *Reimbursement rates.* At-risk afterschool snacks are reimbursed at the free rate for snacks. At-risk afterschool meals are reimbursed at the respective free rates for breakfast, lunch, or supper

(o) *Recordkeeping requirements.* In addition to the other records required by this part, at-risk afterschool care centers must maintain:

(1) Daily attendance rosters, sign-in sheets or, with State agency approval, other methods which result in accurate recording of daily attendance;

(2) The number of at-risk afterschool snacks prepared or delivered for each snack service and/or, in eligible States, the number of at-risk afterschool meals prepared or delivered for each meal service;

(3) The number of at-risk afterschool snacks served to participating children for each snack service and/or, in eligible States, the number of at-risk afterschool meals served to participating children for each meal service; and

(4) Menus for each at-risk afterschool snack service and each at-risk afterschool meal service.

(p) *Reporting requirements.* In addition to other reporting requirements under this part, at-risk afterschool care centers must report the total number of at-risk afterschool snacks and/or (in eligible States) the total number of at-risk afterschool meals served to eligible children based on daily attendance rosters or sign-in sheets.

(q) *Monitoring requirements.* State agencies must monitor independent centers in accordance with § 226.6(m).

Sponsoring organizations of at-risk afterschool care centers must monitor their centers in accordance with § 226.16(d)(4).

[72 FR 41608, July 31, 2007, as amended at 75 FR 16328, Apr. 1, 2010]

### § 226.18 Day care home provisions.

(a) Day care homes shall have current Federal, State or local licensing or approval to provide day care services to children. Day care homes which cannot obtain their license because they lack the funding to comply with licensing standards may request a total limit per home of $300 in administrative funds from a sponsoring organization to assist them in obtaining their license. Day care homes that, at the option of their sponsoring organization, receive administrative funds for licensing-related expenses must complete documentation requested by their sponsor as described in § 226.16(k) prior to receiving any funds. The agreement must be signed by the sponsoring organization and the provider and must include the provider's full name, mailing address, and date of birth. Day care homes which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied. If licensing or approval is not available, a day care home may participate in the Program if:

(1) The right of the sponsoring organization, the State agency, the Department, and other State and Federal officials to make announced or unannounced reviews of the day care home's operations and to have access to its meal service and records during its normal hours of child care operations. For day care homes participating July 29, 2002, the sponsoring organization must amend the current agreement no later than August 29, 2002;

(2) It demonstrates compliance with CACFP child care standards or applicable State or local child care standards to the State agency.

(b) Day care homes participating in the program shall operate under the auspices of a public or private nonprofit sponsoring organization. Sponsoring organizations shall enter into a written permanent agreement with each sponsored day care home which specifies the rights and responsibilities of both parties. Nothing in the preceding sentence shall be construed to limit the ability of the sponsoring organization to suspend or terminate the permanent agreement in accordance with § 226.16(l). This agreement shall be developed by the State agency, unless the State agency elects, at the request of the sponsor, to approve an agreement developed by the sponsor. At a minimum, the agreement shall embody:

(1) The right of the sponsoring organization, the State agency, and the Department to visit the day care home and review its meal service and records during its hours of child care operations;

(2) The responsibility of the sponsoring organization to require key staff, as defined by the State agency, to receive Program training prior to the day care home's participation in the Program, and at least annually thereafter, on content areas established by the State agency, and the responsibility of the day care home to participate in that training;

(3) The responsibility of the day care home to prepare and serve meals which meet the meal patterns specified in § 226.20;

(4) The responsibility of the day care home to maintain records of menus, and of the number of meals, by type, served to enrolled children;

(5) The responsibility of the day care home to promptly inform the sponsoring organization about any change in the number of children enrolled for care or in its licensing or approval status;

(6) The meal types approved for reimbursement to the day care home by the State agency;

(7) The right of the day care home to receive in a timely manner the full food service rate for each meal served to enrolled children for which the sponsoring organization has received payment from the State agency. However, if, with the home provider's consent, the sponsoring organization will incur costs for the provision of program foodstuffs or meals in behalf of the home, and subtract such costs from Program

payments to the home, the particulars of this arrangement shall be specified in the agreement. The sponsoring organization must not withhold Program payments to any family day care home for any other reason, except that the sponsoring organization may withhold from the provider any amounts that the sponsoring organization has reason to believe are invalid, due to the provider having submitted a false or erroneous meal count;

(8) The right of the sponsoring organization or the day care home to terminate the agreement for cause or, subject to stipulations by the State agency, convenience;

(9) A prohibition of any sponsoring organization fee to the day care home for its Program administrative services;

(10) If the State agency has approved a time limit for submission of meal records by day care homes, that time limit shall be stated in the agreement;

(11) The responsibility of the sponsoring organization to inform tier II day care homes of all of their options for receiving reimbursement for meals served to enrolled children. These options include: electing to have the sponsoring organization attempt to identify all income-eligible children enrolled in the day care home, through collection of free and reduced price applications and/or possession by the sponsoring organization or day care home of other proof of a child or household's participation in a categorically eligible program, and receiving tier I rates of reimbursement for the meals served to identified income-eligible children; electing to have the sponsoring organization identify only those children for whom the sponsoring organization or day care home possess documentation of the child or household's participation in a categorically eligible program, under the expanded categorical eligibility provision contained in § 226.23(e)(1), and receiving tier I rates of reimbursement for the meals served to these children; or receiving tier II rates of reimbursement for all meals served to enrolled children;

(12) The responsibility of the sponsoring organization, upon the request of a tier II day care home, to collect applications and determine the eligibility of enrolled children for free or reduced price meals;

(13) The State agency's policy to restrict transfers of day care homes between sponsoring organizations;

(14) The responsibility of the day care home to notify their sponsoring organization in advance whenever they are planning to be out of their home during the meal service period. The agreement must also state that, if this procedure is not followed and an unannounced review is conducted when the children are not present in the day care home, claims for meals that would have been served during the unannounced review will be disallowed;

(15) The day care home's opportunity to request an administrative review if a sponsoring organization issues a notice of proposed termination of the day care home's Program agreement, or if a sponsoring organization suspends participation due to health and safety concerns, in accordance with § 226.6(1)(2); and

(16) If so instructed by its sponsoring organization, the day care home's responsibility to distribute to parents a copy of the sponsoring organization's notice to parents.

(c) Each day care home must serve one or more of the following meal types—breakfast, lunch, supper, and snack. Reimbursement may not be claimed for more than two meals and one snack, or one meal and two snacks, provided daily to each child.

(d) Each day care home participating in the program shall serve the meal types specified in its approved application in accordance with the meal pattern requirements specified in § 226.20. Menu records shall be maintained to document compliance with these requirements. Meals shall be served at no separate charge to enrolled children;

(e) Each day care home must maintain on file documentation of each child's enrollment and must maintain daily records of the number of children in attendance and the number of meals, by type, served to enrolled children. Such documentation of enrollment must be updated annually, signed by a parent or legal guardian, and include information on each child's normal days and hours of care and the meals normally received while in care. Each

tier II day care home in which the provider elects to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals, and in which the sponsoring organization employs a meal counting and claiming system in accordance with §226.13(d)(3)(i), shall maintain and submit each month to the sponsoring organization daily records of the number and types of meals served to each enrolled child by name. Payment may be made for meals served to the provider's own children only when (1) such children are enrolled and participating in the child care program during the time of the meal service, (2) enrolled nonresident children are present and participating in the child care program and (3) providers' children are eligible to receive free or reduced-price meals. Reimbursement may not be claimed for meals served to children who are not enrolled, or for meals served at any one time to children in excess of the home's authorized capacity or for meals served to providers' children who are not eligible for free or reduced-price meals.

(f) The State agency may not require a day care home or sponsoring organization to maintain documentation of home operating costs.

(g) Each day care home shall comply with the recordkeeping requirements established in §226.10(d) and in this section. Failure to maintain such records shall be grounds for the denial of reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended by Amdt. 5, 49 FR 18989, May 4, 1984; 50 FR 8580, Mar. 4, 1985; 52 FR 36907, Oct. 2, 1987; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 903, Jan. 7, 1997; 63 FR 9105, Feb. 24, 1998; 63 FR 9729, Feb. 26, 1998; 64 FR 72261, Dec. 27, 1999; 67 FR 43493, June 27, 2002; 69 FR 53546, Sept. 1, 2004; 70 FR 34633, June 15, 2005; 72 FR 41610, July 31, 2007]

### §226.19 Outside-school-hours care center provisions.

(a) Outside-school-hours care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; *Provided, however,* That public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Outside-school-hours care centers participating as independent centers shall comply with the provisions of §226.15.

(b) All outside-school-hours care centers, independent or sponsored, shall meet the following requirements:

(1) In accordance with §226.6(d)(1), if Federal, State or local licensing or approval is not otherwise required, outside-school-hours care centers must meet State or local health and safety standards. When State or local health and safety standards have not been established, State agencies are encouraged to work with appropriate State and local officials to create such standards. Meeting these standards will remain a precondition for any outside-school-hours care center's eligibility for CACFP nutrition benefits. In cases where Federal, State or local licensing or approval is required, outside-school-hours care centers that are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information that indicates the renewal will be denied.

(2) Except for for-profit centers, outside-school-hours care centers shall be public, or have tax-exempt status under the Internal Revenue Code of 1986.

(3) Nonresidential public or private nonprofit schools which provide organized child care programs for school children may participate in the Program as outside-school-hours care centers if:

(i) Children participate in a regularly scheduled program that meets the criteria of paragraph (b)(1) of this section. The program is organized for the purpose of providing services to children and is distinct from any extracurricular programs organized primarily for scholastic, cultural, or athletic purposes; and

(ii) Separate Program records are maintained.

(4) Outside-school-hours care centers shall be eligible to serve one or more of the following meal types: breakfasts, snacks and suppers. In addition, outside-school-hours care centers shall be eligible to serve lunches to enrolled

children during periods of school vacation, including weekends and holidays, and to children attending schools which do not offer a lunch program. Notwithstanding the eligibility of outside-school-hours care centers to serve Program meals to children on school vacation, including holidays and weekends, such centers shall not operate under the Program on weekends only.

(5) Each outside-school-hours care center participating in the Program shall claim only the meal types specified in its approved application and served in compliance with the meal pattern requirements of § 226.20. Reimbursement may not be claimed for more than two meals and one snack provided daily to each child or for meals served to children at any one time in excess of authorized capacity. For-profit centers may not claim reimbursement for meals served to children in any month in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries.

(6) Each outside-school-hours care center must require key operational staff, as defined by the State agency, to attend Program training prior to the center's participation in the Program, and at least annually thereafter, on content areas established by the State agency. Each meal service must be supervised by an adequate number of operational personnel who have been trained in Program requirements as outlined in this section. Operational personnel must ensure that:

(i) Meals are served only to children and to adults who perform necessary food service labor;

(ii) Meals served to children meet the meal pattern requirements specified in § 226.20;

(iii) Meals served are consumed on the premises of the centers;

(iv) Accurate records are maintained; and

(v) The number of meals prepared or ordered is promptly adjusted on the basis of participation trends.

(7) Each outside-school-hours care center shall accurately maintain the following records:

(i) Information used to determine eligibility for free or reduced price meals in accordance with § 226.23(e)(1);

(ii) Number of meals prepared or delivered for each meal service;

(iii) Daily menu records for each meal service;

(iv) Number of meals served to children at each meal service;

(v) Number of children in attendance during each meal service;

(vi) Number of meals served to adults performing necessary food service labor for each meal service; and

(vii) All other records required by the State agency financial management system.

(8) An outside-school-hours care center may utilize existing school food service facilities or obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the outside-school-hours care center and the school. The center shall maintain responsibility for all Program requirements set forth in this part.

(c) Each outside-school-hours care center shall comply with the recordkeeping requirements established in § 226.10(d), in paragraph (b) of this section and, if applicable, in § 226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36907, Oct. 2, 1987; 54 FR 26724, June 26, 1989; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 56 FR 58175, Nov. 16, 1991; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 64 FR 72261, Dec. 27, 1999; 67 FR 43493, June 27, 2002; 69 FR 53546, Sept. 1, 2004; 70 FR 43262, July 27, 2005; 72 FR 41603, 41610, July 31, 2007]

### § 226.19a Adult day care center provisions.

(a) Adult day care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; provided, however, that public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Adult day care centers participating as independent centers shall comply with the provisions of § 226.15.

(b) All adult day care centers, independent or sponsored, shall meet the following requirements:

(1) Adult day care centers shall provide a community-based group program designed to meet the needs of functionally impaired adults through an individual plan of care. Such a program shall be a structured, comprehensive program that provides a variety of health, social and related support services to enrolled adult participants.

(2) Adult day care centers shall provide care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services.

(3) Adult day care centers shall have Federal, State or local licensing or approval to provide day care services to functionally impaired adults (as defined in §226.2) or individuals 60 years of age or older in a group setting outside their home or a group living arrangement on a less than 24-hour basis. Adult day care centers which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied.

(4) Except for for-profit centers, adult day care centers shall be public, or have tax-exempt status under the Internal Revenue Code of 1986.

(5) Each adult day care center participating in the Program must serve one or more of the following meal types—breakfast, lunch, supper, and snack. Reimbursement may not be claimed for more than two meals and one snack, or one snack and two meals, provided daily to each adult participant.

(6) Each adult day care center participating in the Program shall claim only the meal types specified in its approved application in accordance with the meal pattern requirements specified in §226.20. Participating centers may not claim CACFP reimbursement for meals claimed under part C of title III of the Older Americans Act of 1965. Reimbursement may not be claimed for meals served to persons who are not enrolled, or for meals served to participants at any one time in excess of the center's authorized capacity, or for any meal served at a for-profit center during a calendar month when less than 25 percent of enrolled participants were title XIX or title XX beneficiaries. Menus and any other nutritional records required by the State agency shall be maintained to document compliance with such requirements.

(7) An adult day care center may obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the center and school. The center shall maintain responsibility for all Program requirements set forth in this part.

(8) Adult day care centers shall collect and maintain documentation of the enrollment of each adult participant including information used to determine eligibility for free and reduced price meals in accordance with §226.23(e)(1).

(9) Each adult day care center must maintain daily records of time of service meal counts by type (breakfast, lunch, supper, and snacks) served to enrolled participants, and to adults performing labor necessary to the food service.

(10) Each adult day care center shall maintain records on the age of each enrolled person. In addition, each adult day care center shall maintain records which demonstrate that each enrolled person under the age of 60 meets the functional impairment eligibility requirements established under the definition of "functionally impaired adult" contained in this part. Finally, each adult day care center shall maintain records which document that qualified adult day care participants reside in their own homes (whether alone or with spouses, children or guardians) or in group living arrangements as defined in §226.2.

(11) Each adult day care center must require key operational staff, as defined by the State agency, to attend Program training prior to the facility's participation in the Program, and at least annually thereafter, on content areas established by the State agency. Each meal service must be supervised by an adequate number of operational personnel who have been trained in

Program requirements as outlined in this section.

(c) Each adult day care center shall comply with the recordkeeping requirements established in § 226.10(d), in paragraph (b) of this section and, if applicable, in § 226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.

[53 FR 52591, Dec. 28, 1988, as amended by Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 64 FR 72261, Dec. 27, 1999; 67 FR 43493, June 27, 2002; 69 FR 53546, Sept. 1, 2004; 72 FR 41610, July 31, 2007]

### § 226.20 Requirements for meals.

(a) Except as otherwise provided in this section, each meal served in the Program shall contain, as a minimum, the indicated food components:

(1) A breakfast shall contain: (i) Fluid milk as a beverage or on cereal, or used in part for each purpose;

(ii) Vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or any combination of these foods;

(iii) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or whole-grain or enriched or fortified cereal; or cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgur, or corn grits; or any combination of these foods.

(2) Lunch shall contain: (i) Fluid milk as a beverage;

(ii)(A) Lean meat, poultry or fish; alternate protein products; or cheese; or an egg; or cooked dry beans or peas; or peanut butter; or any combination of these foods. These foods must be served in a main dish, or in a main dish and one other menu item, to meet this requirement. Cooked dry beans or dry peas may be used as the meat alternate or as part of the vegetable/fruit component but not as both food components in the same meal;

(B) Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts shall *not* be used as meat alternates due to their low protein content. Nut or seed meals or flours may be used as an ingredient in a bread/bread alternate, but shall *not* be used as a meat alternate except as defined in this part under Appendix A: Alternate Foods for Meals, and in program guidance materials. As noted in paragraph (c)(2) of this section, nuts or seeds may be used to meet no more than one-half of the meat/meat alternate requirements. Therefore, nuts or seeds must be combined with another meat/meat alternate to fulfill the requirement;

(C) Yogurt may be used to meet all or part of the meat/meat alternate requirement. Yogurt served may be either plain or flavored, unsweetened or sweetened. Noncommercial and/or nonstandardized yogurt products, such as frozen yogurt, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruit and/or nuts or similar products shall not be credited. Four ounces (weight) or ½ cup (volume) of yogurt fulfills the equivalent of one ounce of the meat/meat alternate requirement in the meal pattern.

(iii) Two or more vegetables or fruits, or a combination of both. Full-strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement;

(iv) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgur, or corn grits; or any combination of these foods.

(3) Supper shall contain the food components and servings listed for lunch in § 226.20(a)(2), except that, for adult participants in adult day care centers, it does not require a serving of fluid milk.

(4) Snacks shall contain two of the following four components:

(i) Fluid milk as a beverage, or on cereal, or used in part for each purpose;

(ii) Meat or meat alternate. Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts are excluded and shall *not* be used as meat alternates due to their low protein content. Nut or seed meals or

flours shall *not* be used as a meat alternate except as defined in this part under Appendix A: Alternate Foods for Meals;

(iii) Vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or any combination of these foods. For children, juice may not be served when milk is served as the only other component;

(iv) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgar, or corn grits; or any combination of these foods.

(b) *What are the requirements for the infant meal pattern?*—(1) *Feeding meals to infants.* Meals served to infants ages birth through 11 months must meet the requirements described in paragraph (b)(6) of this section. Foods included in the infant meal must be of a texture and a consistency that are appropriate for the age of the infant being served. The foods must be served during a span of time consistent with the infant's eating habits. For those infants whose dietary needs are more individualized, exceptions to the meal pattern must be made in accordance with the requirements found in paragraph (h) of this section.

(2) *Breastmilk and iron-fortified formula.* Either breastmilk or iron-fortified infant formula, or portions of both, must be served for the entire first year. Meals containing breastmilk and meals containing iron-fortified infant formula supplied by the facility are eligible for reimbursement. However, infant formula provided by a parent (or guardian) and breastmilk fed directly by the infant's mother, during a visit to the facility, contribute to a reimbursable meal only when the facility supplies at least one component of the infant's meal.

(3) *Fruit juice.* Juice should not be offered to infants until they are 6 months of age and ready to drink from a cup. Feeding fruit juice only from a cup will help develop behaviors that may prevent early childhood caries. Fruit juice served as part of the meal pattern for infants 8 through 11 months must be full-strength.

(4) *Solid foods.* Solid foods of an appropriate texture and consistency are required only when the infant is developmentally ready to accept them. The facility should consult with the infant's parent (or guardian) in making the decision to introduce solid foods. Solid foods should be introduced one at a time on a gradual basis with the intent of ensuring the infant's health and nutritional well-being.

(5) *Infant meal pattern.* Infant meals must have, at a minimum, each of the food components indicated, in the amount that is appropriate for the infant's age. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered if the infant is still hungry. Meals may include portions of breastmilk and iron-fortified infant formula as long as the total number of ounces meets, or exceeds, the minimum amount required of this food component. Similarly, to meet the component requirements for vegetables and fruit, portions of both may be served.

(i) *Birth through 3 months.* Only breastmilk or iron-fortified formula is required to meet the infant's nutritional needs.

(A) Breakfast—4 to 6 fluid ounces of breastmilk or iron-fortified infant formula.

(B) Lunch or supper—4 to 6 fluid ounces of breastmilk or iron-fortified infant formula.

(C) Snack—4 to 6 fluid ounces of breastmilk or iron-fortified infant formula.

(ii) *4 through 7 months.* Breastmilk or iron-fortified formula is required. Some infants may be developmentally ready for solid foods of an appropriate texture and consistency. Meals are reimbursable when facilities provide all of the components in the meal pattern that the infant is developmentally ready to accept.

(A) Breakfast—4 to 8 fluid ounces of breastmilk or iron-fortified infant formula; and 0 to 3 tablespoons of iron-fortified dry infant cereal.

(B) Lunch or supper—4 to 8 fluid ounces of breastmilk or iron-fortified

infant formula; and 0 to 3 tablespoons of iron-fortified dry infant cereal; and 0 to 3 tablespoons of fruit or vegetable.

(C) Snack—4 to 6 fluid ounces of breastmilk or iron-fortified infant formula.

(iii) *8 through 11 months.* Breastmilk or iron-fortified formula and solid foods of an appropriate texture and consistency are required. Meals are reimbursable when facilities provide all of the components in the meal pattern that the infant is developmentally ready to accept.

(A) Breakfast—6 to 8 fluid ounces of breastmilk or iron-fortified infant formula; 2 to 4 tablespoons of iron-fortified dry infant cereal; and 1 to 4 tablespoons of fruit or vegetable.

(B) Lunch or supper—6 to 8 fluid ounces of breastmilk or iron-fortified infant formula; 2 to 4 tablespoons of iron-fortified dry infant cereal; and/or 1 to 4 tablespoons of meat, fish, poultry, egg yolk, or cooked dry beans or peas; or ½ to 2 ounces (weight) of cheese; or 1 to 4 ounces (volume) of cottage cheese; or 1 to 4 ounces (weight) of cheese food or cheese spread; and 1 to 4 tablespoons of fruit or vegetable.

(C) Snack—2 to 4 fluid ounces of breastmilk, iron-fortified infant formula, or full strength fruit juice; and 0 to ½ slice of crusty bread (if developmentally ready) or 0 to 2 cracker type products (if developmentally ready), which are made from whole-grain or enriched meal or flour, and suitable as a finger food for an infant.

(6) *Infant meal pattern table.* The minimum amounts of food components to serve to infants, as described in paragraph (b)(5) of this section, are:

CHILD CARE INFANT MEAL PATTERN

| Type of meal service | Birth through 3 months | 4 through 7 months | 8 through 11 months |
|---|---|---|---|
| Breakfast | 4–6 fluid ounces of formula [1] or breastmilk [2,3]. | 4–8 fluid ounces of formula [1] or breastmilk [2,3]; and.<br>0–3 tablespoons of infant cereal [1,4]. | 6–8 fluid ounces of formula [1] or breastmilk [2,3]; and<br>2–4 tablespoons of infant cereal [1]; and<br>1–4 tablespoons of fruit or vegetable or both. |
| Lunch or Supper | 4–6 fluid ounces of formula [1] or breastmilk [2,3]. | 4–8 fluid ounces of formula [1] or breastmilk [2,3]; and.<br>0–3 tablespoons of infant cereal [1,4]; and.<br>0–3 tablespoons of fruit or vegetable or both [4]. | 6–8 fluid ounces of formula [1] or breastmilk [2,3]; and<br>2–4 tablespoons of infant cereal [1]; and/or<br>1–4 tablespoons of meat, fish, poultry, egg yolk, cooked dry beans or peas; or<br>½–2 ounces of cheese; or<br>1–4 ounces (volume) of cottage cheese; or<br>1–4 ounces (weight) of cheese food or cheese spread; and<br>1–4 tablespoons of fruit or vegetable or both. |
| Snack | 4–6 fluid ounces of formula [1] or breastmilk [2,3]. | 4–6 fluid ounces of formula [1] or breastmilk [2,3]. | 2–4 fluid ounces of formula [1], breastmilk [2,3], or fruit juice [5]; and<br>0–½ slice of bread [4,6] or 0–2 crackers [4,6]. |

[1] Infant formula and dry infant cereal must be iron-fortified.
[2] Breastmilk or formula, or portions of both, may be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered if the infant is still hungry.
[4] A serving of this component is required only when the infant is developmentally ready to accept it.
[5] Fruit juice must be full-strength.
[6] A serving of this component must be made from whole-grain or enriched meal or flour.

(c) *Meal patterns for children age one through 12 and adult participants.* When individuals over age one participate in the Program, the total amount of food authorized in the meal patterns set forth below shall be provided in order to qualify for reimbursement.

(1) *Breakfast.* The minimum amount of food components to be served as

breakfast as set forth in paragraph (a)(1) of this section are as follows:

| Food components | Age 1 and 2 | Age 3 through 5 | Age 6 through 12[1] | Adult participants |
|---|---|---|---|---|
| Milk, fluid | ½ cup[2] | ¾ cup | 1 cup | 1 cup.[2] |
| Vegetables and Fruits or | ¼ cup | ½ cup | ½ cup | ½ cup. |
| Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s), and juice. | ¼ cup | ½ cup | ½ cup | ½ cup. |
| Bread and Bread Alternates[3] | | | | |
| Bread or | ½ slice | ½ slice | 1 slice | 2 slices (servings). |
| Cornbread, biscuits, rolls, muffins, etc.[4] or | ½ serving | ½ serving | 1 serving | 2 servings. |
| Cold dry cereal[5] or | ¼ cup or ⅓ ounce. | ⅓ cup or ½ ounce. | ¾ cup or 1 ounce. | 1½ cup or 2 ounces. |
| Cooked cereal or | ¼ cup | ¼ cup | ½ cup | 1 cup. |
| Cooked pasta or noodle products or | ¼ cup | ¼ cup | ½ cup | 1 cup. |
| Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate. | ¼ cup | ¼ cup | ½ cup | 1 cup. |

[1] Children ages 13 through 18 must be served minimum or larger portion sizes specified in this section for children ages 6 through 12.
[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.
[3] Bread, pasta or noodle products, and cereal grains, shall be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole grain or enriched meal or flour; cereal shall be whole grain or enriched or fortified.
[4] Serving sizes and equivalents to be published in guidance materials by FNS.
[5] Either volume (cup) or weight (ounces) whichever is less.

(2) *Lunch.* The minimum amount of food components to be served as lunch as set forth in paragraph (a)(2) of this section are as follows:

| Food components | Age 1 and 2 | Age 3 through 5 | Age 6 through 12[1] | Adult participants |
|---|---|---|---|---|
| Milk, fluid | ½ cup[2] | ¾ cup | 1 cup | 1 cup[2]. |
| Vegetables and Fruits[3] | | | | |
| Vegetables(s) and/or fruit(s) | ¼ cup total | ½ cup total | ¾ cup total | 1 cup total. |
| Bread and Bread Alternates[4] | | | | |
| Bread or | ½ slice | ½ slice | 1 slice | 2 slices (servings). |
| Cornbread, biscuits, rolls, muffins, etc.[5] or | ½ serving | ½ serving | 1 serving | 2 servings. |
| Cooked pasta or noodle products or | ¼ cup | ¼ cup | ½ cup | 1 cup. |
| Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate. | ¼ cup | ¼ cup | ½ cup | 1 cup. |
| Meat and Meat Alternates | | | | |
| Lean meat or poultry or fish[6] or | 1 ounce | 1½ ounces | 2 ounces | 2 ounces. |
| Alternate protein products[7] or | 1 ounce | 1½ ounces | 2 ounces | 2 ounces. |
| Cheese or | 1 ounce | 1½ ounces | 2 ounces | 2 ounces. |
| Egg (large) or | ½ | ¾ | 1 | 1. |
| Cooked dry beans or peas or | ¼ cup | ⅜ cup | ½ cup | ½ cup. |
| Peanut butter or soynut butter or other nut or seed butters or. | 2 tablespoons | 3 tablespoons | 4 tablespoons | 4 tablespoons. |
| Peanuts or soynuts or tree nuts or seeds[8] or | ½ ounce[9]=50% | ¾ ounce[9]=50% | 1 ounce[9]=50% | 1 ounce[9]=50%. |
| Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates. | 4 ounces or ½ cup. | 6 ounces or ¾ cup. | 8 ounces or 1 cup. | 8 ounces or 1 cup. |

[1] Children ages 13 through 18 must be served minimum or larger portion sizes specified in this section for children ages 6 through 12.
[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.
[3] Serve 2 or more kinds of vegetable(s) and/or fruit(s). Full-strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement.
[4] Bread, pasta or noodle products, and cereal grains, shall be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole grain or enriched meal or flour.
[5] Serving sizes and equivalents to be published in guidance materials by FNS.
[6] Edible portion as served.
[7] Must meet the requirements in appendix A of this part.
[8] Tree nuts and seeds that may be used as meat alternates are listed in program guidance.

[9] No more than 50% of the requirement shall be met with nuts or seeds. Nuts or seeds shall be combined with another meat/meat alternate to fulfill the requirement. For purpose of determining combinations, 1 ounce of nuts or seeds is equal to 1 ounce of cooked lean meat, poultry, or fish.

(3) *Supper*. The minimum amount of food components to be served as supper as set forth in paragraph (a)(3) of this section are as follows:

| Food components | Age 1 and 2 | Age 3 through 5 | Age 6 through 12 [1] | Adult participants |
|---|---|---|---|---|
| Milk, fluid | ½ cup [2] | ¾ cup [2] | 1 cup | None. |
| Vegetables and Fruits [3] | | | | |
| Vegetables(s) and/or fruit(s) | ¼cup total | ½ cup total | ¾ cup total | 1 cup total. |
| Bread and Bread Alternates [4] | | | | |
| Bread or | ½ slice | ½ slice | 1 slice | 2 slices (servings). [5] |
| Cornbread, biscuits, rolls, muffins, etc. [5] or | ½ serving | ½ serving | 1 serving | 2 servings. |
| Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate. | ¼ cup | ¼ cup | ½ cup | 1 cup. |
| Meat and Meat Alternates | | | | |
| Lean meat or poultry or fish [6] or | 1 ounce | 1½ ounces | 2 ounces | 2 ounces. |
| Alternate protein products [7] or | 1 ounce | 1½ ounces | 2 ounces | 2 ounces. |
| Cheese or | 1 ounce | 1½ ounces | 2 ounces | 2 ounces. |
| Egg (large) or | ½ | ¾ | 1 | 1. |
| Cooked dry beans or peas or | ¼ cup | ⅜ cup | ½ cup | ½ cup. |
| Peanut butter or soynut butter or other nut or seed butters or. | 2 tablespoons | 3 tablespoons | 4 tablespoons | 4 tablespoons. |
| Peanuts or soynuts or tree nuts or seeds [8] or | ½ ounce [9]=50% | ¾ ounce [9]=50% | 1 ounce [9]=50% | 1 ounce [9]=50%. |
| Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates. | 4 ounces or ½ cup. | 6 ounces or ¾ cup. | 8 ounces or 1 cup. | 8 ounces or 1 cup. |

[1] Children ages 13 through 18 must be served minimum or larger portion sizes specified in this section for children ages 6 through 12.
[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.
[3] Serve 2 or more kinds of vegetable(s) and/or fruit(s). Full-strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement.
[4] Bread, pasta or noodle products, and cereal grains, shall be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole grain or enriched meal or flour.
[5] Serving sizes and equivalents to be published in guidance materials by FNS.
[6] Edible portion as served.
[7] Must meet the requirements in appendix A of this part.
[8] Tree nuts and seeds that may be used as meat alternates are listed in program guidance.
[9] No more than 50% of the requirement shall be met with nuts or seeds. Nuts or seeds shall be combined with another meat/meat alternate to fulfill the requirement. For purpose of determining combinations, 1 ounce of nuts or seeds is equal to 1 ounce of cooked lean meat, poultry, or fish.

(4) *Snack*. The minimum amounts of food components to be served as snack as set forth in paragraph (a)(4) of this section are as follow. Select two of the following four components. (For children, juice may not be served when milk is served as the only other component.)

| Food components | Age 1 and 2 | Age 3 through 5 | Age 6 through 12 [1] | Adult participants [1] |
|---|---|---|---|---|
| **MILK** | | | | |
| Milk, fluid | ½ cup [2] | ½ cup | 1 cup | 1 cup. |
| **VEGETABLES AND FRUIT** | | | | |
| Vegetable(s) and/or fruit(s) or | ½ cup | ½ cup | ¾ cup | ½ cup. |
| Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s), and juice. | ½ cup | ½ cup | ¾ cup | ½ cup. |
| . | | | | |

| Food components | Age 1 and 2 | Age 3 through 5 | Age 6 through 12 [1] | Adult participants [1] |
|---|---|---|---|---|
| **BREAD AND BREAD ALTERNATES [3]** | | | | |
| Bread or | ½ slice | ½ slice | 1 slice | 1 slice (serving). |
| Cornbread, biscuits, rolls, muffins, etc. [4] or | ½ serving | ½ serving | 1 serving | 1 serving. |
| Cold dry cereal [5] | ¼ cup or ⅓ ounce | ⅓ cup or ½ ounce | ¾ cup or 1 ounce | ¾ cup or. 1 ounce. |
| Cooked pasta or noodle products or | ¼ cup | ¼ cup | ½ cup | ½ cup. |
| Cooked cereal or grains or an equivalent quantity of any combination of bread/bread alternates. | ¼ cup | ¼ cup | ½ cup | ½ cup. |
| **MEAT AND MEAT ALTERNATES** | | | | |
| Lean meat or poultry or fish [6] or | ½ ounce | ½ ounce | 1 ounce | 1 ounce. |
| Alternate protein products [7] or | ½ ounce | ½ ounce | 1 ounce | 1 ounce. |
| Cheese or | ½ ounce | ½ ounce | 1 ounce | 1ounce. |
| Egg (large) [8] or | ½ egg | ½ egg | ½ egg | ½ egg. |
| Cooked dry beans or peas or | ⅛ cup | ⅛ cup | ¼ cup | ¼ cup. |
| Peanut butter or soynut butter or other nut or seed butters or. | 1 tablespoon | 1 tablespoon | 2 tablespoons | 2 tablespoons. |
| Peanuts or soynuts or tree nuts or seeds [9] or | ½ ounce | ½ ounce | 1 ounce | 1 ounce. |
| Yogurt, plain or flavored, unsweetened or sweetened, or an equivalent quantity of any combination of meat/meat alternates. | 2 ounces or ¼ cup. | 2 ounces or ¼ cup. | 4 ounces or ½ cup. | 4 ounces or ½ cup. |

[1] Children ages 13 through 18 must be served minimum or larger portion sizes specified in this section for children ages 6 through 12.
[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.
[3] Bread, pasta or noodle products, and cereal grains shall be whole-grain or enriched; cornbread, biscuits, rolls, muffins, etc. shall be made with whole-grain or enriched meal or flour; cereal shall be whole-grain or enriched or fortified.
[4] Serving size and equivalents to be published in guidance materials by FNS.
[5] Either volume (cup) or weight (ounce), whichever is less.
[6] Edible portion as served.
[7] Must meet the requirements in Appendix A of this part.
[8] One-half egg meets the required minimum amount (one ounce or less) of meat alternate.
[9] Tree nuts and seeds that may be used as meat alternates are listed in program guidance.

(d) *Additional food.* To improve the nutrition of participating children over 1 year of age additional foods may be served with each meal as follows:

(1) *Breakfast.* Include as often as practical one-half egg; or a 1-ounce serving (edible portion as served) of meat, poultry or fish; or 1-ounce of cheese; or 2 tablespoons of peanut butter; or 4 oz. of yogurt; or an equivalent quantity of any combination of these foods. Additional foods may be served as desired.

(2) *Lunch, supper or supplemental food.* Additional foods may be served as desired.

(e) *Temporary unavailability of milk.* If emergency conditions prevent an institution normally having a supply of milk from temporarily obtaining milk deliveries, the State agency may approve the service of breakfasts, lunches, or suppers without milk during the emergency period.

(f) *Continuing unavailability of milk.* The inability of an institution to obtain a supply of milk on a continuing basis shall not bar it from participation in the Program. In such cases, the State agency may approve service of meals without milk, provided that an equivalent amount of canned, whole dry or nonfat dry milk is used in the preparation of the components of the meal set forth in paragraphs (a)(1), (2) and (3) of this section.

(g) *Statewide substitutions.* In American Samoa, Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands the following variations from the meal requirements are authorized: A serving of a starchy vegetable, such as yams, plantains, or sweet potatoes may be substituted for the bread requirements.

(h) *Individual substitutions.* Substitutions may be made in food listed in paragraphs (b) and (c) of this section if individual participants are unable, because of medical or other special dietary needs, to consume such foods. Substitutions because of medical needs shall be made only when supported by a statement from a recognized medical authority which includes recommended alternate foods.

(i) *Special variations.* FNS may approve variations in the food components of the meals on an experimental or a continuing basis in any institution where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, economic, or physical needs.

(j) *Meal planning.* Institutions shall plan for and order meals on the basis of current participation trends, with the objective of providing only one meal per participant at each meal service. Records of participation and of ordering or preparing meals shall be maintained to demonstrate positive action toward this objective. In recognition of the fluctuation in participation levels which makes it difficult to estimate precisely the number of meals needed and to reduce the resultant waste, any excess meals that are ordered may be served to participants and may be claimed for reimbursement, unless the State agency determines that the institution has failed to plan and prepare or order meals with the objective of providing only one meal per participant at each meal service.

(k) *Time of meal service.* State agencies may require any institution or facility to allow a specific amount of time to elapse between meal services or require that meal services not exceed a specified duration.

(l) *Sanitation.* Institutions shall ensure that in storing, preparing, and serving food, proper sanitation and health standards are met which conform with all applicable State and local laws and regulations. Institutions shall ensure that adequate facilities are available to store food or hold meals.

(m) *Donated commodities.* Institutions shall efficiently use in the Program any foods donated by the Department and accepted by the institution.

(n) *Plentiful foods.* Institutions shall, insofar as practical, purchase and efficiently use in the Program foods designated as plentiful by the Department.

(o) *Additional provision.* The State agency may allow institutions which serve meals prepared in schools participating in the National School Lunch and School Breakfast Programs to substitute the meal pattern requirements of the regulations governing those Programs (7 CFR part 210 and 7 CFR part 220, respectively) for the meal pattern requirements contained in this section.

(p) *Family-style meal service.* Meals may be served in a family-style setting.

(q) *Offer versus serve.* (1) Each adult day care center shall *offer* its adult participants all of the required food servings as set forth in paragraph (c)(1), (c)(2) and (c)(3) of this section. However, at the discretion of the adult day care center, adult participants may be permitted to *decline:*

(i) *One of the four* food items (one serving of milk, one serving of vegetable and/or fruit, and two servings of bread or bread alternate) required at breakfast;

(ii) *Two of the six* food items (one serving of milk, two servings of vegetable and/or fruit, two servings of bread or bread alternate, and one serving of meat or meat alternate) required at lunch;

(iii) *Two of the five* food items (two servings of vegetables and/or fruit, two servings of bread or bread alternate, and one serving of meat or meat alternate) required at supper.

(2) The price of a reimbursable meal shall not be affected if an adult participant declines a food item.

[47 FR 36527, Aug. 20, 1982; 48 FR 40197, Sept. 16, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 226.20, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 226.21 Food service management companies.

(a) Any institution may contract with a food service management company. An institution which contracts with a food service management company shall remain responsible for ensuring that the food service operation conforms to its agreement with the State agency. All procurements of meals from food service management companies shall adhere to the procurement standards set forth in § 226.22. Public institutions shall follow applicable State or local laws governing bid

procedures. In the absence of any applicable State or local laws, and in addition to the procurement provisions set forth in § 226.22, the State agency may mandate that each institution with Program meal contracts of an aggregate value in excess of $10,000 formally advertise such contracts and comply with the following procedures intended to prevent fraud, waste, and Program abuse:

(1) All proposed contracts shall be publicly announced at least once 14 calendar days prior to the opening of bids. The announcement shall include the time and place of the bid opening;

(2) The institution shall notify the State agency at least 14 calendar days prior to the opening of the bids of the time and place of the bid opening;

(3) The invitation to bid shall not provide for loans or any other monetary benefit or terms or conditions to be made to institutions by food service management companies;

(4) Nonfood items shall be excluded from the invitation to bid, except where such items are essential to the conduct of the food service;

(5) The invitation to bid shall not specify special meal requirements to meet ethnic or religious needs unless special requirements are necessary to meet the needs of the participants to be served;

(6) The bid shall be publicly opened;

(7) All bids totaling $50,000 or more shall be submitted to the State agency for approval before acceptance. All bids shall be submitted to the State agency for approval before accepting a bid which exceeds the lowest bid. State agencies shall respond to any request for approval within 10 working days of receipt;

(8) The institutions shall inform the State agency of the reason for selecting the food service management company chosen. State agencies may require institutions to submit copies of all bids submitted under this section.

(b) The institution and the food service management company shall enter into a standard contract as required by § 226.6(i). However, public institutions may, with the approval of the State agency, use their customary form of contract if it incorporates the provisions of § 226.6(i).

(c) A copy of the contract between each institution and food service management company shall be submitted to the State agency prior to the beginning of Program operations under the subject contract.

(d) Each proposed additional provision to the standard form of contract shall be submitted to the State agency for approval.

(e) A food service management company may not subcontract for the total meal, with or without milk, or for the assembly of the meal.

[47 FR 36527, Aug. 20, 1982, as amended at 53 FR 52594, Dec. 28, 1988]

### § 226.22 Procurement standards.

(a) This section establishes standards and guidelines for the procurement of foods, supplies, equipment, and other goods and services. These standards are furnished to ensure that such materials and services are obtained efficiently and economically and in compliance with the provisions of applicable Federal law and Executive orders.

(b) These standards shall not relieve the institution of any contractual responsibilities under its contracts. The institution is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements entered into in support of the Program. These include, but are not limited to: source evaluation, protests of award, disputes, and claims. Violations of the law shall be referred to the local, State, or Federal authority having proper jurisdiction.

(c) Institutions may use their own procedures for procurement with Program funds to the extent that:

(1) Procurements by public institutions comply with applicable State or local laws and standards set forth in 7 CFR part 3016;

(2) Procurements by private nonprofit institutions comply with standards set forth in 7 CFR part 3019; and

(3) All procurements comply with the procurement requirements in paragraphs (d) through (m) of this section.

(d) Institutions shall maintain a written code of standards of conduct which shall govern the performance of

their officers, employees or agents engaged in the award and administration of contracts supported by Program payments. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(1) The employee, officer or agent;

(2) Any member of his immediate family;

(3) His or her partner; or

(4) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

The institution's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Institutions may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the institution's officers, employees, or agents, or by contractors or their agents.

(e) The institution shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by institution officials to avoid the purchase of unnecessary or duplicative items. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical.

(f) Affirmative steps shall be taken to assure that small and minority businesses are utilized when possible. Affirmative steps shall include the following:

(1) Including qualified small and minority businesses on solicitation lists;

(2) Assuring that small and minority businesses are solicited whenever they are potential sources;

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation;

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority businesses;

(5) Using the services and assistance of the Small Business Administration and the Minority Business Enterprise of the Department of Commerce as required;

(6) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in paragraphs (b)(1) through (5) of this section; and

(7) Taking similar appropriate affirmative action in support of women's business enterprises.

(g) All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition consistent with this section. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to (1) placing unreasonable requirements on firms in order for them to qualify to do business, (2) noncompetitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience and bonding requirements.

(h) The institution shall have written selection procedures which shall provide, as a minimum, the following procedural requirements:

(1) Solicitations of offers, whether by competitive sealed bids or competitive negotiation, shall:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a

clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Clearly set forth all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(2) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(i) Program procurements shall be made by one of the following methods:

(1) Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for the procurement of services, supplies or other property, costing in the aggregate not more than $10,000. Institutions shall comply with State or local small purchase dollar limits under $10,000. If small purchase procedures are used for a procurement under the Program, price or rate quotation shall be obtained from an adequate number of qualified sources; or

(2) In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

(i) In order for formal advertising to be feasible, appropriate conditions must be present, including as a minimum, the following:

(A) A complete, adequate and realistic specification or purchase description is available.

(B) Two or more responsible suppliers are willing and able to compete effectively for the institution's business.

(C) The procurement lends itself to a firm-fixed price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

(ii) If formal advertising is used for a procurement under the Program, the following requirements shall apply:

(A) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised.

(B) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

(C) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(D) A firm-fixed-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the grantee indicates that such discounts are generally taken.

(E) Any or all bids may be rejected when there are sound documented business reasons in the best interest of the Program.

(3) In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized. Negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

(i) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Proposals shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable:

(ii) The Request for Proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance;

(iii) The institution shall provide mechanisms for technical evaluation of the proposal received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award; and

(iv) Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price and other factors considered. Unsuccessful offerors should be notified promptly.

(4) Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising), or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(i) The item is available only from a single source;

(ii) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;

(iii) FNS authorizes noncompetitive negotiation; or

(iv) After solicitation of a number of sources, competition is determined inadequate.

(j) The cost plus a percentage of cost method of contracting shall not be used. Instructions shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under the Program shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

(k) Institutions shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

(l) In addition to provisions defining a sound and complete procurement contract, institutions shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by the provision, Federal Law or FNS:

(1) Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate;

(2) All contracts in excess of $10,000 shall contain suitable provisions for termination by the institution including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor;

(3) All contracts awarded in excess of $10,000 by institutions and their contractors shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR part 60);

(4) Where applicable, all contracts awarded by institutions in excess of $2,500 which involve the employment of mechanics or laborers shall include a provision for compliance with section 103 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 through 330) as supplemented by Department of Labor regulations (29 CFR part 5). Under section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work day of 8 hours and a standard work week of 40 hours. Work in excess of the standard work day or week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 8 hours in

any calendar day or 40 hours in the work week. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence;

(5) The contract shall include notice of USDA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of USDA requirements and regulations pertaining to copyrights and rights in data. These requirements are found in §3015.175. All negotiated contracts (except those awarded by small purchases procedures) awarded by institutions shall include a provision to the effect that the institution, FNS, the Comptroller General of the United States or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions. Institutions shall require contractors to maintain all required records for three years after institutions make final payment and all other pending matters are closed;

(6) Contracts and subcontracts of amounts in excess of $100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1837(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15), which prohibit the use under nonexempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to FNS and to the U.S. EPA Assistant Administrator for Enforcement (EN–329); and

(7) Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy efficiency conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163).

(m) Institutions shall maintain a contract administration system insuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

[47 FR 36527, Aug. 20, 1982, as amended at 71 FR 39519, July 13, 2006]

### § 226.23 Free and reduced-price meals.

(a) The State agency must not enter into a Program agreement with a new institution until the institution has submitted, and the State agency has approved, a written policy statement concerning free and reduced-price meals to be used in all child and adult day care facilities under its jurisdiction, as described in paragraph (b) of this section. The State agency must not require an institution to revise its free and reduced-price policy statement or its nondiscrimination statement unless the institution makes a substantive change to either policy. Pending approval of a revision to these statements, the existing policy must remain in effect.

(b) Institutions that may not serve meals at a separate charge to children (including emergency shelters, at-risk afterschool care centers, and sponsoring organizations of emergency shelters, at-risk afterschool care centers, and day care homes) and other institutions that elect to serve meals at no separate charge must develop a policy statement consisting of an assurance to the State agency that all participants are served the same meals at no separate charge, regardless of race, color, national origin, sex, age, or disability and that there is no discrimination in the course of the food service.This statement shall also contain an assurance that there will be no identification of children in day care homes in which meals are reimbursed at both the tier I and tier II reimbursement rates, and that the sponsoring organization will not make any free and reduced price eligibility information concerning individual households available to day care homes and will otherwise limit the use of such information to

persons directly connected with the administration and enforcement of the Program.

(c) Independent centers and sponsoring organizations of centers which charge separately for meals shall develop a policy statement for determining eligibility for free and reduced-price meals which shall include the following:

(1) The specific criteria to be used in determining eligibility for free and reduced-price meals. The institution's standards of eligibility shall conform to the Secretary's income standards;

(2) A description of the method or methods to be used in accepting applications from families for free and reduced-price meals. Such methods will ensure that applications are accepted from households on behalf of children who are TANF recipients or who are members of food stamp or FDPIR households or, for adult participants, who are members of a food stamp or FDPIR household or SSI or Medicaid participants;

(3) A description of the method or methods to be used to collect payments from those participants paying the full or reduced price of the meal which will protect the anonymity of the participants receiving a free or reduced-price meal;

(4) An assurance which provides that the institution will establish a hearing procedure for use when benefits are denied or terminated as a result of verification:

(i) A simple, publicly announced method for a family to make an oral or written request for a hearing;

(ii) An opportunity for the family to be assisted or represented by an attorney or other person in presenting its appeal;

(iii) An opportunity to examine, prior to and during the hearing, the documents and records presented to support the decision under appeal;

(iv) That the hearing shall be held with reasonable promptness and convenience to the family and that adequate notice shall be given to the family as to the time and place of the hearing;

(v) An opportunity for the family to present oral or documentary evidence and arguments supporting its position;

(vi) An opportunity for the family to question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses;

(vii) That the hearing shall be conducted and the determination made by a hearing official who did not participate in making the initial decision;

(viii) The determination of the hearing official shall be based on the oral and documentary evidence presented at the hearing and made a part of that hearing record;

(ix) That the family and any designated representatives shall be notified in writing of the decision of the hearing official;

(x) That a written record shall be prepared with respect to each hearing, which shall include the decision under appeal, any documentary evidence and a summary of any oral testimony presented at the hearing, the decision of the hearing official, including the reasons therefor, and a copy of the notification to the family of the decision of the hearing official; and

(xi) That such written record of each hearing shall be preserved for a period of three years and shall be available for examination by the family or its representatives at any reasonable time and place during such period;

(5) An assurance that there will be no overt identification of free and reduced-price meal recipients and no discrimination against any participant on the basis of race, color, national origin, sex, age, or handicap;

(6) An assurance that the charges for a reduced-price lunch or supper will not exceed 40 cents, that the charge for a reduced-price breakfast will not exceed 30 cents, and that the charge for a reduced-price snack will not exceed 15 cents.

(d) Each institution shall annually provide the information media serving the area from which the institution draws its attendance with a, unless the State agency has issued a Statewide media release on behalf of all institutions. All media releases issued by institutions other than emergency shelters, at-risk afterschool care centers, and sponsoring organizations of emergency shelters, at-risk afterschool care

centers, or day care homes must include the Secretary's Income Eligibility Guidelines for Free and Reduced-Price Meals. The release issued by all emergency shelters, at-risk afterschool care centers, and sponsoring organizations of emergency shelters, at-risk afterschool care centers, or day care homes, and by other institutions which elect not to charge separately for meals, must announce the availability of meals at no separate charge. The release issued by child care institutions which charge separately for meals shall announce the availability of free and reduced-price meals to children meeting the approved eligibility criteria. The release issued by child care institutions shall also announce that children who are TANF recipients, food stamp or FDPIR households, or are Head Start participants are automatically eligible to receive free meal benefits. The release issued by adult day care centers which charge separately for meals shall announce the availability of free and reduced-price meals to participants meeting the approved eligibility criteria. The release issued by adult day care centers shall also announce that adult participants who are members of food stamp or FDPIR households or who are SSI or Medicaid participants are automatically eligible to receive free meal benefits. All releases shall state that meals are available to all participants without regard to race, color, national origin, sex, age or handicap.

(e)(1) *Application for free and reduced-price meals.* (i) For the purpose of determining eligibility for free and reduced price meals, institutions (other than emergency shelters and at-risk afterschool care centers) shall distribute applications for free and reduced price meals to the families of participants enrolled in the institution. Sponsoring organizations of day care homes shall distribute applications for free and reduced price meals to day care home providers who wish to enroll their own eligible children in the Program. At the request of a provider in a tier II day care home, sponsoring organizations of day care homes shall distribute applications for free and reduced price meals to the households of all children enrolled in the home, except that applications need not be distributed to the households of enrolled children that the sponsoring organization determines eligible for free and reduced price meals under the circumstances described in paragraph (e)(1)(vi) of this section. These applications, and any other descriptive material distributed to such persons, shall contain only the family-size income levels for reduced price meal eligibility with an explanation that households with incomes less than or equal to these levels are eligible for free or reduced price meals. Such forms and descriptive materials may not contain the income standards for free meals. However, such forms and materials distributed by child care institutions other than sponsoring organizations of day care homes shall state that, if a child is a member of a food stamp or FDPIR household or is a TANF recipient, the child is automatically eligible to receive free Program meal benefits, subject to the completion of the application as described in paragraph (e)(1)(ii) of this section; such forms and materials distributed by sponsoring organizations of day care homes shall state that, if a child or a child's parent is participating in or subsidized under a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free or reduced price meals, meals served to the child are automatically eligible for tier I reimbursement, subject to the completion of the application as described in paragraph (e)(1)(ii) of this section, and shall list any programs identified by the State agency as meeting this standard; such forms and materials distributed by adult day care centers shall state that, if an adult participant is a member of a food stamp or FDPIR household or is a SSI or Medicaid participant, the adult participant is automatically eligible to receive free Program meal benefits, subject to the completion of the application as described in paragraph (e)(1)(iii) of this section. Sponsoring organizations of day care homes shall not make free and reduced price eligibility information concerning individual households available to day care homes and shall

otherwise limit the use of such information to persons directly connected with the administration and enforcement of the Program. However, sponsoring organizations may inform tier II day care homes of the number of identified income-eligible enrolled children. If a State agency distributes, or chooses to permit its sponsoring organizations to distribute, applications to the households of children enrolled in tier II day care homes which include household confidentiality waiver statements, such applications shall include a statement informing households that their participation in the program is not dependent upon signing the waivers. Furthermore, such forms and materials distributed by child care institutions shall state that if a child is a Head Start participant, the child is automatically eligible to receive free Program meal benefits, subject to submission by Head Start officials of a Head Start statement of income eligibility or income eligibility documentation.

(ii) Except as provided in paragraph (e)(1)(iv) of this section, the application for children shall contain a request for the following information:

(A) The names of all children for whom application is made;

(B) The names of all other household members;

(C) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number;

(D) The income received by each household member identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security, and other cash income received or withdrawn from any other source, including savings, investments, trust accounts, and other resources);

(E) A statement to the effect that "In certain cases, foster children are eligible for free and reduced-price meals regardless of household income. If such children are living with you and you wish to apply for such meals, please contact us.";

(F) A statement that includes substantially the following information, "The Richard B. Russell National School Lunch Act requires the information on this application. You do not have to give the information, but if you do not, we cannot approve your child for free or reduced price meals. You must include the social security number of the adult household member who signs the application. The social security number is not required when you apply on behalf of a foster child or you list a Food Stamp, Temporary Assistance for Needy Families (TANF) Program or Food Distribution Program on Indian Reservations (FDPIR) case number for your child or other (FDPIR) identifier or when you indicate that the adult household member signing the application does not have a social security number. We will use your information to determine if your child is eligible for free or reduced price meals, and for administration and enforcement of the Program." When the State agency or child care institution, as appropriate, plans to use or disclose children's eligibility information for non-program purposes, additional information, as specified in paragraph (k) of this section, must be added to the Privacy Act notice/statement. State agencies and child care institutions are responsible for drafting the appropriate notice and ensuring that the notice complies with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note (Disclosure of Social Security Number)); and

(G) The signature of an adult member of the household which appears immediately below a statement that the person signing the application certifies that all information furnished is true and correct; that the application is being made in connection with the receipt of Federal funds; that Program officials may verify the information on the application; and that the deliberate misrepresentation of any of the information on the application may subject the applicant to prosecution under applicable State and Federal criminal statutes.

(iii) Except as provided in paragraph (e)(1)(v) of this section, the application for adults shall contain a request for the following information:

(A) The names of all adults for whom application is made;

(B) The names of all other household members;

(C) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number;

(D) The income received by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security, and other cash income received or withdrawn from any other source, including savings, investments, trust accounts and other resources);

(E) A statement which includes substantially the following information: "Section 9 of the National School Lunch Act requires that, unless a food stamp, or FDPIR case number or SSI or Medicaid assistance identification number is provided for the adult for whom benefits are sought, you must include a social security number on the application. This must be the social security number of the adult household member signing the application. If the adult household member signing the application does not possess a social security number, he/she must indicate so on the application. Provision of a social security number is not mandatory, but if a social security number is not provided or an indication is not made that the adult household member signing the application does not have one, the application cannot be approved. This notice must be brought to the attention of the household member whose social security number is disclosed. The social security number may be used to identify the household member in carrying out efforts to verify the correctness of information stated on the application. These verification efforts may be carried out through program reviews, audits and investigations and may include contacting employers to determine income, contacting a food stamp, Indian tribal organization or welfare office to determine current certification for receipt of food stamps or FDPIR benefits, contacting the issuing office of SSI or Medicaid benefits to determine current certification for receipt of these benefits, contacting the State employment security office to determine the amount of benefits received, and checking the documentation produced by household members to provide the amount of income received. These efforts may result in loss or reduction of benefits, administrative claims or legal action if incorrect information is reported." State agencies and institutions shall ensure that the notice complies with section 7 of Pub. L. 93–579. If a State or local agency plans to use the social security numbers for CCFP verification purposes in a manner not described by this notice, the notice shall be altered to include a description of those uses; and

(F) The signature of an adult member of the household which appears immediately below a statement that the person signing the application certifies that all information furnished is true and correct; that the application is being made in connection with the receipt of Federal funds; that Program officials may verify the information on the application; and that the deliberate misrepresentation of any of the information on the application may subject the applicant to prosecution under applicable State and Federal criminal statutes.

(iv) If they so desire, households applying on behalf of children who are members of food stamp or FDPIR households who are TANF recipients may apply under this paragraph rather than under the procedures described in paragraph (e)(1)(ii) of this section. In addition, households of children enrolled in tier II day care homes who are participating in a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free and reduced price meals may apply under this paragraph rather than under the procedures described in paragraph (e)(1)(ii) of this section. Households applying on behalf of children who are 0members of food stamp or FDPIR households; children who are TANF recipients; or for children enrolled in tier II day care homes, other qualifying Federal or State program, shall be required to provide:

(A) For the child(ren) for whom automatic free meal eligibility is claimed, their names and food stamp, FDPIR, or TANF case number; or for the households of children enrolled in tier II day

care homes, their names and other program case numbers (if the program utilizes case numbers); and

(B) The signature of an adult member of the household as provided for in paragraph (e)(1)(ii)(G) of this section. In accordance with paragraph (e)(1)(ii)(F) of this section, if a case number is provided, it may be used to verify the current certification for the child(ren) for whom free meal benefits are claimed. Whenever households apply for children not receiving food stamp, FDPIR, or TANF benefits; or for tier II homes, other qualifying Federal or State program benefits, they must apply in accordance with the requirements set forth in paragraph (e)(1)(ii) of this section.

(v) If they so desire, households applying on behalf of adults who are members of food stamp or FDPIR households or SSI or Medicaid participants may apply for free meal benefits under this paragraph rather than under the procedures described in paragraph (e)(1)(iii) of this section. Households applying on behalf of adults who are members of food stamp or FDPIR households or SSI or Medicaid participants shall be required to provide:

(A) The names and food stamp or FDPIR case numbers or SSI or Medicaid assistance identification numbers of the adults for whom automatic free meal eligibility is claimed; and

(B) The signature of an adult member of the household as provided in paragraph (e)(1)(iii)(F) of this section. In accordance with paragraph (e)(1)(iii)(G) of this section, if a food stamp or FDPIR case number or SSI or Medicaid assistance identification number is provided, it may be used to verify the current food stamp, FDPIR, SSI, or Medicaid certification for the adult(s) for whom free meal benefits are being claimed. Whenever households apply for benefits for adults not receiving food stamp, FDPIR, SSI, or Medicaid benefits, they must apply in accordance with the requirements set forth in paragraph (e)(1)(iii) of this section.

(vi) A sponsoring organization of day care homes may identify enrolled children eligible for free and reduced price meals (i.e., tier I rates), without distributing free and reduced price applications, by documenting the child's or household's participation in or receipt of benefits under a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free and reduced price meals. Documentation shall consist of official evidence, available to the tier II day care home or sponsoring organization, and in the possession of the sponsoring organization, of the household's participation in the qualifying program.

(2) *Letter to households.* Institutions shall distribute a letter to households or guardians of enrolled participants in order to inform them of the procedures regarding eligibility for free and reduced-price meals. The letter shall accompany the application required under paragraph (e)(1) of this section and shall contain:

(i) The income standards for reduced-price meals, with an explanation that households with incomes less than or equal to the reduced-price standards would be eligible for free or reduced-price meals (the income standards for free meals shall *not* be included in letters or notices to such applicants);

(ii) How a participant's household may make application for free or reduced-price meals;

(iii) An explanation that an application for free or reduced price benefits cannot be approved unless it contains complete "documentation" as defined in § 226.2.

(iv) The statement: "In the operation of child feeding programs, no person will be discriminated against because of race, color, national origin, sex, age, or handicap";

(v) A statement to the effect that participants having family members who become unemployed are eligible for free or reduced-price meals during the period of unemployment, provided that the loss of income causes the family income during the period of unemployment to be within the eligibility standards for those meals;

(vi) Except in the case of adult participants, a statement to the effect that in certain cases foster children are eligible for free or reduced-price meals regardless of the income of such household with whom they reside and that households wishing to apply for such

benefits for foster children should contact the institution; and

(vii) An explanation that households receiving free and reduced-price meals must notify appropriate institution officials during the year of any decreases in household size or increases in income of over $50 per month or $600 per year or—

(A) In the case of households of enrolled children that provide a food stamp, FDPIR or TANF case number to establish a child's eligibility for free meals, any termination in the child's certification to participate in the Food Stamp, FDPIR or TANF Programs, or

(B) In the case of households of adult participants that provide a food stamp or FDPIR case number or an SSI or Medicaid assistance identification number to establish an adult's eligibility for free meals, any termination in the adult's certification to participate in the Food Stamp, FDPIR, SSI or Medicaid Programs.

(3) In addition to the information listed in paragraph (e)(2) of this section pricing institutions must include in their letter to household an explanation that indicates that: (i) The information in the application may be verified at any time during the year; and (ii) how a family may appeal a decision of the institution to deny, reduce, or terminate benefits as described under the hearing procedure set forth in paragraph (c)(4) of this section.

(4) *Determination of eligibility*. The institution shall take the income information provided by the household on the application and calculate the household's total current income. When a completed application furnished by a family indicates that the family meets the eligibility criteria for free or reduced-price meals, the participants from that family shall be determined eligible for free or reduced-price meals. Institutions that are pricing programs shall promptly provide written notice to each family informing them of the results of the eligibility determinations. When the information furnished by the family is not complete or does not meet the eligibility criteria for free or reduced-price meals, institution officials must consider the participants from that family as not eligible for free or reduced-price meals, and must consider the participants as eligible for "paid" meals. When information furnished by the family of participants enrolled in a pricing program does not meet the eligibility criteria for free or reduced-price meals, pricing program officials shall provide written notice to each family denied free or reduced-price benefits. At a minimum, this notice shall include:

(i) The reason for the denial of benefits, e.g., income in excess of allowable limits or incomplete application;

(ii) Notification of the right to appeal;

(iii) Instructions on how to appeal; and

(iv) A statement reminding the household that they may reapply for free or reduced-price benefits at any time during the year,

The reasons for ineligibility shall be properly documented and retained on file at the institution.

(5) *Appeals of denied benefits*. A family that wishes to appeal the denial of an application in a pricing program shall do so under the hearing procedures established under paragraph (c)(4) of this section. However, prior to initiating the hearing procedures, the household may request a conference to provide all affected parties the opportunity to discuss the situation, present information and obtain an explanation of the data submitted on the application or the decision rendered. The request for a conference shall not in any way prejudice or diminish the right to a fair hearing. The institution shall promptly schedule a fair hearing, if requested.

(f) Free, reduced-price and paid meal eligibility figures must be reported by institutions to State agencies at least once each year and shall be based on current family-size and income information of enrolled participants. Such information shall be no more than 12 months old.

(g) Sponsoring organizations for family day care homes shall ensure that no separate charge for food service is imposed on families of children enrolled in participating family day care homes.

(h) *Verification of eligibility*. State agencies shall conduct verification of eligibility for free and reduced-price

meals on an annual basis, in accordance with the verification procedures outlined in paragraphs (h) (1) and (2) of this section. Verification may be conducted in accordance with Program assistance requirements of §226.6(m); however, the performance of verification for individual institutions shall occur no less frequently than once every three years. Any State may, with the written approval of FNSRO, use alternative approaches in the conduct of verification, provided that the results achieved meet the requirements of this part. If the verification process discloses deficiencies with the determination of eligibility and/or application procedures which exceed maximum levels established by FNS, State agencies shall conduct follow-up reviews for the purpose of determining that corrective action has been taken by the institution. These reviews shall be conducted within one year of the date the verification process was completed. The verification effort shall be applied without regard to race, color, national origin, sex, age, or handicap. State agencies shall maintain on file for review a description of the annual verification to be accomplished in order to demonstrate compliance with paragraphs (h) (1) and (2) of this section.

(1) *Verification procedures for nonpricing programs.* Except for sponsoring organizations of family day care homes, State agency verification procedures for nonpricing programs shall consist of a review of all approved free and reduced price applications on file. For sponsoring organizations of family day care homes, State agency verification procedures shall consist of a review only of the approved free and reduced price applications (or other documentation, if vouchers or other documentation are used in lieu of free and reduced price applications) on file for those day care homes that are required to be reviewed when the sponsoring organization is reviewed, in accordance with the review requirements set forth in §226.6(m). However, the State agency shall ensure that the day care homes selected for review are representative of the proportion of tier I, tier II, and tier II day care homes with a mix of income-eligible and non-income-eligible children in the sponsorship, and shall ensure that at least 10 percent of all free and reduced price applications (or other documentation, if applicable) on file for the sponsorship are verified. The review of applications shall ensure that:

(i) The application has been correctly and completely executed by the household;

(ii) The institution has correctly determined and classified the eligibility of enrolled participants for free or reduced price meals or, for family day care homes, for tier I or tier II reimbursement, based on the information included on the application submitted by the household;

(iii) The institution has accurately reported to the State agency the number of enrolled participants meeting the criteria for free or reduced price meal eligibility or, for day care homes, the number of participants meeting the criteria for tier I reimbursement, and the number of enrolled participants that do not meet the eligibility criteria for those meals; and

(iv) In addition, the State agency may conduct further verification of the information provided by the household on the approved application for program meal eligibility. If this effort is undertaken, the State agency shall conduct this further verification for nonpricing programs in accordance with the procedures described in paragraph (h)(2) of this section.

(2) *Verification procedures for pricing programs.* (i) For pricing programs, in addition to the verification procedures described in paragraph (h)(1) of this section, State agencies shall also conduct verification of the income information provided on the approved application for free and reduced price meals and, at State agency discretion, verification may also include confirmation of other information required on the application. However,

(A) If a food stamp, FDPIR or TANF case number is provided for a child, verification for such child shall include only confirmation that the child is included in a currently certified food stamp or FDPIR household or is a TANF recipient; or

(B) If a food stamp or FDPIR case number or SSI or Medicaid assistance

identification number is provided for an adult, verification for such adult shall include only confirmation that the adult is included in a currently certified food stamp or FDPIR household or is currently certified to receive SSI or Medicaid benefits.

(ii) State agencies shall perform verification on a random sample of no less than 3 percent of the approved free and reduced price applications in an institution which is a pricing program.

(iii) Households shall be informed in writing that they have been selected for verification and they are required to submit the requested verification information to confirm their eligibility for free or reduced-price benefits by such date as determined by the State agency. Those households shall be informed of the type or types of information and/or documents acceptable to the State agency and the name and phone number of an official who can answer questions and assist the household in the verification effort. This information must include a social security number for each adult household member or an indication that he/she does not have one. State agencies shall inform selected households that:

(A) Section 9 of the National School Lunch Act requires that, unless households provide the child's food stamp, FDPIR or TANF case number, or the adult participant's food stamp or FDPIR case number or SSI or Medicaid assistance identification number, those selected for verification must provide the social security number of each adult household member;

(B) In lieu of providing a social security number, an adult household member may indicate that he/she does not possess one;

(C) Provision of a social security number is not mandatory, but if a social security number is not provided for each adult household member or an indication is not made that he/she does not possess one, benefits will be terminated;

(D) The social security number may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application and continued eligibility for the program. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting employers to determine income, contacting Federal, State or local agencies to determine current certification for receipt of food stamps or FDPIR, TANF, SSI or Medicaid benefits, contacting the State employment security office to determine the amount of benefits received, and checking the documentation produced by household members to prove the amount of income received. These efforts may result in loss or reduction of benefits, administrative claims or legal actions if incorrect information was reported; and

(E) This information must be provided to the attention of each adult household member disclosing his/her social security number. State agencies shall ensure that the notice complies with section 7 of Pub. L. 93–579 (Privacy Act of 1974). These households shall be provided with the name and phone number of an official who can assist in the verification effort.

(iv) Households of enrolled children selected for verification shall also be informed that if they are currently certified to participate in the Food Stamp, FDPIR, or TANF Program they may submit proof of that certification in lieu of income information. In those cases, such proof shall consist of a current "Notice of Eligibility" for Food Stamp, FDPIR, or TANF Program benefits or equivalent official documentation issued by a food stamp, Indian Tribal Organization, or welfare office which shows that the children are members of households or assistance units currently certified to participate in the Food Stamp, FDPIR, or TANF Programs. An identification card for any of these programs is not acceptable as verification unless it contains an expiration date. Households of enrolled adults selected for verification shall also be informed that if they are currently certified to participate in the Food Stamp Program or FDPIR or SSI or Medicaid Programs, they may submit proof of that certification in lieu of income information. In those cases, such proof shall consist of:

(A) A current "Notice of Eligibility" for Food Stamp or FDPIR benefits or equivalent official documentation

issued by a food stamp, Indian Tribal Organization, or welfare office which shows that the adult participant is a member of a household currently certified to participate in the Food Stamp Program or FDPIR. An identification card is not acceptable as verification unless it contains an expiration date; or

(B) Official documentation issued by an appropriate SSI or Medicaid office which shows that the adult participant currently receives SSI or Medicaid assistance. An identification card is not acceptable as verification unless it contains an expiration date. All households selected for verification shall be advised that failure to cooperate with verification efforts will result in a termination of benefits.

(v) Sources of information for verification may include written evidence, collateral contacts, and/or systems of records.

(A) *Written evidence* shall be used as the primary source of information for verification. Written evidence includes written confirmation of a household's circumstances, such as wage stubs, award letters, letters from employers, and, for enrolled children, current certification to participate in the Food Stamp, FDPIR or TANF Programs, or, for adult participants, current certification to participate in the Food Stamp, FDPIR, SSI or Medicaid Programs. Whenever written evidence is insufficient to confirm eligibility, the State agency may use collateral contacts.

(B) *Collateral contact* is a verbal confirmation of a household's circumstances by a person outside of the household. The collateral contact may be made in person or by phone and shall be authorized by the household. The verifying official may select a collateral contact if the household fails to designate one or designates one which is unacceptable to the verifying official. If the verifying official designates a collateral contact, the contact shall not be made without providing written or oral notice to the household. At the time of this notice, the household shall be informed that it may consent to the contact or provide acceptable verification in another form. The household shall be informed that its eligibility for free or reduced price meals shall be terminated if it refuses to choose one of these options. Termination shall be made in accordance with paragraph (h)(2)(vii) of this section. Collateral contacts could include employers, social service agencies, and migrant agencies.

(C) *Systems of records* to which the State agency may have routine access are not considered collateral contacts. Information concerning income, family size, or food stamp/FDPIR/TANF certification for enrolled children, or food stamp/FDPIR/SSI/Medicaid certification for enrolled adults, which is maintained by other government agencies and to which a State agency can legally gain access may be used to confirm a household's eligibility for Program meal benefits. One possible source could be wage and benefit information maintained by the State unemployment agency, if that information is available. The use of any information derived from other agencies must be used with applicable safeguards concerning disclosure.

(vi) Verification by State agencies of receipt of food stamps, FDPIR, TANF, SSI or Medicaid benefits shall be limited to a review to determine that the period of eligibility is current. If the benefit period is found to have expired, or if the household's certification has been terminated, the household shall be required to document their income eligibility.

(vii) The State agency may work with the institution to verify the documentation submitted by the household on the application; however, the responsibility to complete the verification process may not be delegated to the institution.

(viii) If a household refuses to cooperate with efforts to verify, or the verification of income indicates that the household is ineligible to receive benefits or is eligible to receive reduced benefits, the State agency shall require the pricing program institution to terminate or adjust eligibility in accordance with the following procedures. Institution officials shall immediately notify families of the denial of benefits in accordance with paragraphs (e)(4) and (e)(5) of this section. Advance

notification shall be provided to families which receive a reduction or termination of benefits 10 calendar days prior to the actual reduction or termination. The 10-day period shall begin the day the notice is transmitted to the family. The notice shall advise the household of: (A) The change; (B) the reasons for the change; (C) notification of the right to appeal the action and the date by which the appeal must be requested in order to avoid a reduction or termination of benefits; (D) instructions on how to appeal; and (E) the right to reapply at any time during the year. The reasons for ineligibility shall be properly documented and retained on file at the institution.

(ix) When a household disagrees with an adverse action which affects its benefits and requests a fair hearing, benefits shall be continued as follows while the household awaits the hearing:

(A) Households which have been approved for benefits and which are subject to a reduction or termination of benefits later in the same year shall receive continued benefits if they appeal the adverse action within the 10-day advance notice period; and

(B) Households which are denied benefits upon application shall not received benefits.

(3) State agencies shall inform institution officials of the results of the verification effort and the action which will be taken in response to the verification findings. This notification shall be made in accordance with the procedures outlined in §226.14(a).

(4) If the verification results disclose that an institution has inaccurately classified or reported the number of participants eligible for free, reduced-price or paid meals, the State agency shall adjust institution rates of reimbursement retroactive to the month in which the incorrect eligibility figures were reported by the institution to the State agency.

(5) If the verification results disclose that a household has not reported accurate documentation on the application which would support continued eligibility for free or reduced-price meals, the State agency shall immediately adjust institution rates of reimbursement. However, this rate adjustment shall not become effective until the affected households have been notified in accordance with the procedures of paragraph (h)(2)(vi) of this section and any ensuing appeals have been heard as specified in paragraph (h)(2)(viii) of this section.

(6) *Verification procedures for sponsoring organizations of day care homes.* Prior to approving an application for a day care home that qualifies as tier I day care home on the basis of the provider's household income, sponsoring organizations of day care homes shall conduct verification of such income in accordance with the procedures contained in paragraph (h)(2)(i) of this section. Sponsoring organizations of day care homes may verify the information on applications submitted by households of children enrolled in day care homes in accordance with the procedures contained in paragraph (h)(2)(i) of this section.

(i) *Disclosure of children's free and reduced price meal eligibility information to certain programs and individuals without parental consent.* The State agency or child care institution, as appropriate, may disclose aggregate information about children eligible for free and reduced price meals to any party without parental notification and consent when children cannot be identified through release of the aggregate data or by means of deduction. Additionally, the State agency or institution may disclose information that identifies children eligible for free and reduced price meals to the programs and the individuals specified in this paragraph (i) without parental/guardian consent. The State agency or child care institution that makes the free and reduced price meal eligibility determination is responsible for deciding whether to disclose program eligibility information.

(1) *Persons authorized to receive eligibility information.* Only persons directly connected with the administration or enforcement of a program or activity listed in paragraphs (i)(2) or (i)(3) of this section may have access to children's free milk eligibility information, without parental consent. Persons considered directly connected with administration or enforcement of a program or activity listed in paragraphs (i)(2) or (i)(3) of this section are

Federal, State, or local program operators responsible for the ongoing operation of the program or activity or persons responsible for program compliance. Program operators may include persons responsible for carrying out program requirements and monitoring, reviewing, auditing, or investigating the program. Program operators may include contractors, to the extent those persons have a need to know the information for program administration or enforcement. Contractors may include evaluators, auditors, and others with whom Federal or State agencies and program operators contract with to assist in the administration or enforcement of their program in their behalf.

(2) *Disclosure of children's names and free or reduced price meal eligibility status.* The State agency or child care institution, as appropriate, may disclose, without parental consent, only children's names and eligibility status (whether they are eligible for free meals or reduced price meals) to persons directly connected with the administration or enforcement of:

(i) A Federal education program;

(ii) A State health program or State education program administered by the State or local education agency;

(iii) A Federal, State, or local means-tested nutrition program with eligibility standards comparable to the National School Lunch Program (i.e., food assistance programs for households with incomes at or below 185 percent of the Federal poverty level); or

(iv) A third party contractor assisting in verification of eligibility efforts by contacting households who fail to respond to requests for verification of their eligibility.

(3) *Disclosure of all eligibility information.* In addition to children's names and eligibility status, the State agency or child care institution, as appropriate, may disclose, without parental/guardian consent, all eligibility information obtained through the free and reduced price meal eligibility process (including all information on the application or obtained through direct certification) to:

(i) Persons directly connected with the administration or enforcement of programs authorized under the Richard B. Russell National School Lunch Act or the Child Nutrition Act of 1966. This means that all eligibility information obtained for the Child and Adult Care Food Program may be disclosed to persons directly connected with administering or enforcing regulations under the National School Lunch Program, Special Milk Program, School Breakfast Program, Summer Food Service Program, and the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) (Parts 210, 215, 220, 225 and 246, respectively, of this chapter);

(ii) The Comptroller General of the United States for purposes of audit and examination; and

(iii) Federal, State, and local law enforcement officials for the purpose of investigating any alleged violation of the programs listed in paragraphs (i)(2) and (i)(3) of this section.

(4) *Use of free and reduced price meals eligibility information by programs other than Medicaid or the State Children's Health Insurance Program (SCHIP).* State agencies and child care institutions may use children's free milk eligibility information for administering or enforcing the Child and Adult Care Food Program. Additionally, any other Federal, State, or local agency charged with administering or enforcing the Child and Adult Care Food Program may use the information for that purpose. Individuals and programs to which children's free or reduced price meal eligibility information has been disclosed under this section may use the information only in the administration or enforcement of the receiving program. No further disclosure of the information may be made.

(j) *Disclosure of children's free or reduced price meal eligibility information to Medicaid and/or SCHIP, unless parents decline.* Children's free or reduced price meal eligibility information only may be disclosed to Medicaid or SCHIP when both the State agency and the child care institution so elect, the parent/guardian does not decline to have their eligibility information disclosed and the other provisions described in paragraph (j)(1) of this section are met.

The State agency or child care institution, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free or reduced price meals), and any other eligibility information obtained through the free and reduced price meal application or obtained through direct certification to persons directly connected with the administration of Medicaid or SCHIP. Persons directly connected to the administration of Medicaid and SCHIP are State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations for Medicaid or SCHIP.

(1) The State agency must ensure that:

(i) The child care institution and health insurance program officials have a written agreement that requires the health insurance program agency to use the eligibility information to seek to enroll children in Medicaid and SCHIP; and

(ii) Parents/guardians are notified that their eligibility information may be disclosed to Medicaid or SCHIP and given an opportunity to decline to have their children's eligibility information disclosed, prior to any disclosure.

(2) *Use of children's free and reduced price meal eligibility information by Medicaid/SCHIP.* Medicaid and SCHIP agencies and health insurance program operators receiving children's free and reduced price meal eligibility information must use the information to seek to enroll children in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP. No further disclosure of the information may be made. Medicaid and SCHIP agencies and health insurance program operators also may verify children's eligibility in a program under the Child Nutrition Act of 1966 or the Richard B. Russell National School Lunch Act.

(k) *Notifying households of potential uses and disclosures of children's free and reduced price meal eligibility information.* Households must be informed that the information they provide on the free and reduced price meal application will be used to determine eligibility for free or reduced price meals and that their eligibility information may be disclosed to other programs.

(1) For disclosures to programs, other than Medicaid or SCHIP, that are permitted access to children's eligibility information, without parent/guardian consent, the State agency or child care institution, as appropriate, must notify parents/guardians at the time of application that their children's free or reduced price meal eligibility information may be disclosed. The State agency or child care institution, as appropriate, must add substantially the following statement to the Privacy Act notice/statement required under paragraph (e)(1)(ii)(F) of this section, "We may share your eligibility information with education, health, and nutrition programs to help them evaluate, fund, or determine benefits for their programs; auditors for program reviews; and law enforcement officials to help them look into violations of program rules." For children determined eligible for free meals through direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals through direct certification.

(2) For disclosure to Medicaid or SCHIP, the State agency or child care institution, as appropriate, must notify parents/guardians that their children's free or reduced price meal eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed and notifies the State agency or child care institution, as appropriate, by a date specified by the State agency or child care institution, as appropriate. Only the parent or guardian who is a member of the household or family for purposes of the free and reduced price meal application may decline the disclosure of eligibility information to Medicaid or SCHIP. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify eligible children

and seek to enroll them in Medicaid or SCHIP, and that their decision will not affect their children's eligibility for free or reduced price meals. The notification may be included in the letter/notice to parents/guardians that accompanies the free and reduced price meal application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond if they do not want their information disclosed. The State agency or child care institution, as appropriate, must add substantially the following statement to the Privacy Act notice/statement required under paragraph (e)(1)(ii)(F) of this section, "We may share your information with Medicaid or the State Children's Health Insurance Program, unless you tell us not to. The information, if disclosed, will be used to identify eligible children and seek to enroll them in Medicaid or SCHIP." For children determined eligible for free meals through direct certification, the notice of potential disclosure and opportunity to decline the disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals through direct certification process.

(l) *Other disclosures.* State agencies and child care institutions that plan to use or disclose information about children eligible for free and reduced price meals in ways not specified in this section must obtain written consent from children's parents or guardians prior to the use or disclosure.

(1) The consent must identify the information that will be shared and how the information will be used.

(2) There must be a statement informing parents and guardians that failing to sign the consent will not affect the child's eligibility for free or reduced price meals and that the individuals or programs receiving the information will not share the information with any other entity or program.

(3) Parents/guardians must be permitted to limit the consent only to those programs with which they wish to share information.

(4) The consent statement must be signed and dated by the child's parent or guardian who is a member of the household for purposes of the free and reduced price meal application.

(m) *Agreements with programs/individuals receiving children's free or reduced price meal eligibility information.* Agreements or Memoranda of Understanding (MOU) are recommended or required as follows:

(1) The State agency or child care institution, as appropriate, should have a written agreement or MOU with programs or individuals receiving eligibility information, prior to disclosing children's free and reduced price meal eligibility information. The agreement or MOU should include information similar to that required for disclosures to Medicaid and SCHIP specified in paragraph (m)(2) of this section.

(2) For disclosures to Medicaid or SCHIP, the State agency or child care institution, as appropriate, must have a written agreement with the State or local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free or reduced price meal eligibility information to those agencies. At a minimum, the agreement must:

(i) Identify the health insurance program or health agency receiving children's eligibility information;

(ii) Describe the information that will be disclosed;

(iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must be used to seek to enroll children in Medicaid or SCHIP;

(iv) Require that the Medicaid or SCHIP agency describe how they will use the information obtained;

(v) Describe how the information will be protected from unauthorized uses and disclosures;

(vi) Describe the penalties for unauthorized disclosure; and

(vii) Be signed by both the Medicaid or SCHIP program or agency and the State agency or child care institution, as appropriate.

(n) *Penalties for unauthorized disclosure or misuse of children's free and reduced price meal eligibility information.* In accordance with section 9(b)(6)(C) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(6)(C)), any individual who publishes, divulges, discloses or makes known in any manner,

or to any extent not authorized by statute or this section, any information obtained under this section will be fined not more than $1,000 or imprisoned for up to 1 year, or both.

[47 FR 36527, Aug. 20, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 226.3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

## Subpart F—Food Service Equipment Provisions

### § 226.24 Property management requirements.

Institutions and administering agencies shall follow the policies and procedures governing title, use, and disposition of equipment obtained by purchase, whose cost was acquired in whole or part with food service equipment assistance funds in accordance with 7 CFR part 3016 or 7 CFR part 3019, as applicable.

[48 FR 41142, Sept. 14, 1983, as amended at 71 FR 39519, July 13, 2006]

## Subpart G—Other Provisions

### § 226.25 Other provisions.

(a) *Grant closeout procedures.* Grant closeout procedures for the Program shall be in accordance with 7 CFR part 3016 or 7 CFR part 3019, as applicable.

(b) *State requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provisions of this part; however, any additional requirements shall be approved by FNSRO and may not deny the Program to an eligible institution.

(c) *Value of assistance.* The value of assistance to participants under the Program shall not be considered to be income or resources for any purposes under any Federal or State laws, including, but not limited to laws relating to taxation, welfare, and public assistance programs.

(d) *Maintenance of effort.* Expenditure of funds from State and local sources for the maintenance of food programs for children shall not be diminished as a result of funds received under the Act.

(e) *Fraud penalty.* Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this part, whether received directly or indirectly from the Department or whoever receives, conceals, or retains such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets, or property are of the value of $100 or more, be fined not more than $10,000 or imprisoned not more than five years, or both, or, if such funds, assets, or property are of value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(f) *Claims adjustment authority.* The Secretary shall have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of title 28, U.S. Code, to conduct litigation on behalf of the United States.

(g) *Data collection related to organizations.* (1) Each State agency must collect data related to institutions that have an agreement with the State agency to participate in the program for each of Federal fiscal years 2006 through 2009, including those institutions that participated only for part of the fiscal year. Such data shall include:

(i) The name of each institution;

(ii) The city in which each participating institution was headquartered and the name of the state;

(iii) The amount of funds provided to the participating organization, i.e., the sum of the amount of federal funds reimbursed for operating and, where applicable, administrative costs; and

(iv) The type of participating organization, e.g., government agency, educational institution, for-profit organization, non-profit organization/secular,

non-profit organization/faith-based, and "other."

(2) On or before August 31, 2007, and each subsequent year through 2010, State agencies must report to FNS data as specified in paragraph (g)(1) of this section for the prior Federal fiscal year. State agencies must submit this data in a format designated by FNS.

[47 FR 36527, Aug. 20, 1982, as amended at 53 FR 52597, Dec. 28, 1988; 54 FR 13049, Mar. 30, 1989; 69 FR 53547, Sept. 1, 2004; 71 FR 39519, July 13, 2006; 72 FR 24183, May 2, 2007]

### § 226.26 Program information.

Persons desiring information concerning the Program may write to the appropriate State agency or Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, MA 02222–1065.

(b) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, NJ 08691–1598.

(c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street, SW., Room 8T36, Atlanta, GA 30303.

(d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 Jackson Boulevard, 20th Floor, Chicago, IL 60604–3507.

(e) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, CO 80204.

(f) In the States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, TX 75242.

(g) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearney Street, Room 400, San Francisco, CA 94108.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 48 FR 40197, Sept. 6, 1983; 53 FR 52598, Dec. 28, 1988; 65 FR 12442, Mar. 9, 2000]

### § 226.27 Information collection/recordkeeping—OMB assigned control numbers.

| 7 CFR section where requirements are described | Current OMB control number |
|---|---|
| 226.3–226.4 | 0584–0055 |
| 226.6–226.10 | 0584–0055 |
| 226.14–226.16 | 0584–0055 |
| 226.23–226.24 | 0584–0055 |

[50 FR 53258, Dec. 31, 1985]

## APPENDIX A TO PART 226—ALTERNATE FOODS FOR MEALS

### ALTERNATE PROTEIN PRODUCTS

*A. What are the criteria for alternate protein products used in the Child and Adult Care Food Program?*

1. An alternate protein product used in meals planned under the provisions in § 226.20 must meet all of the criteria in this section.

2. An alternate protein product whether used alone or in combination with meat or meat alternate must meet the following criteria:

a. The alternate protein product must be processed so that some portion of the nonprotein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.

b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).

c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. ("When hydrated or formulated" refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).

d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation

that the product meets the criteria in paragraphs A.2. through c of this appendix.

e. Manufacturers should provide information on the percent protein contained in the dry alternate protein product and on an as prepared basis.

f. For an alternate protein product mix, manufacturers should provide information on:

(1) The amount by weight of dry alternate protein product in the package;

(2) Hydration instructions; and

(3) Instructions on how to combine the mix with meat or other meat alternates.

*B. How are alternate protein products used in the Child and Adult Care Food Program?*

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in §226.20.

2. The following terms and conditions apply:

a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.

b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).

C. *How are commercially prepared products used in the Child and Adult Care Food Program?*

Schools, institutions, and service institutions may use a commercially prepared meat or meat alternate product combined with alternate protein products or use a commercially prepared product that contains only alternate protein products.

[65 FR 12442, Mar. 9, 2000]

## APPENDIX B TO PART 226 [RESERVED]

## APPENDIX C TO PART 226—CHILD NUTRITION (CN) LABELING PROGRAM

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service (FNS) in conjunction with the Food Safety and Inspection Service (FSIS), and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA), and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs. This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

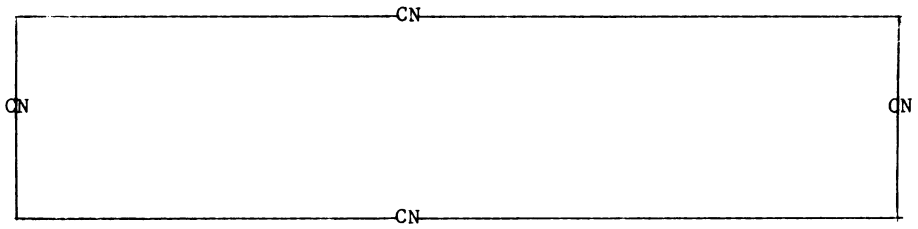
(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10, 225.21, and 226.20 and are served in the main dish.

(b) Juice drinks and juice drink products that contain a minimum of 50 percent full-strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) *CN label* is a food product label that contains a CN label statement and CN logo as defined in paragraph 3 (b) and (c) below.

(b) The *CN logo* (as shown below) is a distinct border which is used around the edges of a "CN label statement" as defined in paragraph 3(c).




(c) The *CN label statement* includes the following:

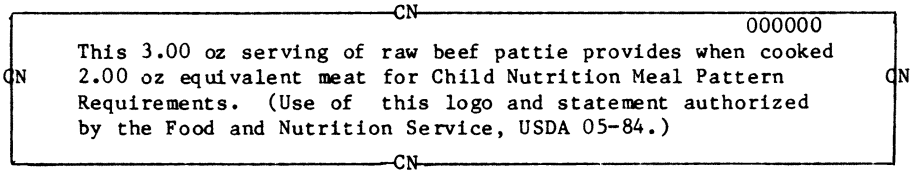
(1) The product identification number (assigned by FNS),

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10, 220.8, 225.21, and 226.20. The statement shall identify the contribution of a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements,

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:




(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

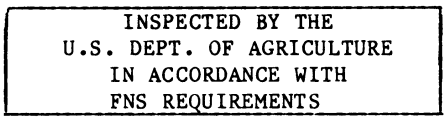
4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by the Food and Nutrition Service and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate, and the manufacturer's or distributor's name and address.

(1) The inspection marking for CN labeled non-meat, non-poultry, and non-seafood products with the exception of juice drinks and juice drink products is established as follows:




(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the *Food Buying Guide for Child Nutrition Programs* (Program Aid Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the child nutrition programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10, 220.8, 225.21, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report of the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Services of the USDC, Food and Drug Administration, or the Department of Justice for action against the company.

Any or all of the following courses of action may be taken:

(a) The company's CN label may be revoked for a specific period of time;

(b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product;

(c) The company's name will be circulated to regional FNS offices;

(d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program.

To apply for a CN label and to obtain additional information on CN label application procedures write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition

Service, Nutrition and Technical Services Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

[49 FR 18457, May 1, 1984; 49 FR 45109, Nov. 15, 1984]

# PART 227—NUTRITION EDUCATION AND TRAINING PROGRAM

## Subpart A—General

Sec.
227.1 General purpose and scope.
227.2 Definitions.
227.3 Administration.
227.4 Application and agreement.
227.5 Program funding.

## Subpart B—State Agency Provisions

227.30 Responsibilities of State agencies.
227.31 Audits, management reviews, and evaluations.

## Subpart C—State Coordinator Provisions

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227.36 Requirements of needs assessment.
227.37 State plan for nutrition education and training.

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227.44 Management evaluations and reviews.
APPENDIX TO PART 227—APPORTIONMENT OF FUNDS FOR NUTRITION EDUCATION AND TRAINING

AUTHORITY: Sec. 15, Pub. L. 95–166, 91 Stat. 1340 (42 U.S.C. 1788), unless otherwise noted.

SOURCE: 44 FR 28282, May 15, 1979, unless otherwise noted.

## Subpart A—General

### § 227.1 General purpose and scope.

The purpose of these regulations is to implement section 19 of the Child Nutrition Act (added by Pub. L. 95–166, effective November 10, 1977) which authorizes the Secretary to formulate and carry out a nutrition information and education program through a system of grants to State agencies to provide for (a) the nutritional training of educational and foodservice personnel, (b) the foodservice management training of school foodservice personnel, and (c) the conduct of nutrition education activities in schools and child care institutions. To the maximum extent possible, the Program shall fully utilize the child nutrition programs as a learning experience.

### § 227.2 Definitions.

(a) *Administrative costs* means costs allowable under Federal Management Circular 74–4, other than program costs, incurred by a State agency for overall administrative and supervisory purposes, including, but not limited to, costs of financial management, data processing, recordkeeping and reporting, personnel management, and supervising the State Coordinator.

(b) *Child Care Food Program* means the program authorized by section 17 of the National School Lunch Act, as amended.

(c) *Child Nutrition Programs* means any or all of the following: National School Lunch Program, School Breakfast Program, Child Care Food Program.

(d) *Commodity only school* means a school which has entered into an agreement under §210.15a(b) of this subchapter to receive commodities donated under part 250 of this chapter for a nonprofit lunch program.

(e) *Department* means the U.S. Department of Agriculture.

(f) *Federal fiscal year* means a period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

(g) *FNS* means the Food and Nutrition Service of the Department.

(h) *FNSRO* means the appropriate Regional Office of the Food and Nutrition Service of the Department.

(i) *Institution* means any licensed, nonschool, public or private nonprofit organization providing day care services where children are not maintained in permanent residence, including but not limited to day care centers, settlement houses, after school recreation centers, neighborhood centers, Head Start centers, and organizations providing day care services for handicapped children and includes a sponsoring organization under the Child Care Food Program regulations.

(j) *National School Lunch Program* means the lunch program authorized by the National School Lunch Act.

(k) *Needs assessment* means a systematic process for delineating the scope, extent (quantity), reach and success of any current nutrition education activities, including those relating to:

(1) Methods and materials available inside and outside the classroom; (2) training of teachers in the principles of nutrition and in nutrition education strategies, methods, and techniques; (3) training of school foodservice personnel in the principles and practices of foodservice management; and (4) compilation of existing data concerning factors impacting on nutrition education and training such as statistics on child health and competency levels achieved by foodservice personnel.

(l) *Program costs* means costs, other than administrative costs, incurred in connection with any or all of the following:

(1) The State Coordinator's salary, and related support personnel costs, including fringe benefits and travel expenses; (2) applying for assessment and planning funds; (3) the conduct of the needs assessment; (4) the development of the State Plan; and (5) the implementation of the approved State Plan, including related support services.

(m) *Program* means the Nutrition Education and Training Program authorized by section 19 of the Child Nutrition Act of 1966, as amended.

(n) *School* means: (1) An educational unit of high school grade or under operating under public or nonprofit private ownership in a single building or complex of buildings. The term "high school grade or under" includes classes of preprimary grade when they are conducted in a school having classes of primary or higher grade, or when they are recognized as a part of the educational system in the State, regardless of whether such preprimary grade classes are conducted in a school having classes of primary or higher grade.

(2) With the exception of residential summer camps which participate in the Summer Food Service Program for Children and private foster homes, any distinct part of a public or nonprofit private institution or any public or nonprofit private child care institution, which (i) maintains children in residence, (ii) operates principally for the care of children and (iii) if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government. The term "child care institution" includes, but is not limited to: Homes for the mentally retarded, the emotionally disturbed, the physically handicapped, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long term care facilities of chronically ill children; and juvenile detention centers.

(3) With respect to the Commonwealth of Puerto Rico, non-profit child care centers certified as such by the Governor of Puerto Rico.

(o) *School Breakfast Program* means the program authorized by section 4 of the Child Nutrition Act of 1966, as amended.

(p) *Foodservice personnel* means those individuals responsible for planning, preparing, serving and otherwise operating foodservice programs funded by USDA grants as provided for in the National School Lunch Act and the Child Nutrition Act of 1966.

(q) *State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

(r) *State agency* means the State educational agency.

(s) *State educational agency* means, as the State legislature may determine:

(1) The Chief State School Officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (2) a board of education controlling the State Department of Education.

### § 227.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program.

(b) Within the States, responsibility for administration of the Program shall be in the State agency, except

that FNSRO shall administer the Program with respect to nonprofit private schools or institutions in any State where the State agency is prohibited by law from administering the Program in nonprofit private schools or institutions.

### § 227.4 Application and agreement.

After the initial fiscal year of participation each State agency desiring to take part in the Program shall enter into a written agreement with the Department for the administration of the Program in accordance with the provisions of this part. The State agency shall execute Form FNS–74, which shall constitute the written agreement.

(Approved by the Office of Management and Budget under control number 0584–0062)

(44 U.S.C. 3506)

[44 FR 28282, May 15, 1979, as amended at 47 FR 746, Jan. 2, 1982]

### § 227.5 Program funding.

(a) *Total grant.* The total grant to each State agency for each fiscal year for program costs and administrative costs shall consist of an amount equal to 50 cents per child enrolled in schools and institutions within the State during such year, but in no event shall such grant be less than $50,000: *Provided, however,* That a State's total grant shall be reduced proportionately if the State does not administer the program in nonprofit private schools and institutions. If funds appropriated for a fiscal year are insufficient to pay the amount to which each State is entitled, the amount of such grant shall be ratably reduced to the extent necessary so that the total of the amounts paid to each State does not exceed the amount of appropriated funds. Each State agency which receives funds based on all children enrolled in public and nonprofit private schools and institutions shall make the Program available to those schools and institutions. Enrollment figures shall be the latest available as certified by the Department of Education.

(b) *First fiscal year participation*—(1) *Assessment and planning grant.* A portion of the total grant shall be made available to each State agency during its first fiscal year of participation as an assessment and planning grant for:

(i) Employing a State Coordinator, as provided for in § 227.30, and related support personnel costs including fringe benefits and travel expenses,

(ii) Undertaking a needs assessment in the State,

(iii) Developing a State Plan for nutrition education and training within the State, and

(iv) Applying for the State assessment and planning grant.

(2) *Advances for the assessment and planning grant.* FNS shall make advances to any State desiring to participate in the Program, to enable the State to carry out the responsibilities set forth in paragraph (b)(1) of this section. Advances shall be made in two phases, in accordance with the following procedures:

(i) Initially, State agencies may receive an advance up to $35,000 for the purpose of hiring a State coordinator, as provided for in § 227.30. Application for such an advance shall be made on Form AD–623 when the State agency applies for participation in the Program. The information required for this advance shall be set out in Part III, Budget Information, Section B, Budget Categories. The State agency shall there indicate the funds required for the salary, travel, and fringe benefits of the State Coordinator, and related personnel costs necessary to carry out the duties and responsibilities of the State Coordinator.

(ii) After appointment of the State Coordinator, the State agency may receive an additional advance of up to 50 percent of the total grant to which the State agency is entitled for the first year of participation, after deduction of the advance made for the State Coordinator under § 227.5(b)(2), but not to exceed $100,000, for the purpose of undertaking a needs assessment in the State, developing a State Plan for nutrition education and training, and applying for the assessment and planning grant. Application for such advance shall be made by amending Part III, Budget Information, of Form AD–623.

(3) *Funds for implementing State plan.* (i) States receiving advances. Each State agency shall receive the remaining portion of its total grant in order

to implement its State plan, which has been approved by FNS, if the State agency has carried out the responsibilities for which advances were received. With the submission of the State plan each State agency may apply for the funds remaining of its total grant.

(ii) States previously participating. Those States which previously participated may apply for their total grant upon submission of the State Plan.

(c) *Administrative costs.* Each State agency may use up to 15 percent of its total grant for up to 50 percent of its cash expenditures for administrative costs.

(d) *Payment to State agencies.* Approval of the State plan by FNS is a prerequisite to the payment of funds to the State agency. All funds made available for the Program shall be provided through a letter of credit or check, as determined by FNS.

(e) *Unobligated funds.* The State agency will release to FNS any Federal funds made available to it under the Program which are unobligated by September 30 of each fiscal year.

(f) *Funds for existing programs.* State agencies shall maintain their present level of funding for existing nutrition education and training programs. FNS funds for the Program shall augment current nutrition education and training programs and projects. Funds made available by FNS for this Program shall not replace such funds.

[44 FR 28282, May 15, 1979, as amended at 52 FR 8223, Mar. 17, 1987]

## Subpart B—State Agency Provisions

### § 227.30 Responsibilities of State agencies.

(a) *General.* Except to the extent that it would be inconsistent with this part, the Program shall be administered in accordance with the applicable provisions of the Departmental regulations 7 CFR part 3015.

(b) *Application.* For the initial fiscal year of participation States shall make application for administration of the Program on Form and are responsible for amending Form AD–623 to request advance funding. In the initial application, in connection with the request for advance funding for the State Coordinator, part IV, Program Narrative, of Form AD–623 shall indicate the State agency's procedures for hiring a State Coordinator and contain a justification for the dollar value of salary requested. The narrative shall also indicate the time frame for hiring the State Coordinator. In amending Form AD–623 in connection with the request for advance funding for the remaining portion of the assessment and planning grant, part IV, Program Narrative, shall set forth the details for areas of the assessment and planning grant, other than employment of the State Coordinator.

(b–1) If any State does not apply for participation in the Program, by April 1 of a fiscal year by submitting Form AD 623 as required in §§ 227.30(b) and 227.5(b)(2)(i), the State's share of the funds shall be provided to the remaining States, so long as this does not take the remaining States' grants above 50 cents per child enrolled in schools or institutions, except in those States which receive a minimum grant of $75,000 for a fiscal year.

(c) *State Coordinator.* After execution of the agreement the State agency shall appoint a nutrition education specialist to serve as a State Coordinator for the Program who may be employed on a full-time or part-time basis. The State Coordinator may be a State employee who reports directly or indirectly to the Chief State School Officer or an individual under contract with the State agency to serve as the State Coordinator. A State agency shall not contract with an organization to provide for the services of a State Coordinator. The State Coordinator, at a minimum, shall meet both of the following requirements:

(1) The State Coordinator shall have a Masters degree or equivalent experience. Equivalent experience is experience related to the position being filled or as defined by State civil service or personnel policies. If the Masters degree is not in foods and nutrition or dietetics, the Bachelors degree shall include academic preparations in foods and nutrition or dietetics.

(2) In addition, the State Coordinator shall have recognized and demonstrated skills in management and education through at least three years

experience in one or more of these areas: Elementary or secondary education, but not limited to classroom teaching; foodservice management and training for adults; community nutrition or public health programs; foodservice operations for children; or community action or assistance programs.

(d) *Needs assessment.* Each State agency shall conduct an ongoing needs assessment in accordance with § 227.36 The needs assessment shall be the data base utilized in formulating the State plan for each fiscal year. For the first year of participation a State agency may apply for funds in order to carry out the needs assessment in accordance with § 227.5.

(e) *Developing and submitting the State plan.* Each State agency shall submit to the Secretary a State plan for Nutrition Education and Training in accordance with § 227.37 prior to the beginning of each fiscal year. The date of submission for the State plan shall be designated by the Secretary. The Secretary shall act on the submitted State plan within 60 days after it is received. For the first year of participation the State agency shall submit to the Secretary, within nine months after the award of the planning and assessment grant, a State plan for nutrition education and training in accordance with § 227.37.

(f) *Records and reports.* (1) Each State agency shall maintain full and complete records concerning Program operations and shall retain such records in accordance with OMB Circular A–102 Attachment C.

(2) Each State agency shall submit to FNS a quarterly Financial Status Report, Form SF–269, as required by OMB Circular A–102, Attachment H.

(3) Each State agency shall submit an annual performance report (Form FNS–42) to FNS within 30 days after the close of the Fiscal Year.

(4) Each State agency shall maintain a financial management system in accordance with Federal Management Circular 74–4 and OMB Circular A–102, Attachment G.

(5) Each State agency shall comply with the requirements of OMB Circular A–102, Attachments N and O, and Federal Management Circular 74–4, for property management and the procurement of supplies, equipment and other services with these Program funds.

(6) Any income accruing to a State or local agency because of the Program shall be used in accordance with OMB Circular A–102, Attachment E.

(g) *Nondiscrimination.* Each State agency shall ensure that Program operations are in compliance with the Department's nondiscrimination regulations (part 15 of this title) issued under title VI of the Civil Rights Act of 1964.

(Approved by the Office of Management and Budget under control number 0584–0062)

(44 U.S.C. 3506; E.O. 12372, July 14, 1982, 47 FR 30959, sec. 401(b) of the Intergovernmental Cooperation Act of 1968 (31 U.S.C. 6506(c))

[44 FR 28282, May 15, 1979, as amended at 45 FR 14842, Mar. 7, 1980; 47 FR 746, Jan. 7, 1982; 47 FR 22072, May 21, 1982; 48 FR 29123, June 24, 1983; 48 FR 39213, Aug. 30, 1983]

### § 227.31 Audits, management reviews, and evaluations.

(a) *Audits.* (1) Examinations by the State agencies in the form of audits or internal audits shall be performed in accord with OMB Circular A–102, Attachment G.

(b) *Management reviews.* The State agency is responsible for meeting the following requirements:

(1) The State agency shall establish management evaluation and review procedures to monitor compliance with the State plan for local educational agencies and land grant colleges, other institutions of higher education and public or private nonprofit educational or research agencies, institutions, or organizations.

(2) The State agency shall require participating agencies to establish program review procedures to be used in reviewing the Agencies operations and those of subsidiaries or contractors.

(c) *Evaluations.* The State agency shall conduct formal evaluations of program activities at least annually. These evaluations shall be aimed at assessing the effectiveness of the various activities undertaken by the State and local agencies. State officials shall analyze why some activities have proved effective while others have not and shall initiate appropriate improvements. The results of the evaluations shall be used to make adjustments in

ongoing activities and to plan activities and programs for the next year's State plan. The State agency shall submit a plan for evaluation of Program activities as part of the State plan in accordance with § 227.37(b)(14).

(Approved by the Office of Management and Budget under control number 0584–0062)

(44 U.S.C. 3506; E.O. 12372 (July 14, 1982, 47 FR 30959); sec. 401(b) Intergovernmental Cooperation Act of 1968 (31 U.S.C. 6506(c))

[44 FR 28282, May 15, 1979, as amended at 47 FR 746, Jan. 7, 1982; 48 FR 29123, June 24, 1983]

## Subpart C—State Coordinator Provisions

### § 227.35 Responsibilities of State coordinator.

At a minimum, the State Coordinator shall be responsible for:

(a) Preparation of a budget,

(b) The conduct of the needs assessment,

(c) Development of a State plan,

(d) Implementation of the approved State Plan,

(e) Evaluation of the progress and implementation of the State Plan,

(f) Coordination of the Program with the Child Nutrition Programs at the State and local levels,

(g) Coordination of the Program with other nutrition education and training programs conducted with Federal or State funds,

(h) Communication of needs and accomplishments of State nutrition education and training programs to parents and the communty at large,

(i) Use of Program funds in compliance with all regulations, instructions, or other guidance material provided by FNS,

(j) Coordinating the submission and preparation of the Program financial status report (SF–269), and

(k) Annual evaluation of the effectiveness of the State Plan.

### § 227.36 Requirements of needs assessment.

(a) The needs assessment is an ongoing process which identifies the discrepancies between "what should be" and "what is" and shall be applied to each category listed below to enable State agencies to determine their nutrition education and training needs for each year. The needs assessment shall identify the following as a minimum:

(1) Children, teachers, and food service personnel in need of nutrition education and training;

(2) Existing State or federally funded nutrition education and training programs including their:

(i) Goals and objectives;

(ii) Source and level of funding;

(iii) Any available documentation of their relative success or failure; and

(iv) Factors contributing to their success or failure;

(3) Offices or agencies at the State and local level designated to be responsible for nutrition education and training of teachers and school food service personnel;

(4) Any relevant State nutrition education mandates;

(5) Funding levels at the State and local level for preservice and inservice nutrition education and training of food service personnel and teachers;

(6) State and local individuals, and groups conducting nutrition education and training;

(7) Materials which are currently available for nutrition education and training programs, and determine for each:

(i) Subject area and content covered;

(ii) Grade level;

(iii) How utilized;

(iv) Acceptability by user;

(v) Currency of materials;

(8) Any major child nutrition related health problems in each State;

(9) Existing sources of primary and secondary data, including any data that has been collected for documenting the State's nutrition education and training needs;

(10) Available documentation of the competencies of teachers in the area of nutrition education;

(11) Available documentation of the competencies of food service personnel;

(12) Problems encountered by schools and institutions in procuring nutritious food economically and in preparing nutritious appetizing meals and areas where training can assist in alleviating these problems;

(13) Problems teachers encounter in conducting effective nutrition education activities and areas where inservice training or materials can assist in alleviating these problems;

(14) Problems in dietary habits of children and areas where nutrition education may assist in positive changes;

(15) Problems encountered in coordinating the nutrition education by teachers with the meal preparation and activities of the food service facility and areas where training might alleviate these problems.

(b) The needs assessment should be an ongoing process and provide not only data on current activities but also a description of the problems and needs in each category and whether training or materials would help alleviate the identified problems.

### § 227.37 State plan for nutrition education and training.

(a) *General.* Each fiscal year the State agency shall submit a State plan for Nutrition Education and Training for approval to FNS. The State plan shall be based on the needs identified from the ongoing needs assessment and evaluation of the State plans from previous years. The State plan shall be submitted in accordance with § 227.30(e). Guidance for the preparation and submission of the State plan shall be provided by FNS.

(b) *Requirements for the State plan.* The State plan shall provide the following:

(1) Description of the ongoing needs assessment conducted within the State;

(2) The findings of the needs assessment within the State used to determine the goals and objectives of the State plan and results of the evaluation of the previous years' State plans for:

(i) Inservice training of food service personnel,

(ii) Nutrition education of children,

(iii) Inservice training in nutrition education for teachers;

(3) Goals and objectives of the State plan;

(4) Identification of the priority populations to be reached during the fiscal year;

(5) Provisions for coordinating the nutrition education and training programs carried out with funds made available under this part with any related publicly supported programs being carried out within the State to include:

(i) Identification of existing programs that may be utilized,

(ii) Description of how representatives of such groups are to be involved in the planning and implementation of the State program;

(iii) Criteria and procedure for selection of such representatives;

(6) Plans to solicit advice and recommendations of the National Advisory Council on Child Nutrition, State educational or other appropriate agencies; the U.S. Department of Education; the U.S. Department of Health and Human Services; and other interested groups and individuals concerned with improvement of child nutrition.

(7) Plans, including a timetable, for reaching all children in the State with instruction in the nutritional value of foods and the relationship among food, nutrition and health, for inservice training of food service personnel in the principles and skills of food service management and nutrition and for inservice instruction for teachers in sound principles of nutrition education;

(8) Any plans for using, on a priority basis, the resources of the land-grant colleges eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503; 7 U.S.C. 301 through 305, 307, and 308) or the Act of August 30, 1890 (26 Stat. 417, as amended; 7 U.S.C. 312 through 326 and 328), including the Tuskegee Institute;

(9) A brief description of the program or activities to be contracted with land-grant colleges, described above, and other institutions of higher education, and other public or private nonprofit educational or research agencies, institutions or organizations for carrying out nutrition education and training activities;

(10) A brief description of pilot projects, including objectives, subject matter and expected outcomes, to be contracted with the land-grant colleges described above, other institutions of higher education, public and nonprofit

educational or research agencies, institutions, or organizations for but not limited to projects for development, demonstration, testing and evaluation of curricula for use in early childhood, elementary, and secondary education programs;

(11) Identification of schools, school districts, and sponsoring agencies which may agree to participate in the nutrition education and training program;

(12) A brief description of (i) State agency sponsored pilot projects including objectives, subject matter and anticipated outcomes and (ii) nutrition education and training programs to be conducted by schools, school districts, and sponsoring agencies receiving funds under this provision including objectives, subject matter and expected outcomes;

(13) Time frame and milestones for implementation of State plans;

(14) Plans to evaluate program activities including an evaluation component for each objective of the State plan;

(15) Description of staff available to perform State agency responsibilities of the State nutrition education and training program which includes:

(i) Definition of duties and responsibilities,

(ii) Minimum professional qualifications,

(iii) Number and classification of personnel;

(16) A description of the procedures used to comply with the requirements of Title VI of the Civil Rights Act of 1964, including racial and ethnic participation data collection, public notification procedures and the annual civil rights compliance review process;

(17) Plans for the conduct of audits in accordance with § 227.31;

(18) A budget detailing the use of program funds;

(19) Description of the financial management system in accordance with § 227.30(e);

(20) Description of the management evaluation and review procedures established in accordance with § 227.31(b); and

(21) Other components that the States determine necessary.

(c) States eligible to receive additional funds pursuant to § 227.30(b–1) shall submit an amendment to the State plan to the Food and Nutrition Service Regional Office for prior approval.

[44 FR 28282, May 15, 1979, as amended at 45 FR 14842, Mar. 7, 1980; 48 FR 39213, Aug. 30, 1983]

## Subpart D—Miscellaneous

### § 227.40 Program information.

Persons desiring information concerning the program may write to the appropriate State agency or Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont: New England Regional Office, FNS, U.S. Department of Agriculture, 33 North Avenue, Burlington, Mass. 01803.

(b) In the States of Delaware, District of Columbia, Maryland, New Jersey, New York, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, One Vahlsing Center, Robbinsville, N.J. 08691.

(c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 1100 Spring Street NW., Atlanta, Ga. 30309.

(d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 536 South Clark Street, Chicago, Ill. 60605.

(e) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 2420 West 26th Avenue, Room 430D, Denver, Colo. 80211.

(f) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Tex. 75242.

(g) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory of the Pacific Islands, the Northern Mariana Islands, and Washington:

Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, Calif. 94108.

### § 227.41 Recovery of funds.

(a) FNS may recover funds from a State agency under any of the following conditions:

(1) If FNS determines, through a review of the State agency's reports, program, or financial analysis, monitoring, audit or otherwise, that the State agency's performance is inadequate or that the State agency has failed to comply with this part or FNS instructions and guidelines.

(2) If FNS determines that the State agency is not expending funds at a rate commensurate with the amount of funds distributed or provided for expenditure under the program.

(3) If FNS determines that a State agency is not providing full and timely reports.

(b) FNS shall effect such recoveries of funds through adjustments in the amount of funds provided under the program.

### § 227.42 Grant closeout procedures.

The requirements of OMB Circular A–102, Attachment L, are applicable in the termination of any grant under this part.

### § 227.43 Participation of adults.

Nothing in this part shall prohibit a State or local educational agency from making available or distributing to adults education materials, resources, activities or programs authorized by this part.

### § 227.44 Management evaluations and reviews.

FNS shall establish evaluation procedures to determine whether State agencies carry out the purpose and provisions of this part, the State agency plan and FNS guidelines and instructions. To the maximum extent possible the State's performance shall be reviewed and evaluated by FNS on a regular basis including the use of public hearings.

## APPENDIX TO PART 227—APPORTIONMENT OF FUNDS FOR NUTRITION EDUCATION AND TRAINING

Pursuant to sections 19(j) of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1788), funds available for the fiscal year ending September 30, 1980, are apportioned among the States as follows:

[See footnotes at the end of Table.]

| State | Public schools [1] | Private schools [2] | Residential child care institutions [3] | Nonresidential child care institutions [4] | Total [5] |
|---|---|---|---|---|---|
| Connecticut | 231,069 | 38,488 | 1,260 | 2,866 | 273,683 |
| Maine | 93,406 | 6,538 | 387 | 808 | 101,139 |
| Massachusetts | 420,866 | 68,337 | 2,697 | 5,352 | 497,252 |
| New Hampshire | 67,087 | 7,978 | 331 | 1,160 | 76,556 |
| Rhode Island | 62,521 | 12,570 | 304 | 767 | 76,162 |
| Vermont | 39,419 | 3,814 | 247 | 579 | 75,000 |
| | 914,368 | 137,725 | 5,226 | 11,532 | 1,099,792 |
| Delaware | 43,210 | 7,277 | 107 | 1,339 | 75,000 |
| District of Columbia | 44,309 | 7,511 | 447 | 2,458 | 75,000 |
| Maryland | 315,196 | 51,992 | 1,292 | 5,234 | 373,714 |
| New Jersey | 520,438 | 117,060 | 3,930 | 8,588 | 650,016 |
| New York | 1,204,026 | 274,593 | 14,068 | 19,756 | 1,512,443 |
| Pennsylvania | 796,518 | 182,089 | 9,026 | 7,312 | 994,945 |
| Puerto Rico | 280,750 | 36,776 | 0 | 0 | 317,526 |
| Virginia | 410,660 | 34,947 | 6,239 | 6,068 | 457,914 |
| Virgin Islands | 9,783 | 2,452 | 11 | 0 | 75,000 |
| West Virginia | 154,000 | 4,942 | 770 | 854 | 160,566 |
| | 3,778,890 | 719,639 | 35,890 | 51,609 | 4,692,124 |
| Alabama | 296,412 | 21,949 | 892 | 10,607 | 329,860 |
| Florida | 589,122 | 57,440 | 2,116 | 19,074 | 667,752 |
| Georgia [5] | 424,042 | 27,708 | 2,783 | 14,806 | 469,339 |
| Kentucky | 269,690 | 27,786 | 3,685 | 3,652 | 304,813 |
| Mississippi | 192,134 | 25,802 | 541 | 12,175 | 230,652 |
| North Carolina | 452,523 | 22,104 | 3,052 | 19,722 | 497,401 |
| South Carolina [5] | 243,200 | 19,225 | 1,255 | 6,559 | 270,239 |
| Tennessee | 339,753 | 17,396 | 1,448 | 7,847 | 366,444 |

| State | Public schools [1] | Private schools [2] | Residential child care institutions [3] | Nonresidential child care institutions [4] | Total [5] |
|---|---|---|---|---|---|
| | 2,806,876 | 219,410 | 15,772 | 94,442 | 3,136,500 |
| Illinois | 793,671 | 160,491 | 5,343 | 15,971 | 975,476 |
| Indiana | 433,267 | 39,967 | 2,814 | 5,279 | 481,327 |
| Michigan | 747,374 | 85,655 | 3,069 | 7,817 | 843,915 |
| Minnesota | 314,333 | 38,994 | 1,245 | 3,135 | 357,707 |
| Ohio | 818,192 | 110,561 | 5,836 | 10,767 | 945,356 |
| Wisconsin | 344,962 | 73,707 | 1,922 | 3,579 | 424,170 |
| | 3,451,799 | 509,375 | 20,229 | 46,548 | 4,027,951 |
| Arkansas | 177,730 | 8,095 | 385 | 4,453 | 190,663 |
| Louisiana | 317,817 | 64,562 | 1,551 | 6,307 | 390,237 |
| New Mexico | 108,673 | 5,448 | 235 | 2,619 | 116,975 |
| Oklahoma | 229,166 | 3,969 | 1,916 | 8,639 | 243,690 |
| Texas | 1,115,829 | 52,654 | 4,163 | 38,934 | 1,211,580 |
| | 1,949,215 | 134,728 | 8,250 | 60,952 | 2,153,145 |
| Colorado [5] | 217,264 | 15,800 | 937 | 4,399 | 238,400 |
| Iowa | 221,255 | 25,957 | 3,204 | 2,631 | 253,047 |
| Kansas | 168,720 | 12,765 | 330 | 1,062 | 182,877 |
| Missouri | 350,248 | 54,950 | 1,271 | 6,629 | 413,098 |
| Montana | 63,950 | 3,425 | 75 | 677 | 75,000 |
| Nebraska | 115,891 | 17,629 | 376 | 1,694 | 135,590 |
| North Dakota [5] | 47,486 | 4,826 | 309 | 383 | 75,000 |
| South Dakota | 53,792 | 5,760 | 267 | 390 | 75,000 |
| Utah | 126,488 | 1,518 | 541 | 1,325 | 129,872 |
| Wyoming | 36,709 | 1,206 | 74 | 497 | 75,000 |
| | 1,401,803 | 143,836 | 7,384 | 19,687 | 1,652,884 |
| Alaska | 35,308 | 739 | 310 | 392 | 75,000 |
| Samoa | 3,616 | 778 | 0 | 0 | 75,000 |
| Arizona | 198,407 | 21,871 | 661 | 4,712 | 225,651 |
| California | 1,629,801 | 170,376 | 28,777 | 44,277 | 1,873,231 |
| Guam | 11,118 | 1,985 | 0 | 0 | 75,000 |
| Hawaii | 66,454 | 13,348 | 1,854 | 3,352 | 85,008 |
| Idaho | 79,009 | 1,868 | 119 | 860 | 81,856 |
| Nevada | 56,927 | 2,179 | 473 | 1,643 | 75,000 |
| Oregon | 183,441 | 9,379 | 859 | 3,703 | 197,382 |
| Trust Territory | 11,590 | 0 | 0 | 0 | 75,000 |
| Washington | 299,362 | 17,318 | 2,140 | 5,656 | 324,476 |
| N Marianas | 1,945 | 0 | 0 | 0 | 75,000 |
| | 2,576,978 | 239,841 | 35,193 | 64,595 | 3,237,604 |
| | 16,879,929 | 2,104,554 | 127,944 | 349,365 | 20,000,000 |

[1] Sources: (1) U.S. Department of Health, Education, and Welfare, Education Division, NCES, *Statistics of Public Schools, Fall 1977,* prepublication data, Table 5 for States and areas, except (2) Northern Marianas and Trust Territory, 1975–76 data from Department of Interior, adjust to include pre-school; Puerto Rico and Guam, Fall 1976 data.

[2] U.S. Department of Health, Education, and Welfare, Education Division, (NCES). Digest of Education Statistics, 1976, Table 46, p. 47, Northern Marianas and Trust Territory 1975–76 data from Department of Interior, adjust to include pre-school.

[3] U.S. Department of Agriculture, Food and Nutrition Service, Annual Report of Meal Service in Schools (Form FNS–47), October 1978.

[4] U.S. Department of Health, Education, and Welfare, *Day Care Centers In the U.S.; A National Profile 1976–77,* Volume 3 of the Final Report of the National Day Care Study, Table 63.

[5] A portion of these funds will be withheld from the States' allocations for use by FNS in administering the Program in nonprofit private schools or institutions.

[44 FR 70451, Dec. 7, 1979]

# PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS

Sec.

235.1 General purpose and scope.
235.2 Definitions.
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235.8 Management evaluations and audits.
235.9 Procurement and property management standards.
235.10 [Reserved]
235.11 Other provisions.
235.12 Information collection/recordkeeping—OMB assigned control numbers.

AUTHORITY: Secs. 7 and 10 of the Child Nutrition Act of 1966, 80 Stat. 888, 889, as amended (42 U.S.C. 1776, 1779).

SOURCE: 41 FR 32405, Aug. 3, 1976, unless otherwise noted.

### § 235.1 General purpose and scope.

This part announces the policies and prescribes the regulations necessary to carry out the provisions of section 7 of the Child Nutrition Act of 1966, as amended. It prescribes the methods for making payments of funds to State agencies for use for administrative expenses incurred in supervising and giving technical assistance in connection with activities undertaken by them under the National School Lunch Program (7 CFR part 210), the Special Milk Program (7 CFR part 215), the School Breakfast Program (7 CFR part 220), the Child and Adult Care Food Program (7 CFR part 226) and the Food Distribution Program (7 CFR part 250).

(Sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776))

[44 FR 51185, Aug. 31, 1979, as amended by Amdt. 17, 55 FR 1378, Jan. 16, 1990; 60 FR 15461, Mar. 24, 1995]

### § 235.2 Definitions.

For the purpose of this part, the term:

*7 CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement certain policies applicable to all Department programs. The applicable provisions deal with competition for discretionary grants and cooperative agreements, costs requiring prior approval, acknowledgement of Department support in publications and audiovisuals produced under USDA programs, intergovernmental review of Department programs under Executive Order 12372, and certain miscellaneous Department requirements.

*7 CFR part 3016* means the Department's Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. 7 CFR part 3016 covers requirements for awards and subawards to State and local governmental organizations under Department programs.

*7 CFR part 3018* means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

*7 CFR part 3019* means the Department's Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. 7 CFR part 3019 covers requirements for awards and subawards to nongovernmental, nonprofit organizations under Department programs.

*7 CFR part 3052* means the Department's regulations implementing OMB Circular A–133, "Audits of State, Local Governments, and Non-Profit Organizations." (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

*Act* means the Child Nutrition Act of 1966, as amended.

*CND* means the Child Nutrition Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

*Department* means the U.S. Department of Agriculture.

*Distributing agency* means a State agency which enters into an agreement with the Department for the distribution of donated foods pursuant to part 250 of this title.

*FNS* means the Food and Nutrition Service of the U.S. Department of Agriculture.

*FNSRO* means the appropriate Food and Nutrition Service Regional Office of the Food and Nutrition Service of the U.S. Department of Agriculture.

*Fiscal year* means a period of 12 calendar months beginning October 1, 1976, and October 1 of each calendar year thereafter and ending with September 30 of the following calendar year.

*Institution* means a child or adult care center or a sponsoring organization as defined in part 226 of this chapter.

*Nonprofit* means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1986.

*OIG* means the Office of the Inspector General of the Department.

*SAE* means federally provided State administrative expense funds for State agencies under this part.

*School* means the term as defined in §§ 210.2, 215.2, and 220.2 of this chapter, as applicable.

*School Food Authority* means the governing body which is responsible for the administration of one or more

schools and which has the legal authority to operate a breakfast or a lunch program therein. The term "School Food Authority" also includes a nonprofit agency or organization to which such governing body has delegated authority to operate the lunch or breakfast program in schools under its jurisdiction, provided the governing body retains the responsibility to comply with breakfast or lunch program regulations.

*Secretary* means the Secretary of Agriculture.

*State* means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

*State agency* means (1) the State educational agency or (2) such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer programs under part 210, 215, 220, 226 or 250 of this title. Unless otherwise indicated, "State agency" shall also mean *Distributing agency* as defined in this section,, when such agency is receiving funds directly from FNS under this part.

*State educational agency* means, as the State legislature may determine: (1) The chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (2) a board of education controlling the State department of education.

(Sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); sec. 205, Pub. L. 96–499, The Omnibus Reconciliation Act of 1980, 94 Stat. 2599; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1772, 1784, 1760); Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759)

[41 FR 32405, Aug. 3, 1976, as amended at 44 FR 48957, Aug. 21, 1979; 44 FR 51185, Aug. 31, 1979; Amdt. 9, 48 FR 19355, Apr. 29, 1983; Amdt. 14, 51 FR 27151, July 30, 1986; 54 FR 2991, Jan. 23, 1989; Amdt. 17, 55 FR 1378, Jan. 16, 1990; 60 FR 15461, Mar. 24, 1995; 64 FR 50743, Sept. 20, 1999; 71 FR 39519, July 13, 2006; 72 FR 63792, Nov. 13, 2007]

### § 235.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the program for payment to States of State administrative expense funds covered by this part. Within FNS, CND shall be responsible for administration of the program.

(b) Each State agency desiring to receive payments under this part shall enter into a written agreement with the Department for the administration of the child nutrition programs in accordance with the applicable requirements of this part, 7 CFR parts 210, 215, 220, 225, 226, 245, 15, 15a, 15b, 3015, and 3016. Each agreement shall cover the operation of the Program during the period specified therein and may be extended at the option of the Department.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338 (42 U.S.C. 1776); sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776))

[41 FR 32405, Aug. 3, 1976, as amended at 44 FR 48957, Aug. 21, 1979; Amdt. 14, 51 FR 27151, July 30, 1986; 71 FR 39519, July 13, 2006]

### § 235.4 Allocation of funds to States.

(a) *Nondiscretionary SAE Funds.* For each fiscal year, FNS shall allocate the following:

(1) To each State which administers the National School Lunch, School Breakfast or Special Milk Programs an amount equal to one (1) percent of the funds expended by such State during the second preceding fiscal year under sections 4 and 11 of the National School Lunch Act, as amended, and sections 3, 4 and 17A of the Child Nutrition Act of 1966, as amended. However, the total amount allocated to any State under this paragraph shall not be less than $200,000 or the amount allocated to the State in the fiscal year ending September 30, 1981, whichever is greater. On October 1, 2008 and each October 1 thereafter, the minimum dollar amount for a fiscal year for administrative costs shall be adjusted to reflect the percentage change between the value of the index for State and local government purchases, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending

June 30 of the second preceding fiscal year, and the value of that index for the 12-month period ending June 30 of the preceding fiscal year.

(2) To each State which administers the Child and Adult Care Food Program an amount equal to the sum of: Twenty percent of the first $50,000; ten percent of the next $100,000; five percent of the next $250,000; and two and one-half percent of any remaining funds expended within the State under section 17 of the National School Lunch Act, as amended, during the second preceding fiscal year. FNS may adjust the amount of any such allocation in accordance with changes in the size of the Child and Adult Care Food Program in a State.

(3) For each of fiscal years 2005 through 2007 no State shall receive less than its fiscal year 2004 allocation for administrative costs for all child nutrition programs.

(b) *Discretionary SAE Funds.* For each fiscal year, FNS shall provide the following additional allocations:

(1) Allocate $30,000 to each State which administers the Child and Adult Care Food Program (7 CFR part 226).

(2) $30,000 to each State which administers the Food Distribution Program (part 250 of this chapter) in schools and/or institutions which participate in programs under parts 210, 220, 226 of this chapter.

(3) Amounts derived by application of the following four-part formula to each State agency which is allocated funds under paragraph (a) of this section:

(i) One equal share of forty (40) percent of the funds designated by FNS for the reviews conducted under §210.18 of this title.

(ii) The ratio of the number of School Food Authorities participating in the National School Lunch or Commodity School Programs under the jurisdiction of the State agency to such School Food Authorities in all States times twenty (20) percent of the funds designated by FNS for reviews conducted under §210.18 or of this title.

(iii) The ratio of the number of free and reduced price meals served in School Food Authorities under the jurisdiction of the State agency during the second preceding fiscal year to the number of free and reduced price meals served in all States in the second preceding fiscal year times twenty (20) percent of the funds designated by FNS for reviews conducted under §210.18 of this title.

(iv) Equal shares of twenty (20) percent of the funds designated by FNS for reviews conducted under §210.18 of this title for each School Food Authority under the jurisdiction of the State agency participating in the National School Lunch or Commodity School Programs which has an enrollment of 40,000 or more; *Provided, however,* That for State agencies with fewer than two School Food Authorities with enrollments of 40,000 or more, an equal share shall be provided to the State agency, for either, or both, of the two largest School Food Authorities which have enrollments of more than 2,000; and *Provided, further,* That State agencies with only one School Food Authority, regardless of size, shall be provided with one equal share. For each fiscal year, the amount of State Administrative Expense Funds designated by FNS for reviews conducted under §210.18 of this title and subject to allocation under this paragraph shall be equal to or greater than the amount designated by FNS for program management improvements for the fiscal year ending September 30, 1980.

(4) Funds which remain after the allocations required in paragraphs (a)(1), (a)(2), (b)(1), (b)(2) and (b)(3) of this section, and after any payments provided for under paragraph (c) of this section, as determined by the Secretary, to those States which administer the Food Distribution Program (part 250 of this chapter) in schools and/or institutions which participate in programs under parts 210, 220, or 226 of this chapter and to those States which administer part 226 of this chapter. The amount of funds to be allocated to each State for the Food Distribution Program for any fiscal year shall bear the same ratio to the total amount of funds made available for allocation to the State for the Food Distribution Program under this paragraph as the value of USDA donated foods delivered to the State for schools and institutions participating in programs under parts 210, 220 and 226 of this chapter during the second preceding fiscal year

bears to the value of USDA donated foods delivered to all the States for such schools and institutions during the second preceding fiscal year. The amount of funds to be allocated to each State which administers the Child and Adult Care Food Program for any fiscal year shall bear the same ratio to the total amount of funds made available for allocation to all such States under this paragraph as the amount of funds allocated to each State under paragraph (a)(2) of this section bears to the amount allocated to all States under that paragraph.

(c) *SAE Funds for the Child and Adult Care Food Program.* If a State elects to have a separate State agency administer the adult care component of the Child and Adult Care Food Program, such separate State agency shall receive a pro rata share of the SAE funds allocated to the State under paragraphs (a)(2), (b)(1), and (b)(4) of this section which is equal to the ratio of funds expended by the State for the adult care component of the Child and Adult Care Food Program during the second preceding fiscal year to the funds expended by the State for the entire Child and Adult Care Food Program during the second preceding fiscal year. The remaining funds shall be allocated to the State agency administering the child care component of the Child and Adult Care Food Program.

(d) *SAE Start-up Cost Assistance for State Administration of Former ROAPs.* For any State agency which agrees to assume responsibility for the administration of food service programs in nonprofit private schools or child and adult care institutions that were previously administered by FNS, an appropriate adjustment in the administrative funds paid under this part to the State shall be made by FNS not later than the succeeding fiscal year. Such an adjustment shall consist of an amount of start-up cost assistance, negotiated with the State agency, of no less than $10,000 and not exceeding $100,000, per State.

(e) *SAE Funding Reduction Upon State Agency Termination of a Food Service Program.* For any State agency which terminates its administration of any food service program for which State administrative expense funds are provided under this part, a reduction in the amount of such funds, negotiated with the State agency, shall be made by FNS.

(f) *SAE Funds for ROAPs.* FNS shall have available to it the applicable amounts provided for in paragraphs (a)(1), (a)(2), and (b)(1) of this section, and part 225 of this title, when it is responsible for the administration of a program or programs within a State.

(g) *Reallocation.* Funds allotted to State agencies under this section shall be subject to the reallocation provisions of § 235.5(d).

(h) *Withholding SAE funds.* The Secretary may withhold some or all of the funds allocated to the State agency under this section if the Secretary determines that the State agency is seriously deficient in the administration of any program for which State administrative expense funds are provided under this part or in the compliance of any regulation issued pursuant to those programs. On a subsequent determination by the Secretary that State agency administration of the programs or compliance with regulations is no longer seriously deficient and is operated in an acceptable manner, the Secretary may allocate some or all of the funds withheld.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338 (42 U.S.C. 1776); sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); sec. 7(a), Pub. L. 95–627, 92 Stat. 3622 (42 U.S.C. 1751); Pub. L. 96–499, secs. 201 and 204, 94 Stat. 2599; secs. 805, 812, 814 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1754, 1759a, 1774 and 1776); E.O. 12372 (July 14, 1982, 47 FR 30959); sec. 401(b) Intergovernmental Cooperation Act of 1968 (31 U.S.C. 6506(c))

[44 FR 48957, Aug. 21, 1979, as amended at 44 FR 51185, Aug. 31, 1979; 44 FR 53489, Sept. 14, 1979; 45 FR 3566, Jan. 18, 1980; Amdt. 11, 48 FR 27892, June 17, 1983; Amdt. 14, 51 FR 27151, July 30, 1986; Amdt. 15, 51 FR 33862, Sept. 24, 1986; Amdt. 17, 55 FR 1378, Jan. 16, 1990; 56 FR 32949, July 17, 1991; 58 FR 42489, Aug. 10, 1993; 60 FR 15462, Mar. 24, 1995; 64 FR 50743, Sept. 20, 1999; 71 FR 46075, Aug. 11, 2006]

### § 235.5 Payments to States.

(a) *Method of payment.* FNS will specify the terms and conditions of the State agency's annual grant of SAE funds in conjunction with the grant award document and will make funds

available for payment by means of a Letter of Credit issued in favor of the State agency. The total amount of a State agency's grant shall be equal to the sum of the amounts allocated to such agency under § 235.4 plus or minus any adjustments resulting from the reallocation provisions under paragraph (d) of this section plus any transfers under § 235.6(a) and/or § 235.6(c) of this part. The amount of SAE funds made available for payment to a State agency in any fiscal year shall be determined by FNS upon approval of the State agency's administrative plan under paragraph (b) of this section and any amendments to such plan under paragraph (c) of this section. Funds shall not be made available before the State agency's plan or amendment to such plan, as applicable, has been approved by FNS. However, if the plan has not been approved by October 1 of the base year, FNS may advance SAE funds to the State agency, in amounts determined appropriate by FNS, pending approval of the plan.

(b) *Administrative plan.* (1) Each State agency shall submit, subject to FNS approval, an initial State Administrative Expense plan based upon guidance provided by FNS. This base year plan shall include:

(i) The staffing pattern for State level personnel;

(ii) A budget for the forthcoming fiscal year showing projected amounts (combined SAE and State funds) by cost category;

(iii) The total amount of budgeted funds to be provided from State sources;

(iv) The total amount of budgeted funds to be provided under this part;

(v) The State agency's estimate of the total amount of budgeted funds (combined SAE and State funds) attributable to administration of the School Nutrition Programs (National School Lunch, School Breakfast and Special Milk Programs), Child and Adult Care Food Program, and/or Food Distribution Program in schools and child and adult care institutions and to each of the major activity areas of the State agency; and

(vi) The State agency's estimate of the total Child and Adult Care Food Program audit funds to be used for the forthcoming fiscal year.

(2) These activity areas shall be defined and described by the State agency in accordance with guidance issued by FNS and may include such activities as program monitoring, technical assistance, Federal reporting/claims processing, policy implementation, and allocation of foods to recipient agencies.

(3) Except in specific instances where determined necessary by FNS, State agencies shall not be required to maintain expenditure records by activity area or program. State agencies shall refer to Office of Management and Budget Circular A–87, Attachment B, to establish cost categories.

(4) FNS shall approve a State agency's plan, or any amendment to such plan under paragraph (c) of this section, if it determines that the plan or amendment is consistent with program administrative needs and SAE requirements under this part.

(5) To the extent practicable, State agencies shall implement their approved plans (as amended). FNS shall monitor State agency implementation of the plans through management evaluations, State agency reports submitted under this part, audits, and through other available means.

(6) FNS may expand plan requirements for individual State agencies in order to address specific administrative deficiencies which affect compliance with program requirements and which have been identified by FNS through its monitoring activities.

(c) *Amendments to the administrative plan.* A State agency may amend its plan at any time to reflect changes in funding or activities, except that, if such changes are substantive as defined in the June 5, 1997 guidance, and any amendments or updates to this guidance, the State agency shall amend its plan in accordance with guidance provided by FNS. Plan amendments shall provide information in a format consistent with that provided in the State agency's plan, but shall only require FNS approval if it results in a substantive change as defined by FNS.

(d) *Reallocation of funds.* Annually, between March 1 and May 1 on a date specified by FNS, of each year, each

State agency shall submit to FNS a State Administrative Expense Funds Reallocation Report (FNS–525) on the use of SAE funds. At such time, a State agency may release to FNS any funds that have been allocated, reallocated or transferred to it under this part or may request additional funds in excess of its current grant level. Based on this information or on other available information, FNS shall reallocate, as it determines appropriate, any funds allocated to State agencies in the current fiscal year which will not be expended in the following fiscal year and any funds carried over from the prior fiscal year which will not be expended in the current fiscal year. Reallocated funds shall be made available for payment to a State agency upon approval by FNS of the State agency's amendment to the base year plan which covers the reallocated funds, if applicable. Notwithstanding any other provision of this part, a State agency may, at any time, release to FNS for reallocation any funds that have been allocated, reallocated or transferred to it under this part and are not needed to implement its approved plan under this section.

(e) *Return of funds.* (1) In Fiscal Year 1991, up to 25 per cent of the SAE funds allocated to each State agency under § 235.4 may remain available for obligation and expenditure in the second fiscal year of the grant. In subsequent fiscal years, up to 20 percent may remain available for obligation and expenditure in the second fiscal year. The maximum amount to remain available will be calculated at the time of the formula allocation by multiplying the appropriate percentage by each State agency's formula allocation as provided under § 235.4(a) through (c). At the end of the first fiscal year, the amount subject to the retention limit is determined by subtracting the amount reported by the State agency as Total Federal share of outlays and unliquidated obligations on the fourth quarter Standard Form (SF) 269, Financial Status Report, from the total amount of SAE funds made available for that fiscal year (i.e., the formula allocation adjusted for any transfers or reallocations). However, funds provided under § 235.4(d) are not subject to the retention limit. Any funds in excess of the amount that remains available to each State agency shall be returned to FNS.

(2) At the end of the fiscal year following the fiscal year for which funds were allocated, each State agency shall return any funds made available which are unexpended.

(3) Return of funds by the State agency shall be made as soon as practicable, but in any event, not later than 30 days following demand by FNS.

[Amdt. 14, 51 FR 27151, July 30, 1986, as amended by Amdt. 17, 55 FR 1378, Jan. 16, 1990; 60 FR 15462, Mar. 24, 1995; 64 FR 50743, Sept. 20, 1999]

### § 235.6 Use of funds.

(a) Funds allocated under this part and 7 CFR part 225 shall be used for State agency administrative costs incurred in connection with the programs governed by 7 CFR parts 210, 215, 220, 225, 226, and 250 of this title. Except as provided under § 235.6(c), funds allocated under § 235.4, paragraphs (a) and (b) and 7 CFR part 225 shall be used for the program(s) for which allocated, except that the State agency may transfer funds allocated for any such program(s) to other such program(s). Subject to the provisions of this paragraph, a State agency may also transfer SAE funds that are not needed to implement its approved plan § 235.5(b) to another State agency within the State that is eligible to receive SAE funds under this part. Up to 25 per cent of funds allocated under § 235.4(a) through (c) for Fiscal Year 1991 and up to 20 per cent of funds allocated in subsequent fiscal years to a State agency may, subject to the provisions of § 235.5 of this part, remain available for obligation and expenditure by such State agency during the following fiscal year.

(a–1) State administrative expense funds paid to any State may be used by State agencies to pay salaries, including employee benefits and travel expenses for administrative and supervisory personnel, for support services, for office equipment, and for staff development, particularly for monitoring and training of food service personnel at the local level in areas such as food purchasing and merchandizing. Such

funds shall be used to employ additional personnel, as approved in the applicable State plan to supervise, improve management, and give technical assistance to school food authorities and to institutions in their initiation, expansion, and conduct of any programs for which the funds are made available. State agencies may also use these funds for their general administrative expenses in connection with any such programs, including travel and related expenses. Additional personnel or part-time personnel hired are expected to meet professional qualifications and to be paid at salary scales of positions of comparable difficulty and responsibility under the State agency. Personnel may be used on a staff year equivalent basis, thus permitting new personnel and existing staff to be cross-utilized for most effective and economical operation under existing and new programs.

(a–2) State Administrative Expense Funds paid to any State agency under §235.4(b)(3) shall be available for reviews conducted under §210.18 activities associated with carrying out actions to ensure adherence to the program performance standards.

(b) State administrative expense funds shall be used consistent with the cost principles and constraints on allowable and unallowable costs and indirect cost rates as prescribed in Office of Management and Budget Circular A–87.

(c) In addition to State Administrative Expense funds made available specifically for food distribution purposes under §235.4 (b)(2) and (b)(4), State Administrative Expense funds allocated under §235.4 (a)(1), (a)(2), (b)(1), (b)(3), and (d), and under (b)(4) for the Child and Adult Care Food Program may be used to assist in the administration of the Food Distribution Program (7 CFR part 250) in schools and institutions which participate in programs governed by parts 210, 220, and 226 of this title when such Food Distribution Program is administered within the State agency and may also be used to pay administrative expenses of a distributing agency, when such agency is other than the State agency and is responsible for administering all or part of such Food Distribution Program.

(d) FNS shall allocate, for the purpose of providing grants on an annual basis to public entities and private nonprofit organizations participating in projects under section 18(c) of the National School Lunch Act, not more than $4,000,000 in each of Fiscal Years 1993 and 1994. Subject to the maximum allocation for such projects for each fiscal year, at the beginning of each of Fiscal Years 1993 and 1994, FNS shall allocate, from funds available under §235.5(d) that have not otherwise been allocated to States, an amount equal to the estimates by FNS of the funds to be returned under paragraph (a) of this section, but not less than $1,000,000 in each fiscal year. To the extent that amounts returned to FNS are less than estimated or are insufficient to meet the needs of the projects, FNS may allocate amounts to meet the needs of the projects from funds available under this section that have not been otherwise allocated to States. FNS shall reallocate any of the excess funds above the minimum level in accordance with §235.5(d).

(e) Where State Administrative Expense Funds are used to acquire personal property or services the provisions of §§235.9 and 235.10 must be observed.

(f) Each State agency shall adequately safeguard all assets and assure that they are used solely for authorized purposes.

(g) Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part, whether received directly or indirectly from the Department, shall:

(1) If such funds, assets, or property are of a value of $100 or more, be fined not more than $25,000 or imprisoned not more than five years or both; or

(2) If such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than one year or both.

(h) Whoever receives, conceals, or retains to his use or gain funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject

to the same penalties provided in paragraph (h) of this section.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338, 1339, 1340 (42 U.S.C. 1751, 1753, 1759a, 1761, 1766, 1772–1775, 1776, 1786); sec. 7(a), Pub. L. 95–627, 92 Stat. 3621, 3622 (42 U.S.C. 1751, 1776))

[41 FR 32405, Aug. 3, 1976, as amended at 43 FR 37172, Aug. 22, 1978; 44 FR 37901, June 29, 1979; 44 FR 48958, Aug. 21, 1979; 44 FR 51185, Aug. 31, 1979; 45 FR 3566, Jan. 18, 1980; Amdt. 11, 48 FR 27892, June 17, 1983; Amdt. 14, 51 FR 27152, July 30, 1986; 56 FR 32949, July 17, 1991; 60 FR 15462, Mar. 24, 1995; 60 FR 57148, Nov. 14, 1995; 64 FR 50744, Sept. 20, 1999]

### § 235.7 Records and reports.

(a) Each State agency shall keep records on the expenditure of State administrative expense funds provided under this part and part 225 of this title. Such records shall conform with the applicable State plan for use of State administrative expense funds. The State agency shall make such records available, upon a reasonable request, to FNS, OIG, or the U.S. Comptroller General and shall maintain current accounting records of State administrative expense funds which shall adequately identify fund authorizations, obligations, unobligated balances, assets, liabilities, outlays and income. The records may be kept in their original form or on microfilm, and shall be retained for a period of three years after the date of the submission of the final Financial Status Report, subject to the exceptions noted below:

(1) If audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(2) Records for nonexpendable property acquired with State Administrative Expense Funds shall be retained for three years after its final disposition.

(b) Each State agency shall submit to FNS a quarterly Financial Status Report (SF–269) on the use of State administrative expense funds provided for each fiscal year under this part. Reports shall be postmarked and/or submitted to FNS no later than 30 days after the end of each quarter of the fiscal year and, in case of funds carried over under § 235.6(a), each quarter of the following fiscal year until all such funds have been obligated and expended. Obligations shall be reported for the fiscal year in which they occur. Each State agency shall submit a final Financial Status Report for each fiscal year's State administrative expense funds. This report shall be postmarked and/or submitted to FNS no later than 30 days after the end of the fiscal year following the fiscal year for which the funds were initially made available. Based on guidance provided by FNS, each State agency shall also use the quarterly SF–269 to report on the use of State funds provided during the fiscal year. Each State agency shall also submit an annual report containing information on School Food Authorities under agreement with the State agency to participate in the National School Lunch or Commodity School programs.

(c) State agencies operating those programs governed by parts 210, 215, 220 and 226 and those State agencies which are distributing agencies eligible for SAE funds shall participate in surveys and studies of programs authorized under the National School Lunch Act, as amended, and the Child Nutrition Act of 1966, as amended, when such studies and surveys are authorized by the Secretary of Agriculture. The aforementioned State agencies shall encourage individual School Food Authorities, child and adult care institutions, and distributing agencies (as applicable) to participate in such studies and surveys. Distribution of State Administrative Expense funds to an individual State agency is contingent upon that State agency's cooperation in such studies and surveys.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338 (42 U.S.C. 1776); sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); 93 Stat. 837, Pub. L. 96–108 (42 U.S.C. 1776); secs. 804, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773 and 1785); sec. 7(a), Pub. L. 95–627, 92 Stat. 3622, 42 U.S.C. 1751)

[41 FR 32405, Aug. 3, 1976, as amended at 43 FR 37173, Aug. 22, 1978; 44 FR 48958, Aug. 21, 1979; 45 FR 8563, Feb. 8, 1980; Amdt. 9, 48 FR 195, Jan. 4, 1983; Amdt. 11, 48 FR 27892, June 17, 1983; Amdt. 12, 49 FR 18989, May 4, 1984; Amdt. 14, 51 FR 27152, July 30, 1986; Amdt. 17, 55 FR 1378, Jan. 16, 1990; 60 FR 15463, Mar. 24, 1995]

### § 235.8 Management evaluations and audits.

(a) Unless otherwise exempt, audits at the State level shall be conducted in accordance with Office of Management and Budget Circular A–133, and the Department's implementing regulations at 7 CFR part 3052. (To obtain the OMB circular referenced in this definition, see 5 CFR 1310.3.)

(b) While OIG shall rely to the fullest extent feasible upon State sponsored audits, it shall, whenever considered necessary, (1) perform on-site test audits, and (2) review audit reports and related working papers of audits performed by or for State agencies.

(c) Each State agency shall provide FNS with full opportunity to conduct management evaluations of all operations of the State agency under this part and shall provide OIG with full opportunity to conduct audits of all such operations. Each State agency shall make available its records, including records of the receipt and expenditure of funds, upon a reasonable request by FNS, OIG, or the U.S. Comptroller General.

(Sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); secs. 804, 805, 812, 814, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1754, 1756, 1759, 1759a, 1771, 1773, 1774, 1776, and 1785))

[41 FR 32405, Aug. 3, 1976, as amended at 44 FR 51186, Aug. 31, 1979; Amdt. 7, 47 FR 18567, Apr. 30, 1982; Amdt. 9, 48 FR 195, Jan. 4, 1983; 54 FR 2991, Jan. 23, 1989; 71 FR 39519, July 13, 2006]

### § 235.9 Procurement and property management standards.

(a) *Requirements.* State agencies shall comply with the requirements of 7 CFR part 3016 concerning the procurement of supplies, equipment and other services with State Administrative Expense Funds.

(b) *Contractual responsibilities.* The standards contained in 7 CFR part 3016 do not relieve the State agency of any contractual responsibilities under its contract. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State or Federal authority that has proper jurisdiction.

(c) *Procurement procedure.* The State agency may use its own procurement procedures which reflect applicable State laws and regulations, in accordance with 7 CFR part 3016.

(d) *Property acquired with State administrative expense funds.* State Agencies shall comply with the requirements of 7 CFR part 3016 in their utilization and disposition of property acquired in whole or in part with State Administrative Expense Funds.

(Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[Amdt. 9, 48 FR 19355, Apr. 29, 1983, as amended at 71 FR 39519, July 13, 2006]

### § 235.10 [Reserved]

### § 235.11 Other provisions.

(a) *State funds.* Expenditures of funds from State sources in any fiscal year for the administration of the National School Lunch Program, School Breakfast Program, Special Milk Program, Child and Adult Care Food Program shall not be less than that expended or obligated in fiscal year 1977. Failure of a State to maintain this level of funding will result in the total withdrawal of SAE funds. State agencies shall follow the provisions of 7 CFR part 3016 in identifying and documenting expenditures of funds from State revenues to meet the State funding requirement of this paragraph.

(b) *Sanctions imposed.* (1) FNS may recover, withhold or cancel payment of up to one hundred (100) percent of the funds payable to a State agency under this part, whenever it is determined by FNS that the State agency has failed to comply with the requirements contained in this part and in parts 210, 215, 220 and 226 of this title and in part 250 of this title as it applies to the operation of the Food Distribution Program in schools and child and adult care institutions.

(2) In addition to the general provisions found in paragraph (b)(1) of this

section, FNS may, for any fiscal year, recover, withhold or cancel payment of up to thirty-three and one-third (33⅓) percent of the funds payable to, and to be used by, a State agency under § 235.4(a)(1) and § 235.4(b)(3) for administration of school nutrition programs in FNS determines that a State agency is deficient in one or more of the following:

(i) Implementing the requirements in § 210.18;

(ii) Conducting the number of reviews required in § 210.18 within the timeframes specified;

(iii) Covering the areas of review set forth in the § 210.18, carrying out corrective action, and assessing and recovering claims as prescribed in §§ 210.18 and 210.19 of this title;

(iv) Conducting reviews with sufficient thoroughness to identify violations of the areas of review identified in § 210.18; and

(v) Meeting the reporting deadlines prescribed for the forms (FNS–10 and SF–269) required under § 210.5(d) of this title.

(3) Furthermore, FNS may for any fiscal year, recover, withhold or cancel payment of up to thirty-three and one-third (33⅓) percent of the funds payable to, and to be used by, a State agency under § 235.4(a)(2), § 235.4(b)(1) and § 235.4(b)(4) for administration of the Child and Adult Care Food Program if FNS determines that a State agency is deficient in meeting the reporting deadlines prescribed for the forms (FNS–44 and SF–269) required under § 226.7(d) of this title.

(4) In establishing the amounts of funds to be recovered, withheld or cancelled under paragraph (b)(2) and (b)(3) of this section, FNS shall determine the current or projected rate of funds usage by the State agency for all funds subject to sanction, and after considering the severity and longevity of the cumulative deficiencies, shall apply an appropriate sanction percentage to the amount so determined. During the fiscal year under sanction, a State agency may not use funds not included in the determination of funds usage to replace sanctioned funds. The maximum sanction percentage that may be imposed against a State agency for failure within one or more of the five deficiency areas specified in paragraph (b)(2) of this section for any fiscal year shall be thirty-three and one-third (33⅓) percent of the funds payable under § 235.4(a)(1) and § 235.4(b)(3) for administration of school nutrition programs for such fiscal year.

(5) Before carrying out any sanction against a State agency under this section, the following procedures shall be implemented:

(i) FNS shall notify the Chief State School Officer or equivalent of the deficiencies found and of its intention to impose sanctions unless an acceptable corrective action plan is submitted and approved by FNS within 60 calendar days.

(ii) The State agency shall develop a corrective action plan with specific timeframes to correct the deficiencies and/or prevent their future recurrence. The plan will include dates by which the State agency will accomplish such corrective action.

(iii) FNS shall review the corrective action plan. If it is acceptable, FNS shall issue a letter to the Chief State School Officer or equivalent approving the corrective action plan, and detailing the technical assistance that is available to the State agency to correct the deficiencies. The letter shall advise the Chief State School Officer or equivalent of the specific sanctions to be imposed if the corrective action plan is not implemented within timeframes set forth in the approved plan.

(iv) Upon advice from the State agency that corrective action has been taken, FNS shall assess such action and, if necessary, shall perform a follow-up review to determine if the noted deficiencies have been corrected. FNS shall then advise the State agency if the actions taken are in compliance with the corrective action plan or if additional corrective action is needed.

(v) If an acceptable corrective action plan is not submitted and approved within 60 calendar days, or if corrective action is not completed within the time limits established in the corrective action plan, FNS may impose a sanction by assessing a claim against the State agency or taking action in accordance with 7 CFR part 3016. FNS shall notify the Chief State School Officer or equivalent of any such action.

(vi) If, subsequent to the imposition of any sanction, FNS determines that the noted deficiencies have been resolved and that the programs for which SAE funds were made available are being operated in an acceptable manner, FNS may return to the State agency or restore to the State agency's Letter of Credit (LOC) part or all of any sanctioned SAE funds.

(6) In carrying out sanctions under this part for any fiscal year, FNS may reduce the amount of allocated SAE funds payable to a State agency in whole or in part during such fiscal year and during following fiscal years if necessary.

(7) Any State agency which has a sanction imposed against it in accordance with this paragraph shall not be eligible to participate in any reallocation of SAE funds under §235.5(d) of this part during any fiscal year in which such sanction is being applied.

(c) *Termination for convenience.* FNS and the State agency may terminate the State agency's participation under this part in whole, or in part, when both parties agree that continuation would not produce beneficial results commensurate with the further expenditure of funds. The two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated. The State agency shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. FNS shall allow full credit to the State agency for the Federal share of the noncancellable obligations, properly incurred by the State agency prior to termination.

(d) In taking any action under paragraphs (b) or (c) of this section, FNS and the State agency shall comply with the provisions of 7 CFR part 3016 concerning grant suspension, termination and closeout procedures.

(e) *State requirements.* Nothing contained in this part shall prevent a State agency from imposing additional operating requirements which are not inconsistent with the provisions of this part.

(f) *Administrative review process.* When FNS asserts a sanction against a State agency under the provisions of paragraph (b) of this section, the State agency may appeal the case and be afforded a review by an FNS Administrative Review Officer of the record including any additional written submissions prepared by the State agency.

(1) FNS shall provide a written notice and shall ensure the receipt of such notice when asserting a sanction against a State agency.

(2) A State agency aggrieved by a sanction asserted against it may file a written request with the Director, Administrative Review Staff, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Va. 22302 for a review of the record. Such request must be postmarked within 30 calendar days of the date of delivery of the sanction notice and the envelope containing the request shall be prominently marked "REQUEST FOR REVIEW." If the State agency does not request a review within 30 calendar days of the date of delivery of the sanction notice, the administrative decision on the sanction shall be final.

(3) Upon receipt of a request for review, FNS shall promptly provide the State agency with a written acknowledgment of the request. The acknowledgment shall include the name and address of the FNS Administrative Review Officer reviewing the sanction. The acknowledgment shall also notify the State agency that any additional information in support of its position must be submitted within 30 calendar days of the receipt of the acknowledgment.

(4) When a review is requested, the FNS Administrative Review Officer shall review all available information and shall make a final determination within 45 calendar days after receipt of the State agency's additional information. The final determination shall take effect upon delivery of the written notice of this final decision to the State agency.

(5) The final determination of the FNS Administrative Review Officer will be the Department's final decision

in the case and will not be subject to reconsideration.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338 (42 U.S.C. 1776); sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); secs. 805 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773); sec. 7(a), Pub. L. 95–627, 93 Stat. 3622, 42 U.S.C. 1751)

[41 FR 32405, Aug. 3, 1976, as amended at 44 FR 48958, Aug. 21, 1979; Amdt. 6, 47 FR 14135, Apr. 2, 1982; Amdt. 11, 48 FR 27892, June 17, 1983; Amdt. 12, 49 FR 18989, May 4, 1984; Amdt. 14, 51 FR 27152, July 30, 1986; Amdt. 15, 51 FR 33862, Sept. 24, 1986; Amdt. 17, 55 FR 1378, Jan. 16, 1990; 56 FR 32950, July 17, 1991; 60 FR 15463, Mar. 24, 1995; 64 FR 50744, Sept. 20, 1999; 71 FR 39519, July 13, 2006]

### § 235.12 Information collection/recordkeeping—OMB assigned control numbers.

| 7 CFR section where requirements are described | Current OMB control number |
|---|---|
| 235.3(b) | 0584–0067 |
| 235.4(d), (e) | 0584–0067 |
| 235.7(a) | 0584–0067 |
| 235.7(b) | 0584–0067 |
| 235.7(c) | 0584–0067 |
| 235.8(a), (b) | 0584–0067 |
| 235.9(c), (d) | 0584–0067 |
| 235.11(b)(2) | 0584–0067 |
| 235.11(b)(5)(ii) | 0584–0067 |
| 235.11(f) | 0584–0067 |

[64 FR 50744, Sept. 20, 1999]

## PART 240—CASH IN LIEU OF DONATED FOODS

Sec.

240.1 General purpose and scope.
240.2 Definitions.
240.3 Cash in lieu of donated foods for program schools.
240.4 Cash in lieu of donated foods for nonresidential child and adult care institutions.
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240.6 Funds for States which have phased out facilities.
240.7 Payments to States.
240.8 Payments to program schools, service institutions, nonresidential child care institutions and commodity schools.
240.9 Use of funds.
240.10 Unobligated funds.
240.11 Records and reports.

AUTHORITY: 42 U.S.C. 612c note, 1751, 1755, 1762a, 1765, 1766, 1779.

SOURCE: 47 FR 15982, Apr. 13, 1982, unless otherwise noted.

### § 240.1 General purpose and scope.

(a) Each school year the Department programs agricultural commodities and other foods to States for delivery to program and commodity schools, nonresidential child care institutions, and service institutions pursuant to the regulations governing the donation of foods for use in the United States, its territories and possessions and areas under its jurisdiction (7 CFR part 250).

(b) Section 6(b) of the Act requires that not later than June 1 of each school year, the Secretary shall make an estimate of the value of the agricultural commodities and other foods that will be delivered during that school year for use in lunch programs by schools participating in the National School Lunch Program (7 CFR part 210). If this estimate is less than the total level of assistance authorized under section 6(e) of the Act the Secretary shall pay to the State administering agency not later than July 1 of that school year, an amount of funds equal to the difference between the value of donated foods as then programmed for that school year and the total level of assistance authorized under such section.

(c) Section 6(e)(1) of the Act requires:

(1) That for each school year, the total commodity assistance, or cash in lieu thereof, available to each State for the National School Lunch Program shall be the amount obtained by multiplying the national average value of donated foods, described in paragraph (c)(2) of this section, by the number of lunches served in that State in the preceding school year; and

(2) That the national average value of foods donated to schools participating in the National School Lunch Program, or cash payments made in lieu thereof, shall be 11 cents, adjusted on July 1, 1982, and each July 1 thereafter to reflect changes in the Price Index for Food Used in Schools and Institutions. Section 6(e)(1) further requires that not less than 75 percent of the assistance under that section shall be in the form of donated foods for the National School Lunch Program. After the end of each school year, FNS shall reconcile the number of lunches served by schools in each State with the number

served in the preceding school year and, based on such reconciliation, shall increase or reduce subsequent commodity assistance or cash in lieu thereof provided to each State.

(d) Section 12(g) of the Act provides that whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this Act or the Child Nutrition Act of 1966, whether received directly or indirectly from the United States Department of Agriculture, or whoever receives, conceals, or retains such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets, or property are of the value of $100 or more, be fined not more than $10,000 or imprisoned not more than five years, or both, or, if such funds, assets, or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(e) Section 14(f) of the Act provides that the value of foods donated to States for use in commodity schools for any school year shall be the sum of the national average value of donated foods established under section 6(e) of the Act and the national average payment established under section 4 of the Act. Section 14(f) also provides that such schools shall be eligible to receive up to five cents of such value in cash for processing and handling expenses related to the use of the donated foods.

(f) Sections 17(h)(1) (B) and (C) of the Act provide that the value of commodities, or cash in lieu thereof, donated to States for use in nonresidential child or adult care institutions participating in the Child and Adult Care Food Program (7 CFR part 226) for any school year shall be, at a minimum, the amount obtained by multiplying the number of lunches and suppers served during the preceding school year by the rate established for lunches for that school year under section 6(e) of the Act. At the end of each school year, FNS shall reconcile the number of lunches and suppers served in participating institutions in each State during such school year with the number of lunches and suppers served in the preceding school year and, based on such reconciliation, shall increase or reduce subsequent commodity assistance or cash in lieu of commodities provided to each State.

(g) Section 16 of the Act provides that a State which has phased out its food distribution facilities prior to June 30, 1974, may elect to receive cash payments in lieu of donated foods for the purposes of the applicable child nutrition programs—i.e., the National School Lunch Program, the Summer Food Service Program for Children (7 CFR part 225) and the Child Care Food Program.

(h) These regulations prescribe the methods for determination of the amount of payments, the manner of disbursement and the requirements for accountability for funds when these respective statutory authorities require the Department to make cash payments in lieu of donating agricultural commodities and other foods.

[47 FR 15982, Apr. 13, 1982, as amended at 52 FR 7267, Mar. 10, 1987; 58 FR 39120, July 22, 1993]

### § 240.2 Definitions.

For the purpose of this part the term:

*Act* means the National School Lunch Act, as amended.

*Child Care Food Program* means the Program authorized by section 17 of the Act.

*Commodity school* means a school that does not participate in the National School Lunch Program under part 210 of this chapter but which operates a nonprofit lunch program under agreement with the State educational agency or FNSRO and receives donated foods, or donated foods and cash or services of a value of up to 5 cents per lunch in lieu of donated foods under this part for processing and handling the foods.

*Department* means the U.S. Department of Agriculture.

*Distributing agencies* means State, Federal or private agencies which enter into agreements with the Department for the distribution of donated foods to program schools, commodity schools, and nonresidential child care institutions.

*Donated-food processing and handling expenses* means any expenses incurred by or on behalf of a commodity school for processing or other aspects of the preparation, delivery, and storage of donated foods for use in its lunch program.

*Donated foods* means foods donated, or available for donation, by the Department under any of the legislation referred to in part 250 of this chapter.

*Fiscal year* means the period of 12 months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

*FNS* means the Food and Nutrition Service of the Department.

*FNSRO* means the appropriate Food and Nutrition Service Regional Office.

*National School Lunch Program* means the Program authorized by sections 4 and 11 of the Act.

*Nonprofit* means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1954, as amended; or in the Commonwealth of Puerto Rico, certified as nonprofit by its Governor.

*Nonresidential child care institution* means any child care center, day care home, or sponsoring organization (as those terms are defined in part 226 of this chapter) which participates in the Child Care Food Program.

*Program school* means a school which participates in the National School Lunch Program.

*School* means (1) an educational unit of high school grade or under except for a private school with an average yearly tuition exceeding $1,500 per child, operating under public or nonprofit private ownership in a single building or complex of buildings. The term "high school grade or under" includes classes of preprimary grade when they are conducted in a school having classes of primary or higher grade, or when they are recognized as a part of the educational system in the State, regardless of whether such preprimary grade classes are conducted in a school having classes of primary or higher grade; (2) with the exception of residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor and private foster homes, any public or nonprofit private child care institution, or distinct part of such institution, which (i) maintains children in residence, (ii) operates principally for the care of children, and (iii) if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government. The term "child care institutions" includes, but is not limited to: homes for the mentally retarded, the emotionally disturbed, the physically handicapped, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers; and (3) with respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

*School food authority* means the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a nonprofit lunch program therein.

*School year* means the period of 12 months beginning July 1 of any calendar year and ending June 30 of the following calendar year.

*Secretary* means the Secretary of Agriculture.

*Service institutions* means camps or sponsors (as those terms are defined in part 225 of this chapter) which participate in the Summer Food Service Program for Children.

*Special needs children* means children who are emotionally, mentally or physically handicapped.

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American-Samoa, the Trust Territory of the Pacific Islands, or the Commonwealth of the Northern Mariana Islands.

*State agency* means the State educational agency or such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer, in the State, the National School Lunch Program, the Child Care Food Program, the Summer

Food Service Program for Children, or nonprofit lunch programs in commodity schools.

*State educational agency* means, as the State legislature may determine, (1) the chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (2) a board of education controlling the State Department of Education.

*Summer Food Service Program for Children* means the Program authorized by section 13 of the Act.

*Tuition* means any educational expense required by the school as part of the students' educational program; not including transportation fees for commuting to and from school, and the cost of room and board. The following monies shall not be included when calculating a school's average yearly tuition per child:

(1) Academic scholarship aid from public or private organizations or entities given to students, or to schools for students, and (2) state, county or local funds provided to schools operating principally for the purpose of educating handicapped or other special needs children for whose education the State, county or local government is primarily or solely responsible. In a school which varies tuition, the average yearly tuition shall be calculated by dividing the total tuition receipts for the current school year by the total number of students enrolled for purposes of determining if the average yearly tuition exceeds $1,500 per child.

### § 240.3 Cash in lieu of donated foods for program schools.

(a) Not later than June 1 of each school year, FNS shall make an estimate of the value of agricultural commodities and other foods that will be delivered to States during the school year under the food distribution regulations (7 CFR part 250) for use in program schools. If the estimated value is less than the total value of assistance authorized under section 6(e) of the Act for the National School Lunch Program, FNS shall determine the difference between the value of the foods then programmed for each State for the school year and the required value and shall pay the difference to each State agency not later than July 1 of that school year.

(b) Notwithstanding any other provision of this section, in any State in which FNS administers the National School Lunch Program in any of the schools of the State, FNS shall withhold from the funds payable to that State under this section an amount equal to the ratio of the number of lunches served in schools in which the program is administered by FNS to the total number of lunches served in all program schools in the State.

[47 FR 15982, Apr. 13, 1982, as amended at 52 FR 7267, Mar. 10, 1987; 58 FR 39120, July 22, 1993]

### § 240.4 Cash in lieu of donated foods for nonresidential child and adult care institutions.

(a) For each school year any State agency may, upon application to FNS prior to the beginning of the school year, elect to receive cash in lieu of donated foods for use in nonresidential child care or adult care institutions participating in the Child and Adult Care Food Program. FNS shall pay each State agency making such election, at a minimum, an amount calculated by multiplying the number of lunches and suppers served in the State's nonresidential child and adult care institutions which meet the meal pattern requirements prescribed in the regulations for the Child and Adult Care Food Program under part 226 of this chapter by the national average value of donated food prescribed in section 6(e)(1) of the Act. However, if a State agency has elected to receive a combination of donated foods and cash, the required amount shall be reduced based upon the number of such lunches and suppers served for which the State receives donated foods.

(b) Notwithstanding any other provision of this section in any State in which FNS administers the Child Care Food Program in any nonresidential child care institution, FNS shall withhold from the funds payable to such State under this section an amount equal to the ratio of the number of lunches and suppers served in such institutions in which the program is administered by the FNS and for which cash payments are provided to the

total number of lunches and suppers served in that program and for which cash in lieu of payments are received, in all nonresidential child care institutions in the State.

[47 FR 15982, Apr. 13, 1982, as amended at 58 FR 39120, July 22, 1993]

### § 240.5 Cash in lieu of donated foods for commodity schools.

(a) The school food authority of a commodity school may elect (1) to receive cash payments in lieu of up to five cents per lunch of the value specified in § 250.4(b)(2)(ii) of this chapter to be used for donated-food processing and handling expenses, or (2) to have such payments retained for use on its behalf by the State agency. The school food authority shall consult with commodity schools before making the election.

(b) When a school food authority makes an election regarding receipt of cash payments and the amount of any payments to be received under this paragraph, such election shall be binding on the school food authority for the school year to which the election applies.

(c) The State agency shall (1) no later than May 14, 1982 for the school year ending June 30, 1982, and no later than August 15 of each subsequent school year, contact all school food authorities of commodity schools to learn their election regarding cash payments under this section and the amount of any such payments, and (2) forward this information to the distributing agency and FNSRO, in accordance with § 210.14(d)(2) of this chapter.

### § 240.6 Funds for States which have phased out facilities.

Notwithstanding any other provision of this part, any State which phased out its food distribution facilities prior to June 30, 1974, may, for purposes of the National School Lunch Program, the Summer Food Service Program for Children, and the Child Care Food Program, elect to receive cash payments in lieu of donated foods. Where such an election is made, FNS shall make cash payments to such State in an amount equivalent in value to the donated foods (or cash in lieu thereof) to which the State would otherwise have been entitled under section 6(e) of the Act, if it had retained its food distribution facilities, except that the amount may be based on the number of meals served in the current school year, rather than on the number of meals served in the preceding school year with a subsequent reconciliation.

[47 FR 15982, Apr. 13, 1982, as amended at 58 FR 39120, July 22, 1993]

### § 240.7 Payments to States.

(a) Funds to be paid to any State agency under § 240.3 of this part for disbursement to program schools shall be made available by means of United States Treasury Department checks. The State agency shall use the funds received without delay for the purpose for which issued.

(b) Funds to be paid to any State agency under § 240.4(a) for disbursement to nonresidential child care institutions and funds to be paid to any State agency under § 240.6 for disbursement to program schools, service institutions, or nonresidential child care institutions shall be made available by means of Letters of Credit issued by FNS in favor of the State agency. The State agency shall:

(1) Obtain funds needed to pay school food authorities, nonresidential child care institutions, and service institutions, as applicable through presentation by designated State Officials of a Payment Voucher on Letter of Credit (Treasury Form GFO 7578) in accordance with procedures prescribed by FNS and approved by the United States Treasury Department;

(2) Submit requests for funds on a monthly basis in such amounts as necessary to make payments with respect to meals served the previous month;

(3) Use the funds received without delay for the purpose for which drawn.

(c) FNS shall make any cash payments elected under § 240.5 of this part by increasing the amount of the Letter of Credit or, where applicable, of the Federal Treasury check, in accordance with the information provided under § 240.5(c) of this part.

(d) Funds received by State agencies pursuant to this part for disbursement to program schools and to commodity schools shall not be subject to the

matching provisions of §210.6 of part 210 of this chapter.

### § 240.8 Payments to program schools, service institutions, nonresidential child care institutions and commodity schools.

(a) Each State agency shall promptly and equitably disburse any cash received in lieu of donated foods under this part to eligible program schools, service institutions and nonresidential child care institutions, as applicable. Funds withheld from States under §§240.3 and 240.4 shall be disbursed to eligible program schools, service institutions, and nonresidential child care institutions by FNSRO's in the same manner.

(b) Unless the school food authority of a commodity school elects to have cash payments for donated-food processing and handling expenses retained for use on its behalf by the State agency, the State agency shall make such payments to the school food authority of such a school on a monthly basis in an amount equal to the number of lunches served (as reported in accordance with §210.13(a) of this chapter) times the value per lunch elected by the school food authority in accordance with §240.5 of this part. For the period November 11, 1981, through the close of the month in which this part is published in the FEDERAL REGISTER, a retroactive payment shall be made, where applicable, to the school food authority of a commodity school based on the number of lunches served during that period which meet the nutritional requirements specified in §210.10 of this chapter.

### § 240.9 Use of funds.

(a) Funds made available to school food authorities (for program schools), service institutions and nonresidential child care institutions under this part shall be used only to purchase United States agricultural commodities and other foods for use in their food service under the National School Lunch Program, Child Care Food Program, or Summer Food Service Program for Children, as applicable. Such foods shall be limited to those necessary to meet the requirements set forth in §210.10 of part 210 of this chapter, §225.10 of part 225 of this chapter and §226.10 of part 226 of this chapter, respectively. On or before disbursing funds to school food authorities (for program schools), service institutions and nonresidential child care institutions, State agencies and FNSRO's shall notify them of the reason for special disbursement, the purpose for which these funds may be used, and, if possible, the amount of funds they will receive.

(b) Cash payments received under §240.5 of this part shall be used only to pay donated-food processing and handling expenses of commodity schools.

(c) Funds provided under this part shall be subject to the Department's Uniform Federal Assistance Regulations (7 CFR part 3015).

### § 240.10 Unobligated funds.

State agencies shall release to FNS any funds paid to them under this part which are unobligated at the end of each fiscal year. Release of funds by any State agency shall be made as soon as practicable, but in any event, not later than 30 days following demand by FNS. Release of funds shall be reflected by a related adjustment in the State agency's Letter of Credit where appropriate or payment by State check where the funds have been paid by United States Treasury Department check.

### § 240.11 Records and reports.

(a) State agencies and distributing agencies shall maintain records and reports on the receipt and disbursement of funds made available under this part, and shall retain such records and reports for a period of three years after the end of the fiscal year to which they pertain, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(b) State agencies shall establish controls and procedures which will assure that the funds made available under this part are not included in determining the State's matching requirements under §210.6 of part 210 of this chapter.

# PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS

Sec.
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245.13 Information collection/recordkeeping—OMB assigned control numbers.

AUTHORITY: 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

## § 245.1 General purpose and scope.

(a) This part established the responsibilities of State agencies, Food and Nutrition Service Regional Offices, school food authorities or local educational agencies, as defined in § 245.2, as applicable in providing free and reduced price meals and free milk in the National School Lunch Program (7 CFR part 210), the School Breakfast Program (7 CFR part 220), the Special Milk Program for Children (7 CFR part 215), and commodity schools. Section 9 of the National School Lunch Act, as amended, and sections 3 and 4 of the Child Nutrition Act of 1966, as amended, require schools participating in any of the programs and commodity schools to make available, as applicable, free and reduced price lunches, breakfasts, and at the option of the School Food Authority for schools participating only in the Special Milk Program free milk to eligible children.

(b) This part sets forth the responsibilities under these Acts of State agencies, the Food and Nutrition Service Regional Offices, school food authorities or local educational agencies, as applicable, with respect to the establishment of income guidelines, determination of eligibility of children for free and reduced price meals, and for free milk and assurance that there is no physical segregation of, or other discrimination against, or overt identification of children unable to pay the full price for meals or milk.

(Sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[Amdt. 6, 39 FR 30337, Aug. 22, 1974, as amended by Amdt. 10, 41 FR 28783, July 13, 1976; 47 FR 31852, July 23, 1982; 72 FR 63792, Nov. 13, 2007]

## § 245.2 Definitions.

*Adult* means any individual 21 years of age or older.

*Commodity school* means a school which does not participate in the National School Lunch Program under part 210 of this chapter, but which enters into an agreement as provided in § 210.15a(b) to receive commodities donated under part 250 of this chapter for a nonprofit lunch program.

*Current income* means income, as defined in § 245.6(a), received during the month prior to application. If such income does not accurately reflect the household's annual rate of income, income shall be based on the projected annual household income. If the prior year's income provides an accurate reflection of the household's current annual income, the prior year may be used as a base for the projected annual rate of income.

*Disclosure* means reveal or use individual children's program eligibility information obtained through the free and reduced price meal or free milk eligibility process for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

*Documentation* means:

(1) The completion of a free and reduced price school meal or free milk application which includes:

(i) For households applying on the basis of income and household size,

names of all household members; income received by each household member, identified by source of the income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, and social security and other cash income); the signature of an adult household member; and the social security number of the adult household member who signs the application or an indication that he/she does not possess a social security number; or

(ii) For a child who is a member of a food stamp, FDPIR or TANF household: the child's name and appropriate food stamp or TANF case number or FDPIR case number or other FDPIR identifier; and the name and signature of an adult household member; and

(2) In lieu of completion of the free and reduced price application, information obtained from the State or local agency responsible for the Food Stamp Program, FDPIR or TANF which includes the name of the child; a statement certifying that the child is a member of a currently certified food stamp, FDPIR or TANF household; information in sufficient detail to match the child attending school in the local educational agency (as defined in this section) with the name of the child certified as a member of a food stamp, FDPIR or TANF household; the signature or a copy of the signature of the individual authorized to provide the certification on behalf of the Food Stamp, FDPIR or TANF office, as appropriate; and the date. When the signature is impracticable to obtain, such as in a computer match, other arrangements may be made to ensure that a responsible official can attest to the data.

*Family* means a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit.

*FDPIR* means the food distribution program for households on Indian reservations operated under part 253 of this title.

*FNS* means the Food and Nutrition Service, United States Department of Agriculture.

*FNSRO where applicable* means the appropriate Food and Nutrition Service Regional Office when that agency administers the National School Lunch Program, School Breakfast Program or Special Milk Program with respect to nonprofit private schools.

*Food Stamp Program* means the program established under the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.) and operated under Parts 271 through 283 of this chapter.

*Food Stamp Household* means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Stamp Program.

*Free meal* means a meal for which neither the child nor any member of his family pays or is required to work in the school or in the school's food service.

*Free milk* means milk served under the regulations governing the Special Milk Program and for which neither the child nor any member of his family pays or is required to work in the school or in the school's food service.

*Household* means "family" as defined in this section.

*Household application* means an application for free and reduced price meal or milk benefits, submitted by a household for a child or children who attend school(s) in the same local educational agency.

*Income eligibility guidelines* means the family-size income levels prescribed annually by the Secretary for use by States in establishing eligibility for free and reduced price meals and for free milk.

*Local educational agency* means a public board of education or other public or private nonprofit authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public or private nonprofit elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public or private nonprofit elementary schools or secondary schools. The term also includes any other public or private nonprofit institution or agency having administrative control and direction of a public or private nonprofit

elementary school or secondary school, including residential child care institutions, Bureau of Indian Affairs schools, and educational service agencies and consortia of those agencies, as well as the State educational agency in a State or territory in which the State educational agency is the sole educational agency for all public or private nonprofit schools.

*Meal* means a lunch or meal supplement or a breakfast which meets the applicable requirements prescribed in §§ 210.10, 210.15a, and 220.8 of this chapter.

*Medicaid* means the State medical assistance program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.).

*Milk* means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local standards for such milk except that, in the meal pattern for infants (0 to 1 year of age) milk means unflavored types of whole fluid milk or an equivalent quantity of reconstituted evaporated milk which meet such standards. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, and the Virgin Islands, if a sufficient supply of such types of fluid milk cannot be obtained, "milk" shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and consistent with State and local standards for such milk.

*Nonprofit* means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1986.

*Operating day* means a day that reimbursable meals are offered to eligible students under the National School Lunch Program or School Breakfast Program.

*Reduced price meal* means a meal which meets all of the following criteria: (1) The price shall be less than the full price of the meal; (2) the price shall not exceed 40 cents for a lunch and 30 cents for a breakfast; and (3) neither the child nor any member of his family shall be required to supply an equivalent value in work for the school or the school's food service.

*Service institution* shall have the meaning ascribed to it in part 225 of this chapter.

*School, school food authority*, and other terms and abbreviations used in this part shall have the meanings ascribed to them in part 210 of this chapter.

*Special Assistance Certification and Reimbursement Alternatives* means the three optional alternatives for free and reduced price meal application and claiming procedures in the National School Lunch Program and School Breakfast Program which are available to those School Food Authorities with schools in which at least 80 percent of the enrolled children are eligible for free or reduced price meals, or schools which are currently, or who will be serving all children free meals.

*State Children's Health Insurance Program (SCHIP)* means the State medical assistance program under title XXI of the Social Security Act (42 U.S.C. 1397aa et seq.).

*TANF* means the State funded program under part A of title IV of the Social Security Act that the Secretary determines complies with standards established by the Secretary that ensure that the standards under the State program are comparable to or more restrictive than those in effect on June 1, 1995. This program is commonly referred to as Temporary Assistance for Needy Families, although States may refer to the program by another name.

*Verification* means confirmation of eligibility for free or reduced price benefits under the National School Lunch Program or School Breakfast Program. Verification shall include confirmation of income eligibility and, at State or local discretion, may also include confirmation of any other information required in the application which is defined as *Documentation* in § 245.2. Such verification may be accomplished by examining information provided by the household such as wage stubs, or by other means as specified in § 245.6a(a)(7). If a Food Stamp Program or TANF case number or a FDPIR case number or other identifier is provided for a child, verification for such child shall only include confirmation that the child is a member of a household receiving food stamps, TANF or FDPIR

benefits. Verification may also be completed through direct contact with one or more of the public agencies as specified in § 245.6a(g).

(Secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1759(a), 1773, 1758))

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 245.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 245.3 Eligibility standards and criteria.

(a) Each State agency, or FNSRO where applicable, shall by July 1 of each year announce family-size income standards to be used by local educational agencies, as defined in § 245.2, under the jurisdiction of such State agency, or FNSRO where applicable, in making eligibility determinations for free or reduced price meals and for free milk. Such family size income standards for free and reduced price meals and for free milk shall be in accordance with Income Eligibility Guidelines published by the Department by notice in the FEDERAL REGISTER.

(b) Each local educational agency shall establish eligibility criteria for free and reduced price meals and for free milk in conformity with the family-size income standards prescribed by the State agency, or FNSRO where applicable, under paragraph (a) of this section. Such criteria shall:

(1) For all schools under the jurisdiction of the local educational agency, specify the uniform family-size income criteria to be used for determining eligibility for free and reduced price meals in schools participating in the National School Lunch or School Breakfast Programs and in commodity-only schools, and for determining eligibility for free milk when the School Food Authority has chosen to serve free milk in its schools participating in the Special Milk Program; and

(2) Provide that all children from a family meeting family-size income criteria and attending any school under the jurisdiction of the local educational agency which participates under the National School Lunch Program, School Breakfast Program, Special Milk Program, or is a commodity only school shall be provided the same benefits. The local educational agency's eligibility criteria shall be a part of the policy statement required under § 245.10 and shall be publicly announced in accordance with the provisions of § 245.5.

(c) Each School Food Authority shall serve free and reduced price meals or free milk in the respective programs to children eligible under its eligibility criteria. When a child is not a member of a family (as defined in § 245.2), the child shall be considered a family of one. In any school which participates in more than one of the child nutrition programs, eligibility shall be applied uniformly so that eligible children receive the same benefits in each program. If a child transfers from one school to another school under the jurisdiction of the same School Food Authority, his eligibility for free or reduced price meals or for free milk, if previously established, shall be transferred to, and honored by, the receiving school if it participates in the National School Lunch Program, School Breakfast Program, Special Milk Program and the School Food Authority has elected to provide free milk, or is a commodity-only school.

(Sec. 8, Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1758); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772); 42 U.S.C. 1785, 1766, 1772, 1773(e), sec. 203, Pub. L. 96–499, 94 Stat. 2599; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[Amdt. 8, 40 FR 57207, Dec. 8, 1975; 40 FR 58281, Dec. 16, 1975, as amended by Amdt. 10, 41 FR 28783, July 13, 1976; Amdt. 13, 44 FR 33049, June 8, 1979; 47 FR 31852, July 23, 1982; 72 FR 63793, Nov. 13, 2007]

### § 245.4 Exceptions for Puerto Rico and the Virgin Islands.

Because the State agencies of Puerto Rico and the Virgin Islands provide free meals or milk to all children in schools under their jurisdiction, regardless of the economic need of the child's family, they are not required to make individual eligibility determinations or publicly announce eligibility criteria. Instead, such State agencies may use a statistical survey to determine the number of children eligible for free or reduced price meals and milk on which a percentage factor for

the withdrawal of special cash assistance funds will be developed subject to the following conditions:

(a) State agencies shall conduct a statistical survey once every three years in accordance with the standards provided by FNS;

(b) State agencies shall submit the survey design to FNS for approval before proceeding with the survey;

(c) State agencies shall conduct the survey and develop the factor for withdrawal between July 1 and December 31 of the first school year of the three-year period;

(d) State agencies shall submit the results of the survey and the factor for fund withdrawal to FNS for approval before any reimbursement may be received under that factor;

(e) State agencies shall keep all material relating to the conduct of the survey and determination of the factor for fund withdrawal in accordance with the record retention requirements in § 210.8(e)(14) of this chapter;

(f) Until the results of the triennial statistical survey are available, the factor for fund withdrawal will be based on the most recently established percentages. The Department shall make retroactive adjustments to the States' Letter of Credit, if appropriate, for the year of the survey;

(g) If any school in these States wishes to charge a student for meals, the State agency, School Food Authority and school shall comply with all the applicable provisions of this part and parts 210, 215 and 220 of this chapter.

(Sec. 9, Pub. L. 95–166, 91 Stat 1336 (42 U.S.C. 1759a); secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; 44 U.S.C. 3506)

[Amdt. 18, 45 FR 52771, Aug. 8, 1980, as amended at 46 FR 51366, Oct. 20, 1981; 47 FR 746, Jan. 7, 1982]

### § 245.5 Public announcement of the eligibility criteria.

(a) After the State agency, or FNSRO where applicable, notifies the local educational agency (as defined in § 245.2) that its criteria for determining the eligibility of children for free and reduced price meals and for free milk have been approved, the local educational agency (as defined in § 245.2) shall publicly announce such criteria: *Provided however*, that no such public announcement shall be required for boarding schools, residential child care institutions (see § 210.2 of this chapter, definition of *Schools*), or a school which includes food service fees in its tuition, where all attending children are provided the same meals or milk. Such announcements shall be made at the beginning of each school year or, if notice of approval is given thereafter, within 10 days after the notice is received. The public announcement of such criteria, as a minimum, shall include the following:

(1) Except as provided in § 245.6(b), a letter or notice and application distributed on or about the beginning of each school year, to the parents of all children in attendance at school. The letter or notice shall contain the following information:

(i) In schools participating in a meal service program, the eligibility criteria for *reduced price* benefits with an explanation that households with incomes less than or equal to the reduced price criteria would be eligible for either free or reduced price meals, or in schools participating in the free milk option, the eligibility criteria for *free* milk benefits;

(ii) How a household may make application for free or reduced price meals or for free milk for its children;

(iii) An explanation that an application for free or reduced price benefits cannot be approved unless it contains complete information as described in paragraph (1)(i) of the definition of *Documentation* in § 245.2;

(iv) An explanation that households with children who are members of currently certified food stamp, FDPIR or TANF households may submit applications for these children with the abbreviated information described in paragraph (2)(ii) of the definition of *Documentation* in § 245.2;

(v) An explanation that the information on the application may be verified at any time during the school year;

(vi) How a household may apply for benefits at any time during the school year as circumstances change;

(vii) A statement to the effect that children having parents or guardians who become unemployed are eligible for free or reduced price meals or for

free milk during the period of unemployment, *Provided*, that the loss of income causes the household income during the period of unemployment to be within the eligibility criteria;

(viii) A statement to the effect that in certain cases foster children are eligible for free or reduced price meals or free milk regardless of the income of the household with whom they reside and that households wishing to apply for such benefits for foster children should contact the local educational agency;

(ix) The statement: "In the operation of child feeding programs, no child will be discriminated against because of race, sex, color, national origin, age or disability;" and

(x) How a household may appeal the decision of the local educational agencywith respect to the application under the hearing procedure set forth in §245.7. The letter or notice shall be accompanied by a copy of the application form required under §245.6.

(xi) A statement to the effect that the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) participants may be eligible for free or reduced price meals.

(2) On or about the beginning of each school year, a public release, containing the same information supplied to parents, and including both free and reduced price eligibility criteria shall be provided to the informational media, the local unemployment office, and to any major employers contemplating large layoffs in the area from which the school draws its attendance.

(b) Copies of the public release shall be made available upon request to any interested persons. Any subsequent changes in a school's eligibility criteria during the school year shall be publicly announced in the same manner as the original criteria were announced.

(Sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758); Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–880 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[Amdt. 8, 40 FR 57207, Dec. 8, 1975, as amended by Amdt. 10, 41 FR 28783, July 13, 1976; 47 FR 31852, 31853, July 23, 1982; Amdt. 24, 48 FR 19355, Apr. 29, 1983; 49 FR 26034, June 26, 1984; 52 FR 19275, May 22, 1987; 64 FR 50744, Sept. 20, 1999; 64 FR 72472, Dec. 28, 1999; 66 FR 48328, Sept. 20, 2001; 68 FR 53489, Sept. 11, 2003; 72 FR 10900, Mar. 12, 2007; 72 FR 63793, Nov. 13, 2007]

### §245.6 Application, eligibility and certification of children for free and reduced price meals and free milk.

(a) *General requirements—content of application and descriptive materials.* Each local educational agency, as defined in §245.2, for schools participating in the National School Lunch Program, School Breakfast Program or Special Milk Program or a commodity only school shall provide meal benefit forms for use by families in making application for free or reduced price meals or free milk for their children.

(1) *Household applications.* The State agency or local educational agency must provide a form that permits a household to apply for all children in that household who attend schools in the same local educational agency. The local educational agency cannot require the household to submit an application for each child attending its schools. The application shall be clear and simple in design and the information requested therein shall be limited to that required to demonstrate that the household does, or does not, meet the eligibility criteria for free or reduced price meals, respectively, or for free milk, issued by the local educational agency. In accordance with §245.3(c), a foster child or an institutionalized child is considered a family of one.

(2) *Understandable communications.* Any communication with households for eligibility determination purposes must be in an understandable and uniform format and to the maximum extent practicable, in a language that parents and guardians can understand.

(3) *Electronic availability.* In addition to the distribution of applications and descriptive materials in paper form as provided for in this section, the local educational agency may establish a system for executing household applications electronically and using electronic signatures. The electronic submission system must comply with the disclosure requirements in this section and with technical assistance and guidance provided by FNS. Descriptive materials may also be made available electronically by the local educational agency.

(4) *Transferring eligibility status.* When a student transfers to another school district, the new local educational agency may accept the eligibility determination from the student's former local educational agency without incurring liability for the accuracy of the initial determination. As required under paragraph (c)(3) of this section, the accepting local educational agency must make changes that occur as a result of verification activities or coordinated review findings conducted in that local educational agency.

(5) *Required income information.* The information requested on the application with respect to the current income of the household must be limited to:

(i) The income received by each member identified by the household member who received the income or an indication that which household members had no income; and

(ii) The source of the income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security and other cash income). Other cash income includes cash amounts received or withdrawn from any source, including savings, investments, trust accounts, and other resources which are available to pay for a child's meals or milk.

(6) *Household members and social security numbers.* The application must require applicants to provide the names of all household members. In addition, the social security number of the adult household member who signs the application must be provided. If the adult member signing the application does not possess a social security number, the household must so indicate. However, if application is being made for a child(ren) who is a member of a household receiving assistance under the Food Stamp Program, or is in a FDPIR or TANF household, the application shall enable the household to provide the appropriate food stamp or TANF case number or FDPIR case number or other FDPIR identifier in lieu of names of all household members, household income information and social security number.

(7) *Adult member's signature.* The application must be signed by an adult member of the family. The application must contain clear instructions with respect to the submission of the completed application to the official or officials designated by the local educational agency to make eligibility determinations. A household must be permitted to file an application at any time during the school year. A household may, but is not required to, report any changes in income, household size or program participation during the school year.

(8) *Required statements for the application.* The application and/or descriptive materials must contain substantially the following statements:

(i) "The Richard B. Russell National School Lunch Act requires the information on this application. You do not have to give the information, but if you do not, we cannot approve your child for free or reduced price meals. You must include the social security number of the adult household member who signs the application. The social security number is not required when you apply on behalf of a foster child or you list a Food Stamp, Temporary Assistance for Needy Families (TANF) Program or Food Distribution Program on Indian Reservations (FDPIR) case number for your child or other FDPIR identifier or when you indicate that the adult household member signing the application does not have a social security number. We will use your information to determine if your child is eligible for free or reduced price meals, and for administration and enforcement of the lunch and breakfast programs." When the State agency or local educational agency, as appropriate, plans to use or disclose children's eligibility information for non-program purposes, additional information, as

specified in paragraph (h) of this section, must be added to the Privacy Act notice/statement. State agencies and local educational agencies are responsible for drafting the appropriate notice and ensuring that the notice complies with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note (Disclosure of Social Security Number)); and

(ii) "In certain cases, foster children are eligible for free or reduced price meals or free milk regardless of your household income. If you have foster children living with you and wish to apply for such meals or milk for them, please contact us."

(9) *Attesting to information on the application.* The application must also include a statement, immediately above the space for signature, that the person signing the application certifies that all information furnished in the application is true and correct, that the application is being made in connection with the receipt of Federal funds, that school officials may verify the information on the application, and that deliberate misrepresentation of the information may subject the applicant to prosecution under applicable State and Federal criminal statutes.

(b) *Direct certification.* In lieu of determining eligibility based on information provided by the household on the free and reduced price meal or milk application specified in paragraph (a) of this section, local educational agencies may determine children eligible for free meals or milk based on documentation obtained from the appropriate State or local agency responsible for the administration of the Food Stamp Program, FDPIR and/or the TANF Program, hereafter referred to as direct certification. The documentation for direct certification shall include the information specified in paragraph (2) of the definition of *Documentation* in §245.2. The food stamp, FDPIR or TANF office may provide school officials with a list which includes all required documentation, or documentation may be obtained through a computerized match in which computerized lists of names of children from food stamp, FDPIR or TANF households and other identifying information are matched against a list of names and other identifying information of schoolchildren. When computer matches are used or the signature of the food stamp, FDPIR or TANF official is otherwise impracticable to obtain, the signature of the food stamp, FDPIR or TANF official is not required. However, other arrangements must be made to ensure that a responsible official can attest to the data. Additionally, the food stamp, FDPIR and/or TANF office may provide food stamp, FDPIR and/or TANF households with individual notices which contain all required documentation. The household may then transmit the notice to the school.

(1) Information about the child or the household obtained directly from the food stamp, FDPIR or TANF office must be kept confidential and shall be used solely for the purpose of determining the child's eligibility for school meal or milk benefits, or as otherwise permitted by section 9 of the National School Lunch Act.

(2) School food authorities are not required to provide the letter specified in §245.5(a) to the parents of children who are eligible for free meals under paragraph (b) of this section when the school food authorities distribute the letters or notices with application forms and the notice to households concerning eligibility for benefits under direct certification, specified in paragraph (c)(1) of this section, through the mail, individualized student packets, or other method which prevents the overt identification of children eligible for direct certification.

(c) *Determination of eligibility*—(1) *Duration of eligibility.* Except as otherwise specified in paragraph (c)(3) of this section, eligibility, as determined through an approved application or by direct certification, for free or reduced price meals must remain in effect for the entire school year and for up to 30 operating days into the subsequent school year. The local educational agency must determine household eligibility, for free or reduced price meals, either through direct certification or the application process at or about the beginning of the school year. The local educational agency must determine eligibility for free or reduced price meals

when a household submits an application or, if feasible, through direct certification, at any time during the school year.

(2) *Use of prior year's eligibility status.* Prior to the processing of applications or the completion of direct certification procedures for the current school year, children from households with approved applications or documentation of direct certification on file from the preceding year shall be offered reimbursable free and reduced price meals or free milk, as appropriate. However, applications and documentation of direct certification from the preceding year shall be used only to determine eligibility for a period not to exceed the first 30 operating days following the first operating day at the beginning of the school year, or until a new eligibility determination is made in the current school year, whichever comes first.

(3) *Exceptions for year-long duration of eligibility*—(i) *Voluntary reporting of changes.* If the household voluntarily reports a change in income or in program participation resulting in categorical eligibility, the local educational agency must inform the household of the consequences of any change that will result in lowered benefits. The household has the option to decline to have the change put into effect.

(ii) *Changes resulting from verification or administrative reviews.* The local educational agency must change the children's eligibility status when a change is required as a result of verification activities conducted under § 245.6a or as a result of a review conducted in accordance with § 210.18 of this chapter.

(iii) *Temporary approvals.* When a household reports no income or a temporary reduction in income, local educational agencies are encouraged to approve free or reduced price meal benefits on a temporary basis only. Approvals for a maximum of 45 days are recommended. At the end of the temporary approval period, the local educational agency would review the household's circumstances and certify or deny the household accordingly.

(4) *Calculating income.* The local educational agency must use the income information provided by the household on the application to calculate the household's total current income. When a household submits an application containing complete documentation, as defined in § 245.2, and the household's total current income is at or below the eligibility limits specified in the Income Eligibility Guidelines as defined in § 245.2, the children in that household must be approved for free or reduced price benefits, as applicable.

(5) *Categorical eligibility.* When a household submits an application containing the required food stamp, FDPIR or TANF documentation, as defined under *Documentation* in § 245.2, the children in that household must be approved for free benefits. Additionally, when the local educational agency obtains documentation, as defined in § 245.2, from the State or local agency responsible for the administration of the Food Stamp Program, FDPIR and/or TANF Program that children are members of a Food Stamp Program, FDPIR or TANF household receiving assistance from one or more of those programs, the local educational agency must approve such children for free benefits without an application.

(6) *Notice of approval*—(i) *Income applications.* The local educational agency must promptly notify the household of the children's eligibility and provide the eligible children the benefits to which they are entitled.

(ii) *Direct Certification.* Households approved for benefits based on information provided by the appropriate State or local agency responsible for the administration of the Food Stamp Program, FDPIR or TANF Program must be notified, in writing, that their children are eligible for free meals or free milk, that no application for free and reduced price school meals or free milk is required. The notice of eligibility must also inform the household that the parent or guardian must notify the local educational agency if they do not want their children to receive free benefits. However, when the parent or guardian transmits a notice of eligibility provided by the food stamp, FDPIR or TANF office, the local educational agency is not required to provide a separate notice of eligibility.

(iii) *Households declining benefits.* Children from households that notify

the local educational agency that they do not want free benefits must have their benefits discontinued as soon as possible. Any notification from the household declining benefits must be documented and maintained on file, as required under paragraph (e) of this section, to substantiate the eligibility determination.

(7) *Denied applications and the notice of denial.* When the application furnished by a family is not complete or does not meet the eligibility criteria for free or reduced price benefits, the local educational agency must document and retain the reasons for ineligibility and must retain the denied application. In addition, the local educational agency must promptly provide written notice to each family denied benefits. As a minimum, this notice shall include:

(i) The reason for the denial of benefits, e.g. income in excess of allowable limits or incomplete application;

(ii) Notification of the right to appeal;

(iii) Instructions on how to appeal; and

(iv) A statement reminding parents that they may reapply for free or reduced price benefits at any time during the school year.

(8) *Appeals of denied benefits.* A family that wishes to appeal an application that was denied may do so in accordance with the procedures established by the local educational agency as required by § 245.7. However, prior to initiating the hearing procedure, the family may request a conference to provide the opportunity for the family and local educational agency officials to discuss the situation, present information, and obtain an explanation of the data submitted in the application or the decision rendered. The request for a conference shall not in any way prejudice or diminish the right to a fair hearing. The local educational authority shall promptly schedule a fair hearing, if requested.

(d) *Households that fail to apply.* After the letter to parents and the applications have been disseminated, the local educational agency may determine, based on information available to it, that a child for whom an application has not been submitted meets the local educational agency's eligibility criteria for free and reduced price meals or for free milk. In such a situation, the local educational agency shall complete and file an application for such child setting forth the basis of determining the child's eligibility. When a local educational agency has obtained a determination of individual family income and family-size data from other sources, it need not require the submission of an application for any child from a family whose income would qualify for free or reduced price meals or for free milk under the local educational agency's established criteria. In such event, the School Food Authority shall notify the family that its children are eligible for free or reduced price meals or for free milk. Nothing in this paragraph shall be deemed to provide authority for the local educational agency to make eligibility determinations or certifications by categories or groups of children.

(e) *Recordkeeping.* The local educational agency must maintain documentation substantiating eligibility determinations on file for 3 years after the date of the fiscal year to which they pertain, except that if audit findings have not been resolved, the documentation must be maintained as long as required for resolution of the issues raised by the audit.

(f) *Disclosure of children's free and reduced price meal or free milk eligibility information to education and certain other programs and individuals without parental consent.* The State agency or local educational agency, as appropriate, may disclose aggregate information about children eligible for free and reduced price meals or free milk to any party without parental notification and consent when children cannot be identified through release of the aggregate data or by means of deduction. Additionally, the State agency or local educational agency also may disclose information that identifies children eligible for free and reduced price meals or free milk to persons directly connected with the administration or enforcement of the programs and the individuals specified in this paragraph (f) without parent/guardian consent. The State agency or local educational

agency that makes the free and reduced price meal or free milk eligibility determination is responsible for deciding whether to disclose children's free and reduced price meal or free milk eligibility information.

(1) *Persons authorized to receive eligibility information*. Only persons directly connected with the administration or enforcement of a program or activity listed in paragraphs (f)(2) or (f)(3) of this section may have access to children's eligibility information, without parental consent. Persons considered directly connected with administration or enforcement of a program or activity listed in paragraphs (f)(2) or (f)(3) of this section are Federal, State, or local program operators responsible for the ongoing operation of the program or activity or responsible for program compliance. Program operators may include persons responsible for carrying out program requirements and monitoring, reviewing, auditing, or investigating the program. Program operators may include contractors, to the extent those persons have a need to know the information for program administration or enforcement. Contractors may include evaluators, auditors, and others with whom Federal or State agencies and program operators contract with to assist in the administration or enforcement of their program in their behalf.

(2) *Disclosure of children's names and eligibility status only*. The State agency or local educational agency, as appropriate, may disclose, without parental consent, children's names and eligibility status (whether they are eligible for free or reduced price meals or free milk) to persons directly connected with the administration or enforcement of:

(i) A Federal education program;

(ii) A State health program or State education program administered by the State or local education agency;

(iii) A Federal, State, or local means-tested nutrition program with eligibility standards comparable to the National School Lunch Program (i.e., food assistance programs for households with incomes at or below 185 percent of the Federal poverty level); or

(iv) A third party contractor assisting in verification of eligibility efforts by contacting households who fail to respond to requests for verification of their eligibility.

(3) *Disclosure of all eligibility information in addition to eligibility status*. In addition to children's names and eligibility status, the State agency or local educational agency, as appropriate, may disclose, without parental consent, all eligibility information obtained through the free and reduced price meals or free milk eligibility process (including all information on the application or obtained through direct certification) to:

(i) Persons directly connected with the administration or enforcement of programs authorized under the Richard B. Russell National School Lunch Act or the Child Nutrition Act of 1966. This means that all eligibility information obtained for the National School Lunch Program, School Breakfast Program or Special Milk Program may be disclosed to persons directly connected with administering or enforcing regulations under the National School Lunch or School Breakfast Programs (Parts 210 and 220, respectively, of this chapter), Child and Adult Care Food Program (Part 226 of this chapter), Summer Food Service Program (Part 225 of this chapter) and the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) (Part 246 of this chapter);

(ii) The Comptroller General of the United States for purposes of audit and examination; and

(iii) Federal, State, and local law enforcement officials for the purpose of investigating any alleged violation of the programs listed in paragraphs (g)(3) and (g)(4) of this section.

(4) *Use of free and reduced price meal or free milk eligibility information by other programs other than Medicaid or the State Children's Health Insurance Program (SCHIP)*. State agencies and local educational agencies may use free and reduced price meal or free milk eligibility information for administering or enforcing the National School Lunch, Special Milk or School Breakfast Programs (Parts 210, 215 and 220, respectively, of this chapter). Additionally,

any other Federal, State, or local agency charged with administering or enforcing these programs may use the information for that purpose. Individuals and programs to which children's free and reduced price meal eligibility information has been disclosed under this section may use the information only in the administration or enforcement of the receiving program. No further disclosure of the information may be made.

(g) *Disclosure of children's eligibility information to Medicaid and/or SCHIP, unless parents decline.* Children's free or reduced price meal or free milk eligibility information only may be disclosed to Medicaid or SCHIP when both the State agency and the local educational agency so elect, the parent/guardian does not decline to have their eligibility information disclosed and the other provisions described in paragraph (i) of this section are met. Provided that both the State agency and local educational agency opt to allow the disclosure of eligibility information to Medicaid and/or SCHIP, the State agency or local educational agency, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free or reduced price meals or free milk), and any other eligibility information obtained through the free and reduced price meal or free milk application or obtained through direct certification to persons directly connected with the administration of Medicaid or SCHIP. Persons directly connected to the administration of Medicaid and SCHIP are State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations for Medicaid or SCHIP.

(1) The State agency must ensure that:

(i) The child care institution and health insurance program officials have a written agreement that requires the health insurance program agency to use the eligibility information to seek to enroll children in Medicaid and SCHIP; and

(ii) Parents/guardians are notified that their eligibility information may be disclosed to Medicaid or SCHIP and given an opportunity to decline to have their children's eligibility information disclosed, prior to any disclosure.

(2) *Use of children's free and reduced price meal eligibility information by Medicaid/SCHIP.* Medicaid and SCHIP agencies and health insurance program operators receiving children's free and reduced price meal or free milk eligibility information may use the information to seek to enroll children in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP. No further disclosure of the information may be made. Medicaid and SCHIP agencies and health insurance program operators also may verify children's eligibility in a program under the Child Nutrition Act of 1966 or the Richard B. Russell National School Lunch Act.

(h) *Notifying households of potential uses and disclosures of children's eligibility information.* Households must be informed that the information they provide on the free and reduced price meal or free milk application will be used to determine eligibility for free and reduced price meals or free milk and that eligibility information may be disclosed to other programs.

(1) For disclosures to programs, other than Medicaid or SCHIP, that are permitted access to children's eligibility information, without parent/guardian consent, the State agency or local educational agency, as appropriate, must notify parents/guardians at the time of application that their children's free and reduced price meal or free milk eligibility information may be disclosed. The State agency or local educational agency, as appropriate, must add substantially the following statement to the Privacy Act notice/statement required under paragraph (a)(8)(i) of this section, "We may share your eligibility information with education, health, and nutrition programs to help them evaluate, fund, or determine benefits for their programs; auditors for program reviews; and law enforcement officials to help them look into violations of program rules." For children

determined eligible through direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals or free milk through direct certification.

(2) For disclosure to Medicaid or SCHIP, the State agency or local educational agency, as appropriate, must notify parents/guardians that their children's free and reduced price meal or free milk eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed. Additionally, the State agency or local educational agency, as appropriate, must give parents/guardians an opportunity to elect not to have their information disclosed to Medicaid or SCHIP. Only the parent or guardian who is a member of the household or family for purposes of the free and reduced price meal or free milk application may decline the disclosure of eligibility information to Medicaid or SCHIP. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify children eligible for and to seek to enroll children in a health insurance program, and that their decision will not affect their children's eligibility for free and reduced price meals or free milk. The notification may be included in the letter/notice to parents/guardians that accompanies the free and reduced price meal or free milk application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond. The State agency or local educational agency, as appropriate, must add substantially the following statement to the Privacy Act notice/statement required under paragraph (a)(8)(i) of this section, "We may share your information with Medicaid or the State Children's Health Insurance Program, unless you tell us not to. The information, if disclosed, will be used to identify eligible children and seek to enroll them in Medicaid or SCHIP." For children determined eligible through direct certification, the notice of potential disclosure and opportunity to decline the disclosure may be included in the document informing parents/guardians of their children's eligibility for free meal or free milk through direct certification.

(i) *Other disclosures.* State agencies and local educational agencies that plan to use or disclose information about children eligible for free or reduced price meals or free milk in ways not specified in this section must obtain written consent from the child's parent or guardian prior to the use or disclosure. Only a parent or guardian who is a member of the child's household for purposes of the free and reduced price meal or free milk application may give consent to the disclosure of free and reduced price meal eligibility information.

(1) The consent must identify the information that will be shared and how the information will be used.

(2) The consent statement must be signed and dated by the child's parent or guardian who is a member of the household for purposes of the free and reduced price meal or free milk application.

(3) There must be a statement informing parents and guardians that failing to sign the consent will not affect the child's eligibility for free or reduced price meals or free milk and that the individuals or programs receiving the information will not share the information with any other entity or program.

(4) Parents/guardians must be permitted to limit the consent only to those programs with which they wish to share information.

(j) *Agreements with programs/individuals receiving children's free and reduced price meal or free milk eligibility information.*

(1) An agreement with programs or individuals receiving free and reduced price meal or free milk eligibility information is recommended for programs other than Medicaid or SCHIP. The agreement or MOU should include information similar to that required for disclosures to Medicaid and SCHIP specified in paragraph (j)(2) of this section.

(2) The State agency or school food authorities, as appropriate, must have a written agreement with the State or

local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free and reduced price meal or free milk eligibility information. At a minimum, the agreement must:

(i) Identify the health insurance program or health agency receiving children's eligibility information;

(ii) Describe the information that will be disclosed;

(iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must be used to seek to enroll children in Medicaid or SCHIP;

(iv) Require that the Medicaid or SCHIP agency describe how they will use the information obtained;

(v) Describe how the information will be protected from unauthorized uses and disclosures;

(vi) Describe the penalties for unauthorized disclosure; and

(vii) Be signed by both the Medicaid or SCHIP program or agency and the State agency or child care institution, as appropriate.

(k) *Penalties for unauthorized disclosure or misuse of information.* In accordance with section 9(b)(6)(C) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(6)(C)), any individual who publishes, divulges, discloses or makes known in any manner, or to any extent not authorized by statute or this section, any information obtained under this section will be fined not more than $1,000 or imprisoned for up to 1 year, or both.

(Sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[35 FR 14065, Sept. 4, 1970]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 245.6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 245.6a Verification requirements.

(a) *Definitions*—(1) *Eligible programs.* For the purposes of this section, the following programs qualify as programs for which a case number may be provided in lieu of income information and that may be used for direct verification purposes:

(i) The Food Stamp Program established under the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.) as defined in § 245.2;

(ii) The Food Distribution Program on Indian Reservations (FDPIR) as defined in § 245.2; and

(iii) A State program funded under the program of block grants to States for temporary assistance for needy families (TANF) as defined in § 245.2.

(2) *Error prone application.* For the purposes of this section, "error prone application" means an approved household application that indicates monthly income within $100 or annual income within $1,200 of the applicable income eligibility limit for free or for reduced meals.

(3) *Non-response rate.* For the purposes of this section, "non-response rate" means the percentage of approved household applications for which verification information was not obtained by the local educational agency after verification was attempted. The non-response rate is reported on the FNS–742 in accordance with paragraph (h) of this section.

(4) *Official poverty line.* For the purposes of this section, "official poverty line" means that described in section 1902(l)(2)(A) of the Social Security Act (42 U.S.C. 1396a(l)(2)(A)).

(5) *Sample size.* For the purposes of this section, "sample size" means the number of approved applications that a local educational agency is required to verify based on the number of approved applications on file as of October 1 of the current school year.

(6) *School year.* For the purposes of this section, a school year means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

(7) *Sources of information.* For the purposes of this section, sources of information for verification may include written evidence, collateral contacts, and systems of records as follows:

(i) Written evidence shall be used as the primary source of information for verification. Written evidence includes written confirmation of a household's circumstances, such as wage stubs,

award letters, and letters from employers. Whenever written evidence is insufficient to confirm income information on the application or current eligibility, the local educational agency may require collateral contacts.

(ii) Collateral contacts are verbal confirmations of a household's circumstances by a person outside of the household. The collateral contact may be made in person or by phone. The verifying official may select a collateral contact if the household fails to designate one or designates one which is unacceptable to the verifying official. If the verifying official designates a collateral contact, the contact shall not be made without providing written or oral notice to the household. At the time of this notice, the household shall be informed that it may consent to the contact or provide acceptable documentation in another form. If the household refuses to choose one of these options, its eligibility shall be terminated in accordance with the normal procedures for failure to cooperate with verification efforts. Collateral contacts could include employers, social service agencies, and migrant agencies.

(iii) Agency records to which the State agency or local educational agency may have access are not considered collateral contacts. Information concerning income, household size, or Food Stamp Program, FDPIR, or TANF eligibility maintained by other government agencies to which the State agency, the local educational agency or school can legally gain access may be used to confirm a household's income, size, or receipt of benefits. Information may also be obtained from individuals or agencies serving the homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); administering a runaway and homeless youth grant program, as established under the Runaway and Homeless Youth Act (42 U.S.C. 5701); or serving migratory children, as they are defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399). Agency records may be used for verification conducted after the household has been notified of its selection for verification or for the direct verification procedures in paragraph (g) of this section. Any information derived from other agencies must be used in accordance with the provisions concerning use and disclosure of eligibility information found in § 245.6(f) through (i) of this part.

(iv) Households which dispute the validity of income information acquired through collateral contacts or a system of records shall be given the opportunity to provide other documentation.

(b) *Deadline and extensions for local educational agencies*—(1) *Deadline.* The local education agency must complete the verification efforts specified in paragraph (c) of this section not later than November 15 of each school year.

(2) *Deadline extensions.* (i) The local educational agency may request an extension of the November 15 deadline, in writing, from the State agency. The State agency may approve an extension up to December 15 of the current school year due to natural disaster, civil disorder, strike or other circumstances that prevent the local educational agency from timely completion of verification activities.

(ii) In the case of natural disaster, civil disorder or other local conditions, USDA may substitute alternatives for the verification deadline in paragraph (b)(1) of this section.

(3) *Beginning verification activities.* The local educational agency may conduct verification activity once it begins the application approval process for the current school year and has approved applications on file. However, the final required sample size must be based on the number of approved applications on file as of October 1.

(c) *Verification requirement*—(1) *General.* The local educational agency must verify eligibility of children in a sample of household applications approved for free and reduced price meal benefits for that school year.

(i) A State may, with the written approval of FNS, assume responsibility for complying with the verification requirements of this section on behalf of its local educational agencies. When assuming such responsibility, States may qualify, if approved by FNS, to use one of the alternative sample sizes provided for in paragraph (c)(4) of this

section if qualified under paragraph (d) of this section.

(ii) An application must be approved if it contains the essential documentation specified in the definition of *Documentation* in §245.2 and, if applicable, the household meets the income eligibility criteria for free or reduced price benefits. Verification efforts must not delay the approval of applications.

(2) *Exceptions from verification.* Verification is not required in residential child care institutions; in schools in which FNS has approved special cash assistance claims based on economic statistics regarding per capita income; or in schools in which all children are served with no separate charge for food service and no special cash assistance is claimed. Local educational agencies in which all schools participate in the special assistance certification and reimbursement alternatives specified in §245.9 shall meet the verification requirement only in those years in which applications are taken for all children in attendance. Verification of eligibility is not required of households if all children in the household are determined eligible based on documentation provided by the State or local agency responsible for the administration of the Food Stamp Program, FDPIR or TANF or if all children in the household are determined to be homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701); or are migratory as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399).

(3) *Standard sample size.* Unless eligible for an alternative sample size under paragraph (d) of this section, the sample size for each local educational agency shall equal the lesser of:

(i) Three (3) percent of all applications approved by the local educational agency for the school year, as of October 1 of the school year, selected from error prone applications; or

(ii) 3,000 error prone applications approved by the local educational agency for the school year, as of October 1 of the school year.

(iii) Local educational agencies shall not exceed the standard sample size in paragraphs (c)(3)(i) or (c)(3)(ii) of this section, as applicable, and, unless eligible for one of the alternative sample sizes provided in paragraph (c)(4) of this section, the local educational agency shall not use a smaller sample size than those in paragraphs (c)(3)(i) or (c)(3)(ii) of this section, as applicable.

(iv) If the number of error-prone applications exceeds the required sample size, the local educational agency shall select the required sample at random, i.e., each application has an equal chance of being selected, from the total number of error-prone applications.

(4) *Alternative sample sizes.* If eligible under paragraph (d) of this section for an alternative sample size, the local educational agency may use one of the following alternative sample sizes:

(i) *Alternative One.* The sample size shall equal the lesser of:

(A) 3,000 of all applications selected at random from applications approved by the local educational agency as of October 1 of the school year; or

(B) Three (3) percent of all applications selected at random from applications approved by the local educational agency as of October 1 of the school year.

(ii) *Alternative Two.* The sample size shall equal the lesser of the sum of:

(A) 1,000 of all applications approved by the local educational agency as of October 1 of the school year, selected from error prone applications or

(B) One (1) percent of all applications approved by the local educational agency as of October 1 of the school year, selected from error prone applications PLUS

(C) The lesser of:

(*1*) 500 applications approved by the local educational agency as of October 1 of the school year that provide a case number in lieu of income information showing participation in an eligible program as defined in paragraph (a)(1) of this section; or

(*2*) One-half (½) of one (1) percent of applications approved by the local educational agency as of October 1 of the school year that provide a case number in lieu of income information showing participation in an eligible program as

defined in paragraph (a)(1) of this section.

(5) *Completing the sample size.* When there are an insufficient number of error prone applications or applications with case number to meet the sample sizes provided for in paragraphs (c)(3) or (c)(4) of this section, the local educational agency shall select, at random, additional approved applications to comply with the specified sample size requirements.

(6) *Local conditions.* In the case of natural disaster, civil disorder, strike or other local conditions as determined by FNS, FNS may substitute alternatives for the sample size and sample selection criteria in paragraphs (c)(3) and (c)(4) of this section.

(7) *Verification for cause.* In addition to the required verification sample, local educational agencies must verify any questionable application and should, on a case-by-case basis, verify any application for cause such as an application on which a household reports zero income or when the local educational agency is aware of additional income or persons in the household. Any application verified for cause is not considered part of the required sample size. If the local educational agency verifies a household's application for cause, all verification procedures in this section must be followed.

(d) *Eligibility for alternative sample sizes*—(1) *State agency oversight.* At a minimum, the State agency shall establish a procedure for local educational agencies to designate use of an alternative sample size and may set a deadline for such notification. The State agency may also establish criteria for reviewing and approving the use of an alternative sample size, including deadlines for submissions.

(2) *Lowered non-response rate.* Any local educational agency is eligible to use one of the alternative sample sizes in paragraph (c)(4) of this section for any school year when the non-response rate for the preceding school year is less than twenty percent.

(3) *Improved non-response rate.* A local educational agency with more than 20,000 children approved by application as eligible for free or reduced price meals as of October 1 of the school year is eligible to use one of the alternative sample sizes in paragraph (c)(4) of this section for any school year when the non-response rate for the preceding school year is at least ten percent below the non-response rate for the second preceding school year.

(4) *Continuing eligibility for alternative sample sizes.* The local educational agency must annually determine if it is eligible to use one of the alternative sample sizes provided in paragraph (c)(4) of this section. If qualified, the local educational agency shall contact the State agency in accordance with procedures established by the State agency under paragraph (d)(1) of this section.

(e) *Activities prior to household notification*—(1) *Confirmation of a household's initial eligibility.* (i) Prior to conducting any other verification activity, an individual, other than the individual who made the initial eligibility determination, shall review for accuracy each approved application selected for verification to ensure that the initial determination was correct. If the initial determination was correct, the local educational agency shall verify the approved application. If the initial determination was incorrect, the local educational agency must:

(A) If the eligibility status changes from reduced price to free, make the increased benefits immediately available and notify the household of the change in benefits; the local educational agency will then verify the application;

(B) If the eligibility status changes from free to reduced price, first verify the application and then notify the household of the correct eligibility status after verification is completed and, if required, send the household a notice of adverse action in accordance with paragraph (j) of this section; or

(C) If the eligibility status changes from free or reduced price to paid, send the household a notice of adverse action in accordance with paragraph (j) of this section and do not conduct verification on this application and select a similar application (for example, another error-prone application) to replace it.

(ii) The requirements in paragraph (e)(1)(i) of this section are waived if the local educational agency is using a

technology-based system that demonstrates a high level of accuracy in processing an initial eligibility determination based on the income eligibility guidelines for the National School Lunch Program. Any local educational agency that conducts a confirmation review of all applications at the time of certification meets this requirement. The State agency may request documentation to support the accuracy of the local educational agency's system. If the State agency determines that the technology-based system is inadequate, it may require that the local educational agency conduct a confirmation review of each application selected for verification.

(2) *Replacing applications.* The local educational agency may, on a case-by-case basis, replace up to five percent of applications selected and confirmed for verification. Applications may be replaced when the local educational agency determines that the household would be unable to satisfactorily respond to the verification request. Any application removed shall be replaced with another approved application selected on the same basis (i.e., an error-prone application must be substituted for a withdrawn error-prone application).

(f) *Verification procedures and assistance for households*—(1) *Notification of selection* Other than households verified through the direct verification process in paragraph (g) of this section, households selected for verification shall be provided written notice that their applications were selected for verification and that they are required, by such date as determined by the local educational agency, to submit the requested information to verify eligibility for free or reduced price meals. Any communications with households concerning verification must be in an understandable and uniform format and, to the maximum extent practicable, in a language that parents and guardians can understand. The written notice shall also include a telephone number for assistance in accordance with paragraph (f)(5) of this section. These households shall be advised of the type or types of information and/or documents acceptable to the school. This information must include a social security number for each adult household member or an indication that such member does not have one. Local educational agencies must inform selected households that:

(i) Section 9 of the Richard B. Russell National School Lunch Act requires that, unless the child's Food Stamp Program/FDPIR case number or other FDPIR identifier or TANF case number was provided, households selected for verification must provide the social security number of each adult household member;

(ii) In an adult member does not posses a social security number, that adult member must indicate that s/he does not possess one;

(iii) Provision of a social security number is not mandatory but if a social security number is not provided for each adult household member or an indication is not made that he/she does not possess one, benefits will be terminated;

(iv) The social security numbers may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application and continued eligibility for the program. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting offices administering means-tested programs or the State employment security office and checking documentation produced by household members to prove the amount of income received. These verification efforts may also include contacting employers to determine income.

(v) The provisos in paragraphs (f)(1)(i) through (f)(1)(iv) of this section must be provided to the attention of each adult household member disclosing his/her social security number. State agencies and local educational agencies must ensure that the notice complies with section 7 of Public Law 93–579 (Privacy Act of 1974).

(vi) Households notified of their selection for verification must also be informed that, in lieu of any information that would otherwise be required, they can submit proof that the children are members of a household receiving assistance under the Food Stamp Program, FDPIR or TANF as described in

paragraph (f)(3) of this section to verify the free meal eligibility of a child who is a member of a household receiving assistance under the Food Stamp Program, FDPIR or TANF household. Households must also be informed that, in lieu of any information that would otherwise be required, they may request that the local educational agency contact the appropriate officials to confirm that their children are homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); are served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701 et seq.); or are migratory as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399). Households notified of their selection for verification shall be advised that failure to cooperate with verification efforts will result in the termination of benefits.

(2) *Documentation timeframe.* Households selected and notified of their selection for verification must provide documentation of income. The documentation must indicate the source, amount and frequency of all income and can be for any point in time between the month prior to application for school meal benefits and the time the household is requested to provide income documentation.

(3) *Food Stamp FDPIR or TANF recipients.* On applications where households have furnished Food Stamp Program or TANF case numbers or FDPIR case numbers or other FDPIR identifiers, verification shall be accomplished by confirming with the Food Stamp Program, FDPIR, or TANF office that at least one child who is eligible because a case number was furnished, is a member of a household participating in one of the eligible programs in paragraph (a)(1) of this section. The household may also provide a copy of "Notice of Eligibility" for the Food Stamp Program, FDPIR or the TANF Program or equivalent official documentation issued by the Food Stamp Program, FDPIR or TANF office which confirms that at least one child who is eligible because a case number was provided is a member of a household receiving assistance under the Food Stamp Program, FDPIR or the TANF program. An identification card for these programs is not acceptable as verification unless it contains an expiration date. If it is not established that at least one child is a member of a household receiving assistance under the Food Stamp Program, FDPIR or the TANF program (in accordance with the timeframe in paragraph (f)(2) of this section), the procedures for adverse action specified in paragraph (j) of this section must be followed.

(4) *Household cooperation.* If a household refuses to cooperate with efforts to verify, eligibility for free or reduced price benefits shall be terminated in accordance with paragraph (j) of this section. Households which refuse to complete the verification process and which are consequently determined ineligible for such benefits shall be counted toward meeting the local educational agency's required sample of verified applications.

(5) *Telephone assistance.* The local educational agency shall provide a telephone number to households selected for verification to call free of charge to obtain information about the verification process. The telephone number must be prominently displayed on the letter to households selected for verification.

(6) *Followup attempts.* The local educational agency shall make at least one attempt to contact any household that does not respond to a verification request. The attempt may be through a telephone call, e-mail, mail or in person and must be documented by the local educational agency. Non-response to the initial request for verification includes no response and incomplete or ambiguous responses that do not permit the local educational agency to resolve the children's eligibility for free or reduced price meal and milk benefits. The local educational agency may contract with another entity to conduct followup activity in accordance with § 210.21 of this chapter, the use and disclosure of information requirements of the Richard B. Russell National School Lunch Act and this section.

(7) *Eligibility changes.* Based on the verification activities, the local educational agency shall make appropriate modifications to the eligibility determinations made initially. The local educational agency must notify the household of any change. Households must be notified of any reduction in benefits in accordance with paragraph (j) of this section. Households with reduced benefits or that are longer eligible for free or reduced price meals must be notified of their right to reapply at any time with documentation of income or participation in one of the eligible programs in paragraph (a)(1) of this section.

(g) *Direct verification.* Local educational agencies may conduct direct verification activities with the eligible programs defined in paragraph (a)(1) of this section and with the public agency that administers the State plan for medical assistance under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.), (Medicaid), and under title XXI of the Social Security Act (42 U.S.C. 1397aa et seq.), the State Children's Health Insurance Program (SCHIP) as defined in §245.2. Records from the public agency may be used to verify income and program participation. The public agency's records are subject to the timeframe in paragraph (g)(5) of this section. Direct verification must be conducted prior to contacting the household for documentation.

(1) *Names submitted.* The local educational agency must only submit the names of school children certified for free or reduced price meal benefits or free milk to the agency administering an eligible program, the Medicaid program or the SCHIP program. Names and other identifiers of adult or nonschool children must not be submitted for direct verification purposes.

(2) *Eligible programs.* If information obtained through direct verification of an application for free or reduced price meal benefits indicates a child is participating in one of the eligible programs in paragraph (a)(1) of this section, no additional verification is required.

(3) *States with Medicaid Income Limits of 133%.* In States in which the income eligibility limit applied in the Medicaid program or in SCHIP is not more than 133% of the official poverty line or in States that otherwise identify households that have income that is not more than 133% of the official poverty line, records from these agencies may be used to verify eligibility. If information obtained through direct verification with these programs verifies the household's eligibility status, no additional verification is required.

(4) *States with Medicaid Income Limits between 133%–185%.* In States in which the income eligibility limit applied in the Medicaid program or in SCHIP exceeds 133% of the official poverty line, direct verification information must include either the percentage of the official poverty line upon which the applicant's Medicaid participation is based or Medicaid income and Medicaid household size in order to determine that the applicant is either at or below 133% of the Federal poverty line, or is between 133% and 185% of the Federal poverty line. Verification for children approved for free meals is complete if Medicaid data indicates that the percentage is at or below 133% of the Federal poverty line. Verification for children approved for reduced price meals is complete if Medicaid data indicates that the percentage is at or below 185% of the Federal poverty line. If information obtained through direct verification with these programs verifies eligibility status, no additional verification is required.

(5) *Documentation timeframe.* For the purposes of direct verification, documentation must be the most recent available but such documentation must indicate eligibility for participation or income within the 180-day period ending on the date of application. In addition, local educational agencies may use documentation, which must be within the 180-day period ending on the date of application, for any one month or for all months in the period from the month prior to application through the month direct verification is conducted. The information provided only needs to indicate eligibility for participation in the program at that point in time, not that the child was certified for that program's benefits within the 180-day period.

(6) *Incomplete information.* If it is the information provided by the public agency does not verify eligibility, the local educational agency must conduct verification in accordance with paragraph (f) of this section. In addition, households must be able to dispute the validity of income information acquired through direct verification and shall be given the opportunity to provide other documentation.

(h) *Verification reporting and recordkeeping requirements.* By March 1, each local educational agency must report information related to its annual statutorily required verification activity, which excludes verification conducted in accordance with paragraph (c)(7) of this section, to the State agency in accordance with guidelines provided by FNS.

(i) *Nondiscrimination.* The verification efforts shall be applied without regard to race, sex, color, national origin, age, or disability.

(j) *Adverse action.* If verification activities fail to confirm eligibility for free or reduced price benefits or should the household fail to cooperate with verification efforts, the school or local educational agencyshall reduce or terminate benefits, as applicable, as follows: Ten days advance notification shall be provided to households that are to receive a reduction or termination of benefits, prior to the actual reduction or termination. The first day of the 10 day advance notice period shall be the day the notice is sent. The notice shall advise the household of:

(1) The change;

(2) The reasons for the change;

(3) Notification of the right to appeal and when the appeal must be filed to ensure continued benefits while awaiting a hearing and decision;

(4) Instructions on how to appeal; and

(5) The right to reapply at any time during the school year. The reasons for ineligibility shall be properly documented and retained on file at the local educational agency.

(Sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[48 FR 12510, Mar. 25, 1983, as amended at 49 FR 26034, June 26, 1984; 52 FR 19275, May 22, 1987; 55 FR 19240, May 9, 1990; 56 FR 32950, July 17, 1991; 56 FR 33861, July 24, 1991; 64 FR 50744, Sept. 20, 1999; 64 FR 72474, Dec. 28, 1999; 66 FR 48328, Sept. 20, 2001; 68 FR 53489, Sept. 11, 2003; 72 FR 63795, Nov. 13, 2007; 73 FR 76859, Dec. 18, 2008]

### § 245.7 Hearing procedure for families and local educational agencies.

(a) Each local educational agency of a school participating in the National School Lunch Program, School Breakfast Program or the Special Milk Program or of a commodity only school shall establish a hearing procedure under which:

(1) A family can appeal from a decision made by the local educational agency with respect to an application the family has made for free or reduced price meals or for free milk, and

(2) The local educational agency can challenge the continued eligibility of any child for a free or reduced price meal or for free milk. The hearing procedure shall provide for both the family and the local educational agency:

(i) A simple, publicly announced method to make an oral or written request for a hearing;

(ii) An opportunity to be assisted or represented by an attorney or other person;

(iii) An opportunity to examine, prior to and during the hearing, any documents and records presented to support the decision under appeal;

(iv) That the hearing shall be held with reasonable promptness and convenience, and that adequate notice shall be given as to the time and place of the hearing;

(v) An opportunity to present oral or documentary evidence and arguments supporting a position without undue interference;

(vi) An opportunity to question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses;

(vii) That the hearing shall be conducted and the decision made by a hearing official who did not participate

in making the decision under appeal or in any previously held conference;

(viii) That the decision of the hearing official shall be based on the oral and documentary evidence presented at the hearing and made a part of the hearing record;

(ix) That the parties concerned and any designated representative shall be notified in writing of the decision of the hearing official;

(x) That a written record shall be prepared with respect to each hearing, which shall include the challenge or the decision under appeal, any documentary evidence and a summary of any oral testimony presented at the hearing, the decision of the hearing official, including the reasons therefor, and a copy of the notification to the parties concerned of the decision of the hearing official; and

(xi) That the written record of each hearing shall be preserved for a period of 3 years and shall be available for examination by the parties concerned or their representatives at any reasonable time and place during that period.

(b) *Continuation of benefits.* When a household disagrees with an adverse action which affects its benefits and requests a fair hearing, benefits shall be continued as follows while the household awaits the hearing and decision:

(1) Households that have been approved for benefits and that are subject to a reduction or termination of benefits later in the same school year shall receive continued benefits if they appeal the adverse action within the 10 day advance notice period; and

(2) Households that are denied benefits upon application shall not receive benefits.

(44 U.S.C. 3506; sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[Amdt. 6, 39 FR 30339, Aug. 22, 1974, as amended at 47 FR 746, Jan. 7, 1982; 48 FR 12511, Mar. 25, 1983; 72 FR 63796, Nov. 13, 2007]

### § 245.8 Nondiscrimination practices for children eligible to receive free and reduced price meals and free milk.

School Food Authorities and local educational agencies of schools participating in the National School Lunch Program, School Breakfast Program or Special Milk Program or of commodity only schools shall take all actions that are necessary to insure compliance with the following nondiscrimination practices for children eligible to receive free and reduced price meals or free milk:

(a) The names of the children shall not be published, posted or announced in any manner;

(b) There shall be no overt identification of any of the children by the use of special tokens or tickets or by any other means;

(c) The children shall not be required to work for their meals or milk;

(d) The children shall not be required to use a separate dining area, go through a separate serving line, enter the dining area through a separate entrance or consume their meals or milk at a different time;

(e) When more than one lunch or breakfast or type of milk is offered which meets the requirements prescribed in § 210.10, § 220.8 or the definition of *Milk* in § 215.2 of this chapter, the children shall have the same choice of meals or milk that is available to those children who pay the full price for their meal or milk.

[Amdt. 6, 39 FR 30339, Aug. 22, 1974, as amended at 72 FR 63796, Nov. 13, 2007]

### § 245.9 Special assistance certification and reimbursement alternatives.

(a) *Provision 1.* A School Food Authority of a school having at least 80 percent of its enrolled children determined eligible for free or reduced price meals may, at its option, authorize the school to reduce annual certification and public notification for those children eligible for *free meals* to once every two consecutive school years. This alternative shall be known as provision 1 and the following requirements shall apply:

(1) A School Food Authority of a school operating under provision 1 requirements shall publicly notify in accordance with § 245.5, parents of enrolled children who are receiving free meals once every two consecutive school years, and shall publicly notify in accordance with § 245.5, parents of all other enrolled children on an annual basis.

(2) The 80 percent enrollment eligibility for this alternative shall be

based on the school's March enrollment data of the previous school year, or on other comparable data.

(3) A School Food Authority of a school operating under provision 1, shall count the number of free, reduced price and paid meals served to children in that school as the basis for monthly reimbursement claims.

(b) *Provision 2.* A school food authority may certify children for free and reduced price meals for up to 4 consecutive school years in the schools which serve meals at no charge to all enrolled children; provided that public notification and eligibility determinations are in accordance with §§ 245.5 and 245.3, respectively, during the base year as defined in paragraph (b)(6) of this section. The Provision 2 base year is the first year, and is included in the 4-year cycle. The following requirements apply:

(1) *Meals at no charge.* Participating schools must serve reimbursable meals, as determined by a point of service observation, or as otherwise approved under part 210 of this chapter, to all participating children at no charge.

(2) *Cost differential.* The school food authority of a school participating in Provision 2 must pay, with funds from non-Federal sources, the difference between the cost of serving lunches and/or breakfasts at no charge to all participating children and Federal reimbursement.

(3) *Meal counts.* During the base year, even though meals are served to participating students at no charge, schools must take daily meal counts of reimbursable student meals by type (free, reduced price, and paid) at the point of service, or as otherwise approved under part 210 of this chapter. During the non-base years, participating Provision 2 schools must take total daily meal counts (not by type) of reimbursable student meals at the point of service, or as otherwise approved under part 210 of this chapter. For the purpose of calculating reimbursement claims in the non-base years, school food authorities must establish school specific monthly or annual claiming percentages, as follows:

(i) *Monthly percentages.* In any given Provision 2 school, the monthly meal counts of the actual number of meals served by type (free, reduced price, and paid) during the base year must be converted to monthly percentages for each meal type. For example, the free lunch percentage is derived by dividing the monthly total number of reimbursable free lunches served by the total number of reimbursable lunches served in the same month (free, reduced price and paid). The percentages for the reduced price and paid lunches are calculated using the same method as the above example for free lunches. These three percentages, calculated at the end of each month of the first school year, are multiplied by the corresponding monthly lunch count total of all reimbursable lunches served in the second, third and fourth consecutive school years, and applicable extensions, in order to calculate reimbursement claims for free, reduced price and paid lunches each month. The free, reduced price and paid percentages for breakfasts and, as applicable, snacks, are calculated using the same method; or

(ii) *Annual percentages.* In any given Provision 2 school, the actual number of all reimbursable meals served by type (free, reduced price, and paid) during the base year must be converted to an annual percentage for each meal type. For example, the free lunch percentage is derived by dividing the annual total number of reimbursable free lunches served by the annual total number of reimbursable lunches served for all meal types (free, reduced price and paid). The percentages for the reduced price and paid lunches are calculated using the same method as the above example for free lunches. These three percentages, calculated at the end of the base year, are multiplied by the total monthly lunch count of all reimbursable lunches served in each month of the second, third and fourth consecutive school years, and applicable extensions, in order to calculate reimbursement claims for free, reduced price and paid lunches each month. The free, reduced price and paid percentages for breakfasts and, as applicable, snacks, are calculated using the same method for each type of meal service.

(4) *School food authority claims review process.* During the Provision 2 base year (not including a streamlined base

year under paragraph (c)(2)(iii) of this section), school food authorities are required to review the lunch count data for each school under its jurisdiction to ensure the accuracy of the monthly Claim for Reimbursement in accordance with §210.8(a)(2) of this chapter. During non-base years and streamlined base years, school food authorities must compare each Provision 2 school's total daily meal counts to the school's total enrollment, adjusted by an attendance factor. The school food authority must promptly follow-up as specified in §210.8(a)(4) of this chapter when the claims review suggests the likelihood of lunch count problems. When a school elects to operate Provision 2 only in the School Breakfast Program, school food authorities must continue to comply with the claims review requirements of §210.8(a)(2) of this chapter for the National School Lunch Program.

(5) *Verification.* Except as otherwise specified in §245.6a(a)(5), school food authorities are required to conduct verification in accordance with §245.6a. When a school elects to participate under Provision 2 or for all of the meal programs in which it participates (breakfast 7 CFR part 220 and/or lunch 7 CFR part 210), the applications from that school are excluded from the school food authority's required verification sample size and are exempt from verification during non-base years.

(6) *Base year.* For purposes of this paragraph (b), the term *base year* means the last school year for which eligibility determinations were made and meal counts by type were taken or the school year in which a school conducted a streamlined base year as authorized under paragraph (c)(2)(iii) of this section. Schools shall offer reimbursable meals to all students at no charge during the Provision 2 base year except as otherwise specified in paragraph (b)(6)(ii) of this section.

(i) *Duration of the base year.* The base year must begin at the start of the school year or as otherwise specified in paragraph (b)(6)(ii) of this section.

(ii) *Delayed implementation.* At State agency discretion, schools may delay implementation of Provision 2 for a period of time not to exceed the first claiming period of the school year in which the base year is established. Schools implementing this option may conduct standard meal counting and claiming procedures, including charging students eligible for reduced price and paid meals, during the first claiming period of the school year. Such schools must submit claims reflecting the actual number of meals served by type. In subsequent years, such schools shall convert the actual number of reimbursable meals served by type (free, reduced price and paid) during the remaining claiming periods of the base year, in which meals were served at no charge to all participating students, to an annual percentage for each type of meal. The annual claiming percentages must be applied to the total number of reimbursable meals served during the first claiming period in all non-base years of operation for that cycle and any extensions.

(c) *Extension of Provision 2.* At the end of the initial cycle, and each subsequent 4-year cycle, the State agency may allow a school to continue under Provision 2 for another 4 years using the claiming percentages calculated during the most recent base year if the school food authority can establish, through available and approved socioeconomic data, that the income level of the school's population, as adjusted for inflation, has remained stable, declined or has had only negligible improvement since the base year.

(1) *Extension criteria.* School food authorities must submit to the State agency available and approved socioeconomic data to establish whether the income level of a school's population, as adjusted for inflation, remained constant with the income level of the most recent base year.

(i) *Available and approved sources of socioeconomic data.* Pre-approved sources of socioeconomic data which may be used by school food authorities to establish the income level of the school's population are: local data collected by the city or county zoning and economic planning office; unemployment data; local Food Stamp Program certification data including direct certification; Food Distribution Program

on Indian Reservations data; statistical sampling of the school's population using the application or equivalent income measurement process; and, Temporary Assistance for Needy Families data (provided that the eligibility standards were the same or more restrictive in the base year as the current year with allowance for inflation). To grant an extension using pre-approved socioeconomic data sources, State agencies must review and evaluate the socioeconomic data submitted by the school food authority to ensure that it is reflective of the school's population, provides equivalent data for both the base year and the last year of the current cycle, and demonstrates that the income level of the school's population, as adjusted for inflation, has remained stable, declined or had only negligible improvement. If the school food authority wants to establish the income level of the school's population using alternate sources of socioeconomic data, the use of such data must be approved by the Food and Nutrition Service. Data from alternate sources must be reflective of the school's population, be equivalent data for both the base year and the last year of the current cycle, and effectively measure whether the income level of the school's population, as adjusted for inflation, has remained stable, declined or had only negligible improvement.

(ii) *Negligible improvement.* The change in the income level of the school's population shall be considered negligible if there is a 5 percent or less improvement, after adjusting for inflation, over the base year in the level of the socioeconomic indicator which is used to establish the income level of the school's population.

(2) *Extension not approved.* The State agency shall not approve an extension of Provision 2 procedures in those schools for which the available and approved socioeconomic data does not reflect the school's population, is not equivalent data for the base year and the last year of the current cycle, or shows over 5 percent improvement, after adjusting for inflation, in the income level of the school's population. Such schools shall:

(i) *Return to standard meal counting and claiming.* Return to standard meal counting and claiming procedures;

(ii) *Establish a new base year.* Establish a new Provision 2 base year by taking new free and reduced price applications, making new free and reduced price eligibility determinations, and taking point of service counts of free, reduced price and paid meals for the first year of the new cycle. For these schools, the new Provision 2 cycle will be 4 years. Schools electing to establish a Provision 2 base year shall follow procedures contained in paragraph (b) of this section;

(iii) *Establish a streamlined base year.* With prior approval by the State agency, establish a streamlined base year by providing reimbursable meals to all participating students at no charge and developing either enrollment based or participation based claiming percentages.

(A) *Enrollment based percentages.* In accordance with guidance established by the Food and Nutrition Service, establish a new Provision 2 base year by determining program eligibility on the basis of household size and income, and direct certification if applicable, for a statistically valid proportion of the school's enrollment as of October 31, or other date approved by the State agency. The statistically valid measurement of the school's enrollment must be obtained during the first year of the new cycle and meet the requirements of paragraph (k) of this section. Using the data obtained, enrollment based claiming percentages representing a proportion of the school's population eligible for free, reduced price and paid benefits shall be developed and applied to total daily meal counts of reimbursable meals at the point of service, or as otherwise approved under part 210 of this chapter. For schools electing to participate in Provision 2, these percentages shall be used for claiming reimbursement for each year of the new cycle and any extensions; or

(B) *Participation based percentages.* In accordance with guidance established by the Food and Nutrition Service, establish a new Provision 2 base year by determining program eligibility on the basis of household size and income, and direct certification if applicable, for a

statistically valid proportion of participating students established over multiple operating days. The statistically valid measurement of the school's student participation must be obtained during the first year of the new cycle and meet the requirements of paragraph (k) of this section. Using the data obtained, participation based claiming percentages representing a proportion of the school's participating students which are eligible for free, reduced price and paid benefits shall be developed and applied to total daily meal counts of reimbursable meals at the point of service or as otherwise approved under part 210 of this chapter. These percentages shall be used for claiming reimbursement for each year of the new cycle and any extensions; or

(iv) *Establish a Provision 3 base year.* Schools may convert to Provision 3 using the procedures contained in paragraphs (e)(2)(ii) or (e)(2)(iii) of this section.

(d) *Provision 3.* A school food authority of a school which serves all enrolled children in that school reimbursable meals at no charge during any period for up to 4 consecutive school years may elect to receive Federal cash reimbursement and commodity assistance at the same level as the total Federal cash and commodity assistance received by the school during the last year that eligibility determinations for free and reduced price meals were made and meals were counted by type (free, reduced price and paid) at the point of service, or as otherwise authorized under part 210 of this chapter. Such cash reimbursement and commodity assistance will be adjusted for each of the 4 consecutive school years pursuant to paragraph (d)(4) of this section. For purposes of this paragraph (d), the term base year means the last complete school year for which eligibility determinations were made and meal counts by type were taken or the school year in which a school conducted a streamlined base year as authorized under paragraph (e)(2)(iii) of this section. The base year must begin at the start of a school year. Reimbursable meals may be offered to all students at no charge or students eligible for reduced price and paid meal benefits may be charged for meals during a Provision 3 base, *except that* schools conducting a Provision 3 streamlined base year must provide reimbursable meals to all participating students at no charge in accordance with paragraph (e)(2)(iii) of this section. The Provision 3 base year immediately precedes, and is not included in, the 4-year cycle. This alternative shall be known as Provision 3, and the following requirements shall apply:

(1) *Meals at no charge.* Participating schools must serve reimbursable meals, as determined by a point of service observation, or as otherwise authorized under part 210 of this chapter, to all participating children at no charge during non-base years of operation or as specified in paragraph (e)(2)(iii) of this section, if applicable.

(2) *Cost differential.* The school food authority of a school participating in Provision 3 must pay, with funds from non-Federal sources, the difference between the cost of serving lunches and/or breakfasts at no charge to all participating children and Federal reimbursement.

(3) *Meal counts.* Participating schools must take total daily meal counts of reimbursable meals served to participating children at the point of service, or as otherwise authorized under part 210 of this chapter, during the non-base years. Such meal counts must be retained at the local level in accordance with paragraph (g) of this section. State agencies may require the submission of the meal counts on the school food authority's monthly Claim for Reimbursement or through other means. In addition, school food authorities must establish a system of oversight using the daily meal counts to ensure that participation has not declined significantly from the base year. If participation declines significantly, the school food authority must provide the school with technical assistance, adjust the level of financial assistance received through the State agency or return the school to standard eligibility determination and meal counting procedures, as appropriate. In residential child care institutions, the State agency may approve implementation of Provision 3 without the requirement to obtain daily meal counts of reimbursable meals at the point of service if:

(i) The State agency determines that enrollment, participation and meal counts do not vary; and

(ii) There is an approved mechanism in place to ensure that students will receive reimbursable meals.

(4) *Annual adjustments.* The State agency or school food authority shall make annual adjustments for enrollment and inflation to the total Federal cash and commodity assistance received by a Provision 3 school in the base year. The adjustments shall be made for increases and decreases in enrollment of children with access to the program(s). The annual adjustment for enrollment shall be based on the school's base year enrollment as of October 31 compared to the school's current year enrollment as of October 31. Another date within the base year may be used if it is approved by the State agency, and provides a more accurate reflection of the school's enrollment or accommodates the reporting system in effect in that State. If another date is used for the base year, the current year date must correspond to the base year date of comparison. State agencies may, at their discretion, make additional adjustments to a participating school's enrollment more frequently than once per school year. If more frequent enrollment is calculated, it must be applied for both upward and downward adjustments. The annual adjustment for inflation shall be effected through the application of the current year rates of reimbursement. To the extent that the number of operating days in the current school year differs from the number of operating days in the base year, and the difference affects the number of meals, a prorata adjustment shall also be made to the base year level of assistance, as adjusted by enrollment and inflation. Upward and downward adjustments to the number of operating days shall be made. Such adjustment shall be effected by either:

(i) Multiplying the average daily meal count by type (free, reduced price and paid) by the difference in the number of operating days between the base year and the current year and adding/subtracting that number of meals from the Claim for Reimbursement, as appropriate. In developing the average daily meal count by type for the current school year, schools shall use the base year data adjusted by enrollment; or

(ii) Multiplying the dollar amount otherwise payable (i.e., the base year level of assistance, as adjusted by enrollment and inflation) by the ratio of the number of operating days in the current year to the number of operating days in the base year.

(5) *Reporting requirements.* The State agency shall submit to the Department on the monthly FNS–10, Report of School Programs Operations, the number of meals, by type (i.e., monthly meal counts by type for the base year, as adjusted); or the number of meals, by type, constructed to reflect the adjusted levels of cash assistance. State agencies may employ either method to effect payment of reimbursement for Provision 3 schools.

(6) *School food authority claims review process.* During the Provision 3 base year (not including a streamlined base year under paragraph (e)(2)(iii) of this section), school food authorities are required to review the lunch count data for each school under its jurisdiction to ensure the accuracy of the monthly Claim for Reimbursement in accordance with § 210.8(a)(2) of this chapter. During non-base years and streamlined base years, school food authorities must conduct their own system of oversight or compare each Provision 3 school's total daily meal counts to the school's total enrollment, adjusted by an attendance factor. The school food authority must promptly follow-up as specified in § 210.8(a)(4) of this chapter when the claims review suggests the likelihood of lunch count problems. When a school elects to operate Provision 3 only in the School Breakfast Program, school food authorities must continue to comply with the claims review requirements of § 210.8(a)(2) of this chapter for the National School Lunch Program.

(7) *Verification.* Except as otherwise specified in § 245.6a(a)(5), school food authorities are required to conduct verification in accordance with § 245.6a. When a school elects to participate under Provision 3 for all of the meal programs in which it participates (breakfast 7 CFR part 220 and/or lunch

7 CFR part 210), the applications from that school are excluded from the school food authority's required verification sample size and are exempt from verification during non-base years.

(e) *Extension of Provision 3.* At the end of the initial cycle, and each subsequent 4-year cycle, the State agency may allow a school to continue under Provision 3 for another 4 years without taking new free and reduced price applications and meal counts by type. State agencies may grant an extension of Provision 3 if the school food authority can establish, through available and approved socioeconomic data, that the income level of the school's population, as adjusted for inflation, has remained stable, declined, or has had only negligible improvement since the most recent base year.

(1) *Extension criteria.* School food authorities must submit to the State agency available and approved socioeconomic data to establish whether the income level of the school's population, as adjusted for inflation, remained constant with the income level of the most recent base year.

(i) *Available and approved sources of socioeconomic data.* Pre-approved sources of socioeconomic data which may be used by school food authorities to establish the income level of the school's population are: local data collected by the city or county zoning and economic planning office; unemployment data; local Food Stamp Program certification data including direct certification; Food Distribution Program on Indian Reservations data; statistical sampling of the school's population using the application process; and Temporary Assistance for Needy Families data (provided that the eligibility standards were the same or more restrictive in the base year as the current year with allowance for inflation). To grant an extension using pre-approved socioeconomic data sources, State agencies must review and evaluate the socioeconomic data submitted by the school food authority to ensure that it is reflective of the school's population, provides equivalent data for both the base year and the last year of the current cycle, and demonstrates that the income level of the school's population, as adjusted for inflation, has remained stable, declined or had only negligible improvement. If the school food authority wants to establish the income level of the school's population using alternate sources of data, the use of such data must be approved by the Food and Nutrition Service. Data from alternate sources must be reflective of the school's population, be equivalent data for both the base year and the last year of the current cycle, and effectively measure whether the income level of the school's population, as adjusted for inflation, has remained stable, declined or had only negligible improvement.

(ii) *Negligible improvement.* The change in the income level of the school population shall be considered negligible if there is a 5 percent or less improvement, after adjusting for inflation, over the base year in the level of the socioeconomic indicator which is used to establish the income level of the school's population.

(2) *Extension not approved.* Schools for which the available and approved socioeconomic data does not reflect the school's population, is not equivalent data for the base year and the last year of the current cycle, or shows over 5 percent improvement after adjusting for inflation, shall not be approved for an extension. Such schools must elect one of the following options:

(i) *Return to standard meal counting and claiming.* Return to standard meal counting and claiming procedures;

(ii) *Establish a new base year.* Establish a new Provision 3 base year by taking new free and reduced price applications, making new free and reduced price eligibility determinations, and taking point of service counts of free, reduced price and paid meals for the first year of the new cycle. Schools electing to establish a Provision 3 base year shall follow procedures contained in paragraph (d) of this section;

(iii) *Establish a streamlined base year.* With prior approval by the State agency, establish a streamlined base year by providing reimbursable meals to all participating students at no charge and developing either enrollment based or participation based claiming percentages.

(A) *Enrollment based percentages.* In accordance with guidance established by the Food and Nutrition Service, establish a new Provision 3 base year by determining program eligibility on the basis of household size and income, and direct certification if applicable, for a statistically valid proportion of the school's enrollment as of October 31, or other date approved by the State agency. The statistically valid measurement of the school's enrollment must be obtained during the first year of the new cycle and meet the requirements of paragraph (k) of this section. Using the data obtained, enrollment based claiming percentages representing a proportion of the school's population eligible for free, reduced price and paid benefits shall be developed and applied to total daily meal counts of reimbursable meals at the point of service, or as otherwise approved under part 210 of this chapter. For schools electing to participate in Provision 3, the streamlined base year level of assistance will be adjusted for enrollment, inflation and, if applicable, operating days, for each subsequent year of the new cycle and any extensions; or

(B) *Participation based percentages.* In accordance with guidance established by the Food and Nutrition Service, establish a new Provision 3 base year by determining program eligibility on the basis of household size and income, and direct certification if applicable, for a statistically valid proportion of participating students established over multiple operating days. The statistically valid measurement of the school's student participation must be obtained during the first year of the new cycle and meet the requirements of paragraph (k) of this section. Using the data obtained, participation based claiming percentages representing a proportion of the school's participating students which are eligible for free, reduced price and paid benefits shall be developed and applied to total daily meal counts of reimbursable meals at the point of service or as otherwise approved under part 210 of this chapter. For schools electing to participate in Provision 3, the streamlined base year level of assistance as described in this paragraph (e)(2)(iii)(B) will be adjusted for enrollment, inflation and, if applicable, operating days, for each subsequent year of the new cycle and any extensions; or

(iv) *Establish a Provision 2 base year.* Schools may convert to Provision 2 using the procedures contained in paragraphs (c)(2)(ii) or (c)(2)(iii) of this section.

(f) *Policy statement requirement.* A school food authority of a Provision 1, 2, or 3 school shall:

(1) Amend its Free and Reduced Price Policy Statement, specified in § 245.10, to include a list of all schools participating in Provision 1, 2, or 3, and for each school:

(i) The initial year of implementing the provision;

(ii) The years the cycle is expected to remain in effect;

(iii) The year the provision must be reconsidered; and

(iv) The available and approved socioeconomic data that will be used in the reconsideration, if applicable.

(2) Certify that the school(s) meet the criteria for participating in the special assistance provisions, as specified in paragraphs (a), (b), (c), (d) or (e) of this section, as appropriate.

(g) *Recordkeeping.* School food authorities of schools implementing Provision 1, 2 or 3 shall retain records related to the implementation of the provision. Failure to maintain sufficient records shall result in the State agency requiring the school to return to standard meal counting and claiming procedures and/or fiscal action. Recordkeeping requirements specific to Provision 2 and Provision 3 include:

(1) *Base year records.* A school food authority shall ensure that records as specified in §§ 210.15(b) and 220.7(e) of this chapter which support subsequent year earnings are retained for the base year for schools under Provision 2 and Provision 3. In addition, records of enrollment data for the base year must be retained for schools under Provision 3. Such base year records must be retained during the period the provision is in effect, including all extensions, plus 3 fiscal years after the submission of the last Claim for Reimbursement which employed the base year data. School food authorities that conduct a streamlined base year must retain all

records related to the statistical methodology and the determination of claiming percentages. Such records shall be retained during the period the provision is in effect, including all extensions, plus 3 fiscal years after the submission of the last Claim for Reimbursement which employed the streamlined base year data. In either case, if audit findings have not been resolved, base year records must be retained beyond the 3-year period as long as required for the resolution of the issues raised by the audit.

(2) *Non-base year records.* School food authorities that are granted an extension of a provision must retain records of the available and approved socioeconomic data which is used to determine the income level of the school's population for the base year and year(s) in which extension(s) are made. In addition, State agencies must also retain records of the available and approved socioeconomic data which is used to determine the income level of the school's population for the base year and year(s) in which extensions are made. Such records must be retained at both the school food authority level and at the State agency during the period the provision is in effect, including all extensions, plus 3 fiscal years after the submission of the last monthly Claim for Reimbursement which employed base year data. If audit findings have not been resolved, records must be retained beyond the 3-year period as long as required for the resolution of the issues raised by the audit. In addition, for schools operating under Provision 2, a school food authority must retain non-base year records pertaining to total daily meal count information, edit checks and on-site review documentation. For schools operating under Provision 3, a school food authority must retain non-base year records pertaining to total daily meal count information, the system of oversight or edit checks, on-site review documentation, annual enrollment data and the number of operating days, which are used to adjust the level of assistance. Such records shall be retained for three years after submission of the final monthly Claim for Reimbursement for the fiscal year.

(h) *Availability of documentation.* Upon request, the school food authority shall make documentation including enrollment data, participation data, available and approved socioeconomic data that was used to grant the extension, if applicable, or other data available at any reasonable time for monitoring and audit purposes. In addition, upon request from the Food and Nutrition Service, school food authorities under Provision 2 or Provision 3, or State agencies shall submit to the Food and Nutrition Service all data and documentation used in granting extensions including documentation as specified in paragraphs (g) and (h) of this section.

(i) *Return to standard meal counting and claiming.* A school food authority may return a school to standard notification, certification and counting procedures at any time if standard procedures better suit the school's program needs. The school food authority will then notify the State agency.

(j) *Puerto Rico and Virgin Islands.* Puerto Rico and the Virgin Islands, where a statistical survey procedure is permitted in lieu of eligibility determinations for each child, may either maintain their standard procedures in accordance with §245.4 or may opt for Provision 2 or Provision 3 provided the eligibility requirements as set forth in paragraphs (a), (b), (c), (d) and (e) of this section are met, as applicable.

(k) *Statistical income measurements.* Statistical income measurements that are used under this section to establish enrollment or participation base claiming percentages must comply with the standards outlined as follows:

(1) For enrollment based claiming percentages, statistical income measurements must meet the following standards:

(i) The sample frame shall be limited to enrolled students who have access to the school meals program;

(ii) A sample of enrolled students shall be randomly selected from the sample frame;

(iii) The response rate to the survey shall be at least 80 percent;

(iv) The number of households that complete the survey shall be sufficiently large so that it can be asserted with 95 percent confidence that the

true percentage of students who are enrolled in the school, have access to the school meals program, and are eligible for free meals is within plus or minus 2.5 percentage points of the point estimate determined from the sample; and

(v) To minimize statistical bias, data from all households that complete the survey must be used when calculating the enrollment based claiming percentages for paragraphs (c)(2)(iii)(A) and (e)(2)(iii)(A) of this section.

(2) For participation based claiming percentages, statistical income measurements must meet the following standards:

(i) The sample frame must be limited to students participating in the meal program for which the participation based claiming percentages are being developed;

(ii) The sample frame must represent multiple operating days, as established through guidance, in the meal program for which the participation based claiming percentages are being developed;

(iii) A sample of participating students shall be randomly selected from the sample frame;

(iv) The response rate to the survey shall be at least 80 percent;

(v) The number of households that complete the survey shall be sufficiently large so that it can be asserted with 95 percent confidence that the true percentage of participating students who are eligible for free meals is within plus or minus 2.5 percentage points of the point estimate determined from the sample; and,

(vi) To minimize statistical bias, data from all households that complete the survey must be used when calculating the participation based claiming percentages for paragraphs (c)(2)(iii)(B) and (e)(2)(iii)(B) of this section.

(Sec. 9, Pub. L. 95–166, 91 Stat. 1336 (42 U.S.C. 1759a); secs. 805, and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773))

[Amdt. 19, 45 FR 67287, Oct. 10, 1980, as amended by Amdt. 23, 47 FR 14135, Apr. 2, 1982; 66 FR 48328, Sept. 20, 2001]

### § 245.10 Action by local educational agencies.

(a) Each local educational agencyof a school desiring to participate in the National School Lunch Program, School Breakfast Program, or to provide free milk under the Special Milk Program, or to become a commodity-only school shall submit for approval to the State agency a free and reduced price policy statement. Once approved, the policy statement shall be a permanent document which may be amended as necessary, except as specified in paragraph (c) of this section. Such policy statement, as a minimum, shall contain the following:

(1) The official or officials designated by the local educational agency to make eligibility determinations on its behalf for free and reduced price meals or for free milk;

(2) An assurance that for children who are not categorically eligible for free and reduced price benefits the local educational agency will determine eligibility for free and reduced price meals or free milk in accordance with the current Income Eligibility Guidelines.

(3) The specific procedures the local educational agency will use in accepting applications from families for free and reduced price meals or for free milk. Additionally, if the school food authority has opted to determine eligibility for children from food stamp, FDPIR or TANF households based on documentation obtained from the State or local agency responsible for the Food Stamp, FDPIR or TANF Program, in lieu of an application, the school food authority shall include the specific procedures it will use to obtain the required documentation. Additionally, school food authorities that have implemented direct certification and that must provide households a notice of eligibility, as specified in §245.6(b), must also include in their policy statement a copy of the notice to households regarding their children's eligibility under the direct certification provision.

(4) A description of the method or methods to be used to collect payments from those children paying the full price of the meal or milk, or a reduced price of a meal, which will prevent the overt identification of the children receiving a free meal or free milk or a reduced price meal, and

(5) An assurance that the school will abide by the hearing procedure set

forth in § 245.7 and the nondiscrimination practices set forth in § 245.8.

(b) The policy statement submitted by each local educational agency shall be accompanied by a copy of the application form to be used by the school and of the proposed letter or notice to parents.

(c) Each local educational agency shall amend its permanent free and reduced price policy statement to reflect substantive changes. Any amendment to a policy shall be approved by the State agency prior to implementation, or as provided in paragraph (e) of this section. Each year, if a local educational agency does not have its policy statement approved by the State agency, or FNSRO where applicable, by October 15, reimbursement shall be suspended for any meals or milk served until such time as the local educational agency's free and reduced price policy statement has been approved by the State agency, or FNSRO where applicable. Furthermore, no commodities donated by the Department shall be used in any school after October 15, until such time as the local educational agency's free and reduced price policy statement has been approved by the State agency, or FNSRO where applicable. Once the local educational agency's free and reduced price policy statement has been approved, reimbursement may be allowed, at the discretion of the State agency, or FNSRO where applicable, for eligible meals and milk served during the period of suspension.

(d) If any free and reduced price policy statement submitted for approval by any local educational agency to the State agency, or FNSRO where applicable, is determined to be not in compliance with the provisions of this part, the local educational agency shall submit a policy statement that does meet the provisions within 30 days after notification by the State agency, or FNSO where applicable.

(e) When revision of a local educational agency's approved free and reduced price policy statement is necessitated because of a change in the family-size income standards of the State agency, or FNSRO where applicable, or because of other program changes, the local educational agency shall have 60 days from the date the State agency announces the change in which to have its revised policy statement approved by the State agency, or FNSRO where applicable. In the event that a local educational agency's proposed revised free and reduced price policy statement has not been submitted to, and approved by, the State agency, or FNSRO where applicable, within 60 days following the public announcement by the State agency, reimbursement shall be suspended for any meals or milk served after the end of the 60-day period. No commodities donated by the Department shall be used in any school after the end of the 60-day period, until such time as the local educational agency's free and reduced price policy statement has been approved by the State agency, or FNSRO where applicable. Reimbursement may be allowed at the discretion of the State agency, or FNSRO where applicable, for eligible meals and milk served during the period of suspension once the local educational agency's free and reduced price policy statement has been approved by the State agency, or FNSRO where applicable. Pending approval of a revision of a policy statement, the existing statement shall remain in effect.

(Sec. 8, Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1758); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772); 44 U.S.C. 3506; sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[35 FR 14065, Sept. 4, 1970, as amended at 38 FR 14958, June 7, 1973; Amdt. 6, 39 FR 30339, Aug. 22, 1974; Amdt. 8, 40 FR 57208, Dec. 8, 1975; Admt. 13, 44 FR 33049, June 8, 1979; 47 FR 746, Jan. 7, 1982; 48 FR 12511, Mar. 25, 1983; 64 FR 50744, Sept. 20, 1999;64 FR 72474, Dec. 28, 1999; 72 FR 63796, Nov. 13, 2007]

### § 245.11 Action by State agencies and FNSROs.

(a) Each State agency, or FNSRO where applicable, shall, for schools under its jurisdiction:

(1) As necessary, each State agency or FNSRO, as applicable, shall issue a prototype free and reduced price policy statement and any other instructions to ensure that each local educational agency as defined in § 245.2 is fully informed of the provisions of this part. If the State elects to establish for all schools a maximum price for reduced price lunches that is less than 40 cents,

the State shall establish such price in its prototype policy. Such State shall then receive the adjusted national average factor provided for in § 210.4(b); (2) prescribe and publicly announce by July 1 of each fiscal year, in accordance with § 245.3(a), family-size income standards. Any standards prescribed by FNSRO with respect to nonprofit private schools shall be developed by FNSRO after consultation with the State agency.

(a–1) When a revision of the family-size income standards of the State agency, or FNSRO where applicable, is necessitated because of a change in the Secretary's income poverty guidelines or because of other program changes, the State agency shall publicly announce its revised family-size income standards no later than 30 days after the Secretary has announced such change.

(b) State agencies, and FNSRO where applicable, shall review the policy statements submitted by school-food authorities for compliance with the provisions of this part and inform the school-food authorities of any necessary changes or amendments required in any policy statement to bring such statement into compliance. They shall notify school-food authorities in writing of approval of their policy statements and shall direct them to distribute promptly the public announcements required under the provisions of § 245.5.

(c) Each State agency, or FNSRO where applicable, shall instruct local educational agencies under their jurisdiction that they may not alter or amend the eligibility criteria set forth in an approved policy statement without advance approval of the State agency, or FNSRO where applicable.

(d) Not later than 10 days after the State agency, or FNSRO where applicable, announces its family-size income standards, it shall notify local educational agencies in writing of any amendment to their free and reduced price policy statements necessary to bring the family-sized income criteria into conformance with the State agency's or FNSRO's family-size income standards.

(e) Except as provided in § 245.10, the State agency, or FNSRO where applicable, shall neither disburse any funds, nor authorize the distribution of commodities donated by the Department to any school unless the local educational agency has an approved free and reduced price policy statement on file with the State Agency, or FNSRO where applicable.

(f) Each State agency, or FNSRO where applicable, shall, in the course of its supervisory assistance, review and evaluate the performance of local educational agencies and of schools in fulfilling the requirements of this part, and shall advise local educational agencies of any deficiencies found and any corrective action required to be taken.

(g) The State agency must notify FNS whether the TANF Program in their State is comparable to or more restrictive than the State's Aid to Families with Dependent Children Program that was in effect on June 1, 1995. Automatic eligibility and direct certification for TANF households is allowed only in States in which FNS has been assured that the TANF standards are comparable to or more restrictive than the program it replaced. State agencies must inform FNS when there is a change in the State's TANF Program that would no longer make households participating in TANF automatically eligible for free school meals.

(h) The State agency shall take action to ensure the proper implementation of Provisions 1, 2, and 3. Such action shall include:

(1) *Notification.* Notifying school food authorities of schools implementing Provision 2 and/or 3 that each Provision 2 or Provision 3 school must return to standard eligibility determination and meal counting procedures or apply for an extension under Provision 2 or 3. Such notification must be in writing, and be sent no later than February 15, or other date established by the State agency, of the fourth year of a school's current cycle;

(2) *Return to standard procedures.* Returning the school to standard eligibility determination and meal counting procedures and fiscal action as required under § 210.19(c) of this chapter if the State agency determines that records were not maintained; and

(3) *Technical assistance.* Providing technical assistance, adjustments to the level of financial assistance for the current school year, and returning the school to standard eligibility determination and meal counting procedures, as appropriate, if a State agency determines at any time that:

(i) The school or school food authority has not correctly implemented Provision 1, Provision 2 or Provision 3;

(ii) Meal quality has declined because of the implementation of the provision;

(iii) Participation in the program has declined over time;

(iv) Eligibility determinations or the verification procedures were incorrectly conducted; or

(v) Meal counts were incorrectly taken or incorrectly applied.

(4) *State agency recordkeeping.* State agencies shall retain the following information annually for the month of October and, upon request, submit to FNS:

(i) The number of schools using Provision 1, Provision 2 and Provision 3 for NSLP;

(ii) The number of schools using Provision 2 and Provision 3 for SBP only;

(iii) The number of extensions granted to schools using Provision 2 and Provision 3 during the previous school year;

(iv) The number of extensions granted during the previous year on the basis of Food Stamp/FDPIR data;

(v) The number of extensions granted during the previous year on the basis of Temporary Assistance for Needy Families (TANF) data;

(vi) The number of extensions granted during the previous year on the basis of local data collected by a city or county zoning and/or economic planning office;

(vii) The number of extensions granted during the previous year on the basis of applications collected from enrolled students;

(viii) The number of extensions granted during the previous year on the basis of statistically valid surveys of enrolled students; and

(ix) The number of extensions granted during the previous year on the basis of alternate data as approved by the State agency's respective FNS Regional Office.

(5) *State agency approval.* Prior to approval for participation under Provision 2 or Provision 3, State agencies shall ensure school and/or school food authority program compliance as required under §§ 210.19(a)(4) and 220.13(k) of this chapter.

(i) No later than March 1, 2005 and by March 1st each year thereafter, each State agency must collect annual verification data from each local educational agency as described in § 245.6a(c) and in accordance with guidelines provided by FNS. Each State agency must analyze these data, determine if there are potential problems, and formulate corrective actions and technical assistance activities that will support the objective of certifying only those children eligible for free or reduced price meals. No later than April 15, 2005 and by April 15 each year thereafter, each State agency must report to FNS the verification information in a consolidated electronic file that has been reported to it as required under § 245.6a(c), by local educational agency, and any ameliorative actions the State agency has taken or intends to take in local educational agencyies with high levels of applications changed due to verification. Contingent upon new funding to support this purpose, FNS will also require each State agency to report the aggregate number of students who were terminated as a result of verification but who were reinstated as of February 15th. The first report containing this data element would be required in the school year beginning July 1, 2005 and each school year thereafter. State agencies are encouraged to collect and report any or all verification data elements before the required dates.

(Secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1758, 1759(a), 1773, 1778))

[35 FR 14065, Sept. 4, 1970, as amended at 38 FR 14958, June 7, 1973; Amdt. 8, 40 FR 57208, Dec. 8, 1975; 44 FR 1364, Jan. 5, 1979; 46 FR 51368, Oct. 20, 1981; 48 FR 12511, Mar. 25, 1983; 52 FR 19276, May 22, 1987; 64 FR 50744, Sept. 20, 1999; 64 FR 72474, Dec. 28, 1999; 66 FR 48333, Sept. 20, 2001; 68 FR 53490, Sept. 11, 2003; 72 FR 63796, Nov. 13, 2007]

EFFECTIVE DATE NOTE: At 68 FR 53490, Sept. 11, 2003, § 245.11(i) was added. This paragraph contains information collection and

recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

### § 245.12 Fraud penalties.

(a) Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part, whether received directly or indirectly from the Department, shall—

(1) If such funds, assets, or property are of a value of $100 or more, be fined not more than $25,000 or imprisoned not more than five years of both; or

(2) If such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than one year or both.

(b) Whoever receives, conceals, or retains to his use or gain funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties provided in paragraph (a) of this section.

(Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626)

[Amdt. 14, 44 FR 37901, June 29, 1979, as amended at 64 FR 50744, Sept. 20, 1999]

### § 245.13 Information collection/recordkeeping—OMB assigned control numbers.

| 7 CFR section where requirements are described | Current OMB control number |
|---|---|
| 245.3 (a), (b) | 0584–0026 |
| 245.4 | 0584–0026 |
| 245.5 (a), (b) | 0584–0026 |
| 245.6 (a), (b), (c), (e) | 0584–0026 |
| 245.7(a) | 0584–0026 |
| 245.9 (a), (b), (c) | 0584–0026 |
| 245.10 (a), (d), (e) | 0584–0026 |
| 245.11 (a), (a–1), (b), (c), (d), (f) | 0584–0026 |
| 245.13(a)–(c) | 0584–0026 |

[72 FR 68985, Dec. 6, 2007, as amended at 73 FR 11312, Mar. 3, 2008]

# PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN

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246.28 OMB control numbers.

AUTHORITY: 42 U.S.C. 1786.

SOURCE: 50 FR 6121, Feb. 13, 1985, unless otherwise noted.

## Subpart A—General

### § 246.1 General purpose and scope.

This part announces regulations under which the Secretary of Agriculture shall carry out the Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program). Section 17 of the Child Nutrition Act of 1966, as amended, states in part that the Congress finds that substantial numbers of pregnant, postpartum and breastfeeding women, infants and young children from families with inadequate income are at special risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both. The purpose of the Program is to provide supplemental foods and nutrition education through payment of cash grants to State agencies which administer the Program through local agencies at no cost to eligible persons. The Program shall serve as an adjunct to good health care during critical times of growth and development, in order to prevent the occurrence of health problems, including drug and other harmful substance abuse, and to improve the health status of these persons. The program shall be supplementary to the Food Stamp Program; any program under which foods are distributed to needy families in lieu of food stamps; and receipt of food or meals from soup kitchens, or shelters, or other forms of emergency food assistance.

[50 FR 6121, Feb. 13, 1985, as amended at 54 FR 51294, Dec. 14, 1989; 58 FR 11506, Feb. 26, 1993]

### § 246.2 Definitions.

For the purpose of this part and all contracts, guidelines, instructions, forms and other documents related hereto, the term:

*7 CFR part 3016* means the Department's Uniform Federal Assistance Regulations. Part 3016 implements the policies established by the Office of Management and Budget (OMB) in Circulars A–21, A–87, A–102, A–110, and A–122, as well as OMB Guidance on Implementation of the Federal Grant and Cooperative Agreement Act of 1977.

*7 CFR part 3017* means the Department's Common Rule regarding Governmentwide Debarment and Suspension (Non-procurement). Part 3017 implements the requirements established by Executive Order 12549 (February 18, 1986).

*7 CFR part 3018* means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

*7 CFR part 3021* means the Department's Common Rule regarding Governmentwide Requirements for Drug-Free Workplace. Part 3021 implements the requirements established in section 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690).

*Above-50-percent vendors* means vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion under guidelines approved by FNS.

*Affirmative Action Plan* means that portion of the State Plan which describes how the Program will be initiated and expanded within the State's jurisdiction in accordance with § 246.4(a).

*A–130* means Office of Management and Budget Circular A–130, which provides guidance for the coordinated development and operation of information systems.

*Applicants* means pregnant women, breastfeeding women, postpartum women, infants, and children who are applying to receive WIC benefits, and the breastfed infants of applicant breastfeeding women. Applicants include individuals who are currently participating in the program but are re-applying because their certification period is about to expire.

*Authorized supplemental foods* means those supplemental foods authorized by the State or local agency for issuance to a particular participant.

*Breastfeeding* means the practice of feeding a mother's breastmilk to her infant(s) on the average of at least once a day.

*Breastfeeding women* means women up to one year postpartum who are breastfeeding their infants.

*Cash-value voucher* means a fixed-dollar amount check, voucher, electronic benefit transfer (EBT) card or other document which is used by a participant to obtain authorized fruits and vegetables.

*Categorical eligibility* means persons who meet the definitions of pregnant women, breastfeeding women, postpartum women, or infants or children.

*Certification* means the implementation of criteria and procedures to assess and document each applicant's eligibility for the Program.

*Children* means persons who have had their first birthday but have not yet attained their fifth birthday.

*Clinic* means a facility where applicants are certified.

*Competent professional authority* means an individual on the staff of the local agency authorized to determine nutritional risk and prescribe supplemental foods. The following persons are the only persons the State agency may authorize to serve as a competent professional authority: Physicians, nutritionists (bachelor's or master's degree in Nutritional Sciences, Community Nutrition, Clinical Nutrition, Dietetics, Public Health Nutrition or Home Economics with emphasis in Nutrition), dieticians, registered nurses, physician's assistants (certified by the National Committee on Certification of Physician's Assistants or certified by the State medical certifying authority), or State or local medically trained health officials. This definition also applies to an individual who is not on the staff of the local agency but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on the staff of the local agency.

*Competitive bidding* means a procurement process under which FNS or the State agency selects a single source (such as a single infant formula manufacturer offering the lowest price), as determined by the submission of sealed bids, for a product for which bids are sought for use in the Program.

*Compliance buy* means a covert, onsite investigation in which a representative of the Program poses as a participant, parent or caretaker of an infant or child participant, or proxy, transacts one or more food instruments or cash-value vouchers, and does not reveal during the visit that he or she is a program representative.

*Contract brand infant formula* means all infant formulas (except exempt infant formulas) produced by the manufacturer awarded the infant formula cost containment contract. If under a single solicitation the manufacturer subcontracts for soy-based infant formula, then all soy-based infant formulas covered by the subcontract are also considered contract brand infant formulas (see § 246.16a(c)(1)(i)). If a State agency elects to solicit separate bids for milk-based and soy-based infant formulas, all infant formulas issued under each contract are considered the contract brand infant formula (see § 246.16a(c)(1)(ii)). For example, all of the milk-based infant formulas issued by a State agency that are produced by the manufacturer that was awarded the milk-based contract are considered contract brand infant formulas. Similarly, all of the soy-based infant formulas issued by a State agency that are produced by the manufacturer that was awarded the soy-based contract are also considered to be contract brand infant formulas. Contract brand infant formulas also include all infant formulas (except exempt infant formulas) introduced after the contract is awarded.

*Cost containment measure* means a competitive bidding, rebate, direct distribution, or home delivery system implemented by a State agency as described in its approved State Plan of operation and administration.

*CSFP* means the Commodity Supplemental Food Program administered by the Department, authorized by section 5 of the Agriculture and Consumer Protection Act of 1973, as amended, and governed by part 247 of this title.

*Days* means calendar days.

*Department* means the U.S. Department of Agriculture.

*Discount* means, with respect to a State agency that provides Program foods to participants without the use of retail grocery stores (such as a State agency that provides for the home delivery or direct distribution of supplemental food), the amount of the price reduction or other price concession

provided to any State agency by the manufacturer or supplier of the particular food product as the result of the purchase of Program food by each such State agency, or its representative, from the manufacturer or supplier.

*Disqualification* means the act of ending the Program participation of a participant, authorized food vendor, or authorized State or local agency, whether as a punitive sanction or for administrative reasons.

*Documentation* means the presentation of written documents which substantiate statements made by an applicant or participant or a person applying on behalf of an applicant.

*Drug* means:

(a) A beverage containing alcohol;

(b) A controlled substance (having the meaning given it in section 102(6) of the Controlled Substance Act (21 U.S.C. 802(6)); or

(c) A controlled substance analogue (having the meaning given it in section 102(32) of the Controlled Substance Act (21 U.S.C. 802(32)).

*Dual participation* means simultaneous participation in the Program in one or more than one WIC clinic, or participation in the Program and in the CSFP during the same period of time.

*Electronic signature* means an electronic sound, symbol, or process, attached to or associated with an application or other record and executed and or adopted by a person with the intent to sign the record.

*Employee fraud and abuse* means the intentional conduct of a State, local agency or clinic employee which violates program regulations, policies, or procedures, including, but not limited to, misappropriating or altering food instruments or cash-value vouchers, entering false or misleading information in case records, or creating case records for fictitious participants.

*Exempt infant formula* means an infant formula that meets the requirements for an exempt infant formula under section 412(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a(h)) and the regulations at 21 CFR parts 106 and 107.

*Family* means a group of related or nonrelated individuals who are living together as one economic unit, except that residents of a homeless facility or an institution shall not all be considered as members of a single family.

*Farmer* means an individual authorized by the State agency to sell eligible fruits and vegetables to participants at a farmers' market or roadside stands. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized.

*Fiscal year* means the period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

*FNS* means the Food and Nutrition Service of the U.S. Department of Agriculture.

*Food costs* means the costs of supplemental foods, determined in accordance with § 246.14(b).

*Food delivery system* means the method used by State and local agencies to provide supplemental foods to participants.

*Food instrument* means a voucher, check, electronic benefits transfer card (EBT), coupon or other document which is used by a participant to obtain supplemental foods.

*Food sales* means sales of all Food Stamp Program eligible foods intended for home preparation and consumption, including meat, fish, and poultry; bread and cereal products; dairy products; fruits and vegetables. Food items such as condiments and spices, coffee, tea, cocoa, and carbonated and noncarbonated drinks may be included in food sales when offered for sale along with foods in the categories identified above. Food sales do not include sales of any items that cannot be purchased with food stamp benefits, such as hot foods or food that will be eaten in the store.

*Health services* means ongoing, routine pediatric and obstetric care (such as infant and child care and prenatal and postpartum examinations) or referral for treatment.

*High-risk vendor* means a vendor identified as having a high probability of committing a vendor violation through application of the criteria established in § 246.12(j)(3) and any additional criteria established by the State agency.

*Home food delivery contractor* means a sole proprietorship, partnership, cooperative association, corporation, or other business entity that contracts with a State agency to deliver authorized supplemental foods to the residences of participants under a home food delivery system.

*Homeless facility* means the following types of facilities which provide meal service. A supervised publicly or privately operated shelter (including a welfare hotel or congregate shelter) designed to provide temporary living accommodations; a facility that provides a temporary residence for individuals intended to be institutionalized; or a public or private place not designed for, or normally used as, a regular sleeping accommodation for human beings.

*Homeless individual* means a woman, infant or child:

(a) Who lacks a fixed and regular nighttime residence; or

(b) Whose primary nighttime residence is:

(1) A supervised publicly or privately operated shelter (including a welfare hotel, a congregate shelter, or a shelter for victims of domestic violence) designated to provide temporary living accommodation;

(2) An institution that provides a temporary residence for individuals intended to be institutionalized;

(3) A temporary accommodation of not more than 365 days in the residence of another individual; or

(4) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

*IHS* means the Indian Health Service of the U.S. Department of Health and Human Services.

*Individual with disabilities* means a handicapped person as defined in 7 CFR 15b.3.

*Infant formula* means a food that meets the definition of an infant formula in section 201(z) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(z)) and that meets the requirements for an infant formula under section 412 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a) and the regulations at 21 CFR parts 106 and 107.

*Institution* means any residential accommodation which provides meal service, except private residences and homeless facilities.

*Infants* means persons under one year of age.

*Inventory audit* means the examination of food invoices or other proofs of purchase to determine whether a vendor has purchased sufficient quantities of supplemental foods to provide participants the quantities specified on food instruments redeemed by the vendor during a given period of time.

*Local agency* means: (a) A public or private, nonprofit health or human service agency which provides health services, either directly or through contract, in accordance with § 246.5; (b) an IHS service unit; (c) an Indian tribe, band or group recognized by the Department of the Interior which operates a health clinic or is provided health services by an IHS service unit; or (d) an intertribal council or group that is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior, which operates a health clinic or is provided health services by an IHS service unit.

*Members of populations* means persons with a common special need who do not necessarily reside in a specific geographic area, such as off-reservation Indians or migrant farmworkers and their families.

*Migrant farmworker* means an individual whose principal employment is in agriculture on a seasonal basis, who has been so employed within the last 24 months, and who establishes, for the purposes of such employment, a temporary abode.

*Net price* means the difference between an infant formula manufacturer's lowest national wholesale price per unit for a full truckload of infant formula and the rebate level or the discount offered or provided by the manufacturer under an infant formula cost containment contract.

*Non-contract brand infant formula* means all infant formula, including exempt infant formula, that is not covered by an infant formula cost containment contract awarded by that State agency.

*Nonprofit agency* means a private agency which is exempt from income tax under the Internal Revenue Code of 1954, as amended.

*Nutrition education* means individual and group sessions and the provision of materials that are designed to improve health status and achieve positive change in dietary and physical activity habits, and that emphasize the relationship between nutrition, physical activity, and health, all in keeping with the personal and cultural preferences of the individual.

*Nutrition Services and Administration (NSA) Costs* means those direct and indirect costs, exclusive of food costs, as defined in §246.14(c), which State and local agencies determine to be necessary to support Program operations. Costs include, but are not limited to, the costs of Program administration, start-up, monitoring, auditing, the development of and accountability for food delivery systems, nutrition education and breastfeeding promotion and support, outreach, certification, and developing and printing food instruments and cash-value vouchers.

*Nutritional risk* means: (a) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements; (b) Other documented nutritionally related medical conditions; (c) Dietary deficiencies that impair or endanger health; (d) Conditions that directly affect the nutritional health of a person, including alcoholism or drug abuse; or (e) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, including, but not limited to, homelessness and migrancy.

*OIG* means the Department's Office of the Inspector General.

*Other harmful substances* means other substances such as tobacco, prescription drugs and over-the-counter medications that can be harmful to the health of the WIC population, especially the pregnant woman and her fetus.

*Partially-redeemed food instrument* means a paper food instrument which is redeemed for less than all of the supplemental foods authorized for that food instrument.

*Participants* means pregnant women, breastfeeding women, postpartum women, infants and children who are receiving supplemental foods or food instruments or cash-value vouchers under the Program, and the breastfed infants of participant breastfeeding women.

*Participant violation* means any intentional action of a participant, parent or caretaker of an infant or child participant, or proxy that violates Federal or State statutes, regulations, policies, or procedures governing the Program. Participant violations include intentionally making false or misleading statements or intentionally misrepresenting, concealing, or withholding facts to obtain benefits; exchanging cash-value vouchers, food instruments or supplemental foods for cash, credit, non-food items, or unauthorized food items, including supplemental foods in excess of those listed on the participant's food instrument; threatening to harm or physically harming clinic, farmer or vendor staff; and dual participation.

*Participation* means the sum of:

(1) The number of persons who received supplemental foods or food instruments during the reporting period;

(2) The number of infants who did not receive supplemental foods or food instruments but whose breastfeeding mother received supplemental foods or food instruments during the report period; and

(3) The number of breastfeeding women who did not receive supplemental foods or food instruments but whose infant received supplemental foods or food instruments during the report period.

*Postpartum women* means women up to six months after termination of pregnancy.

*Poverty income guidelines* means the poverty income guidelines prescribed by the Department of Health and Human Services. These guidelines are adjusted annually by the Department of Health and Human Services, with each annual adjustment effective July 1 of each year. The poverty income guidelines prescribed by the Department of Health and Human Services shall be used for all States, as defined in this section, except for Alaska and

Hawaii. Separate poverty income guidelines are prescribed for Alaska and Hawaii.

*Pregnant women* means women determined to have one or more embryos or fetuses in utero.

*Price adjustment* means an adjustment made by the State agency, in accordance with the vendor agreement, to the purchase price on a food instrument after it has been submitted by a vendor for redemption to ensure that the payment to the vendor for the food instrument complies with the State agency's price limitations.

*Primary contract infant formula* means the specific infant formula for which manufacturers submit a bid to a State agency in response to a rebate solicitation and for which a contract is awarded by the State agency as a result of that bid.

*Program* means the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) authorized by section 17 of the Child Nutrition Act of 1966, as amended.

*Proxy* means any person designated by a woman participant, or by a parent or caretaker of an infant or child participant, to obtain and transact food instruments or cash-value vouchers or to obtain supplemental foods on behalf of a participant. The proxy must be designated consistent with the State agency's procedures established pursuant to § 246.12(r)(1). Parents or caretakers applying on behalf of child and infant participants are not proxies.

*Rebate* means the amount of money refunded under cost containment procedures to any State agency from the manufacturer of the particular food product as the result of the purchase of the supplemental food with a voucher or other purchase instrument by a participant in each State agency's program. Such rebates shall be payments made subsequent to the exchange of a food instrument for food.

*Remote Indian or Native village* means an Indian or Native village that is located in a rural area, has a population of less than 5,000 inhabitants, and is not accessible year-round by means of a public road (as defined in 23 U.S.C. 101).

*Routine monitoring* means overt, onsite monitoring during which program representatives identify themselves to vendor personnel.

*Secretary* means the Secretary of Agriculture.

*SFPD* means the Supplemental Food Programs Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

*Sign or signature* means a handwritten signature on paper or an electronic signature. If the State agency chooses to use electronic signatures, the State agency must ensure the reliability and integrity of the technology used and the security and confidentiality of electronic signatures collected in accordance with sound management practices, and applicable Federal law and policy, and the confidentiality requirements in § 246.26.

*State* means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands.

*State agency* means the health department or comparable agency of each State; an Indian tribe, band or group recognized by the Department of the Interior; an intertribal council or group which is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior and which has an ongoing relationship with such tribes, bands or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the IHS.

*State alliance* means two or more State agencies that join together for the purpose of procuring infant formula under the Program by soliciting competitive bids for infant formula.

*State Plan* means a plan of Program operation and administration that describes the manner in which the State agency intends to implement and operate all aspects of Program administration within its jurisdiction in accordance with § 246.4.

*Supplemental foods* means those foods containing nutrients determined by nutritional research to be lacking in the diets of pregnant, breastfeeding and postpartum women, infants, and children, and foods that promote the health of the population served by the

WIC Program as indicated by relevant nutrition science, public health concerns, and cultural eating patterns, as prescribed by the Secretary in § 246.10.

*Vendor* means a sole proprietorship, partnership, cooperative association, corporation, or other business entity operating one or more stores authorized by the State agency to provide authorized supplemental foods to participants under a retail food delivery system. Each store operated by a business entity constitutes a separate vendor and must be authorized separately from other stores operated by the business entity. Each store must have a single, fixed location, except when the authorization of mobile stores is necessary to meet the special needs described in the State agency's State Plan in accordance with § 246.4(a)(14)(xiv).

*Vendor authorization* means the process by which the State agency assesses, selects, and enters into agreements with stores that apply or subsequently reapply to be authorized as vendors.

*Vendor limiting criteria* means criteria established by the State agency to determine the maximum number and distribution of vendors it authorizes pursuant to § 246.12(g)(2).

*Vendor overcharge* means intentionally or unintentionally charging the State agency more for authorized supplemental foods than is permitted under the vendor agreement. It is not a vendor overcharge when a vendor submits a food instrument for redemption and the State agency makes a price adjustment to the food instrument.

*Vendor peer group system* means a classification of authorized vendors into groups based on common characteristics or criteria that affect food prices, for the purpose of applying appropriate competitive price criteria to vendors at authorization and limiting payments for food to competitive levels.

*Vendor selection criteria* means the criteria established by the State agency to select individual vendors for authorization consistent with the requirements in § 246.12(g)(3) and (g)(4).

*Vendor violation* means any intentional or unintentional action of a vendor's current owners, officers, managers, agents, or employees (with or without the knowledge of management) that violates the vendor agreement or Federal or State statutes, regulations, policies, or procedures governing the Program.

*WIC* means the Special Supplemental Nutrition Program for Women, Infants and Children authorized by section 17 of the Child Nutrition Act of 1966, 42 U.S.C. 1786.

*WIC-eligible medical foods* means certain enteral products that are specifically formulated to provide nutritional support for individuals with a qualifying condition, when the use of conventional foods is precluded, restricted, or inadequate. Such WIC-eligible medical foods must serve the purpose of a food, meal or diet (may be nutritionally complete or incomplete) and provide a source of calories and one or more nutrients; be designed for enteral digestion via an oral or tube feeding; and may not be a conventional food, drug, flavoring, or enzyme. WIC-eligible medical foods include many, but not all, products that meet the definition of medical food in Section 5(b)(3) of the Orphan Drug Act (21 U.S.C. 360ee(b)(3)).

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 246.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 246.3 Administration.

(a) *Delegation to FNS.* Within the Department, FNS shall act on behalf of the Department in the administration of the Program. Within FNS, SFPD and the Regional Offices are responsible for Program administration. FNS shall provide assistance to State and local agencies and evaluate all levels of Program operations to ensure that the goals of the Program are achieved in the most effective and efficient manner possible.

(b) *Delegation to the State agency.* The State agency is responsible for the effective and efficient administration of the Program in accordance with the requirements of this part; the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a, and 15b); governing administration of

grants (7 CFR part 3016); governing nonprocurement debarment/suspension (7 CFR part 3017); governing restrictions on lobbying (7 CFR part 3018); and governing the drug-free workplace requirements (7 CFR 3021); FNS guidelines; and, instructions issued under the FNS Directives Management System. The State agency shall provide guidance to local agencies on all aspects of Program operations.

(c) *Agreement and State Plan.* (1) Each State agency desiring to administer the Program shall annually submit a State Plan and enter into a written agreement with the Department for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this part.

(2) The written agreement shall include a certification regarding lobbying and, if applicable, a disclosure of lobbying activities, as required by 7 CFR part 3018.

(d) *State agency eligibility.* A State agency shall be ineligible to participate in the WIC Program if State or local sales tax is collected on WIC food purchases in the area in which it administers the program, except that, if sales tax is collected on WIC food purchases by sovereign Indian entities which are not State agencies, the State agency shall remain eligible if any vendors collecting such tax are disqualified.

(e) *State staffing standards.* Each State agency shall ensure that sufficient staff is available to administer an efficient and effective Program including, but not limited to, the functions of nutrition education, certification, food delivery, fiscal reporting, monitoring, and training. Based on the June participation of the previous fiscal year, each State agency, as a minimum, shall employ the following staff:

(1) A full-time or equivalent administrator when the monthly participation level exceeds 1,500, or a half-time or equivalent administrator when the monthly participation exceeds 500.

(2) At least one full-time or equivalent Program specialist for each 10,000 participants above 1,500, but the State agency need not employ more than eight Program specialists unless the State agency considers it necessary. Program specialists should be utilized for providing fiscal management and technical assistance, monitoring vendors, reviewing local agencies, training, and nutritional services, or other Program duties as assigned by the State agency.

(3) For nutrition-related services, one full-time or equivalent nutritionist when the monthly participation is above 1,500, or a half-time or equivalent nutritionist when the monthly participation exceeds 500. The nutritionist shall be named State WIC Nutrition Coordinator and shall meet State personnel standards and qualifications in paragraphs (e)(3) (i), (ii), (iii), (iv), or (v) of this section and have the qualifications in paragraph (e)(3)(vi) of this section. Upon request, an exception to these qualifications may be granted by FNS. The State WIC Nutrition Coordinator shall—

(i) Hold a Master's degree with emphasis in food and nutrition, community nutrition, public health nutrition, nutrition education, human nutrition, nutrition science or equivalent and have at least two years responsible experience as a nutritionist in education, social service, maternal and child health, public health, nutrition, or dietetics; or

(ii) Be registered or eligible for registration with the American Dietetic Association and have at least two years experience; or

(iii) Have at least a Bachelor of Science or Bachelor of Arts degree, from an accredited four-year institution, with emphasis in food and nutrition, community nutrition, public health nutrition, nutrition education, human nutrition, nutrition science or equivalent and have at least three years of responsible experience as a nutritionist in education, social service, maternal and child health, public health nutrition, or dietetics; or

(iv) Be qualified as a Senior Public Health Nutritionist under the Department of Health and Human Services guidelines; or

(v) Meet the IHS standards for a Public Health Nutritionist; and

(vi) Have at least one of the following: Program development skills, education background and experience in the development of educational and

training resource materials, community action experience, counseling skills or experience in participant advocacy.

(4) A designated breastfeeding promotion coordinator, to coordinate breastfeeding promotion efforts identified in the State plan in accordance with the requirement of §246.4(a)(9) of this part. The person to whom the State agency assigns this responsibility may perform other duties as well.

(5) A staff person designated for food delivery system management. The person to whom the State agency assigns this responsibility may perform other duties as well.

(6) The State agency shall enforce hiring practices which comply with the nondiscrimination criteria set forth in §246.8. The hiring of minority staff is encouraged.

(f) *Delegation to local agency.* The local agency shall provide Program benefits to participants in the most effective and efficient manner, and shall comply with this part, the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a, 15b), the Department's regulations governing the administration of grants (7 CFR part 3016), Office of Management and Budget Circular A–130, and State agency and FNS guidelines and instructions.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 52 FR 21236, June 4, 1987; 59 FR 11499, Mar. 11, 1994; 65 FR 83277, Dec. 29, 2000; 71 FR 56728, Sept. 27, 2006]

## Subpart B—State and Local Agency Eligibility

### §246.4 State plan.

(a) *Requirements.* By August 15 of each year, each State agency shall submit to FNS for approval a State Plan for the following fiscal year as a prerequisite to receiving funds under this section. The State agency may submit the State Plan in the format provided by FNS guidance. Alternatively, the State agency may submit the Plan in combination with other federally required planning documents or develop its own format, provided that the information required below is included. FNS requests advance notification that a State agency intends to use an alternative format. The State Plan shall be signed by the State designated official responsible for ensuring that the Program is operated in accordance with the State Plan. FNS will provide written approval or denial of a completed State Plan or amendment within 30 days of receipt. Within 15 days after FNS receives an incomplete Plan, FNS will notify the State agency that additional information is needed to complete the Plan. Any disapproval will be accompanied by a statement of the reasons for the disapproval. After receiving approval of the State Plan, each State agency shall only submit to FNS for approval substantive changes in the State Plan. A complete and approved Plan shall include:

(1) An outline of the State agency's goals and objectives for improving Program operations.

(2) A budget for nutrition services and administration funds, and an estimate of food expenditures.

(3) An estimate of Statewide participation for the coming fiscal year by category of women, infants and children.

(4) The State agency staffing pattern.

(5) An Affirmative Action Plan which includes—

(i) A list of all areas and special populations, in priority order based on relative need, within the jurisdiction of the State agency, the State agency's plans to initiate or expand operations under the Program in areas most in need of supplemental foods, including plans to inform nonparticipating local agencies of the availability and benefits of the Program and the availability of technical assistance in implementing the Program, and a description of how the State agency will take all reasonable actions to identify potential local agencies and encourage agencies to implement or expand operations under the Program within the following year in the neediest one-third of all areas unserved or partially served;

(ii) An estimate of the number of potentially eligible persons in each area and a list of the areas in the Affirmative Action Plan which are currently operating the Program and their current participation, which participant

priority levels as specified in § 246.7 are being reached in each of these areas, and which areas in the Affirmative Action Plan are currently operating CSFP and their current participation; and

(iii) A list of the names and addresses of all local agencies.

(6) Plans to provide program benefits to eligible migrant farmworkers and their families, to Indians, and to homeless individuals.

(7) The State agency's plans, to be conducted in cooperation with local agencies, for informing eligible persons of the availability of Program benefits, including the eligibility criteria for participation, the location of local agencies operating the Program, and the institutional conditions of § 246.7(n)(1)(i) of this part, with emphasis on reaching and enrolling eligible women in the early months of pregnancy and migrants. Such information shall be publicly announced by the State agency and by local agencies at least annually. Such information shall also be distributed to offices and organizations that deal with significant numbers of potentially eligible persons, including health and medical organizations, hospitals and clinics, welfare and unemployment offices, social service agencies, farmworker organizations, Indian tribal organizations, organizations and agencies serving homeless individuals, and religious and community organizations in low-income areas.

(8) A description of how the State agency plans to coordinate program operations with other services or programs that may benefit participants in, or applicants for, the program.

(9) The State agency's nutrition education goals and action plans, including a description of the methods that will be used to provide drug and other harmful substance abuse information, promote breastfeeding, and to meet the special nutrition education needs of migrant farmworkers and their families, Indians, and homeless persons.

(10) For Indian State or local agencies that wish to apply for the alternate income determination procedure in accordance with § 246.7(d)(2)(vii), documentation that the majority of Indian household members have incomes below eligibility criteria.

(11) A copy of the procedure manual developed by the State agency for guidance to local agencies in operating the Program. The manual shall include—

(i) Certification procedures, including:

(A) A list of the specific nutritional risk criteria by priority level which explains how a person's nutritional risk is determined;

(B) Hematological data requirements including timeframes for the collection of such data;

(C) The procedures for requiring proof of pregnancy, consistent with § 246.7(c)(2)(ii), if the State agency chooses to require such proof;

(D) The State agency's income guidelines for Program eligibility;

(E) Adjustments to the participant priority system (see § 246.7(e)(4)) to accommodate high-risk postpartum women or the addition of Priority VII; and,

(F) Alternate language for the statement of rights and responsibilities which is provided to applicants, parents, or caretakers when applying for benefits as outlined in § 246.7(i)(10) and (j)(2)(i) through (j)(2)(iii). This alternate language must be approved by FNS before it can be used in the required statement.

(ii) Methods for providing nutrition education to participants. Nutrition education will include information on drug abuse and other harmful substances. Participants will include homeless individuals.

(iii) Instructions concerning all food delivery operations performed at the local level, including the list of acceptable foods and their maximum monthly quantities as required by § 246.10(b)(1).

(iv) Instructions for providing all records and reports which the State agency requires local agencies to maintain and submit; and

(v) Instructions on coordinating operations under the program with drug and other harmful substance abuse counseling and treatment services.

(12) A description of the State agency's financial management system.

(13) A description of how the State agency will distribute nutrition services and administration funds, including start-up funds, to local agencies operating under the Program.

(14) A description of the food delivery system as it operates at the State agency level, including—

(i) *Type of system.* All food delivery systems in use within the State agency's jurisdiction;

(ii) *Vendor limiting and selection criteria.* Vendor limiting criteria, if used by the State agency, and the vendor selection criteria established by the State agency consistent with the requirements in §246.12(g)(3) and (g)(4);

(iii) *A sample vendor and farmer, if applicable, agreement.* The sample vendor agreement must include the sanction schedule, the process for notification of violations in accordance with §246.12(l)(3), and the State agency's policies and procedures on incentive items in accordance with §246.12(g)(3)(iv), which may be incorporated as attachments or, if the sanction schedule, the process for notification of violations, or policies on incentive items are in the State agency's regulations, through citations to the regulations. State agencies that intend to delegate signing of vendor agreements to local agencies must describe the State agency supervision and instruction that will be provided to ensure the uniformity and quality of local agency activities;

(iv) *Vendor monitoring.* The system for monitoring vendors to ensure compliance and prevent fraud, waste, and program noncompliance, and the State agency's plans for improvement in the coming year in accordance with §246.12(j). The State agency must also include the criteria it will use to determine which vendors will receive routine monitoring visits. State agencies that intend to delegate any aspect of vendor monitoring responsibilities to a local agency or contractor must describe the State agency supervision and instruction that will be provided to ensure the uniformity and quality of vendor monitoring;

(v) *Options regarding trafficking convictions.* The option exercised by the State agency to sanction vendors pursuant to §246.12(k)(1)(i).

(vi) *Food instruments and cash-value vouchers.* A facsimile of the food instrument and cash-value voucher, if used, and a description of the system the State agency will use to account for the disposition of food instruments and cash value vouchers in accordance with §246.12(q);

(vii) *Names of contractors.* The names of companies, excluding authorized vendors, with whom the State agency has contracted to participate in the operation of the food delivery system;

(viii) *Nutrition services and administration funds conversion* For State agencies applying for authority to convert food funds to nutrition services and administration funds under §246.16(g), a full description of their proposed cost-cutting system or system modification;

(ix) *Homeless participants.* If the State agency plans to adapt its food delivery system to accommodate the needs of homeless individuals, a description of such adaptations;

(x) *Infant formula cost containment.* A description of any infant formula cost containment system. A State agency must submit a State Plan or Plan amendment if it is attempting to structure and justify a system that is not a single-supplier competitive bidding system for infant formula in accordance with §246.16a(d); is requesting a waiver for an infant formula cost containment system under §246.16a(e); or, is planning to change or modify its current system or implement a system for the first time. The amendment must be submitted at least 90 days before the proposed effective date of the system change. The plan amendment must include documentation for requests for waivers based on interference with efficient or effective program operations; a cost comparison analysis conducted under §246.16a(d)(2); and a description of the proposed cost containment system. If FNS disputes supporting plan amendment documentation, it will deem the Plan amendment incomplete under this paragraph (a), and will provide the State agency with a statement outlining disputed issues within 15 days of receipt of the Plan amendment. The State agency may not enter into any infant formula cost containment contract until the disputed issues are

resolved and FNS has given its consent. If necessary, FNS may grant a postponement of implementation of an infant formula cost containment system under § 246.16a(f). If at the end of the postponement period issues remain unresolved the State agency must proceed with a cost containment system judged by FNS to comply with the provisions of this part. If the State agency does not comply, it will be subject to the penalties set forth in § 246.16a(i);

(xi) *Vendor and farmer training.* The procedures the State agency will use to train vendors in accordance with § 246.12(i) and farmers. State agencies that intend to delegate any aspect of training to a local agency, contractor, or vendor representative must describe the State agency supervision and instructions that will be provided to ensure the uniformity and quality of vendor training.

(xii) *Food instrument and cash-value voucher security.* A description of the State agency's system for ensuring food instrument and cash-value voucher security in accordance with § 246.12(p);

(xiii) *Participant access determination criteria.* A description of the State agency's participant access determination criteria consistent with § 246.12(l); and

(xiv) *Mobile stores.* The special needs necessitating the authorization of mobile stores, if the State agency chooses to authorize such stores.

(xv) *Vendor cost containment.* A description of the State agency's vendor peer group system, competitive price criteria, and allowable reimbursement levels that demonstrates that the State agency is in compliance with the cost containment provisions in § 246.12(g)(4); information on non-profit above-50-percent vendors that the State agency has exempted from competitive price criteria and allowable reimbursement levels in § 246.12(g)(4)(iv); a justification and documentation supporting the State agency's request for an exemption from the vendor peer group requirement in § 246.12(g)(4), if applicable; and, if the State agency authorizes any above-50-percent vendors, information required by FNS to determine whether the State agency's vendor cost containment system meets the requirements in § 246.12(g)(4)(i).

(xvi) *Other cost containment systems.* A description of any other food cost containment systems (such as juice and cereal rebates and food item restrictions).

(xvii) *List of infant formula wholesalers, distributors, and retailers.* The policies and procedures for compiling and distributing to authorized WIC retail vendors, on an annual or more frequent basis, as required by § 246.12(g)(11), a list of infant formula wholesalers, distributors, and retailers licensed in the State in accordance with State law (including regulations), and infant formula manufacturers registered with the Food and Drug Administration (FDA) that provide infant formula. The vendor may provide only the authorized infant formula which the vendor has obtained from a source included on the list described in § 246.12(g)(11) to participants in exchange for food instruments specifying infant formula.

(15) The State agency's procedures for accepting and processing vendor applications outside of its established timeframes if the State agency determines there will otherwise be inadequate participant access to the WIC Program.

(16) The State agency's plans to prevent and identify dual participation in accordance with § 246.7(l)(1)(i) and (l)(1)(ii). In States where the Program and the CSFP operate in the same area, or where an Indian State agency operates a Program in the same area as a geographic State agency, a copy of the written agreement between the State agencies for the detection and prevention of dual participation shall be submitted.

(17) A description of the procedures the State will use to comply with the civil rights requirements described in § 246.8, including the processing of discrimination complaints.

(18) A copy of the State agency's fair hearing procedures for participants and the administrative appeal procedures for local agencies and food vendors.

(19) The State agency's plan to reach and enroll migrants, and eligible women in the early months of pregnancy.

(20) The State agency's plan to establish, to the extent practicable, that homeless facilities, and institutions if it chooses to make the Program available to them, meet the conditions established in §246.7(n)(1)(i) of this part, if residents of such accommodations are to be eligible to receive WIC Program benefits.

(21) A plan to provide program benefits to unserved infants and children under the care of foster parents, protective services, or child welfare authorities, including infants exposed to drugs perinatally.

(22) A plan to improve access to the Program for participants and prospective applicants who are employed or who reside in rural areas, by addressing their special needs through the adoption or revision of procedures and practices to minimize the time participants and applicants must spend away from work and the distances participants and applicants must travel. The State agency shall also describe any plans for issuance of food instruments and cash-value vouchers to employed or rural participants, or to any other segment of the participant population, through means other than direct participant pick-up, pursuant to §246.12(r)(4). Such description shall also include measures to ensure the integrity of Program services and fiscal accountability. The State agency will also describe its policy for approving transportation of participants to and from WIC clinics.

(23) Assurance that each local agency and any subgrantees of the State agency and/or local agencies are in compliance with the requirements of 7 CFR part 3017 regarding nonprocurement debarment/suspension.

(24) A description of the State agency's plans to provide and maintain a drug-free workplace in compliance with requirements in 7 CFR part 3021.

(25) A list of all organizations with which the State agency or its local agencies has executed or intends to execute a written agreement pursuant to §246.26(h) authorizing the use and disclosure of confidential applicant and participant information for non-WIC purposes.

(26) The State agency's policies and procedures for preventing conflicts of interest at the local agency or clinic level in a reasonable manner. At a minimum, this plan must prohibit the following WIC certification practices by local agency or clinic employees, or provide effective alternative policies and procedures when such prohibition is not possible:

(i) Certifying oneself;

(ii) Certifying relatives or close friends; or,

(iii) One employee determining eligibility for all certification criteria and issuing food instruments, cash-value vouchers or supplemental food for the same participant.

(27) The State agency's plan for collecting and maintaining information on cases of participant and employee fraud and abuse. Such information should include the nature of the fraud detected and the associated dollar losses.

(28) The State agency's Universal Identifier number.

(b) *Public comment.* The State agency shall establish a procedure under which members of the general public are provided an opportunity to comment on the development of the State agency plan.

(c) *Amendments.* At any time after approval, the State agency may amend the State Plan to reflect changes. The State agency shall submit the amendments to FNS for approval. The amendments shall be signed by the State designated official responsible for ensuring that the Program is operated in accordance with the State Plan.

(d) *Retention of copy.* A copy of the approved State Plan or the WIC portion of the State's composite plan of operations shall be kept on file at the State agency for public inspection.

[50 FR 6121, Feb. 13, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §246.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 246.5 Selection of local agencies.

(a) *General.* This section sets forth the procedures the State agency shall perform in the selection of local agencies and the expansion, reduction, and

disqualification of local agencies already in operation. In making decisions to intitiate, continue, and discontinue the participation of local agencies, the State agency shall give consideration to the need for Program benefits as delineated in the Affirmative Action Plan.

(b) *Application of local agencies.* The State agency shall require each agency, including subdivisions of the State agency, which desires approval as a local agency, to submit a written local agency application. After the receipt of an incomplete application, the State agency shall provide written notification to the applicant agency of the additional information needed. After the receipt of a complete application, the State agency shall notify the applicant agency in writing of the approval or disapproval of its application. When an application is disapproved, the State agency shall advise the applicant agency of the reasons for disapproval and of the right to appeal as set forth in § 246.18. When an agency submits an application and there are no funds to serve the area, the applicant agency shall be notified that there are currently no funds available for Program initiation or expansion. The applicant agency shall be notified by the State agency when funds become available.

(c) *Program initiation and expansion.* The State agency shall meet the following requirements concerning Program initiation and expansion:

(1) The State agency will consider the Affirmative Action Plan (see § 246.4(a)(5)) when funding local agencies and expanding existing operations, and may consider how much of the current need is being met at each priority level. The selection criteria cited in paragraph (d)(1) of this section shall be applied to each area or special population before eliminating that area from consideration and serving the next area of special population. The State agency shall consider the number of participants in each priority level being served by existing local agencies in determining when it is appropriate to move into additional areas in the Affirmative Action Plan or to expand existing operations in an area. Additionally, the State agency shall consider the total number of people potentially eligible in each area compared to the number being served.

(2) The State agency shall provide a written justification to FNS for not funding an agency to serve the highest priority area or special population. Such justification may include its inability to administer the Program, lack of interest expressed for operating the Program, or for those areas or special populations which are under consideration for expansion of an existing operation, a determination by the State agency that there is a greater need for funding an agency serving an area or special population not operating the Program. The State agency shall use the participant priority system in § 246.7 as a measurement of greater need in such determination.

(3) The State agency may fund more than one local agency to serve the same area or special population as long as more than one local agency is necessary to serve the full extent of need in that area or special population.

(d) *Local agency priority system.* The State agency shall establish standards for the selection of new local agencies. Such standards shall include the following considerations:

(1) The State agency shall consider the following priority system, which is based on the relative availability of health and administrative services, in the selection of local agencies:

(i) First consideration shall be given to a public or a private nonprofit health agency that will provide ongoing, routine pediatric and obstetric care and administrative services.

(ii) Second consideration shall be given to a public or a private nonprofit health or human service agency that will enter into a written agreement with another agency for either ongoing, routine pediatric and obstetric care or administrative services.

(iii) Third consideration shall be given to a public or private nonprofit health agency that will enter into a written agreement with private physicians, licensed by the State, in order to provide ongoing, routine pediatric and obstetric care to a specific category of participants (women, infants or children).

(iv) Fourth consideration shall be given to a public or private nonprofit

human service agency that will enter into a written agreement with private physicians, licensed by the State, to provide ongoing, routine pediatric and obstetric care.

(v) Fifth consideration shall be given to a public or private nonprofit health or human service agency that will provide ongoing, routine pediatric and obstetric care through referral to a health provider.

(2) The State agency must, when seeking new local agencies, publish a notice in the local media (unless it has received an application from a local public or nonprofit private health agency that can provide adequate services). The notice will include a brief explanation of the Program, a description of the local agency priority system (outlined in this paragraph (d)), and a request that potential local agencies notify the State agency of their interest. In addition, the State agency will contact all potential local agencies to make sure they are aware of the opportunity to apply. If an application is not submitted within 30 days, the State agency may then select a local agency in another area. If sufficient funds are available, a State agency will give notice and consider applications outside the local area at the same time.

(e) *Disqualification of local agencies.* (1) The State agency may disqualify a local agency—

(i) When the State agency determines noncompliance with Program regulations;

(ii) When the State's Program funds are insufficient to support the continued operation of all its existing local agencies at their current participation level; or

(iii) When the State agency determines, following a review of local agency credentials in accordance with paragraph (f) of this section, that another local agency can operate the Program more effectively and efficiently.

(2) The State agency may establish its own criteria for disqualification of local agencies. The State agency shall notify the local agency of any State-established criteria. In addition to any State established criteria, the State agency shall consider, at a minimum—

(i) The availability of other community resources to participants and the cost efficiency and cost effectiveness of the local agency in terms of both food and nutrition services and administration costs;

(ii) The percentages of participants in each priority level being served by the local agency and the percentage of need being met in each participant category;

(iii) The relative position of the area or special population served by the local agency in the Affirmative Action Plan;

(iv) The local agency's place in the priority system in paragraph (d)(1) of this section; and

(v) The capability of another local agency or agencies to accept the local agency's participants.

(3) When disqualifying a local agency under the Program, the State agency shall—

(i) Make every effort to transfer affected participants to another local agency without disruption of benefits;

(ii) Provide the affected local agency with written notice not less than 60 days in advance of the pending action which includes an explanation of the reasons for disqualification, the date of disqualification, and, except in cases of the expiration of a local agency's agreement, the local agency's right to appeal as set forth in § 246.18; and

(iii) Ensure that the action is not in conflict with any existing written agreements between the State and the local agency.

(f) *Periodic review of local agency qualifications.* The State agency may conduct periodic reviews of the qualifications of authorized local agencies under its jurisdiction. Based upon the results of such reviews the State agency may make appropriate adjustments among the participating local agencies, including the disqualification of a local agency when the State agency determines that another local agency can operate the Program more effectively and efficiently. In conducting such reviews, the State agency shall consider the factors listed in paragraph (e)(2) of this section in addition to whatever criteria it may develop. The State agency shall implement the procedures established in paragraph (e)(3) of this

section when disqualifying a local agency.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985; 65 FR 53527, Sept. 5, 2000; 71 FR 56728, Sept. 27, 2006]

### § 246.6 Agreements with local agencies.

(a) *Signed written agreements.* The State agency shall enter into a signed written agreement with each local agency, including subdivisions of the State agency, which sets forth the local agency's responsibilities for Program operations as prescribed in this part. Copies of the agreement shall be kept on file at both the State and local agencies for purposes of review and audit in accordance with §§ 246.19 and 246.20. Neither the State agency nor the local agency has an obligation to renew the agreement. The expiration of an agreement is not subject to appeal. The State agency shall provide local agencies with advance written notice of the expiration of an agreement as required under §§ 246.5(e)(3)(ii) and 246.18(b)(1).

(b) *Provisions of agreement.* The agreement between the State agency and each local agency shall ensure that the local agency—

(1) Complies with all the fiscal and operational requirements prescribed by the State agency pursuant to this part, 7 CFR part 3016, the debarment and suspension requirements of 7 CFR part 3017, if applicable, the lobbying restrictions of 7 CFR part 3018, and FNS guidelines and instructions, and provides on a timely basis to the State agency all required information regarding fiscal and Program information;

(2) Has a competent professional authority on the staff of the local agency and the capabilities necessary to perform the certification procedures;

(3) Makes available appropriate health services to participants and informs applicants of the health services which are available;

(4) Prohibits smoking in the space used to carry out the WIC Program during the time any aspect of WIC services are performed;

(5) Has a plan for continued efforts to make health services available to participants at the clinic or through written agreements with health care providers when health services are provided through referral;

(6) Provides nutrition education services to participants, in compliance with § 246.11 and FNS guidelines and instructions;

(7) Implements a food delivery system prescribed by the State agency pursuant to § 246.12 and approved by FNS;

(8) Maintains complete, accurate, documented and current accounting of all Program funds received and expended;

(9) Maintains on file and has available for review, audit, and evaluation all criteria used for certification, including information on the area served, income standards used, and specific criteria used to determine nutritional risk; and

(10) Does not discriminate against persons on the grounds of race, color, national origin, age, sex or handicap; and compiles data, maintains records and submits reports as required to permit effective enforcement of the nondiscrimination laws.

(c) *Indian agencies.* Each Indian State agency shall ensure that all local agencies under its jurisdiction serve primarily Indian populations.

(d) *Health and human service agencies.* When a health agency and a human service agency comprise the local agency, both agencies shall together meet all the requirements of this part and shall enter into a written agreement which outlines all Program responsibilities of each agency. The agreement shall be approved by the State agency during the application process and shall be on file at both the State and local agency. No Program funds shall be used to reimburse the health agency for the health services provided. However, costs of certification borne by the health agency may be reimbursed.

(e) *Health or human service agencies and private physicians.* When a health or human service agency and private physician(s) comprise the local agency, all parties shall together meet all of the requirements of this part and shall enter into a written agreement which outlines the inter-related Program responsibilities between the physician(s) and the local agency. The agreement shall be approved by the State agency

during the application process and shall be on file at both agencies. The local agency shall advise the State agency on its application of the name(s) and address(es) of the private physician(s) participating and obtain State agency approval of the written agreement. A competent professional authority on the staff of the health or human service agency shall be responsible for the certification of participants. No Program funds shall be used to reimburse the private physician(s) for the health services provided. However, costs of certification data provided by the physician(s) may be reimbursed.

(f) *Outreach/Certification In Hospitals.* The State agency shall ensure that each local agency operating the program within a hospital and/or that has a cooperative arrangement with a hospital:

(1) Advises potentially eligible individuals that receive inpatient or outpatient prenatal, maternity, or postpartum services, or that accompany a child under the age of 5 who receives well-child services, of the availability of program services; and

(2) To the extent feasible, provides an opportunity for individuals who may be eligible to be certified within the hospital for participation in the WIC Program.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11500, Mar. 11, 1994; 63 FR 63974, Nov. 18, 1998]

## Subpart C—Participant Eligibility

### § 246.7 Certification of participants.

(a) *Integration with health services.* To lend administrative efficiency and participant convenience to the certification process, whenever possible, Program intake procedures shall be combined with intake procedures for other health programs or services administered by the State and local agencies. Such merging may include verification procedures, certification interviews, and income computations. Local agencies shall maintain and make available for distribution to all pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children applying for and participating in the Program a list of local resources for drug and other harmful substance abuse counseling and treatment.

(b) *Program referral and access.* State and local agencies shall provide WIC Program applicants and participants or their designated proxies with information on other health-related and public assistance programs, and when appropriate, shall refer applicants and participants to such programs.

(1) The State agency shall provide each local WIC agency with materials showing the maximum income limits, according to family size, applicable to pregnant women, infants, and children up to age 5 under the medical assistance program established under Title XIX of the Social Security Act (in this section, referred to as the "Medicaid Program"). The local agency shall, in turn, provide to adult individuals applying or reapplying for the WIC Program for themselves or on behalf of others, written information about the Medicaid Program. If such individuals are not currently participating in Medicaid but appear to have family income below the applicable maximum income limits for the program, the local agency shall also refer these individuals to Medicaid, including the referral of infants and children to the appropriate entity in the area authorized to determine eligibility for early and periodic screening, diagnostic, and treatment (EPSDT) services, and, the referral of pregnant women to the appropriate entity in the area authorized to determine presumptive eligibility for the Medicaid Program, if such determinations are being offered by the State.

(2) State agencies shall provide WIC services at community and migrant health centers, Indian Health Services facilities, and other federally health care supported facilities established in medically underserved areas to the extent feasible.

(3) Local agencies may provide information about other potential sources of food assistance in the local area to adult individuals applying or reapplying in person for the WIC Program for themselves or on behalf of others, when such applicants cannot be served because the Program is operating at capacity in the local area.

(4) Each local agency that does not routinely schedule appointments shall

schedule appointments for employed adult individuals seeking to apply or reapply for participation in the WIC Program for themselves or on behalf of others so as to minimize the time such individuals are absent from the workplace due to such application.

(5) Each local agency shall attempt to contact each pregnant woman who misses her first appointment to apply for participation in the Program in order to reschedule the appointment. At the time of initial contact, the local agency shall request an address and telephone number where the pregnant woman can be reached.

(c) *Eligibility criteria and basic certification procedures.* (1) To qualify for the Program, infants, children, and pregnant, postpartum, and breastfeeding women must:

(i) Reside within the jurisdiction of the State (except for Indian State agencies). Indian State agencies may establish a similar requirement. All State agencies may determine a service area for any local agency, and may require that an applicant reside within the service area. However, the State agency may not use length of residency as an eligibility requirement.

(ii) Meet the income criteria specified in paragraph (d) of this section.

(iii) Meet the nutritional risk criteria specified in paragraph (e) of this section.

(2)(i) At certification, the State or local agency must require each applicant to present proof of residency (i.e., location or address where the applicant routinely lives or spends the night) and proof of identity. The State or local agency must also check the identity of participants, or in the case of infants or children, the identity of the parent or guardian, or proxies when issuing food, cash-value vouchers or food instruments. The State agency may authorize the certification of applicants when no proof of residency or identity exists (such as when an applicant or an applicant's parent is a victim of theft, loss, or disaster; a homeless individual; or a migrant farmworker). In these cases, the State or local agency must require the applicant to confirm in writing his/her residency or identity. Further, an individual residing in a remote Indian or Native village or an individual served by an Indian tribal organization and residing on a reservation or pueblo may establish proof of residency by providing the State agency their mailing address and the name of the remote Indian or Native village.

(ii) For a State agency opting to require proof of pregnancy, the State agency may issue benefits to applicants who claim to be pregnant (assuming that all other eligibility criteria are met) but whose conditions (as pregnant) are not visibly noticeable and do not have documented proof of pregnancy at the time of the certification interview and determination. The State agency should then allow a reasonable period of time, not to exceed 60 days, for the applicant to provide the requested documentation. If such documentation is not provided as requested, the woman can no longer be considered categorically eligible, and the local agency would then be justified in terminating the woman's WIC participation in the middle of a certification period.

(3) A State, a State agency, and an Indian Tribal Organization (including, an Indian tribe, band, or group recognized by the Department of the Interior; or an intertribal council or group which is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior and which has an ongoing relationship with such tribes, bands or groups for other purposes and has contracted with them to administer the Program) serving as a State agency, may limit WIC participation to United States citizens, nationals, and qualified aliens as these terms are defined in the Immigration and Nationality Laws (8 U.S.C. 1101 et seq.). State agencies that implement this option shall inform FNS of their intentions and provide copies of the procedures they will establish regarding the limitation of WIC services to United States citizens, nationals, and qualified aliens.

(4) The certification procedure shall be performed at no cost to the applicant.

(d) *Income criteria and income eligibility determinations.* The State agency

shall establish, and provide local agencies with, income guidelines, definitions, and procedures to be used in determining an applicant's income eligibility for the Program.

(1) *Income eligibility guidelines.* The State agency may prescribe income guidelines either equaling the income guidelines established under section 9 of the National School Lunch Act for reduced-price school meals or identical to State or local guidelines for free or reduced-price health care. However, in conforming Program income guidelines to health care guidelines, the State agency shall not establish Program guidelines which exceed the guidelines for reduced-price school meals or are less than 100 percent of the revised poverty income guidelines issued annually by the Department of Health and Human Services. Program applicants who meet the requirements established by paragraph (d)(2)(vi)(A) of this section shall not be subject to the income limits established by State agencies under this paragraph.

(i) *Local agency income eligibility guidelines.* Different guidelines may be prescribed for different local agencies within the State provided that the guidelines are the ones used by the local agencies for determining eligibility for free or reduced-price health care.

(ii) *Annual adjustments in the income guidelines.* On or before June 1 each year, FNS will announce adjustments in the income guidelines for reduced-price meals under section 9 of the National School Lunch Act, based on annual adjustments in the revised poverty income guidelines issued by the Department of Health and Human Services.

(iii) Implementation of the income guidelines. On or before July 1 each year, each State agency shall announce and transmit to each local agency the State agency's family size income guidelines, unless changes in the poverty income guidelines issued by the Department of Health and Human Services do not necessitate changes in the State or local agency's income guidelines. The State agency may implement revised guidelines concurrently with the implementation of income guidelines under the Medicaid program established under Title XIX of the Social Security Act (42 U.S.C. 1396 of et seq.). The State agency shall ensure that conforming adjustments are made, if necessary, in local agency income guidelines. The local agency shall implement (revised) guidelines not later than July 1 of each year for which such guidelines are issued by the State.

(2) *Income eligibility determinations.* The State agency shall ensure that local agencies determine income through the use of a clear and simple application form provided or approved by the State agency.

(i) *Timeframes for determining income.* In determining the income eligibility of an applicant, the State agency may instruct local agencies to consider the income of the family during the past 12 months and the family's current rate of income to determine which indicator more accurately reflects the family's status. However, persons from families with adult members who are unemployed shall be eligible based on income during the period of unemployment if the loss of income causes the current rate of income to be less than the State or local agency's income guidelines for Program eligibility.

(ii) *Definition of* "*Income*". If the State agency uses the National School Lunch reduced-priced meal income guidelines, as specified in paragraph (d)(1) of this section, it shall use the following definition of income: Income for the purposes of this part means gross cash income before deductions for income taxes, employees' social security taxes, insurance premiums, bonds, etc. Income includes the following—

(A) Monetary compensation for services, including wages, salary, commissions, or fees;

(B) Net income from farm and nonfarm self-employment;

(C) Social Security benefits;

(D) Dividends or interest on savings or bonds, income from estates or trusts, or net rental income;

(E) Public assistance or welfare payments;

(F) Unemployment compensation;

(G) Government civilian employee or military retirement or pensions or veterans' payments;

(H) Private pensions or annuities;

(I) Alimony or child support payments;

(J) Regular contributions from persons not living in the household;

(K) Net royalties; and

(L) Other cash income. Other cash income includes, but is not limited to, cash amounts received or withdrawn from any source including savings, investments, trust accounts and other resources which are readily available to the family.

(iii) *Use of a State or local health care definition of "Income".* If the State agency uses State or local free or reduced-price health care income guidelines, it will ensure that the definitions of income (see paragraph (d)(2)(ii) of this section), family (see §246.2) and allowable exclusions from income (see paragraph (d)(2)(iv) of this section) are used uniformly to determine an applicant's income eligibility. This ensures that households with a gross income in excess of 185 percent of the Federal income guidelines (see paragraph (d)(1) of this section) are not eligible for Program benefits. The exception to this requirement is persons who are also income eligible under other programs (see paragraph (d)(2)(vi) of this section).

(iv) *Income exclusions.* (A) In determining income eligibility, the State agency may exclude from consideration as income any:

(*1*) Basic allowance for housing received by military services personnel residing off military installations or in privatized housing, whether on- or off-base; and

(*2*) Cost-of-living allowance provided under 37 U.S.C. 405, to a member of a uniformed service who is on duty outside the contiguous states of the United States.

(B) The value of inkind housing and other inkind benefits, shall be excluded from consideration as income in determining an applicant's eligibility for the program.

(C) Loans, not including amounts to which the applicant has constant or unlimited access.

(D) Payments or benefits provided under certain Federal programs or acts are excluded from consideration as income by legislative prohibition. The payments or benefits which must be excluded from consideration as income include, but are not limited to:

(*1*) Reimbursements from the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, sec. 216, 42 U.S.C. 4636);

(*2*) Any payment to volunteers under Title I (VISTA and others) and Title II (RSVP, foster grandparents, and others) of the Domestic Volunteer Service Act of 1973 (Pub. L. 93–113, sec. 404(g), 42 U.S.C. 5044(g)) to the extent excluded by that Act;

(*3*) Payment to volunteers under section 8(b)(1)(B) of the Small Business Act (SCORE and ACE) (Pub. L. 95–510, sec. 101, 15 U.S.C. 637(b)(1)(D));

(*4*) Income derived from certain submarginal land of the United States which is held in trust for certain Indian tribes (Pub. L. 94–114, sec. 6, 25 U.S.C. 459e);

(*5*) Payments received under the Job Training Partnership Act (Pub. L. 97–300, sec. 142(b), 29 U.S.C. 1552(b));

(*6*) Income derived from the disposition of funds to the Grand River Band of Ottawa Indians (Pub. L. 94–540, sec. 6);

(*7*) Payments received under the Alaska Native Claims Settlement Act (Pub. L. 100–241, sec. 15, 43 U.S.C. sec. 1626(c));

(*8*) The value of assistance to children or their families under the National School Lunch Act, as amended (Pub. L. 94–105, sec. 9(d), 42 U.S.C. sec. 1760(e)), the Child Nutrition Act of 1966 (Pub. L. 89–642, sec. 11(b), 42 U.S.C. sec. 1780(b)), and the Food Stamp Act of 1977 (Pub. L. 95–113, sec. 1301, 7 U.S.C. sec. 2017(b));

(*9*) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescalero Reservation (Pub. L. 95–433, sec. 2, 25 U.S.C. 609c–1);

(*10*) Payments to the Passamaquoddy Tribe and the Penobscot Nation or any of their members received pursuant to the Maine Indian Claims Settlement Act of 1980 (Pub. L. 96–420, sec. 6, 9(c), 25 U.S.C. 1725(i), 1728(c));

(*11*) Payments under the Low-income Home Energy Assistance Act, as amended (Pub. L. 99–125, sec. 504(c), 42 U.S.C. sec. 8624(f));

(*12*) Student financial assistance received from any program funded in whole or part under Title IV of the Higher Education Act of 1965, including the Pell Grant, Supplemental Educational Opportunity Grant, State Student Incentive Grants, National Direct Student Loan, PLUS, College Work Study, and Byrd Honor Scholarship programs, which is used for costs described in section 472 (1) and (2) of that Act (Pub. L. 99–498, section 479B, 20 U.S.C. 1087uu). The specified costs set forth in section 472 (1) and (2) of the Higher Education Act are tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including the costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study; and an allowance for books, supplies, transportation, and miscellaneous personal expenses for a student attending the institution on at least a half-time basis, as determined by the institution. The specified costs set forth in section 472 (1) and (2) of the Act are those costs which are related to the costs of attendance at the educational institution and do not include room and board and dependent care expenses;

(*13*) Payments under the Disaster Relief Act of 1974, as amended by the Disaster Relief and Emergency Assistance Amendments of 1989 (Pub. L. 100–707, sec. 105(i), 42 U.S.C. sec. 5155(d));

(*14*) Effective July 1, 1991, payments received under the Carl D. Perkins Vocational Education Act, as amended by the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990 (Pub. L. 101–392, sec. 501, 20 U.S.C. sec. 2466d);

(*15*) Payments pursuant to the Agent Orange Compensation Exclusion Act (Pub. L. 101–201, sec. 1);

(*16*) Payments received for Wartime Relocation of Civilians under the Civil Liberties Act of 1988 (Pub. L. 100–383, sec. 105(f)(2), 50 App. U.S.C. sec. 1989b–4(f)(2));

(*17*) Value of any child care payments made under section 402(g)(1)(E) of the Social Security Act, as amended by the Family Support Act (Pub. L. 100–485, sec. 301, 42 U.S.C. sec. 602 (g)(1)(E));

(*18*) Value of any "at-risk" block grant child care payments made under section 5081 of Pub. L. 101–508, which amended section 402(i) of the Social Security Act;

(*19*) Value of any child care provided or paid for under the Child Care and Development Block Grant Act, as amended (Pub. L. 102–586, Sec. 8(b)), 42 U.S.C. 9858q);

(*20*) Mandatory salary reduction amount for military service personnel which is used to fund the Veteran's Educational Assistance Act of 1984 (GI Bill), as amended (Pub. L. 99–576, sec. 303(a)(1), 38 U.S.C. sec. 1411 (b));

(*21*) Payments received under the Old Age Assistance Claims Settlement Act, except for per capita shares in excess of $2,000 (Pub. L. 98–500, sec. 8, 25 U.S.C. sec. 2307);

(*22*) Payments received under the Cranston-Gonzales National Affordable Housing Act, unless the income of the family equals or exceeds 80 percent of the median income of the area (Pub. L. 101–625, sec. 522(i)(4), 42 U.S.C. sec. 1437f nt);

(*23*) Payments received under the Housing and Community Development Act of 1987, unless the income of the family increases at any time to not less than 50 percent of the median income of the area (Pub. L. 100–242, sec. 126(c)(5)(A), 25 U.S.C. sec. 2307);

(*24*) Payments received under the Sac and Fox Indian claims agreement (Pub. L. 94–189, sec. 6);

(*25*) Payments received under the Judgment Award Authorization Act, as amended (Pub. L. 97–458, sec. 4, 25 U.S.C. sec. 1407 and Pub. L. 98–64, sec. 2(b), 25 U.S.C. sec. 117b(b));

(*26*) Payments for the relocation assistance of members of Navajo and Hopi Tribes (Pub. L. 93–531, sec. 22, 22 U.S.C. sec. 640d-21);

(*27*) Payments to the Turtle Mountain Band of Chippewas, Arizona (Pub. L. 97–403, sec. 9);

(*28*) Payments to the Blackfeet, Grosventre, and Assiniboine tribes (Montana) and the Papago (Arizona) (Pub. L. 97–408, sec. 8(d));

(*29*) Payments to the Assiniboine Tribe of the Fort Belknap Indian community and the Assiniboine Tribe of the Fort Peck Indian Reservation (Montana) (Pub. L. 98–124, sec. 5);

(*30*) Payments to the Red Lake Band of Chippewas (Pub. L. 98–123, sec. 3);

(*31*) Payments received under the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act (Pub. L. 99–346, sec. 6(b)(2));

(*32*) Payments to the Chippewas of Mississippi (Pub. L. 99–377, sec. 4(b));

(*33*) Payments received by members of the Armed Forces and their families under the Family Supplemental Subsistence Allowance from the Department of Defense (Pub. L. 109–163, sec. 608); and

(*34*) Payments received by property owners under the National Flood Insurance Program (Pub. L. 109–64).

(v) *Are applicants required to document income eligibility?* (A) *Adjuctively/automatically income eligible applicants.* The State or local agency must require applicants determined to be adjunctively or automatically income eligible to document their eligibility for the program that makes them income eligible as set forth in paragraph (d)(2)(vi) of this section.

(B) *Other applicants.* The State or local agency must require all other applicants to provide documentation of family income at certification.

(C) *Exceptions.* The income documentation requirement does not apply to an individual for whom the necessary documentation is not available or an individual such as a homeless woman or child for whom the agency determines the income documentation requirement would present an unreasonable barrier to participation. Examples of individuals for whom the necessary documentation is not available include those with no income or no proof of income (such as an applicant or applicant's parent who is a migrant farmworker or other individual who works for cash). These are the only exceptions that may be used. When using these exceptions, the State or local agency must require the applicant to sign a statement specifying why he/she cannot provide documentation of income. Such a statement is not required when there is no income.

(D) *Verification.* The State or local agency may require verification of information it determines necessary to confirm income eligibility for Program benefits.

(vi) *Adjunct or automatic income eligibility.* (A) The State agency shall accept as income-eligible for the Program any applicant who documents that he/she is:

(*1*) Certified as fully eligible to receive food stamps under the Food Stamp Act of 1977, or certified as fully eligible, or presumptively eligible pending completion of the eligibility determination process, to receive Temporary Assistance for Needy Families (TANF) under Part A of Title IV of the Social Security Act or Medical Assistance (i.e., Medicaid) under Title XIX of the Social Security Act; or

(*2*) A member of a family that is certified eligible to receive assistance under TANF, or a member of a family in which a pregnant woman or an infant is certified eligible to receive assistance under Medicaid.

(B) The State agency may accept, as evidence of income within Program guidelines, documentation of the applicant's participation in State-administered programs not specified in this paragraph that routinely require documentation of income, provided that those programs have income eligibility guidelines at or below the State agency's Program income guidelines.

(C) Persons who are adjunctively income eligible, as set forth in paragraphs (d)(2)(vi)(A) of this section, shall not be subject to the income limits established under paragraph (d)(1) of this section.

(vii) *Income eligibility of pregnant women.* A pregnant woman who is ineligible for participation in the program because she does not meet income guidelines shall be considered to have satisfied the income guidelines if the guidelines would be met by increasing the number of individuals in her family by the number of embryos or fetuses in utero. The same increased family size may also be used for any of the pregnant woman's categorically eligible family members. The State agency shall allow applicants to waive this increase in family size.

(viii) *Income eligibility of Indian applicants.* If an Indian State agency (or a non-Indian State agency which acts on behalf of a local agency operated by an Indian organization or the Indian Health Service) submits census data or

other reliable documentation demonstrating to FNS that the majority of the Indian households in a local agency's service area have incomes at or below the State agency's income eligibility guidelines, FNS may authorize the State agency to approve the use of an income certification system under which the local Indian agency shall inform each Indian applicant household of the maximum family income allowed for that applicant's family size. The local agency shall ensure that the applicant, or the applicant's parent or caretaker, signs a statement that the applicant's family income does not exceed the maximum. The local agency may verify the income eligibility of any Indian applicant.

(ix) *Are instream migrant farmworkers and their family members required to document income eligibility?* Certain instream migrant farmworkers and their family members with expired Verification of Certification cards shall be declared to satisfy the State agency's income standard and income documentation requirements. Such cases include when income of that instream migrant farmworker is determined at least once every 12 months. Such families shall satisfy the income criteria in any State for any subsequent certification while the migrant is instream during the 12-month period following the determination. The determination can occur either in the migrant's home base area before the migrant has entered the stream for a particular agricultural season, or in an instream area during the agricultural season.

(e) *Nutritional risk.* To be certified as eligible for the Program, applicants who meet the Program's eligibility standards specified in paragraph (c) of this section must be determined to be at nutritional risk. A competent professional authority on the staff of the local agency shall determine if a person is at nutritional risk through a medical and/or nutritional assessment. This determination may be based on referral data submitted by a competent professional authority not on the staff of the local agency. Nutritional risk data shall be documented in the participant's file and shall be used to assess an applicant's nutritional status and risk, tailor the food package to address nutritional needs, design appropriate nutrition education, and make referrals to health and social services for follow-up, as necessary and appropriate.

Except as stated in paragraph (e)(1)(v) of this section, at least one determination of nutritional risk must be documented at the time of certification in order for an income eligible applicant to receive WIC benefits.

(1) *Determination of nutritional risk.* (i) *Required nutritional risk data.* (A) At a minimum, height or length and weight measurements shall be performed and/or documented in the applicant's file at the time of certification. In addition, a hematological test for anemia such as a hemoglobin, hematocrit, or free erythrocyte protoporphyrin test shall be performed and/or documented at certification for applicants with no other nutritional risk factor present. For applicants with a qualifying nutritional risk factor present at certification, such test shall be performed and/or documented within 90 days of the date of certification. However, for breastfeeding women 6–12 months postpartum, such hematological tests are not required if a test was performed after the termination of their pregnancy. In addition, such hematological tests are not required, but are permitted, for infants under nine months of age. All infants nine months of age and older (who have not already had a hematological test performed or obtained, between the ages of six and nine months), shall have a hematological test performed between nine and twelve months of age or obtained from referral sources. This hematological test does not have to occur within 90 days of the date of certification. Only one test is required for children between 12 and 24 months of age, and this test should be done 6 months after the infant test, if possible. At the State or local agency's discretion, the hematological test is not required for children ages two and older who were determined to be within the normal range at their last certification. However, the hematological test shall be performed on such children at least once every 12 months. Hematological test data submitted by a competent professional authority not

on the staff of the local agency may be used to establish nutritional risk. However, such referral hematological data must:

(*1*) Be reflective of a woman applicant's category, meaning the test must have been taken for pregnant women during pregnancy and for postpartum or breastfeeding women following termination of pregnancy;

(*2*) Conform to the anemia screening schedule for infants and children as outlined in paragraph (e)(1)(ii)(B) of this section; and

(*3*) Conform to recordkeeping requirements as outlined in paragraph (i)(4) of this section.

(B) Height or length and weight measurements and, with the exceptions specified in paragraph (e)(1)(v) of this section, hematological tests, shall be obtained for all participants, including those who are determined at nutritional risk based solely on the established nutritional risk status of another person, as provided in paragraphs (e)(1)(iv) and (e)(1)(v) of this section.

(ii) *Timing of nutritional risk data.* (A) *Weight and height or length.* Weight and height or length shall be measured not more than 60 days prior to certification for program participation.

(B) *Hematological test for anemia.* (*1*) For pregnant, breastfeeding, and postpartum women, and child applicants, the hematological test for anemia shall be performed or obtained from referral sources at the time of certification or within 90 days of the date of certification. The hematological test for anemia may be deferred for up to 90 days from the time of certification for applicants who have at least one qualifying nutritional risk factor present at the time of certification. If no qualifying risk factor is identified, a hematological test for anemia must be performed or obtained from referral sources (with the exception of presumptively eligible pregnant women).

(*2*) Infants nine months of age and older (who have not already had a hematological test performed, between six and nine months of age, by a competent professional authority or obtained from referral sources), shall between nine and twelve months of age have a hematological test performed or obtained from referral sources. Such a test may be performed more than 90 days after the date of certification.

(*3*) For pregnant women, the hematological test for anemia shall be performed during their pregnancy. For persons certified as postpartum or breastfeeding women, the hematological test for anemia shall be performed after the termination of their pregnancy. For breastfeeding women who are 6–12 months postpartum, no additional blood test is necessary if a test was performed after the termination of their pregnancy. The participant or parent/guardian shall be informed of the test results when there is a finding of anemia, and notations reflecting the outcome of the tests shall be made in the participant's file. Nutrition education, food package tailoring, and referral services shall be provided to the participant or parent/guardian, as necessary and appropriate.

(iii) *Breastfeeding dyads.* A breastfeeding woman may be determined to be a nutritional risk if her breastfed infant has been determined to be a nutritional risk. A breastfed infant can be certified based on the mother's medical and/or nutritional assessment. A breastfeeding mother and her infant shall be placed in the highest priority level for which either is qualified.

(iv) *Infants born to WIC mothers or women who were eligible to participate in WIC.* An infant under six months of age may be determined to be at nutritional risk if the infant's mother was a Program participant during pregnancy or of medical records document that the woman was at nutritional risk during pregnancy because of detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements or other documented nutritionally related medical conditions.

(v) *Presumptive eligibility for pregnant women.* A pregnant woman who meets the income eligibility standards may be considered presumptively eligible to participate in the program, and may be certified immediately without an evaluation of nutritional risk for a period up to 60 days. A nutritional risk evaluation of such woman shall be completed not later than 60 days after the

woman is certified for participation. A hematological test for anemia is not required to be performed within the 60-day period, but rather within 90 days, unless the nutritional risk evaluation performed does not identify a qualifying risk factor. If no qualifying risk factor is identified, a hematological test for anemia must be performed or obtained from referral sources before the 60-day period elapses. Under the subsequent determination process, if the woman does not meet any qualifying nutritional risk criteria, including anemia criteria, the woman shall be determined ineligible and may not participate in the program for the reference pregnancy after the date of the determination. Said applicant may subsequently reapply for program benefits and if found to be both income eligible and at qualifying nutritional risk may participate in the program. Persons found ineligible to participate in the program under this paragraph shall be advised in writing of the ineligibility, of the reasons for the ineligibility, and of the right to a fair hearing. The reasons for the ineligibility shall be properly documented and shall be retained on file at the local agency. In addition, if the nutritional risk evaluation is not completed within the 60-day timeframe, the woman shall be determined ineligible.

(vi) *Regression.* A WIC participant who is reapplying for WIC benefits may be considered to be at nutritional risk in the next certification period if the competent professional authority determines that the applicant's nutritional status may regress to the nutritional risk condition(s) certified for in the previous certification period without supplemental foods and/or WIC nutrition services, and if the nutritional risk condition(s) certified for in the previous certification period is/are appropriate to the category of the participant in the subsequent certification based on regression. However, such applicants shall not be considered at nutritional risk based on the possibility of regression for consecutive certification periods. Applicants who are certified based on the possibility of regression should be placed either in the same priority for which they were certified in the previous certification period; a priority level lower than the priority level assigned in the previous certification period, consistent with §246.7(e)(4); or in Priority VII, if the State agency is using that priority level.

(2) *Nutritional risk criteria.* The following are examples of nutritional risk conditions which may be used as a basis for certification. These examples include—

(i) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements, such as anemia, underweight, overweight, abnormal patterns of weight gain in a pregnant woman, low birth weight in an infant, or stunting in an infant or child;

(ii) Other documented nutritionally related medical conditions, such as clinical signs of nutritional deficiencies, metabolic disorders, pre-eclampsia in pregnant women, failure to thrive in an infant, chronic infections in any person, alcohol or drug abuse or mental retardation in women, lead poisoning, history of high risk pregnancies or factors associated with high risk pregnancies (such as smoking; conception before 16 months postpartum; history of low birth weight, premature births, or neonatal loss; adolescent pregnancy; or current multiple pregnancy) in pregnant women, or congenital malformations in infants or children, or infants born of women with alcohol or drug abuse histories or mental retardation.

(iii) Dietary deficiencies that impair or endanger health, such as inadequate dietary patterns assessed by a 24-hour dietary recall, dietary history, or food frequency checklist; and

(iv) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, such as homelessness or migrancy.

(3) *Nutritional risk priorities.* In determining nutritional risk, the State agency shall develop and include in its State Plan, specific risk conditions by priority level with indices for identifying these conditions. The criteria shall be used statewide and in accordance with the priority system as set forth in paragraph (e)(4) of this section.

(4) *Nutritional risk priority system.* The competent professional authority shall fill vacancies which occur after a local agency has reached its maximum participation level by applying the following participant priority system to persons on the local agency's waiting list. Priorities I through VI shall be utilized in all States. The State agency may, at its discretion, expand the priority system to include Priority VII. The State agency may set income or other sub-priority levels within any of these seven priority levels. The State agency may expand Priority III, IV, or V to include high-risk postpartum women. The State agency may place pregnant or breastfeeding women and infants who are at nutritional risk solely because of homelessness or migrancy in Priority IV; children who are at nutritional risk solely because of homelessness or migrancy in Priority V; and postpartum women who are at nutritional risk solely because of homelessness or migrancy in Priority VI, *OR*, the State agency may place pregnant, breastfeeding or postpartum women, infants, and children who are at nutritional risk solely because of homelessness or migrancy in Priority VII.

(i) *Priority I.* Pregnant women, breastfeeding women and infants at nutritional risk as demonstrated by hematological or anthropometric measurements, or other documented nutritionally related medical conditions which demonstrate the need for supplemental foods.

(ii) *Priority II.* Except those infants who qualify for Priority I, infant up to six months of age of Program participants who participated during pregnancy, and infants up to six months of age born of women who were not Program participants during pregnancy but whose medical records document that they were at nutritional risk during pregnancy due to nutritional conditions detectable by biochemical or anthropometric measurements or other documented nutritionally related medical conditions which demonstrated the person's need for supplemental foods.

(iii) *Priority III.* Children at nutritional risk as demonstrated by hematological or anthropometric measurements or other documented medical conditions which demonstrate the child's need for supplemental foods.

(iv) *Priority IV.* Pregnant women, breastfeeding women, and infants at nutritional risk because of an inadequate dietary pattern.

(v) *Priority V.* Children at nutritional risk because of an inadequate dietary pattern.

(vi) *Priority VI.* Postpartum women at nutritional risk.

(vii) *Priority VII.* Individuals certified for WIC solely due to homelessness or migrancy and, at State agency option, in accordance with the provisions of paragraph (e)(1)(vi) of this section, previously certified participants who might regress in nutritional status without continued provision of supplemental foods.

(f) *Processing standards.* The local agencies shall process applicants within the following timeframes:

(1) *Waiting lists.* When the local agency is serving its maximum caseload, the local agency shall maintain a waiting list of individuals who visit the local agency to express interest in receiving Program benefits and who are likely to be served. However, in no case shall an applicant who requests placement on the waiting list be denied inclusion. State agencies may establish a policy which permits or requires local agencies to accept telephone requests for placement on the waiting list. The waiting list shall include the person's name, address or phone number, status (e.g., pregnant, breastfeeding, age of applicant), and the date he or she was placed on the waiting list. Individuals shall be notified of their placement on a waiting list within 20 days after they visit the local agency during clinic office hours to request Program benefits. For those State agencies establishing procedures to accept telephone requests for placement on a waiting list, individuals shall be notified of their placement on a waiting list within 20 days after contacting the local agency by phone. The competent professional authority shall apply the participant priority system as specified in paragraph (e)(4) of this section to the waiting list to ensure that the highest priority persons become Program participants first when caseload slots become available.

(2) *Timeframes for processing applicants.* (i) When the local agency is not serving its maximum caseload, the local agency shall accept applications, make eligibility determinations, notify the applicants of the decisions made and, if the applicants are to be enrolled, issue food, cash-value vouchers or food instruments. All of these actions shall be accomplished within the timeframes set forth below.

(ii) The processing timeframes shall begin when the individual visits the local agency during clinic office hours to make an oral or written request for Program benefits. To ensure that accurate records are kept of the date of such requests, the local agency shall, at the time of each request, record the applicant's name, address and the date. The remainder of the information necessary to determine eligibility shall be obtained by the time of certification. Medical data taken prior to certification may be used as provided in paragraph (g)(4) of this section.

(iii) The local agency shall act on applications within the following timeframes:

(A) Special nutritional risk applicants shall be notified of their eligibility or ineligibility within 10 days of the date of the first request for Program benefits; except that State agencies may provide an extension of the notification period to a maximum of 15 days for those local agencies which make written request, including a justification of the need for an extension. The State agency shall establish criteria for identifying categories of persons at special nutritional risk who require expedited services. At a minimum, however, these categories shall include pregnant women eligible as Priority I participants, and migrant farmworkers and their family members who soon plan to leave the jurisdiction of the local agency.

(B) All other applicants shall be notified of their eligibility or ineligibility within 20 days of the date of the first request for Program benefits.

(iv) Each local agency using a retail purchase system shall issue a food instrument(s) and if applicable cash-value voucher(s) to the participant at the same time as notification of certification. Such food instrument(s) and cash-value vouchers shall provide benefits for the current month or the remaining portion thereof and shall be redeemable immediately upon receipt by the participant. Local agencies may mail the initial food instrument(s) and if applicable cash-value vouchers with the notification of certification to those participants who meet the criteria for the receipt of food instruments through the mail, as provided in § 246.12(r)(4).

(v) Each local agency with a direct distribution or home delivery system shall issue the supplemental foods to the participant within 10 days of issuing the notification of certification.

(g) *Certification periods.* (1) Program benefits will be based upon certifications established in accordance with the following timeframes:

| A/an: | Will be certified: |
|---|---|
| (i) Pregnant woman | For the duration of her pregnancy, and up to the last day of the month in which the infant becomes six weeks old or the pregnancy ends (for example, if the infant is born June 4, six weeks after birth would be July 16, and certification would end July 31). |
| (ii) Postpartum woman | Up to the last day of the sixth month after the baby is born or the pregnancy ends (postpartum). |
| (iii) Breastfeeding woman | Approximately every six months. The State agency may permit its local agencies to certify a breastfeeding woman up to the last day of the month in which her infant turns 1 year old, or until the woman ceases breastfeeding, whichever occurs first. |
| (iv) Infant | Approximately every six months. The State agency may permit its local agencies to certify an infant under six months of age up to the last day of the month in which the infant turns 1 year old, provided the quality and accessibility of health care services are not diminished. |
| (v) Child | Approximately every six months ending with the last day of the month in which a child reaches his/her fifth birthday. |

(2) The State agency may authorize local agencies under its jurisdiction to establish shorter certification periods than outlined in paragraph (g)(1) of

this section on a case-by-case basis. If the State agency exercises this option, it shall issue guidance for use by local agencies in establishing the shorter periods.

(3) In cases where there is difficulty in appointment scheduling for persons referenced in paragraphs (g)(1) (iii), (iv) and (v) of this section, the certification period may be shortened or extended by a period not to exceed 30 days.

(h) *Mandatory and optional mid-certification actions.* Mid-certification actions are either mandatory or optional as follows:

(1) *Mandatory reassessment of income eligibility mid-certification.* (i) The local agency must reassess a participant's income eligibility during the current certification period if the local agency receives information indicating that the participant's household income has changed. However, such assessments are not required in cases where sufficient time does not exist to effect the change. Sufficient time means 90 days or less before the expiration of the certification period.

(ii) *Mandatory disqualification mid-certification for income ineligibility.* The local agency must disqualify a participant and any other household members currently receiving WIC benefits who are determined ineligible based on the mid-certification income reassessment. However, adjunctively-eligible WIC participants (as defined in paragraphs (d)(2)(vi)(A) or (d)(2)(vi)(B) of this section) may not be disqualified from the WIC Program solely because they, or certain family members, no longer participate in one of the other specified programs. The State agency will ensure that such participants and other household members currently receiving WIC benefits are disqualified during a certification period only after their income eligibility has been reassessed based on the income screening procedures used for applicants who are not adjunctively eligible.

(2) *Mandatory sanctions or other actions for participant violations.* The local agency must impose disqualifications, or take other actions in accordance with the procedures set forth in § 246.12(u), in response to participant violations including, but not limited to, the violations listed in the definition of *Participant violation* in § 246.2.

(3) *Optional mid-certification actions.* A participant may be disqualified during a certification period for the following reasons:

(i) A State agency may allow local agencies to disqualify a participant for failure to obtain food instruments, cash-value vouchers or supplemental foods for several consecutive months. As specified by the State agency, proof of such failure includes failure to pick up supplemental foods, cash-value vouchers or food instruments, nonreceipt of food instruments or cash-value vouchers (when mailed instruments or vouchers are returned), or failure to have an electronic benefit transfer card revalidated for purchase of supplemental foods; or

(ii) If a State agency experiences funding shortages, it may be necessary to discontinue Program benefits to some certified participants. The State agency must explore alternatives (such as elimination of new certifications) before taking such action. In discontinuing benefits, the State agency will affect the least possible number of participants and those whose nutritional and health status would be least impaired by the action. When a State agency elects to discontinue benefits due to insufficient funds, it will not enroll new participants during that period. The State may discontinue benefits by:

(A) Disqualifying a group of participants; and/or,

(B) Withholding benefits from a group with the expectation of providing benefits again when funds are available.

(i) *Certification forms.* All certification data for each person certified shall be recorded on a form (or forms) which are provided by the State agency. The information on the forms shall include—

(1) Name and address;

(2) Date of initial visit to apply for participation;

(3) An indication of whether the applicant was physically present at certification and, if not, the reason why an exception was granted or a copy of the document(s) in the file which explains the reason for the exception;

(4) A description of the document(s) used to determine residency and identity or a copy of the document(s) used or the applicant's written statement when no documentation exists;

(5) Information regarding income eligibility for the Program as specified in paragraph (d) of this section as follows:

(i) A description of the document(s) used to determine income eligibility or a copy of the document(s) in the file;

(ii) An indication that no documentation is available and the reason(s) why or a copy of the applicant's written statement explaining such circumstances; or

(iii) An indication that the applicant has no income.

(6) The date of certification and the date nutritional risk data were taken if different from the date of certification;

(7) Height or length, weight, and hematological test results;

(8) The specific nutritional risk conditions which established eligibility for the supplemental foods. Documentation should include health history when appropriate to the nutritional risk condition, with the applicant's or applicant's parent's or caretaker's consent;

(9) The signature and title of the competent professional authority making the nutritional risk determination, and, if different, the signature and title of the administrative person responsible for determining income eligibility under the Program; and

(10) A statement of the rights and obligations under the Program. The statement must contain a signature space, and must be read by or to the applicant, parent, or caretaker. It must contain the following language or alternate language as approved by FNS (see § 246.4(a)(11)(i)), and be signed by the applicant, parent, or caretaker after the statement is read:

I have been advised of my rights and obligations under the Program. I certify that the information I have provided for my eligibility determination is correct, to the best of my knowledge. This certification form is being submitted in connection with the receipt of Federal assistance. Program officials may verify information on this form. I understand that intentionally making a false or misleading statement or intentionally misrepresenting, concealing, or withholding facts may result in paying the State agency, in cash, the value of the food benefits improperly issued to me and may subject me to civil or criminal prosecution under State and Federal law.

(11) If the State agency exercises the authority to use and disclose confidential applicant and participant information for non-WIC purposes pursuant to § 246.26(d)(2), a statement that:

(i) Notifies applicants that the chief State health officer (or the governing authority, in the case of an Indian State agency) may authorize the use and disclosure of information about their participation in the WIC Program for non-WIC purposes;

(ii) Must indicate that such information will be used by State and local WIC agencies and public organizations only in the administration of their programs that serve persons eligible for the WIC Program; and,

(iii) Will be added to the statement required under paragraph (i)(10) of this section. This statement must also indicate that such information can be used by the recipient organizations only for the following:

(A) To determine the eligibility of WIC applicants and participants for programs administered by such organizations;

(B) To conduct outreach for such programs;

(C) To enhance the health, education, or well-being of WIC applicants and participants currently enrolled in those programs;

(D) To streamline administrative procedures in order to minimize burdens on participants and staff; and,

(E) To assess and evaluate a State's health system in terms of responsiveness to participants' health care needs and health care outcomes.

(j) *Notification of participant rights and responsibilities.* In order to inform applicants and participants or their parents or caretakers of Program rights and responsibilities, the following information shall be provided. Where a significant number or proportion of the population eligible to be served needs the information in a language other than English, reasonable steps shall be taken to provide the information in appropriate languages to such persons, considering the scope of the Program

and the size and concentration of such population.

(1) During the certification procedure, every Program applicant, parent or caretaker shall be informed of the illegality of dual participation.

(2) At the time of certification, each Program participant, parent or caretaker must read, or have read to him or her, the statement provided in paragraph (i)(10) of this section (or an alternate statement as approved by FNS). In addition, the following sentences (or alternate sentences as approved by FNS) must be read:

(i) "Standards for eligibility and participation in the WIC Program are the same for everyone, regardless of race, color, national origin, age, handicap, or sex."

(ii) "You may appeal any decision made by the local agency regarding your eligibility for the Program."

(iii) "The local agency will make health services and nutrition education available to you, and you are encouraged to participate in these services."

(3) If the State agency implements the policy of disqualifying a participant for not picking up supplemental foods, cash-value vouchers or food instruments in accordance with paragraph (h)(3)(i) of this section, it shall provide notice of this policy and of the importance of regularly picking up cash-value vouchers, food instruments or supplemental foods to each participant, parent or caretaker at the time of each certification.

(4) At least during the initial certification visit, each participant, parent or caretaker shall receive an explanation of how the local food delivery system operates and shall be advised of the types of health services available, where they are located, how they may be obtained and why they may be useful.

(5) Persons found ineligible for the Program during a certification visit shall be advised in writing of the ineligibility, of the reasons for the ineligibility, and of the right to a fair hearing. The reasons for ineligibility shall be properly documented and shall be retained on file at the local agency.

(6) A person who is about to be suspended or disqualified from program participation at any time during the certification period shall be advised in writing not less than 15 days before the suspension or disqualification. Such notification shall include the reasons for this action, and the participant's right to a fair hearing. Further, such notification need not be provided to persons who will be disqualified for not picking up cash-value vouchers, supplemental foods or food instruments in accordance with paragraph (h)(3)(i) of this section.

(7) When a State or local agency pursues collection of a claim pursuant to §246.23(c) against an individual who has been improperly issued benefits, the person shall be advised in writing of the reason(s) for the claim, the value of the improperly issued benefits which must be repaid, and of the right to a fair hearing.

(8) Each participant, parent or caretaker shall be notified not less than 15 days before the expiration of each certification period that certification for the Program is about to expire.

(9) If a State agency must suspend or terminate benefits to any participant during the participant's certification period due to a shortage of funds for the Program, it shall issue a notice to such participant in advance, as stipulated in paragraph (j)(6) of this section.

(k) *Transfer of certification.* (1) Each State agency shall ensure issuance of a Verification of Certification card to every participant who is a member of a family in which there is a migrant farmworker or any other participant who is likely to be relocating during the certification period. Certifying local agencies shall ensure that Verification of Certification cards are fully completed.

(2) The State agency shall require the receiving local agency to accept Verification of Certification cards from participants, including participants who are migrant farmworkers or members of their families, who have been participating in the Program in another local agency within or outside of the jurisdiction of the State agency. A person with a valid Verification of Certification card shall not be denied participation in the receiving State because the person does not meet that State's particular eligibility criteria.

(3) The Verification of Certification card is valid until the certification period expires, and shall be accepted as proof of eligibility for Program benefits. If the receiving local agency has waiting lists for participation, the transferring participant shall be placed on the list ahead of all waiting applicants.

(4) The Verification of Certification card shall include the name of the participant, the date the certification was performed, the date income eligibility was last determined, the nutritional risk condition of the participant, the date the certification period expires, the signature and printed or typed name of the certifying local agency official, the name and address of the certifying local agency and an identification number or some other means of accountability. The Verification of Certification card shall be uniform throughout the jurisdiction of the State agency.

(l) *Dual participation.* The State agency is responsible for the following:

(1) In conjunction with WIC local agencies, the prevention and identification of dual participation within each local agency and between local agencies under the State agency's jurisdiction, including actions to identify suspected instances of dual participation at least semiannually. The State or local agency must take follow-up action within 120 days of detecting instances of suspected dual participation;

(2) In areas where a local agency serves the same population as an Indian State agency or a CSFP agency, and in areas where geographical or other factors make it likely that participants travel regularly between contiguous local service areas located across State agency borders, entering into an agreement with the other agency for the detection and prevention of dual participation. The agreement must be made in writing and included in the State Plan;

(3) Immediate termination from participation in one of the programs or clinics for participants found in violation due to dual participation; and

(4) In cases of dual participation resulting from intentional misrepresentation, the collection of improperly issued benefits in accordance with §246.23(c)(1) and disqualification from both programs in accordance with §246.12(u)(2).

(m) *Certification of persons in homeless facilities and institutions.* (1) Pregnant, breastfeeding, and postpartum women, infants or children who meet the requirements of paragraph (c) of this section, and who reside in a homeless facility, shall be considered eligible for the Program and shall be treated equally with all other eligible applicants at the local agency where they apply for WIC benefits, Provided that: the State or local agency has taken reasonable steps to:

(i) Establish, to the extent practicable, that the homeless facility meets the following conditions with respect to resident WIC participants:

(A) The homeless facility does not accrue financial or in-kind benefit from a person's participation in the Program, e.g., by reducing its expenditures for food service because its residents are receiving WIC foods;

(B) Foods provided by the WIC Program are not subsumed into a communal food service, but are available exclusively to the WIC participant for whom they were issued;

(C) The homeless facility places no constraints on the ability of the participant to partake of the supplemental foods and nutrition education available under the Program;

(ii) Contact the homeless facility periodically to ensure continued compliance with these conditions; and

(iii) Request the homeless facility to notify the State or local agency if it ceases to meet any of these conditions.

(2) The State agency may authorize or require local agencies to make the Program available to applicants who meet the requirements of paragraph (c) of this section, but who reside in institutions which meet the conditions of paragraphs (n)(1)(i)(A)–(C) of this section with respect to resident WIC participants.

(3) The State or local agency shall attempt to establish to the best of its ability,whether a homeless facility or institution complies with the conditions of paragraphs (n)(1)(i) (A)–(C) of

this section with respect to WIC participants. If caseload slots are available, full certification periods shall be provided to the following:

(i) Participants who are residents of a homeless facility or institution which has been found to be in compliance with the conditions of paragraph (n)(1)(i)(A)–(C) of this section;

(ii) Participants who are residents of a homeless facility or institution whose compliance with the conditions of paragraphs (n)(1)(i)(A)–(C) of this section has not yet been established; and

(iii) Participants for whom no other shelter alternative is available in the local agency's service delivery area.

(4) If a homeless facility or institution has been determined to be noncompliant during the course of a participant's initial certification period, participants applying for continued benefits may be certified again, but the State agency shall discontinue issuance of WIC foods, except infant formula, to the participant in such accommodation until the accommodation's compliance is achieved or alternative shelter arrangements are made. If certified, such participants shall continue to be eligible to receive all other WIC benefits, such as nutrition education and health care referral services.

(5) The State agency shall continue to the end of their certification periods the participation of residents of a homeless facility or institution which ceases to comply with the conditions of paragraphs (n)(1)(i)(A)–(C) of this section.

(6) As soon as the State or local agency determines that a homeless facility/institution does not meet the conditions of paragraphs (n)(1)(i) (A)–(C) of this section, it shall refer all participants using such accommodation to any other accommodations in the area which meet these conditions.

(n) *Drug and other harmful substance abuse screening.* When a State agency determines that screening is necessary to fulfill the referral requirements in this part, the State agency must require screening for the use of drugs and other harmful substances. When such screening is required, it shall:

(1) Be limited to the extent the State agency deems necessary to fulfill the referral requirement of §246.4(a)(8) of this part and the drug and other harmful substance abuse information requirement of §246.11(a)(3) of this part; and

(2) Be integrated into certification process as part of the medical or nutritional assessment.

(o) *Are applicants required to be physically present at certification?*—(1) *In general.* The State or local agency must require all applicants to be physically present at each WIC certification.

(2) *Exceptions*—(i) *Disabilities.* The State or local agency must grant an exception to applicants who are qualified individuals with disabilities and are unable to be physically present at the WIC clinic because of their disabilities or applicants whose parents or caretakers are individuals with disabilities that meet this standard. Examples of such situations include:

(A) A medical condition that necessitates the use of medical equipment that is not easily transportable;

(B) A medical condition that requires confinement to bed rest; and

(C) A serious illness that may be exacerbated by coming in to the WIC clinic.

(ii) *Receiving ongoing health care.* The State agency may exempt from the physical presence requirement, if being physically present would pose an unreasonable barrier, an infant or child who was present at his/her initial WIC certification and is receiving ongoing health care.

(iii) *Working parents or caretakers.* The State agency may exempt from the physical presence requirement an infant or child who was present at his/her initial WIC certification *and* was present at a WIC certification or recertification determination within the 1-year period ending on the date of the most recent certification or recertification determination *and* is under the care of one or more working parents or one or more primary working caretakers whose working status presents a barrier to bringing the infant or child in to the WIC clinic.

(iv) *Infants under 8 weeks of age.* The State agency may exempt from the

physical presence requirement an infant under eight (8) weeks of age who cannot be present at certification for a reason determined appropriate by the local agency, and for whom all necessary certification information is provided.

(p) *Certification of qualified aliens.* In those cases where a person sponsors a qualified alien, (as the term is defined in the Immigration and Nationality Laws (8 U.S.C.1101 et seq.)), i.e., signs an affidavit of support, the sponsor's income, including the income of the sponsor's spouse, shall not be counted in determining the income eligibility of the qualified alien except when the alien is a member of the sponsor's family or economic unit. Sponsors of qualified aliens are not required to reimburse the State or local agency or the Federal government for WIC Program benefits provided to sponsored aliens. Further, qualified aliens are eligible for the WIC Program without regard to the length of time in the qualifying status.

[50 FR 6121, Feb. 13, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 246.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 246.8 Nondiscrimination.

(a) *Civil rights requirements.* The State agency shall comply with the requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b), and FNS instructions to ensure that no person shall, on the grounds of race, color, national origin, age, sex or handicap, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under the Program. Compliance with title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and regulations and instructions issued thereunder shall include, but not be limited to:

(1) Notification to the public of the nondiscrimination policy and complaint rights of participants and potentially eligible persons;

(2) Review and monitoring activity to ensure Program compliance with the nondiscrimination laws and regulations;

(3) Collection and reporting of racial and ethnic participation data as required by title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs on the basis of race, color, or national origin; and

(4) Establishment of grievance procedures for handling complaints based on sex and handicap.

(b) *Complaints.* Persons seeking to file discrimination complaints should write to USDA, Director, Office of Adjudication and Compliance, 1400 Independence Avenue, SW., Washington, DC 20250–9410, or call (800) 795–3272 (voice) or (202) 720–6382 (TTY). All complaints received by State or local agencies which allege discrimination based on race, color, national origin, or age shall be referred to the Secretary of Agriculture or Director, Office of Equal Opportunity. A State or local agency may process complaints which allege discrimination based on sex or handicap if grievance procedures are in place.

(c) *Non-English materials.* Where a significant number or proportion of the population eligible to be served needs service or information in a language other than English in order effectively to be informed of or to participate in the Program, the State agency shall take reasonable steps considering the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to required Program information except certification forms which are used only by local agency staff. The State agency shall also ensure that all rights and responsibilities listed on the certification form are read to these applicants in the appropriate language.

[50 FR 6121, Feb. 13, 1985, as amended at 73 FR 11312, Mar. 3, 2008]

### § 246.9 Fair hearing procedures for participants.

(a) *Availability of hearings.* The State agency shall provide a hearing procedure through which any individual may appeal a State or local agency action which results in a claim against the individual for repayment of the cash value of improperly issued benefits or results in the individual's denial of participation or disqualification from the Program.

(b) *Hearing system.* The State agency shall provide for either a hearing at the State level or a hearing at the local level which permits the individual to appeal a local agency decision to the State agency. The State agency may adopt local level hearings in some areas, such as those with large caseloads, and maintain only State level hearings in other areas.

(c) *Notification of appeal rights.* At the time of a claim against an individual for improperly issued benefits or at the time of participation denial or of disqualification from the Program, the State or local agency shall inform each individual in writing of the right to a fair hearing, of the method by which a hearing may be requested, and that any positions or arguments on behalf of the individual may be presented personally or by a representative such as a relative, friend, legal counsel or other spokesperson. Such notification is not required at the expiration of a certification period.

(d) *Request for hearing.* A request for a hearing is defined as any clear expression by the individual, the individual's parent, caretaker, or other representative, that he or she desires an opportunity to present his or her case to a higher authority. The State or local agency shall not limit or interfere with the individual's freedom to request a hearing.

(e) *Time limit for request.* The State or local agency shall provide individuals a reasonable period of time to request fair hearings; provided that, such time limit is not less than 60 days from the date the agency mails or gives the applicant or participant the notice of adverse action.

(f) *Denial or dismissal of request.* The State and local agencies shall not deny or dismiss a request for a hearing unless—

(1) The request is not received within the time limit set by the State agency in accordance with paragraph (e) of this section;

(2) The request is withdrawn in writing by the appellant or a representative of the appellant;

(3) The appellant or representative fails, without good cause, to appear at the scheduled hearing; or

(4) The appellant has been denied participation by a previous hearing and cannot provide evidence that circumstances relevant to Program eligibility have changed in such a way as to justify a hearing.

(g) *Continuation of benefits.* Participants who appeal the termination of benefits within the 15 days advance adverse action notice period provided by § 246.7(j)(6) must continue to receive Program benefits until the hearing official reaches a decision or the certification period expires, whichever occurs first. This does not apply to applicants denied benefits at initial certification, participants whose certification periods have expired, or participants who become categorically ineligible for benefits. Applicants who are denied benefits at initial certification, participants whose certification periods have expired, or participants who become categorically ineligible during a certification period may appeal the denial or termination within the timeframes set by the State agency in accordance with paragraph (e) of this section, but must not receive benefits while awaiting the hearing or its results.

(h) *Rules of procedure.* State and local agencies shall process each request for a hearing under uniform rules of procedure and shall makes these rules of procedure available for public inspection and copying. At a minimum, such rules shall include: The time limits for requesting and conducting a hearing; all advance notice requirements; the rules of conduct at the hearing; and the rights and responsibilities of the appellant. The procedures shall not be unduly complex or legalistic.

(i) *Hearing official.* Hearings shall be conducted by an impartial official who does not have any personal stake or involvement in the decision and who was

not directly involved in the initial determination of the action being contested. The hearing official shall—

(1) Administer oaths or affirmations if required by the State;

(2) Ensure that all relevant issues are considered;

(3) Request, receive and make part of the hearing record all evidence determined necessary to decide the issues being raised;

(4) Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing;

(5) Order, where relevant and necessary, an independent medical assessment or professional evaluation from a source mutually satisfactory to the appellant and the State agency; and

(6) Render a hearing decision which will resolve the dispute.

(j) *Conduct of the hearing.* The State or lcoal agency shall ensure that the hearing is accessible to the appellant and is held within three weeks from the date the State or local agency received the request for a hearing. The State or local agency shall provide the appellant with a minimum of 10 days advance written notice of the time and place of the hearing and shall enclose an explanation of the hearing procedure with the notice. The State or local agency shall also provide the appellant or representative an opportunity to—

(1) Examine, prior to and during the hearing, the documents and records presented to support the decision under appeal;

(2) Be assisted or represented by an attorney or other persons;

(3) Bring witnesses;

(4) Advance arguments without undue interference;

(5) Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses; and

(6) Submit evidence to establish all pertinent facts and circumstances in the case.

(k) *Fair hearing decisions.* (1) Decisions of the hearing official shall be based upon the application of appropriate Federal law, regulations and policy as related to the facts of the case as established in the hearing record. The verbatim transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, constitute the exclusive record for a final decision by hearing official. The State or local agency shall retain the hearing record in accordance with §246.25 and make these records available, for copying and inspection, to the appellant or representative at any reasonable time.

(2) The decision by the hearing official shall summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and the pertinent regulations or policy. The decision shall become a part of the record.

(3) Within 45 days of the receipt of the request for the hearing, the State or local agency shall notify the appellant or representative in writing of the decision and the reasons for the decision in accordance with paragraph (k)(2) of this section. If the decision is in favor of the appellant and benefits were denied or discontinued, benefits shall begin immediately. If the decision concerns disqualification and is in favor of the agency, as soon as administratively feasible, the local agency shall terminate any continued benefits, as decided by the hearing official. If the decision regarding repayment of benefits by the appellant is in favor of the agency, the State or local agency shall resume its efforts to collect the claim, even during pendency of an appeal of a local-level fair hearing decision to the State agency. The appellant may appeal a local hearing decision to the State agency, provided that the request for appeal is made within 15 days of the mailing date of the hearing decision notice. If the decision being appealed concerns disqualification from the Program, the appellant shall not continue to receive benefits while an appeal to the State agency of a decision rendered on appeal at the local level is pending. The decision of a hearing official at the local level is binding on the local agency and the State agency unless it is appealed to the State level and overturned by the State hearing official.

(4) The State and local agency shall make all hearing records and decisions

available for public inspection and copying; however, the names and addresses of participants and other members of the public shall be kept confidential.

(l) *Judicial review*. If a State level decision upholds the agency action and the appellant expresses an interest in pursuing a higher review of the decision, the State agency shall explain any further State level review of the decision and any State level rehearing process. If these are either unavailable or have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21236, June 4, 1987; 59 FR 11503, Mar. 11, 1994; 71 FR 56730, Sept. 27, 2006; 73 FR 11312, Mar. 3, 2008]

## Subpart D—Participant Benefits

### § 246.10 Supplemental foods.

(a) *General*. This section prescribes the requirements for providing supplemental foods to participants. The State agency must ensure that local agencies comply with this section.

(b) *State agency responsibilities*. (1) State agencies may:

(i) Establish criteria in addition to the minimum Federal requirements in Table 4 of paragraph (e)(12) of this section, except that the State agency may not establish further restrictions on the eligible fruits and vegetables, for the supplemental foods in their States. These State criteria could address, but not be limited to, other nutritional standards, competitive cost, Statewide availability, and participant appeal; and

(ii) Make food package adjustments to better accommodate participants who are homeless. At the State agency's option, these adjustments would include, but not be limited to, issuing authorized supplemental foods in individual serving-size containers to accommodate lack of food storage or preparation facilities.

(2) State agencies must:

(i) Identify the brands of foods and package sizes that are acceptable for use in the Program in their States in accordance with the requirements of this section. State agencies must also provide to local agencies, and include in the State Plan, a list of acceptable foods and their maximum monthly allowances as specified in Tables 1 through 4 of paragraphs (e)(9) through (e)(12) of this section; and

(ii) Ensure that local agencies:

(A) Make available to participants the maximum monthly allowances of authorized supplemental foods, except as noted in paragraph (c) of this section, and abide by the authorized substitution rates for WIC food substitutions as specified in Tables 1 through 3 of paragraphs (e)(9) through (e)(11) of this section;

(B) Make available to participants more than one food from each WIC food category except for the categories of peanut butter and eggs, and any of the WIC-eligible fruits and vegetables (fresh or processed) in each authorized food package as listed in paragraph (e) of this section;

(C) Authorize only a competent professional authority to prescribe the categories of authorized supplemental foods in quantities that do not exceed the regulatory maximum and are appropriate for the participant, taking into consideration the participant's age and nutritional needs; and

(D) Advise participants or their caretaker, when appropriate, that the supplemental foods issued are only for their personal use. However, the supplemental foods are not authorized for participant use while hospitalized on an in-patient basis. In addition, consistent with § 246.7(m)(1)(i)(B), supplemental foods are not authorized for use in the preparation of meals served in a communal food service. This restriction does not preclude the provision or use of supplemental foods for individual participants in a nonresidential setting (e.g., child care facility, family day care home, school, or other educational program); a homeless facility that meets the requirements of § 246.7(m)(1); or, at the State agency's discretion, a residential institution (e.g., home for pregnant teens, prison, or residential drug treatment center) that meets the requirements currently set forth in § 246.7(m)(1) and (m)(2).

(c) *Nutrition tailoring*. The full maximum monthly allowances of all supplemental foods in all food packages must be made available to participants

if medically or nutritionally warranted. Reductions in these amounts cannot be made for cost-savings, administrative convenience, caseload management, or to control vendor abuse. Reductions in these amounts cannot be made for categories, groups or subgroups of WIC participants. The provision of less than the maximum monthly allowances of supplemental foods to an individual WIC participant in all food packages is appropriate only when:

(1) Medically or nutritionally warranted (e.g., to eliminate a food due to a food allergy);

(2) A participant refuses or cannot use the maximum monthly allowances; or

(3) The quantities necessary to supplement another programs' contribution to fill a medical prescription would be less than the maximum monthly allowances.

(d) *Medical documentation*—(1) *Supplemental foods requiring medical documentation*. Medical documentation is required for the issuance of the following supplemental foods:

(i) Any non-contract brand infant formula;

(ii) Any infant formula prescribed to a child or adult who receives Food Package III;

(iii) Any exempt infant formula;

(iv) Any WIC-eligible medical food;

(v) Any authorized supplemental food issued to participants who receive Food Package III;

(vi) Any authorized soy-based beverage or tofu issued to children who receive Food Package IV;

(vii) Any additional authorized cheese issued to children who receive Food Package IV that exceeds the maximum substitution rate;

(viii) Any additional authorized tofu and cheese issued to women who receive Food Packages V and VII that exceeds the maximum substitution rate; and

(ix) Any contract brand infant formula that does not meet the requirements in Table 4 of paragraph (e)(12) of this section.

(2) *Supplemental foods not requiring medical documentation*. (i) State agencies may authorize local agencies to issue a non-contract brand infant formula that meets the requirements in Table 4 of paragraph (e)(12) of this section without medical documentation in order to meet religious eating patterns; and

(ii) The State agency has the discretion to require medical documentation for any contract brand infant formula other than the primary contract infant formulaand may decide that some contract brand infant formula may not be issued under any circumstances.

(3) *Medical Determination*. For purposes of this program, medical documentation means that a health care professional licensed to write medical prescriptions under State law has:

(i) Made a medical determination that the participant has a qualifying condition as described in paragraphs (e)(3) through (e)(7) of this section that dictates the use of the supplemental foods, as described in paragraph (d)(1) of this section; and

(ii) Provided the written documentation that meets the technical requirements described in paragraphs (d)(4)(ii) and (d)(4)(iii) of this section.

(4) *Technical Requirements*—(i) *Location*. All medical documentation must be kept on file (electronic or hard copy) at the local clinic. The medical documentation kept on file must include the initial telephone documentation, when received as described in paragraph (d)(4)(iii)(B) of this section.

(ii) *Content*. All medical documentation must include the following:

(A) The name of the authorized WIC formula (infant formula, exempt infant formula, WIC-eligible medical food) prescribed, including amount needed per day;

(B) The authorized supplemental food(s) appropriate for the qualifying condition(s) and their prescribed amounts;

(C) Length of time the prescribed WIC formula and/or supplemental food is required by the participant;

(D) The qualifying condition(s) for issuance of the authorized supplemental food(s) requiring medical documentation, as described in paragraphs (e)(3) through (e)(7) of this section; and

(E) Signature, date and contact information (or name, date and contact information), if the initial medical documentation was received by telephone

and the signed document is forthcoming, of the health care professional licensed by the State to write prescriptions in accordance with State laws.

(iii) *Written confirmation*—(A) *General.* Medical documentation must be written and may be provided as an original written document, an electronic document, by facsimile or by telephone to a competent professional authority until written confirmation is received.

(B) *Medical documentation provided by telephone.* Medical documentation may be provided by telephone to a competent professional authority who must promptly document the information. The collection of the required information by telephone for medical documentation purposes may only be used until written confirmation is received from a health care professional licensed to write medical prescriptions and used only when absolutely necessary on an individual participant basis. The local clinic must obtain written confirmation of the medical documentation within a reasonable amount of time (i.e., one or two week's time) after accepting the initial medical documentation by telephone.

(5) *Medical supervision requirements.* Due to the nature of the health conditions of participants who are issued supplemental foods that require medical documentation, close medical supervision is essential for each participant's dietary management. The responsibility remains with the participant's health care provider for this medical oversight and instruction. This responsibility cannot be assumed by personnel at the WIC State or local agency. However, it would be the responsibility of the WIC competent professional authority to ensure that only the amounts of supplemental foods prescribed by the participant's health care provider are issued in the participant's food package.

(e) *Food packages.* There are seven food packages available under the Program that may be provided to participants. The authorized supplemental foods must be prescribed from food packages according to the category and nutritional needs of the participant. The food packages are as follows:

(1) *Food Package I—Infants birth through 5 months*—(i) *Participant category served.* This food package is designed for issuance to infant participants from birth through age 5 months who do not have a condition qualifying them to receive Food Package III.

(ii) *Infant feeding categories*—(A) *Birth to one month.* Three infant feeding options are available during the first month after birth—fully breastfeeding, i.e., the infant receives no infant formula from the WIC Program; partially breastfeeding, i.e., the infant receives not more than 104 reconstituted fluid ounces of formula; or fully formula-feeding. Infant formula is not provided during the first month after birth to fully breastfed infants to support the successful establishment of breastfeeding.

(B) *One through 5 months.* Three infant feeding options are available from 1 months through 5 months—fully breastfeeding, fully formula-feeding, or partially breastfeeding, i.e., the infant is breastfed but also receives infant formula from the WIC Program in an amount not to exceed approximately half the amount of infant formula allowed for a fully formula fed infant.

(iii) *Infant formula requirements.* This food package provides iron-fortified infant formula that is not an exempt infant formula. The issuance of any contract brand or noncontract brand infant formula that contains less than 10 milligrams of iron per liter at standard dilution (i.e., approximately 20 kilocalories per fluid ounce of prepared formula) is prohibited. Except as specified in paragraph (d) of this section, local agencies must issue as the first choice of issuance the primary contract infant formula, as defined in § 246.2, with all other infant formulas issued as an alternative to the primary contract infant formula.

(iv) *Physical forms.* Local agencies must issue all WIC formulas (WIC formulas mean all infant formula, exempt infant formula and WIC-eligible medical foods) in concentrated liquid or powder physical forms. Ready-to-feed WIC formulas may be authorized when the competent professional authority determines and documents that:

(A) The participant's household has an unsanitary or restricted water supply or poor refrigeration;

(B) The person caring for the participant may have difficulty in correctly diluting concentrated or powder forms; or

(C) The WIC infant formula is only available in ready-to-feed.

(v) *Authorized category of supplemental foods.* Infant formula is the only category of supplemental foods authorized in this food package. Exempt infant formulas and WIC-eligible medical foods are authorized only in Food Package III.

(2) *Food Package II—Infants 6 through 11 months*—(i) *Participant category served.* This food package is designed for issuance to infant participants from 6 through 11 months of age who do not have a condition qualifying them to receive Food Package III.

(ii) *Infant feeding options.* Three infant feeding options are available—fully breastfeeding, fully formula-feeding, or partially breastfeeding.

(iii) *Infant formula requirements.* The requirements for issuance of infant formula in Food Package I, specified in paragraphs (e)(1)(iii) and (e)(1)(iv) of this section, also apply to the issuance of infant formula in Food Package II.

(iv) *Authorized categories of supplemental foods.* Infant formula, infant fruits and vegetables, infant meat, and infant cereal are the categories of supplemental foods authorized in this food package.

(3) *Food Package III—Participants with qualifying conditions*—(i) *Participant category served and qualifying conditions.* This food package is reserved for issuance to women, infants and child participants who have a documented qualifying condition that requires the use of a WIC formula (infant formula, exempt infant formula or WIC-eligible medical food) because the use of conventional foods is precluded, restricted, or inadequate to address their special nutritional needs. Medical documentation must meet the requirements described in paragraph (d) of this section. Participants who are eligible to receive this food package must have one or more qualifying conditions, as determined by a health care professional licensed to write medical prescriptions under State law. The qualifying conditions include but are not limited to premature birth, low birth weight, failure to thrive, inborn errors of metabolism and metabolic disorders, gastrointestinal disorders, malabsorption syndromes, immune system disorders, severe food allergies that require an elemental formula, and life threatening disorders, diseases and medical conditions that impair ingestion, digestion, absorption or the utilization of nutrients that could adversely affect the participant's nutrition status. This food package may not be issued solely for the purpose of enhancing nutrient intake or managing body weight.

(ii) *Non-authorized issuance of Food Package III.* This food package is not authorized for:

(A) Infants whose only condition is:

(*1*) A diagnosed formula intolerance or food allergy to lactose, sucrose, milk protein or soy protein that does not require the use of an exempt infant formula; or

(*2*) A non-specific formula or food intolerance.

(B) Women and children who have a food intolerance to lactose or milk protein that can be successfully managed with the use of one of the other WIC food packages (i.e., Food Packages IV–VII); or

(C) Any participant solely for the purpose of enhancing nutrient intake or managing body weight without an underlying qualifying condition.

(iii) *Restrictions on the issuance of WIC formulas in ready-to-feed (RTF) forms.* WIC State agencies must issue WIC formulas (infant formula, exempt infant formula and WIC-eligible medical foods) in concentrated liquid or powder physical forms unless the requirements for issuing RTF are met as described in paragraph (e)(1)(iv) of this section. In addition to those requirements, there are two additional conditions which may be used to issue RTF in Food Package III:

(A) If a ready-to-feed form better accommodates the participant's condition; or

(B) If it improves the participant's compliance in consuming the prescribed WIC formula.

(iv) *Unauthorized WIC costs.* All apparatus or devices (e.g., enteral feeding tubes, bags and pumps) designed to administer WIC formulas are not allowable WIC costs.

(v) *Authorized categories of supplemental foods.* The supplemental foods authorized in this food package require medical documentation for issuance and include infant formula (for children or women), exempt infant formula, WIC-eligible medical foods, infant cereal, infant food fruits and vegetables, milk and milk alternatives, cheese, eggs, canned fish, fruits and vegetables, breakfast cereal, whole wheat bread or other whole grains, juice, legumes and/or peanut butter.

(vi) *Coordination with medical payors and other programs that provide or reimburse for formulas.* WIC State agencies must coordinate with other Federal, State or local government agencies or with private agencies that operate programs that also provide or could reimburse for exempt infant formulas and WIC-eligible medical foods benefits to mutual participants. At a minimum, a WIC State agency must coordinate with the State Medicaid Program for the provision of exempt infant formulas and WIC-eligible medical foods that are authorized or could be authorized under the State Medicaid Program for reimbursement and that are prescribed for WIC participants who are also Medicaid recipients. The WIC State agency is responsible for providing up to the maximum amount of exempt infant formulas and WIC-eligible medical foods under Food Package III in situations where reimbursement is not provided by another entity.

(4) *Food Package IV—Children 1 through 4 years*—(i) *Participant category served.* This food package is designed for issuance to participants 1 through 4 years of age who do not have a condition qualifying them to receive Food Package III.

(ii) *Authorized categories of supplemental foods.* Milk, breakfast cereal, juice, fruits and vegetables, whole wheat bread or other whole grains, eggs, and legumes or peanut butter are the categories of supplemental foods authorized in this food package. Cheese may be substituted for milk in amounts described in Table 2 of paragraph (e)(10) of this section. Substitutions exceeding the maximum substitution allowance of cheese, up to the maximum allowance for fluid milk, may be allowed with medical documentation of the qualifying condition. Soy-based beverage and tofu can be substituted for milk only with medical documentation in this food package, in amounts described in Table 2 of paragraph (e)(10) of this section. A health care professional licensed by the State to write prescriptions must make a medical determination and provide medical documentation that a child cannot drink milk and requires soy-based beverage, tofu, or additional cheese as a substitute for milk. Such determination can be made for situations that include, but are not limited to, milk allergy, severe lactose maldigestion, and vegan diets. Medical documentation must meet the requirements described in paragraph (d) of this section.

(5) *Food Package V—Pregnant and partially breastfeeding women*—(i) *Participant category served.* This food package is designed for issuance to women participants with singleton pregnancies who do not have a condition qualifying them to receive Food Package III. This food package is also designed for issuance to breastfeeding women participants, up to 1 year postpartum, who do not have a condition qualifying them to receive Food Package III and whose partially breastfed infants receive formula from the WIC program in amounts that do not exceed the maximum allowances described in Table 1 of paragraph (e)(9) of this section. Women participants breastfeeding more than one infant, and women participants pregnant with more than one fetus, are eligible to receive Food Package VII as described in paragraph (e)(7) of this section.

(ii) *Authorized categories of supplemental foods.* Milk, breakfast cereal, juice, fruits and vegetables, whole wheat bread or other whole grains, eggs, legumes and peanut butter are the categories of supplemental foods authorized in this food package. Cheese or calcium-set tofu may be substituted for milk in amounts described in Table 2 of paragraph (e)(10) of this section. Amounts of cheese or calcium-set tofu exceeding the maximum substitution allowances may be allowed with medical documentation of the qualifying

condition, up to the maximum allowance for fluid milk. A health care professional licensed by the State to write prescriptions must make a medical determination and provide medical documentation that a woman cannot drink milk and requires additional cheese or calcium-set tofu. Such determination can be made for situations that include, but are not limited to, milk allergy or severe lactose maldigestion. Medical documentation must meet the requirements described in paragraph (d) of this section.

(6) *Food Package VI—Postpartum women*—(i) *Participant category served.* This food package is designed for issuance to women up to 6 months postpartum who are not breastfeeding their infants, and to breastfeeding women up to 6 months postpartum whose participating infant receives more than the maximum amount of formula allowed for partially breastfed infants as described in Table 1 of paragraph (e)(9) of this section.

(ii) *Authorized categories of supplemental foods.* Milk, breakfast cereal, juice, fruits and vegetables, eggs, and legumes or peanut butter are the categories of supplemental foods authorized in this food package. Cheese or calcium-set tofu may be substituted for milk in amounts described in Table 2 of paragraph (e)(10) of this section. Amounts of cheese or calcium-set tofu exceeding the maximum substitution allowances may be allowed with medical documentation of the qualifying condition, up to the maximum allowance for fluid milk. A health care professional licensed by the State to write prescriptions must make a medical determination and provide medical documentation that a woman cannot drink milk and requires additional cheese or calcium-set tofu. Such determination can be made for situations that include, but are not limited to, milk allergy or severe lactose maldigestion. Medical documentation must meet the requirements described in paragraph (d) of this section.

(7) *Food Package VII—Fully breastfeeding*—(i) *Participant category served.* This food package is designed for issuance to breastfeeding women up to 1 year postpartum whose infants do not receive infant formula from WIC (these breastfeeding women are assumed to be fully breastfeeding their infants). This food package is also designed for issuance to women participants pregnant with two or more fetuses, and women participants partially breastfeeding multiple infants. Women participants fully breastfeeding multiple infants receive 1.5 times the supplemental foods provided in Food Package VII.

(ii) *Authorized categories of supplemental foods.* Milk, cheese, breakfast cereal, juice, fruits and vegetables, whole wheat bread or other whole grains, eggs, legumes, peanut butter, and canned fish are the categories of supplemental foods authorized in this food package. Cheese or calcium-set tofu may be substituted for milk in amounts described in Table 2 of paragraph (e)(10) of this section. Amounts of cheese or calcium-set tofu exceeding the maximum substitution allowances may be allowed with medical documentation of the qualifying condition, up to the maximum allowance for fluid milk. A health care professional licensed by the State to write prescriptions must make a medical determination and provide medical documentation that a woman cannot drink milk and requires additional cheese or calcium-set tofu. Such determination can be made for situations that include, but are not limited to, milk allergy or severe lactose maldigestion. Medical documentation must meet the requirements described in paragraph (d) of this section.

(8) *Supplemental Foods—Maximum monthly allowances, options and substitution rates, and minimum requirements.* Tables 1 through 3 of paragraphs (e)(9) through (e)(11) of this section specify the maximum monthly allowances of foods in WIC food packages and identify WIC food options and substitution rates. Table 4 of paragraph (e)(12) of this section describes the minimum requirements and specifications of supplemental foods in the WIC food packages.

(9) *Maximum monthly allowances of supplemental foods for infants.* The maximum monthly allowances, options and substitution rates of supplemental foods for infants in Food Packages I, II and III are stated in Table 1 as follows:

TABLE 1—MAXIMUM MONTHLY ALLOWANCES OF SUPPLEMENTAL FOODS FOR INFANTS IN FOOD PACKAGES I, II AND III

| Foods [1] | Fully formula fed (FF) | | Partially breastfed (BF/FF) | | Fully breastfed (BF) | |
|---|---|---|---|---|---|---|
| | Food packages I-FF & III–FF<br>A: 0 through 3 months<br>B: 4 through 5 months | Food packages II–FF & III–FF<br>6 through 11 months | Food packages I-BF/FF & III BF/FF<br>A: 0 to 1 month [2]<br>B: 1 through 3 months [2]<br>C: 4 through 5 months | Food packages II- BF/FF & III BF/FF<br>6 through 11 months | Food package I–BF<br>0 through 5 months | Food package II–BF<br>6 through 11 months |
| WIC Formula [4 5 6 7] | A: 806 fl oz reconstituted liquid concentrate or 832 fl. oz. RTF or 870 fl oz reconstituted powder.<br>B: 884 fl oz reconstituted liquid concentrate or 896 fl. oz. RTF or 960 fl oz reconstituted powder. | 624 fl. oz. reconstituted liquid concentrate or 640 fl. oz. RTF or 696 fl oz reconstituted powder. | A: 104 fl oz reconstituted powder [3].<br>B: 364 fl oz reconstituted liquid concentrate or 384 fl oz RTF or 435 fl oz reconstituted powder.<br>C: 442 fl. oz. reconstituted liquid concentrate or 448 fl. oz. RTF or 522 fl oz reconstituted powder. | 312 fl. oz. reconstituted liquid concentrate or 320 fl. oz. RTF or 384 fl oz reconstituted powder. | | |
| Infant cereal [8] | | 24 oz | | 24 oz | | 24 oz. |
| Infant food fruits and vegetables [8 9 10] | | 128 oz | | 128 oz | | 256 oz. |
| Infant food meat [8 10] | | | | | | 77.5 oz. |

**Table 1 Footnotes:** (Abbreviations in order of appearance in table): FF = fully formula fed; BF/FF = partially breastfed (*i.e.,* the infant is breastfed but also receives formula from the WIC Program); BF = fully breastfed (*i.e.,* the infant receives no formula through the WIC program).

[1] Table 4 describes the minimum requirements and specifications for the supplemental foods.

[2] The powder form is the form recommended for partially breastfed infants ages 0 through 3 months in Food Package I.

[3] Liquid concentrate and ready-to-feed (RTF) may be substituted at rates that provide comparable nutritive value.

[4] WIC formula means infant formula, exempt infant formula, or WIC-eligible medical food. Only infant formula may be issued for infants in Food Packages I and II. Exempt infant formula may only be issued for infants in Food Package III.

[5] The maximum monthly allowance is specified in reconstituted fluid ounces for liquid concentrate, RTF liquid, and powder forms of infant formula and exempt infant formula. Reconstituted fluid ounce is the form prepared for consumption as directed on the container.

[6] If powder infant formula is provided, State agencies must provide at least the number of reconstituted fluid ounces as the maximum allowance for the liquid concentrate form of the same product in the same Food Package up to the maximum monthly allowance for powder. State agencies must issue whole containers that are all the same size.

[7] State agencies may round up and disperse whole containers of infant formula over the food package timeframe to allow participants to receive the full authorized nutritional benefit (FNB). State agencies must use the methodology described in accordance with paragraph (h)(1) of this section.

[8] State agencies may round up and disperse whole containers of infant foods (infant cereal, fruits and vegetables, and meat) over the Food Package timeframe. State agencies must use the methodology described in accordance with paragraph (h)(2) of this section.

[9] Fresh banana may replace up to 16 ounces of infant food fruit at a rate of 1 pound of bananas per 8 ounces of infant food fruit.

[10] In lieu of infant foods (cereal, fruit and vegetables, and meat), infants greater than 6 months of age in Food Package III may receive exempt infant formula or WIC-eligible medical foods at the same maximum monthly allowance as infants ages 4 through 5 months of age of the same feeding option.

(10) *Maximum monthly allowances of supplemental foods in Food Packages IV through VII.* The maximum monthly allowances, options and substitution rates of supplemental foods for children and women in Food Package IV through VII are stated in Table 2 as follows:

TABLE 2—MAXIMUM MONTHLY ALLOWANCES OF SUPPLEMENTAL FOODS FOR CHILDREN AND WOMEN IN FOOD PACKAGES IV, V, VI AND VII

| Foods[1] | Children | Women | | |
|---|---|---|---|---|
| | Food Package IV 1 through 4 years | Food Package V: Pregnant and partially breastfeeding (up to 1 year postpartum)[2] | Food Package VI: Postpartum (up to 6 months postpartum)[3] | Food Package VII: Fully breastfeeding (up to 1 year post-partum)[4 5] |
| Juice, single strength[6] | 128 fl oz | 144 fl oz | 96 fl oz | 144 fl oz. |
| Milk, fluid | 16 qt[7 8 9 10] | 22 qt[7 8 11 12] | 16 qt[7 8 11 12] | 24 qt[7 8 11 12]. |
| Breakfast cereal[13] | 36 oz | 36 oz | 36 oz | 36 oz. |
| Cheese | N/A | N/A | N/A | 1 lb. |
| Eggs | 1 dozen | 1 dozen | 1 dozen | 2 dozen. |
| Fruits and vegetables[14 15]. | $6.00 in cash value vouchers | $10.00 in cash value vouchers | $10.00 in cash value vouchers | $10.00 in cash value vouchers. |
| Whole wheat bread or other whole grains[16]. | 2 lb | 1 lb | N/A | 1 lb. |
| Fish (canned) | N/A | N/A | N/A | 30 oz. |
| Legumes, dry[17] | 1 lb | 1 lb | 1 lb | 1 lb. |
| And/or | Or | And | Or | And |
| Peanut butter | 18 oz | 18 oz | 18 oz | 18 oz. |

**Table 2 Footnotes:** N/A = the supplemental food is not authorized in the corresponding food package.

[1] Table 4 of paragraph (e)(12) of this section describes the minimum requirements and specifications for the supplemental foods.

[2] Food Package V is issued to two categories of WIC participants: Women participants with singleton pregnancies and breastfeeding women whose partially breastfed infants receive formula from the WIC Program in amounts that do not exceed the maximum formula allowances for Food Packages I–BF/FF–A, I–BF/FF–B, I–BF/FF–C, or II–BF/FF, as appropriate for the age of the infant as described in Table 1 of paragraph (e)(9) of this section.

[3] Food Package VI is issued to two categories of WIC participants: Non-breastfeeding postpartum women and breastfeeding postpartum women whose partially breastfed infants receive more than the maximum infant formula allowances for Food Packages I–BF/FF–A, I–BF/FF–B, I–BF/FF–C, or II–BF/FF, as appropriate for the age of the infant as described in Table 1 of paragraph (e)(9) of this section.

[4] Food Package VII is issued to three categories of WIC participants: Fully breastfeeding women whose infants do not receive formula from the WIC Program; women pregnant with two or more fetuses; and women fully or partially breastfeeding multiple infants.

[5] Women fully breastfeeding multiple infants are prescribed 1.5 times the maximum allowances.

[6] Combinations of single-strength and concentrated juices may be issued provided that the total volume does not exceed the maximum monthly allowance for single-strength juice.

[7] Whole milk, as specified in FDA standards, is the only type of milk allowed for 1-year-old children (12 through 23 months). Reduced fat milks, as specified in FDA standards, i.e., 2% milk fat, are the only types of milk allowed for children ≥ 24 months of age and women.

[8] Evaporated milk may be substituted at the rate of 16 fluid ounces of evaporated milk per 32 fluid ounces of fluid milk or a 1:2 fluid ounce substitution ratio. Dry milk may be substituted at an equal reconstituted rate to fluid milk. When a combination of different milk forms is provided, the full maximum monthly fluid milk allowance must be provided.

[9] For children, cheese may be substituted for milk at the rate of 1 pound of cheese per 3 quarts of milk. No more than 1 lb. of cheese may be substituted for milk. With medical documentation, additional amounts of cheese may be substituted in cases of lactose intolerance or other qualifying conditions, up to the maximum allowance for fluid milk.

[10] For children, soy-based beverage and calcium-set tofu may be substituted for milk only with medical documentation for qualifying conditions. Soy-based beverage may be substituted for milk, with medical documentation, for children in Food Package IV on a quart for quart basis up to the total maximum allowance of milk. Tofu may be substituted for milk, with medical documentation, for children in Food Package IV at the rate of 1 pound of tofu per 1 quart of milk up to the total maximum allowance of milk.

[11] For women, cheese or calcium-set tofu may be substituted for milk at the rate of 1 pound of cheese per 3 quarts of milk or 1 pound of tofu per 1 quart of milk. A maximum of 4 quarts of milk can be substituted in this manner in Food Packages V and VI; however, no more than 1 pound of cheese may be substituted for milk. A maximum of 6 quarts of milk can be substituted in this manner in Food Package VII; therefore, no more than 2 lbs. of cheese may be substituted for milk. With medical documentation, additional amounts of cheese or tofu may be substituted, up to the maximum allowances for fluid milk, in cases of lactose intolerance or other qualifying conditions.

[12] For women, soy-based beverage may be substituted for milk at the rate of 1 quart of soy-based beverage for 1 quart of milk up to the total maximum monthly allowance of milk.

[13] At least one-half of the total number of breakfast cereals on the State agency's authorized food list must have whole grain as the primary ingredient and meet labeling requirements for making a health claim as a "whole grain food with moderate fat content" as defined in Table 4 of paragraph (e)(12) of this section.

[14] Processed (canned, frozen, dried) fruits and vegetables may be substituted for fresh fruits and vegetables. Dried fruit and dried vegetables are not authorized for children in Food Package IV.

[15] The monthly value of the fruit/vegetable cash-value vouchers will be adjusted annually for inflation as described in § 246.16(j).

[16] Brown rice, bulgur (cracked wheat), oatmeal, whole-grain barley, soft corn or whole wheat tortillas may be substituted for whole wheat bread on an equal weight basis.

[17] Canned legumes may be substituted for dried legumes at the rate of 64 oz. of canned beans for 1 lb. dried beans. Under Food Packages V and VII, two additional combinations of dry or canned beans/peas are authorized: 1 lb. Dry and 64 oz. Canned beans/peas (and no peanut butter); or 2 lb. Dry or 128 oz. Canned beans/peas (and no peanut butter) or 36 oz. peanut butter (and no beans).

(11) *Maximum monthly allowances of supplemental foods for children and women with qualifying conditions in Food Package III.* The maximum monthly allowances, options and substitution rates of supplemental foods for participants with qualifying conditions in Food Package III are stated in Table 3 as follows:

TABLE 3—MAXIMUM MONTHLY ALLOWANCES OF SUPPLEMENTAL FOODS FOR CHILDREN AND WOMEN IN FOOD PACKAGE III

| Foods [1] | Children | Women | | |
|---|---|---|---|---|
| | 1 through 4 years | Pregnant and partially breastfeeding (up to 1 year postpartum) [2] | Postpartum (up to 6 months postpartum) [3] | Fully breastfeeding (up to 1 year postpartum) [4 5] |
| Juice, single strength [6] | 128 fl oz | 144 fl oz | 96 fl oz | 144 fl oz. |
| WIC Formula [7 8] | 455 fl oz liquid concentrate | 455 fl oz liquid concentrate | 455 fl oz liquid concentrate | 455 fl oz liquid concentrate. |
| Milk | 16 qt [9 10 11 12] | 22 qt [9 10 13 14] | 16 qt [9 10 13 14] | 24 qt [9 10 13 14]. |
| Breakfast cereal [15 16] | 36 oz | 36 oz | 36 oz | 36 oz. |
| Cheese | N/A | N/A | N/A | 1 lb. |
| Eggs | 1 dozen | 1 dozen | 1 dozen | 2 dozen. |
| Fruits and vegetables [17 18] | $6.00 in cash value vouchers | $10.00 in cash value vouchers | $10.00 in cash value vouchers | $10.00 in cash value vouchers. |
| Whole wheat bread [19] | 2 lb | 1 lb | N/A | 1 lb. |
| Fish (canned) | N/A | N/A | N/A | 30 oz. |
| Legumes, dry [20] | 1 lb | 1 lb | 1 lb | 1 lb. |
| And/or | Or | And | Or | And |
| Peanut butter | 18 oz | 18 oz | 18 oz | 18 oz. |

**Table 3 Footnotes:** N/A = the supplemental food is not authorized in the corresponding food package.

[1] Table 4 of paragraph (e)(12) of this section describes the minimum requirements and specifications for the supplemental foods.

[2] Food Package V is issued to two categories of WIC participants—women participants with singleton pregnancies and breastfeeding women whose partially breastfed infants receive formula from the WIC Program in amounts that do not exceed the maximum formula allowances for Food Packages I–BF/FF–A, I–BF/FF–B, I–BF/FF–C, or II–BF/FF, as appropriate for the age of the infant as described in Table 1 of paragraph (e)(9) of this section.

[3] Food Package VI is issued to two categories of WIC participants—non-breastfeeding postpartum women and breastfeeding postpartum women whose partially breastfed infants receive more than the maximum formula allowances for Food Packages I–BF/FF–A, I–BF/FF–B, I–BF/FF–C or II–BF/FF, as appropriate for the age of the infant as described in Table 1 of paragraph (e)(9) of this section.

[4] Food Package VII is issued to three categories of WIC participants—fully breastfeeding women whose infants do not receive formula from the WIC Program; women pregnant with two or more fetuses; and women fully or partially breastfeeding multiple infants.

[5] Women fully breastfeeding multiple infants are prescribed 1.5 times the maximum allowances.

[6] Combinations of single-strength and concentrated juices may be issued provided that the total volume does not exceed the maximum monthly allowance for single-strength juice.

[7] WIC formula means infant formula, exempt infant formula, or WIC-eligible medical food.

[8] Powder and Ready-to-Feed may be substituted at rates that provide comparable nutritive value.

[9] Whole milk, as specified in FDA standards, is the only type of milk allowed for 1-year-old children (12 through 23 months). Reduced fat milks, as specified in FDA standards, i.e., 2% milk fat, are the only types of milk allowed for children > 24 months of age and women. With medical documentation, whole milk may be substituted for reduced fat milk for children > 24 months of age and women.

[10] Evaporated milk may be substituted at the rate of 16 fluid ounces of evaporated milk per 32 fluid ounces of fluid milk or a 1:2 fluid ounce substitution ratio. Dry milk may be substituted at an equal reconstituted rate to fluid milk. When a combination of different milk forms is provided, the full maximum monthly fluid milk allowance must be provided.

[11] For children, cheese may be substituted for milk at the rate of 1 pound of cheese per 3 quarts of milk. No more than 1 lb. of cheese may be substituted for milk. With medical documentation, additional amounts of cheese may be substituted in cases of lactose intolerance or other qualifying conditions, up to the maximum allowance for fluid milk.

[12] For children, soy-based beverage and tofu may be substituted for milk only with medical documentation for qualifying conditions. Soy-based beverage may be substituted for milk, with medical documentation, for children in Food Package IV on a quart for quart basis up to the total maximum allowance of milk. Tofu may be substituted for milk, with medical documentation, for children in Food Package IV at the rate of 1 pound of tofu per 1 quart of milk up to the total maximum allowance of milk.

[13] For women, cheese or calcium-set tofu may be substituted for milk at the rate of 1 pound of cheese per 3 quarts of milk or 1 pound of tofu per 1 quart of milk. A maximum of 4 quarts of milk can be substituted in this manner in Food Packages V and VI; however, no more than 1 pound of cheese may be substituted for milk. A maximum of 6 quarts of milk can be substituted in this manner in Food Package VII; therefore, no more than 2 lbs. of cheese may be substituted for milk. With medical documentation, additional amounts of cheese or tofu may be substituted, up to the maximum allowances for fluid milk, in cases of lactose intolerance or other qualifying conditions.

[14] For women, soy-based beverage may be substituted for milk at the rate of 1 quart of soy-based beverage for 1 quart of milk up to the total maximum monthly allowance of milk.

[15] 32 dry ounces of infant cereal may be substituted for 36 ounces of breakfast cereal.

[16] At least one half of the total number of breakfast cereals on the State agency's authorized food list must have whole grain as the primary ingredient and meet labeling requirements for making a health claim as a "whole grain food with moderate fat content" as defined in Table 4 of paragraph (e)(12) of this section.

[17] Processed (canned, frozen, dried) fruits and vegetables may be substituted for fresh fruits and vegetables. Dried fruit and dried vegetables are not authorized for children.

[18] The monthly value of the fruit/vegetable cash-value vouchers will be adjusted annually for inflation as described in § 246.16(j).

[19] Brown rice, bulgur (cracked wheat), oatmeal, whole-grain barley, soft corn or whole wheat tortillas may be substituted for whole wheat bread on an equal weight basis.

[20] Canned legumes may be substituted for dried legumes at the rate of 64 oz. of canned beans for 1 lb dried beans. Issuance of two additional combinations of dry or canned beans/peas is authorized for the Pregnant and Partially Breastfeeding (up to 1 year postpartum) category and Fully Breastfeeding (Enhanced) (up to 1 year postpartum) category: 1 lb. Dry and 64 oz. Canned beans/peas (and no peanut butter); or 2 lb. Dry or 128 oz. Canned beans/peas (and no peanut butter) or 36 oz. peanut butter (and no beans).

(12) *Minimum requirements and specifications for supplemental foods.* Table 4 describes the minimum requirements and specifications for supplemental foods in all food packages:

TABLE 4—MINIMUM REQUIREMENTS AND SPECIFICATIONS FOR SUPPLEMENTAL FOODS

| Categories/foods | Minimum requirements and specifications |
|---|---|
| WIC formula: | |
| Infant formula | All authorized infant formulas must (1) meet the definition for an infant formula in section 201(z) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(z)) and meet the requirements for an infant formula under section 412 of the Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. 350a) and the regulations at 21 CFR parts 106 and 107;<br>(2) Be designed for enteral digestion via an oral or tube feeding;<br>(3) Provide at least 10 mg iron per liter (at least 1.8 mg iron/100 kilocalories) at standard dilution;<br>(4) Provide at least 67 kilocalories per 100 milliliters (approximately 20 kilocalories per fluid ounce) at standard dilution.<br>(5) Not require the addition of any ingredients other than water prior to being served in a liquid state. |
| Exempt infant formula | All authorized exempt infant formula must (1) meet the definition and requirements for an exempt infant formula under section 412(h) of the Federal Food, Drug, and Cosmetic Act as amended (21 U.S.C. 350a(h)) and the regulations at 21 CFR Parts 106 and 107; and<br>2) Be designed for enteral digestion via an oral or tube feeding. |
| WIC-eligible medical foods. [1] | Certain enteral products that are specifically formulated to provide nutritional support for individuals with a qualifying condition, when the use of conventional foods is precluded, restricted, or inadequate. Such WIC-eligible medical foods must serve the purpose of a food, meal or diet (may be nutritionally complete or incomplete) and provide a source of calories and one or more nutrients; be designed for enteral digestion via an oral or tube feeding; and may not be a conventional food, drug, flavoring, or enzyme.<br>WIC-eligible medical foods include many, but not all, products that meet the definition of medical food in Section 5(b)(3) of the Orphan Drug Act (21 U.S.C. 360ee(b)(3)). |
| Milk and milk alternatives: | |
| Cow's milk | Must conform to FDA standard of identity for whole, reduced fat, low-fat, or non-fat milks (21 CFR 131.110). Must be pasteurized and contain at least 400 IU of vitamin D per quart (100 IU per cup) and 2000 IU of vitamin A per quart (500 IU per cup).<br>May be flavored or unflavored. May be fluid, shelf-stable, evaporated (21 CFR 131.130), or dried (i.e., powder) (21 CFR 131.147). [2]<br>Cultured Milks. Must conform to FDA standard of identity for cultured milk (21 CFR 131.112—cultured buttermilk, kefir cultured milk, acidophilus cultured milk). |
| Goat milk | Must conform to FDA standard of identity for whole, reduced fat, low-fat, or non-fat milks (21 CFR part 131). Must be pasteurized and contain at least 400 IU of vitamin D per quart (100 IU per cup) and 2000 IU of vitamin A per quart (500 IU per cup) following FDA fortification standards (21 CFR part 131). May be flavored or unflavored. May be fluid, shelf-stable, evaporated (21 CFR 131.130), or dried (i.e., powdered) (21 CFR 131.147). [2] |
| Cheese | Domestic cheese made from 100 percent pasteurized milk. Must conform to FDA standard of identity (21 CFR Part 133); Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, part-skim or whole Mozzarella, pasteurized processed American, or blends of any of these cheeses are authorized.<br>Cheeses that are labeled low, free, reduced, less or light in the nutrients of sodium, fat or cholesterol are WIC-eligible. [3] |
| Tofu | Calcium-set tofu prepared with only calcium salts (e.g., calcium sulfate). May not contain added fats, sugars, oils, or sodium. |
| Soy-based beverage | Must be fortified to meet the following nutrient levels: 276 mg calcium per cup, 8 g protein per cup, 500 IU vitamin A per cup, 100 IU vitamin D per cup, 24 mg magnesium per cup, 222 mg phosphorus per cup, 349 mg potassium per cup, 0.44 mg riboflavin per cup, and 1.1 mcg vitamin B12 per cup, in accordance with fortification guidelines issued by FDA. |
| Juice | Must be pasteurized 100% unsweetened fruit juice. Must conform to FDA standard of identity (21 CFR part 146) or vegetable juice must conform to FDA standard of identity (21 CFR part 156) and contain at least 30 mg of vitamin C per 100 mL of juice. With the exception of 100 percent citrus juices, State agencies must verify the vitamin C content of all State-approved juices. Juices that are fortified with other nutrients may be allowed at the State agency's option. Juice may be fresh, from concentrate, frozen, canned, or shelf-stable.<br>Vegetable juice may be regular or lower in sodium. [3] |
| Eggs | Fresh shell domestic hens' eggs or dried eggs mix (must conform to FDA standard of identity in 21 CFR 160.105) or pasteurized liquid whole eggs (must conform to FDA standard of identity in 21 CFR 160.115). |

TABLE 4—MINIMUM REQUIREMENTS AND SPECIFICATIONS FOR SUPPLEMENTAL FOODS—Continued

| Categories/foods | Minimum requirements and specifications |
|---|---|
| | Hard boiled eggs, where readily available for purchase in small quantities, may be provided for homeless participants. |
| Breakfast cereal | Breakfast cereals as defined by FDA in 21 CFR 170.3(n)(4) for ready-to-eat and instant and regular hot cereals.<br>Must contain a minimum of 28 mg iron per 100 g dry cereal.<br>Must contain ≤ 21.2 g sucrose and other sugars per 100 g dry cereal (≤ 6 g per dry oz).<br>At least half of the cereals authorized on a State agency's food list must have whole grain as the primary ingredient by weight AND meet labeling requirements for making a health claim as a "whole grain food with moderate fat content": [4]<br>(1) Contain a minimum of 51% whole grains (using dietary fiber as the indicator);<br>(2) Meet the regulatory definitions for "low saturated fat" at 21 CFR 101.62 (≤ 1 g saturated fat per RACC) and "low cholesterol" (≤ 20 mg cholesterol per RACC);<br>(3) Bear quantitative trans fat labeling; and<br>(4) Contain ≤ 6.5 g total fat per RACC and ≤ 0.5 g trans fat per RACC. |
| Fruits and Vegetables (fresh and processed). | Any variety of fresh whole or cut fruit without added sugars. [5]<br>Any variety of fresh whole or cut vegetable, except white potatoes, without added sugars, fats, or oils (orange yams and sweet potatoes are allowed). [5]<br>Any variety of canned [6] fruits (must conform to FDA standard of identity (21 CFR part 145); including applesauce, juice pack or water pack without added sugars, fats, oils, or salt (i.e. sodium). Any variety of frozen fruits without added sugars. [7]<br>Any variety of canned [6] or frozen vegetables (must conform to FDA standard of identity (21 CFR part 155)) except white potatoes (orange yams and sweet potatoes are allowed); without added sugars, fats, or oils. May be regular or lower in sodium. [3 7]<br>Any type of dried fruits or dried vegetable without added sugars, fats, oils, or salt (i.e., sodium). [5] |
| Whole wheat bread/Whole grain bread/Other whole unprocessed grains. | *Bread*<br>*Whole wheat bread* must conform to FDA standard of identity (21 CFR 136.180). (Includes whole wheat buns and rolls.)<br>AND<br>Whole wheat must be the primary ingredient by weight in all whole wheat bread products.<br>*Whole grain bread* must meet labeling requirements for making a health claim as a "whole grain food with moderate fat content": [4]<br>(1) Contain a minimum of 51% whole grains (using dietary fiber as the indicator);<br>(2) Meet the regulatory definitions for "low saturated fat" at 21 CFR 101.62 (≤ 1 g saturated fat per RACC) and "low cholesterol" (≤ 20 mg cholesterol per RACC);<br>(3) Bear quantitative trans fat labeling; and<br>(4) Contain ≤ 6.5 g total fat per RACC and ≤ 0.5 g trans fat per RACC.<br>AND<br>Whole grain must be the primary ingredient by weight in all whole grain bread products.<br>*Other Whole Unprocessed Grains*<br>Brown rice, bulgur (cracked wheat), oatmeal, and whole-grain barley without added sugars, fats, oils, or salt (i.e., sodium). May be instant-, quick-, or regular-cooking.<br>Soft corn or whole wheat tortillas may be allowed at the State agency's option. Whole grain must be the primary ingredient by weight. |
| Canned fish [6] | Canned only:<br>Light tuna (must conform to FDA standard of identity (21 CFR 161.190));<br>Salmon (must conform to FDA standard of identity (21 CFR 161.170));<br>Sardines;<br>Mackerel (N. Atlantic Scomber scombrus, or Chub Pacific Scomber japonicus);<br>May be packed in water or oil. Pack may include bones or skin. May be regular or lower in sodium content. [3] |
| Mature legumes (dry beans and peas) | Any type of mature dry beans, peas, or lentils in dry-packaged or canned [6] forms. Examples include but are not limited to black beans ("turtle beans"), blackeye peas (cowpeas of the blackeye variety, "cow beans"), garbanzo beans (chickpeas), great northern beans, kidney beans, lima beans ("butter beans"), navy beans, pinto beans, soybeans, split peas, and lentils. All categories exclude soups. May not contain added sugars, fats, oils or meat as purchased. Canned legumes may be regular or lower in sodium content. [3 8]<br>Baked beans may be provided for participants with limited cooking facilities. [8] |
| Peanut butter | Peanut butter and reduced fat peanut butter (must conform to FDA Standard of Identity (21 CFR 164.150)); creamy or chunky, regular or reduced fat, salted or unsalted [3] forms are allowed. |
| Infant Foods: | |
| Infant cereal | Infant cereal must contain a minimum of 45 mg of iron per 100 g of dry cereal. [9] |
| Infant fruits | Any variety of single ingredient commercial infant food fruit without added sugars, starches, or salt (i.e., sodium). Texture may range from strained through diced. [10] |

TABLE 4—MINIMUM REQUIREMENTS AND SPECIFICATIONS FOR SUPPLEMENTAL FOODS—Continued

| Categories/foods | Minimum requirements and specifications |
|---|---|
| Infant vegetables | Any variety of single ingredient commercial infant food vegetables without added sugars, starches, or salt (i.e., sodium). Texture may range from strained through diced.[11] |
| Infant meat | Any variety of commercial infant food meat or poultry, as a single major ingredient, with added broth or gravy. Added sugars or salt (i.e. sodium) are not allowed. Texture may range from pureed through diced.[12] |

Table 4 Footnotes: FDA = Food and Drug Administration of the U.S. Department of Health and Human Services; RACC = reference amount customarily consumed.

[1] The following are not considered a WIC eligible medical food: Formulas used solely for the purpose of enhancing nutrient intake, managing body weight, addressing picky eaters or used for a condition other than a qualifying condition (e.g., vitamin pills, weight control products, etc.); medicines or drugs, as defined by the Food, Drug and Cosmetic Act (21 U.S.C. 350a) as amended; enzymes, herbs, or botanicals; oral rehydration fluids or electrolyte solutions; flavoring or thickening agents; and feeding utensils or devices (e.g., feeding tubes, bags, pumps) designed to administer a WIC-eligible formula.

[2] All authorized milks must confirm to FDA, DHHS standards of identity for milks as defined by 21 CFR part 131 and meet WIC's requirements for vitamin fortification as stated above. Additional authorized milks include, but are not limited to: calcium-fortified, lactose-reduced and lactose-free, acidified, and UHT pasteurized milks. Other milks are permitted at the State agency's discretion provided that the State agency determines that the milk meets the minimum requirements for authorized milk.

[3] Any of the folowing lower sodium forms are allowable:

*Sodium-free*—less than 5 mg sodium per serving;

*Very low sodium*—35 mg sodium or less per serving or, if the serving is 30 g or less or 2 tablespoons or less, 35 mg sodium or less per 50 g of the food;

*Low-sodium*—140 mg sodium or less per serving or, if the serving is 30 g or less or 2 tablespoons or less, 140 mg sodium or less per 50 g of the food;

*Light in sodium*—at least 50 percent less sodium per serving than average reference amount for same food with no sodium reduction;

*Lightly salted*—at least 50 percent less sodium per serving than reference amount (If the food is not "low in sodium," the statement "not a low-sodium food" must appear on the same panel as the Nutrition Facts panel.); and

*Reduced or less sodium*—at least 25 percent less sodium per serving than reference food.

[4] Food and Drug Administration (FDA), *Health Claim Notification for Whole Grain Foods with Moderate Fat Content* at *http://www.cfsan.fda.gov/~dms/flgrain2.html*

[5] Herbs or spices; edible blossoms and flowers, e.g., squash blossoms (broccoli, cauliflower and artichokes are allowed); creamed or sauced vegetables; vegetable-grain (pasta or rice) mixtures; fruit-nut mixtures; breaded vegetables; fruits and vegetables for purchase on salad bars; peanuts; ornamental and decorative fruits and vegetables such as chili peppers on a string; garlic on a string; gourds; painted pumpkins; fruit baskets and party vegetable trays; and items such as blueberry muffins and other baked goods are not authorized. Mature legumes (dry beans and peas) and juices are provided as separate food WIC categories and are not authorized under the fruit and vegetable category.

[6] "Canned" refers to processed food items in cans or other shelf-stable containers, e.g., jars, pouches.

[7] Excludes white potatoes; catsup or other condiments; pickled vegetables, olives; soups; juices; and fruit leathers and fruit roll-ups.

[8] The following canned mature legumes are not authorized: soups; immature varieties of legumes, such as those used in canned green peas, green beans, snap beans, orange beans, and wax beans; baked beans with meat; e.g., beans and franks; and beans containing added sugars (with the exception of baked beans), fats, meat, or oils.

[9] Infant cereals containing infant formula, milk, fruit, or other non-cereal ingredients are not allowed.

[10] Mixtures with cereal or infant food desserts (e.g., peach cobbler) are not authorized; however, combinations of single ingredients (e.g., apple-banana) are allowed.

[11] Combinations of single ingredients (e.g., peas and carrots) are allowed.

[12] No infant food combinations (e.g., meat and vegetables) or dinners (e.g., spaghetti and meatballs) are allowed.

(f) *USDA purchase of commodity foods.* (1) At the request of a State agency, FNS may purchase commodity foods for the State agency using funds allocated to the State agency. The commodity foods purchased and made available to the State agency must be equivalent to the foods specified in Table 4 of paragraph (e)(12) of this section.

(2) The State agency must:

(i) Distribute the commodity foods to its local agencies or participants; and

(ii) Ensure satisfactory storage facilities and conditions for the commodity foods, including documentation of proper insurance.

(g) *Infant formula manufacturer registration.* Infant formula manufacturers supplying formula to the WIC Program must be registered with the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.). Such manufacturers wishing to bid for a State contract to supply infant formula to the program must certify with the State health department that their formulas comply with the Federal Food, Drug, and Cosmetic Act and regulations issued pursuant to the Act.

(h) *Rounding up.* State agencies may round up to the next whole container for either infant formula or infant foods (infant cereal, fruits, vegetables and meat). State agencies that use the rounding up option must calculate the amount of infant formula or infant foods provided according to the requirements and methodology as described in this section.

(1) *Infant Formula.* State agencies must use the maximum monthly allowance of reconstituted fluid ounces of liquid concentrate infant formula as specified in Table 1 of paragraph (e)(9) of this section as the full nutritional benefit (FNB) provided by infant formula for each food package category and infant feeding option (e.g., Food Package I A fully formula fed, IA–FF).

(i) For State agencies that use rounding up of infant formula, the FNB is determined over the timeframe (the number of months) that the participant receives the food package. In any given month of the timeframe, the monthly issuance of reconstituted fluid ounces of infant formula may exceed the maximum monthly allowance or fall below the FNB; however, the cumulative average over the timeframe may not fall below the FNB. In addition, the State agency must:

(A) Use the methodology described in paragraph (h)(1)(ii) of this section for calculating and dispersing the rounding up option;

(B) Issue infant formula in whole containers that are all the same size; and

(C) Disperse the number of whole containers as evenly as possible over the timeframe with the largest monthly issuances given in the beginning of the timeframe.

(ii) The methodology to calculate rounding up and dispersing infant formula to the next whole container over the food package timeframe is as follows:

(A) Multiply the FNB amount for the appropriate food package and feeding option (e.g. Food Package I A fully formula fed, IA–FF) by the timeframe the participant will receive the food package to determine the total amount of infant formula to be provided.

(B) Divide the total amount of infant formula to be provided by the yield of the container (in reconstituted fluid ounces) issued by the State agency to determine the total number of containers to be issued during the timeframe that the food package is prescribed.

(C) If the number of containers to be issued does not result in a whole number of containers, the State agency must round up to the next whole container in order to issue whole containers.

(2) *Infant foods.* (i) State agencies may use the rounding up option to the next whole container of infant food (infant cereal, fruits, vegetables and meats) when the maximum monthly allowance cannot be issued due to varying container sizes of authorized infant foods.

(ii) State agencies that use the rounding up option for infant foods must:

(A) Use the methodology described in paragraph (h)(2)(iii) of this section for calculating and dispersing the rounding up option;

(B) Issue infant foods in whole containers; and

(C) Disperse the number of whole containers as evenly as possible over the timeframe (the number of months the participant will receive the food package).

(iii) The methodology to round up and disperse infant food is as follows:

(A) Multiply the maximum monthly allowance for the infant food by the timeframe the participant will receive the food package to determine the total amount of food to be provided.

(B) Divide the total amount of food provided by the container size issued by the State agency (e.g., ounces) to determine the total number of food containers to be issued during the timeframe that the food package is prescribed.

(C) If the number of containers to be issued does not result in a whole number of containers, the State agency must round up to the next whole container in order to issue whole containers.

(i) *Plans for substitutions.* (1) The State agency may submit to FNS a plan for substitution of food(s) acceptable for use in the Program to allow for different cultural eating patterns. The plan shall provide the State agency's justification, including a specific explanation of the cultural eating pattern and other information necessary for FNS to evaluate the plan as specified in paragraph (i)(2) of this section.

(2) FNS will evaluate a State agency's plan for substitution of foods for different cultural eating patterns based on the following criteria:

(i) Any proposed substitute food must be nutritionally equivalent or superior to the food it is intended to replace.

(ii) The proposed substitute food must be widely available to participants in the areas where the substitute is intended to be used.

(iii) The cost of the substitute food must be equivalent to or less than the cost of the food it is intended to replace.

(3) FNS will make a determination on the proposed plan based on the evaluation criteria specified in paragraph (i)(2) of this section, as appropriate. The State agency shall substitute foods only after receiving the written approval of FNS.

[50 FR 6121, Feb. 13, 1985 as amended at 73 FR 11312, Mar. 3, 2008; 74 FR 48845, Sept. 25, 2009; 74 FR 69245, Dec. 31, 2009]

### § 246.11 Nutrition education.

(a) *General.* (1) Nutrition education shall be considered a benefit of the Program, and shall be made available at no cost to the participant. Nutrition education shall be designed to be easily understood by participants, and it shall bear a practical relationship to participant nutritional needs, household situations, and cultural preferences including information on how to select food for themselves and their families. Nutrition education shall be thoroughly integrated into participant health care plans, the delivery of supplemental foods, and other Program operations.

(2) The State agency shall ensure that nutrition education is made available to all participants. Nutrition education may be provided through the local agencies directly, or through arrangements made with other agencies. At the time of certification, the local agency shall stress the positive, long-term benefits of nutrition education and encourage the participant to attend and participate in nutrition education activities. However, individual participants shall not be denied supplemental foods for failure to attend or participate in nutrition education activities.

(3) As an integral part of nutrition education, the State agency shall ensure that local agencies provide drug and other harmful substance abuse information to all pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in the program. Drug and other harmful substance abuse information may also be provided to pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in local agency services other than the Program.

(b) *Goals.* Nutrition education shall be designed to achieve the following two broad goals:

(1) Emphasize the relationship between nutrition, physical activity and health with special emphasis on the nutritional needs of pregnant, postpartum, and breastfeeding women, infants and children under five years of age, and raise awareness about the dangers of using drugs and other harmful substances during pregnancy and while breastfeeding.

(2) Assist the individual who is at nutritional risk in improving health status and achieving a positive change in dietary and physical activity habits, and in the prevention of nutrition-related problems through optimal use of the supplemental foods and other nutritious foods. This is to be taught in the context of the ethnic, cultural and geographic preferences of the participants and with consideration for educational and environmental limitations experienced by the participants.

(c) *State agency responsibilities.* The State agency shall perform the following activities in carrying out nutrition education responsibilities:

(1) Develop and coordinate the nutrition education component of Program operations with consideration of local agency plans, needs and available nutrition education resources.

(2) Provide in-service training and technical assistance for professional and para-professional personnel involved in providing nutrition education to participants at local agencies. The State agency shall also provide training on the promotion and management of breastfeeding to staff at local agencies who will provide information and assistance on this subject to participants.

(3) Identify or develop resources and educational materials for use in local

agencies, including breastfeeding promotion and instruction materials, taking reasonable steps to include materials in languages other than English in areas where a significant number or proportion of the population needs the information in a language other than English, considering the size and concentration of such population and, where possible, the reading level of participants.

(4) Develop and implement procedures to ensure that nutrition education is offered to all adult participants and to parents and guardians of infant or child participants, as well as child participants, whenever possible.

(5) Monitor local agency activities to ensure compliance with provisions set forth in paragraphs (c)(7), (d), and (e) of this section.

(6) Establish standards for participant contacts that ensure adequate nutrition education in accordance with paragraph (e) of this section.

(7) Establish standards for breastfeeding promotion and support which include, at a minimum, the following:

(i) A policy that creates a positive clinic environment which endorses breastfeeding as the preferred method of infant feeding;

(ii) A requirement that each local agency designate a staff person to coordinate breastfeeding promotion and support activities;

(iii) A requirement that each local agency incorporate task-appropriate breastfeeding promotion and support training into orientation programs for new staff involved in direct contact with WIC clients; and

(iv) A plan to ensure that women have access to breastfeeding promotion and support activities during the prenatal and postpartum periods.

(d) *Local agency responsibilities.* Local agencies shall perform the following activities in carrying out their nutrition education responsibilities:

(1) Make nutrition education available or enter into an agreement with another agency to make nutrition education available to all adult participants, and to parents or caretakers of infant and child participants, and whenever possible, to child participants. Nutrition education may be provided through the use of individual or group sessions. Educational materials designed for Program participants may be utilized to provide education to pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in local agency services other than the program.

(2) Develop an annual local agency nutrition education plan consistent with the State's nutrition education component of Program operations and in accordance with this part and FNS guidelines. The local agency shall submit its nutrition education plan to the State agency by a date specified by the State agency.

(e) *Participant contacts.* (1) The nutrition education contacts shall be made available through individual or group sessions which are appropriate to the individual participant's nutritional needs. All pregnant participants shall be encouraged to breastfeed unless contraindicated for health reasons.

(2) During each six-month certification period, at least two nutrition contacts shall be made available to all adult participants and the parents or caretakers of infant and child participants, and wherever possible, the child participants themselves.

(3) Nutrition education contacts shall be made available at a quarterly rate, but not necessarily taking place within each quarter, to parents or caretakers of infant participants certified for a period in excess of six months.

(4) The local agency shall document in each participant's certification file that nutrition education has been given to the participant in accordance with State agency standards, except that the second or any subsequent nutrition education contact during a certification period that is provided to a participant in a group setting may be documented in a masterfile. Should a participant miss a nutrition education appointment, the local agency shall, for purposes of monitoring and further education efforts, document this fact in the participant's file, or, at the local agency's discretion, in the case of a second or subsequent missed contact where the nutrition education was offered in a group setting, document this fact in a master file.

(5) An individual care plan shall be provided for a participant based on the need for such plan as determined by the competent professional authority, except that any participant, parent, or caretaker shall receive such plan upon request.

(6) Contacts shall be designed to meet different cultural and language needs of Program participants.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 58 FR 11507, Feb. 26, 1993; 59 FR 11503, Mar. 11, 1994; 65 FR 53528, Sept. 5, 2000; 71 FR 56731, Sept. 27, 2006; 73 FR 11312, Mar. 3, 2008]

## Subpart E—State Agency Provisions

### § 246.12 Food delivery systems.

(a) *General.* This section sets forth design and operational requirements for food delivery systems. In recognition of emergent electronic benefits transfer (EBT) technology, FNS may, on a case-by-case basis, modify regulatory provisions to the extent FNS determines the particular EBT system provides adequate safeguards that serve the purpose of the provisions being modified.

(1) *Management.* The State agency is responsible for the fiscal management of, and accountability for, food delivery systems under its jurisdiction. The State agency may permit only authorized vendors and farmers, home food delivery contractors, and direct distribution sites to accept food instruments and cash-value vouchers.

(2) *Design.* The State agency must design all food delivery systems to be used by its local agencies.

(3) *FNS oversight.* FNS may, for a stated cause and by written notice, require revision of a proposed or operating food delivery system and will allow a reasonable time for the State agency to effect such a revision.

(4) *Part 3016.* All contracts or agreements entered into by the State or local agency for the management or operation of food delivery systems must conform to the requirements of part 3016 of this title.

(b) *Uniform food delivery systems.* The State agency may operate up to three types of food delivery systems under its jurisdiction—retail, home delivery, or direct distribution. Each system must be procedurally uniform throughout the jurisdiction of the State agency and must ensure adequate participant access to supplemental foods. When used, food instruments must be uniform within each type of system.

(c) *No charge for authorized supplemental foods.* The State agency must ensure that participants receive their authorized supplemental foods free of charge.

(d) *Compatibility of food delivery system.* The State agency must ensure that the food delivery system(s) selected is compatible with the delivery of health and nutrition education services to participants.

(e) *Retail food delivery systems: General.* Retail food delivery systems are systems in which participants, parents or caretakers of infant and child participants, and proxies obtain authorized supplemental foods by submitting a food instrument or cash-value voucher to an authorized vendor.

(f) *Retail food delivery systems: Food instrument and cash-value voucher requirements*—(1) *General.* State agencies using retail food delivery systems must use food instruments and cash-value vouchers that comply with the requirements of paragraph (f)(2) of this section.

(2) *Printed food instruments and cash-value vouchers.* Each printed food instrument and cash-value voucher must clearly bear on its face the following information:

(i) *Authorized supplemental foods.* The supplemental foods authorized to be obtained with the food instrument or cash-value voucher;

(ii) *First date of use.* The first date on which the food instrument or cash-value vouchermay be used to obtain supplemental foods;

(iii) *Last date of use.* The last date on which the food instrument or cash-value vouchers may be used to obtain authorized supplemental foods. This date must be a minimum of 30 days from the first date on which it may be used, except for the participant's first month of issuance, when it may be the end of the month or cycle for which the food instrument or cash-value voucher

is valid. Rather than entering a specific last date of use on each instrument or cash-value voucher, all instruments or cash-value vouchers may be printed with a notice that the participant must transact them within a specified number of days after the first date on which the food instrument or cash-value voucher may be used;

(iv) *Redemption period.* The date by which the vendor must submit the food instrument or cash-value voucher for redemption. This date must be no more than 60 days from the first date on which the food instrument or cash-value vouchermay be used. If the date is fewer than 60 days, then the State agency must ensure that the allotted time provides the vendor sufficient time to submit the food instrument or cash-value voucher for redemption without undue burden;

(v) *Serial number.* A unique and sequential serial number;

(vi) *Purchase price.* A space for the purchase price to be entered. At the discretion of the State agency, a maximum price may be printed on the food instrument that is higher than the expected purchase price of the authorized supplemental foods for which it will be used, but that is low enough to protect against potential loss of funds. When a maximum price is printed on the food instrument, the space for the purchase price must be clearly distinguishable from the maximum price. For example, the words "purchase price" or "actual amount of sale" could be printed larger and in a different area of the food instrument than the maximum price; and

(vii) *Signature space.* A space where participants, parents or caretakers of infant or child participants, or proxies must sign.

(3) *Vendor identification.* The State agency must implement procedures to ensure each food instrument and cash-value voucher submitted for redemption can be identified by the vendor or farmer that submitted the food instrument or cash-value voucher. Each vendor operated by a single business entity must be identified separately. The State agency may identify vendors by requiring that all authorized vendors stamp their names and/or enter a vendor identification number on all food instruments or cash-value vouchers prior to submitting them for redemption.

(g) *Retail food delivery systems: Vendor authorization*—(1) *General.* The State agency must authorize an appropriate number and distribution of vendors in order to ensure the lowest practicable food prices consistent with adequate participant access to supplemental foods and to ensure effective State agency management, oversight, and review of its authorized vendors.

(2) *Vendor limiting criteria.* The State agency may establish criteria to limit the number of stores it authorizes. The State agency must apply its limiting criteria consistently throughout its jurisdiction. Any vendor limiting criteria used by the State agency must be included in the State Plan in accordance with § 246.4(a)(14)(ii).

(3) *Vendor selection criteria.* The State agency must develop and implement criteria to select stores for authorization. The State agency must apply its selection criteria consistently throughout its jurisdiction. The State agency may reassess any authorized vendor at any time during the vendor's agreement period using the vendor selection criteria in effect at the time of the reassessment and must terminate the agreements with those vendors that fail to meet them. The vendor selection criteria must include the following categories and requirements and must be included in the State Plan in accordance with § 246.4(a)(14)(ii).

(i) *Minimum variety and quantity of supplemental foods.* The State agency must establish minimum requirements for the variety and quantity of supplemental foods that a vendor applicant must stock to be authorized. These requirements include that the vendor stock at least two varieties of fruits, two varieties of vegetables, and at least one whole grain cereal authorized by the State agency. The State agency may not authorize a vendor applicant unless it determines that the vendor applicant meets these minimums. The State agency may establish different minimums for different vendor peer groups. The State agency may not authorize a vendor applicant unless it determines that the vendor applicant obtains infant formula only from sources

included on the State agency's list described in paragraph (g)(11) of this section.

(ii) *Business integrity.* The State agency must consider the business integrity of a vendor applicant. In determining the business integrity of a vendor applicant, the State agency may rely solely on facts already known to it and representations made by the vendor applicant on its vendor application. The State agency is not required to establish a formal system of background checks for vendor applicants. Unless denying authorization of a vendor applicant would result in inadequate participant access, the State agency may not authorize a vendor applicant if during the last six years the vendor applicant or any of the vendor applicant's current owners, officers, or managers have been convicted of or had a civil judgment entered against them for any activity indicating a lack of business integrity. Activities indicating a lack of business integrity include fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and obstruction of justice. The State agency may add other types of convictions or civil judgments to this list.

(iii) *Current Food Stamp Program disqualification or civil money penalty for hardship.* Unless denying authorization of a vendor applicant would result in inadequate participant access, the State agency may not authorize a vendor applicant that is currently disqualified from the Food Stamp Program or that has been assessed a Food Stamp Program civil money penalty for hardship and the disqualification period that would otherwise have been imposed has not expired.

(iv) *Provision of incentive items.* The State agency may not authorize or continue the authorization of an above-50-percent vendor, or make payments to an above-50-percent vendor, which provides or indicates an intention to provide prohibited incentive items to customers. Evidence of such intent includes, but is not necessarily limited to, advertising the availability of prohibited incentive items.

(A) The State agency may approve any of the following incentive items to be provided by above-50-percent vendors to customers, at the discretion of the State agency:

(*1*) Food, merchandise, or services obtained at no cost to the vendor, subject to documentation;

(*2*) Food, merchandise, or services of nominal value, i.e., having a per item cost of less than $2, subject to documentation;

(*3*) Food sales and specials which involve no cost or less than $2 in cost to the vendor for the food items involved, subject to documentation, and do not result in a charge to a WIC food instrument for foods in excess of the foods listed on the food instrument;

(*4*) Minimal customary courtesies of the retail food trade, such as helping the customer to obtain an item from a shelf or from behind a counter, bagging food for the customer, and assisting the customer with loading the food into a vehicle.

(B) The following incentive items are prohibited for above-50-percent vendors to provide to customers:

(*1*) Services which result in a conflict of interest or the appearance of such conflict for the above-50-percent vendor, such as assistance with applying for WIC benefits;

(*2*) Lottery tickets provided to customers at no charge or below face value;

(*3*) Cash gifts in any amount for any reason;

(*4*) Anything made available in a public area as a complimentary gift which may be consumed or taken without charge;

(*5*) An allowable incentive item provided more than once per customer per shopping visit, regardless of the number of customers or food instruments involved, unless the incentive items had been obtained by the vendor at no cost or the total value of multiple incentive items provided during one shopping visit would not exceed the less-than-$2 nominal value limit;

(*6*) Food, merchandise or services of greater than nominal value provided to the customer;

(*7*) Food, merchandise sold to customers below cost, or services purchased by customers below fair market value;

(*8*) Any kind of incentive item which incurs a liability for the WIC Program;

(*9*) Any kind of incentive item which violates any Federal, State, or local law or regulations.

(C) For-profit goods or services offered by the above-50-percent vendor to WIC participants at a fair market value based on comparable for-profit goods or services of other businesses are not incentive items subject to approval or prohibition, except that such goods or services must not constitute a conflict of interest or result in a liability for the WIC Program.

(4) *Vendor selection criteria: competitive price.* The State agency must establish a vendor peer group system and distinct competitive price criteria and allowable reimbursement levels for each peer group. The State agency must use the competitive price criteria to evaluate the prices a vendor applicant charges for supplemental foods as compared to the prices charged by other vendor applicants and authorized vendors, and must authorize vendors selected from among those that offer the program the most competitive prices. The State agency must consider a vendor applicant's shelf prices or the prices it bids for supplemental foods, which may not exceed its shelf prices. In establishing competitive price criteria and allowable reimbursement levels, the State agency must consider participant access by geographic area. The State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment.

(i) *Vendors that meet the above-50-percent criterion.* Vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion under guidelines approved by FNS, are defined as above-50-percent vendors. Each State agency annually must implement procedures approved by FNS to identify authorized vendors and vendor applicants as either above-50-percent vendors or regular vendors, in accordance with paragraphs (g)(4)(i)(E) and (g)(4)(i)(F) of this section. The State agency must receive FNS certification of its vendor cost containment system under section 246.12(g)(4)(vi) prior to authorizing any above-50-percent vendors. The State agency that chooses to authorize any above-50-percent vendors:

(A) Must distinguish these vendors from other authorized vendors in its peer group system or its alternative cost containment system approved by FNS by establishing separate peer groups for above-50-percent vendors or by placing above-50-percent vendors in peer groups with other vendors and establishing distinct competitive price selection criteria and allowable reimbursement levels for the above-50-percent vendors;

(B) Must reassess the status of new vendors within six months after authorization to determine whether or not the vendors are above-50-percent vendors, and must take necessary follow-up action, such as terminating vendor agreements or reassigning vendors to the appropriate peer group;

(C) Must compare above-50-percent vendors' prices against the prices of vendors that do not meet the above-50-percent criterion in determining whether the above-50-percent vendors have competitive prices and in establishing allowable reimbursement levels for such vendors; and

(D) Must ensure that the prices of above-50-percent vendors do not inflate the competitive price criteria and allowable reimbursement levels for the peer groups or result in higher total food costs if program participants transact their food instruments at above-50-percent vendors rather than at other vendors that do not meet the above-50-percent criterion. To comply with this requirement, the State agency must compare the average cost of each type of food instrument redeemed by above-50-percent vendors against the average cost of the same type of food instrument redeemed by regular vendors. The average cost per food instrument may be weighted to reflect the relative proportion of food instruments redeemed by each category of vendors in the peer group system. The State agency must compute statewide average costs per food instrument at

least quarterly to monitor compliance with this requirement. If average payments per food instrument for above-50-percent vendors exceed average payments per food instrument to regular vendors, then the State agency must take necessary action to ensure compliance, such as adjusting payment levels. Where EBT systems are in use, it may be more appropriate to compare prices of individual WIC food items to ensure that average payments to above-50-percent vendors do not exceed average payments for the same food item to comparable vendors. If FNS determines that a State agency has failed to ensure that above-50-percent vendors do not result in higher costs to the program than if participants transact their food instruments at regular vendors, FNS will establish a claim against the State agency to recover excess food funds expended and will require remedial action. A State agency may exclude partially-redeemed food instruments from a quarterly cost neutrality assessment based on an empirical methodology approved by FNS. A State agency may not exclude food instruments from the quarterly cost neutrality assessment based on a rate of partially-redeemed food instruments.

(E) Must determine whether vendor applicants are expected to be above-50-percent vendors. The State agency must ask vendor applicants whether they expect to derive more than 50 percent of their annual revenue from the sale of food items from transactions involving WIC food instruments. This question applies whether or not the State agency chooses to authorize above-50-percent vendors. A vendor who answers in the affirmative must be treated as an above-50-percent vendor. The State agency must further assess a vendor who answers in the negative, by first calculating WIC redemptions as a percent of total food sales in existing WIC-authorized stores owned by the vendor applicant. Second, the State agency must calculate or request from the vendor applicant the percentage of anticipated food sales by type of payment, *i.e.*, cash, Supplemental Nutrition Assistance Program, WIC, and credit/debit card. Third, the State agency must review either the inventory invoices for food items, or the actual food items present at the preauthorization visit required by paragraph (g)(5) of this section, or both. Fourth, the State agency must determine whether WIC authorization is required in order for the store to open for business. If the vendor would be expected to be an above-50-percent vendor under any of these criteria, then the vendor must be treated as an above-50-percent vendor. State agencies may use additional data sources and methodologies, if approved by FNS.

(F) Must determine whether a currently authorized vendor meets the above-50-percent criterion, based on the State agency's calculation of WIC redemptions as a percent of the vendor's total foods sales for the same period. If WIC redemptions are more than 50 percent of the total food sales, the vendor must be deemed to be an above-50-percent vendor. As an initial step in identifying above-50-percent vendors, the State agency may compare each vendor's WIC redemptions to Supplemental Nutrition Assistance Program redemptions for the same period. If more than one WIC State agency authorizes a particular vendor, then each State agency must obtain and add the WIC redemptions for each State agency that authorizes the vendor to derive the total WIC redemptions. If Supplemental Nutrition Assistance Program redemptions exceed WIC redemptions, no further assessment is required since the vendor would not be an above-50-percent vendor. For vendors whose WIC redemptions exceed their Supplemental Nutrition Assistance Program redemptions, or if this comparison of redemptions was not made, the State agency must obtain from these vendors a statement of the total amount of revenue derived from the sale of foods that could be purchased using Supplemental Nutrition Assistance Program benefits. The State agency must also obtain from these vendors documentation (such as tax documents or other verifiable documentation) to support the amount of food sales claimed by the vendor. After evaluating the documentation received from the vendor, the State agency must calculate WIC redemptions as a percent of total food

sales and classify the vendor as meeting or not meeting the above-50- percent criterion. State agencies may use additional methods, if approved by FNS.

(ii) *Implementing effective peer groups.* The State agency's methodology for establishing a vendor peer group system must include the following:

(A) At least two criteria for establishing peer groups, one of which must be a measure of geography, such as metropolitan or other statistical areas that form distinct labor and products markets, unless the State agency receives FNS approval to use a single criterion;

(B) Routine collection of vendor shelf prices at least every six months following authorization to monitor vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section and to ensure State agency policies and procedures dependent on shelf price data are efficient and effective. FNS may grant an exemption from this shelf price collection requirement if the State agency demonstrates to FNSs' satisfaction that an alternative methodology for monitoring vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section is efficient and effective and other State agency policies and procedures are not dependent on frequent collection of shelf price data. Such exemption would remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first;

(C) Assessment of the effectiveness of the peer groupings and competitive price criteria at least every three years and modification, as necessary, to enhance system performance. The State agency may change a vendor's peer group whenever the State agency determines that placement in an alternate peer group is warranted.

(iii) *Subsequent price increases.* The State agency must establish procedures to ensure that a vendor selected for participation in the program does not, subsequent to selection, increase prices to levels that would make the vendor ineligible for authorization.

(iv) *Exceptions to competitive price criteria.* The State agency may except from the competitive price criteria and allowable reimbursement levels pharmacy vendors that supply only exempt infant formula and/or WIC-eligible medical foods, and non-profit vendors for which more than 50 percent of their annual revenue from food sales consists of revenue derived from WIC food instruments. A State agency that elects to exempt non-profit vendors from competitive price criteria and/or allowable reimbursements levels must notify FNS, in writing, at least 30 days prior to the effective date of the exemption. The State agency's notification must indicate the reason for the exemption, including whether the vendor is needed to ensure participant access, why other vendors that are subject to competitive price criteria and allowable reimbursement levels cannot provide the required supplemental foods, the benefits to the program of exempting the non-profit vendor from the competitive price criteria and/or allowable reimbursement levels, the criteria the State agency used to assess the competitiveness of the non-profit vendor's prices, and how the State agency will determine the reimbursement level for the non-profit vendor. This notification requirement does not apply to State agency contracts and agreements with non-profit health and/or human service agencies or organizations.

(v) *Exemptions from the vendor peer group system requirement.* With prior written approval from FNS, a State agency may use a vendor cost containment approach other than a peer group system if it meets certain conditions. A State agency that obtains an exemption from the peer group requirement still must establish competitive pricing criteria for vendor selection and allowable reimbursement levels. An exemption from the peer group requirement would remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first. During the period of the exemption, the State agency must provide annually to FNS documentation that it either authorizes no above-50-

percent vendors, or that such vendors' redemptions continue to represent less than five percent of total WIC redemptions, depending on the terms of the exemption. The conditions for obtaining an exemption from the vendor peer group system are as follows:

(A) The State agency chooses not to authorize any vendors that derive more than 50 percent of their revenue from food sales from WIC food instruments, and the State agency demonstrates to FNS that establishing a vendor peer group system would be inconsistent with efficient and effective operation of the program, or that its alternative cost containment system would be as effective as a peer group system; or

(B) The State agency determines that food instruments redeemed by vendors that meet the above-50-percent criterion comprise less than five percent of the total WIC redemptions in the State in the fiscal year prior to a fiscal year in which the exemption is effective; and the State agency demonstrates to FNS that its alternative vendor cost containment system would be as effective as a vendor peer group system and would not result in higher costs if program participants redeem food instruments at vendors that meet the above-50-percent criterion rather than at vendors that do not meet this criterion.

(vi) *Cost containment certification.* If a State agency elects to authorize any above-50-percent vendors, the State agency must submit information, in accordance with guidance provided by FNS, to demonstrate that its competitive price criteria and allowable reimbursement levels do not result in average payments per food instrument to these vendors that are higher than average payments per food instrument to comparable vendors that are not above-50-percent vendors. To calculate average payments per food instrument, the State agency must include either all food instruments redeemed by all authorized vendors or a representative sample of the redeemed food instruments. The State agency must add the redemption amounts for all redeemed food instruments of the same type and divide the sum by the number of food instruments of that type. If the State agency does not designate food instruments by type, it must calculate the average payment for each distinct combination of foods prescribed on the food instrument. The State agency may calculate average payments per food instrument type for groups of vendors that meet the above-50-percent criterion and comparable vendors, or the State agency may calculate average payments for each food instrument type for each vendor. State agencies with EBT systems must compare the average cost of each WIC food purchased by participants at above-50-percent vendors with the average cost of each food purchased from comparable vendors. If FNS determines, based on its review of the information provided by the State agency and any other relevant data, that the requirements in this paragraph have been met, FNS will certify that the State agency's competitive price criteria and allowable reimbursement levels established for above-50-percent vendors do not result in higher average payments per food instrument (or higher costs for each WIC food item in EBT systems). If the State agency's methodology for establishing competitive price criteria and allowable reimbursement levels fails to meet the requirement of this section regarding average food instrument payments to above-50-percent vendors, FNS will disapprove the State agency's request to authorize above-50-percent vendors. At least every three years following initial certification, the State agency must submit information which demonstrates that it continues to meet the requirements of this section relative to average payments to above-50-percent vendors. FNS may require annual updates of selected food instrument redemption data.

(vii) *Limitation on private rights of action.* The competitive pricing provisions of this paragraph do not create a private right of action.

(5) *No imposition of EBT costs on retail vendors.* The State agency may not impose the costs of EBT equipment, systems, or processing required for electronic benefit transfers on any retail

store authorized to transact food instruments, as a condition for authorization or participation in the program. The State agency may allow retailers to contribute to such costs on a voluntary basis.

(6) *On-site preauthorization visit.* The State agency must conduct an on-site visit prior to or at the time of a vendor's initial authorization.

(7) *Sale of store to circumvent WIC sanction.* The State agency may not authorize a vendor applicant if the State agency determines the store has been sold by its previous owner in an attempt to circumvent a WIC sanction. The State agency may consider such factors as whether the store was sold to a relative by blood or marriage of the previous owner(s) or sold to any individual or organization for less than its fair market value.

(8) *Impact on small businesses.* The State agency is encouraged to consider the impact of authorization decisions on small businesses.

(9) *Application periods.* The State agency may limit the periods during which applications for vendor authorization will be accepted and processed, except that applications must be accepted and processed at least once every three years. The State agency must develop procedures for processing vendor applications outside of its timeframes when it determines there will be inadequate participant access unless additional vendors are authorized.

(10) *Data collection at authorization.* At the time of application, the State agency must collect the vendor applicant's Food Stamp Program authorization number if the vendor applicant is authorized in that program. In addition, the State agency must collect the vendor applicant's current shelf prices for supplemental foods.

(11) *List of infant formula wholesalers, distributors, and retailers licensed under State law or regulations, and infant formula manufacturers registered with the Food and Drug Administration (FDA).* The State agency must provide a list in writing or by other effective means to all authorized WIC retail vendors of the names and addresses of infant formula wholesalers, distributors, and retailers licensed in the State in accordance with State law (including regulations), and infant formula manufacturers registered with the Food and Drug Administration (FDA) that provide infant formula, on at least an annual basis.

(i) *Notification to vendors.* The State agency is required to notify vendors that they must purchase infant formula only from a source included on the State agency's list, or from a source on another State agency's list if the vendor's State agency permits this, and must only provide such infant formula to participants in exchange for food instruments specifying infant formula. For the purposes of paragraph (g)(11) of this section, "infant formula" means *Infant formula, Contract brand infant formula* and *Non-contract brand infant formula* as defined in § 246.2, and infant formula covered by a waiver granted under § 246.16a(e).

(ii) *Type of license.* If more than one type of license applies, the State agency may choose which one to use.

(iii) *Exclusions from list.* The State agency may not exclude a State-licensed entity from the list except when:

(A) Specifically required or authorized by State law or regulations; or

(B) The entity does not carry infant formula.

(h) *Retail food delivery systems: Vendor agreements*—(1) *General*—(i) *Entering into agreements.* The State agency must enter into written agreements with all authorized vendors. The agreements must be for a period not to exceed three years. The agreement must be signed by a representative who has legal authority to obligate the vendor and a representative of the State agency. When the vendor representative is obligating more than one vendor, the agreement must specify all vendors covered by the agreement. When more than one vendor is specified in the agreement, the State agency may add or delete an individual vendor without affecting the remaining vendors. The State agency must require vendors to reapply at the expiration of their agreements and must provide vendors with not less than 15 days advance written notice of the expiration of their agreements.

(ii) *Delegation to local agencies.* The State agency may delegate to its local agencies the authority to sign vendor

agreements if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(iii). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of local agency activities.

(2) *Standard vendor agreement.* The State agency must use a standard vendor agreement throughout its jurisdiction, although the State agency may make exceptions to meet unique circumstances provided that it documents the reasons for such exceptions.

(3) *Vendor agreement provisions.* The vendor agreement must contain the following specifications, although the State agency may determine the exact wording to be used:

(i) *Acceptance of food instruments and cash value vouchers.* The vendor may accept food instruments and cash-value vouchersonly from participants, parents or caretakers of infant and child participants, or proxies.

(ii) *No substitutions, cash, credit, refunds, or exchanges.* The vendor may provide only the authorized supplemental foods listed on the food instrument and cash-value voucher.

(A) The vendor may not provide unauthorized food items, nonfood items, cash, or credit (including rain checks) in exchange for food instruments or cash-value vouchers. The vendor may not provide refunds or permit exchanges for authorized supplemental foods obtained with food instruments or cash-value vouchers, except for exchanges of an identical authorized supplemental food item when the original authorized supplemental food item is defective, spoiled, or has exceeded its "sell by," "best if used by," or other date limiting the sale or use of the food item. An identical authorized supplemental food item means the exact brand and size as the original authorized supplemental food item obtained and returned by the participant.

(B) The vendor may provide only the authorized infant formula which the vendor has obtained from sources included on the list described in paragraph (g)(11) of this section to participants in exchange for food instruments specifying infant formula.

(iii) *Treatment of participants, parents/caretakers, and proxies.* The vendor must offer program participants, parents or caretakers of infant of child participants, and proxies the same courtesies offered to other customers.

(iv) *Time periods for transacting food instruments and cash-value vouchers.* The vendor may accept a food instrument or cash-value voucher only within the specified time period.

(v) *Purchase price on food instruments and cash-value vouchers.* The vendor must ensure that the purchase price is entered on food instruments and cash-value vouchers in accordance with the procedures described in the vendor agreement. The State agency has the discretion to determine whether the vendor or the participant enters the purchase price. The purchase price must include only the authorized supplemental food items actually provided and must be entered on the food instrument or cash-value voucher before it is signed.

(vi) *Signature on food instruments and cash-value vouchers.* For printed food instruments and cash-value vouchers, the vendor must ensure the participant, parent or caretaker of an infant or child participant, or proxy signs the food instrument or cash-value voucher in the presence of the cashier. In EBT systems, a Personal Identification Number (PIN) may be used in lieu of a signature.

(vii) *Sales tax prohibition.* The vendor may not collect sales tax on authorized supplemental foods obtained with food instruments.

(viii) *Food instrument redemption.* The vendor must submit food instruments for redemption in accordance with the redemption procedures described in the vendor agreement. The vendor may redeem a food instrument only within the specified time period. As part of the redemption procedures, the State agency may make price adjustments to the purchase price on food instruments submitted by the vendor for redemption to ensure compliance with the price limitations applicable to the vendor. As part of the redemption procedures, the State agency must establish and apply limits on the amount of reimbursement allowed for food instruments based on a vendor's peer group

and competitive price criteria. In setting allowable reimbursement levels, the State agency must consider participant access in a geographic area and may include a factor to reflect fluctuations in wholesale prices. In establishing allowable reimbursement levels for above-50-percent vendors the State agency must ensure that reimbursements do not result in higher food costs than if participants transacted their food instruments at vendors that are not above-50-percent vendors, or in higher average payments per food instrument to above-50-percent vendors than average payments to comparable vendors. The State agency may make price adjustments to the purchase price on food instruments submitted by the vendor for redemption to ensure compliance with the allowable reimbursement level applicable to the vendor. A vendor's failure to remain price competitive is cause for termination of the vendor agreement, even if actual payments to the vendor are within the maximum reimbursement amount. The State agency may exempt vendors that supply only exempt infant formula and/or WIC-eligible medical foods and nonprofit above-50-percent vendors from the allowable reimbursement limits.

(ix) *Vendor claims.* When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency will delay payment or establish a claim. The State agency may delay payment or establish a claim in the amount of the full purchase price of each food instrument or cash-value voucher that contained the vendor overcharge or other error. The State agency will provide the vendor with an opportunity to justify or correct a vendor overcharge or other error. The vendor must pay any claim assessed by the State agency. In collecting a claim, the State agency may offset the claim against current and subsequent amounts to be paid to the vendor. In addition to denying payment or assessing a claim, the State agency may sanction the vendor for vendor overcharges or other errors in accordance with the State agency's sanction schedule.

(x) *No charge for authorized supplemental foods or restitution from participants.* The vendor may not charge participants, parents or caretakers of infant and child participants, or proxies for authorized supplemental foods obtained with food instruments or cash-value vouchers. In addition, the vendor may not seek restitution from these individuals for food instruments or cash-value vouchers not paid or partially paid by the State agency. The State agency may, however, allow participants, parents or caretakers of child participants to pay the difference when the purchase of authorized fruits and vegetables exceeds the value of the cash-value voucher.

(xi) *Training.* At least one representative of the vendor must participate in training annually. Annual vendor training may be provided by the State agency in a variety of formats, including newsletters, videos, and interactive training. The State agency will have sole discretion to designate the date, time, and location of all interactive training, except that the State agency will provide the vendor with at least one alternative date on which to attend such training.

(xii) *Vendor training of staff.* The vendor must inform and train cashiers and other staff on program requirements.

(xiii) *Accountability for owners, officers, managers, and employees.* The vendor is accountable for its owners, officers, managers, agents, and employees who commit vendor violations.

(xiv) *Monitoring.* The vendor may be monitored for compliance with program requirements.

(xv) *Recordkeeping.* The vendor must maintain inventory records used for Federal tax reporting purposes and other records the State agency may require for the period of time specified by the State agency in the vendor agreement. Upon request, the vendor must make available to representatives of the State agency, the Department, and the Comptroller General of the United States, at any reasonable time and place for inspection and audit, all food instruments and cash-value vouchers in the vendor's possession and all program-related records.

(xvi) *Termination.* The State agency will immediately terminate the agreement if it determines that the vendor

has provided false information in connection with its application for authorization. Either the State agency or the vendor may terminate the agreement for cause after providing advance written notice of a period of not less than 15 days to be specified by the State agency.

(xvii) *Change in ownership or location or cessation of operations.* The vendor must provide the State agency advance written notification of any change in vendor ownership, store location, or cessation of operations. In such instances, the State agency will terminate the vendor agreement, except that the State agency may permit vendors to move short distances without terminating the agreement. The State agency has the discretion to determine the length of advance notice required for vendors reporting changes under this provision, whether a change in location qualifies as a short distance, and whether a change in business structure constitutes a change in ownership.

(xviii) *Sanctions.* In addition to claims collection, the vendor may be sanctioned for vendor violations in accordance with the State agency's sanction schedule. Sanctions may include administrative fines, disqualification, and civil money penalties in lieu of disqualification. The State agency must notify a vendor in writing when an investigation reveals an initial incidence of a violation for which a pattern of incidences must be established in order to impose a sanction, before another such incidence is documented, unless the State agency determines, in its discretion, on a case-by-case basis, that notifying the vendor would compromise an investigation.

(xix) *Conflict of interest.* The State agency will terminate the agreement if the State agency identifies a conflict of interest, as defined by applicable State laws, regulations, and policies, between the vendor and the State agency or its local agencies.

(xx) *Criminal penalties.* A vendor who commits fraud or abuse in the Program is liable to prosecution under applicable Federal, State or local laws. Those who have willfully misapplied, stolen or fraudulently obtained program funds will be subject to a fine of not more than $25,000 or imprisonment for not more than five years or both, if the value of the funds is $100 or more. If the value is less than $100, the penalties are a fine of not more than $1,000 or imprisonment for not more than one year or both.

(xxi) *Not a license/property interest.* The vendor agreement does not constitute a license or a property interest. If the vendor wishes to continue to be authorized beyond the period of its current agreement, the vendor must reapply for authorization. If a vendor is disqualified, the State agency will terminate the vendor's agreement, and the vendor will have to reapply in order to be authorized after the disqualification period is over. In all cases, the vendor's new application will be subject to the State agency's vendor selection criteria and any vendor limiting criteria in effect at the time of the reapplication.

(xxii) *Compliance with vendor agreement, statutes, regulations, policies, and procedures.* The vendor must comply with the vendor agreement and Federal and State statutes, regulations, policies, and procedures governing the Program, including any changes made during the agreement period.

(xxiii) *Nondiscrimination regulations.* The vendor must comply with the nondiscrimination provisions of Departmental regulations (parts 15, 15a and 15b of this title).

(xxiv) *Compliance with vendor selection criteria.* The vendor must comply with the vendor selection criteria throughout the agreement period, including any changes to the criteria. Using the current vendor selection criteria, the State agency may reassess the vendor at any time during the agreement period. The State agency will terminate the vendor agreement if the vendor fails to meet the current vendor selection criteria.

(xxv) *Reciprocal Food Stamp Program disqualification for WIC Program disqualifications.* Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

(4) *Purchase price and redemption procedures.* The State agency must describe in the vendor agreement its purchase price and redemption procedures. The redemption procedures must ensure that the State agency does not pay a vendor more than the price limitations applicable to the vendor.

(5) *Sanction schedule.* The State agency must include its sanction schedule in the vendor agreement or as an attachment to it. The sanction schedule must include all mandatory and State agency vendor sanctions and must be consistent with paragraph (l) of this section. If the sanction schedule is in State law or regulations or in a document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.

(6) *Actions subject to administrative review and review procedures.* The State agency must include the adverse actions a vendor may appeal and those adverse actions that are not subject to administrative review. The State agency also must include a copy of the State agency's administrative review procedures in the vendor agreement or as an attachment to it or must include a statement that the review procedures are available upon request and the applicable review procedures will be provided along with an adverse action subject to administrative review. These items must be consistent with § 246.18. If these items are in State law or regulations or in a document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.

(7) *Notification of program changes.* The State agency must notify vendors of changes to Federal or State statutes, regulations, policies, or procedures governing the Program before the changes are implemented. The State agency should give as much advance notice as possible.

(8) *Allowable and prohibited incentive items for above-50-percent vendors.* The vendor agreement for an above-50-percent vendor, or another document provided to the vendor and cross-referenced in the agreement, must include the State agency's policies and procedures for allowing and prohibiting incentive items to be provided by an above-50-percent vendor to customers, consistent with paragraph (g)(3)(iv) of this section.

(i) The State agency must provide written approval or disapproval (including by electronic means such as electronic mail or facsimile) of requests from above-50-percent vendors for permission to provide allowable incentive items to customers;

(ii) The State agency must maintain documentation for the approval process, including invoices or similar documents showing that the cost of each item is either less than the $2 nominal value limit, or obtained at no cost, unless the State agency provides the vendor with a list of pre-approved incentive items at the time of authorization; and

(iii) The State agency must define prohibited incentive items.

(i) *Retail food delivery systems: Vendor training*—(1) *General requirements.* The State agency must provide training annually to at least one representative of each vendor. Prior to or at the time of a vendor's initial authorization, and at least once every three years thereafter, the training must be in an interactive format that includes a contemporaneous opportunity for questions and answers. The State agency must designate the date, time, and location of the interactive training and the audience (e.g., managers, cashiers, etc.) to which the training is directed. The State agency must provide vendors with at least one alternative date on which to attend interactive training. Examples of acceptable vendor training include on-site cashier training, offsite classroom-style train-the-trainer or manager training, a training video, and a training newsletter. All vendor training must be designed to prevent program errors and noncompliance and improve program service.

(2) *Content.* The annual training must include instruction on the purpose of the Program, the supplemental foods authorized by the State agency, the minimum varieties and quantities of authorized supplemental foods that must be stocked by vendors, the requirement that vendors obtain infant formula only from sources included on

a list provided by the State agency, the procedures for transacting and redeeming food instruments and cash-value vouchers, the vendor sanction system, the vendor complaint process, the claims procedures, the State agency's policies and procedures regarding the use of incentive items, and any changes to program requirements since the last training.

(3) *Delegation.* The State agency may delegate vendor training to a local agency, a contractor, or a vendor representative if the State agency indicates its intention to do so in its State Plan in accordance with §246.4(a)(14)(xi). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of vendor training.

(4) *Documentation.* The State agency must document the content of and vendor participation in vendor training.

(j) *Retail food delivery systems: Monitoring vendors and identifying high-risk vendors*—(1) *General requirements.* The State agency must design and implement a system for monitoring its vendors for compliance with program requirements. The State agency may delegate vendor monitoring to a local agency or contractor if the State agency indicates its intention to do so in its State Plan in accordance with §246.4(a)(14)(iv). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of vendor monitoring.

(2) *Routine monitoring.* The State agency must conduct routine monitoring visits on a minimum of five percent of the number of vendors authorized by the State agency as of October 1 of each fiscal year in order to survey the types and levels of abuse and errors among authorized vendors and to take corrective actions, as appropriate. The State agency must develop criteria to determine which vendors will receive routine monitoring visits and must include such criteria in its State Plan in accordance with §246.4(a)(14)(iv).

(3) *Identifying high-risk vendors.* The State agency must identify high-risk vendors at least once a year using criteria developed by FNS and/or other statistically-based criteria developed by the State agency. FNS will not change its criteria more frequently than once every two years and will provide adequate advance notification of changes prior to implementation. The State agency may develop and implement additional criteria. All State agency-developed criteria must be approved by FNS.

(4) *Compliance investigations.* (i) *High-risk vendors.* The State agency must conduct compliance investigations of a minimum of five percent of the number of vendors authorized by the State agency as of October 1 of each fiscal year. The State agency must conduct compliance investigations on all high-risk vendors up to the five percent minimum. The State agency may count toward this requirement a compliance investigation of a high-risk vendor conducted by a Federal, State, or local law enforcement agency. The State agency also may count toward this requirement a compliance investigation conducted by another WIC State agency provided that the State agency implements the option to establish State agency sanctions based on mandatory sanctions imposed by the other WIC State agency, as specified in paragraph (l)(2)(iii) of this section. A compliance investigation of a high-risk vendor may be considered complete when the State agency determines that a sufficient number of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys have been conducted in which no program violations are found, or when an inventory audit has been completed.

(ii) *Randomly selected vendors.* If fewer than five percent of the State agency's authorized vendors are identified as high-risk, the State agency must randomly select additional vendors on which to conduct compliance investigations sufficient to meet the five-percent requirement. A compliance investigation of a randomly selected vendor may be considered complete when the State agency determines that a sufficient number of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys are conducted in which no program violations are found, or when an inventory audit has been completed.

(iii) *Prioritization.* If more than five percent of the State agency's vendors are identified as high-risk, the State agency must prioritize such vendors so as to perform compliance investigations of those determined to have the greatest potential for program noncompliance and/or loss of funds.

(5) *Monitoring report.* For each fiscal year, the State agency must send FNS a summary of the results of its vendor monitoring containing information stipulated by FNS. The report must be sent by February 1 of the following fiscal year. Plans for improvement in the coming year must be included in the State Plan in accordance with § 246.4(a)(14)(iv).

(6) *Documentation*—(i) *Monitoring visits.* The State agency must document the following information for all monitoring visits, including routine monitoring visits, inventory audits, and compliance buys:

(A) the date of the monitoring visit, inventory audit, or compliance buy;

(B) the name(s) and signature(s) of the reviewer(s); and

(C) the nature of any problem(s) detected.

(ii) *Compliance buys.* For compliance buys, the State agency must also document:

(A) the date of the buy;

(B) a description of the cashier involved in each transaction;

(C) the types and quantities of items purchased, current shelf prices or prices charged other customers, and price charged for each item purchased, if available. Price information may be obtained prior to, during, or subsequent to the compliance buy; and

(D) the final disposition of all items as destroyed, donated, provided to other authorities, or kept as evidence.

(k) *Retail food delivery systems: Vendor claims*—(1) *System to review food instruments and cash-value vouchers for vendor claims.* The State agency must design and implement a system to review food instruments and cash-value vouchers submitted by vendors for redemption to ensure compliance with the applicable price limitations and to detect questionable food instruments or cash-value vouchers, suspected vendor overcharges, and other errors. This review must examine either all or a representative sample of the food instruments and cash-value vouchers and may be done either before or after the State agency makes payments on the food instruments or cash-value vouchers. The review of food instruments must include a price comparison or other edit designed to ensure compliance with the applicable price limitations and to assist in detecting vendor overcharges. For printed food instruments and cash-value vouchers the system also must detect the following errors—purchase price missing; participant, parent/caretaker, or proxy signature missing; vendor identification missing; food instruments or cash-value vouchers transacted or redeemed after the specified time periods; and, as appropriate, altered purchase price. The State agency must take follow-up action within 120 days of detecting any questionable food instruments or cash-value vouchers, suspected vendor overcharges, and other errors and must implement procedures to reduce the number of errors when possible.

(2) *Delaying payment and establishing a claim.* When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency must delay payment or establish a claim. Such vendor violations may be detected through compliance investigations, food instrument or cash-value voucher reviews, or other reviews or investigations of a vendor's operations. The State agency may delay payment or establish a claim in the amount of the full purchase price of each food instrument or cash-value voucher that contained the vendor overcharge or other error.

(3) *Opportunity to justify or correct.* When payment for a food instrument or cash-value voucher is delayed or a claim is established, the State agency must provide the vendor with an opportunity to justify or correct the vendor overcharge or other error. If satisfied with the justification or correction, the State agency must provide payment or adjust the proposed claim accordingly.

(4) *Timeframe and offset.* The State agency must deny payment or initiate claims collection action within 90 days of either the date of detection of the

vendor violation or the completion of the review or investigation giving rise to the claim, whichever is later. Claims collection action may include offset against current and subsequent amounts owed to the vendor.

(5) *Food instruments and cash-value vouchers redeemed after the specified period.* With justification and documentation, the State agency may pay vendors for food instruments and cash-value vouchers submitted for redemption after the specified period for redemption. If the total value of such food instruments or cash-value vouchers submitted at one time exceeds $500.00, the State agency must obtain the approval of the FNS Regional Office before payment.

(l) *Retail food delivery systems: Vendor sanctions*—(1) *Mandatory vendor sanctions*—(i) *Permanent disqualification.* The State agency must permanently disqualify a vendor convicted of trafficking in food instruments or cash-value vouchers or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments or cash-value vouchers. A vendor is not entitled to receive any compensation for revenues lost as a result of such violation. If reflected in its State Plan, the State agency may impose a civil money penalty in lieu of a disqualification for this violation when it determines, in its sole discretion, and documents that:

(A) Disqualification of the vendor would result in inadequate participant access; or

(B) The vendor had, at the time of the violation, an effective policy and program in effect to prevent trafficking; and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.

(ii) *Six-year disqualification.* The State agency must disqualify a vendor for six years for:

(A) One incidence of buying or selling food instruments for cash (trafficking); or

(B) One incidence of selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments or cash-value vouchers.

(iii) *Three-year disqualification.* The State agency must disqualify a vendor for three years for:

(A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments or cash-value vouchers;

(B) A pattern of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time;

(C) A pattern of vendor overcharges;

(D) A pattern of receiving, transacting and/or redeeming food instruments or cash-value vouchers outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person;

(E) A pattern of charging for supplemental food not received by the participant; or

(F) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments or cash-value vouchers.

(iv) *One-year disqualification.* The State agency must disqualify a vendor for one year for:

(A) A pattern of providing unauthorized food items in exchange for food instruments or cash-value vouchers, including charging for supplemental foods provided in excess of those listed on the food instrument; or

(B) A pattern of an above-50-percent vendor providing prohibited incentive items to customers as set forth in paragraph (g)(3)(iv) of this section, in accordance with the State agency's policies and procedures required by paragraph (h)(8) of this section.

(v) *Second mandatory sanction.* When a vendor, who previously has been assessed a sanction for any of the violations in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section, receives another sanction for any of these violations, the State agency must double the second sanction. Civil money penalties may only be doubled up to the

limits allowed under paragraph (l)(1)(x)(C) of this section.

(vi) *Third or subsequent mandatory sanction.* When a vendor, who previously has been assessed two or more sanctions for any of the violations listed in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section, receives another sanction for any of these violations, the State agency must double the third sanction and all subsequent sanctions. The State agency may not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section.

(vii) *Disqualification based on a Food Stamp Program disqualification.* The State agency must disqualify a vendor who has been disqualified from the Food Stamp Program. The disqualification must be for the same length of time as the Food Stamp Program disqualification, may begin at a later date than the Food Stamp Program disqualification, and is not subject to administrative or judicial review under the WIC Program.

(viii) *Voluntary withdrawal or nonrenewal of agreement.* The State agency may not accept voluntary withdrawal of the vendor from the Program as an alternative to disqualification for the violations listed in paragraphs (l)(1)(i) through (l)(1)(iv) of this section, but must enter the disqualification on the record. In addition, the State agency may not use nonrenewal of the vendor agreement as an alternative to disqualification.

(ix) *Participant access determinations.* Prior to disqualifying a vendor for a Food Stamp Program disqualification pursuant to paragraph (l)(1)(vii) of this section or for any of the violations listed in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section, the State agency must determine if disqualification of the vendor would result in inadequate participant access. The State agency must make the participant access determination in accordance with paragraph (l)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency must impose a civil money penalty in lieu of disqualification. However, as provided in paragraph (l)(1)(vi) of this section, the State agency may not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section. The State agency must include documentation of its participant access determination and any supporting documentation in the file of each vendor who is disqualified or receives a civil money penalty in lieu of disqualification.

(x) *Civil money penalty formula.* For each violation subject to a mandatory sanction, the State agency must use the following formula to calculate a civil money penalty imposed in lieu of disqualification:

(A) Determine the vendor's average monthly redemptions for at least the 6-month period ending with the month immediately preceding the month during which the notice of adverse action is dated;

(B) Multiply the average monthly redemptions figure by 10 percent (.10);

(C) Multiply the product from paragraph (l)(1)(x)(B) of this section by the number of months for which the store would have been disqualified. This is the amount of the civil money penalty, provided that the civil money penalty shall not exceed the maximum amount specified in §3.91(b)(3)(v) of this title for each violation. For a violation that warrants permanent disqualification, the amount of the civil money penalty shall be the maximum amount specified in §3.91(b)(3)(v) of this title for each violation. When during the course of a single investigation the State agency determines a vendor has committed multiple violations, the State agency must impose a CMP for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation may not exceed the amount specified in §3.91(b)(3)(v) of this title as the maximum penalty for violations occurring during a single investigation.

(xi) *Notification to FNS.* The State agency must provide the appropriate FNS office with a copy of the notice of adverse action and information on vendors it has either disqualified or imposed a civil money penalty in lieu of

disqualification for any of the violations listed in paragraphs (l)(1)(i) through (l)(1)(iv) of this section. This information must include the name of the vendor, address, identification number, the type of violation(s), and the length of disqualification or the length of the disqualification corresponding to the violation for which the civil money penalty was assessed, and must be provided within 15 days after the vendor's opportunity to file for a WIC administrative review has expired or all of the vendor's WIC administrative reviews have been completed.

(xii) *Multiple violations during a single investigation.* When during the course of a single investigation the State agency determines a vendor has committed multiple violations (which may include violations subject to State agency sanctions), the State agency must disqualify the vendor for the period corresponding to the most serious mandatory violation. However, the State agency must include all violations in the notice of administration action. If a mandatory sanction is not upheld on appeal, then the State agency may impose a State agency-established sanction.

(2) *State agency vendor sanctions.* (i) *General requirements.* The State agency may impose sanctions for vendor violations that are not specified in paragraphs (l)(1)(i) through (l)(1)(iv) of this section as long as such vendor violations and sanctions are included in the State agency's sanction schedule. State agency sanctions may include disqualifications, civil money penalties assessed in lieu of disqualification, and administrative fines. The total period of disqualification imposed for State agency violations investigated as part of a single investigation may not exceed one year. A civil money penalty or fine may not exceed a maximum amount specified in §3.91(b)(3)(v) of this title for each violation. The total amount of civil money penalties and administrative fines imposed for violations investigated as part of a single investigation may not exceed an amount specified in §3.91(b)(3)(v) of this title as the maximum penalty for violations occurring during a single investigation. A State agency vendor sanction must be based on a pattern of violative incidences.

(ii) *Food Stamp Program civil money penalty for hardship.* The State agency may disqualify a vendor that has been assessed a civil money penalty for hardship in the Food Stamp Program, as provided under §278.6 of this chapter. The length of such disqualification must correspond to the period for which the vendor would otherwise have been disqualified in the Food Stamp Program. If a State agency decides to exercise this option, the State agency must:

(A) Include notification that it will take such disqualification action in its sanction schedule; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (l)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency may not disqualify the vendor or impose a civil money penalty in lieu of disqualification. The State agency must include documentation of its participant access determination and any supporting documentation in each vendor's file.

(iii) *A mandatory sanction by another WIC State agency.* The State agency may disqualify a vendor that has been disqualified or assessed a civil money penalty in lieu of disqualification by another WIC State agency for a mandatory vendor sanction. The length of the disqualification must be for the same length of time as the disqualification by the other WIC State agency or, in the case of a civil money penalty in lieu of disqualification assessed by the other WIC State agency, for the same length of time for which the vendor would otherwise have been disqualified. The disqualification may begin at a later date than the sanction imposed by the other WIC State agency. If a State agency decides to exercise this option, the State agency must:

(A) Include notification that it will take such action in its sanction schedule; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (l)(8) of this section. If the

State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency must impose a civil money penalty in lieu of disqualification, except that the State agency may not impose a civil money penalty in situations in which the vendor has been assessed a civil money penalty in lieu of disqualification by the other WIC State agency. Any civil money penalty in lieu of disqualification must be calculated in accordance with paragraph (l)(2)(x) of this section. The State agency must include documentation of its participant access determination and any supporting documentation in each vendor's file.

(3) *Notification of violations.* The State agency must notify a vendor in writing when an investigation reveals an initial incidence of a violation for which a pattern of incidences must be established in order to impose a sanction, before another such incidence is documented, unless the State agency determines, in its discretion, on a case-by-case basis, that notifying the vendor would compromise an investigation. This notification requirement applies to the violations set forth in paragraphs (l)(1)(iii)(C) through (l)(1)(iii)(F), (l)(1)(iv), and (l)(2)(i) of this section.

(i) Prior to imposing a sanction for a pattern of violative incidences, the State agency must either provide such notice to the vendor, or document in the vendor file the reason(s) for determining that such notice would compromise an investigation.

(ii) The State agency may use the same method of notification which the State agency uses to provide a vendor with adequate advance notice of the time and place of an administrative review in accordance with § 246.18(b)(3).

(iii) If notification is provided, the State agency may continue its investigation after the notice of violation is received by the vendor, or presumed to be received by the vendor, consistent with the State agency's procedures for providing such notice.

(iv) All of the incidences of a violation occurring during the first compliance buy visit must constitute only one incidence of that violation for the purpose of establishing a pattern of incidences.

(v) A single violative incidence may only be used to establish the violations set forth in paragraphs (l)(1)(ii)(A), (l)(1)(ii)(B), and (l)(1)(iii)(A) of this section.

(4) *Administrative reviews.* The State agency must provide administrative reviews of sanctions to the extent required by § 246.18.

(5) *Installment plans.* The State agency may use installment plans for the collection of civil money penalties and administrative fines.

(6) *Failure to pay a civil money penalty.* If a vendor does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the State agency must disqualify the vendor for the length of the disqualification corresponding to the violation for which the civil money penalty was assessed (for a period corresponding to the most serious violation in cases where a mandatory sanction included the imposition of multiple civil money penalties as a result of a single investigation).

(7) *Actions in addition to sanctions.* Vendors may be subject to actions in addition to the sanctions in this section, such as claims pursuant to paragraph (k) of this section and the penalties set forth in § 246.23(c) in the case of deliberate fraud.

(8) *Participant access determination criteria.* The State agency must develop participant access criteria. When making participant access determinations, the State agency must consider the availability of other authorized vendors in the same area as the violative vendor and any geographic barriers to using such vendors.

(9) *Termination of agreement.* When the State agency disqualifies a vendor, the State agency must also terminate the vendor agreement.

(m) *Home food delivery systems.* Home food delivery systems are systems in which authorized supplemental foods are delivered to the participant's home. Home food delivery systems must provide for:

(1) *Procurement.* Procurement of supplemental foods in accordance with § 246.24, which may entail measures such as the purchase of food in bulk

lots by the State agency and the use of discounts that are available to States.

(2) *Accountability.* The accountable delivery of authorized supplemental foods to participants. The State agency must ensure that:

(i) Home food delivery contractors are paid only after the delivery of authorized supplemental foods to participants;

(ii) A routine procedure exists to verify the correct delivery of authorized supplemental foods to participants, and, at a minimum, such verification occurs at least once a month after delivery; and

(iii) Records of delivery of supplemental foods and bills sent or payments received for such supplemental foods are retained for at least three years. Federal, State, and local authorities must have access to such records.

(n) *Direct distribution food delivery systems.* Direct distribution food delivery systems are systems in which participants, parents or caretakers of infant or child participants, or proxies pick up authorized supplemental foods from storage facilities operated by the State agency or its local agencies. Direct distribution food delivery systems must provide for:

(1) *Storage and insurance.* Adequate storage and insurance coverage that minimizes the danger of loss due to theft, infestation, fire, spoilage, or other causes;

(2) *Inventory.* Adequate inventory control of supplemental foods received, in stock, and issued;

(3) *Procurement.* Procurement of supplemental foods in accordance with § 246.24, which may entail measures such as purchase of food in bulk lots by the State agency and the use of discounts that are available to States;

(4) *Availability.* The availability of program benefits to participants and potential participants who live at great distance from storage facilities; and

(5) *Accountability.* The accountable delivery of authorized supplemental foods to participants.

(o) *Participant, parent/caretaker, proxy, vendor, farmer and home food delivery contractor complaints.* The State agency must have procedures to document the handling of complaints by participants, parents or caretakers of infant or child participants, proxies, vendors, farmers, home food delivery contractors, and direct distribution contractors. Complaints of civil rights discrimination must be handled in accordance with § 246.8(b).

(p) *Food instrument and cash-value voucher security.* The State agency must develop standards for ensuring the security of food instruments and cash-value vouchers from the time the food instruments and cash-value vouchers are created to the time they are issued to participants, parents/caretakers, or proxies. For pre-printed food instruments or cash-value vouchers, these standards must include maintenance of perpetual inventory records of food instruments or cash-value vouchers throughout the State agency's jurisdiction; monthly physical inventory of food instruments or cash-value vouchers on hand throughout the State agency's jurisdiction; reconciliation of perpetual and physical inventories of food instruments and cash-value vouchers; and maintenance of all food instruments and cash-value vouchers under lock and key, except for supplies needed for immediate use. For EBT and print-on-demand food instruments and cash-value vouchers, the standards must provide for the accountability and security of the means to manufacture and issue such food instruments and cash-value vouchers.

(q) *Food instrument and cash-value voucher disposition.* The State agency must account for the disposition of all food instruments and cash-value vouchers as either issued or voided, and as either redeemed or unredeemed. Redeemed food instruments and cash-value vouchers must be identified as validly issued, lost, stolen, expired, duplicate, or not matching valid enrollment and issuance records. In an EBT system, evidence of matching redeemed food instruments to valid enrollment and issuance records may be satisfied through the linking of the Primary Account Number (PAN) associated with the electronic transaction to valid enrollment and issuance records. This process must be performed within 120 days of the first valid date for participant use of the food instruments and must be conducted in accordance with

the financial management requirements of § 246.13. The State agency will be subject to claims as outlined in § 246.23(a)(4) for redeemed food instruments or cash-value vouchers that do not meet the conditions established in paragraph (q) of this section.

(r) *Issuance of food instruments, cash-value vouchers and authorized supplemental foods.* The State agency must:

(1) *Parents/caretakers and proxies.* Establish uniform procedures that allow parents and caretakers of infant and child participants and proxies to obtain and transact food instruments and cash-value vouchers or obtain authorized supplemental foods on behalf of a participant. In determining whether a particular participant or parent/caretaker should be allowed to designate a proxy or proxies, the State agency must require the local agency or clinic to consider whether adequate measures can be implemented to provide nutrition education and health care referrals to that participant or, in the case of an infant or child participant, to the participant's parent or caretaker;

(2) *Signature requirement.* Ensure that the participant, parent or caretaker of an infant or child participant, or proxy signs for receipt of food instruments, cash-value vouchers or authorized supplemental foods, except as provided in paragraph (r)(4) of this section;

(3) *Instructions.* Ensure that participants, parents or caretakers of infant and child participants, and proxies receive instructions on the proper use of food instruments and cash-value vouchers, or on the procedures for obtaining authorized supplemental foods when food instruments or cash-value vouchers are not used. The State agency must also ensure that participants, parents or caretakers of infant and child participants, and proxies are notified that they have the right to complain about improper vendor, farmer and home food delivery contractor practices with regard to program responsibilities;

(4) *Food instrument and cash-value voucher pick up.* Require participants, parents and caretakers of infant and child participants, and proxies to pick up food instruments and cash-value vouchers in person when scheduled for nutrition education or for an appointment to determine whether participants are eligible for a second or subsequent certification period. However, in all other circumstances the State agency may provide for issuance through an alternative means such as EBT or mailing, unless FNS determines that such actions would jeopardize the integrity of program services or program accountability. If a State agency opts to mail food instruments and cash-value vouchers, it must provide justification, as part of its alternative issuance system in its State Plan, as required in § 246.4(a)(21), for mailing food instruments and cash-value voucher to areas where food stamps are not mailed. State agencies that opt to mail food instruments and cash-value vouchers must establish and implement a system that ensures the return of food instruments and cash-value vouchers to the State or local agency if a participant no longer resides or receives mail at the address to which the food instruments and cash-value vouchers were mailed; and

(5) *Maximum issuance of food instruments and cash-value voucher.* Ensure that no more than a three-month supply of food instruments and cash-value vouchers or a one-month supply of authorized supplemental foods is issued at any one time to any participant, parent or caretaker of an infant or child participant, or proxy.

(6) *Any authorized vendor.* Each State agency shall allow participants to receive supplemental foods from any vendor authorized by the State agency under retail delivery systems.

(s) *Payment to vendors, farmers and home food delivery contractors.* The State agency must ensure that vendors, farmers and home food delivery contractors are paid promptly. Payment must be made within 60 days after valid food instruments or cash-value vouchers are submitted for redemption. Actual payment to vendors, farmers and home food delivery contractors may be made by local agencies.

(t) *Conflict of interest.* The State agency must ensure that no conflict of interest exists, as defined by applicable State laws, regulations, and policies,

between the State agency and any vendor, farmer or home food delivery contractor, or between any local agency and any vendor, farmer or home food delivery contractor under its jurisdiction.

(u) *Participant violations and sanctions*—(1) *General requirements.* The State agency must establish procedures designed to control participant violations. The State agency also must establish sanctions for participant violations. Participant sanctions may include disqualification from the Program for a period of up to one year.

(2) *Mandatory disqualification.* (i) *General.* Except as provided in paragraphs (u)(2)(ii) and (u)(2)(iii) of this section, whenever the State agency assesses a claim of $100 or more, assesses a claim for dual participation, or assess a second or subsequent claim of any amount, the State agency must disqualify the participant for one year.

(ii) *Exceptions to mandatory disqualification.* The State agency may decide not to impose a mandatory disqualification if, within 30 days of receipt of the letter demanding repayment, full restitution is made or a repayment schedule is agreed on, or, in the case of a participant who is an infant, child, or under age 18, the State or local agency approves the designation of a proxy.

(iii) *Terminating a mandatory disqualification.* The State agency may permit a participant to reapply for the Program before the end of a mandatory disqualification period if full restitution is made or a repayment schedule is agreed upon or, in the case of a participant who is an infant, child, or under age 18, the State or local agency approves the designation of a proxy.

(3) *Warnings before sanctions.* The State agency may provide warnings before imposing participant sanctions.

(4) *Fair hearings.* At the time the State agency notifies a participant of a disqualification, the State agency must advise the participant of the procedures to follow to obtain a fair hearing pursuant to § 246.9.

(5) *Referral to law enforcement authorities.* When appropriate, the State agency must refer vendors, home food delivery contractors, and participants who violate program requirements to Federal, State, or local authorities for prosecution under applicable statutes.

(v) *Farmers.* The State agency may authorize farmers at farmers markets (or roadside stands) to accept the cash-value voucher for eligible fruits and vegetables. The State agency must enter into written agreements with all authorized farmers. The agreement must be signed by a representative who has legal authority to obligate the farmer and a representative of the State agency. The agreement must be for a period not to exceed three years. Only farmers authorized by the State agency may redeem the fruit and vegetable cash-value voucher. The State agency must require farmers to reapply at the expiration of their agreements and must provide farmers with not less than 15 days advance written notice of the expiration of the agreement.

(1) The agreement must include the following provisions, although the State agency may determine the exact wording. The farmer must:

(i) Assure that the cash-value voucher is redeemed only for eligible fruits and vegetables as defined by the State agency;

(ii) Provide eligible fruits and vegetables at the current price or less than the current price charged to other customers;

(iii) Accept the cash-value voucher within the dates of their validity and submit such vouchers for payment within the allowable time period established by the State agency;

(iv) Redeem the cash-value voucher in accordance with a procedure established by the State agency,

(v) Accept training on cash-value voucher procedures and provide training to any employees with cash-value voucher responsibilities on such procedures;

(vi) Agree to be monitored for compliance with program requirements, including both overt and covert monitoring;

(vii) Be accountable for actions of employees in the provision of authorized foods and related activities;

(viii) Pay the State agency for any cash-value vouchers transacted in violation of this agreement;

(ix) Offer WIC participants, parent or caretakers of child participants or

proxies the same courtesies as other customers;

(x) Comply with the nondiscrimination provisions of USDA regulations as provided in § 248.7; and

(xi) Notify the State agency if any farmers' market ceases operation prior to the end of the authorization period.

(2) The farmer must not:

(i) Collect sales tax on cash-value voucher purchases;

(ii) Seek restitution from WIC participants, parent or caretakers of child participants or proxies for cash-value vouchers not paid or partially paid by the State agency;

(iii) Issue cash change for purchases that are in an amount less than the value of the cash-value voucher;

(3) Neither the State agency nor the farmer has an obligation to renew the agreement. Either the State agency or the farmer may terminate the agreement for cause after providing advance written notification.

(4) The State agency may deny payment to the farmer for improperly redeemed cash-value vouchers and may demand refunds for payments already made on improperly redeemed vouchers.

(5) The State agency may disqualify a farmer for WIC Program abuse. The farmer has the right to appeal a denial of an application to participate, a disqualification, or a program sanction by the State agency. Expiration of an agreement with a farmer and claims actions under § 246.23, are not appealable.

(6) A farmer which commits fraud or engages in other illegal activity is liable to prosecution under applicable Federal, State or local laws.

[65 FR 83278, Dec. 29, 2000, as amended at 70 FR 29579, May 24, 2005; 70 FR 71722, Nov. 29, 2005; 71 FR 56731, Sept. 27, 2006; 73 FR 68995, Dec. 6, 2007; 73 FR 11312, Mar. 3, 2008; 74 FR 555, Jan. 6, 2009; 74 FR 51758, Oct. 8, 2009; 75 FR 15603, Mar. 30, 2010]

### § 246.13 Financial management system.

(a) *Disclosure of expenditures.* The State agency shall maintain a financial management system which provides accurate, current and complete disclosure of the financial status of the Program. This shall include an accounting for all property and other assets and all Program funds received and expended each fiscal year.

(b) *Internal control.* The State agency shall maintain effective control over and accountability for all Program grants and funds. The State agency must have effective internal controls to ensure that expenditures financed with Program funds are authorized and properly chargeable to the Program.

(c) *Record of expenditures.* The State agency shall maintain records which adequately identify the source and use of funds expended for Program activities. These records shall contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays, and income.

(d) *Payment of costs.* The State shall implement procedures which ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost principles and standard provisions of this part, 7 CFR part 3016, and FNS guidelines and instructions.

(e) *Identification of obligated funds.* The State agency shall implement procedures which accurately identify obligated Program funds at the time the obligations are made.

(f) *Resolution of audit findings.* The State agency shall implement procedures which ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Use of minority- and women-owned banks.* Consistent with the national goals of expanding opportunities for minority business enterprises, State and local agencies are encouraged to use minority- and women-owned banks.

(h) *Adjustment of expenditures.* The State agency must adjust projected expenditures to account for redeemed food instruments and for other changes as appropriate.

(i) *Transfer of cash.* The State agency shall have controls to minimize the time elapsing between receipt of Federal funds from the U.S. Department of Treasury and the disbursements of these funds for Program costs. In the Letter of Credit system, the State agency shall make drawdowns from the

U.S. Department of Treasury's Regional Disbursing Office as close as possible to the actual date that disbursement of funds is made. Advances made by the State agency to local agencies shall also conform to these same standards.

(j) *Local agency financial management.* The State agency shall ensure that all local agencies develop and implement a financial management system consistent with requirements prescribed by FNS and the State agency pursuant to the requirements of this section.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 65 FR 83286, Dec. 29, 2000]

### § 246.14 Program costs.

(a) *General.* (1) The two kinds of allowable costs under the Program are "food costs" and "nutrition services and administration costs." In general, costs necessary to the fulfillment of Program objectives are to be considered allowable costs. The two types of nutrition services and administration costs are:

(i) *Direct costs.* Those direct costs that are allowable under 7 CFR part 3016.

(ii) *Indirect costs.* Those indirect costs that are allowable under 7 CFR part 3016. When computing indirect costs, food costs may not be used in the base to which the indirect cost rate is applied. In accordance with the provisions of 7 CFR part 3016, a claim for indirect costs shall be supported by an approved allocation plan for the determination of allowable indirect costs.

(2) Program funds may not be used to pay for retroactive benefits. Except as provided in paragraph (e) of this section and §§ 246.16(g) and 246.16(h) of this part, funds allocated by FNS for food purchases may not be used to pay nutrition services and administration costs. However, nutrition services and administration funds may be used to pay for food costs.

(b) *What costs may I charge to the food grant?* (1) The State agency may use food funds for costs of:

(i) Acquiring supplemental foods provided to State or local agencies or participants, whichever receives the supplemental food first;

(ii) Warehousing supplemental foods; and

(iii) Purchasing and renting breast pumps.

(2) For costs to be allowable, the State agency must ensure that food costs do not exceed the customary sales price charged by the vendor, home food delivery contractor, or supplier in a direct distribution food delivery system. In addition, food costs may not exceed the price limitations applicable to the vendor.

(c) *Specified allowable nutrition services and administration costs.* Allowable nutrition services and administration (NSA) costs include the following:

(1) The cost of nutrition education and breastfeeding promotion and support which meets the requirements of § 246.11. During each fiscal year, each State agency shall expend, for nutrition education activities and breastfeeding promotion and support activities, an aggregate amount that is not less than the sum of one-sixth of the amount expended by the State agency for costs of NSA and an amount equal to its proportionate share of the national minimum expenditure for breastfeeding promotion and support activities. The amount to be spent on nutrition education shall be computed by taking one-sixth of the total fiscal year NSA expenditures. The amount to be spent by a State agency on breastfeeding promotion and support activities shall be an amount that is equal to at least its proportionate share of the national minimum breastfeeding promotion expenditure as specified in paragraph (c)(1) of this section. The national minimum expenditure for breastfeeding promotion and support activities shall be equal to $21 multiplied by the number of pregnant and breastfeeding women in the Program, based on the average of the last three months for which the Department has final data. On October 1, 1996 and each October 1 thereafter, the $21 will be adjusted annually using the same inflation percentage used to determine the national administrative grant per person. If the State agency's total reported nutrition education and breastfeeding promotion and support expenditures are less than the required amount of expenditures, FNS will issue a claim for the difference. The State

agency may request prior written permission from FNS to spend less than the required portions of its NSA grant for either nutrition education or for breastfeeding promotion and support activities. FNS will grant such permission if the State agency has sufficiently documented that other resources, including in-kind resources, will be used to conduct these activities at a level commensurate with the requirements of this paragraph (c)(1). However, food costs used to purchase or rent breast pumps may not be used for this purpose. Nutrition education costs are limited to activities which are distinct and separate efforts to help participants understand the importance of nutrition to health. The cost of dietary assessments for the purpose of certification, the cost of prescribing and issuing supplemental foods, the cost of screening for drug and other harmful substance use and making referrals to drug and other harmful substance abuse services, and the cost of other health-related screening shall not be applied to the expenditure requirement for nutrition education and breastfeeding promotion and support activities. The Department shall advise State agencies regarding methods for minimizing documentation of the nutrition education and breastfeeding promotion and support expenditure requirement. Costs to be applied to the one-sixth minimum amount required to be spent on nutrition education and the target share of funds required to be spent on breastfeeding promotion and support include, but need not be limited to—

(i) Salary and other costs for time spent on nutrition education and breastfeeding promotion and support consultations whether with an individual or group;

(ii) The cost of procuring and producing nutrition education and breastfeeding promotion and support materials including handouts, flip charts, filmstrips, projectors, food models or other teaching aids, and the cost of mailing nutrition education or breastfeeding promotion and support materials to participants;

(iii) The cost of training nutrition or breastfeeding promotion and support educators, including costs related to conducting training sessions and purchasing and producing training materials;

(iv) The cost of conducting evaluations of nutrition education or breastfeeding promotion and support activities, including evaluations conducted by contractors;

(v) Salary and other costs incurred in developing the nutrition education and breastfeeding promotion and support portion of the State Plan and local agency nutrition education and breastfeeding promotion and support plans; and

(vi) The cost of monitoring nutrition education and breastfeeding promotion and support activities.

(2) The cost of Program certification, nutrition assessment and procedures and equipment used to determine nutritional risk, including the following:

(i) Laboratory fees incurred for up to two hematological tests for anemia per individual per certification period. The first test shall be to determine anemia status. The second test may be performed only in follow up to a finding of anemia when deemed necessary for health monitoring as determined by the WIC State agency;

(ii) Expendable medical supplies;

(iii) Medical equipment used for taking anthropometric measurements, such as scales, measuring boards, and skin fold calipers; and for blood analysis to detect anemia, such as spectrophotometers,
hematofluorometers and centrifuges; and

(iv) Salary and other costs for time spent on nutrition assessment and certification.

(3) The cost of outreach services.

(4) The cost of administering the food delivery system, including the cost of transporting food.

(5) The cost of translators for materials and interpreters.

(6) The cost of fair hearings, including the cost of an independent medical assessment of the appellant, if necessary.

(7) The cost of transporting participants to clinics when prior approval for using Program funds to provide transportation has been granted by the State agency and documentation that such service is considered essential to

assure Program access has been filed at the State agency. Direct reimbursement to participants for transportation cost is not an allowable cost.

(8) The cost of monitoring and reviewing Program operations.

(9) The cost, exclusive of laboratory tests, of screening for drug and other harmful substance use and making referrals for counseling and treatment services.

(10) The cost of breastfeeding aids which directly support the initiation and continuation of breastfeeding.

(d) *Costs allowable with approval.* The costs of capital expenditures exceeding the dollar threshold established in Agency policy and guidance are allowable only with the approval of FNS prior to the capital investment. These expenditures include the costs of facilities, equipment (including medical equipment), automated data processing (ADP) projects, other capital assets, and any repairs that materially increase the value or useful life of such assets.

(e) *Use of funds recovered from vendors, participants, or local agencies.* (1) The State agency may keep funds collected through the recovery of claims assessed against vendors, participants, or local agencies. Recovered funds include those withheld from a vendor as a result of reviews of food instruments prior to payment. Recovered funds may be used for either food or NSA costs.

(2) These recovered funds may be used in the fiscal year:

(i) In which the initial obligation was made;

(ii) In which the claim arose;

(iii) In which the funds are collected; or

(iv) after the funds are collected.

(3) The State agency may not credit any recoveries until:

(i) In the case of a vendor claim, the vendor has had the opportunity to correct or justify the error or apparent overcharge in accordance with §246.12(k)(3);

(ii) In the case of a participant, any administrative hearing requested in accordance with §246.9 has been completed; or

(iii) In the case of a local agency claim, any administrative review requested in accordance with the local agency agreement has been completed.

(4) The State agency must report vendor, participant, and local agency recoveries to FNS through the normal reporting process;

(5) The State agency must keep documentation supporting the amount and use of these vendor, participant, and local agency recoveries.

[50 FR 6121, Feb. 13, 1987, as amended at 52 FR 21237, June 4, 1987; 53 FR 25314, July 6, 1988; 54 FR 18091, Apr. 27, 1989; 58 FR 11507, Feb. 26, 1993; 59 FR 11503, Mar. 11, 1994; 63 FR 63974, Nov. 18, 1998; 64 FR 67999, Dec. 6, 1999; 64 FR 70178, Dec. 16, 1999; 65 FR 83286, Dec. 29, 2000; 71 FR 56731, Sept. 27, 2006; 73 FR 11312, Mar. 3, 2008]

### § 246.15 Program income other than grants.

(a) *Interest earned on advances.* Interest earned on advances of Program funds at the State and local levels shall be treated in accordance with the provisions of 31 CFR part 205, which implement the requirements of the Cash Management Improvement Act of 1990. However, State agencies will not incur an interest liability to the Federal government on rebate funds for infant formula or other foods, *provided* that all interest earned on such funds is used for program purposes.

(b) *Other Program income.* The State agency may use current program income (applied in accordance with the addition method described in §3016.25(g)(2) of this title) for costs incurred in the current fiscal year and, with the approval of FNS, for costs incurred in previous years or subsequent fiscal years. Provided that the costs supported by the income further the broad objectives of the Program, they need not be a kind that would be permissible as charges to Federal funds. Money received by the State agency as a result of civil money penalties or fines assessed against a vendor and any interest charged in the collection of these penalties and fines shall be considered as program income.

[50 FR 6121, Feb. 13, 1985, as amended at 63 FR 63974, Nov. 18, 1998; 64 FR 13324, Mar. 18, 1999; 71 FR 56731, Sept. 27, 2006]

**§ 246.16 Distribution of funds.**

(a) *General.* This paragraph describes the timeframes for distribution of appropriated funds by the Department to participating State agencies and the authority for the Secretary to use appropriated funds for evaluation studies and demonstration projects.

(1) Authorized appropriations to carry out the provisions of this section may be made not more than 1 year in advance of the beginning of the fiscal year in which the funds shall become available for disbursement to the State agencies. The funds shall remain available for the purposes for which appropriated until expended.

(2) In the case of appropriations legislation providing funds through the end of a fiscal year, the Secretary shall issue to State agencies an initial allocation of funds provided under such legislation not later than the expiration of the 15-day period beginning on the date of the enactment and subsequent allocation of funds shall be issued not later than the beginning of each of the second, third and fourth quarters of the fiscal year.

(3) Allocations of funds pursuant to paragraph (a)(2) of this section shall be made as follows: The initial allocation of funds to State agencies shall include not less than ⅓ of the appropriated amounts for the fiscal year. The allocation of funds to be made not later than the beginning of the second and third quarters shall each include not less than ¼ of the appropriated amounts for the fiscal year.

(4) In the case of legislation providing funds for a period that ends prior to the end of a fiscal year, the Secretary shall issue to State agencies an initial allocation of funds not later than the expiration of the 10-day period beginning on the date of enactment. In the case of legislation providing appropriations for a period of not more than 4 months, all funds must be allocated to State agencies except those reserved by the Secretary to carry out paragraph (a)(6) of this section.

(5) In any fiscal year unused amounts from a prior fiscal year that are identified by the end of the first quarter of the fiscal year shall be recovered and reallocated not later than the beginning of the second quarter of the fiscal year. Unused amounts from a prior fiscal year that are identified after the end of the first quarter of the fiscal year shall be recovered and reallocated on a timely basis.

(6) Up to one-half of one percent of the sums appropriated for each fiscal year, not to exceed $5,000,000, shall be available to the Secretary for the purpose of evaluating Program performance, evaluating health benefits, providing technical assistance to improve State agency administrative systems, preparing reports on program participant characteristics, and administering pilot projects, including projects designed to meet the special needs of migrants, Indians, rural populations, and to carry out technical assistance and research evaluation projects for the WIC Farmers' Market Nutrition Program.

(b) *Distribution and application of grant funds to State agencies.* Notwithstanding any other provision of law, funds made available to the State agencies for the Program in any fiscal year will be managed and distributed as follows:

(1) The State agency shall ensure that all Program funds are used only for Program purposes. As a prerequisite to the receipt of funds, the State agency shall have executed an agreement with the Department and shall have received approval of its State Plan.

(2) Notwithstanding any other provision of law, all funds not made available to the Secretary in accordance with paragraph (a)(6) of this section shall be distributed to State agencies on the basis of funding formulas which allocate funds to all State agencies for food costs and NSA costs incurred during the fiscal year for which the funds had been made available to the Department. Final State agency grant levels as determined by the funding formula and State agency breastfeeding promotion and support expenditure targets will be issued in a timely manner.

(3) *When may I transfer funds from one fiscal year to another?*—(i) *Back spend authority.* The State agency may back spend into the prior fiscal year up to an amount equal to one percent of its current year food grant and one percent of its current year NSA grant.

Food funds spent back may be used only for food costs incurred during the prior fiscal year. NSA funds spent back may be used for either food or NSA costs incurred during the prior fiscal year. With prior FNS approval, the State agency may also back spend food funds up to an amount equal to three percent of its current year food grant in a fiscal year for food costs incurred in the prior fiscal year. FNS will approve such a request only if FNS determines there has been a significant reduction in infant formula cost containment savings that affected the State agency's ability to maintain its participation level.

(ii) *Spend forward authority.* (A) The State agency may spend forward NSA funds up to an amount equal to three (3) percent of its total grant (NSA plus food grants) in any fiscal year. These NSA funds spent forward may be used only for NSA costs incurred in the next fiscal year. Any food funds that the State agency converts to NSA funds pursuant to paragraph (f) of this section (based on projected or actual participation increases during a fiscal year) may not be spent forward into the next fiscal year. With prior FNS approval, the State agency may spend forward additional NSA funds up to an amount equal to one-half of one percent of its total grant. These funds are to be used in the next fiscal year for the development of a management information system, including an electronic benefit transfer system.

(B) Funds spent forward will not affect the amount of funds allocated to the State agency for any fiscal year. Funds spent forward must be the first funds expended by the State agency for costs incurred in the next fiscal year.

(iii) *Reporting requirements.* In addition to obtaining prior FNS approval for certain spend forward/back spending options, the State agency must report to FNS the amount of all funds it already has or intends to back spend and spend forward. The spending options must be reported at closeout.

(c) *Allocation formula.* State agencies shall receive grant allocations according to the formulas described in this paragraph. To accomplish the distribution of funds under the allocation formulas, State agencies shall furnish the Department with any necessary financial and Program data.

(1) *Use of participation data in the formula.* Wherever the formula set forth in paragraphs (c)(2) and (c)(3) of this section require the use of participation data, the Department shall use participation data reported by State agencies according to § 246.25(b).

(2) *How is the amount of NSA funds determined?* The funds available for allocation to State agencies for NSA for each fiscal year must be sufficient to guarantee a national average per participant NSA grant, adjusted for inflation. The amount of the national average per participant grant for NSA for any fiscal year will be an amount equal to the national average per participant grant for NSA issued for the preceding fiscal year, adjusted for inflation. The inflation adjustment will be equal to the percentage change between two values. The first is the value of the index for State and local government purchases, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30 of the second preceding fiscal year. The second is the best estimate that is available at the start of the fiscal year of the value of such index for the 12-month period ending June 30 of the previous fiscal year. Funds for NSA costs will be allocated according to the following procedure:

(i) *Fair share target funding level determination.* For each State agency, FNS will establish, using all available NSA funds, an NSA fair share target funding level which is based on each State agency's average monthly participation level for the fiscal year for which grants are being calculated, as projected by FNS. Each State agency receives an adjustment to account for the higher per participant costs associated with small participation levels and differential salary levels relative to a national average salary level. The formula shall be adjusted to account for these cost factors in the following manner: 90 percent of available funds shall provide compensation based on rates which are proportionately higher for the first 15,000 or fewer participants, as projected by FNS, and 10 percent of available funds shall provide

compensation based on differential salary levels, as determined by FNS.

(ii) *Base funding level.* To the extent funds are available and subject to the provisions of paragraph (c)(2)(iv) of this section, each State agency shall receive an amount equal to 100 percent of the final formula-calculated NSA grant of the preceding fiscal year, prior to any operational adjustment funding allocations made under paragraph (c)(2)(iv) of this section. If funds are not available to provide all State agencies with their base funding level, all State agencies shall have their base funding level reduced by a pro-rata share as required by the shortfall of available funds.

(iii) *Fair share allocation.* Any funds remaining available for allocation for NSA after the base funding level required by paragraph (c)(2)(ii) of this section has been completed and subject to the provisions of paragraph (c)(2)(iv) of this section shall be allocated to bring each State agency closer to its NSA fair share target funding level. FNS shall make fair share allocation funds available to each State agency based on the difference between the NSA fair share target funding level and the base funding level, which are determined in accordance with paragraphs (c)(2)(i) and (c)(2)(ii) of this section, respectively. Each State agency's difference shall be divided by the sum of the differences for all State agencies, to determine the percent share of the available fair share allocation funds each State agency shall receive.

(iv) *Operational adjustment funds.* Each State agency's final NSA grant shall be reduced by up to 10 percent, and these funds shall be aggregated for all State agencies within each FNS region to form an operational adjustment fund. The Regions shall allocate these funds to State agencies according to national guidelines and shall consider the varying needs of State agencies within the region.

(v) *Operational level.* The sum of each State agency's stability, residual and operational adjustment funds shall constitute the State agency's operational level. This operational level shall remain unchanged for such year even if the number of Federally-supported participants in the program at such State agency is lower than the Federally-projected participation level. However, if the provisions of paragraph (e)(2)(ii) of this section are applicable, a State agency will have its operational level for NSA reduced in the immediately succeeding fiscal year.

(3) *Allocation of food benefit funds.* In any fiscal year, any amounts remaining from amounts appropriated for such fiscal year and amounts appropriated from the preceding fiscal year after making allocations under paragraph (a)(6) of this section and allocations for nutrition services and administration (NSA) as required by paragraph (c)(2) of this section shall be made available for food costs. Allocations to State agencies for food costs will be determined according to the following procedure:

(i) *Fair share target funding level determination.* (A) For each State agency, FNS will establish a fair share target funding level which shall be an amount of funds proportionate to the State agency's share of the national aggregate population of persons who are income eligible to participate in the Program based on the 185 percent of poverty criterion. The Department will determine each State agency's population of persons categorically eligible for WIC which are at or below 185% of poverty, through the best available, nationally uniform, indicators as determined by the Department. If the Commodity Supplemental Food Program (CSFP) also operates in the area served by the WIC State agency, the number of participants in such area participating in the CSFP but otherwise eligible to participate in the WIC Program, as determined by FNS, shall be deducted from the WIC State agency's population of income eligible persons. If the State agency chooses to exercise the option in § 246.7(c)(2) to limit program participation to U.S. citizens, nationals, and qualified aliens, FNS will reduce the State agency's population of income eligible persons to reflect the number of aliens the State agency declares no longer eligible.

(B) The Department may adjust the respective amounts of food funds that would be allocated to a State agency which is outside the 48 contiguous states and the District of Columbia

when the State agency can document that economic conditions result in higher food costs for the State agency. Prior to any such adjustment, the State agency must demonstrate that it has successfully implemented voluntary cost containment measures, such as improved vendor management practices, participation in multi-state agency infant formula rebate contracts or other cost containment efforts. The Department may use the Thrifty Food Plan amounts used in the Food Stamp Program, or other available data, to formulate adjustment factors for such State agencies.

(ii) *Prior year grant level allocation.* To the extent funds are available, each State agency shall receive a prior year grant allocation equal to its final authorized grant level as of September 30 of the prior fiscal year. If funds are not available to provide all State agencies with their full prior year grant level allocation, all State agencies shall have their full prior year grant level allocation reduced by a pro-rata share as required by the shortfall of available funds.

(iii) *Inflation/fair share allocation.* (A) If funds remain available after the allocation of funds under paragraph (c)(3)(ii) of this section, the funds shall be allocated as provided in this paragraph (c)(3)(iii). First, FNS will calculate a target inflation allowance by applying the anticipated rate of food cost inflation, as determined by the Department, to the prior year grant funding level. Second, FNS will allocate 80 percent of the available funds to all State agencies in proportionate shares to meet the target inflation allowance. Third, FNS will allocate 20 percent of the available funds to each State agency which has a prior year grant level allocation, as determined in paragraph (c)(3)(ii) of this section and adjusted for inflation as determined in this paragraph (c)(3)(iii), which is still less than its fair share target funding level. The amount of funds allocated to each State agency shall be based on the difference between its prior year grant level allocation plus target inflation funds and the fair share funding target level. Each State agency's difference shall be divided by the sum of the differences for all such State agencies, to determine the percentage share of the 20 percent of available funds each State agency shall receive. In the event a State agency declines any of its allocation under either this paragraph (c)(3)(iii) or paragraph (c)(3)(ii) of this section, the declined funds shall be reallocated in the percentages and manner described in this paragraph (c)(3)(iii). Once all State agencies receive allocations equal to their full target inflation allowance, any remaining funds shall be allocated or reallocated, in the manner described in this paragraph (c)(3)(iii), to those State agencies still under their fair share target funding level.

(B) In the event funds still remain after completing the distribution in paragraph (c)(3)(iii)(A) of this section, these funds shall be allocated to all State agencies including those with a stability allocation at, or greater than, their fair share allocation. Each State agency which can document the need for additional funds shall receive additional funds based on the difference between its prior year grant level and its fair share allocation. State agencies closest to their fair share allocation shall receive first consideration.

(iv) *Migrant services.* At least 9/10 of one percent of appropriated funds for each fiscal year shall be available first to assure service to eligible members of migrant populations. For those State agencies serving migrants, a portion of the grant shall be designated to each State agency for service to members of migrant populations based on that State agency's prior year reported migrant participation. The national aggregate amount made available first for this purpose shall equal 9/10 of one percent of all funds appropriated each year for the Program.

(v) *Special provisions for Indian State agencies.* The Department may choose to adjust the allocations and/or eligibles data among Indian State agencies, or among Indian State agencies and the geographic State agencies in which they are located when eligibles data for the State agencies' population is determined to not fairly represent the population to be served. Such allocations may be redistributed from one State agency to another, based on negotiated

agreements among the affected State agencies approved by FNS.

(4) *Adjustment for new State agencies.* Whenever a State agency that had not previously administered the program enters into an agreement with the Department to do so during a fiscal year, the Department shall make any adjustments to the requirements of this section that are deemed necessary to establish an appropriate initial funding level for such State agency.

(d) *Distribution of funds to local agencies.* The State agency shall provide to local agencies all funds made available by the Department, except those funds necessary for allowable State agency NSA costs and food costs paid directly by the State agency. The State agency shall distribute the funds based on claims submitted at least quarterly by the local agency. Where the State agency advances funds to local agencies, the State agency shall ensure that each local agency has funds to cover immediate disbursement needs, and the State agency shall offset the advances made against incoming claims as they are submitted to ensure that funding levels reflect the actual expenditures reported by the local agency. Upon receipt of Program funds from the Department, the State agency shall take the following actions:

(1) Distribute funds to cover expected food cost expenditures and/or distribute caseload targets to each local agency which are used to project food cost expenditures.

(2) Allocate funds to cover expected local agency NSA costs in a manner which takes into consideration each local agency's needs. For the allocation of NSA funds, the State agency shall develop an NSA funding procedure, in cooperation with representative local agencies, which takes into account the varying needs of the local agencies. The State agency shall consider the views of local agencies, but the final decision as to the funding procedure remains with the State agency. The State agency shall take into account factors it deems appropriate to further proper, efficient and effective administration of the program, such as local agency staffing needs, density of population, number of persons served, and availability of administrative support from other sources.

(3) The State agency may provide in advance to any local agency any amount of funds for NSA deemed necessary for the successful commencement or significant expansion of program operations during a reasonable period following approval of a new local agency, a new cost containment measure, or a significant change in an existing cost containment measure.

(e) *Recovery and reallocation of funds.* (1) Funds may be recovered from a State agency at any time the Department determines, based on State agency reports of expenditures and operations, that the State agency is not expending funds at a rate commensurate with the amount of funds distributed or provided for expenditures under the Program. Recovery of funds may be either voluntary or involuntary in nature. Such funds shall be reallocated by the Department through application of appropriate formulas set forth in paragraph (c) of this section.

(2) *Performance standards.* The following standards shall govern expenditure performance.

(i) The amount allocated to any State agency for food benefits in the current fiscal year shall be reduced if such State agency's food expenditures for the preceding fiscal year do not equal or exceed 97 percent of the amount allocated to the State agency for such costs. Such reduction shall equal the difference between the State agency's preceding year food expenditures and the performance expenditure standard amount. For purposes of determining the amount of such reduction, the amount allocated to the State agency for food benefits for the preceding fiscal year shall not include food funds expended for food costs incurred under the spendback provision in paragraph (b)(3)(i) of this section or conversion authority in paragraph (g) of this section. Temporary waivers of the performance standard may be granted at the discretion of the Department.

(ii) *Reduction of NSA grant.* FNS will reduce the State agency's NSA grant for the next fiscal year if the State agency's current fiscal year per participant NSA expenditure is more than 10

percent higher than its per participant NSA grant. To avoid a reduction to its NSA grant level, the State agency may submit a "good cause" justification explaining why it exceeded the applicable limit on excess NSA expenditures. This justification must be submitted at the same time as the close-out report for the applicable fiscal year. Good cause may include dramatic and unforeseen increases in food costs, which would prevent a State agency from meeting its projected participation level.

(iii) *Spend forward funds.* If any State agency notifies the Department of its intent to spend forward a specific amount of funds for expenditure in the subsequent fiscal year, in accordance with paragraph (b)(3)(ii) of this section, such funds shall not be subject to recovery by the Department.

(f) *How do I qualify to convert food funds to NSA funds based on increased participation?*—(1) *Requirements.* The State agency qualifies to convert food funds to NSA funds based on increased participation in any fiscal year in two ways:

(i) *Approved plan.* A State agency may submit a plan to FNS to reduce average food costs per participant and to increase participation above the FNS-projected level for the State agency. If approved, the State agency may use funds allocated for food costs to pay NSA costs.

(ii) *Participation increases achieved.* The State agency may also convert food funds to NSA funds in any fiscal year if it achieves, through acceptable measures, increases in participation in excess of the FNS-projected level for the State agency. Acceptable measures include use of cost containment measures, curtailment of vendor abuse, and breastfeeding promotional activities. FNS will disallow the State agency's conversion of food funds to NSA funds in accordance with paragraph (h) of this section if:

(A) The State agency increases its participation level through measures that are not in the nutritional interests of participants; or

(B) It is not otherwise allowable under program regulations.

(2) *Limitation.* The State agency may convert food funds only to the extent that the conversion is necessary—

(i) To cover NSA expenditures in the current fiscal year that exceed the State agency's NSA grant for the current fiscal year and any NSA funds which the State agency has spent forward into the current fiscal year; and

(ii) To ensure that the State agency maintains the level established for the per participant NSA grant for the current fiscal year.

(3) *Maximum amount.* The maximum amount the State agency may convert equals the State agency's conversion rate times the projected or actual participation increase, as applicable. The conversion rate is the same as the per participant NSA grant and is determined by dividing the State agency's NSA grant by the FNS-projected participation level. The NSA grant used in the calculation equals the initial allocation of current year funds plus the operational adjustment funding allocated to the State agency for that fiscal year.

(g) *How do I qualify to convert food funds to NSA funds for service to remote Indian or Native villages?*—(1) *Eligible State agencies.* Only State agencies located in noncontiguous States containing a significant number of remote Indian or Native villages qualify to convert food funds to NSA funds under this paragraph (g) in any fiscal year.

(2) *Limitation.* In the current fiscal year, food funds may be converted only to the extent necessary to cover expenditures incurred:

(i) In providing services (including the full cost of air transportation and other transportation) to remote Indian or Native villages; and

(ii) To provide breastfeeding support in those areas that exceed the State agency's NSA grant for the current fiscal year and any NSA funds which the State agency has spent forward into the current fiscal year.

(h) *What happens at the end of the fiscal year in which food funds are converted?* At the end of the fiscal year, the Department will determine the amount of food funds which the State agency was entitled to convert to NSA funds under paragraphs (f) and (g) of this section. In the event that the State agency has converted more than

the permitted amount of funds, the Department will disallow the amount of excess conversion.

(i) *How do converted funds affect the calculation of my prior year food grant and base NSA grant?* For purposes of establishing a State agency's prior year food grant and base NSA grant under paragraphs (c)(2)(i) and (c)(3)(i) of this section, respectively, amounts converted from food funds to NSA funds under paragraphs (f) and (g) of this section and § 246.14(e) during the preceding fiscal year will be treated as though no conversion had taken place.

(j) *Inflation adjustment of the fruit and vegetable voucher.* The monthly cash value of the fruit and vegetable voucher shall be adjusted annually for inflation. Adjustments are effective the first day of each fiscal year beginning on or after October 1, 2008. The inflation-adjusted value of the voucher shall be equal to a base value increased by a factor based on the Consumer Price Index for fresh fruits and vegetables, as provided in this section.

(1) *Adjustment year.* The adjustment year is the fiscal year that begins October 1 of the current calendar year.

(2) *Base value of the fruit and vegetable voucher.* The base value of the fruit and vegetable voucher is the monthly cash value of the voucher for fiscal year 2008. The base value equals:

(i) $6 for children;

(ii) $10 for pregnant and postpartum women; and

(iii) $10 for breastfeeding women.

(3) *Adjusted value of the fruit and vegetable voucher.* The adjusted value of the fruit and vegetable voucher is the cash value of the voucher for adjustment years beginning on or after October 1, 2008. The adjusted value is the base value increased by an amount equal to the base value of the fruit and vegetable voucher:

(i) Multiplied by the inflation adjustment described in paragraph (j)(4) of this section; and

(ii) Subject to rounding as described in paragraph (j)(5) of this section.

(4) *Inflation adjustment.* The inflation adjustment of the fruit and vegetable voucher shall equal the percentage (if any) by which the annual average value of the Consumer Price Index for fresh fruits and vegetables, computed from monthly values published by the Bureau of Labor Statistics, for the twelve months ending on March 31 of the fiscal year immediately prior to the adjustment year, exceeds the average of the monthly values of that index for the twelve months ending on March 31, 2007.

(5) *Rounding.* If any increase in the cash value of the voucher determined under paragraph (j)(3) of this section is not a multiple of $1, such increase shall be rounded to the next lowest multiple of $1. However, if the adjusted value of the voucher for the adjustment year, as determined under paragraph (j)(3) of this section, is lower than the adjusted value for the fiscal year immediately prior to the adjustment year, then the adjusted value of the voucher will remain unchanged from that immediate prior fiscal year.

[50 FR 6121, Feb. 13, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 246.16, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

### § 246.16a Infant formula cost containment.

(a) *Who must use cost containment procedures for infant formula?* All State agencies must continuously operate a cost containment system for infant formula that is implemented in accordance with this section except:

(1) State agencies with home delivery or direct distribution food delivery systems;

(2) Indian State agencies with 1,000 or fewer participants in April of any fiscal year, which are exempt for the following fiscal year;

(3) State agencies granted a waiver under paragraph (e) of this section; and

(4) State agencies granted a postponement under paragraph (f) of this section.

(b) *What cost containment procedures must be used?* State agencies must use either a single-supplier competitive system as outlined in paragraph (c) of this section, or an alternative cost containment system as outlined in paragraph (d) of this section.

(c) *What is the single-supplier competitive system?* Under the single-supplier

competitive system, a State agency solicits sealed bids from infant formula manufacturers to supply and provide a rebate for infant formulas. The State agency must conduct the procurement in a manner that maximizes full and open competition consistent with the requirements of this section.

(1) *How must a State agency structure the bid solicitation?* (i) *Single solicitation.* Under the single solicitation system, the State agency's bid solicitation must require the winning bidder to supply and provide a rebate on all infant formulas it produces that the State agency chooses to issue, except exempt infant formulas. Rebates must also be paid on any new infant formulas that are introduced after the contract is awarded. The solicitation must require bidders that do not produce a soy-based infant formula to subcontract with another manufacturer to supply a soy-based infant formula under the contract. In this case, the bid solicitation must require that the winning bidder pay the State agency a rebate on the soy-based infant formula supplied by the subcontractor that is issued by the State agency. The bid solicitation must require all rebates (including those for soy-based infant formula supplied by a subcontractor) to be calculated in accordance with paragraph (c)(6) of this section. All of these infant formulas are called contract brand infant formulas.

(ii) *Separate solicitations.* Under the separate solicitation system, a State agency issues two bid solicitations. Any State agency or alliance that served a monthly average of more than 100,000 infants during the preceding 12-month period shall issue separate bid solicitations for milk-based and soy-based infant formula. The first solicitation must require the winning bidder to supply and provide a rebate on all milk-based infant formulas it produces that the State agency chooses to issue, except exempt infant formulas. Rebates must also be paid on any new milk-based infant formulas that are introduced by the manufacturer after the contract is awarded. These infant formulas are considered to be contract brand infant formulas. The second bid solicitation must require the winning bidder to supply and provide a rebate on all soy-based infant formulas it produces that the State agency chooses to issue. Rebates must also be paid on any new soy-based infant formulas that are introduced by the manufacturer after the contract is awarded. These infant formulas are also considered to be contract brand infant formulas.

(2) *What is the size limitation for a State alliance?* A State alliance may exist among State agencies if the total number of infants served by States participating in the alliance as of October 1, 2003, or such subsequent date determined by the Secretary for which data is available, does not exceed 100,000. However, a State alliance that existed as of July 1, 2004, and serves over 100,000 infants may exceed this limit to include any State agency that served less than 5,000 infants as of October 1, 2003, or such subsequent date determined by the Secretary for which data is available, and/or any Indian State agency. The Secretary may waive these requirements not earlier than 30 days after submitting to the Committee on Education and the Workforce of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a written report that describes the cost-containment and competitive benefits of the proposed waiver.

(3) *On what types and physical forms of infant formula must bids be solicited?* The bid solicitation must require bidders to specify a rebate for each of the types and physical forms of infant formulas specified in the following chart. These rebates apply proportionally to other infant formulas produced by the winning bidder(s) (see paragraph (c)(6) of this section).

| Type of infant formula | Physical forms of infant formula | Infant formula requirements |
|---|---|---|
| **(i) For a single solicitation, the solicitation must require bidders to specify a rebate amount for the following:** | | |
| A single milk-based infant formula (primary contract infant formula); bidders must specify the brand name of the milk-based infant formula for which the rebate is being specified. | Concentrated liquid, powdered, and ready-to-feed. | Meets requirements under §246.10(e)(1)(iii) and §246.10(e)(2)(iii) and suitable for routine issuance to the majority of generally healthy, full-term infants. |
| **(ii) For separate solicitations, the solicitation must require bidders to specify a rebate amount for the following:** | | |
| (A) A single milk-based infant formula (primary milk-based contract brand infant formula); bidders must specify the brand name of the milk-based infant formula for which the rebate is being specified. | Concentrated liquid, powdered, and ready-to-feed. | Meets requirements under §246.10(e)(1)(iii) and §246.10(e)(2)(iii) and suitable for routine issuance to the majority of generally healthy, full-term infants. |
| (B) A single soy-based infant formula (primary soy-based contract brand infant formula); bidders must specify the brand name of the soy-based infant formula for which the rebate is being specified. | Concentrated liquid, powdered, and ready-to-feed. | Meets requirements under §246.10(e)(1)(iii) and §246.10(e)(2)(iii). |

(4) *How are contracts awarded?* A State agency must award the contract(s) to the responsive and responsible bidder(s) offering the lowest total monthly net price for infant formula or the highest monthly rebate (subject to paragraph (c)(4)(ii) of this section) for a standardized number of units of infant formula. The State agency must calculate the lowest net price using the lowest national wholesale cost per unit for a full truckload of the infant formula on the date of the bid opening.

(i) *Calculating the standardized number of units of infant formula.* The State agency must specify a standardized number of units (e.g., cans) of infant formula by physical form (e.g., concentrated liquid, powdered, and ready-to-feed) to be bid upon. The standardized number of units must contain the equivalent of the total number of ounces by physical form needed to give the maximum allowance to the average monthly number of infants using each form. The number of infants does not include infant participants who are exclusively breastfed and those who are issued exempt infant formula. The average monthly number of infant using each physical form must be based on at least 6 months of the most recent participation and issuance data. In order to calculate the standardized number of units of infant formula by form to be bid upon, the average monthly number of infants using each physical form is multiplied by the maximum monthly allowable number of ounces for each form (as allowed under §246.10(e)(9)(Table1)), and divided by the corresponding unit size (i.e., number of ounces per unit being bid). In order to compare bids, total cost is calculated by multiplying this standardized number of units by the net price for each physical form. Alternative calculations that arrive at a mathematically equivalent result are acceptable.

(ii) *Determining the lowest total monthly net price or highest rebate.* To determine the lowest total monthly net price a State agency must multiply the net price per unit by the established standardized amount of infant formula to be bid upon as calculated in paragraph (c)(4)(i) of this section. If the bid evaluation is based on highest rebate offered, the State agency must multiply the rebate offered by the established amount of infant formula to be bid upon as calculated in paragraph (c)(4)(i) of this section.

(iii) *Highest rebate limitation.* Before issuing the bid solicitation, a State agency that elects to evaluate bids by highest rebate must demonstrate to FNS' satisfaction that the weighted average retail prices for different brands of infant formula in the State vary by 5 percent or less. The weighted average retail price must take into account the prices charged for each type and physical form of infant formula by authorized vendors or, if a State agency elects, it may include stores that do not participate in the WIC program in the State. The State agency must also

base calculations on the proportion of each type and physical form of infant formula the State agency issues based on the data provided to bidders pursuant to paragraph (c)(5) of this section.

(5) *What data must be provided to bidders?* The State agency must provide as part of the bid solicitation the participation and infant formula usage data and the standardized number of ounces by physical form of infant formula to be used in evaluating bids as described in paragraph (c)(4) of this section. The State agency must notify bidders that the participation and infant formula usage data does not necessarily reflect the actual issuance and redemption that will occur under the contract.

(6) *How is the rebate to be calculated on all other contract brand infant formulas?* All bids must specify the rebates offered by each bidder for the primary contract infant formula(s). After the contract is awarded, the State agency must calculate the percentage discount for all other contract brand infant formulas (i.e., all other infant formulas produced by the bidder other than exempt infant formulas) approved for issuance by the State agency. The State agency must use the following method in calculating the rebates:

(i) *Calculation of percentage discounts.* Rebates for contract brand infant formulas, other than the primary contract infant formula(s) for which bids were received, must be calculated by first determining the percentage discount for each physical form (e.g., concentrated liquid, powdered, and ready-to-feed) of the primary contract infant formula(s). The percentage discount must be calculated by dividing the rebate for the primary contract infant formula by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the primary contract infant formula. The percentage discounts must be used to determine the rebate for all other contract brand infant formulas approved for issuance by the State agency.

(ii) *Calculation of rebate amount.* The rebate for each type and form of all other contract brand infant formulas must be calculated by multiplying the percentage discount by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the other contract brand infant formula. The percentage discount used for each of the other contract brand infant formulas depends on the physical form of the infant formula. For example, if the percentage discount provided for the primary contract brand powdered infant formula is 80 percent of its wholesale price, the same percentage discount must be applied to all other contract brand powdered infant formulas. The rebate for any types or forms of contract brand infant formulas that are introduced during the contract period must be calculated using the wholesale prices of these new contract brand infant formulas at the time the infant formulas are approved for issuance by the State agency.

(iii) *Calculation of rebates during contract term.* The rebates resulting from the application of the percentage discount must remain the same throughout the contract period except for the cent-for-cent rebate adjustments required in paragraph (c)(6)(iv) of this section.

(iv) *Cent-for-cent rebate adjustments.* Bid solicitations must require the manufacturer to adjust rebates for price changes subsequent to the bid opening. Price adjustments must reflect any increase and decrease, on a cent-for-cent basis, in the manufacturer's lowest national wholesale prices for a full truckload of infant formula.

(7) *What is the first choice of issuance for infant formula?* The State agency must use the primary contract infant formula(s) as the first choice of issuance (by physical form), with all other infant formulas issued as an alternative (see § 246.10(e)(1)(iii)).

(8) *Under what circumstances may the State agency issue other contract brand formulas?* Except as required in paragraph (c)(7) of this section, the State agency may choose to approve for issuance some, none, or all of the winning bidder's other infant formula(s). In addition, the State agency may require medical documentation before issuing any contract brand infant formula, except as provided in paragraph (c)(7) of this section (see § 246.10(c)(1)(i))

and must require medical documentation before issuing any WIC formula covered by § 246.10(c)(1)(iii).

(d) *What is an alternative cost containment system?* Under an alternative cost containment system, a State agency elects to implement an infant formula cost containment system of its choice. The State agency may only implement an alternative system if such a system provides a savings equal to or greater than a single-supplier competitive system. A State agency must conduct a cost comparison demonstrating such savings as described in paragraphs (d)(1) and (d)(2) of this section.

(1) *How must the State agency structure the bid solicitation?* The State agency must solicit bids simultaneously using the single-supplier competitive system described in paragraph (c) of this section and the alternative cost containment system(s) the State agency has selected. The State agency may prescribe standards of its choice for the alternative cost containment system(s), provided that conditions established for each system addressed in the bid solicitation include identical bid specifications for the contract period length and the types and forms of infant formula(s) to be included in the systems. In addition, the alternative cost containment system must cover the types and forms of infant formulas routinely issued to the majority of generally healthy, full-term infants. The State agency must use the procedure outlined in paragraph (d)(2) of this section in conducting a cost comparison to determine which system offers the greatest savings over the entire contract period specified in the bid solicitation.

(2) *How does the State agency conduct the cost comparison?* (i) *Establishing infant formula cost containment savings.* (A) *Savings under the single-supplier competitive system.* The State agency must project food cost savings in the single-supplier competitive system based on the lowest monthly net price or highest monthly rebate, as described in paragraph (c)(4) of this section.

(B) *Savings under an alternative cost containment system.* The State agency must project food cost savings under alternative cost containment systems based on the lowest monthly net cost or highest monthly rebate, as described in paragraph (c)(4) of this section. Food cost savings must be based on the standardized amount of infant formula expected to be issued as calculated for a single-supplier competitive system, prorated by the percentage of anticipated total infant formula purchases attributable to each manufacturer. The State agency must use the aggregate market share of the manufacturers submitting bids in calculating its cost savings estimate.

(C) *General.* In establishing the potential food cost savings under each system, the State agency must take into consideration in its estimate of savings any inflation factors which would affect the amount of savings over the life of the contract. Further, the State agency must not subtract any loss of payments which would occur under the terms of a current contract as a result of any State agency action to be effective after expiration of the contract.

(ii) *Nutrition services and administration cost adjustment.* The State agency must deduct from the food cost savings projected for each system under this paragraph (d) the nutrition services and administration costs associated with developing and implementing—but not operating—each cost containment system. This includes any anticipated costs for modifying its automated data processing system or components of its food delivery system(s), and of training participants, local agencies, vendors, and licensed health care professionals on the purpose and procedures of the new system. For contracts of two years or less, such costs must be proportionately distributed over at least a two year period. The State agency must not deduct any costs associated with procurement. The State agency must itemize and justify all nutrition services and administration cost adjustments as necessary and reasonable for the development and implementation of each system.

(iii) *Final cost comparison.* The State agency must calculate the food costs savings and deduct the appropriate nutrition services and administration costs for each system for which bids were received. The State agency must implement the single-supplier competitive system, unless its comparative cost analysis shows that, over the

length of the contract stipulated in the bid solicitation, an alternative cost containment system offers savings at least equal to, or greater than, those under the competitive single-supplier system. If the comparative cost analysis permits selection of the alternative cost containment system and the State agency wishes to implement that system, it must first submit a State Plan amendment with the calculations and supporting documentation for this cost analysis to FNS for approval. Only after the calculations are approved by FNS may the State agency award the contract or contracts under the alternative cost containment system.

(e) *How does a State agency request a waiver of the requirement for a single-supplier competitive system?* A State agency which, after completing the cost comparison in paragraphs (d)(2)(i) through (d)(2)(iii) of this section, is required to implement the single-supplier competitive cost containment system for infant formula procurement, may request a waiver from FNS to permit it to implement an alternative system. State agencies must support all waiver requests with documentation in the form of a State Plan amendment as required under § 246.4(a)(14)(x) and may submit such requests only in either of the following circumstances:

(1) The difference between the single-supplier competitive system and the alternative cost containment system is less than 3 percent of the savings anticipated under the latter system and not more than $100,000 per annum.

(2) The single-supplier competitive system would be inconsistent with the efficient or effective operation of the program. Examples of justifications FNS will not accept for a waiver, include, but are not limited to: preservation of participant preference for otherwise nutritionally equivalent infant formulas; maintenance of health care professionals' prerogatives to prescribe otherwise nutritionally equivalent infant formulas for non-medical reasons; potential loss of free or otherwise discounted materials to WIC clinics and other health care facilities; potential inability of a manufacturer selected in accordance with applicable State procurement procedures to supply contractually-specified amounts of infant formula; and the possibility of interrupted infant formula supplies to retail outlets as a consequence of entering into a contract with a single manufacturer.

(f) *How does a State agency request a postponement of the requirement for a continuously operated cost containment system for infant formula?* A State agency may request a postponement of the requirement to continuously operate a cost containment system for infant formula that has been implemented in accordance with this section. However, a State agency may only request a postponement when it has taken timely and responsible action to implement a cost containment system before its current system expires but has been unable to do so due to procurement delays, disputes with FNS concerning cost containment issues during the State Plan approval process or other circumstances beyond its control. The written postponement request must be submitted to FNS before the expiration of the current system. The postponement period may be no longer than 120 days. If a postponement is granted, the State agency may extend, renew or otherwise continue an existing system during the period of the postponement.

(g) *May a State agency implement cost containment systems for other supplemental foods?* Yes, when a State agency finds that it is practicable and feasible to implement a cost containment system for any WIC food other than infant formula, the State agency must fully implement that system in accordance with the time frames established by the State agency and notification must be given to FNS by means of the State agency's State Plan.

(h) *What are the implementation time frames for Indian State agencies that lose their exemption from the infant formula cost containment requirement?* If an Indian State agency operating a retail food delivery system expands its program participation above 1000 and thereby loses its exemption from the requirements of paragraph (a) of this section regarding the method of cost containment for infant formula, then the Indian State agency must begin compliance with paragraph (a) of this

section in accordance with time frames established by FNS.

(i) *What are the penalties for failure to comply with the cost containment requirements?* Any State agency that FNS determines to be out of compliance with the cost containment requirements of this part must not draw down on or obligate any Program grant funds, nor will FNS make any further Program funds available to such State agency, until it is in compliance with these requirements.

(j) *What provisions are prohibited to be included in cost containment contracts?* A State agency may not issue bid solicitations or enter into contracts which:

(1) Prescribe conditions that would void, reduce the savings under or otherwise limit the original contract if the State agency solicited or secured bids for, or entered into, a subsequent cost containment contract to take effect after the expiration of the original contract;

(2) Does not include the registration and certification requirements in § 246.10(g);

(3) Require infant formula manufacturers to submit bids on more than one of the systems specified in the invitation for bids; or

(4) Require infant formula manufacturers to provide gratis infant formula or other items.

(k) *What are the requirements for infant formula rebate invoices?* A State agency must have a system in place that ensures infant formula rebate invoices, under competitive bidding, provide a reasonable estimate or an actual count of the number of units purchased by participants in the program.

(l) *What are the requirements for the national cost containment bid solicitation and selection for infant formula?* FNS will solicit and select bids for infant formula rebates on behalf of State agencies with retail food delivery systems based on the following guidelines:

(1) FNS will solicit bids and select the winning bidder(s) for infant formula cost containment contracts only if two or more State agencies with retail food delivery systems request FNS to conduct bid solicitation and selection on their behalf. FNS will conduct the bid solicitation and selection process only and will not award or enter into any infant formula cost containment contract on behalf of the individual State agencies. Each State agency will individually award and enter into infant formula cost containment contract(s) with the winning bidder(s). State agencies must obtain the rebates directly from the infant formula manufacturer(s). FNS will conduct the bid solicitation in accordance with this paragraph (l) and the competitive bidding procurement procedures of the State agency with the highest infant participation in the bid group on whose behalf bids are being solicited. Any bid protests and contractual disputes are the responsibility of the individual State agencies to resolve.

(2) FNS will make a written offer to all State agencies to conduct bid solicitation and selection on their behalf at least once every 12 months. FNS will send State agencies a copy of the draft Request for Rebates when making the offer to State agencies. Only State agencies that provide the information required by this paragraph (l)(2) in writing, signed by a responsible State agency official, by certified mail, return receipt requested or by hand delivery with evidence of receipt within 15 days of receipt of the offer will be included in the national bid solicitation and selection process. Each interested State agency must provide:

(i) A statement that the State agency requests FNS to conduct bid solicitation and selection on its behalf;

(ii) A statement of the State agency's minimum procurement procedures applicable to competitive bidding (as defined in § 246.2) for infant formula cost containment contracts and supporting documentation;

(iii) A statement of any limitation on the duration of infant formula cost containment contracts and supporting documentation;

(iv) A statement of any contractual provisions required to be included in infant formula cost containment contracts by the State agency;

(v) The most recent available average monthly number of infant participants less those infant participants who are exclusively breastfed and those who are issued exempt infant formula. The average monthly participation level must

be based on at least 6 months of participation data.

(vi) Infant formula usage rates by type (e.g., milk-based or soy-based), form (e.g., concentrated, powdered, ready-to-feed), container size, and supporting documentation;

(vii) A statement of the termination date of the State agency's current infant formula cost containment contract; and

(viii) Any other related information that FNS may request.

(3) If FNS determines that the number of State agencies making the request provided for in paragraph (l)(2) of this section does not comply with the requirements of paragraph (c)(2) of this section, FNS shall, in consultation with such State agencies, divide such State agencies into more than one group and solicit bids for each group. These groups of State agencies are referred to as "bid groups." In determining the size and composition of the bid groups, FNS will, to the extent practicable, take into account the need to maximize the number of potential bidders so as to increase competition among infant formula manufacturers and the similarities in the State agencies' procurement and contract requirements (as provided by the State agencies in accordance with paragraphs (l)(2)(ii), (l)(2)(iii), and (l)(2)(iv) of this section). FNS reserves the right to exclude a State agency from the national bid solicitation and selection process if FNS determines that the State agency's procurement requirements or contractual requirements are so dissimilar from those of the other State agencies in any bid group that the State agency's inclusion in the bid group could adversely affect the bids.

(4) For each bid group formed pursuant to paragraphs (l)(2) and (l)(3) of this section, FNS will use for soliciting bids the competitive bidding procurement procedures of the State agency in the group with the highest infant participation. To the extent not inconsistent with the requirements of this paragraph (l), FNS will use that set of procedures in soliciting the bids for that bid group of State agencies. FNS will notify each State agency in the bid group of the choice and provide them each a copy of the procurement procedures of the chosen State agency. Each State agency must provide FNS a written statement, signed by a responsible State agency official, by certified mail, return receipt requested or by hand delivery with evidence of receipt stating whether that State agency is legally authorized to award an infant formula cost containment contract pursuant to that set of procedures within 10 days of the receipt of the notification. If the State agency determines it is not legally authorized to award an infant formula cost containment contract pursuant to those procedures, that State agency may not continue in that round of the national bid solicitation and selection.

(5) At a minimum, in soliciting bids FNS will address the following:

(i) Unless FNS determines that doing so would not be in the best interest of the Program, bids will be solicited for either:

(A) A single contract for each State agency under which the winning bidder will be required to supply and provide rebates on all infant formulas produced by that manufacturer (except exempt infant formulas) that are issued by the State agency. If that manufacturer does not produce a soy-based infant formula, the winning bidder will be required to subcontract with another manufacturer for a soy-based infant formula and the winning bidder will be required to pay a rebate on the soy-based infant formula; or

(B) Two separate contracts for each State agency. Under the first contract, the winning bidder will supply and provide a rebate on all the milk-based infant formulas the winning bidder produces (except exempt infant formulas) that are issued by the State agency and under the second contract the winning bidder will supply and provide a rebate on all the soy-based infant formulas the winning bidder produces (except exempt infant formulas) that are issued by the State agency.

(ii) The infant formula cost containment contract(s) to be entered into by the State agencies and infant formula manufacturers must provide for a constant net price for infant formula for the full term of the infant formula cost containment contract(s).

(iii) The duration of the infant formula cost containment contracts for each bid group will be determined by FNS in consultation with the State agencies. The term will be for a period of not less than 2 years, unless the law applicable to a State agency regarding the duration of infant formula cost containment contracts is more restrictive than this paragraph (l)(5)(iii). In such cases, the term of the contract for only that State agency will be for one year, with the option provided to the State agency to extend the contract for a specified number of additional years (to be determined by FNS in consultation with the State agency). The date on which the individual State agencies' current infant formula cost containment contracts terminate may vary, so the infant formula cost containment contracts awarded by the State agencies within a bid group may begin on different dates.

(iv) FNS will not prescribe conditions that are prohibited under paragraph (j) of this section.

(v) FNS will solicit bids for rebates only from infant formula manufacturers. FNS may limit advertising to contacting in writing each infant formula manufacturer which has registered with the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 et seq.).

(6) FNS will select the winning bidder(s). The winning bidder(s) will be the responsive and responsible bidder(s) meeting the specifications and all bid terms and conditions which offers the lowest net price weighted to take into account infant formula usage rates and infant participation. In all instances the winning bidder(s) will be those which singly or in combination yield the greatest aggregate savings based on the net price weighted to take into account the infant formula usage rates. To break a tie between 2 equally low bids, FNS will select the bidder to be awarded the infant formula cost containment contract by a drawing by lot limited to the bidders which submitted those bids.

(7) Once FNS has conducted bid selection, a State agency may decline to award the infant formula cost containment contract(s) only if the State agency determines that awarding the contract(s) would not be in the best interests of its Program, taking into account whether the national bid solicitation and selection would achieve a lower aggregate savings.

(8) As soon as practicable after selecting the winning bid(s), FNS will notify the affected State agencies in writing of the bid results, including the name(s) of the winning bidder(s). If a State agency chooses to request approval to decline to award the infant formula cost containment contract(s) in accordance with paragraph (l)(7) of this section, it must notify FNS in writing, signed by a responsible State agency official, together with supporting documentation, by certified mail, return receipt requested or by hand delivery with evidence of receipt within 10 days of the State agency's receipt of this notification of bid results.

(9) If FNS approves any State agency's request to decline to award the infant formula cost containment contract(s) in accordance with paragraphs (l)(7) and (l)(8) of this section, FNS will notify the bidders of the decision. If two or more State agencies remain in the group, FNS will require the bidders to indicate in writing whether they wish to withdraw or modify their bids within 5 days of receipt of this notification. FNS will again permit State agencies to decline to award the infant formula cost containment contract(s) in accordance with paragraphs (l)(7) and (l)(8) of this section. If FNS approves these additional State agency requests to decline contract awards, FNS may conduct a resolicitation of bids in accordance with this paragraph (l).

(m) *What are the penalties for disclosing the amount of the bid or discount practices prior to the time bids are opened?* Any person, company, corporation, or other legal entity that submits a bid in response to a bid solicitation and discloses the amount of the bid, or the rebate or discount practices of such entities, in advance of the time the bids are opened by the Secretary or the State agency, shall be ineligible to submit bids to supply infant formula to the program for the bidding in progress for up to 2 years from the date the bids are opened. In addition, any person,

company, corporation, or other legal entity shall be subject to a civil money penalty as specified in §3.91(b)(3)(iv) of this title, as determined by the Secretary to provide restitution to the program for harm done to the program.

[65 FR 51224, Aug. 23, 2000, as amended at 73 FR 11313, Mar. 3, 2008; 73 FR 21811, Apr. 23, 2008]

### § 246.17 Closeout procedures.

(a) *General.* State agencies shall submit preliminary and final closeout reports for each fiscal year. All obligations shall be liquidated before closure of a fiscal year grant. Obligations shall be reported for the fiscal year in which they occur.

(b) *Fiscal year closeout reports.* State agencies—

(1) Shall submit to FNS, within 30 days after the end of the fiscal year, preliminary financial reports which show cumulative actual expenditures and obligations for the fiscal year, or part thereof, for which Program funds were made available;

(2) Shall submit to FNS, within 120 days after the end of the fiscal year, final fiscal year closeout reports;

(3) May submit revised closeout reports. FNS will reimburse State agencies for additional costs claimed in a revised closeout report up to the State's original grant level, if costs are properly justified and if funds are available for the fiscal year pertaining to the request. FNS will not be responsible for reimbursing State agencies for unreported expenditures later than one year after the end of the fiscal year in which they were incurred.

(c) *Grant closeout procedures.* When grants to State agencies are terminated, the following procedures shall be performed in accordance with 7 CFR part 3016.

(1) FNS may disqualify a State agency's participation under the Program, in whole or in part, or take such remedies as may be legal and appropriate, whenever FNS determines that the State agency failed to comply with the conditions prescribed in this part, in its Federal-State Agreement, or in FNS guidelines and instructions. FNS will promptly notify the State agency in writing of the disqualification together with the effective date. A State agency shall disqualify a local agency by written notice whenever it is determined by FNS or the State agency that the local agency has failed to comply with the requirements of the Program.

(2) FNS or the State agency may disqualify the State agency or restrict its participation in the Program when both parties agree that continuation under the Program would not produce beneficial results commensurate with the further expenditure of funds. The State agency or the local agency may disqualify the local agency or restrict its participation in the Program under the same conditions. The two parties shall agree upon the conditions of disqualification, including the effective date thereof, and, in the case of partial disqualification, the portion to be disqualified.

(3) Upon termination of a grant, the affected agency shall not incur new obligations for the disqualified portion after the effective date, and shall cancel as many outstanding obligations as possible. FNS will allow full credit to the State agency for the Federal share of the noncancellable obligations properly incurred by the State agency prior to disqualification, and the State agency shall do the same for the local agency.

(4) A grant closeout shall not affect the retention period for, or Federal rights of access to, grant records as specified in §246.25. The closeout of a grant does not affect the State or local agency's responsibilities regarding property or with respect to any Program income for which the State or local agency is still accountable.

(5) A final audit is not a required part of the grant closeout and should not be needed unless there are problems with the grant that require attention. If FNS considers a final audit to be necessary, it shall so inform OIG. OIG will be resonsible for ensuring that necessary final audits are performed and for any necessary coordination with other Federal cognizant audit agencies or the State or local auditors. Audits performed in accordance with §246.20 may serve as final audits providing such audits meet the needs of requesting agencies. If the grant is closed out without the audit, FNS reserves the

right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

[50 FR 6121, Feb. 13, 1985, as amended at 71 FR 56731, Sept. 27, 2006]

### § 246.18 Administrative review of State agency actions.

(a) *Adverse actions subject to administrative reviews*—(1) *Vendor appeals*—(i) *Adverse actions subject to full administrative reviews.* Except as provided elsewhere in paragraph (a)(1) of this section, the State agency must provide full administrative reviews to vendors that appeal the following adverse actions:

(A) Denial of authorization based on the application of the vendor selection criteria for minimum variety and quantity of authorized supplemental foods (§ 246.12(g)(3)(i)), or on a determination that the vendor is attempting to circumvent a sanction (§ 246.12(g)(6));

(B) Termination of an agreement for cause;

(C) Disqualification; and

(D) Imposition of a fine or a civil money penalty in lieu of disqualification.

(ii) *Adverse actions subject to abbreviated administrative reviews.* The State agency must provide abbreviated administrative reviews to vendors that appeal the following adverse actions, unless the State agency decides to provide full administrative reviews for any of these types of adverse actions:

(A) Denial of authorization based on the vendor selection criteria for business integrity or for a current Food Stamp Program disqualification or civil money penalty for hardship (§ 246.12(g)(3)(ii) and (g)(3)(iii));

(B) Denial of authorization based on the application of the vendor selection criteria for competitive price (§ 246.12(g)(4));

(C) The application of the State agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

(D) Denial of authorization based on a State agency-established vendor selection criterion if the basis of the denial is a WIC vendor sanction or a Food Stamp Program withdrawal of authorization or disqualification;

(E) Denial of authorization based on the State agency's vendor limiting criteria (§ 246.12(g)(2));

(F) Denial of authorization because a vendor submitted its application outside the timeframes during which applications are being accepted and processed as established by the State agency under § 246.12(g)(8);

(G) Termination of an agreement because of a change in ownership or location or cessation of operations (§ 246.12(h)(3)(xvii));

(H) Disqualification based on a trafficking conviction (§ 246.12(l)(1)(i));

(I) Disqualification based on the imposition of a Food Stamp Program civil money penalty for hardship (§ 246.12(l)(2)(ii)); and

(J) Disqualification or a civil money penalty imposed in lieu of disqualification based on a mandatory sanction imposed by another WIC State agency (§ 246.12(l)(2)(iii)).

(K) A civil money penalty imposed in lieu of disqualification based on a Food Stamp Program disqualification under § 246.12(l)(1)(vii) and,

(L) Denial of an application based on a determination of whether an applicant vendor is currently authorized by the Food Stamp Program.

(iii) *Actions not subject to administrative reviews.* The State agency may not provide administrative reviews pursuant to this section to vendors that appeal the following actions:

(A) The validity or appropriateness of the State agency's vendor limiting criteria (§ 246.12(g)(2)) or vendor selection criteria for minimum variety and quantity of supplemental foods, business integrity, and current Supplemental Nutrition Assistance Program disqualification or civil money penalty for hardship (§ 246.12(g)(3));

(B) The validity or appropriateness of the State agency's selection criteria for competitive price (§ 246.12(g)(4)), including, but not limited to, vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

(C) The validity or appropriateness of the State agency's participant access

criteria and the State agency's participant access determinations;

(D) The State agency's determination to include or exclude an infant formula manufacturer, wholesaler, distributor, or retailer from the list required pursuant to § 246.12(g)(11);

(E) The validity or appropriateness of the State agency's prohibition of incentive items and the State agency's denial of an above-50-percent vendor's request to provide an incentive item to customers pursuant to § 246.12(h)(8);

(F) The State agency's determination whether to notify a vendor in writing when an investigation reveals an initial violation for which a pattern of violations must be established in order to impose a sanction, pursuant to § 246.12(l)(3);

(G) The State agency's determination whether a vendor had an effective policy and program in effect to prevent trafficking and that the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation (§ 246.12(l)(1)(i)(B));

(H) Denial of authorization if the State agency's vendor authorization is subject to the procurement procedures applicable to the State agency;

(I) The expiration of a vendor's agreement;

(J) Disputes regarding food instrument or cash-value voucher payments and vendor claims (other than the opportunity to justify or correct a vendor overcharge or other error, as permitted by § 246.12(k)(3); and

(K) Disqualification of a vendor as a result of disqualification from the Food Stamp Program (§ 246.12(l)(1)(vii)).

(2) *Effective date of adverse actions against vendors.* The State agency must make denials of authorization and disqualifications imposed under § 246.12(l)(1)(i) effective on the date of receipt of the notice of adverse action. The State agency must make all other adverse actions effective no earlier than 15 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the vendor receives the review decision.

(3) *Local agency appeals*—(i) *Adverse actions subject to full administrative reviews.* Except as provided in paragraph (a)(3)(ii) of this section, the State agency must provide full administrative reviews to local agencies that appeal the following adverse actions:

(A) Denial of a local agency's application;

(B) Disqualification of a local agency; and

(C) Any other adverse action that affects a local agency's participation.

(ii) *Actions not subject to administrative reviews.* The State agency may not provide administrative reviews pursuant to this section to local agencies that appeal the following actions:

(A) Expiration of the local agency's agreement; and

(B) Denial of a local agency's application if the State agency's local agency selection is subject to the procurement procedures applicable to the State agency;

(iii) *Effective date of adverse actions against local agencies.* The State agency must make denials of local agency applications effective immediately. The State agency must make all other adverse actions effective no earlier than 60 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the local agency receives the review decision.

(4) *Farmer appeals*—(i) *Adverse Actions.* The State agency shall provide a hearing procedure whereby farmers adversely affected by certain actions of the State agency may appeal those actions. A farmer may appeal an action of the State agency denying its application to participate, imposing a sanction, or disqualifying it from participation in the program. Expiration of an agreement is not subject to appeal.

(ii) *Effective date of adverse actions against farmers.* The State agency must make denials of authorization and disqualifications effective on the date of receipt of the notice of adverse action. The State agency must make all other adverse actions effective no earlier than 15 days after the date of the notice of the adverse action and no later

than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the farmer receives the review decision.

(b) *Full administrative review procedures.* The State agency must develop procedures for a full administrative review of the adverse actions listed in paragraphs (a)(1)(i), (a)(3) and (a)(4) of this section. At a minimum, these procedures must provide the vendor, farmer or local agency with the following:

(1) Written notification of the adverse action, the procedures to follow to obtain a full administrative review and the cause(s) for and the effective date of the action. When a vendor is disqualified due in whole or in part to violations in § 246.12(l)(1), such notification must include the following statement: "This disqualification from WIC may result in disqualification as a retailer in the Food Stamp Program. Such disqualification is not subject to administrative or judicial review under the Food Stamp Program."

(2) The opportunity to appeal the adverse action within a time period specified by the State agency in its notification of adverse action.

(3) Adequate advance notice of the time and place of the administrative review to provide all parties involved sufficient time to prepare for the review.

(4) The opportunity to present its case and at least one opportunity to reschedule the administrative review date upon specific request. The State agency may set standards on how many review dates can be scheduled, provided that a minimum of two review dates is allowed.

(5) The opportunity to cross-examine adverse witnesses. When necessary to protect the identity of WIC Program investigators, such examination may be conducted behind a protective screen or other device (also referred to as an "in camera" examination).

(6) The opportunity to be represented by counsel.

(7) The opportunity to examine prior to the review the evidence upon which the State agency's action is based.

(8) An impartial decision-maker, whose determination is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program, according to the evidence presented at the review. The State agency may appoint a reviewing official, such as a chief hearing officer or judicial officer, to review appeal decisions to ensure that they conform to approved policies and procedures.

(9) Written notification of the review decision, including the basis for the decision, within 90 days from the date of receipt of a vendor's request for an administrative review, and within 60 days from the date of receipt of a local agency's request for an administrative review. These timeframes are only administrative requirements for the State agency and do not provide a basis for overturning the State agency's adverse action if a decision is not made within the specified timeframe.

(c) *Abbreviated administrative review procedures.* Except when the State agency decides to provide full administrative reviews for the adverse actions listed in paragraph (a)(1)(ii) of this section, the State agency must develop procedures for an abbreviated administrative review of the adverse actions listed in paragraph (a)(1)(ii) of this section. At a minimum, these procedures must provide the vendor with the following:

(1) Written notification of the adverse action, the procedures to follow to obtain an abbreviated administrative review, the cause(s) for and the effective date of the action, and an opportunity to provide a written response; and

(2) A decision-maker who is someone other than the person who rendered the initial decision on the action and whose determination is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program, according to the information provided to the vendor concerning the cause(s) for the adverse action and the vendor's response; and

(3) Written notification of the review decision, including the basis for the decision, within 90 days of the date of receipt of the request for an administrative review. This timeframe is only an

administrative requirement for the State agency and does not provide a basis for overturning the State agency's adverse action if a decision is not made within the specified timeframe.

(d) *Continuing responsibilities.* Appealing an action does not relieve a local agency, farmer or vendor that is permitted to continue program operations while its appeal is in process from the responsibility of continued compliance with the terms of any written agreement with the State agency.

(e) *Finality and effective date of decisions.* The State agency procedures must provide that review decisions rendered under both the full and abbreviated review procedures are the final State agency action. If the adverse action under review has not already taken effect, the State agency must make the action effective on the date of receipt of the review decision by the vendor, farmer or local agency.

(f) *Judicial review.* If the review decision upholds the adverse action against the vendor, farmer or local agency, the State agency must inform the vendor, farmer or local agency that it may be able to pursue judicial review of the decision.

[65 FR 83266, Dec. 29, 2000, as amended at 70 FR 71724, Nov. 29, 2005; 73 FR 68998, Dec. 6, 2007; 73 FR 21811, Apr. 23, 2008; 74 FR 557, Jan. 6, 2009; 74 FR 51759, Oct. 8, 2009]

## Subpart F—Monitoring and Review

### § 246.19 Management evaluation and monitoring reviews.

(a) *Management evaluations and reviews.* (1) FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of Program objectives as provided under this part, FNS guidelines, instructions, and the Federal-State agreement with the Department. FNS will provide assistance to States in discharging this responsibility, establish standards and procedures to determine how well the objectives of this part are being accomplished, and implement sanction procedures as warranted by State Program performance.

(2) The State agency must submit a corrective action plan, including implementation timeframes, within 60 days of receipt of an FNS management evaluation report containing a finding that the State agency did not comply with program requirements. If FNS determines through a management evaluation or other means that during a fiscal year the State agency has failed, without good cause, to demonstrate efficient and effective administration of its program, or has failed to comply with its corrective action plan, or any other requirements contained in this part or the State Plan, FNS may withhold an amount up to 100 percent of the State agency's nutrition services and administration funds for that year.

(3) Sanctions imposed upon a State agency by FNS in accordance with this section (but not claims for repayment assessed against a State agency) may be appealed in accordance with the procedures established in § 246.22. Before carrying out any sanction against a State agency, the following procedures will be followed:

(i) FNS will notify the Chief State Health Officer or equivalent in writing of the deficiencies found and of FNS' intention to withhold nutrition services and administration funds unless an acceptable corrective action plan is submitted by the State agency to FNS within 60 days after mailing of notification.

(ii) The State agency shall develop a corrective action plan with a schedule according to which the State agency shall accomplish various actions to correct the deficiencies and prevent their future recurrence.

(iii) If the corrective action plan is acceptable, FNS will notify the Chief State Health Officer or equivalent in writing within 30 days of receipt of the plan. The letter approving the corrective action plan will describe the technical assistance that is available to the State agency to correct the deficiencies. The letter will also advise the Chief State Health Officer or equivalent of the sanctions to be imposed if the corrective action plan is not implemented according to the schedule set forth in the approved plan.

(iv) Upon notification from the State agency that corrective action as been taken, FNS will assess such action, and, if necessary, will perform a follow-up review to determine if the noted deficiencies have been corrected. FNS

will then advise the State agency of whether the actions taken are in compliance with the corrective action plan, and whether the deficiency is resolved or further corrective action is needed.

(v) If an acceptable corrective action plan is not submitted within 60 days, or if corrective action is not completed according to the schedule established in the corrective action plan, FNS may withhold nutrition services and administration funds through a reduction of the State agency Letter of Credit or by assessing a claim against the State agency. FNS will notify the Chief State Health Officer or equivalent of this action.

(vi) If compliance is achieved before the end of the fiscal year in which the nutrition services and administration funds are withheld, the funds withheld shall be restored to the State agency's Letter of Credit. FNS is not required to restore funds withheld if compliance is not achieved until the subsequent fiscal year. If the 60-day warning period ends in the fourth quarter of a fiscal year, FNS may elect not to withhold funds until the next fiscal year.

(b) *State agency responsibilities.* (1) The State agency shall establish an ongoing management evaluation system which includes at least the monitoring of local agency operations, the review of local agency financial and participation reports, the development of corrective action plans to resolve Program deficiencies, the monitoring of the implementation of corrective action plans, and on-site visits. The results of such actions shall be documented.

(2) Monitoring of local agencies must encompass evaluation of management, certification, nutrition education, participant services, civil rights compliance, accountability, financial management systems, and food delivery systems. If the State agency delegates the signing of vendor agreements, vendor training, or vendor monitoring to a local agency, it must evaluate the local agency's effectiveness in carrying out these responsibilities.

(3) The State agency shall conduct monitoring reviews of each local agency at least once every two years. Such reviews shall include on-site reviews of a minimum of 20 percent of the clinics in each local agency or one clinic, whichever is greater. The State agency may conduct such additional on-site reviews as the State agency determines to be necessary in the interest of the efficiency and effectiveness of the program.

(4) The State agency must promptly notify a local agency of any finding in a monitoring review that the local agency did not comply with program requirements. The State agency must require the local agency to submit a corrective action plan, including implementation timeframes, within 60 days of receipt of a State agency report of a monitoring review containing a finding of program noncompliance. The State agency must monitor local agency implementation of corrective action plans.

(5) As part of the regular monitoring reviews, FNS may require the State agency to conduct in-depth reviews of specified areas of local agency operations, to implement a standard form or protocol for such reviews, and to report the results to FNS. No more than two such areas will be stipulated by FNS for any fiscal year and the areas will not be added or changed more often than once every two fiscal years. These areas will be announced by FNS at least six months before the beginning of the fiscal year.

(6) The State agency shall require local agencies to establish management evaluation systems to review their operations and those of associated clinics or contractors.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11508, Mar. 11, 1994]

### § 246.20 Audits.

(a) *Federal audit responsibilities.* (1) OIG reserves the right to perform audits of State and local agencies and other organizations involved in the Program as determined by OIG to be necessary. In performing such audits, OIG will rely to the extent feasible on audit work performed by other Federal and non-Federal auditors.

(2) The State agency may take exception to particular audit findings and recommendations. The State agency shall submit a response or statement to FNS as to the action taken or a proposed corrective action plan regarding

the findings. A proposed corrective action plan developed and submitted by the State agency shall include specific timeframes for its implementation and for completion of correction of deficiencies and their causes.

(3) FNS will determine whether Program deficiencies have been adequately corrected. If additional corrective action is necessary, FNS shall schedule a follow-up review, allowing a reasonable time for such corrective action to be taken.

(b) *State audit responsibilities.* (1) State agencies must obtain annual audits in accordance with part 3052 of this title. In addition, States must require local agencies under their jurisdiction to obtain audits in accordance with part 3052 of this title.

(2) Each State agency shall make all State or local agency sponsored audit reports of Program operations under its jurisdiction available for the Department's review upon request. The cost of these audits shall be considered a part of nutrition services and administration costs and may be funded from the State or local agency nutrition services and administration funds, as appropriate. For purposes of determining the Program's pro rata share of indirect costs associated with organization-wide audits, the cost of food shall not be considered in the total dollar amount of the Program.

[50 FR 6121, Feb. 13, 1985, as amended at 71 FR 56731, Sept. 27, 2006]

### § 246.21 Investigations.

(a) *Authority.* The Department may make an investigation of any allegation of noncompliance with this part and FNS guidelines and instructions. The investigation may include, where appropriate, a review of pertinent practices and policies of any State or local agency, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the State or local agency has failed to comply with the requirements of this part.

(b) *Confidentiality.* No State or local agency, participant, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this part because that person has made a complaint or formal allegation, or has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conducting of any investigation, hearing, or judicial proceeding.

## Subpart G—Miscellaneous Provisions

### § 246.22 Administrative appeal of FNS decisions.

(a) *Right to appeal.* When FNS asserts a sanction against a State agency under the provisions of § 246.19, the State agency may appeal and must be afforded a hearing or review by an FNS Administrative Review Officer. The right of appeal shall not apply to claims for repayment assessed by FNS against the State agency under § 246.23(a). A State agency shall have the option of requesting a hearing to present its position or a review of pertinent documents and records including any additional written submission prepared by the State agency.

(1) FNS will send a written notice by Certified Mail-Return Receipt Requested to the state agency or otherwise ensure receipt of such notice by the agency when asserting a sanction against a State agency as specified in § 246.19(a).

(2) A State agency aggrieved by a sanction asserted against it may file a written request with the Director, Administrative Review Division, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Va. 22302, for a hearing or a review of the record. Such request shall be sent by Certified Mail-Return Receipt Requested and postmarked within 30 days of the date of receipt of the sanction notice. The envelope containing the request shall be prominently marked "REQUEST FOR REVIEW OR HEARING." The request shall clearly identify the specific FNS sanction(s) being appealed and shall include

a photocopy of the FNS notice of sanction. If the State agency does not request a review of hearing within 30 days of receipt of the notice, the administrative decision on the sanctions will be considered final.

(b) *Acknowledgment of request.* Within 15 days of receipt by the Director of the Administrative Review Division of a request for review or hearing, the Director will provide the State agency with a written acknowledgment of the request.

(1) The acknowledgment will include the name and address of the FNS Administrative Review Officer to review the sanction;

(2) The acknowledgment will also notify the State agency that within 30 days of the receipt of the acknowledgment, the State agency shall submit three sets of the following information to the Administrative Review Officer—

(i) A clear, concise identification of the issue(s) in dispute;

(ii) The State agency's position with respect to the issue(s) in dispute;

(iii) The pertinent facts and reasons in support of the State agency's position with respect to the issue(s) in dispute and a copy of the specific sanction notice provided by FNS;

(iv) All pertinent documents, correspondence and records which the State agency believes are relevant and helpful toward a more thorough understanding of the issue(s) in dispute;

(v) The relief sought by the State agency;

(vi) The identity of the person(s) presenting the State agency's position when a hearing is involved; and

(vii) A list of prospective State agency witnesses when a hearing is involved.

(c) *FNS action.* (1) When a hearing is requested pursuant to this section, the Administrative Review Officer will, within 60 days after receipt of the State agency's information, schedule and conduct the hearing. The State agency will be advised of the time, date and location of the hearing at least 10 days in advance.

(2) When a hearing is requested, the FNS Administrative Review Officer will make a final determination within 30 days after the hearing, and the final determination will take effect upon delivery of the written notice of this final decision to the State agency.

(3) When a review is requested, the FNS Administrative Review Officer will review information presented by a State agency and will make a final determination within 30 days after receipt of that information. The final determination will take effect upon delivery of the written notice of this final decision to the State agency.

### § 246.23 Claims and penalties.

(a) *Claims against State agencies.* (1) If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any Program funds provided to a State agency for supplemental foods or nutrition services and administration purposes were, through State or local agency negligence or fraud, misused or otherwise diverted from Program purposes, a formal claim will be assessed by FNS against the State agency. The State agency shall pay promptly to FNS a sum equal to the amount of the nutrition services and administration funds or the value of supplemental foods or food instruments so misused or diverted.

(2) If FNS determines that any part of the Program funds received by a State agency; or supplemental foods, either purchased or donated commodities; or food instruments, were lost as a result of thefts, embezzlements, or unexplained causes, the State agency shall, on demand by FNS, pay to FNS a sum equal to the amount of the money or the value of the supplemental foods or food instruments so lost.

(3) The State agency shall have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

(4) FNS will establish a claim against any State agency that has not accounted for the disposition of all redeemed food instruments and cash-value vouchers and taken appropriate follow-up action on all redeemed food instruments and cash-value vouchers that cannot be matched against valid enrollment and issuance records, including cases that may involve fraud,

unless the State agency has demonstrated to the satisfaction of FNS that it has:

(i) Made every reasonable effort to comply with this requirement;

(ii) Identified the reasons for its inability to account for the disposition of each redeemed food instrument or cash-value voucher; and

(iii) Provided assurances that, to the extent considered necessary by FNS, it will take appropriate actions to improve its procedures.

(b) *Interest charge on claims against State agencies.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit within 30 days from the date of the first demand letter from FNS, FNS will assess an interest (late) charge against the State agency. Interest accrual shall begin on the 31st day after the date of the first demand letter, bill or claim, and shall be computed monthly on any unpaid balance as long as the debt exists. From a source other than the Program, the State agency shall provide the funds necessary to maintain Program operations at the grant level authorized by FNS.

(c) *Claims*—(1) *Claims against participants.* (i) *Procedures.* If the State agency determines that program benefits have been obtained or disposed of improperly as the result of a participant violation, the State agency must establish a claim against the participant for the full value of such benefits. For all claims, the State agency must issue a letter demanding repayment. If full restitution is not made or a repayment schedule is not agreed on within 30 days of receipt of the letter, the State agency must take additional collection actions until restitution is made or a repayment schedule is agreed on, unless the State agency determines that further collection actions would not be cost-effective. The State agency must establish standards, based on a cost benefit analysis, for determining when collection actions are no longer cost-effective. At the time the State agency issues the demand letter, the State agency must advise the participant of the procedures to follow to obtain a fair hearing pursuant to § 246.9 and that failure to pay the claim may result in disqualification. In addition to establishing a claim, the State agency must determine whether disqualification is required by § 246.12(u)(2).

(ii) *Types of restitution.* In lieu of financial restitution, the State agency may allow participants or parents or caretakers of infant or child participants for whom financial restitution would cause undue hardship to provide restitution by performing in-kind services determined by the State agency. Restitution may not include offsetting the claim against future program benefits, even if agreed to by the participant or the parent or caretaker of an infant or child participant.

(iii) *Disposition of claims.* The State agency must document the disposition of all participant claims.

(2) *Claims against the State agency.* FNS will assert a claim against the State agency for losses resulting from program funds improperly spent as a result of dual participation, if FNS determines that the State agency has not complied with the requirements in § 246.7(l)(1).

(3) *Delegation of claims responsibility.* The State agency may delegate to its local agencies the responsibility for collecting participant claims.

(d) *Penalties.* In accordance with section 12(g) of the National School Lunch Act, whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under section 17 of the Child Nutrition Act of 1966, as amended, whether received directly or indirectly from USDA, or whoever receives, conceals or retains such funds, assets or property for his or her own interest, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets or property are of the value of $100 or more, be fined not more than $25,000 or imprisoned not more than five years, or both, or if such funds, assets or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21238, June 4, 1987; 65 FR 83288, Dec. 29, 2000; 71 FR 56731, Sept. 27, 2006; 72 FR 68998, Dec. 6, 2007]

### § 246.24 Procurement and property management.

(a) *Requirements.* State and local agencies shall ensure that subgrantees comply with the requirements of 7 CFR part 3016, the nonprocurement debarment/suspension requirements of 7 CFR part 3017, and if applicable, the lobbying restrictions as required in 7 CFR part 3018 concerning the procurement and allowability of food in bulk lots, supplies, equipment and other services with Program funds. These requirements are adopted to ensure that such materials and services are obtained for the Program in an effective manner and in compliance with the provisions of applicable law and executive orders.

(b) *Contractual responsibilities.* The standards contained in A–130 and 7 CFR part 3016 do not relieve the State or local agency of the responsibilities arising under its contracts. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to, disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

(c) *State regulations.* The State or local agency may use its own procurement regulations which reflect applicable State and local regulations, provided that procurements made with Program funds adhere to the standards set forth in A–130 and 7 CFR part 3016.

(d) *Property acquired with Program funds.* State and local agencies shall observe the standards prescribed in 7 CFR part 3016 in their utilization and disposition of real property and equipment, including automated data processing equipment, acquired in whole or in part with Program funds.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11508, Mar. 11, 1994]

### § 246.25 Records and reports.

(a) *Recordkeeping requirements.* Each State and local agency shall maintain full and complete records concerning Program operations. Such records shall comply with 7 CFR part 3016 and the following requirements:

(1) Records shall include, but not be limited to, information pertaining to financial operations, food delivery systems, food instrument issuance and redemption, equipment purchases and inventory, certification, nutrition education, civil rights and fair hearing procedures.

(2) All records shall be retained for a minimum of three years following the date of submission of the final expenditure report for the period to which the report pertains. If any litigation, claim, negotiation, audit or other action involving the records has been started before the end of the three-year period, the records shall be kept until all issues are resolved, or until the end of the regular three-year period, whichever is later. If FNS deems any of the Program records to be of historical interest, it may require the State or local agency to forward such records to FNS whenever either agency is disposing of them.

(3) Records for nonexpendable property acquired in whole or in part with Program funds shall be retained for three years after its final disposition.

(4) All records shall be available during normal business hours for representatives of the Department and the Comptroller General of the United States to inspect, audit, and copy. Any reports or other documents resulting from the examination of such records that are publicly released may not include confidential applicant or participant information.

(b) *Financial and participation reports*—(1) *Monthly reports.* (i) State agencies must submit financial and program performance data on a monthly basis, as specified by FNS, to support program management and funding decisions. Such information must include, but may not be limited to:

(A) Actual and projected participation;

(B) Actual and projected food funds expenditures;

(C) A listing by source year of food and NSA funds available for expenditure; and,

(D) NSA expenditures and unliquidated obligations.

(ii) State agencies must require local agencies to report such financial and participation information as is necessary for the efficient management of food and NSA funds expenditures.

(2) *Annual reports.* (i) Every year, State agencies must report to FNS the average number of migrant farmworker household members participating in the Program during a 12-month period of time specified by FNS.

(ii) State agencies must submit itemized NSA expenditure reports annually as an addendum to their WIC Program closeout reports, as required by § 246.17(b)(2).

(3) *Biennial reports.* (i) *Participant characteristics report.* State and local agencies must provide such information as may be required by FNS to provide a biennial participant characteristics report. This includes, at a minimum, information on income and nutritional risk characteristics of participants, information on breastfeeding incidence and duration, and participation in the Program by category (i.e., pregnant, breastfeeding and postpartum women, infants and children) within each priority level (as established in § 246.7(e)(4)) and by migrant farmworker households.

(ii) *Civil rights report.* Racial and ethnic participation data contained in the biennial participant characteristics report will also be used to fulfill civil rights reporting requirements.

(c) *Other reports.* State agencies must submit reports to reflect additions and deletions of local agencies administering the WIC Program and local agency address changes as these events occur.

(d) *Source documentation.* To be acceptable for audit purposes, all financial and Program performance reports shall be traceable to source documentation.

(e) *Certification of reports.* Financial and Program reports shall be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(f) *Use of reports.* FNS will use State agency reports to measure progress in achieving objectives set forth in the State Plan, and this part, or other State agency performance plans. If it is determined, through review of State agency reports, Program or financial analysis, or an audit, that a State agency is not meeting the objectives set forth in its State Plan, FNS may request additional information including, but not limited to, reasons for failure to achieve its objectives.

(g) *Extension of reporting deadline.* FNS may extend the due date for any Financial and Participation Report upon receiving a justified request from the State agency. The State agency should not wait until the due date if an extension is to be requested, but should submit the request as soon as the need is known. Failure by a State agency to submit a report by its due date may result in appropriate enforcement actions by FNS in accordance with § 246.19(a)(2), including withholding of further grant payments, suspension or termination of the grant.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21238, June 4, 1987; 53 FR 15653, May 3, 1988; 59 FR 11508, Mar. 11, 1994; 65 FR 53528, Sept. 5, 2000; 71 FR 56731, Sept. 27, 2006; 72 FR 24183, May 2, 2007]

### § 246.26 Other provisions.

(a) *No aid reduction.* The value of benefits or assistance available under the Program shall not be considered as income or resources of participants or their families for any purpose under Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare and public assistance programs.

(b) *Statistical information.* FNS reserves the right to use information obtained under the Program in a summary, statistical or other form which does not identify particular individuals.

(c) *Medical information.* FNS may require the State or local agencies to supply medical data and other information collected under the Program in a form that does not identify particular individuals, to enable the Secretary or the State agencies to evaluate the effect of food intervention upon low-income individuals determined to be at nutritional risk.

(d) *Confidentiality of applicant and participant information*—(1) *WIC purposes.* (i) Confidential applicant and

participant information is any information about an applicant or participant, whether it is obtained from the applicant or participant, another source, or generated as a result of WIC application, certification, or participation, that individually identifies an applicant or participant and/or family member(s). Applicant or participant information is confidential, regardless of the original source and exclusive of previously applicable confidentiality provided in accordance with other Federal, State or local law.

(ii) Except as otherwise permitted by this section, the State agency must restrict the use and disclosure of confidential applicant and participant information to persons directly connected with the administration or enforcement of the WIC Program whom the State agency determine have a need to know the information for WIC Program purposes. These persons may include, but are not limited to: personnel from its local agencies and other WIC State or local agencies; persons under contract with the State agency to perform research regarding the WIC Program, and persons investigating or prosecuting WIC Program violations under Federal, State or local law.

(2) *Non-WIC purposes.* (i) *Use by WIC State and local agencies.* Any WIC State or local agency may use confidential applicant and participant information in the administration of its other programs that serve persons eligible for the WIC Program in accordance with paragraph (h) of this section.

(ii) *Disclosure to public organizations.* The State agency and its local agencies may disclose confidential applicant and participant information to public organizations for use in the administration of their programs that serve persons eligible for the WIC Program in accordance with paragraph (h) of this section.

(3) *Child abuse and neglect reporting.* Staff of the State agency and its local agencies who are required by State law to report known or suspected child abuse or neglect may disclose confidential applicant and participant information without the consent of the participant or applicant to the extent necessary to comply with such law.

(4) *Release forms.* Except in the case of subpoenas or search warrants (see paragraph (i) of this section), the State agency and its local agencies may disclose confidential applicant and participant information to individuals or entities not listed in this section only if the affected applicant or participant signs a release form authorizing the disclosure and specifying the parties to which the information may be disclosed. The State or local agency must permit applicants and participants to refuse to sign the release form and must notify the applicants and participants that signing the form is not a condition of eligibility and refusing to sign the form will not affect the applicant's or participant's application or participation in the WIC Program. Release forms authorizing disclosure to private physicians or other health care providers may be included as part of the WIC application or certification process. All other requests for applicants or participants to sign voluntary release forms must occur after the application and certification process is completed.

(5) *Access to information by applicants and participants.* The State or local agency must provide applicants and participants access to all information they have provided to the WIC Program. In the case of an applicant or participant who is an infant or child, the access may be provided to the parent or guardian of the infant or child, assuming that any issues regarding custody or guardianship have been settled. However, the State or local agency need not provide the applicant or participant (or the parent or guardian of an infant or child) access to any other information in the file or record such as documentation of income provided by third parties and staff assessments of the participant's condition or behavior, unless required by Federal, State, or local law or policy or unless the information supports a State or local agency decision being appealed pursuant to § 246.9.

(e) *Confidentiality of vendor information.* Confidential vendor information is any information about a vendor (whether it is obtained from the vendor or another source) that individually

identifies the vendor, except for vendor's name, address, telephone number, Web site/e-mail address, store type, and authorization status. Except as otherwise permitted by this section, the State agency must restrict the use or disclosure of confidential vendor information to:

(1) Persons directly connected with the administration or enforcement of the WIC Program or the Food Stamp Program who the State agency determines have a need to know the information for purposes of these programs. These persons may include personnel from its local agencies and other WIC State and local agencies and persons investigating or prosecuting WIC or Food Stamp Program violations under Federal, State, or local law;

(2) Persons directly connected with the administration or enforcement of any Federal or State law or local law or ordinance. Prior to releasing the information to one of these parties (other than a Federal agency), the State agency must enter into a written agreement with the requesting party specifying that such information may not be used or redisclosed except for purposes directly connected to the administration or enforcement of a Federal, or State law; and

(3) A vendor that is subject to an adverse action, including a claim, to the extent that the confidential information concerns the vendor subject to the adverse action and is related to the adverse action.

(4) At the discretion of the State agency, all authorized vendors and vendor applicants regarding vendor sanctions which have been imposed, identifying only the vendor's name, address, length of the disqualification or amount of the civil money penalty, and a summary of the reason(s) for such sanction provided in the notice of adverse action. Such information may be disclosed only following the exhaustion of all administrative and judicial review, in which the State agency has prevailed, regarding the sanction imposed on the subject vendor, or the time period for requesting such review has expired.

(f) *Confidentiality of Food Stamp Program retailer information.* Except as otherwise provided in this section, the State agency must restrict the use or disclosure of information about Food Stamp Program retailers obtained from the Food Stamp Program, including information provided pursuant to Section 9(c) of the Food Stamp Act of 1977 (7 U.S.C. 2018(c)) and §278.1(q) of this chapter, to persons directly connected with the administration or enforcement of the WIC Program.

(g) *USDA and the Comptroller General.* The State agency must provide the Department and the Comptroller General of the United States access to all WIC Program records, including confidential vendor, applicant and participant information, pursuant to §246.25(a)(4).

(h) *Requirements for use and disclosure of confidential applicant and participant information for non-WIC purposes.* The State or local agency must take the following steps before using or disclosing confidential applicant or participant information for non-WIC purposes pursuant to paragraph (d)(2) of this section.

(1) *Designation by chief State health officer.* The chief State health officer (or, in the case of an Indian State agency, the governing authority) must designate in writing the permitted non-WIC uses of the information and the names of the organizations to which such information may be disclosed.

(2) *Notice to applicants and participants.* The applicant or participant must be notified either at the time of application (in accordance with §246.7(i)(11)) or through a subsequent notice that the chief State health officer (or, in the case of an Indian State agency, the governing authority) may authorize the use and disclosure of information about their participation in the WIC Program for non-WIC purposes. This statement must also indicate that such information will be used by State and local WIC agencies and public organizations only in the administration of their programs that serve persons eligible for the WIC Program.

(3) *Written agreement and State plan.* The State or local agency disclosing the information must enter into a written agreement with the other public organization or, in the case of a non-WIC use by a State or local WIC agency, the unit of the State or local agency that will be using the information.

The State agency must also include in its State plan, as specified in §246.4(a)(24), a list of all organizations (including units of the State agency or local agencies) with which the State agency or its local agencies has executed or intends to execute a written agreement. The written agreement must:

(i) Specify that the receiving organization may use the confidential applicant and participant information only for:

(A) Establishing the eligibility of WIC applicants or participants for the programs that the organization administers;

(B) Conducting outreach to WIC applicants and participants for such programs;

(C) Enhancing the health, education, or well-being of WIC applicants or participants who are currently enrolled in such programs, including the reporting of known or suspected child abuse or neglect that is not otherwise required by State law;

(D) Streamlining administrative procedures in order to minimize burdens on staff, applicants, or participants in either the receiving program or the WIC Program; and/or

(E) Assessing and evaluating the responsiveness of a State's health system to participants' health care needs and health care outcomes; and

(ii) Contain the receiving organization's assurance that it will not use the information for any other purpose or disclose the information to a third party.

(i) *Subpoenas and search warrants.* The State agency may disclose confidential applicant, participant, or vendor information pursuant to a valid subpoena or search warrant in accordance with the following procedures:

(1) *Subpoena procedures.* In determining how to respond to a subpoena duces tecum (i.e., a subpoena for documents) or other subpoena for confidential information, the State or local agency must use the following procedures:

(i) Upon receiving the subpoena, immediately notify its State agency;

(ii) Consult with legal counsel for the State or local agency and determine whether the information requested is in fact confidential and prohibited by this section from being used or disclosed as stated in the subpoena;

(iii) If the State or local agency determines that the information is confidential and prohibited from being used or disclosed as stated in the subpoena, attempt to quash the subpoena unless the State or local agency determines that disclosing the confidential information is in the best interest of the Program. The determination to disclose confidential information without attempting to quash the subpoena should be made only infrequently; and,

(iv) If the State or local agency seeks to quash the subpoena or decides that disclosing the confidential information is in the best interest of the Program, inform the court or the receiving party that this information is confidential and seek to limit the disclosure by:

(A) Providing only the specific information requested in the subpoena and no other information; and,

(B) Limiting to the greatest extent possible the public access to the confidential information disclosed.

(2) *Search warrant procedures.* In responding to a search warrant for confidential information, the State or local agency must use the following procedures:

(i) Upon receiving the search warrant, immediately notify its State agency;

(ii) Immediately notify legal counsel for the State or local agency;

(iii) Comply with the search warrant; and,

(iv) Inform the individual(s) serving the search warrant that the information being sought is confidential and seek to limit the disclosure by:

(A) Providing only the specific information requested in the search warrant and no other information; and

(B) Limiting to the greatest extent possible the public access to the confidential information disclosed.

(j) *Data collection related to local agencies.* (1) Each State agency must collect data related to local agencies that have an agreement with the State agency to participate in the program for each of Federal fiscal years 2006 through 2009, including those local agencies that participated only for part of the fiscal year. Such data shall include:

(i) The name of each local agency;

(ii) The city in which each local agency was headquartered and the name of the state;

(iii) The amount of funds provided to the participating organization, i.e., the amount of federal funds provided for nutrition services and administration to each participating local agency; and

(iv) The type of participating organization, e.g., government agency, educational institution, non-profit organization/secular, non-profit organization/faith-based, and "other."

(2) On or before August 31, 2007, and each subsequent year through 2010, State agencies must report to FNS data as specified in paragraph (j)(1) of this section for the prior Federal fiscal year. State agencies must submit this data in a format designated by FNS.

[50 FR 6121, Feb. 13, 1985, as amended at 53 FR 35301, Sept. 13, 1988; 65 FR 83288, Dec. 29, 2000; 71 FR 56731, Sept. 27, 2006; 72 FR 24184, May 2, 2007; 73 FR 21811, Apr. 23, 2008]

### § 246.27 Program information.

Any person who wishes information, assistance, records or other public material shall request such information from the State agency, or from the FNS Regional Office serving the appropriate State as listed below:

(a) Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont: U.S. Department of Agriculture, FNS, Northeast Region, 10 Causeway Street, room 501, Boston, Massachusetts 02222–1066.

(b) Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia: U.S. Department of Agriculture, FNS, Mid-Atlantic Region, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(c) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee: U.S. Department of Agriculture, FNS, Southeast Region, 61 Forsyth Street, SW., room 8T36, Atlanta, Georgia 30303.

(d) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: U.S. Department of Agriculture, FNS, Midwest Region, 77 West Jackson Boulevard—20th Floor, Chicago, Illinois 60604–3507.

(e) Arkansas, Louisiana, New Mexico, Oklahoma, Texas: U.S. Department of Agriculture, FNS, Southwest Region, 1100 Commerce Street, room 5–C–30, Dallas, Texas 75242.

(f) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming: U.S. Department of Agriculture, FNS, Mountain Plains Region, 1244 Speer Boulevard, suite 903, Denver, Colorado 80204.

(g) Alaska, American Samoa, Arizona, California, the Commonwealth of the Northern Mariana Islands, Guam, Hawaii, Idaho, Nevada, Oregon, Washington: U.S. Department of Agriculture, FNS, Western Region,90 Seventh Street, Suite #10–100, San Francisco, California 94103.

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### § 246.28 OMB control numbers.

The following control numbers have been assigned to the information collection requirements in 7 CFR part 246 by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511.

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| .7(n) | 0584–0386 |
| .7(i) | 0584–A536 |
| .10 | 0584–A536 |
| .11(a)(3) | 0584–0386 |
| .11(d) | 0584–0043 |
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| .14(d)(1) | 0584–0043 |
| .16(c) | 0584–0043 |
| .17(c)(1) | 0584–0043 |
| .19 | 0584–0043 |
| .20(a) | 0584–0043 |
| .25(a), (b) | 0584–0043, 0584–0347 |

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# PART 247—COMMODITY SUPPLEMENTAL FOOD PROGRAM

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247.37 Civil rights requirements.

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SOURCE: 70 FR 47063, Aug. 11, 2005, unless otherwise noted.

## § 247.1 Definitions.

Following is a list of definitions that apply to the Commodity Supplemental Food Program (CSFP).

*Applicant* means any person who applies to receive program benefits. Applicants include program participants applying for recertification.

*Breastfeeding women* means women up to one year postpartum who are breastfeeding their infants.

*Caseload* means the number of persons the State agency may serve on an average monthly basis over the course of the caseload cycle.

*Caseload cycle* means the period from January 1 through the following December 31.

*Certification* means the use of procedures to determine an applicant's eligibility for the program.

*Certification period* means the period of time that a participant may continue to receive program benefits without a review of his or her eligibility.

*Children* means persons who are at least one year of age but have not reached their sixth birthday.

*Commodities* means nutritious foods purchased by USDA to supplement the diets of CSFP participants.

*CSFP* means the Commodity Supplemental Food Program.

*Department* means the U.S. Department of Agriculture.

*Disqualification* means the act of ending Program participation of a participant as a punitive sanction.

*Dual participation* means simultaneous participation by an individual in CSFP and the WIC Program, or in CSFP at more than one distribution site.

*Elderly persons* means persons at least 60 years of age.

*Fiscal year* means the period from October 1 through the following September 30.

*FNS* means the Food and Nutrition Service.

*Infants* means persons under one year of age.

*Local agency* means a public or private nonprofit agency, including an Indian tribal organization, which enters into an agreement with the State agency to administer CSFP at the local level.

*Nonprofit agency* means a private agency or organization with tax-exempt status under the Internal Revenue Code, or that has applied for tax-exempt status with the Internal Revenue Service.

*Postpartum women* means women up to one year after termination of pregnancy.

*Proxy* means any person designated by a participant, or by the participant's adult parent or caretaker, to obtain supplemental foods on behalf of the participant.

*7 CFR part 250* means the Department's regulations pertaining to the donation of foods for use in USDA food distribution programs.

*7 CFR part 3016* means the Department's regulations pertaining to administrative requirements for grants and cooperative agreements with State, local, and Indian tribal governments.

*7 CFR part 3019* means the Department's regulations pertaining to administrative requirements for grants and cooperative agreements with nonprofit organizations.

*7 CFR part 3052* means the Department's regulations pertaining to audits of States, local governments, and nonprofit organizations.

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

*State agency* means the agency designated by the State to administer CSFP at the State level; an Indian tribe or tribal organization recognized by the Department of the Interior that administers the program for a specified tribe or tribes; or, the appropriate area office of the Indian Health Service of the Department of Health and Human Services.

*State Plan* means the document that describes the manner in which the State agency intends to administer the program in the State.

*Subdistributing agency* means an agency or organization that has entered into an agreement with the State agency to perform functions normally performed by the State, such as entering into agreements with eligible recipient agencies under which commodities are made available, ordering commodities and/or making arrangements for the storage and delivery of such commodities on behalf of eligible recipient agencies.

*WIC Program* means the Special Supplemental Nutrition Program for Women, Infants, and Children.

### § 247.2 The purpose and scope of CSFP.

(a) *How does CSFP help participants?* Through CSFP, the Department provides nutritious commodities to help State and local agencies meet the nutritional needs of low-income pregnant, postpartum, and breastfeeding women, infants under one year of age, children who are at least one year of age but have not reached their sixth birthday, and elderly persons. Through local agencies, each participant receives a monthly package of commodities, based on food package guide rates developed by FNS, with input from State and local agencies. Food packages include such nutritious foods as infant formula and cereal, juices, canned fruits and vegetables, canned meat or poultry and other protein items, and grain products such as pasta, as well as other foods. Participants also receive nutrition education.

(b) *How many persons may be served in CSFP?* State agencies may serve eligible persons up to the caseload limit assigned to them by FNS. Caseload is the number of persons that may be served on an average monthly basis over the course of the caseload cycle, which extends from January 1 through the following December 31.

### § 247.3 Administering agencies.

(a) *What agencies are responsible for administering CSFP?* CSFP is administered at the Federal level by the Department's Food and Nutrition Service (FNS), which provides commodities, assigns caseload, and allocates administrative funds to State agencies. State

agencies are responsible for administering the program at the State level. The State agency may select local agencies to administer the program in local areas of the State. The State agency must provide guidance to local agencies on all aspects of program operations. The State agency may also select subdistributing agencies (e.g., another State agency, a local governmental agency, or a nonprofit organization) to distribute or store commodities, or to perform other program functions on behalf of the State agency. Local or subdistributing agencies may also select other agencies to perform specific program functions (e.g., food distribution or storage), with the State agency's approval. Although the State agency may select other organizations to perform specific activities, the State agency is ultimately responsible for all aspects of program administration.

(b) *Are there specific functions that the State agency cannot delegate to another agency?* Yes. The State agency may not delegate the performance of the following functions to another agency:

(1) Establishing eligibility requirements, in accordance with the options provided to the State agency under § 247.9; or

(2) Establishing a management review system and conducting reviews of local agencies, in accordance with § 247.34.

(c) *What Federal requirements must State, subdistributing, and local agencies follow in administering CSFP?* State, subdistributing, and local agencies must administer the program in accordance with the provisions of this part, and with the provisions contained in part 250 of this chapter, unless they are inconsistent with the provisions of this part.

### § 247.4 Agreements.

(a) *What agreements are necessary for agencies to administer CSFP?* The following agreements are necessary for agencies to administer CSFP:

(1) *Agreements between FNS and State agencies.* Each State agency must enter into an agreement with FNS (Form FNS–74, the Federal-State Agreement) prior to receiving commodities or administrative funds;

(2) *Agreements between State agencies and local or subdistributing agencies.* The State agency must enter into written agreements with local or subdistributing agencies prior to making commodities or administrative funds available to them. The agreements must contain the information specified in paragraph (b) of this section. Agreements between State and local agencies must also contain the information specified in paragraph (c) of this section. Copies of all agreements must be kept on file by the parties to the agreements; and

(3) *Agreements between local and subdistributing agencies and other agencies.* The State agency must ensure that local and subdistributing agencies enter into written agreements with other agencies prior to making commodities or administrative funds available to these other agencies. The agreements must contain the information specified in paragraph (b) of this section. Copies of all agreements must be kept on file by the parties to the agreements.

(b) *What are the required contents of agreements?* All agreements described under paragraphs (a)(2) and (a)(3) of this section must contain the following:

(1) An assurance that each agency will administer the program in accordance with the provisions of this part and with the provisions of part 250 of this chapter, unless they are inconsistent with the provisions of this part;

(2) An assurance that each agency will maintain accurate and complete records for a period of three years from the close of the fiscal year to which they pertain, or longer if the records are related to unresolved claims actions, audits, or investigations;

(3) A statement that each agency receiving commodities for distribution is responsible for any loss resulting from improper distribution, or improper storage, care, or handling of commodities;

(4) A statement that each agency receiving program funds is responsible for any misuse of program funds;

(5) A description of the specific functions that the State, subdistributing, or local agency is delegating to another agency; and

(6) A statement specifying:

(i) That either party may terminate the agreement by written notice to the other; and

(ii) The minimum number of days of advance notice that must be given. (The advance notification period must be at least 30 days.)

(c) *What other assurances or information must be included in agreements between State and local agencies?* In addition to the requirements under paragraph (b) of this section, agreements between State and local agencies must contain the following:

(1) An assurance that the local agency will provide, or cause to be provided, nutrition education to participants, as required in § 247.18;

(2) An assurance that the local agency will provide information to participants on other health, nutrition, and public assistance programs, and make referrals as appropriate, as required in § 247.14;

(3) An assurance that the local agency will distribute commodities in accordance with the approved food package guide rate;

(4) An assurance that the local agency will take steps to prevent and detect dual participation, as required in § 247.19;

(5) The names and addresses of all certification, distribution, and storage sites under the jurisdiction of the local agency; and

(6) An assurance that the local agency will not subject any person to discrimination under the program on the grounds of race, color, national origin, age, sex, or disability.

(d) *What is the duration of required agreements?* Agreements between FNS and State agencies are considered permanent, but may be amended at the initiation of State agencies or at the request of FNS. All amendments must be approved by FNS. The State agency establishes the duration of agreements it signs with local agencies or subdistributing agencies. The State agency may establish, or permit the local or subdistributing agency to establish, the duration of agreements between local or subdistributing agencies and other agencies. However, State and local agencies must comply with the requirements in § 250.12(c) of this chapter when entering agreements with other entities.

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### § 247.5 State and local agency responsibilities.

State and local agencies are responsible for administering the program in accordance with the provisions of this part, and with the provisions of part 250 of this chapter, as applicable. Although the State agency may delegate some responsibilities to another agency, the State agency is ultimately responsible for all aspects of program administration. The following is an outline of the major responsibilities of State and local agencies; it is not intended to be all-inclusive.

(a) *What are the major responsibilities shared by State and local agencies?* The major responsibilities shared by State and local agencies include:

(1) Entering into required agreements;

(2) Ordering commodities for distribution;

(3) Storing and distributing commodities;

(4) Establishing procedures for resolving complaints about commodities;

(5) Complying with civil rights requirements;

(6) Maintaining accurate and complete records; and

(7) Conducting program outreach.

(b) *What are the major State agency responsibilities?* The major responsibilities of State agencies include:

(1) Completing and submitting the State Plan;

(2) Selecting local agencies to administer the program in local areas of the State;

(3) Determining caseload needs, and submitting caseload requests to FNS;

(4) Assigning caseload, and allocating administrative funds, to local agencies;

(5) Establishing eligibility requirements, in accordance with the options provided to the State agency under § 247.9. (This function may not be delegated to another agency.);

(6) Establishing nutritional risk criteria and a residency requirement for participants, if such criteria are to be used;

(7) Establishing a financial management system that effectively accounts for funds received for program administration;

(8) Developing a plan for the detection and prevention of dual participation, in coordination with CSFP local agencies and with the State WIC agency;

(9) Developing a plan for providing nutrition education to participants;

(10) Establishing appeals and fair hearing procedures for local agencies and program participants;

(11) Developing a management review system and conducting reviews of local agencies. (This function may not be delegated to another agency.);

(12) Determining and pursuing claims, and establishing standards for pursuit of claims against participants;

(13) Ensuring compliance with Federal audit requirements;

(14) Providing guidance to local agencies, as needed; and

(15) Ensuring that program participation does not exceed the State agency's caseload allocation on an average monthly basis.

(c) *What are the major local agency responsibilities?* The major local agency responsibilities include:

(1) Determining eligibility of applicants in accordance with eligibility criteria established by the State agency;

(2) Complying with fiscal and operational requirements established by the State agency;

(3) Ensuring that participation does not exceed the caseload assigned by the State agency;

(4) Issuing foods to participants in accordance with the established food package guide rates;

(5) Providing nutrition education and information on the availability of other nutrition and health assistance programs to participants;

(6) Informing applicants of their rights and responsibilities in the program;

(7) Meeting the special needs of the homebound elderly, to the extent possible; and

(8) Pursuing claims against participants.

**§ 247.6 State Plan.**

(a) *What is the State Plan?* The State Plan is a document that describes how the State agency will operate CSFP and the caseload needed to serve eligible applicants. The State agency must submit the State Plan to FNS for approval. Once submitted and approved, the State Plan is considered permanent, with amendments submitted at the State agency's initiative, or at FNS request. All amendments are subject to FNS approval. The State Plan may be submitted in the format provided in FNS guidance, in an alternate format, or in combination with other documents required by Federal regulations. The State agency is encouraged to collaborate with the State WIC agency in developing the State Plan, for example, in developing plans for serving women, infants, and children, program outreach, and nutrition education. (Collaboration with the State WIC agency is required in preventing and detecting dual participation.) The State Plan must be signed by the State agency official responsible for program administration. A copy of the State Plan must be kept on file at the State agency for public inspection.

(b) *When must the State Plan be submitted?* The State Plan must be submitted by August 15 to take effect for the fiscal year beginning in the following October. FNS will provide notification of the approval or disapproval of the State Plan within 30 days of receipt, and will notify the State agency within 15 days of receipt if additional information is needed. Disapproval of the Plan will include a reason for the disapproval. Approval of the Plan is a prerequisite to the assignment of caseload and allocation of administrative funds, but does not ensure that caseload and funds will be provided.

(c) *What must be included in the State Plan?* The State Plan must include:

(1) The names and addresses of all local agencies and subdistributing agencies with which the State agency has entered into agreement;

(2) The income eligibility standards to be used for women, infants, and children, and the options to be used relating to income or other eligibility requirements, as provided under § 247.9;

(3) The nutritional risk criteria to be used, if the State chooses to establish such criteria;

(4) A description of plans for serving women, infants, children, and elderly participants and the caseload needed to serve them;

(5) A description of plans for conducting outreach to women, infants, children, and the elderly;

(6) A description of the system for storing and distributing commodities;

(7) A description of plans for providing nutrition education to participants;

(8) A description of the means by which the State agency will detect and prevent dual participation, including collaboration with the State WIC agency, and a copy of the agreement signed with the State WIC agency to accomplish this;

(9) A description of the standards the State agency will use in determining if the pursuit of a claim against a participant is cost-effective;

(10) A description of the means by which the State will meet the needs of the homebound elderly; and

(11) Copies of all agreements entered into by the State agency.

(d) *When must the State agency submit amendments to the State Plan?* The State agency must submit amendments to FNS to reflect any changes in program operations or administration described in the State Plan, and to request additional caseload for the following caseload cycle. FNS may also require that the State Plan be amended to reflect changes in Federal law or policy. The State agency may submit amendments to the State Plan at any time during the fiscal year, for FNS approval. The amendments will take effect immediately upon approval, unless otherwise specified by FNS. If a State agency would like to receive additional caseload for the caseload cycle beginning the following January 1, it must submit an amendment to the Plan which conveys the request for additional caseload by November 5. The State agency must also describe in this submission any plans for serving women, infants, children, and the elderly at new sites. FNS action on the State agency's request for additional caseload is part of the caseload assignment process, as described under § 247.21.

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### § 247.7 Selection of local agencies.

(a) *How does a local agency apply to participate in CSFP?* Local agencies wishing to participate in CSFP must submit a written application to the State agency. The application must describe how the local agency will operate the program and, for nonprofit agencies, must include the agency's tax-exempt status. To be eligible to participate in CSFP, a nonprofit agency must have tax-exempt status under the Internal Revenue Code (IRC), or have applied for tax-exempt status with the Internal Revenue Service (IRS), and be moving towards such status. Nonprofit agencies organized or operated exclusively for religious purposes are automatically tax-exempt under the IRC. Nonprofit agencies required to obtain tax-exempt status must provide documentation from the IRS that they have obtained such status, or have applied for it.

(b) *On what basis does the State agency make a decision on the local agency's application?* The State agency must approve or disapprove the local agency's application based on, at minimum, the following criteria:

(1) The ability of the local agency to operate the program in accordance with Federal and State requirements;

(2) The need for the program in the projected service area of the local agency;

(3) The resources available (caseload and funds) for initiating a program in the local area; and

(4) For nonprofit agencies, the tax-exempt status, with appropriate documentation.

(c) *What must the State agency do if a nonprofit agency approved for CSFP is subsequently denied tax-exempt status by the IRS, or does not obtain this status within a certain period of time?* In accordance with paragraph (a) of this section, the State agency may approve a nonprofit agency that has applied to the IRS for tax-exempt status, and is

moving toward compliance with the requirements for recognition of tax-exempt status. However, if the IRS subsequently denies a participating agency's application for recognition of tax-exempt status, the agency must immediately notify the State agency of the denial. The State agency must terminate the agency's agreement and participation immediately upon notification. If documentation of recognition of tax-exempt status is not received within 180 days of the effective date of the agency's approval to participate in CSFP, the State agency must terminate the agency's participation until such time as recognition of tax-exempt status is obtained. However, the State agency may grant an extension of 90 days if the agency demonstrates that its inability to obtain tax-exempt status in the 180-day period is due to circumstances beyond its control.

(d) *How much time does the State agency have to make a decision on the local agency's application?* The State agency must inform the local agency of approval or denial of the application within 60 days of its receipt. If the application is denied, the State agency must provide a written explanation for the denial, along with notification of the local agency's right to appeal the decision, in accordance with § 247.35. If the application is approved, the State and local agency must enter into an agreement in accordance with the requirements of § 247.4.

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### § 247.8 Individuals applying to participate in CSFP.

(a) *What information must individuals applying to participate in CSFP provide?* To apply for CSFP benefits, the applicant, or the adult parent or caretaker of the applicant, must provide the following information on the application:

(1) Name and address, including some form of identification for each applicant;

(2) Household income, except where the applicant is determined to be automatically eligible under § 247.9(b)(1)(i) and (b)(1)(ii);

(3) Household size, except where the applicant is determined to be automatically eligible under § 247.9(b)(1)(i) and (b)(1)(ii); and

(4) Other information related to eligibility, such as age or pregnancy, as applicable.

(b) *What else is required on the application form?* The application form must include a nondiscrimination statement that informs the applicant that program standards are applied without discrimination by race, color, national origin, age, sex, or disability. After informing the applicant (or adult parent or caretaker) of his or her rights and responsibilities, in accordance with § 247.12, the local agency must ensure that the applicant, or the adult parent or caretaker of the applicant, signs the application form beneath the following pre-printed statement. The statement must be read by, or to, the applicant (or adult parent or caretaker) before signing.

"This application is being completed in connection with the receipt of Federal assistance. Program officials may verify information on this form. I am aware that deliberate misrepresentation may subject me to prosecution under applicable State and Federal statutes. I am also aware that I may not receive both CSFP and WIC benefits simultaneously, and I may not receive CSFP benefits at more than one CSFP site at the same time. Furthermore, I am aware that the information provided may be shared with other organizations to detect and prevent dual participation. I have been advised of my rights and obligations under the program. I certify that the information I have provided for my eligibility determination is correct to the best of my knowledge.

I authorize the release of information provided on this application form to other organizations administering assistance programs for use in determining my eligibility for participation in other public assistance programs and for program outreach purposes. (Please indicate decision by placing a checkmark in the appropriate box.)

YES [ ]

NO [ ]"

(Approved by the Office of Management and Budget under control number 0584–0293)

**§ 247.9 Eligibility requirements.**

(a) *Who is eligible for CSFP?* To be eligible for CSFP, individuals must fall into one of the following population groups:

(1) Infants, i.e., persons under one year of age;

(2) Children, i.e., persons who are at least one year of age but have not reached their sixth birthday;

(3) Pregnant women;

(4) Breastfeeding women, up to one year after giving birth (post-partum);

(5) Post-partum women, up to one year after termination of pregnancy; or

(6) Elderly persons, i.e., persons at least 60 years of age.

(b) *What are the income eligibility requirements for women, infants, and children?* (1) The State agency must establish household income limits that are at or below 185 percent of the Federal Poverty Income Guidelines published annually by the Department of Health and Human Services, but not below 100 percent of these guidelines. However, the State agency must accept as income-eligible, regardless of actual income, any applicant who is:

(i) Certified as eligible to receive food stamps under the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.), Temporary Assistance for Needy Families (TANF) under Part A of Title IV of the Social Security Act (42 U.S.C. 601 et seq.), or Medical Assistance (i.e., Medicaid) under Title XIX of the Social Security Act (42 U.S.C. 1396 et seq.); or

(ii) A member of a family that is certified eligible to receive assistance under TANF, or a member of a family in which a pregnant woman or an infant is certified eligible to receive assistance under Medicaid.

(2) The State agency may consider women, infants, and children participating in another Federal, State, or local food, health, or welfare program as automatically eligible for CSFP if the income eligibility limits for the program are equal to or lower than the established CSFP limits.

(3) For a pregnant woman, the State agency must count each embryo or fetus in utero as a household member in determining if the household meets the income eligibility standards.

(c) *What are the income eligibility requirements for elderly persons?* The State agency must use a household income limit at or below 130 percent of the Federal Poverty Income Guidelines. Elderly persons in households with income at or below this level must be considered eligible for CSFP benefits (assuming they meet other requirements contained in this part). However, elderly persons certified before September 17, 1986 (i.e., under the three elderly pilot projects) must remain subject to the eligibility criteria in effect at the time of their certification.

(d) *When must the State agency revise the CSFP income guidelines to reflect the annual adjustments of the Federal Poverty Income Guidelines?* Each year, FNS will notify State agencies, by memorandum, of adjusted income guidelines by household size at 185 percent, 130 percent, and 100 percent of the Federal Poverty Income Guidelines. The memorandum will reflect the annual adjustments to the Federal Poverty Income Guidelines issued by the Department of Health and Human Services. The State agency must implement the adjusted guidelines for elderly applicants immediately upon receipt of the memorandum. However, for women, infants, and children applicants, the State agency must implement the adjusted guidelines at the same time that the State WIC agency implements the adjusted guidelines in WIC.

(e) *How is income defined and considered as it relates to CSFP eligibility?* (1) Income means gross income before deductions for such items as income taxes, employees' social security taxes, insurance premiums, and bonds.

(2) The State agency may exclude from consideration the following sources of income listed under the WIC regulations at § 246.7(d)(2)(iv) of this chapter:

(i) Any basic allowance for housing received by military services personnel residing off military installations; and

(ii) The value of inkind housing and other inkind benefits.

(3) The State agency must exclude from consideration all income sources excluded by legislation, which are listed in § 246.7(d)(2)(iv)(C) of this chapter. FNS will notify State agencies of any new forms of income excluded by statute through program policy memoranda.

(4) The State agency may authorize local agencies to consider the household's average income during the previous 12 months and current household income to determine which more accurately reflects the household's status. In instances in which the State makes the decision to authorize local agencies to determine a household's income in this manner, all local agencies must comply with the State's decision and apply this method of income determination in situations in which it is warranted.

(f) *What other options does the State agency have in establishing eligibility requirements for CSFP?* (1) The State agency may require that an individual be at nutritional risk, as determined by a physician or by local agency staff.

(2) The State agency may require that an individual reside within the service area of the local agency at the time of application for CSFP benefits. However, the State agency may not require that an individual reside within the area for any fixed period of time.

### § 247.10 Distribution and use of CSFP commodities.

(a) *What are the requirements for distributing CSFP commodities to participants?* The local agency must distribute a package of commodities to participants each month, or a two-month supply of commodities to participants every other month, in accordance with the food package guide rates established by FNS.

(b) *What must the local agency do to ensure that commodities are distributed only to CSFP participants?* The local agency must require each participant, or participant's proxy, to present some form of identification before distributing commodities to that person.

(c) *What restrictions apply to State and local agencies in the distribution of CSFP commodities?* State and local agencies must not require, or request, that participants make any payments, or provide any materials or services, in connection with the receipt of CSFP commodities. State and local agencies must not use the distribution of CSFP commodities as a means of furthering the political interests of any person or party.

(d) *What are the restrictions for the use of CSFP commodities?* CSFP commodities may not be used for outreach, refreshments, or for any purposes other than distribution to, and nutrition education for, CSFP participants.

### § 247.11 Applicants exceed caseload levels.

(a) *What must the local agency do if the number of applicants exceeds the local agency's caseload level?* If all caseload has been filled, the local agency must maintain a waiting list of individuals who apply for the program. In establishing the waiting list, the local agency must include the date of application and information necessary to allow the local agency to contact the applicant when caseload space becomes available. Unless they have been determined ineligible, applicants must be notified of their placement on a waiting list within 10 days of their request for benefits in accordance with § 247.15.

(b) *What are the requirements for serving individuals on the waiting list once caseload slots become available?* The local agency must certify eligible individuals from the waiting list consistent with civil rights requirements at § 247.37. For example, a local agency may certify eligible individuals from the waiting list based on the date the application was received on a first-come, first-served basis.

[70 FR 47063, Aug. 11, 2005, as amended at 75 FR 5879, Feb. 5, 2010]

### § 247.12 Rights and responsibilities.

(a) *What information regarding an individual's rights in CSFP must the local agency provide to the applicant?* The local agency is responsible for informing the applicant, orally or in writing, of the following:

(1) The local agency will provide notification of a decision to deny or terminate CSFP benefits, and of an individual's right to appeal this decision by requesting a fair hearing, in accordance with § 247.33(a);

(2) The local agency will make nutrition education available to all adult participants, and to parents or caretakers of infant and child participants, and will encourage them to participate; and

(3) The local agency will provide information on other nutrition, health, or assistance programs, and make referrals as appropriate.

(b) *What information regarding an individual's responsibilities in CSFP must the local agency provide to the applicant?* In addition to the written statement required by § 247.8(b), the local agency is responsible for informing the applicant, orally or in writing, of the following:

(1) Improper use or receipt of CSFP benefits as a result of dual participation or other program violations may lead to a claim against the individual to recover the value of the benefits, and may lead to disqualification from CSFP; and

(2) Participants must report changes in household income or composition within 10 days after the change becomes known to the household.

### § 247.13 Provisions for non-English or limited-English speakers.

(a) *What must State and local agencies do to ensure that non-English or limited-English speaking persons are aware of their rights and responsibilities in the program?* If a significant proportion of the population in an area is comprised of non-English or limited-English speaking persons with a common language, the State agency must ensure that local agencies inform such persons of their rights and responsibilities in the program, as listed under § 247.12, in an appropriate language. State and local agencies must ensure that bilingual staff members or interpreters are available to serve these persons.

(b) *What must State and local agencies do to ensure that non-English or limited-English speaking persons are aware of other program information?* If a significant proportion of the population in an area is comprised of non-English or limited-English speaking persons with a common language, the State agency must ensure that local agencies provide other program information, except application forms, to such persons in their appropriate language.

### § 247.14 Other public assistance programs.

(a) *What information on other public assistance programs must the local agency provide to women, infants, and children applicants?* The local agency must provide CSFP applicants eligible for both CSFP and WIC with written information on the WIC Program, to assist them in choosing the program in which they wish to participate. Additionally, the local agency must provide women, infants, and children applicants with written information on the following nutrition, health, or public assistance programs, and make referrals to these programs as appropriate:

(1) The Medicaid Program, which is the medical assistance program established under Title XIX of the Social Security Act (42 U.S.C. 1396 et seq.), and other health insurance programs for low-income households in the State. The State agency must provide local agencies with materials showing the income standards utilized in the Medicaid Program;

(2) The Temporary Assistance for Needy Families (TANF) program under part A of Title IV of the Social Security Act (42 U.S.C. 601 et seq.);

(3) The Child Support Enforcement Program under part D of Title IV of the Social Security Act (42 U.S.C. 651 et seq.); and

(4) The Food Stamp Program (7 U.S.C. 2011 et seq.).

(b) *What information on other public assistance programs must the local agency provide to elderly applicants?* The local agency must provide elderly applicants with written information on the following programs, and make referrals, as appropriate:

(1) Supplemental security income benefits provided under Title XVI of the Social Security Act (42 U.S.C. 1381 et seq.);

(2) Medical assistance provided under Title XIX of the Social Security Act (42 U.S.C. 1396 et seq.), including medical assistance provided to a qualified Medicare beneficiary (42 U.S.C. 1395(p) and 1396d(5)); and

(3) The Food Stamp Program (7 U.S.C. 2011 et seq.).

(c) *Is the value of CSFP benefits counted as income or resources for any other public assistance programs?* No. The value of benefits received in CSFP may not be considered as income or resources of participants or their families for any purpose under Federal,

State, or local laws, including laws relating to taxation and public assistance programs.

### § 247.15 Notification of eligibility or ineligibility of applicant.

(a) *What is the timeframe for notifying an applicant of eligibility or ineligibility for CSFP benefits?* Local agencies must notify applicants of their eligibility or ineligibility for CSFP benefits, or their placement on a waiting list, within 10 days from the date of application.

(b) *What must be included in the notification of eligibility or ineligibility?* The notification of eligibility must include information on the time, location, and means of food distribution, and the length of the certification period. Notification of ineligibility must be in writing, and must include the reason the applicant is not eligible, a statement of the individual's right to a fair hearing to appeal the decision, and a statement that informs the applicant that program standards are applied without discrimination by race, color, national origin, age, sex, or disability.

### § 247.16 Certification period.

(a) *How long is the certification period? (1) Women, infants, and children.* For women, infants, and children, the State agency must establish certification periods that may not exceed 6 months in length. However, pregnant women may be certified to participate for the duration of their pregnancy and for up to six weeks post-partum.

(2) *Elderly persons.* For elderly persons, the State agency must establish certification periods that may not exceed 6 months in length. However, the State agency may authorize local agencies to extend the certification period without a formal review of eligibility for additional 6-month periods, as long as the following conditions are met:

(i) The person's address and continued interest in receiving program benefits are verified; and

(ii) The local agency has sufficient reason to believe that the person still meets the income eligibility standards (e.g., the elderly person has a fixed income).

(b) *On what day of the final month does the certification period end?* The certification period extends to the final day of the month in which eligibility expires (e.g., the last day of the month in which a child reaches his or her sixth birthday).

(c) *Does the certification period end when a participant moves from the local area in which he or she was receiving benefits?* No. The State agency must ensure that local agencies serve a CSFP participant, or WIC participant (if also eligible for CSFP), who moves from another area to an area served by CSFP, and whose certification period has not expired. The participant must be given the opportunity to continue to receive CSFP benefits for the duration of the certification period. If the local agency has a waiting list, the participant must be placed on its waiting list ahead of all other waiting applicants. The local agency that determined the participant's eligibility must provide verification of the expiration date of the certification period to the participant upon request.

(d) *What must the local agency do to ensure that participants are aware of the expiration of the certification period?* The local agency must notify program participants in writing at least 15 days before the expiration date that eligibility for the program is about to expire. The local agency must include a statement in the written notification that informs the applicant that program standards are applied without discrimination by race, color, national origin, age, sex, or disability.

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### § 247.17 Notification of discontinuance of participant.

(a) *What must a local agency do if it has evidence that a participant is no longer eligible for CSFP benefits during the certification period?* If a local agency has evidence that a participant is no longer eligible for CSFP benefits during the certification period, it must provide the participant with a written notification of discontinuance at least 15 days before the effective date of discontinuance.

(b) *What must a local agency do if it has to discontinue a participant from participation in the program prior to the end*

*of the certification period due to the lack of resources necessary to continue providing benefits to the participant?* If a local agency does not have sufficient resources, such as a sufficient number of caseload slots, to continue providing benefits to the participant(s) for the entire certification period, it must provide the participant(s) with a written notification of discontinuance at least 15 days before the effective date of discontinuance.

(c) *What must be included in the notification of discontinuance?* The notification of discontinuance must include the effective date of discontinuance, the reason for the participant's discontinuance, a statement of the individual's right to appeal the discontinuance through the fair hearing process, in accordance with §247.33(a), and a statement that informs the applicant that program standards are applied without discrimination by race, color, national origin, age, sex, or disability.

### §247.18 Nutrition education.

(a) *What are the State agency's responsibilities in ensuring that nutrition education is provided?* The State agency must establish an overall nutrition education plan and must ensure that local agencies provide nutrition education to participants in accordance with the plan. The State agency may allow local agencies to share personnel and educational resources with other programs in order to provide the best nutrition education possible to participants. The State agency must establish an evaluation procedure to ensure that the nutrition education provided is effective. The evaluation procedure must include participant input and must be directed by a nutritionist or other qualified professional. The evaluation may be conducted by the State or local agency, or by another agency under agreement with the State or local agency.

(b) *What type of nutrition education must the local agency provide?* The local agency must provide nutrition education that can be easily understood by participants and is related to their nutritional needs and household situations. The local agency must provide nutrition education that includes the following information, which should account for specific ethnic and cultural characteristics whenever possible:

(1) The nutritional value of CSFP foods, and their relationship to the overall dietary needs of the population groups served;

(2) Nutritious ways to use CSFP foods;

(3) Special nutritional needs of participants and how these needs may be met;

(4) For pregnant and postpartum women, the benefits of breastfeeding;

(5) The importance of health care, and the role nutrition plays in maintaining good health; and

(6) The importance of the use of the foods by the participant to whom they are distributed, and not by another person.

(c) *To whom must local agencies provide nutrition education?* The local agency must make nutrition education available to all adult participants and to parents or caretakers of infants and child participants. Local agencies are encouraged to make nutrition education available to children, where appropriate.

(d) *May CSFP foods be used in cooking demonstrations?* Yes. The State or local agency, or another agency with which it has signed an agreement, may use CSFP foods to conduct cooking demonstrations as part of the nutrition education provided to program participants, but not for other purposes.

### §247.19 Dual participation.

(a) *What must State and local agencies do to prevent and detect dual participation?* The State agency must work with the State WIC agency to develop a plan to prevent and detect dual participation, in accordance with an agreement signed by both agencies. The State agency must also work with local agencies to prevent and detect dual participation. In accordance with §247.8(a)(1), the local agency must check the identification of all applicants when they are certified or recertified. In accordance with §247.8(b), the local agency must ensure that the applicant, or the adult parent or caretaker of the applicant, signs an application form which includes a statement advising the applicant that he or she may not receive

both CSFP and WIC benefits simultaneously, or CSFP benefits at more than one CSFP site at the same time.

(b) *What must the local agency do if a CSFP participant is found to be committing dual participation?* A participant found to be committing dual participation must be discontinued from one of the programs (WIC or CSFP), or from participation at more than one CSFP site. Whenever an individual's participation in CSFP is discontinued, the local agency must notify the individual of the discontinuance, in accordance with § 247.17. The individual may appeal the discontinuance through the fair hearing process, in accordance with § 247.33(a). In accordance with § 247.20(b), if the dual participation resulted from the participant, or the parent or caretaker of the participant, making false or misleading statements, or intentionally withholding information, the local agency must disqualify the participant from CSFP, unless the local agency determines that disqualification would result in a serious health risk. The local agency must also initiate a claim against the participant to recover the value of CSFP benefits improperly received, in accordance with § 247.30(c).

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### § 247.20 Program violations.

(a) *What are program violations in CSFP?* Program violations are actions taken by CSFP applicants or participants, or the parents or caretakers of applicants or participants, to obtain or use CSFP benefits improperly. Program violations include the following actions:

(1) Intentionally making false or misleading statements, orally or in writing;

(2) Intentionally withholding information pertaining to eligibility in CSFP;

(3) Selling commodities obtained in the program, or exchanging them for non-food items;

(4) Physical abuse, or threat of physical abuse, of program staff; or

(5) Committing dual participation.

(b) *What are the penalties for committing program violations?* If applicants or participants, or the parents or caretakers of applicants or participants, commit program violations, the State agency may require local agencies to disqualify the applicants or participants for a period of up to one year. However, if the local agency determines that disqualification would result in a serious health risk, the disqualification may be waived. For program violations that involve fraud, the State agency must require local agencies to disqualify the participant from CSFP for a period of up to one year, unless the local agency determines that disqualification would result in a serious health risk. The State agency must require local agencies to permanently disqualify a participant who commits three program violations that involve fraud. For purposes of this program, fraud includes:

(1) Intentionally making false or misleading statements to obtain CSFP commodities;

(2) Intentionally withholding information to obtain CSFP commodities; or

(3) Selling CSFP commodities, or exchanging them for non-food items.

(c) *What must the local agency do to notify the individual of disqualification from CSFP?* The local agency must provide the individual with written notification of disqualification from CSFP at least 15 days before the effective date of disqualification. The notification must include the effective date and period of disqualification, the reason for the disqualification, and a statement that the individual may appeal the disqualification through the fair hearing process, in accordance with § 247.33(a).

### § 247.21 Caseload assignment.

(a) *How does FNS assign caseload to State agencies?* Each year, FNS assigns a caseload to each State agency to allow persons meeting the eligibility criteria listed under § 247.9 to participate in the program, up to the caseload limit. To the extent that resources are available, FNS assigns caseload to State agencies in the following order:

(1) *Base caseload.* The State agency may not receive base caseload in excess of its total caseload assigned for the previous caseload cycle. Base caseload is determined in the following manner:

(i) Each State agency entering its second year of program participation receives base caseload equal to the amount assigned to it in its first year of participation; and

(ii) A State agency that has participated in two or more caseload cycles receives base caseload equal to the highest of:

(A) Average monthly participation for the previous fiscal year; or

(B) Average monthly participation for the last quarter of the previous fiscal year; or

(C) Participation during September of the previous fiscal year, but only if:

(*1*) The full-year appropriation for the preceding fiscal year was enacted on or after February 15; and

(*2*) The State agency received additional caseload equal to or greater than 10 percent of its base caseload in the previous caseload cycle; and

(*3*) October participation in the current fiscal year was equal to or greater than 95 percent of September participation in the previous fiscal year.

(2) *Additional caseload.* Each participating State agency may request additional caseload to increase program participation. Eligibility for and assignment of additional caseload are determined in the following manner:

(i) A State agency entering its second year of program participation qualifies to receive additional caseload if the State achieved a participation level which was equal to or greater than 95 percent of assigned caseload for the previous caseload cycle, based on the highest of:

(A) Average monthly participation for the previous fiscal year; or

(B) Average monthly participation for the last quarter of the previous fiscal year; or

(C) Participation during September of the previous fiscal year, but only if:

(*1*) The full-year appropriation for the preceding fiscal year was enacted on or after February 15; and

(*2*) October participation in the current fiscal year was equal to or greater than 95 percent of September participation in the previous fiscal year.

(ii) A State agency that has participated in two or more caseload cycles qualifies to receive additional caseload if the State achieved a participation level which was equal to or greater than 95 percent of assigned caseload for the previous caseload cycle, based on the highest of:

(A) Average monthly participation for the previous fiscal year; or

(B) Average monthly participation for the last quarter of the previous fiscal year; or

(C) Participation during September of the previous fiscal year, but only if:

(*1*) The full-year appropriation for the preceding fiscal year was enacted on or after February 15; and

(*2*) The State agency received additional caseload equal to or greater than 10 percent of its base caseload in the previous caseload cycle; and

(*3*) October participation in the current fiscal year was equal to or greater than 95 percent of September participation in the previous fiscal year.

(iii) Of each eligible State agency's request for additional caseload, FNS assigns an amount that it determines the State needs and can efficiently utilize. In making this determination, FNS considers the factors listed below, in descending order of importance. If all reasonable requests for additional caseload cannot be met, FNS assigns it to those States that are most likely to utilize it. The factors are:

(A) The percentage of caseload utilized by the State in the previous fiscal year;

(B) Program participation trends in the State in previous fiscal years; and

(C) Other information provided by the State agency in support of the request.

(3) *New caseload.* Each State agency requesting to begin participation in the program, and with an approved State Plan, may receive caseload to serve women, infants, and children, and the elderly, as requested in the State Plan. Of the State agency's caseload request, FNS assigns caseload in an amount that it determines the State needs and can efficiently utilize. This determination is made based on information contained in the State Plan and on other relevant information. However, if all caseload requests cannot be met, FNS will assign caseload to those States that are most likely to utilize it.

(b) *When does FNS assign caseload to State agencies?* FNS must assign caseload to State agencies by December 31 of each year, or within 30 days after enactment of appropriations legislation covering the full fiscal year, whichever comes later. Caseload assignments for the previous caseload cycle will remain in effect, subject to the availability of sufficient funding, until caseload assignments are made for the current caseload cycle.

(c) *How do State agencies request additional caseload for the next caseload cycle?* In accordance with § 247.6(d), a State agency that would like additional caseload for the next caseload cycle (beginning the following January 1) must submit a request for additional caseload by November 5, as an amendment to the State Plan. The State agency must also describe plans for serving women, infants, and children, and the elderly, at new sites in this submission.

[70 FR 47063, Aug. 11, 2005, as amended at 75 FR 5879, Feb. 5, 2010]

### § 247.22 Allocation and disbursement of administrative funds to State agencies.

(a) *What must State agencies do to be eligible to receive administrative funds?* In order to receive administrative funds, the State agency must have signed an agreement with FNS to operate the program, in accordance with § 247.4(a)(1), and must have an approved State Plan.

(b) *How does FNS allocate administrative funds to State agencies?* (1) As required by law, each fiscal year FNS allocates to each State agency an administrative grant per assigned caseload slot, adjusted each year for inflation.

(2) For fiscal year 2003, the amount of the grant per assigned caseload slot was equal to the per-caseload slot amount provided in fiscal year 2001, adjusted by the percentage change between:

(i) The value of the State and local government price index, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30, 2001; and

(ii) The value of that index for the 12-month period ending June 30, 2002.

(3) For subsequent fiscal years, the amount of the grant per assigned caseload slot is equal to the amount of the grant per assigned caseload slot for the preceding fiscal year, adjusted by the percentage change between:

(i) The value of the State and local government price index, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30 of the second preceding fiscal year; and

(ii) The value of that index for the 12-month period ending June 30 of the preceding fiscal year.

(c) *How do State agencies access administrative funds?* FNS provides administrative funds to State agencies on a quarterly basis. Such funds are provided by means of a Letter of Credit, unless other funding arrangements have been made with FNS. The State agency obtains the funds by electronically accessing its Letter of Credit account.

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### § 247.23 State provision of administrative funds to local agencies.

(a) *How much of the administrative funds must State agencies provide to local agencies for their use?* The State agency must provide to local agencies for their use all administrative funds it receives, except that the State agency may retain for its own use the amount determined by the following formula:

(1) 15 percent of the first $50,000 received;

(2) 10 percent of the next $100,000 received;

(3) 5 percent of the next $250,000 received; and

(4) A maximum of $30,000, if the administrative grant exceeds $400,000.

(b) *May a State agency request to retain more than the amount determined by the above formula in the event of special needs?* Yes, the State agency may request approval from FNS to retain a larger amount than is allowed under the formula prescribed in paragraph (a) of this section. However, in making its request, the State agency must provide justification of the need for the larger amount at the State level, and must

ensure that local agencies will not suffer undue hardship as a result of a reduction in administrative funds.

(c) *How must the State agency distribute funds among local agencies?* The State agency must distribute funds among local agencies on the basis of their respective needs, and in a manner that ensures the funds will be used to achieve program objectives.

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### § 247.24 Recovery and redistribution of caseload and administrative funds.

(a) *May FNS recover and redistribute caseload and administrative funds assigned to a State agency?* Yes. FNS may recover and redistribute caseload and administrative funds assigned to a State agency during the fiscal year. FNS will redistribute these resources to other State agencies in accordance with the provisions of §§ 247.21(a) and 247.22(b). In reassigning caseload, FNS will use the most up-to-date data on participation and the extent to which caseload is being utilized, as well as other information provided by State agencies. In accordance with § 247.21(a)(2), in instances in which FNS recovers caseload slots, the State agency must use 95 percent of its original caseload allocation to be eligible for additional caseload. However, the State agency must not exceed its reduced caseload allocation on an average monthly basis.

(b) *Is there a limit on the amount of caseload slots or administrative funds that FNS may recover?* Yes. FNS will not unilaterally recover caseload that would result in the recovery of more than 50 percent of the State's administrative funds. However, in instances in which the State agency requests that FNS recover any portion of its assigned caseload, the 50-percent limitation will not apply.

### § 247.25 Allowable uses of administrative funds and other funds.

(a) *What are allowable uses of administrative funds provided to State and local agencies?* Administrative funds may be used for costs that are necessary to ensure the efficient and effective administration of the program, in accordance with parts 3016 and 3019 of this title. Part 3016 of this title contains the rules for management of Federal grants to State, local, and Indian tribal governments, and part 3019 of this title contains the grants management rules for nonprofit organizations. These departmental regulations incorporate by reference OMB Circulars A–87 (Cost Principles for State, Local, and Indian Tribal Governments) and A–122 (Cost Principles for Non-Profit Organizations), which set out the principles for determining whether specific costs are allowable. For availability of OMB Circulars referenced in this section, see 5 CFR 1310.3. Some examples of allowable costs in CSFP include:

(1) Storing, transporting, and distributing foods;

(2) Determining the eligibility of program applicants;

(3) Program outreach;

(4) Nutrition education;

(5) Audits and fair hearings;

(6) Monitoring and review of program operations; and

(7) Transportation of participants to and from the local agency, if necessary.

(b) *What are unallowable uses of administrative funds?* In addition to those costs determined to be unallowable by the principles contained in the OMB circulars referenced in paragraph (a) of this section, specific examples of unallowable uses of administrative funds in CSFP include:

(1) The cost of alteration of facilities not required specifically for the program; and

(2) Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or by other means).

(c) *What costs are allowable only with prior approval of FNS?* Capital expenditures, which include the acquisition of facilities or equipment, or enhancements to such capital assets, with a cost per unit of at least $5,000, are allowable only with prior approval of FNS. Examples of equipment include automated information systems, automated data processing equipment, and other computer hardware and software.

(d) *What procedures must State and local agencies use in procuring property, equipment, or services with program funds, and disposing of such property or*

*equipment?* The procedures that State and local agencies must follow in procuring property, equipment, or services with program funds, or disposing of such property or equipment, are contained in parts 3016 and 3019 of this title. State, local, and Indian tribal governments must comply with part 3016 of this title, while nonprofit subgrantees must comply with part 3019 of this title. State and local agencies may use procurement procedures established by State and local regulations as long as these procedures do not conflict with Federal regulations. Federal regulations do not relieve State or local agencies from responsibilities established in contracts relating to procurement of property, equipment, or services. The State agency is the responsible authority regarding the settlement of all contractual and administrative issues arising out of procurements for the program.

(e) *What is program income and how must State and local agencies use it?* Program income is income directly generated from program activities. It includes, for example, income from the sale of packing containers or pallets, and the salvage of commodities. Program income does not include interest earned from administrative funds. State and local agencies must use program income for allowable program costs, in accordance with part 3016 of this title.

(f) *How must State and local agencies use funds recovered as a result of claims actions?* The State agency must use funds recovered as a result of claims actions against subdistributing or local agencies in accordance with the provisions of § 250.15(c) of this chapter. The State agency must use funds recovered as a result of claims actions against participants for allowable program costs. The State agency may authorize local agencies to use such funds for allowable program costs incurred at the local level.

### § 247.26 Return of administrative funds.

(a) *Must State agencies return administrative funds that they do not use at the end of the fiscal year?* Yes. If, by the end of the fiscal year, a State agency has not obligated all of its allocated administrative funds, the unobligated funds must be returned to FNS.

(b) *What happens to administrative funds that are returned by State agencies at the end of the fiscal year?* If, in the following fiscal year, OMB reapportions the returned administrative funds, the funds are used to support the program. Such funds are not returned to State agencies in the form of administrative funds in addition to the legislatively mandated grant per assigned caseload slot.

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### § 247.27 Financial management.

(a) *What are the Federal requirements for State and local agencies with regard to financial management?* State and local public agencies must maintain a financial management system that complies with the Federal regulations contained in part 3016 of this title, while nonprofit organizations must comply with the Federal regulations contained in part 3019 of this title. The State agency's financial management system must provide accurate, current, and complete disclosure of the financial status of the program, including an accounting of all program funds received and expended each fiscal year. The State agency must ensure that local agencies develop and implement a financial management system that allows them to meet Federal requirements.

(b) *What are some of the major components of the State agency's financial management system?* In addition to other requirements, the State agency's financial management system must provide for:

(1) Prompt and accurate payment of allowable costs;

(2) Timely disbursement of funds to local agencies;

(3) Timely and appropriate resolution of claims and audit findings; and

(4) Maintenance of records identifying the receipt and use of administrative funds, funds recovered as a result of claims actions, program income (as defined under § 247.25(e)), and property and other assets procured with program funds.

### § 247.28 Storage and inventory of commodities.

(a) *What are the requirements for storage of commodities?* State and local agencies must provide for storage of commodities that protects them from theft, spoilage, damage or destruction, or other loss. State and local agencies may contract with commercial facilities to store and distribute commodities. The required standards for warehousing and distribution systems, and for contracts with storage facilities, are included under § 250.14 of this chapter.

(b) *What are the requirements for the inventory of commodities?* A physical inventory of all USDA commodities must be conducted annually at each storage and distribution site where these commodities are stored. Results of the physical inventory must be reconciled with inventory records and maintained on file by the State or local agency.

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### § 247.29 Reports and recordkeeping.

(a) *What recordkeeping requirements must State and local agencies meet?* State and local agencies must maintain accurate and complete records relating to the receipt, disposal, and inventory of commodities, the receipt and disbursement of administrative funds and other funds, eligibility determinations, fair hearings, and other program activities. State and local agencies must also maintain records pertaining to liability for any improper distribution of, use of, loss of, or damage to commodities, and the results obtained from the pursuit of claims arising in favor of the State or local agency. All records must be retained for a period of three years from the end of the fiscal year to which they pertain, or, if they are related to unresolved claims actions, audits, or investigations, until those activities have been resolved. All records must be available during normal business hours for use in management reviews, audits, investigations, or reports of the General Accounting Office.

(b) *What reports must State and local agencies submit to FNS?* State agencies must submit the following reports to FNS:

(1) *SF–269A, Financial Status Report.* The State agency must submit the SF–269A, Financial Status Report, to report the financial status of the program at the close of the fiscal year. This report must be submitted within 90 days after the end of the fiscal year. Obligations must be reported for the fiscal year in which they occur. Revised reports may be submitted at a later date, but FNS will not be responsible for reimbursing unpaid obligations later than one year after the end of the fiscal year in which they were incurred.

(2) *FNS–153, Monthly Report of the Commodity Supplemental Food Program and Quarterly Administrative Financial Status Report.* The State agency must submit the FNS–153 on a monthly basis. FNS may permit the data contained in the report to be submitted less frequently, or in another format. The report must be submitted within 30 days after the end of the reporting period. On the FNS–153, the State agency reports:

(i) The number of program participants in each population category (e.g., infants, children, and elderly);

(ii) The receipt and distribution of commodities, and beginning and ending inventories, as well as other commodity data; and

(iii) On a quarterly basis, the cumulative amount of administrative funds expended and obligated, and the amount remaining unobligated.

(3) *FNS–191, Racial/Ethnic Group Participation.* Local agencies must submit a report of racial/ethnic participation each year, using the FNS–191.

(c) *Is there any other information that State and local agencies must provide to FNS?* FNS may require State and local agencies to provide data collected in the program to aid in the evaluation of the effect of program benefits on the low-income populations served. Any such requests for data will not include identification of particular individuals.

(d) *What data must the State agency collect related to local agencies?* (1) Each State agency must collect data related to local agencies that have an agreement with the State agency to participate in the program for each of Federal fiscal years 2006 through 2009; including those local agencies that participated

only for part of the fiscal year. Such data shall include:

(i) The name of each local agency;

(ii) The city in which each participating local agency was headquartered and the name of the state;

(iii) The amount of funds provided to the participating organization, i.e., the amount of federal administrative funds provided to each participating local agency; and

(iv) The type of participating organization, e.g., government agency, educational institution, non-profit organization/secular, non-profit organization/faith-based, and "other."

(2) On or before August 31, 2007, and each subsequent year through 2010, State agencies must report to FNS data as specified in paragraph (d)(1) of this section for the prior Federal fiscal year. State agencies must submit this data in a format designated by FNS.

(Approved by the Office of Management and Budget under control numbers 0584–0025, 0584–0293)

[70 FR 47063, Aug. 11, 2005 as amended at 72 FR 24184, May 2, 2007]

### § 247.30 Claims.

(a) *What happens if a State or local agency misuses program funds?* If FNS determines that a State or local agency has misused program funds through negligence, fraud, theft, embezzlement, or other causes, FNS must initiate and pursue a claim against the State agency to repay the amount of the misused funds. The State agency will be given the opportunity to contest the claim. The State agency is responsible for initiating and pursuing claims against subdistributing and local agencies if they misuse program funds.

(b) *What happens if a State or local agency misuses program commodities?* If a State or local agency misuses program commodities, FNS must initiate a claim against the State agency to recover the value of the misused commodities. The procedures for pursuing claims resulting from misuse of commodities are detailed in § 250.15(c) of this chapter. Misused commodities include commodities improperly distributed or lost, spoiled, stolen, or damaged as a result of improper storage, care, or handling. The State agency is responsible for initiating and pursuing claims against subdistributing agencies, local agencies, or other agencies or organizations if they misuse program commodities. The State agency must use funds recovered as a result of claims for commodity losses in accordance with § 250.15(c) of this chapter.

(c) *What happens if a participant improperly receives or uses CSFP benefits through fraud?* The State agency must ensure that a local agency initiates a claim against a participant to recover the value of CSFP commodities improperly received or used if the local agency determines that the participant, or the parent or caretaker of the participant, fraudulently received or used the commodities. For purposes of this program, fraud includes intentionally making false or misleading statements, or intentionally withholding information, to obtain CSFP commodities, or the selling or exchange of CSFP commodities for nonfood items. The local agency must advise the participant of the opportunity to appeal the claim through the fair hearing process, in accordance with § 247.33(a). The local agency must also disqualify the participant from CSFP for a period of up to one year, unless the local agency determines that disqualification would result in a serious health risk, in accordance with the requirements of § 247.20(b).

(d) *What procedures must be used in pursuing claims against participants?* The State agency must establish standards, based on a cost-benefit review, for determining when the pursuit of a claim is cost-effective, and must ensure that local agencies use these standards in determining if a claim is to be pursued. In pursuing a claim against a participant, the local agency must:

(1) Issue a letter demanding repayment for the value of the commodities improperly received or used;

(2) If repayment is not made in a timely manner, take additional collection actions that are cost-effective, in accordance with the standards established by the State agency; and

(3) Maintain all records regarding claims actions taken against participants, in accordance with § 247.29.

(Approved by the Office of Management and Budget under control number 0584–0293)

### § 247.31 Audits and investigations.

(a) *What is the purpose of an audit?* The purpose of an audit is to ensure that:

(1) Financial operations are properly conducted;

(2) Financial reports are fairly presented;

(3) Proper inventory controls are maintained; and

(4) Applicable laws, regulations, and administrative requirements are followed.

(b) *When may the Department conduct an audit or investigation of the program?* The Department may conduct an audit of the program at the State or local agency level at its discretion, or may investigate an allegation that the State or local agency has not complied with Federal requirements. An investigation may include a review of any State or local agency policies or practices related to the specific area of concern.

(c) *What are the responsibilities of the State agency in responding to an audit by the Department?* In responding to an audit by the Department, the State agency must:

(1) Provide access to any records or documents compiled by the State or local agencies, or contractors; and

(2) Submit a response or statement to FNS describing the actions planned or taken in response to audit findings or recommendations. The corrective action plan must include time frames for implementation and completion of actions. FNS will determine if actions or planned actions adequately respond to the program deficiencies identified in the audit. If additional actions are needed, FNS will schedule a follow-up review and allow sufficient time for further corrective actions. The State agency may also take exception to particular audit findings or recommendations.

(d) *When is a State or local agency audit required?* State and local agency audits must be conducted in accordance with part 3052 of this title, which contains the Department's regulations pertaining to audits of States, local governments, and nonprofit organizations. The value of CSFP commodities distributed by the agency or organization must be considered part of the Federal award.

(e) *What are the requirements for State or local agency audits?* State and local agency audits must be conducted in accordance with the requirements of part 3052 of this title, which contains the Department's regulations pertaining to audits of States, local governments, and nonprofit organizations. The State agency must ensure that local agencies meet the audit requirements. The State agency must ensure that all State or local agency audit reports are available for FNS review.

(Approved by the Office of Management and Budget under control number 0584–0293)

### § 247.32 Termination of agency participation.

(a) *When may a State agency's participation in CSFP be terminated?* While paragraphs (a)(1), (a)(2), and (a)(3) of this section, as applicable, describe the circumstances and basic procedures for terminating State agency programs, specific actions and procedures relating to program termination are more fully described in part 3016 of this title.

(1) *Termination by FNS.* FNS may terminate a State agency's participation in CSFP, in whole or in part, if the State agency does not comply with the requirements of this part. FNS must provide written notification to the State agency of termination, including the reasons for the action, and the effective date.

(2) *Termination by State agency.* The State agency may terminate the program, in whole or in part, upon written notification to FNS, stating the reasons and effective date of the action. In accordance with § 247.4(b)(6), which relates to the termination of agreements, either party must provide, at minimum, 30 days' written notice.

(3) *Termination by mutual agreement.* The State agency's program may also be terminated, in whole or in part, if both parties agree the action would be in the best interest of the program. The two parties must agree upon the conditions of the termination, including the effective date.

(b) *When may a local agency's participation in CSFP be terminated?* While paragraphs (b)(1), (b)(2), and (b)(3) of this section, as applicable, describe the

circumstances and basic procedures in termination of local agency programs, specific actions and procedures relating to program termination are more fully described in part 3016 of this title.

(1) *Termination by State agency*. The State agency may terminate a local agency's participation in CSFP, or may be required to terminate a local agency's participation, in whole or in part, if the local agency does not comply with the requirements of this part. The State agency must notify the local agency in writing of the termination, the reasons for the action, and the effective date, and must provide the local agency with an opportunity to appeal, in accordance with § 247.35. (The local agency may appeal the termination in accordance with § 247.35.)

(2) *Termination by local agency*. The local agency may terminate the program, in whole or in part, upon written notification to the State agency, stating the reasons and effective date of the action. In accordance with § 247.4(b)(6), which relates to the termination of agreements, either party must provide, at minimum, 30 days' written notice.

(3) *Termination by mutual agreement*. The local agency's program may also be terminated, in whole or in part, if both the State and local agency agree that the action would be in the best interest of the program. The two parties must agree upon the conditions of the termination, including the effective date.

### § 247.33 Fair hearings.

(a) *What is a fair hearing?* A fair hearing is a process that allows a CSFP applicant or participant to appeal an adverse action, which may include the denial or discontinuance of program benefits, disqualification from the program, or a claim to repay the value of commodities received as a result of fraud. State and local agencies must ensure that CSFP applicants and participants understand their right to appeal an adverse action through the fair hearing process, which includes providing written notification of the individual's right to a fair hearing along with notification of the adverse action. Such notification is not required at the expiration of a certification period.

(b) *What are the basic requirements the State agency must follow in establishing procedures to be used in fair hearings?* The State agency must establish simple, clear, uniform rules of procedure to be used in fair hearings, including, at a minimum, the procedures outlined in this section. The State agency may use alternate procedures if approved by FNS. The rules of procedure must be available for public inspection and copying.

(c) *How may an individual request a fair hearing?* An individual, or an individual's parent or caretaker, may request a fair hearing by making a clear expression, verbal or written, to a State or local agency official, that an appeal of the adverse action is desired.

(d) *How much time does an individual have to request a fair hearing?* The State or local agency must allow an individual at least 60 days from the date the agency mails or gives the individual the notification of adverse action to request a fair hearing.

(e) *When may a State or local agency deny a request for a fair hearing?* The State or local agency may deny a request for a fair hearing when:

(1) The request is not received within the time limit established in paragraph (d) of this section;

(2) The request is withdrawn in writing by the individual requesting the hearing or by an authorized representative of the individual; or

(3) The individual fails to appear, without good cause, for the scheduled hearing.

(f) *Does the request for a fair hearing have any effect on the receipt of CSFP benefits?* Participants who appeal the discontinuance of program benefits within the 15-day advance notification period required under §§ 247.17 and 247.20 must be permitted to continue to receive benefits until a decision on the appeal is made by the hearing official, or until the end of the participant's certification period, whichever occurs first. However, if the hearing decision finds that a participant received program benefits fraudulently, the local agency must include the value of benefits received during the time that the hearing was pending, as well as for any previous period, in its initiation and

pursuit of a claim against the participant.

(g) *What notification must the State or local agency provide an individual in scheduling the hearing?* The State or local agency must provide an individual with at least 10 days' advance written notice of the time and place of the hearing, and must include the rules of procedure for the hearing.

(h) *What are the individual's rights in the actual conduct of the hearing?* The individual must have the opportunity to:

(1) Examine documents supporting the State or local agency's decision before and during the hearing;

(2) Be assisted or represented by an attorney or other persons;

(3) Bring witnesses;

(4) Present arguments;

(5) Question or refute testimony or evidence, including an opportunity to confront and cross-examine others at the hearing; and,

(6) Submit evidence to help establish facts and circumstances.

(i) *Who is responsible for conducting the fair hearing, and what are the specific responsibilities of that person?* The fair hearing must be conducted by an impartial official who does not have any personal stake or involvement in the decision and who was not directly involved in the initial adverse action that resulted in the hearing. The hearing official is responsible for:

(1) Administering oaths or affirmations, as required by the State;

(2) Ensuring that all relevant issues are considered;

(3) Ensuring that all evidence necessary for a decision to be made is presented at the hearing, and included in the record of the hearing;

(4) Ensuring that the hearing is conducted in an orderly manner, in accordance with due process; and

(5) Making a hearing decision.

(j) *How is a hearing decision made?* The hearing official must make a decision that complies with Federal laws and regulations, and is based on the facts in the hearing record. In making the decision, the hearing official must summarize the facts of the case, specify the reasons for the decision, and identify the evidence supporting the decision and the laws or regulations that the decision upholds. The decision made by the hearing official is binding on the State or local agency.

(k) *What is the time limit for making a hearing decision and notifying the individual of the decision?* A hearing decision must be made, and the individual notified of the decision, in writing, within 45 days of the request for the hearing. The notification must include the reasons for the decision.

(l) *How does the hearing decision affect the individual's receipt of CSFP benefits?* If a hearing decision is in favor of an applicant who was denied CSFP benefits, the receipt of benefits must begin within 45 days from the date that the hearing was requested, if the applicant is still eligible for the program. If the hearing decision is against a participant, the State or local agency must discontinue benefits as soon as possible, or at a date determined by the hearing official.

(m) *What must be included in the hearing record?* In addition to the hearing decision, the hearing record must include a transcript or recording of testimony, or an official report of all that transpired at the hearing, along with all exhibits, papers, and requests made. The record must be maintained in accordance with § 247.29(a). The record of the hearing must be available for public inspection and copying, in accordance with the confidentiality requirements under § 247.36(b).

(n) *What further steps may an individual take if a hearing decision is not in his or her favor?* If a hearing decision upholds the State or local agency's action, and a State-level review or rehearing process is available, the State or local agency must describe to the individual any State-level review or rehearing process. The State or local agency must also inform the individual of the right of the individual to pursue judicial review of the decision.

### § 247.34 Management reviews.

(a) *What must the State agency do to ensure that local agencies meet program requirements and objectives?* The State agency must establish a management review system to ensure that local agencies, subdistributing agencies, and other agencies conducting program activities meet program requirements

and objectives. As part of the system, the State agency must perform an on-site review of all local agencies, and of all storage facilities utilized by local agencies, at least once every two years. As part of the on-site review, the State agency must evaluate all aspects of program administration, including certification procedures, nutrition education, civil rights compliance, food storage practices, inventory controls, and financial management systems. In addition to conducting on-site reviews, the State agency must evaluate program administration on an ongoing basis by reviewing financial reports, audit reports, food orders, inventory reports, and other relevant information.

(b) *What must the State agency do if it finds that a local agency is deficient in a particular area of program administration?* The State agency must record all deficiencies identified during the review and institute follow-up procedures to ensure that local agencies and subdistributing agencies correct all deficiencies within a reasonable period of time. To ensure improved program performance in the future, the State agency may require that local agencies adopt specific review procedures for use in reviewing their own operations and those of subsidiaries or contractors. The State agency must provide copies of review reports to FNS upon request.

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### § 247.35 Local agency appeals of State agency actions.

(a) *What recourse must the State agency provide local agencies to appeal a decision that adversely affects their participation in CSFP?* The State agency must establish a hearing procedure to allow local agencies to appeal a decision that adversely affects their participation in CSFP—e.g., the termination of a local agency's participation in the program. The adverse action must be postponed until a decision on the appeal is made.

(b) *What must the State agency include in the hearing procedure to ensure that the local agency has a fair chance to present its case?* The hearing procedure must provide the local agency:

(1) Adequate advance notice of the time and place of the hearing;

(2) An opportunity to review the record before the hearing, and to present evidence at the hearing;

(3) An opportunity to confront and cross-examine witnesses; and

(4) An opportunity to be represented by counsel, if desired.

(c) *Who conducts the hearing and how is a decision on the appeal made?* The hearing must be conducted by an impartial person who must make a decision on the appeal that is based solely on the evidence presented at the hearing, and on program legislation and regulations. A decision must be made within 60 days from the date of the request for a hearing, and must be provided in writing to the local agency.

### § 247.36 Confidentiality of applicants or participants.

(a) *Can the State or local agency disclose information obtained from applicants or participants to other agencies or individuals?* State and local agencies must restrict the use or disclosure of information obtained from CSFP applicants or participants to persons directly connected with the administration or enforcement of the program, including persons investigating or prosecuting program violations. The State or local agency may exchange participant information with other health or welfare programs for the purpose of preventing dual participation. In addition, with the consent of the participant, as indicated on the application form, the State or local agency may share information obtained with other health or welfare programs for use in determining eligibility for those programs, or for program outreach. However, the State agency must sign an agreement with the administering agencies for these programs to ensure that the information will be used only for the specified purposes, and that agencies receiving such information will not further share it.

(b) *Can the State or local agency disclose the identity of persons making a complaint or allegation against another individual participating in or administering the program?* The State or local agency must protect the confidentiality, and other rights, of any person

making allegations or complaints against another individual participating in, or administering CSFP, except as necessary to conduct an investigation, hearing, or judicial proceeding.

### § 247.37 Civil rights requirements.

(a) *What are the civil rights requirements that apply to CSFP?* State and local agencies must comply with the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and titles II and III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.). State and local agencies must also comply with the Department's regulations on nondiscrimination (parts 15, 15a, and 15b of this title), and with the provisions of FNS Instruction 113–2, including the collection of racial/ethnic participation data and public notification of nondiscrimination policy. State and local agencies must ensure that no person shall, on the grounds of race, color, national origin, age, sex, or disability, be subjected to discrimination under the program.

(b) *How does an applicant or participant file a complaint of discrimination?* CSFP applicants or participants who believe they have been discriminated against should file a discrimination complaint with the USDA Director, Office of Civil Rights, Room 326W, Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250–9410, or telephone (202) 720–5964.

# PART 248—WIC FARMERS' MARKET NUTRITION PROGRAM (FMNP)

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AUTHORITY: 42 U.S.C. 1786.

SOURCE: 59 FR 11517, Mar. 11, 1994, unless otherwise noted.

## Subpart A—General

### § 248.1 General purpose and scope.

This part announces regulations under which the Secretary of Agriculture shall carry out the WIC Farmers' Market Nutrition Program. The dual purposes of the FMNP are:

(a) To provide resources in the form of fresh, nutritious, unprepared foods (fruits and vegetables) from farmers' markets to women, infants, and children who are nutritionally at risk and who are participating in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) or are on the waiting list for the WIC Program; and

(b) To expand the awareness, use of and sales at farmers' markets.

This will be accomplished through payment of cash grants to approved State agencies which administer the FMNP and deliver benefits at no cost to eligible persons. The FMNP shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.) and to any other Federal or State program under which foods are distributed to needy families in lieu of food stamps.

### § 248.2 Definitions.

For the purpose of this part and all contracts, guidelines, instructions, forms and other documents related hereto, the term:

*Administrative costs* means those direct and indirect costs, exclusive of food costs, as defined in § 248.12(b), which State agencies determine to be necessary to support FMNP operations. Administrative costs include, but are not limited to, the costs of administration, start-up, training, monitoring, auditing, the development of and accountability for coupon and market management, nutrition education, outreach, eligibility determination, and developing, printing, and distributing coupons.

*Compliance buy* means a covert, onsite investigation in which a FMNP representative poses as a FMNP participant and transacts one or more FMNP food coupons.

*Coupon* means a coupon, voucher, or other negotiable financial instrument by which benefits under the FMNP are transferred to recipients.

*Days* means calendar days.

*Demonstration project* means the Farmers' Market Coupon Demonstration Project authorized by section 17(m) of the Child Nutrition Act of 1966 (CNA), (42 U.S.C. 1786(m)), as amended by section 501 of the Hunger Prevention Act of 1988 (Pub. L. 100–435), enacted September 19, 1988. Public Law 102–314 authorized the Secretary to competitively award, subject to the availability of funds, a 3-year grant (which was subsequently extended for an additional year by Public Law 102–142) to up to 10 States that submitted applications that were approved for the establishment of demonstration projects designed to provide WIC participants with coupons that could be exchanged for fresh, nutritious, unprepared foods at farmers' markets. Those States are: Connecticut, Iowa, Maryland, Massachusetts, Michigan, New York, Pennsylvania, Texas, Vermont, and Washington.

*Department* means the U.S. Department of Agriculture.

*Eligible foods* means fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs for human consumption. Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes. Honey, maple syrup, cider, nuts, seeds, eggs, meat, cheese and seafood are examples of foods not eligible for purposes of the FMNP. State agencies shall consider locally grown to mean produce grown only within State borders but may also define it to include areas in neighboring States adjacent to its borders. Under no circumstances can produce grown outside of the United States and its territories be considered eligible foods.

*Farmer* means an individual authorized to sell produce at participating farmers' markets and/or roadside stands. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the FMNP. For purposes of this part, the term "farmer" shall mean "producer" as that term is used in section 17(m)(6)(D) of the CNA (42 U.S.C. 1786(m)(6)(D)). A participating State agency has the option to authorize individual farmers, farmers' markets and/or roadside stands.

*Farmers' market* means an association of local farmers who assemble at a defined location for the purpose of selling their produce directly to consumers.

*Fiscal year* means the period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

*FMNP funds* means Federal grant funds provided for the FMNP, plus the required matching funds.

*FNS* means the Food and Nutrition Service of the U.S. Department of Agriculture.

*Food costs* means the cost of eligible supplemental foods.

*Household* has the same definition as that of "family" defined in § 246.2 of this chapter. Each such family shall constitute a separate household for FMNP benefit issuance purposes.

*In-kind contributions* means property or services which benefit the FMNP and which are contributed by non-Federal parties without charge to the FMNP.

*Local agency* means any nonprofit entity or local government agency which issues FMNP coupons, and provides nutrition education and/or information on operational aspects of the FMNP to FMNP recipients.

*Matching requirement* means State, local or private funds, or program income, equal to not less than 30 percent of the administrative FMNP cost for the fiscal year. The Secretary may negotiate with an Indian State agency a lower percentage of matching funds, but not less than 10 percent of the administrative cost of the program, if the Indian State agency demonstrates to the Secretary financial hardship for the affected Indian tribe, band, group, or council. The match may be satisfied through expenditures for similar farmers' market programs which operate during the same period as the FMNP. Similar programs include other farmers' market programs which serve low-income women, infants and children (who may or may not be WIC participants or on the waiting list for WIC services), as well as other categories of low-income recipients, such as, but not limited to, low-income elderly persons.

*Nonprofit agency* means a private agency which is exempt from income tax under the Internal Revenue Code of 1986, as amended, (26 U.S.C. 1 *et. seq.*).

*Nutrition education* means individual or group education sessions and the provision of information and educational materials designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

*OIG* means the Department's Office of the Inspector General.

*Program or FMNP* means the WIC Farmers' Market Nutrition Program authorized by section 17(m) of the Child Nutrition Act of 1966 (CNA) (42 U.S.C. 1786(m)), as amended. The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is authorized by section 17 of the CNA, as amended. Within section 17, section 17(m) authorizes the FMNP.

*Recipient* means a person chosen by the State agency to receive FMNP benefits. Such person must be a woman, infant over 4 months of age, or child, who receives benefits under the WIC Program or is on the waiting list to receive benefits under the WIC Program.

*Roadside stand* means a location at which an individual farmer sells his/her produce directly to consumers. This is in contrast to a group or association of farmers selling their produce at a farmers' market.

*SFPD* means the Supplemental Food Programs Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

*Similar programs* means other farmers' market projects or programs which serve low-income women, infants and children, or other categories of recipients, such as, but not limited to, elderly persons.

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands.

*State agency* means the agriculture department, the health department or any other agency approved by the chief executive officer of the State; an Indian tribe, band or group recognized by the Department of the Interior; an intertribal council or group which is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior and which has an ongoing relationship with such tribes, bands or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the Indian Health Service (IHS), an agency of the Department of Health and Human Services.

*State Plan* means a plan of FMNP operation and administration that describes the manner in which the State

agency intends to implement, operate and administer all aspects of the FMNP within its jurisdiction in accordance with § 248.4.

*Total FMNP funds* means the sum of the Federal funds provided to the State agency and non-Federal contributions provided by the State agency for FMNP purposes.

*WIC* means the Special Supplemental Nutrition Program for Women, Infants and Children authorized by section 17 of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1771 *et. seq.*).

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49745, Sept. 27, 1995; 64 FR 48076, Sept. 2, 1999; 73 FR 65249, Nov. 3, 2008]

### § 248.3 Administration.

(a) *Delegation to FNS.* Within the Department, FNS shall act on behalf of the Department in the administration of the FMNP. Within FNS, SFPD and the FNS Regional Offices are responsible for FMNP administration. FNS shall provide assistance to State agencies and evaluate all levels of FMNP operations to ensure that the goals of the FMNP are achieved in the most effective and efficient manner possible.

(b) *Delegation to State agency.* The State agency is responsible for the effective and efficient administration of the FMNP in accordance with the requirements of this part; the requirements of the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a and 15b), administration of grants (7 CFR part 3016), nonprocurement debarment/suspension (7 CFR part 3017), drug-free workplace (7 CFR part 3017), and lobbying (7 CFR part 3018); and, Office of Management and Budget Circular A–130, FNS guidelines, and Instructions issued under the FNS Directives Management System. The State agency shall provide guidance to cooperating WIC State and local agencies on all aspects of FMNP operations. Pursuant to section 17(m)(2) of the CNA, State agencies may operate the FMNP locally through nonprofit organizations or local government entities and must ensure coordination among the appropriate agencies and organizations.

(c) *Agreement and State Plan.* Each State agency desiring to administer the FMNP shall annually submit a State Plan and enter into a written agreement with the Department for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this part.

(d) *State agency ineligibility.* A State agency shall be ineligible to participate in the FMNP if State or local sales tax is collected on Program food purchases in the area in which it administers the Program, except that, if sales tax is collected on Program food purchases by sovereign Indian entities which are not State agencies, the State agency shall remain eligible so long as any farmers' markets collecting such tax are disqualified.

(e) *Coordination with WIC agency.* The Chief Executive Officer of the State shall ensure coordination between the designated administering State agency and the WIC State agency, if different, by ensuring that the two agencies enter into a written agreement. Such coordination between agencies is necessary for the successful operation of the FMNP, because WIC participants or persons on the waiting list for WIC services are the only persons eligible to receive Federal benefits under the FMNP. The written agreement shall delineate the responsibilities of each agency, describe any compensation for services, and shall be signed by the designated representative of each agency. This agreement shall be submitted each year along with the State Plan.

(f) *State staffing standards.* Each State agency shall ensure that sufficient staff is available to efficiently and effectively administer the FMNP. This shall include, but not be limited to, sufficient staff to provide nutrition education in coordination with the WIC Program, coupon and market management, fiscal reporting, monitoring, and training. The State agency shall provide an outline of administrative staff and job descriptions for staff whose salaries will be paid from program funds in their State Plans.

## Subpart B—State Agency Eligibility

### § 248.4 State Plan.

(a) *Requirements.* By November 15 of each year, each applying or participating State agency shall submit to

FNS for approval a State Plan for the following year as a prerequisite to receiving funds under this section. The State Plan shall be signed by the State designated official responsible for ensuring that the Program is operated in accordance with the State Plan. FNS will provide written approval or denial of a completed State Plan or amendment within 30 days. Portions of the State Plan which do not change annually need not be resubmitted. However, the State agency shall provide the title of the sections that remain unchanged, as well as the year of the last Plan in which the sections were submitted. At a minimum, the Plan must address the following areas in sufficient detail to demonstrate the State agency's ability to meet the requirements of the FMNP:

(1) A copy of the agreement between the designated administering State agency and the WIC State agency, if different, for services such as nutrition education, and documentation of coordinated efforts as required in §248.3(e), as well as copies of agreements with agencies other than the WIC State agency.

(2) Estimated number of recipients for the fiscal year, and proposed months of operation.

(3) Estimated cost of the FMNP, including a minimum amount necessary to operate the FMNP.

(4) Description of how the Program will achieve its dual purposes of providing a nutritional benefit to WIC (or waiting list) participants and expanding the awareness and use of farmers' markets.

(5) Outline of administrative staff and job descriptions.

(6) Detailed description of the recordkeeping system including, but not limited to, the system for maintaining records pertaining to financial operations, coupon issuance and redemption, and FMNP participation.

(7) Detailed description of the financial management system, including, but not limited to documentation of how the State will meet the matching requirement and procedures for obligating funds.

(8) Detailed description of the service area including:

(i) The number and addresses of participating markets, roadside stands and area WIC clinics including a map outlining the service area and proximity of markets/roadside stands to clinics; and

(ii) Estimated number of WIC participants and persons on the WIC waiting list that will receive FMNP coupons.

(9) Description of the coupon issuance system including:

(i) How the State agency will target areas with highest concentrations of eligible persons and greatest access to farmers' markets within the broadest possible geographic area;

(ii) Annual benefit amount per recipient;

(iii) Method for instructing recipients on the proper use of FMNP coupons and the purpose of the FMNP; and

(iv) Method for ensuring that FMNP coupons are only issued to eligible recipients.

(10) Detailed description of the coupon and farmers' market management system including:

(i) Criteria for authorizing farmers' markets and/or roadside stands;

(ii) Procedures for training farmers and market managers, at authorization, and annually thereafter;

(iii) Procedures for monitoring farmers, farmers' markets and/or roadside stands;

(iv) Description of system for identifying high risk farmers, farmers' markets and/or roadside stands and procedures for sanctioning farmers, farmers' markets and/or roadside stands;

(v) Facsimile of the FMNP coupon;

(vi) Identification of the fresh, nutritious, unprepared fruits, vegetables, and herbs which are eligible for purchase under the Program;

(vii) Description of FMNP coupon replacement policy;

(viii) Procedures for handling recipient and farmer/farmers' market complaints.

(11) Detailed description of the FMNP coupon redemption process including:

(i) Procedures for ensuring the secure transportation and storage of FMNP coupons;

(ii) System for identifying and reconciling FMNP coupons;

(iii) Timeframes for FMNP coupon redemption by recipients; submission for payment by markets, and payment by the State agency;

(12) System for ensuring that FMNP coupons are redeemed only by authorized farmers, farmers' markets and/or roadside stands and only for eligible foods.

(13) System for identifying FMNP coupons which are redeemed or submitted for payment outside valid dates or by unauthorized farmers, farmers' markets and/or roadside stands.

(14) A copy of the written agreement to be used between the State agency and authorized farmers, farmers' markets and/or roadside stands. In those States which authorize farmers' markets, but not individual farmers, this agreement shall specify in detail the role of and procedures to be used by farmers' markets for monitoring and sanctioning farmers, and the appropriate procedures to be used by a farmer to appeal a sanction or disqualification imposed by a farmers' market.

(15) If available, information on the change in consumption of fresh fruits and vegetables by recipients. This information shall be submitted as an addendum to the State Plan and shall be submitted at such a date specified by the Secretary.

(16) If available, information on the effects of the program on farmers' markets. This information shall be submitted as an addendum to the State Plan and shall be submitted at such a date specified by the Secretary.

(17) A description of the procedures the State agency will use to comply with the civil rights requirements described in § 248.7(a), including the processing of discrimination complaints.

(18) State agencies which have not previously participated in the FMNP, shall provide the following additional information:

(i) A statement assuring that if the State agency receives Federal funds, as specified under § 248.14 to operate the FMNP, and applies those funds to similar programs operated in the previous fiscal year with State or local funds, the amount of State and local funds that were available to similar programs in the fiscal year preceding the first year of operation shall not be reduced. The State agency shall include data in the State Plan showing that it did not reduce the amount of State and local funds available to the similar program in the preceding fiscal year.

(ii) A capability statement which includes a summary description of any prior experience with farmers' market projects or programs, including information and data describing the attributes of such projects or programs.

(19) For States making expansion requests, documentation which demonstrates:

(i) The need for an increase in funding;

(ii) That the use of the increased funding will be consistent with serving WIC participants, or persons on a waiting list for WIC benefits, by expanding benefits to more persons, by enhancing current benefits, or a combination of both, and expanding the awareness and use of farmers' markets;

(iii) The ability to satisfactorily operate the existing FMNP;

(iv) The management capabilities of the State agency to expand; and

(v) Whether, in the case of a State agency that intends to use the funding to increase the value of the Federal share of the benefits received by a recipient, the funding provided will increase the rate of coupon redemption.

(20) For those State agencies requesting the extra 2 percent administrative rate for market development or technical assistance to promote such development in disadvantaged areas or remote rural areas, an explanation of their justification and plans for the use of such funds.

(b) *Amendments.* At any time after approval, the State agency may amend the State Plan to reflect changes. The State agency shall submit the amendments to FNS for approval. The amendments shall be signed by the State designated official responsible for ensuring that the FMNP is operated in accordance with the State Plan.

(c) *Retention of copy.* A copy of the approved State Plan shall be kept on file at the State agency for public inspection.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49746, Sept. 27, 1995; 64 FR 48076, Sept. 2, 1999; 73 FR 65249, Nov. 3, 2008]

### § 248.5 Selection of new State agencies.

In selecting new State agencies, the Department will use objective criteria

to rank and approve State plans submitted in accordance with § 248.4. In making this ranking, the Department will consider the amount of funds necessary to successfully operate the FMNP in the State compared with other States and with the total amount of funds available to the FMNP. Approval of a State Plan does not equate to an obligation on the part of the Department to fund the FMNP within that State agency.

[64 FR 48076, Sept. 2, 1999]

## Subpart C—Recipient Eligibility

### § 248.6 Recipient eligibility.

(a) *Eligibility for certification.* Individuals who are eligible to receive Federal benefits under the FMNP are those, excluding infants 4 months of age or younger, who are currently receiving benefits under WIC or who are on the waiting list to receive benefits from WIC.

(b) *Limitations on certification.* If necessary to limit the number of recipients, State agencies may impose additional eligibility requirements, such as limiting participant certification to certain geographic areas, or to high priority WIC participants such as pregnant and breastfeeding women. States may also preclude groups of low priority persons, such as persons on the waiting list for WIC. Each State agency must specifically identify these limitations on certification in its State Plan.

(c) *Recipient or household benefit allocation.* On a Statewide basis, State agencies shall elect to allocate and issue benefits either to recipients or households. A State agency allocating benefits on a household basis shall not issue more benefits to a household than it otherwise would if benefits were allocated to individual recipients within the household. For those State agencies issuing FMNP benefits on a household basis, each family as defined in § 246.2 of this chapter shall constitute a separate household. Foods provided, regardless of method of issuance, are intended for the sole benefit of FMNP recipients and are not intended to be shared with other non-participating household members. If a State agency issues benefits on a household basis, data concerning number and type of recipients must still be provided as required by § 248.23(b). Recipients shall receive FMNP benefits free of charge.

### § 248.7 Nondiscrimination.

(a) *Civil rights requirements.* The State agency shall comply with the requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b), and applicable FNS Instructions to ensure that no person shall, on the grounds of race, color, national origin, age, sex or handicap, be excluded from participation, be denied benefits, or be otherwise subjected to discrimination, under the FMNP. Because racial and ethnic participation data (as required by title VI of the Civil Rights Act of 1964) are collected at the time women, infants, and children are certified for participation in the WIC Program, the Department has determined that the WIC data collection effort is sufficient to fulfill the racial/ethnic data collection requirement for the FMNP. Therefore, no additional data collection is required. Compliance with title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and regulations and instructions issued thereunder shall include, but not be limited to:

(1) Notification to the public of the nondiscrimination policy and complaint rights of recipients and potentially eligible persons, which may be satisfied through the Department's required nondiscrimination statement on brochures and publications;

(2) Review and monitoring activity to ensure FMNP compliance with the nondiscrimination laws and regulations;

(3) Establishment of grievance procedures for handling recipient complaints based on sex and handicap.

(b) *Complaints.* Persons seeking to file discrimination complaints may file them either with the Secretary of Agriculture, or the Director, USDA, Office of Adjudication and Compliance, Room

326–W, Whitten Building, 14th and Independence Avenue, SW., Washington, DC 20250–9410 (or call (800) 795–3272 (voice) or (202) 720–6382 (TTY)), or with the office established by the State agency to handle discrimination grievances or complaints. All complaints received by State agencies which allege discrimination based on race, color, national origin, or age shall be referred to the Secretary of Agriculture or the Director of the Office of Equal Opportunity, USDA. A State agency may process complaints which allege discrimination based on sex or handicap if grievance procedures are in place.

[59 FR 11517, Mar. 11, 1994, as amended at 73 FR 65249, Nov. 3, 2008]

## Subpart D—Recipient Benefits

### § 248.8 Level of benefits and eligible foods.

(a) *General.* State agencies shall identify in the State Plan the fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs which are eligible for purchase under the FMNP. Ineligible foods for the purpose of the FMNP include, but are not limited to: honey, maple syrup, cider, nuts and seeds, eggs, cheese, meat and seafood. Locally grown shall mean produce grown only within a State's borders but may be defined to include border areas in adjacent States. Under no circumstances can produce grown outside of the United States and its territories be considered eligible foods.

(b) *The value of the Federal benefits received.* The value of the Federal FMNP benefit received by each recipient, or by each family within a household in those States which elect to issue benefits on a household basis under § 248.6(c) may not be less than $10 per year nor more than $30 per year.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49746, Sept. 27, 1995; 73 FR 65250, Nov. 3, 2008]

### § 248.9 Nutrition education.

(a) *Goals.* Nutrition education shall emphasize the relationship of proper nutrition to the total concept of good health, including the importance of consuming fresh fruits and vegetables.

(b) *Requirement.* The State agency shall integrate nutrition education into FMNP operations and may satisfy nutrition education requirements through coordination with other agencies within the State. Such other agencies may include the WIC Program which routinely offers nutrition education to participants and which may wish to use the opportunity of the FMNP to reinforce nutrition messages. State agencies wishing to coordinate nutrition education with WIC shall enter into a written cooperative agreement with WIC agencies to offer nutrition education relevant to the use and nutritional value of foods available to FMNP recipients. In cases where relevant WIC nutrition education sessions are used to meet this requirement, reimbursement to the WIC local agency shall not be permitted. In cases where FMNP recipients are not receiving relevant nutrition education from the WIC Program, the State agency shall arrange alternative methods for the provision of such nutrition education which is an allowable cost under the FMNP.

## Subpart E—State Agency Provisions

### § 248.10 Coupon and market management.

(a) *General.* This section sets forth State agency responsibilities regarding the authorization of farmers, farmers' markets, and roadside stands. The State agency is responsible for the fiscal management of, and accountability for, FMNP-related activities for farmers, farmers' markets and roadside stands. Each State agency may decide whether to authorize farmers individually, farmers' markets, roadside stands, or all of the above. All contracts or agreements entered into by the State agency for the management or operation of farmers, farmers' markets and roadside stands shall conform with the requirements of 7 CFR part 3016, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(1) Only farmers, farmers' markets and roadside stands authorized by the

State agency may redeem FMNP coupons. Only farmers authorized by the State agency or that have a valid agreement with an authorized farmers' market may redeem coupons.

(2) The State agency shall establish criteria for the authorization of individual farmers, farmers' markets and roadside stands. Any authorized farmer, farmers' market and roadside stand must agree to sell recipients only those foods identified as eligible by the State agency, in exchange for FMNP coupons. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the FMNP, except individuals employed by a farmer otherwise qualified under these regulations, or individuals hired by a nonprofit organization to sell produce at farmers' markets or roadside stands on behalf of local farmers.

(3) The State agency shall ensure that an appropriate number of farmers, farmers' markets and/or roadside stands are authorized for adequate recipient access in the area(s) proposed to be served and for effective management of the farmers, farmers' markets and/or roadside stands by the State agency. The State agency may establish criteria to limit the number of authorized farmers, farmers' markets and/or roadside stands.

(4) The State agency shall ensure that face-to-face training is conducted prior to start up of the first year of FMNP participation of a farmers' market and individual farmer. The face-to-face training shall include at a minimum those items listed in paragraph (d) of this section.

(5) Authorized farmers shall display a sign stating that they are authorized to redeem FMNP coupons.

(6) Authorized farmers, farmers' markets and roadside stands shall comply with the requirements of Title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on non-discrimination (7 CFR parts 15, 15a and 15b), and FNS Instructions as outlined in § 248.7.

(7) The State agency shall ensure that there is no conflict of interest between the State or local agency and any participating farmer, farmers' market and roadside stand.

(b) *Farmers' market agreements.* The State agency shall ensure that all participating farmers' markets enter into written agreements with the State agency. The agreement shall be signed by a representative who has legal authority to obligate the farmer, farmers' market and/or roadside stand. The agreement shall be signed by a representative who has legal authority to obligate the farmers/farmers' market. Agreements shall include a description of sanctions for noncompliance with FMNP requirements and shall contain at a minimum, the following specifications, although the State agency may determine the exact wording to be used:

(1) The farmer, farmers' market and roadside stand shall:

(i) Provide such information as the State agency may require for its periodic reports to FNS;

(ii) Assure that FMNP coupons are redeemed only for eligible foods;

(iii) Provide eligible foods at the current price or less than the current price charged to other customers;

(iv) Accept FMNP coupons within the dates of their validity and submit such coupons for payment within the allowable time period established by the State agency;

(v) In accordance with a procedure established by the State agency, mark each transacted coupon with a farmer identifier. In those cases where the agreement is between the State agency and the farmer, each transacted FMNP coupon shall contain a farmer identifier and shall be batched for reimbursement under that identifier. In those cases where the agreement is between the State agency and the farmers' market, each transacted FMNP coupon shall contain a farmer identifier and be batched for reimbursement under a farmers' market identifier.

(vi) Accept training on FMNP procedures and provide training to farmers and any employees with FMNP responsibilities on such procedures;

(vii) Agree to be monitored for compliance with FMNP requirements, including both overt and covert monitoring;

(viii) Be accountable for actions of farmers or employees in the provision of foods and related activities;

(ix) Pay the State agency for any coupons transacted in violation of this agreement;

(x) Offer FMNP recipients the same courtesies as other customers;

(xi) Comply with the nondiscrimination provisions of USDA regulations as provided in § 248.7; and

(xii) Notify the State agency if any farmer, farmers' market and/or roadside stand ceases operation prior to the end of the authorization period.

(2) The farmer, farmers' market and roadside stand shall not:

(i) Collect sales tax on FMNP coupon purchases;

(ii) Seek restitution from FMNP recipients for coupons not paid by the State agency;

(iii) Issue cash change for purchases that are in an amount less than the value of the FMNP coupon(s).

(3) Neither the State agency nor the farmer, farmers' market nor a roadside stand has an obligation to renew the agreement. Either the State agency or the farmer, farmers' market or a roadside stand may terminate the agreement for cause after providing advance written notification.

(4) The State agency may deny payment to the farmer, farmers' market or roadside stand for improperly redeemed FMNP coupons and may demand refunds for payments already made on improperly redeemed coupons.

(5) The State agency may disqualify a farmer, farmers' market or roadside stand for FMNP abuse. The farmer, farmers' market and/or roadside stand has the right to appeal a denial of an application to participate, a disqualification, or a FMNP sanction by the State agency. Expiration of a contract or agreement with a farmer, farmers' market or roadside stand, and claims actions under § 248.20, are not appealable.

(6) A farmer, farmers' market or a roadside stand which commits fraud or engages in other illegal activity is liable to prosecution under applicable Federal, State or local laws.

(7) Agreements may not exceed 3 years.

(c) *Farmer agreements for State agencies which do not authorize farmers.* Those State agencies which authorize farmers' markets but not individual farmers shall require authorized farmers' markets to enter into a written agreement with each farmer within the market that is participating in FMNP. The State agency shall set forth the required terms for the agreement and provide a sample agreement which may be used.

(d) *Annual training for farmers/farmers' market managers.* State agencies shall conduct annual training for farmers/farmers' market managers participating in the FMNP. The State agency shall conduct a face-to-face training for all farmers and farmers' market managers who have never previously participated in the program prior to their commencing participation in the FMNP. After a farmer/farmers' market manager's first year of FMNP operation, State agencies have discretion in determining the method used for annual training purposes. At a minimum, annual training shall include instruction emphasizing:

(1) Eligible food choices;

(2) Proper FMNP coupon redemption procedures, including deadlines for submission of coupons for payment;

(3) Equitable treatment of FMNP recipients, including the availability of produce to FMNP recipients that is of the same quality and cost as that sold to other customers;

(4) Civil rights compliance and guidelines;

(5) Guidelines for storing FMNP coupons safely; and

(6) Guidelines for cancelling FMNP coupons, such as punching holes or rubber stamping.

(e) *Monitoring and review of farmers, farmers' markets, roadside stands and local agencies.* The State agency shall be responsible for the monitoring of farmers, farmers' markets, roadside stands and local agencies within its jurisdiction. This shall include developing a system for identifying high risk farmers, farmers' markets, and roadside stands and ensuring on-site monitoring, conducting further investigation, and sanctioning of such farmers, farmers' markets, or roadside stands as appropriate.

(1) Where coupon reimbursement responsibilities are delegated to farmers' market managers, farmers' market associations, or nonprofit organizations, the State agency may establish bonding requirements for these entities. Costs of such bonding are not reimbursable administrative expenses.

(2) Each State agency shall rank participating farmers, farmers' markets and roadside stands by risk factors, and shall conduct annual, on-site monitoring of at least 10 percent of farmers, 10 percent of farmers' markets and 10 percent of roadside stands which shall include those farmers, farmers' markets and roadside stands identified as being the highest risk.Mandatory high-risk indicators are a proportionately high volume of FMNP coupons redeemed by a farmer as compared to other farmers within the farmers' market and within the State, recipient complaints, and farmers and farmers' markets in their first year of FMNP operation. States are encouraged to formally establish other high risk indicators for identifying potential problems. If additional high risk indicators are established, they shall be set forth in the farmers/farmers' market agreement and in the State Plan. If application of the high-risk indicators results in fewer than 10 percent of farmers and farmers' markets as high-risk, the State agency shall randomly select additional farmers and farmers' markets to be monitored in order to meet the 10 percent minimum. The high-risk indicators listed above generally apply to a State agency already participating in the FMNP. A State agency participating in the FMNP for the first time shall, in lieu of applying the high-risk indicators, randomly select 10 percent of its participating farmers, 10 percent of its participating farmers' markets, and 10 percent of its participating roadside stands for monitoring visits.

(3) The following shall be documented for all on-site farmers, farmers' markets, and roadside stands monitoring visits. At a minimum, documentation must include the names of the farmer, farmers' market or roadside stand and the reviewer; date of review; nature of problem(s) detected or the observation that the farmer, farmers' market or roadside stand appears to be in compliance with FMNP requirements; a record of interviews with recipients, market managers and/or farmers; and the signature of the reviewer. The State agency shall do so after a reasonable delay when necessary to protect the identity of the reviewer(s) or the integrity of the investigation. After the farmer/farmers' market has been informed of any deficiencies detected by the monitoring visit, and instances where the farmer/farmers' market will be permitted to continue participation, the farmer/farmers' market shall provide plans as to how the deficiencies will be corrected.

(4) At least every 2 years, the State agency shall review all local agencies within its jurisdiction. WIC State agency reviews of WIC local agencies, which include reviews of FMNP practices, may contribute to meeting the requirement that all local agencies be reviewed once every 2 years.

(f) *Control of FMNP coupons.* (1) The State agency shall control and provide accountability for the receipt and issuance of FMNP coupons.

(2) The State agency shall ensure that there is secure transportation and storage of unissued FMNP coupons.

(3) The State agency shall design and implement a system of review of FMNP coupons to detect errors. At a minimum, the errors the system must detect are a missing recipient signature, a missing farmer and/or market identification, and redemption by a farmer outside of the valid date. The State agency shall implement procedures to reduce the number of errors in transactions, where possible.

(g) *Payment to farmers/farmers' markets.* The State agency shall ensure that farmers/ farmers' markets are promptly paid for food costs.

(h) *Reconciliation of FMNP coupons.* The State agency shall identify the disposition of all FMNP coupons as validly redeemed, lost or stolen, expired, or not matching issuance records. Validly redeemed FMNP coupons are those that are issued to a valid recipient and redeemed by an authorized farmers/farmers' market within valid dates. FMNP coupons that were redeemed but cannot be traced to a valid recipient or authorized farmer/farmers' market

shall be subject to claims action in accordance with § 248.20. (1) If the State agency elects to replace lost, stolen or damaged FMNP coupons, it must describe its system for doing so in the State Plan.

(2) The State agency shall use uniform FMNP coupons within its jurisdiction.

(3) FMNP coupons must include, at a minimum, the following information:

(i) The last date by which the recipient may use the coupon. This date shall be no later than November 30 of each year.

(ii) A date by which the farmer or farmers' market must submit the coupon for payment. When establishing this date, State agencies shall take into consideration the date financial statements are due to the FNS, and allow time for the corresponding coupon reconciliation that must be done by the State agency prior to submission of financial statements. Currently, financial statements are due to FNS by January 30.

(iii) A unique and sequential serial number.

(iv) A denomination (dollar amount).

(v) A farmer identifier for the redeeming farmer when agreements are between the State agency and the farmer.

(vi) In those instances where State agencies have agreements with farmers' markets, there must be a farmer identifier on each coupon and a market identifier on the cover of coupons which are batched by the market manager for reimbursement.

(i) *Instructions to recipients.* Each recipient shall receive instructions on the proper use and redemption of the FMNP coupons, including, but not limited to:

(1) A list of names and addresses of authorized farmers, farmers' markets and roadside stands at which FMNP coupons may be redeemed.

(2) A description of eligible foods and the prohibition against cash change.

(3) An explanation of their right to complain about improper farmer/farmers' market practices with regard to FMNP responsibilities and the process for doing so.

(j) *Recipients and farmer/farmers' market complaints.* The State agency shall have procedures which document the handling of complaints by recipients and farmers/farmers' markets. Complaints of civil rights discrimination shall be handled in accordance with § 248.7(b).

(k) *Recipients and farmer/farmers' market sanctions.* The State agency shall establish policies which determine the type and level of sanctions to be applied against recipients and farmers/farmers' markets, based upon the severity and nature of the FMNP violations observed, and such other factors as the State agency determines appropriate, such as whether repeated offenses have occurred over a period of time. Farmers/farmers' markets may be sanctioned, disqualified, or both, when appropriate. Sanctions may include fines for improper FMNP coupon redemption procedures and the penalties outlined in § 248.20, in case of deliberate fraud. In those instances where compliance purchases are conducted, the results of covert compliance purchases can be a basis for farmer/farmers' market sanctions. A farmer/farmers' market committing fraud or other unlawful activities is liable to prosecution under applicable Federal, State or local laws. State agency policies shall ensure that a farmer that is disqualified from the FMNP at one market or roadside stand shall not participate in the FMNP at any other farmers' market or roadside stand in the State's jurisdiction during the disqualification period.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49746, Sept. 27, 1995; 73 FR 65250, Nov. 3, 2008]

### § 248.11 Financial management system.

(a) *Disclosure of expenditures.* The State agency shall maintain a financial management system which provides accurate, current and complete disclosure of the financial status of the FMNP. This shall include an accounting for all property and other assets and all FMNP funds received and expended each fiscal year.

(b) *Internal controls.* The State agency shall maintain effective controls over and accountability for all FMNP funds. The State agency must have effective internal controls to ensure that expenditures financed with FMNP funds

are authorized and properly chargeable to the FMNP.

(c) *Record of expenditures.* The State agency shall maintain records which adequately identify the source and use of funds expended for FMNP activities. These records shall contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays, and income.

(d) *Payment of costs.* The State agency shall implement procedures which ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost principles and standard provisions of this part, 7 CFR part 3016, and FNS guidelines and Instructions.

(e) *Identification of obligated funds.* The State agency shall implement procedures which accurately identify obligated FMNP funds at the time the obligations are made.

(f) *Resolution of audit findings.* The State agency shall implement procedures which ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Reconciliation of food instruments.* The State agency shall reconcile FMNP coupons in accordance with § 248.10(h).

(h) *Transfer of cash.* The State agency shall establish the timing and amounts of its cash draws against its Letter of Credit in accordance with 31 CFR part 205.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49747, Sept. 27, 1995]

### § 248.12 FMNP costs.

(a) *General*—(1) *Composition of allowable costs.* In general, a cost item will be deemed allowable if it is reasonable and necessary for FMNP purposes and otherwise satisfies allowability criteria set forth in 7 CFR 3016.22 and this part. FMNP purposes include the administration and operation of the FMNP. Program costs supported by State matching contributions must meet the same criteria for allowability as costs supported by Federal funds. Allowable FMNP costs may be classified as follows:

(i) *Food costs and administrative costs.* Food costs are the costs of food benefits provided to FMNP recipients. Administrative costs are the costs associated with providing FMNP benefits and services to recipients and generally administering the FMNP. Specific examples of allowable administrative costs are listed in paragraph (b) of this section. Except as provided in § 248.14(g) of this part, a State agency's administrative costs under the FMNP may not exceed 17 percent of its total FMNP costs. Any costs incurred for food and/or administration above the Federal grant level will be the State agency's responsibility.

(ii) *Market development or technical assistance costs.* Market development or technical assistance costs are those costs under § 248.14(h) incurred to promote the development of farmers' markets in socially or economically disadvantaged areas, or remote rural areas, where individuals eligible for participation in the program have limited access to locally grown fruits and vegetables. Subject to a determination by the Secretary under § 248.14(h), a State agency may, during any fiscal year, use not more than 2 percent of total program funds for such market development or technical assistance.

(iii) *Direct and indirect costs.* Direct costs are food and administrative costs incurred specifically for the FMNP. Indirect costs are administrative costs that benefit multiple programs or activities, and cannot be identified to any one without effort disproportionate to the results achieved. In accordance with the provisions of 7 CFR part 3016, a claim for reimbursement of indirect costs shall be supported by an approved allocation plan for the determination of such costs. An indirect cost rate developed through such an allocation plan may not be applied to a base that includes food costs.

(2) *Costs allowable with prior approval.* A State or local agency must obtain prior approval in accordance with 7 CFR 3016.22 before charging to the FMNP any capital expenditures and other cost items designated by 7 CFR 3016.22 as requiring such approval.

(3) *Unallowable costs.* Costs that are not reasonable and necessary for

FMNP purposes, or that do not otherwise satisfy the cost principles of 7 CFR 3016.22, are unallowable. Notwithstanding any other provision of part 3016 or this part, the cost of constructing or operating a farmers' market is unallowable. Unallowable costs may never be claimed for Federal reimbursement or counted toward the State matching requirement.

(b) *Specified allowable administrative costs.* Allowable administrative costs include the following:

(1) The costs associated with the provision of nutrition education which meets the requirements of § 248.9 of this part.

(2) The costs of FMNP coupon issuance, or recipient education covering proper coupon redemption procedures.

(3) The cost of outreach services.

(4) The costs associated with the food delivery process, such as printing FMNP coupons, processing redeemed coupons, and training market managers on the food delivery system.

(5) The cost of monitoring and reviewing Program operations.

(6) The cost of FMNP training.

(7) The cost of required reporting and recordkeeping.

(8) The cost of determining which local WIC sites will be utilized.

(9) The cost of recruiting and authorizing farmers/farmers' markets to participate in the FMNP.

(10) The cost of preparing contracts for farmers/farmers' markets and local WIC providers.

(11) The cost of developing a data processing system for redemption and reconciliation of FMNP coupons.

(12) The cost of designing program training and informational materials.

(13) The cost of coordinating FMNP implementation responsibilities between designated administering agencies.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49747, Sept. 27, 1995]

### § 248.13 FMNP income.

Program income means gross income the State agency earns from grant supported activities. It includes fees for services performed and receipts from the use or rental of real or personal property acquired with Federal grant funds, but does not include proceeds from the disposition of such property. The State agency shall retain Program income earned during the agreement period and use it for Program purposes in accordance with the addition method described in 7 CFR 3016.25(g)(2). Fines, penalties or assessments paid by local agencies or farmers/farmers' markets are also deemed to be FMNP income. The State agency shall ensure that the sources and applications of Program income are fully documented.

### § 248.14 Distribution of funds.

(a) *Conditions for receipt of Federal funds*—(1) *Matching of funds*—(i) *Match amount.* As a prerequisite to the receipt of Federal funds, a State agency must agree to contribute State, local or private funds, or program income, equal to not less than 30 percent of the total administrative FMNP cost. The Secretary may negotiate a lower percentage of matching funds, but not lower than 10 percent of the administrative cost of the program, in the case of an Indian State agency that demonstrates to the Secretary financial hardship for the affected Indian tribe, band, group, or council. The State agency may contribute more than the minimum amount. State, local or private funds for similar programs as defined in § 248.2 may satisfy the State matching requirement.

(ii) *Sources of matching contributions.* A State agency may count any form of contribution authorized by 7 CFR 3016.24 toward the State matching requirement including in-kind contributions.

(iii) *Failure to match.* A State agency's failure to meet the State matching requirement will result in the establishment of a claim for the amount of Federal grant funds not matched. The matching requirement will be considered satisfied if State or other non-Federal matching contributions reported on the final closeout report (required by § 248.15(a)) amount to at least 30 percent of the administrative costs. This match amount may be lower for those Indian State agencies that have demonstrated to the Secretary financial hardship as set forth in paragraph (a)(1)(i) of this section.

(2) *State Plan and agreement.* A State agency shall have its State Plan approved and shall execute an agreement with the Department in accordance with § 248.3(c) of this part.

(b) *Distribution of FMNP funds to previously participating State agencies.* Provided that sufficient FMNP funds are available, each State agency that participated in the FMNP in any prior fiscal year, shall receive not less than the amount of funds the State agency received in the most recent fiscal year in which it received funding, if it otherwise complies with the requirements established in this part.

(c) *Ratable reduction.* If amounts appropriated for any fiscal year for grants under the FMNP are not sufficient to pay to each previously participating State agency at least an amount as identified in paragraph (b) of this section, each State agency's grant shall be ratably reduced, except that, to the extent permitted by available funds, each State agency shall receive at least $75,000 or the amount that the State agency received for the most recent prior fiscal year in which the State participated, if that amount is less than $75,000.

(d) *Expansion of participating State agencies and establishment of new State agencies.* Any FMNP funds remaining for allocation after meeting the requirements of paragraph (b) of this section shall be allocated in the following manner:

(1) Of the remaining funds, 75 percent shall be made available to State agencies already participating in the FMNP that wish to serve additional recipients. If this amount is greater than that necessary to satisfy all State plans approved for additional recipients, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(2) of this section.

(2) Of the remaining funds, 25 percent shall be made available to State agencies that have not participated in the FMNP in any prior fiscal year. If this amount is greater than that necessary to satisfy the approved State Plans for new States, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(1) of this section. The Department reserves the right not to fund every State agency with an approved State Plan.

(3) In any fiscal year, any FMNP funds that remain unallocated after satisfying the requirements of paragraphs (d)(1) and (d)(2) of this section, shall be reallocated in accordance with paragraph (k) of this section.

(e) *Expansion for current State agencies.* In providing funds to State agencies that participated in the FMNP in the previous fiscal year, the Department shall consider on a case-by-case basis, the following:

(1) Whether the State agency utilized at least 80 percent of its prior year food grant. States that did not spend at least 80 percent of their prior year food grant may still be eligible for expansion funding if, in the judgment of the Department, good cause existed which was beyond the management control of the State, such as severe weather conditions, or unanticipated decreases in participant caseload in the WIC Program.

(2) Documentation supporting the funds expansion request as outlined in § 248.4(a)(19).

(f) *Funding of new State agencies.* Funds will be awarded to new State agencies in accordance with § 248.5.

(g) *Administrative funding.* A State agency shall have available for administrative costs an amount not greater than 17 percent of total FMNP funds. The 17 percent administrative cost limitation shall not apply to any funds that a State agency may contribute in excess of its minimum matching requirement. A State agency may use any non-Federal contributions in excess of the 30 percent (or the negotiated percentage for those Indian State agencies that received a lower amount) matching requirement for food and/or administrative costs.

(h) *Market development.* A State agency shall be permitted to use not more than 2 percent of total program funds for market development or technical assistance to farmers' markets if the Secretary determines that the State intends to promote the development of farmers' markets in socially or economically disadvantaged areas, or remote rural areas, where individuals eligible for participation in the program

have limited access to locally grown fruits and vegetables.

(i) *Transfer of funds.* A State agency may use not more than 5 percent of the Federal FMNP funds made available for the fiscal year to reimburse expenses incurred by the FMNP during a preceding fiscal year. The State agency shall provide such justification for its request to spend back funds under this paragraph as FNS may require.

(j) *Recovery of unused funds.* State agencies shall return to FNS any unexpended funds made available for a fiscal year by February 1 of the following fiscal year.

(k) *Reallocation of funds.* Any funds recovered under paragraphs (d)(3) and (j) of this section will be reallocated in accordance with the appropriate method determined by FNS.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49747, Sept. 27, 1995; 60 FR 57148, Nov. 14, 1995; 64 FR 48076, Sept. 2, 1999; 73 FR 65251, Nov. 3, 2008]

### § 248.15 Closeout procedures.

(a) *General.* State agencies shall submit to FNS a final closeout report for the fiscal year on a form prescribed by FNS on a date specified by FNS.

(b) *Grant closeout procedures.* When grants to State agencies are terminated, the following procedures shall be performed in accordance with 7 CFR part 3016.

(1) FNS may disqualify a State agency's participation under the FMNP, in whole or in part, or take such remedies as may be appropriate, whenever FNS determines that the State agency failed to comply with the conditions prescribed in this part, in its Federal-State Agreement, or in FNS guidelines and instructions. FNS will promptly notify the State agency in writing of the disqualification together with the effective date.

(2) FNS may disqualify the State agency or restrict its participation in the FMNP when both parties agree that continuation under the FMNP would not produce beneficial results commensurate with the further expenditure of funds.

(3) Upon termination of a grant, the affected agency shall not incur new obligations after the effective date of the disqualification, and shall cancel as many outstanding obligations as possible. FNS will allow full credit to the State agency for the Federal share of the noncancellable obligations properly incurred by the State agency prior to disqualification, and the State agency shall do the same for farmers/farmers' markets.

(4) A grant closeout shall not affect the retention period for, or Federal rights of access to, FMNP records as specified in § 248.24(b) and (c). The closeout of a grant does not affect the responsibilities of the State agency regarding property or with respect to any FMNP income for which the State agency is still accountable.

(5) A final audit is not a required part of the grant closeout and should not be needed unless there are problems with the grant that require attention. If FNS considers a final audit to be necessary, it shall so inform OIG. OIG will be responsible for ensuring that necessary final audits are performed and for any necessary coordination with other Federal cognizant audit agencies or State or local auditors. Audits performed in accordance with § 248.18 may serve as final audits providing such audits meet the needs of requesting agencies. If the grant is closed out without an audit, FNS reserves the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

### § 248.16 Administrative appeal of State agency decisions.

(a) *Requirements.* The State agency shall provide a hearing procedure whereby recipients, local agencies and farmers/farmers' markets adversely affected by certain actions of the State agency may appeal those actions. A recipient may appeal disqualification/suspension of FMNP benefits. A local agency may appeal an action of the State agency disqualifying it from participating in the FMNP. A farmer/farmers' market may appeal an action of the State agency denying its application to participate, imposing a sanction, or disqualifying it from participating in the FMNP. Expiration of a contract or agreement shall not be subject to appeal.

(b) *Postponement pending decision.* An adverse action may, at the State agency's option, be postponed until a decision in the appeal is rendered.

(1) In a case where an adverse action affects a local agency or farmer/farmers' market, a postponement is appropriate where the State agency finds that recipients would be unduly inconvenienced by the adverse action. In addition, the State agency may determine other relevant criteria to be considered in deciding whether or not to postpone an adverse action.

(2) In a case where a recipient appeals the termination of benefits, that recipient shall continue to receive FMNP benefits until the hearing official reaches a decision or the expiration of the current FMNP season, whichever occurs first. Applicants who are denied benefits may appeal the denial, but shall not receive benefits while awaiting the decision.

(c) *Procedure.* The State agency hearing procedure shall at a minimum provide the recipient, local agency or farmer/farmers' market with the following:

(1) Written notification of the adverse action, the cause(s) for the action, and the effective date of the action, including the State agency's determination of whether the action shall be postponed under paragraph (b) of this section if it is appealed, and the opportunity for a hearing. Such notification shall be provided within a reasonable timeframe established by the State agency and in advance of the effective date of the action.

(2) The opportunity to appeal the action within the time specified by the State agency in its notification of adverse action.

(3) Adequate advance notice of the time and place of the hearing to provide all parties involved sufficient time to prepare for the hearing.

(4) The opportunity to present its case and at least one opportunity to reschedule the hearing date upon specific request. The State agency may set standards on how many hearing dates can be scheduled, provided that a minimum of two hearing dates is allowed.

(5) The opportunity to confront and cross-examine adverse witnesses.

(6) The opportunity to be represented by counsel, or in the case of a recipient appeal, by a representative designated by the recipient, if desired.

(7) The opportunity to review the case record prior to the hearing.

(8) An impartial decision maker, whose decision as to the validity of the State agency's action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the FMNP. The basis for the decision shall be stated in writing, although it need not amount to a full opinion or contain formal findings of fact and conclusions of law.

(9) Written notification of the decision in the appeal, within 60 days from the date of receipt of the request for a hearing by the State agency.

(d) *Continuing responsibilities.* Appealing an adverse action does not relieve a farmer/farmers' market or local agency permitted to continue in the FMNP while its appeal is pending, from responsibility for continued compliance with the terms of the written agreement or contract with the State agency.

(e) *Judicial review.* If a State level decision is rendered against the recipient, local agency or farmer/farmers' market and the appellant expresses an interest in pursuing a further review of the decision, the State agency shall explain any further State level review of the decision and any available State level rehearing process. If neither is available or both have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

(f) *Additional appeals procedures for State agencies which authorize farmers' markets and not individual farmers.* A State agency which authorizes farmers' markets and not individual farmers shall ensure that procedures are in place to be used when a farmer seeks to appeal an action of a farmers' market or association denying the farmer's application to participate, or sanctioning or disqualifying the farmer. The procedures shall be set forth in the State Plan and in the agreements entered by

the State agency and the farmers' market and the farmers' market and the farmer.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49748, Sept. 27, 1995; 60 FR 57148, Nov. 14, 1995]

## Subpart F—Monitoring and Review of State Agencies

### § 248.17 Management evaluations and reviews.

(a) *General.* FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of FMNP objectives as provided under these regulations, the State Plan, and the written agreement with the Department. FNS will provide assistance to State agencies in discharging this responsibility, and will establish standards and procedures to determine how well the objectives of this part are being accomplished, and implement sanction procedures as warranted by State FMNP performance.

(b) *Responsibilities of FNS.* FNS shall establish evaluation procedures to determine whether State agencies carry out the purposes and provisions of this part, the State Plan, and the written agreement with the Department. As a part of the evaluation procedure, FNS shall review audits to ensure that the FMNP has been included in audit examinations at a reasonable frequency. These evaluations shall also include reviews of selected local agencies, and on-site reviews of selected farmers, farmers' markets and roadside stands. These evaluations will measure the State agency's progress toward meeting the objectives outlined in its State Plan and the State agency's compliance with these regulations.

(1) If FNS determines that the State agency has failed, without good cause, to demonstrate efficient and effective administration of its FMNP or has failed to comply with the requirements contained in this section or the State Plan, FNS may withhold an amount up to 100 percent of the State agency's administrative grant.

(2) Sanctions imposed upon a State agency by FNS in accordance with this section (but not claims for repayment assessed against a State agency) may be appealed in accordance with the procedures established in § 248.20. Before carrying out any sanction against a State agency, the following procedures will be followed:

(i) FNS will notify the chief departmental officer of the administering agency in writing of the deficiencies found and of FNS' intention to withhold administrative funds unless an acceptable corrective action plan is submitted by the State agency to FNS within 45 days after mailing of notification.

(ii) The State agency shall develop a corrective action plan, including timeframes for implementation to address the deficiencies and prevent their future recurrence.

(iii) If the corrective action plan is acceptable, FNS will notify the chief departmental officer of the administering agency in writing within 30 days of receipt of the plan. The letter will advise the State agency of the sanctions to be imposed if the corrective action plan is not implemented according to the schedule set forth in the approved plan.

(iv) Upon notification from the State agency that corrective action has been taken, FNS will assess such action, and if necessary, perform a follow-up review to determine if the noted deficiencies have been corrected. FNS will then advise the State agency of whether the actions taken are in compliance with the corrective action plan, and whether the deficiency is resolved or further corrective action is needed. Compliance buys can be required if, during FNS management evaluations by regional offices, a State agency is found to be out of compliance with its responsibility to monitor and review farmers, farmers' markets and roadside stands.

(v) If an acceptable corrective action plan is not submitted within 45 days, or if corrective action is not completed according to the schedule established in the corrective action plan, FNS may withhold the award of FMNP administrative funds. If the 45-day warning period ends in the fourth quarter of a fiscal year, FNS may elect not to withhold funds until the next fiscal year. FNS will notify the chief departmental officer of the administering State agency.

(vi) If compliance is achieved before the end of the fiscal year in which the FMNP administrative funds are withheld, the funds withheld may be restored to the State agency. FNS is not required to restore funds withheld beyond the end of the fiscal year for which the funds were initially awarded.

(c) *Responsibilities of State agencies.* The State agency is responsible for meeting the following requirements:

(1) The State agency shall establish evaluation and review procedures and document the results of such procedures. The procedures shall include, but are not limited to:

(i) Annual monitoring reviews of participating farmers, farmers' markets and roadside stands, including on-site reviews of a minimum of 10 percent of farmers, 10 percent of farmers' markets, and 10 percent of roadside stands, which includes those farmers, farmers' markets, and roadside stands identified as being the highest risk. First year of operation in the FMNP shall be considered a high-risk indicator. More frequent reviews may be performed as the State agency deems necessary.

(ii) Conducting monitoring reviews of all local agencies within the State agency's jurisdiction at least once every 2 years. Monitoring of local agencies shall encompass, but not be limited to, evaluation of management, accountability, certification, nutrition education, financial management systems, and coupon management systems. WIC State agency reviews of local agencies conducted for the WIC Program may contribute to meeting the FMNP requirement that all local agencies be reviewed once every two years if the reviews include reviews of FMNP practices. When the WIC State agency conducts a review of the local agency outside of the FMNP season, a review of documents and procedural plans of the FMNP, rather than actual FMNP activities, is acceptable.

(iii) Instituting the necessary follow-up procedures to correct identified problem areas.

(2) On its own initiative or when required by FNS, the State agency shall provide special reports on FMNP activities, and take positive action to correct deficiencies in FMNP operations.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49748, Sept. 27, 1995; 73 FR 65251, Nov. 3, 2008]

### § 248.18 Audits.

(a) *Federal access to information.* The Secretary, the Comptroller General of the United States, or any of their duly authorized representatives, or duly authorized State auditors shall have access to any books, documents, papers, and records of the State agency and their contractors, for the purpose of making surveys, audits, examinations, excerpts, and transcripts.

(b) *State agency response.* The State agency may take exception to particular audit findings and recommendations. The State agency shall submit a response or statement to FNS as to the action taken or planned regarding the findings. A proposed corrective action plan developed and submitted by the State agency shall include specific time frames for its implementation and for completion of the correction of deficiencies and problems leading to the deficiencies.

(c) *Corrective action.* FNS shall determine whether FMNP deficiencies identified in an audit have been adequately corrected. If additional corrective action is necessary, FNS shall schedule a follow-up review, allowing a reasonable time for such corrective action to be taken.

(d) *State sponsored audits.* State and local agencies shall conduct independent audits in accordance with 7 CFR part 3015, §3016.26 or part 3051, as applicable. A State or local agency may elect to obtain either an organization-wide audit or an audit of the Program if it qualifies to make such an election under applicable regulations.

### § 248.19 Investigations.

(a) *Authority.* The Department may make an investigation of any allegation of noncompliance with this part and FNS guidelines and instructions. The investigation may include, where appropriate, a review of pertinent practices and policies of any State and local agency, the circumstances under which the possible noncompliance with this part occurred, and other factors

relevant to a determination as to whether the State and local agency has failed to comply with the requirements of this part.

(b) *Confidentiality*. No State or local agency, recipient, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this part because that person has made a complaint or formal allegation, or has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conducting of any investigation, hearing, or judicial proceeding.

## Subpart G—Miscellaneous Provisions

### § 248.20 Claims and penalties.

(a) *Claims against State agencies*. (1) If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any FMNP funds provided to a State agency for food or administrative purposes were, through State agency negligence or fraud, misused or otherwise diverted from FMNP purposes, a formal claim will be assessed by FNS against the State agency. The State agency shall pay promptly to FNS a sum equal to the amount of the administrative funds or the value of coupons so misused or diverted.

(2) If FNS determines that any part of the FMNP funds received by a State agency; or coupons, were lost as a result of theft, embezzlement, or unexplained causes, the State agency shall, on demand by FNS, pay to FNS a sum equal to the amount of the money or the value of the FMNP coupons so lost.

(3) The State agency shall have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

(4) FNS is authorized to establish claims against a State agency for unreconciled FMNP coupons. When a State agency can demonstrate that all reasonable management efforts have been devoted to reconciliation and 99 percent or more of the FMNP coupons issued have been accounted for by the reconciliation process, FNS may determine that the reconciliation process has been completed to satisfaction.

(b) *Interest charge on claims against State agencies*. If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit within 30 days from the date of the first demand letter from FNS, FNS will assess an interest (late) charge against the State agency. Interest accrual shall begin on the 31st day after the date of the first demand letter, bill or claim, and shall be computed monthly on any unpaid balance as long as the debt exists. From a source other than the FMNP, the State agency shall provide the funds necessary to maintain FMNP operations at the grant level authorized by FNS.

(c) *Penalties*. In accordance with section 12(g) of the National School Lunch Act, whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under section 17 of the Child Nutrition Act of 1966, as amended, whether received directly or indirectly from USDA, or whoever receives, conceals or retains such funds, assets or property for his or her own interest, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets or property are of the value of $100 or more, be fined not more than $10,000 or imprisoned not more than five years, or both, or if such funds, assets or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

### § 248.21 Procurement and property management.

(a) *Requirements*. State agencies shall comply with the requirements of 7 CFR part 3016 for procurement of supplies, equipment and other services with FMNP funds. These requirements are adopted by FNS to ensure that such materials and services are obtained for the FMNP in an effective manner and

in compliance with the provisions of applicable law and executive orders.

(b) *Contractual responsibilities.* The standards contained in 7 CFR part 3016 do not relieve the State agency of the responsibilities arising under its contracts. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the FMNP. This includes, but is not limited to, disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

(c) *State regulations.* The State agency may use its own procurement regulations which reflect applicable State and local regulations, provided that procurements made with FMNP funds adhere to the standards set forth in 7 CFR part 3016.

(d) *Property acquired with program funds.* State and local agencies shall observe the standards prescribed in 7 CFR part 3016 in their utilization and disposition of real property and equipment acquired in whole or in part with FMNP funds.

### § 248.22 Nonprocurement debarment/suspension, drug-free workplace, and lobbying restrictions.

The State agency shall ensure compliance with the requirements of the Department's regulations governing nonprocurement debarment/suspension (7 CFR part 3017), drug-free workplace (7 CFR part 3017), and the Department's regulations governing restrictions on lobbying (7 CFR part 3018), where applicable.

### § 248.23 Records and reports.

(a) *Recordkeeping requirements.* Each State agency shall maintain full and complete records concerning FMNP operations. Such records shall comply with 7 CFR part 3016 and the following requirements:

(1) Records shall include, but not be limited to, information pertaining to financial operations, FMNP coupon issuance and redemption, equipment purchases and inventory, nutrition education, and civil rights procedures.

(2) All records shall be retained for a minimum of 3 years following the date of submission of the final expenditure report for the period to which the report pertains. If any litigation, claim, negotiation, audit or other action involving the records has been started before the end of the 3-year period, the records shall be kept until all issues are resolved, or until the end of the regular 3-year period, whichever is later. If FNS deems any of the FMNP records to be of historical interest, it may require the State agency to forward such records to FNS whenever the State agency is disposing of them.

(3) Records for nonexpendable property acquired in whole or in part with FMNP funds shall be retained for three years after its final disposition.

(4) All records shall be available during normal business hours for representatives of the Department of the Comptroller General of the United States to inspect, audit, and copy. Any reports resulting from such examinations shall not divulge names of individuals.

(b) *Financial and recipient reports.* State agencies shall submit financial and FMNP performance data on a yearly basis as specified by FNS and required by section 17(m)(8) of the CNA. Such information shall include, but shall not be limited to:

(1) Number and type of recipients (Federal and non-Federal).

(2) Value of coupons issued.

(3) Value of coupons redeemed.

(c) *Source documentation.* To be acceptable for audit purposes, all financial and FMNP performance reports shall be traceable to source documentation.

(d) *Certification of reports.* Financial and FMNP reports shall be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(e) *Use of reports.* FNS will use State agency reports to measure progress in achieving objectives set forth in the State Plan, and this part, or other State agency performance plans. If it is determined, through review of State agency reports, FMNP or financial analysis, or an audit, that a State

agency is not meeting the objectives set forth in its State Plan, FNS may request additional information including, but not limited to, reasons for failure to achieve these objectives.

### § 248.24 Other provisions.

(a) *No aid reduction.* The value of benefits or assistance available under the FMNP shall not be considered as income or resources of recipients or their families for any purpose under Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare and public assistance programs. Section 17(m)(7)(B) of the CNA provides that any programs for which a grant is received under this subsection shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 as amended (7 U.S.C. 2011 et seq.) and to any other Federal or State program under which foods are distributed to needy families in lieu of food stamps.

(b) *Statistical information.* FNS reserves the right to use information obtained under the FMNP in a summary, statistical or other form which does not identify particular individuals.

(c) *Confidentiality.* The State agency shall restrict the use or disclosure of information obtained from FMNP applicants and recipients to persons directly connected with the administration or enforcement of the WIC Program or the FMNP, including persons investigating or prosecuting violations in the WIC Program or FMNP under Federal, State or local authority.

### § 248.25 FMNP information.

Any person who wishes information, assistance, records or other public material shall request such information from the State agency, or from the FNS Regional Office serving the appropriate State as listed below:

(a) Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont: U.S. Department of Agriculture, FNS, Northeast Region, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1066.

(b) Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia: U.S. Department of Agriculture, FNS, Mid-Atlantic Region, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, New Jersey, 08691–1598.

(c) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee: U.S. Department of Agriculture, FNS, Southeast Region, 61 Forsyth Street, SW., Room 8T36, Atlanta, Georgia 30303.

(d) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: U.S. Department of Agriculture, FNS, Midwest Region, 77 West Jackson Boulevard—20th floor, Chicago, Illinois 60604–3507.

(e) Arkansas, Louisiana, New Mexico, Oklahoma, Texas: U.S. Department of Agriculture, FNS, Southwest Region, 1100 Commerce Street, room 5–C–30, Dallas, Texas 75242.

(f) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming: U.S. Department of Agriculture, FNS, Mountain Plains Region, 1244 Speer Boulevard, suite 903, Denver, Colorado 80204.

(g) Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory of the Pacific Islands, the Northern Mariana Islands, Washington: U.S. Department of Agriculture, FNS, Western Region, 90 Seventh Street, Suite #10–100, San Francisco, California 94103.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49748, Sept. 27, 1995; 60 FR 57148, Nov. 14, 1995; 73 FR 65251, Nov. 3, 2008]

### § 248.26 OMB control number.

The collecting of information requirements for part 248 have been approved by the Office of Management and Budget and assigned OMB control number 0584–0477.

[60 FR 49748, Sept. 27, 1995]

## PART 249—SENIOR FARMERS' MARKET NUTRITION PROGRAM (SFMNP)

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AUTHORITY: 7 U.S.C. 3007.

SOURCE: 71 FR 74630, Dec. 12, 2006, unless otherwise noted.

## Subpart A—General

### § 249.1 General purpose and scope.

(a) This part announces regulations under which the Secretary of Agriculture shall carry out the Senior Farmers' Market Nutrition Program (SFMNP). The purposes of the SFMNP are to:

(1) Provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables, honey, and herbs from farmers' markets, roadside stands, and community supported agriculture (CSA) programs to low-income seniors;

(2) Increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic farmers' markets, roadside stands, and CSAs; and

(3) Develop or aid in the development of new and additional farmers' markets, roadside stands, and CSAs.

(b) These goals will be accomplished through payment of cash grants to approved State agencies. The SFMNP shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. 2011, et seq.), and to any other Federal or State food or nutrition assistance program under which foods are distributed to needy families in lieu of food stamps.

[71 FR 74630, Dec. 12, 2006, as amended at 74 FR 48374, Sept. 23, 2009]

### § 249.2 Definitions.

For the purpose of this part and all contracts, guidelines, instructions, forms and other documents related hereto, the term:

*Administrative costs* means those direct and indirect costs (as defined in—249.12(a)(1)(ii)), exclusive of food costs, which State agencies determine to be necessary to support SFMNP operations. Administrative costs include, but are not limited to, the costs associated with administration and start-up; the provision of nutrition education; SFMNP coupon issuance; participant education covering coupon redemption procedures; eligibility determinations; outreach services; printing SFMNP coupons, processing redeemed coupons, and training farmers, market managers, and/or farmers who operate CSA programs on the food delivery system; monitoring and reviewing program operations; required reporting and recordkeeping; determining which local sites will be utilized; recruiting and authorizing farmers, farmers' markets, roadside stands, and/or CSA programs to participate in the SFMNP; preparing contracts for farmers, farmers' markets, roadside stands, and/or CSA programs; developing a data processing system for redemption and reconciliation of coupons; designing program training and informational materials;

and coordinating SFMNP implementation responsibilities between designated administering agencies.

*Bulk purchase* means a program model in which bulk quantities of certain produce items, such as apples or sweet potatoes, are purchased directly from authorized farmers by the State agency, and are then equitably divided among and distributed directly to eligible SFMNP participants, either at a central distribution point (such as a local senior center) or through some type of home delivery network.

*Community supported agriculture (CSA) program* means a program under which a farmer or group of farmers grows food for a group of shareholders (or subscribers) who pledge to buy a portion of the farmer's crop(s) for that season. State agencies may purchase shares or subscribe to a community supported agriculture program on behalf of individual SFMNP participants.

*Compliance buy* means a covert, onsite investigation in which a SFMNP representative poses as a SFMNP participant or authorized representative and attempts to transact one or more SFMNP coupons, or, in the case of CSA programs, attempts to obtain eligible foods purchased with SFMNP funds at a distribution site.

*Coupon* means a check or other negotiable financial instrument by which benefits under the program are transferred to program participants.

*Days* means calendar days.

*Department* means the U.S. Department of Agriculture.

*Distribution site* means the location where packages of eligible foods are assembled for and/or distributed to SFMNP participants who are shareholders in CSA programs.

*Eligible foods* means fresh, nutritious, unprepared, locally grown fruits, vegetables, honey, and herbs for human consumption. Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes. Dried fruits or vegetables, such as prunes (dried plums), raisins (dried grapes), sun-dried tomatoes, or dried chili peppers are not considered eligible foods. Potted fruit or vegetable plants, potted or dried herbs, wild rice, nuts of any kind (even raw), maple syrup, cider, seeds, eggs, meat, cheese and seafood are also not eligible foods for purposes of the SFMNP.

*Farmer* means an individual authorized to sell eligible foods at participating farmers' markets and/or roadside stands, and through CSAs. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the SFMNP. A participating State agency has the option to authorize individual farmers or farmers' markets, roadside stands, and/or CSA programs.

*Farmers' market* means an association of local farmers who assemble at a defined location for the purpose of selling their produce directly to consumers.

*Federally recognized Indian tribal government* means the same as the definition of that term found at §3016.3 of this chapter, i.e., the governing body or a governmental agency of any Indian tribe, band, organization, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by the Secretary through the Bureau of Indian Affairs.

*Fiscal year* means the period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

*FNS* means the Food and Nutrition Service of the U.S. Department of Agriculture.

*Food costs* means the cost of eligible foods purchased at authorized farmers' markets, roadside stands, and/or through bulk purchases or CSA programs.

*Household* means a group of related or nonrelated individuals who are living together as one economic unit.

*Local agency* means any nonprofit entity or local government agency that certifies eligible participants, issues SFMNP coupons, arranges for distribution of eligible foods through CSA programs, and/or provides nutrition education or information on operational aspects of the Program to SFMNP participants.

*Locally grown* means grown within State borders. If the State agency chooses, *locally grown* may also mean grown in areas of States adjacent to that State, as long as such areas are part of the United States.

*Nonprofit agency* means a private agency that is exempt from the payment of Federal income tax under the Internal Revenue Code of 1986, as amended (26 U.S.C. 1, et seq.).

*Nutrition education means:*

(1) Individual or group sessions; and

(2) The provision of relevant materials, in keeping with the individual's personal, cultural, and socioeconomic preferences and the Dietary Guidelines for Americans, that:

(i) Emphasize relationships between nutrition and health; and

(ii) Encourage participants to build healthful eating patterns, and to take action for good health.

*OIG* means FNS' Office of Inspector General.

*Participant* means a person or household who meets the eligibility requirements of the SFMNP and to whom coupons or equivalent benefits have been issued.

*Program or SFMNP* means the Senior Farmers' Market Nutrition Program authorized by Section 4402 of the Farm Security and Rural Investment Act of 2002, 7 U.S.C. 3007.

*Proxy* means an individual authorized by an eligible senior to act on the senior's behalf, including application for certification, receipt of SFMNP coupons or other benefits, use of SFMNP coupons at authorized outlets, and/or acceptance of SFMNP foods provided through a CSA program, as long as the SFMNP benefits are ultimately received by the eligible senior. The terms *proxy* and *authorized representative* may be used interchangeably for purposes of this program.

*Roadside stand* means a location at which an individual farmer sells his/her produce directly to consumers. This is in contrast to a group or association of farmers selling their produce at a farmers' market or through a CSA program. The term *roadside stand* may be used interchangeably with the term *farmstand* as defined in §248.2 of this chapter.

*Senior* means an individual 60 years of age or older, or as defined in §249.6(a)(1).

*SFPD* means the Supplemental Food Programs Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

*Shareholder* means a SFMNP participant for whom a full or partial share in a community supported agriculture program has been purchased by the State agency, and who receives SFMNP benefits in the form of actual eligible foods rather than coupons that must be exchanged for eligible foods at farmers' markets and/or roadside stands.

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and as applicable, American Samoa or the Commonwealth of the Northern Marianas.

*State agency* means the agriculture, aging, or health department, or any other agency approved by the Chief Executive Officer of the State that has administrative responsibility for the SFMNP; an intertribal council or group that is an authorized representative of Indian tribes, bands, or groups recognized by FNS of the Interior and that has an ongoing relationship with such tribes, bands, or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the Indian Health Service, a division of FNS of Health and Human Services.

*State Plan* means a plan of SFMNP operation and administration that describes the manner in which the State agency intends to implement, operate and administer all aspects of the SFMNP within its jurisdiction in accordance with §249.4.

*WIC* means the Special Supplemental Nutrition Program for Women, Infants and Children authorized by Section 17 of the Child Nutrition Act of 1966 (42 U.S.C. 1786).

*WIC Farmers' Market Nutrition Program (FMNP)* means the nutrition assistance program authorized by Section 17(m) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(m)), to provide resources to women, infants, and children who are nutritionally at risk, in

the form of fresh, nutritious, unprepared foods (such as fruits and vegetables) from farmers' markets; to expand the awareness and use of farmers' markets; and to increase sales at such markets.

[71 FR 74630, Dec. 12, 2006, as amended at 74 FR 48374, Sept. 23, 2009]

### § 249.3 Administration.

(a) *Delegation to FNS.* Within FNS, FNS shall act on behalf of the Department in the administration of the SFMNP. Within FNS, SFPD and the FNS Regional Offices are responsible for SFMNP administration. FNS shall provide assistance to State agencies and evaluate all levels of SFMNP operations to ensure that the goals of the SFMNP are achieved in the most effective and efficient manner possible.

(b) *Delegation to State agency.* The State agency is responsible for the effective and efficient administration of the SFMNP in accordance with the requirements of this Part; the requirements of FNS' regulations governing nondiscrimination (parts 15, 15a and 15b of this title), administration of grants (part 3016 of this title), nonprocurement debarment/suspension (part 3017 of this title), drug-free workplace (part 3021 of this title), and lobbying (part 3018 of this title); FNS guidelines; FNS Instructions issued under the FNS Directives Management System; and Office of Management and Budget Circular A–130 (For availability of OMB Circulars referenced in this section, see 5 CFR 1310.3). The State agency shall provide guidance to cooperating State and local agencies on all aspects of SFMNP operations. State agencies may operate the SFMNP locally through nonprofit organizations or local government entities and must ensure coordination among the appropriate agencies and organizations.

(c) *Agreement and State Plan.* Each State agency desiring to administer the SFMNP shall annually submit a State Plan of Operations and enter into a written agreement with FNS for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this Part. If the State agency administers both the SFMNP and the WIC Farmers' Market Nutrition Program (FMNP), one consolidated State Plan may be submitted for both programs, in accordance with guidance provided by FNS.

(d) *Coordination with other agencies.* The Chief Executive Officer of the State shall ensure coordination between the designated administering State agency and any other State, local, or nonprofit agencies or entities involved in administering any aspect of the SFMNP by ensuring that the agencies enter into a written agreement or letter/memorandum of understanding. The written agreement or letter/memorandum of understanding must delineate the responsibilities of each agency, describe any compensation for services, and must be signed by the designated representative of each agency. This agreement must be submitted each year along with the State Plan.

(e) *State staffing standards.* Each State agency shall ensure that sufficient staff is available to administer the SFMNP efficiently and effectively. This shall include, but not be limited to, sufficient staff to identify and certify eligible SFMNP participants, provide program information and nutrition education to participants, and oversee coupon, market, and/or CSA program management, fiscal reporting, monitoring, and training. The State agency shall provide in its State Plan an outline of administrative staff and job descriptions for staff whose salaries will be paid from program funds.

## Subpart B—State Agency Eligibility

### § 249.4 State Plan.

(a) *Requirements.* By November 15 of each year, each applying or participating State agency shall submit to FNS for approval a State Plan for the following year as a prerequisite to receiving funds under this section. If the State agency administers both the SFMNP and the FMNP, one consolidated State Plan may be submitted for both programs, in accordance with guidance provided by FNS. The State Plan must be signed by the State-designated official responsible for ensuring that the Program is operated in accordance with the State Plan. FNS will provide written approval or denial of a completed State Plan or amendment

within 30 days of receipt. Portions of the State Plan that do not change annually need not be resubmitted. However, the State agency shall provide the title of the sections that remain unchanged, as well as the year of the last Plan in which the sections were submitted. At a minimum, the Plan must include the following items, which must include sufficient detail to demonstrate the State agency's ability to meet the requirements of the SFMNP:

(1) A copy of the agreement between the designated administering State agency and any other cooperating State, local, or nonprofit agencies or organizations for services such as certification of eligible participants, issuance of SFMNP coupons or benefits, and/or nutrition education, as required in § 249.3(d).

(2) A description of the State agency's procedures for identifying and certifying eligible SFMNP participants, including the specific age and income criteria that will be used to determine SFMNP eligibility.

(3) An estimated number of participants for the fiscal year, and proposed months of operation.

(4) A detailed budget for the SFMNP, including:

(i) The minimum amount necessary to operate the SFMNP;

(ii) A description of the Federal and non-Federal funds that will be used to operate the Program; and

(iii) An assurance that no more than 50 percent of the Federal SFMNP grant will be used to support a CSA program model for the delivery of SFMNP benefits.

(5) An outline of administrative staff and job descriptions.

(6) A detailed description of the SFMNP recordkeeping system including, but not limited to, the system for maintaining separate records for SFMNP funds pertaining to financial operations, coupon issuance and redemption, authorization of farmers, markets, and/or CSA programs, distribution of eligible foods through CSA programs, and SFMNP participation.

(7) A detailed description of the State agency's financial management system, including how the system will provide accurate, current and complete disclosure of the program's financial status and required reports.

(8) A detailed description of the service area, including:

(i) The number and addresses of authorized farmers, farmers' markets, roadside stands, and community supported agriculture programs that participated in the SFMNP during the prior year; and

(ii) SFMNP certification/issuance sites (such as senior centers or senior housing facilities), including a map outlining the service area and proximity of markets, roadside stands, and/or community supported agriculture programs to certification/issuance or distribution sites that participated in the SFMNP during the prior year.

(9) A description of the coupon issuance system including:

(i) A description of how the State agency will target areas with the highest concentrations of eligible persons and greatest access to farmers' markets and/or roadside stands;

(ii) The benefit level per participant, or household if benefits are issued on a household basis, including:

(A) How coupons will be issued;

(B) The value of benefits provided to each participant or household at each issuance during the year;

(C) The frequency of coupon issuance; and

(D) The total amount of SFMNP benefits issued to each participant or household during the year.

(iii) A method for instructing participants on the proper use of SFMNP coupons and the purpose of the SFMNP;

(iv) A method for ensuring that SFMNP coupons are issued only to eligible participants; and

(v) A method for preventing and identifying dual participation, in accordance with § 249.6(d)(1).

(10) If the agency is using a "paperless" system, i.e., a system that does not issue actual coupons, a complete description of how such a system will be operated in a manner that ensures the integrity of SFMNP funds and benefits.

(11) A detailed description of the SFMNP coupon redemption process including:

(i) The procedures for ensuring the secure transportation and storage of SFMNP coupons;

(ii) A system for identifying and reconciling SFMNP coupons; and

(iii) The timeframes for SFMNP coupon redemption by participants, submission for payment by farmers or authorized outlets (farmers' markets and/or roadside stands), and payment by the State agency.

(12) A description of the State agency's CSA program, if applicable, including:

(i) How the State agency will target and select community supported agriculture programs designed to provide SFMNP benefits to eligible participants;

(ii) The annual benefit amount per participant or household, if benefits are issued on a household basis;

(iii) How CSA program contracts are developed, negotiated, and executed by the State agency;

(iv) How CSA program shares are allocated to eligible SFMNP participants;

(v) A method for instructing participants and farmers participating in the CSA program on the purpose of the SFMNP, and the procedures for delivery and distribution of eligible foods provided for the SFMNP through the CSA;

(vi) A system to ensure receipt by eligible participants of eligible foods provided through a CSA program. Such a system should include a written receipt or distribution log, with the participant's signature (or that of the eligible participant's proxy, if proxies are allowed) and the date of each distribution;

(vii) The payment procedures for the CSA program(s) used by the State agency;

(viii) How the State agency ensures that the full value of eligible foods for which it has contracted is provided regularly throughout the SFMNP season;

(ix) A listing of delivery dates and distribution sites for CSA program-provided eligible foods; and

(x) A system for ensuring that each SFMNP shareholder receives an equitable amount of eligible foods at each delivery, and that the total value of the eligible foods provided under the SFMNP falls within the minimum and maximum Federal SFMNP benefit levels, as specified in § 249.8(b).

(13) A complete description of age- and circumstance-appropriate nutrition education to be provided to SFMNP participants, including:

(i) The agencies that will provide the nutrition education;

(ii) The format(s) in which the nutrition education will be provided; and

(iii) The locations where nutrition education is likely to be provided.

(14) A detailed description of the State agency's system for managing its coupon, market, and CSA program management systems, including:

(i) The criteria for authorizing farmers' markets, roadside stands, and/or community supported agriculture programs, including the agency responsible for authorization;

(ii) The procedures for training farmers, market managers, and/or CSA program farmers at authorization, and annually thereafter;

(iii) The procedures for monitoring farmers' markets, roadside stands, and/or community supported agriculture programs;

(iv) A description of the State agency's system for identifying high-risk farmers and farmers' markets, roadside stands, and/or community supported agriculture programs, as set forth at § 249.10(e)(2)(ii);

(v) The procedures for sanctioning farmers, farmers' markets, roadside stands, and/or community supported agriculture programs;

(vi) A facsimile of the SFMNP coupon, including the denominations of coupons that will be issued, and a clear indication of where the participant/proxy and (if applicable) farmer are required to sign, stamp, or otherwise endorse the coupon before it can be redeemed;

(vii) A complete listing of the fresh, nutritious, unprepared fruits, vegetables, honey, and herbs eligible for purchase under the SFMNP;

(viii) A description of SFMNP coupon replacement policy or statement that coupons will not be replaced; and

(ix) The State agency's procedures for handling participant and farmer/farmers' market, roadside stands, and CSA program complaints.

(15) A system for ensuring that SFMNP coupons are redeemed only by authorized farmers/farmers' markets/roadside stands, and only for eligible foods.

(16) A system for identifying SFMNP coupons that are redeemed or submitted for payment outside valid dates or by unauthorized farmers/farmers' markets/roadside stands.

(17) A copy of the written agreement to be used between the State agency and authorized farmers/farmers' markets, roadside stands, and/or CSA programs. In those States that authorize farmers' markets, but not individual farmers, this agreement shall specify in detail the role of and procedures to be used by farmers' markets for monitoring and sanctioning farmers, and the appropriate procedures to be used by a farmer to appeal a sanction or disqualification imposed by a farmers' market.

(18) If available, information on the change in consumption of fresh fruits, vegetables, honey, and herbs by SFMNP participants. This information shall be submitted as an addendum to the State Plan and shall be submitted at a date specified by the Secretary.

(19) If available, information on the effects of the program on farmers' markets, roadside stands, and/or CSA programs. This information shall be submitted as an addendum to the State Plan and shall be submitted at a date specified by the Secretary.

(20) A description of the procedures the State agency will use to comply with the civil rights requirements described in § 249.7(a), including the processing of discrimination complaints.

(21) A copy of the State agency's fair hearing procedures for SFMNP participants and the administrative appeal procedures for local agencies, farmers, farmers' markets, roadside stands, and/or CSA programs.

(22) State agencies that have not previously participated in the SFMNP must provide:

(i) A description of the need for the SFMNP in that State agency;

(ii) The specific goals and objectives of the SFMNP, designed to fulfill the purpose of the Program as set forth in § 249.1; and

(iii) A capability statement that includes a summary description of any prior experience with farmers' market projects or programs, including information and data describing the attributes of such projects or programs.

(23) For State agencies making expansion requests, documentation that demonstrates:

(i) The need for an increase in funding;

(ii) That the use of the increased funding will be consistent with serving eligible SFMNP participants by expanding benefits to more persons, by enhancing current benefits, or a combination of both, and expanding the awareness and use of farmers' markets, roadside stands, and CSA programs;

(iii) The ability of the State agency to operate the existing SFMNP satisfactorily;

(iv) The management capabilities of the State agency to expand; and

(v) Whether, in the case of a State agency that intends to use the funding to increase the value of the Federal benefits received by a participant, the funding provided will increase the rate of coupon redemption.

(b) *Amendments.* At any time after approval, the State agency may amend the State Plan to reflect changes. The State agency shall submit such amendments to FNS for approval. The proposed amendments shall be signed by the State-designated official responsible for ensuring that the SFMNP is operated in accordance with the State Plan. The amendments must be approved by FNS prior to implementation.

(c) *Retention of copy.* A copy of the approved State Plan shall be kept on file at the State agency for public inspection.

[71 FR 74630, Dec. 12, 2006, as amended at 74 FR 48374, 48375, Sept. 23, 2009]

### § 249.5 Selection of new State agencies.

In selecting new State agencies, FNS will use objective criteria to rank and approve State plans submitted in accordance with § 249.4. In making this ranking, FNS will consider the amount of funds necessary to operate the SFMNP successfully in the State compared with other States and with the total amount of funds available to the

SFMNP, the number of participants estimated to be served, and the projected benefit level. Approval of a State Plan does not equate to an obligation on the part of FNS to fund the SFMNP within that State.

## Subpart C—Participant Eligibility

### § 249.6 Participant eligibility.

(a) *Eligibility for certification.* Individuals who are eligible to receive Federal benefits under the SFMNP are those who meet the following criteria:

(1) *Categorical eligibility.* Participants must be not less than 60 years of age, except that State agencies may exercise the option to deem Native Americans who are 55 years of age or older as categorically eligible for SFMNP benefits. State agencies may, at their discretion, also deem disabled individuals less than 60 years of age who are currently living in housing facilities occupied primarily by older individuals where congregate nutrition services are provided, as categorically eligible to receive SFMNP benefits.

(2) *Residency requirement.* The State agency may establish a residency requirement for SFMNP applicants. The State agency may determine a service area for any local agency, and may require that an applicant be residing within the service area at the time of application to be eligible for the Program. However, the State agency may not impose any durational or fixed residency requirements.

(3) *Income eligibility.* The State agency must ensure that local agencies determine income eligibility through the use of a clear and simple application process approved by the State agency. Participants must have a maximum household income of not more than 185 percent of the annual poverty income guidelines, or be determined automatically income eligible based on current participation/eligibility to receive benefits in another means-tested program, as designated by the State agency, for which income eligibility is set at or below 185 percent of the poverty income guidelines and for which documentation of family income is required. FNS will announce the income poverty guidelines annually.

(b) *Documentation of income eligibility*—(1) *Automatically income eligible applicants.* The State or local agency must require applicants determined to be automatically income eligible to provide documentation of their eligibility to participate in another means-tested assistance program, as designated by the State agency.

(2) *Other applicants.* (i) The State or local agency must require all other applicants to provide, at a minimum, a signed statement affirming that their household size and income does not exceed the maximum income eligibility standard in use by the State agency.

(ii) If the State agency offers a benefit of more than $50 per participant through a CSA program, it must require documentation of household size and income from all participants receiving the higher benefit level.

(iii) The State agency has the option to require all applicants to provide documentation of family income at certification, and/or to require verification of the information provided by the applicant.

(c) *Certification periods.* Participants may be certified only for the current fiscal year's SFMNP period of operation. Eligibility must be determined at the beginning of each period of operation. Prior fiscal year certifications may not be carried over into subsequent fiscal years, but the State agency may make use of its participant enrollment listings from the prior fiscal year in its outreach efforts for the current fiscal year.

(d) *Participant rights and responsibilities.* Where a significant number or proportion of the population eligible to be served needs information regarding participation in the SFMNP in a language other than English, reasonable steps must be taken to provide this information in the appropriate language(s) to such persons, considering the scope of the Program and the size and concentration of such population(s). In order to inform applicants and participants or their authorized representatives/proxies of SFMNP rights and responsibilities, State/local agencies must provide the following information:

(1) During the certification process, every program applicant or authorized

representative must be informed of the illegality of dual participation, i.e., obtaining SFMNP benefits from more than one service delivery area or from more than one SFMNP program model (coupon system and CSA program) within the same service delivery area.

(2) At the time of certification, each SFMNP applicant or authorized representative must read or have read to him or her the following statements or similar statements:

I have been advised of my rights and obligations under the SFMNP. I certify that the information I have provided for my eligibility determination is correct, to the best of my knowledge. This certification form is being submitted in connection with the receipt of Federal assistance. Program officials may verify information on this form. I understand that intentionally making a false or misleading statement or intentionally misrepresenting, concealing, or withholding facts may result in paying the State agency, in cash, the value of the food benefits improperly issued to me and may subject me to civil or criminal prosecution under State and Federal law.

Standards for eligibility and participation in the SFMNP are the same for everyone, regardless of race, color, national origin, age, disability, or sex.

I understand that I may appeal any decision made by the local agency regarding my eligibility for the SFMNP.

(3) During the certification visit, each participant or authorized representative must:

(i) Receive an explanation of how to use his/her SFMNP coupons at farmers' markets and roadside stands, and/or how SFMNP foods will be provided under the CSA program in that service delivery area; and

(ii) Be advised of the other types of services that are available to SFMNP participants, where such services are located, how they may be obtained, and why they may be useful.

(4) Persons found ineligible for the SFMNP during a certification visit must be advised in writing of their ineligibility, of the reasons for their ineligibility, and of their right to a fair hearing. The reasons for ineligibility must be properly documented and must be retained on file at the local agency. Such notice is not required when participation is denied solely because of lack of sufficient funding to provide SFMNP benefits to all eligible applicants.

(5) When a State or local agency pursues collection of a claim pursuant to §249.20(c) against an individual who has been issued SFMNP benefits for which she/he is not eligible, the person must be advised in writing of the reason(s) for the claim, the value of the improperly issued benefits that must be repaid, and of his/her right to a fair hearing.

(e) *Certification without charge.* Certification for the SFMNP must be performed at no cost to the applicant or the authorized representative.

(f) *Use of proxies or authorized representatives.* At the State agency's discretion, a senior may designate an authorized representative (proxy) to apply for certification, shop at the farmers' market or roadside stands, and/or pick up their eligible foods from CSA program distribution sites on his/her behalf if the senior is unable to perform these actions. The State agency must obtain a signed statement from the eligible senior designating another individual as his/her authorized representative. A senior who has been certified to receive SFMNP benefits may designate an authorized representative at any point during the program's period of operation.

(g) *Processing standards.* (1) Applicants for the SFMNP must be notified of their eligibility or ineligibility for benefits, or of their placement on a waiting list, as described in paragraph (g)(2) of this section, within 15 days from the date of application.

(2) When all available program benefits have been allocated to eligible participants, and there is a reasonable expectation that additional funds may become available to provide further SFMNP benefits to eligible seniors, the local agency must maintain a waiting list of individuals who contact the local agency to apply for the Program. Individuals must be notified of their placement on a waiting list within 15 days after they contact the local agency to request Program benefits. To enable the local agency to contact these individuals when caseload space becomes available, the waiting list must include the name of the applicant, the date placed on the waiting list, and an

address or phone number of the applicant.

(h) *Limitations on certification.* If necessary to limit the number of participants, State agencies may impose additional eligibility requirements, such as limiting participant certification to certain geographic areas. Each State agency must specifically identify these limitations on certification in its State Plan.

### § 249.7 Nondiscrimination.

(a) *Civil rights requirements.* (1) The State agency must comply with the following requirements to ensure that no person shall, on the grounds of race, color, national origin, age, sex or disability, be excluded from participation, be denied benefits, or be otherwise subjected to discrimination, under the SFMNP:

(i) Title VI of the Civil Rights Act of 1964;

(ii) Title IX of the Education Amendments of 1972;

(iii) Section 504 of the Rehabilitation Act of 1973;

(iv) The Age Discrimination Act of 1975;

(v) Department of Agriculture regulations on nondiscrimination (parts 15, 15a and 15b of this title); and

(vi) Applicable FNS Instructions, including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and annual reviews of each local agency's racial and ethnic participation data (as required by title VI of the Civil Rights Act of 1964).

(2) Compliance with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and regulations and instructions issued thereunder shall include, but not be limited to:

(i) Notification to the public of the nondiscrimination policy and complaint rights of participants and potentially eligible persons, which may be satisfied through FNS' required nondiscrimination statement on brochures and publications;

(ii) Review and monitoring activity to ensure SFMNP compliance with the nondiscrimination laws and regulations; and

(iii) Establishment of grievance procedures for handling participant complaints based on sex and handicap.

(b) *Complaints.* Persons seeking to file discrimination complaints may file them either with the Secretary of Agriculture, or the Director, Office of Civil Rights, USDA, Washington, DC 20250 or with the office established by the State agency to handle discrimination grievances or complaints. All complaints received by State agencies that allege discrimination based on race, color, national origin, or age shall be referred to the Secretary of Agriculture or the Director of the Office of Civil Rights, USDA. A State agency may process complaints that allege discrimination based on sex or disability if grievance procedures are in place.

## Subpart D—Participant Benefits

### § 249.8 Level of benefits and eligible foods.

(a) *General.* State agencies must identify in the State Plan the fresh, nutritious, unprepared, locally grown fruits, vegetables, honey, and herbs that are eligible for purchase under the SFMNP. Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes. Dried fruits or vegetables, such as prunes (dried plums), raisins (dried grapes), sun-dried tomatoes, or dried chili peppers are not considered eligible foods in the SFMNP. Potted fruit or vegetable plants, potted or dried herbs, wild rice, nuts of any kind (even raw), maple syrup, cider, seeds, eggs, meat, cheese, and seafood are also not eligible for purposes of the SFMNP. "Locally grown" means produce grown only within a State's borders but may be defined by State agencies to include border areas in adjacent States. Under no circumstances may produce grown outside of the United States and its territories be considered eligible food.

(b) *The value of the Federal benefits received.* (1) The Federal SFMNP benefit level received by each participant, whether individual or household, may not be less than $20 per year or more than $50 per year, except that:

(i) A State agency that operated the SFMNP in FY 2006 may continue to issue the same level of benefits that was provided to participants in FY 2006, even if the benefit level was less than $20;

(ii) Participants served by a State agency that operated the SFMNP through a CSA program model in FY 2006 may, at the State agency's discretion, continue to receive the same CSA benefit levels that were provided to such participants in FY 2006, subject to the conditions set forth at § 249.14(e)(3), Distribution of Funds; and

(iii) Participants who are participating in the SFMNP through a CSA program may receive a higher total benefit level than participants participating in a check or coupon program model, as long as that level is consistent for all Senior CSA program participants and does not exceed the $50 annual maximum per individual or household, except as provided in paragraph (b)(1) of this section.

(2) The total value of SFMNP benefits provided in a combination of program models, such as coupons/checks and bulk purchase, may not exceed the $50 maximum benefit level set forth in paragraph 249.8(b)(1).

(c) *Participant or household benefit allocation.* (1) All SFMNP participants living in the areas served by the State agency must be offered the same amount of SFMNP benefits, regardless of the program model(s) used by that State agency.

(2) Benefits may be allocated on an individual or on a household basis.

(3) Foods provided are intended for the sole benefit of SFMNP participants and are not meant to be shared with other non-participating household members.

(4) Participants must receive SFMNP benefits free of charge.

[71 FR 74630, Dec. 12, 2006, as amended at 74 FR 48374, Sept. 23, 2009]

### § 249.9 Nutrition education.

(a) *Goal.* Nutrition education shall emphasize the relationship of proper nutrition to good health, including the importance of consuming fruits and vegetables.

(b) *Requirement.* The State agency shall integrate nutrition education into SFMNP operations and may satisfy nutrition education requirements through coordination with other agencies within the State. State agencies wishing to coordinate nutrition education with another State agency or organization must enter into a written cooperative agreement with such agencies to offer nutrition education relevant to the use and nutritional value of foods available to SFMNP participants. In cases where SFMNP participants are receiving relevant nutrition education from an agency other than the administering State agency, the provision of nutrition education is an allowable administrative cost under the SFMNP.

## Subpart E—State Agency Provisions

### § 249.10 Coupon, market, and CSA program management.

(a) *General.* This section sets forth State agency responsibilities regarding the authorization of farmers, farmers' markets, roadside stands, and/or CSA programs. The State agency is responsible for the fiscal management of and accountability for SFMNP-related activities for farmers, farmers' markets, roadside stands, and CSA programs. Each State agency may decide whether to authorize individual farmers and farmers' markets separately, or to authorize only farmers' markets. In addition, each State agency may decide whether to authorize roadside stands and/or CSA programs. The State agency may authorize a farmer for participation in a farmers' market, a roadside stand, and/or CSA program simultaneously. All contracts or agreements entered into by the State agency for the management or operation of farmers, farmers' markets, roadside stands, and/or CSA programs shall conform to the requirements of part 3016 of this title.

(1) Only farmers, farmers' markets, and/or roadside stands authorized by the State agency may redeem SFMNP coupons. Only farmers authorized by the State agency, or having a valid agreement with an authorized farmers' market, may redeem coupons. Only CSA programs authorized by the State agency may receive payment from the

State agency at the beginning of the planting season, in order to provide eligible foods to senior participants who are shareholders.

(2) The State agency must establish criteria for the authorization of individual farmers and/or farmers' markets, roadside stands, and/or CSA programs. Any authorized farmer, farmers' market, roadside stand and/or CSA program must agree to sell participants only those foods identified as eligible by the State agency. State agencies may determine farmers, farmers' markets and/or roadside stands as automatically authorized to participate in the SFMNP based on current authorization to operate in the FMNP under part 248 of this chapter. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the SFMNP, except individuals employed by a farmer otherwise qualified under these regulations, or individuals hired by a nonprofit organization to sell produce at roadside stands on behalf of local farmers.

(3) The State agency must ensure that an appropriate number of farmers, farmers' markets, roadside stands, and/or CSA programs are authorized for adequate participant access in the area(s) proposed to be served and for effective management of the farmers, farmers' markets, roadside stands, and/or CSA programs by the State agency.

(4) The State agency may establish criteria to limit the number of authorized farmers, farmers' markets, and/or roadside stands.

(5) The State agency must limit the value of shares awarded to CSA programs to no more than 50 percent of their total Federal SFMNP food grant, except in the case of a State agency that has grandfathered a CSA program model into the permanent SFMNP that uses more than 50 percent of the total Federal SFMNP food grant for the CSA program. The State agency shall make efforts to select the CSA program(s) that provides the greatest variety of eligible foods.

(6) The State agency may purchase bulk quantities of eligible foods directly from authorized farmers. Such foods must then be equitably divided among and distributed directly to eligible SFMNP participants. SFMNP participants who have received checks or coupons to purchase eligible foods earlier in the season may also receive foods through the bulk purchase option as long as the total combined value of the benefits provided to each SFMNP participant does not exceed $50, as stipulated in § 249.8(b).

(7) The State agency shall ensure that training is conducted prior to start up of the first year of SFMNP participation of an individual farmer, farmers' market, roadside stand, and/or CSA program. The training shall include at a minimum those items listed in paragraph (d) of this section, and may be delivered in a variety of methods, including but not limited to classroom settings, telephone conferences, videoconferences, and web-based training modules.

(8) Authorized farmers shall display a sign stating that they are authorized to redeem SFMNP coupons.

(9) Authorized farmers, farmers' markets, roadside stands, and/or CSA programs shall comply with the requirements of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (parts 15, 15a and 15b of this title), and FNS Instructions as outlined in § 249.7.

(10) The State agency shall ensure that there is no conflict of interest between the State or local agency and any participating farmer, farmers' market, roadside stand and/or CSA program.

(b) *Farmer, farmers' market, roadside stand, and/or CSA program agreements.* The State agency shall ensure that all participating farmers' markets, roadside stands, and/or CSA programs enter into written agreements with the State agency. State agencies that authorize individual farmers shall also enter into written agreements with the individual farmers. The agreement must be signed by a representative who has legal authority to obligate the farmer, farmers' market, roadside stand, and/or CSA program. Agreements must include a

description of sanctions for noncompliance with SFMNP requirements and shall contain, at a minimum, the following specifications, although the State agency may determine the exact wording to be used:

(1) The farmer, farmers' market and/or roadside stand shall:

(i) Provide such information as the State agency may require for its periodic reports to FNS;

(ii) Assure that SFMNP coupons are redeemed only for eligible foods;

(iii) Provide eligible foods at or less than the price charged to other customers;

(iv) Accept SFMNP coupons within the dates of their validity and submit such coupons for payment within the allowable time period established by the State agency;

(v) In accordance with a procedure established by the State agency, mark each transacted coupon with a farmer identifier. In those cases where the agreement is between the State agency and the farmer and/or roadside stand, each transacted SFMNP coupon shall contain a farmer identifier and shall be batched for reimbursement under that identifier. In those cases where the agreement is between the State agency and the farmers' market, each transacted SFMNP coupon shall contain a farmer identifier and be batched for reimbursement under a farmers' market identifier.

(vi) Accept training on SFMNP procedures and provide training to farmers and any employees with SFMNP responsibilities on such procedures;

(vii) Agree to be monitored for compliance with SFMNP requirements, including both overt and covert monitoring;

(viii) Be accountable for actions of farmers or employees in the provision of eligible foods and related activities;

(ix) Pay the State agency for any coupons transacted in violation of this agreement;

(x) Offer SFMNP participants the same courtesies as other customers;

(xi) Comply with the nondiscrimination provisions of USDA regulations as provided in § 249.7; and

(xii) Notify the State agency if any farmer, farmers' market or roadside stand ceases operation prior to the end of the authorization period.

(2) The farmer, farmers' market and/or roadside stand shall neither:

(i) Seek restitution from SFMNP participants for coupons not paid by the State agency; nor

(ii) Issue cash change for purchases that are in an amount less than the value of the SFMNP coupon(s); nor

(iii) Collect tax on SFMNP coupon purchases.

(3) The CSA program shall:

(i) Provide such information as the State agency may require for its periodic reports to FNS;

(ii) Assure that SFMNP participants receive only eligible foods;

(iii) Provide eligible foods to their SFMNP shareholders at or less than the price charged to other customers;

(iv) Assure that the shareholder receives eligible foods that are of equitable value and quantity to their share;

(v) Assure that all funds from the State agency are used for planting of crops for SFMNP shareholders;

(vi) Provide to the State agency access to a tracking system that determines the value of the eligible foods provided and the remaining value owed to each SFMNP shareholder;

(vii) Assure that SFMNP shareholders/authorized representatives provide written acknowledgement of receipt of eligible foods;

(viii) Accept training on SFMNP procedures and provide training to farmers and any employees with SFMNP responsibilities for such procedures;

(ix) Agree to be monitored for compliance with SFMNP requirements, including both overt and covert monitoring;

(x) Be accountable for actions of farmers or employees in the provision of eligible foods and related activities;

(xi) Offer SFMNP shareholders the same courtesies as other customers;

(xii) Notify the State agency immediately when the CSA program is experiencing a problem with its crops, and may be unable to provide SFMNP shareholders with the complete amount of eligible foods agreed upon between the CSA program and the State agency;

(xiii) Comply with the nondiscrimination provisions of USDA regulations as provided in § 249.7; and

(xiv) Notify the State agency if any CSA program ceases operation prior to the end of the authorization period.

(4) The CSA program shall not substitute ineligible produce when eligible foods are not available.

(5) Neither the State agency nor the farmer, farmers' market, roadside stand, and/or CSA program has an obligation to renew the agreement. The State agency or the farmer, farmers' market, roadside stand and/or CSA program may terminate the agreement for cause after providing advance written notification.

(6) The State agency may deny payment to the farmer, farmers' market and/or roadside stand for improperly redeemed SFMNP coupons and may demand refunds for payments already made on improperly redeemed coupons.

(7) The State agency may demand a refund from any CSA program that fails to provide the full benefit to all SFMNP shareholders as specified in its contract, or that provides ineligible foods as substitutes for eligible foods.

(8) The State agency may disqualify a farmer, farmers' market, roadside stand, and/or CSA program for SFMNP violations. The farmer, farmers' market, roadside stand, and/or CSA program has the right to appeal a denial of an application to participate, a disqualification, or a SFMNP sanction by the State agency. Expiration of a contract or agreement with a farmer, farmers' market, roadside stand, and/or CSA program, and claims actions under § 249.20, are not appealable.

(9) A farmer, farmers' market, roadside stand, and/or CSA program, which commits fraud or engages in other illegal activity is liable to prosecution under applicable Federal, State or local laws.

(10) Agreements may not exceed 3 years.

(c) *Agreements with farmers' markets that do not authorize individual farmers.* Those State agencies that authorize farmers' markets but not individual farmers shall require authorized farmers' markets to enter into a written agreement with each farmer within the market that is participating in SFMNP. The State agency must set forth the required terms for the agreement and provide a sample agreement that may be used.

(d) *Annual training for farmers, farmers' market managers and/or farmers that operate a roadside stand or CSA program.* State agencies shall conduct annual training for farmers, farmers' market managers, and/or farmers who operate a CSA program in the SFMNP. The State agency must conduct interactive training for all farmers and farmers' market managers who have never previously participated in the SFMNP. After a farmer/farmers' market manager's first year of SFMNP operation, State agencies have discretion in determining the method used for annual training purposes. At a minimum, annual training shall include instruction emphasizing:

(1) Eligible food choices;

(2) Proper SFMNP coupon redemption procedures, including deadlines for submission of coupons for payment, and/or receipt of payment for CSA programs' distribution of eligible foods;

(3) Equitable treatment of SFMNP participants, including the availability of eligible foods to SFMNP participants that are of the same quality and cost as that sold to other customers;

(4) Civil rights compliance and guidelines;

(5) Guidelines for storing SFMNP coupons safely; and

(6) Guidelines for cancelling SFMNP coupons, such as punching holes or rubber-stamping.

(e) *Monitoring and review of farmers, farmers' markets, roadside stands, CSA programs and local agencies.* The State agency shall be responsible for the monitoring of farmers, farmers' markets, roadside stands, CSA programs and local agencies within its jurisdiction. This shall include developing a system for identifying high risk farmers, farmers' markets, roadside stands, and/or CSA programs, and ensuring onsite monitoring, conducting further investigation, and sanctioning of such farmers, farmers' markets, roadside stands, and/or CSA programs as appropriate. In States where both the

SFMNP and the FMNP are in operation, these monitoring/review requirements may be coordinated to avoid duplication. If the same farmers, farmers' markets, and/or roadside stands are authorized for both programs, a review conducted by one program may be counted toward the requirement for the other program.

(1) Where coupon reimbursement responsibilities are delegated to farmers' market managers, farmers' market associations, or nonprofit organizations, the State agency may establish bonding requirements for these entities. Costs of such bonding are not reimbursable administrative expenses.

(2)(i) Each State agency shall rank participating farmers, farmers' markets, roadside stands, and/or CSA programs by risk factors, and shall conduct annual, on-site monitoring of at least 10 percent of farmers, 10 percent of farmers' markets, 10 percent of roadside stands, and 10 percent of the CSA programs or one of each program model, whichever is greater, which shall include those farmers, farmers' markets, roadside stands, and/or CSA programs identified as being the highest-risk.

(ii) Mandatory high-risk indicators include:

(A) A proportionately high volume of SFMNP coupons redeemed by a farmer within a farmers' market or at a single roadside stand (as compared to other farmers within the farmers' market or within the State);

(B) Participant complaints;

(C) In the case of CSA programs, an extended or ongoing inability to provide the full SFMNP benefit to each shareholder as contracted; and

(D) Farmers, farmers' markets, roadside stands, and/or CSA programs in their first year of SFMNP operation. States are encouraged to formally establish other high-risk indicators for identifying potential problems.

(iii) If additional high-risk indicators are established, they must be set forth in the farmers, farmers' market, roadside stand, and/or CSA program agreement and in the State Plan. If application of the high-risk indicators results in fewer than 10 percent of farmers, farmers' markets, roadside stands, and/or CSA programs being designated as high-risk, the State agency shall randomly select additional farmers, farmers' markets, roadside stands, and/or CSA programs to be monitored in order to meet the 10 percent minimum. The high-risk indicators listed above generally apply to a State agency already participating in the SFMNP. A State agency participating in the SFMNP for the first time shall, in lieu of applying the high-risk indicators, randomly select 10 percent of its participating farmers, 10 percent of its participating farmers' markets, 10 percent of its participating roadside stands, and 10 percent of its participating CSA programs or at least one farmers' market, roadside stand, and/or CSA program, whichever is greater, for monitoring visits.

(3)(i) The following shall be documented for all on-site monitoring visits to farmers, farmers' markets, roadside stands, and/or CSA programs, at a minimum:

(A) Names of both the farmer, farmers' market, roadside stand, and/or CSA program and the reviewer;

(B) Date of review;

(C) Nature of problem(s) detected or the observation that the farmer, farmers' market, roadside stand, and/or CSA program appears to be in compliance with SFMNP requirements;

(D) Record of interviews with participants, market managers, farmers, and/or farmers who operate a CSA program; and

(E) Signature of the reviewer.

(ii) Reviewers are not required to notify the farmer, farmers' market, roadside stand, and/or CSA program of the monitoring visit before, during, or immediately after the visit. The State agency shall do so after a reasonable delay when necessary to protect the identity of the reviewer(s) or the integrity of the investigation.

(iii) In instances where the farmer, farmers' market, roadside stand, and/or CSA program will be permitted to continue participating in the SFMNP after being informed of any deficiencies detected by the monitoring visit, the farmer, farmers' market, roadside stand, and/or CSA program shall provide plans as to how the deficiencies will be corrected.

(4) At least every 2 years, the State agency must review all local agencies within its jurisdiction.

(f) *Control of SFMNP coupons.* The State agency must:

(1) Control and provide accountability for the receipt and issuance of SFMNP coupons;

(2) Ensure that there is secure transportation and storage of unissued SFMNP coupons; and

(3) Design and implement a system of review of SFMNP coupons to detect errors. At a minimum, the errors the system must detect are a missing participant signature (if such signature is required by the State agency), a missing farmer and/or market identification, and redemption by a farmer outside of the valid date. The State agency must have procedures in place to reduce the number of errors in transactions.

(g) *Payment to farmers, farmers' markets, roadside stands, and/or CSA programs.* The State agency must ensure that farmers, farmers' markets, roadside stands, and/or CSA programs are promptly paid for food costs.

(h) *Reconciliation of SFMNP coupons.* The State agency shall identify the disposition of all SFMNP coupons as validly redeemed, lost or stolen, expired, or not matching issuance records. Validly redeemed SFMNP coupons are those that are issued to a valid participant and redeemed by an authorized farmer, farmers' market, and/or roadside stand within valid dates. SFMNP coupons that were redeemed but cannot be traced to a valid participant or authorized farmer, farmers' market, and/or roadside stand shall be subject to claims action in accordance with § 249.20.

(1) If the State agency elects to replace lost, stolen or damaged SFMNP coupons, it must describe its system for doing so in the State Plan.

(2) The State agency must use uniform SFMNP coupons within its jurisdiction.

(3) SFMNP coupons must include, at a minimum, the following information:

(i) The last date by which the participant may use the coupon. This date shall be no later than November 30 of each year.

(ii) A date by which the farmer or farmers' market must submit the coupon for payment. When establishing this date, State agencies shall take into consideration the date financial statements are due to the FNS, and allow time for the corresponding coupon reconciliation that must be done by the State agency prior to submission of financial statements. Financial statements are due to FNS by January 30.

(iii) A unique and sequential serial number.

(iv) A denomination (dollar amount).

(v) A farmer identifier for the redeeming farmer when agreements are between the State agency and the farmer.

(vi) In those instances where State agencies have agreements with farmers' markets, there must be a farmer identifier on each coupon and a market identifier on the cover of coupons that are batched by the market manager for reimbursement.

(i) *Instructions to participants.* Each participant must receive instruction on the redemption of the SFMNP coupons, or participation in a CSA program (where applicable), including, but not limited to:

(1) A list of names and addresses of authorized farmers, farmers' markets, and/or roadside stands at which SFMNP coupons may be redeemed, or procedures on the home-delivery process;

(2) Procedures to designate a proxy;

(3) The name and address of the authorized farmer of the CSA program, and locations of distribution sites;

(4) A description of eligible foods and the prohibition against cash change for SFMNP purchases of eligible foods;

(5) A description of eligible foods that will be provided through the CSA program;

(6) A schedule outlining a timeframe for distribution of the eligible foods from the CSA program; and

(7) An explanation of his/her right to complain about improper farmer, farmers' market, roadside stand, and/or CSA program practices with regard to SFMNP responsibilities and the process for doing so.

(j) *Participant and farmer, farmers' market, roadside stand, and/or CSA program complaints.* The State agency must have procedures that document

the handling of complaints from participants and farmers/farmers' markets, roadside stands, and/or CSA programs. Complaints of civil rights discrimination shall be handled in accordance with § 249.7(b).

(k) *Participant and farmer, farmers' market, roadside stand, and/or CSA program sanctions.* (1) The State agency must establish policies which determine the type and level of sanctions to be applied against participants and farmers, farmers' markets, roadside stands, and/or CSA programs based upon the severity and nature of the SFMNP violations observed, and such other factors as the State agency determines appropriate, such as whether repeated offenses have occurred over a period of time. Farmers, farmers' markets, roadside stands, and/or CSA programs may be sanctioned, disqualified, or both, when appropriate. Sanctions may include fines for improper SFMNP coupon redemption and the penalties outlined in § 249.20, in the case of deliberate fraud.

(2) In those instances where compliance purchases are conducted, the results of covert compliance purchases can be a basis for farmer, farmers' market, and/or roadside stand sanctions.

(3) A farmer, farmers' market, roadside stand, and/or CSA program committing fraud or other unlawful activities are liable to prosecution under applicable Federal, State or local laws.

(4) State agency policies must ensure that a farmer that is disqualified from the SFMNP at one market, roadside stand, or CSA program shall not participate in the SFMNP at any other farmers' market, roadside stand or CSA program in the State's jurisdiction during the disqualification period.

(5) State agency policies must ensure that a farmer, farmers' market, roadside stand, and/or CSA program that is disqualified from participating in the WIC Farmers' Market Nutrition Program is also disqualified from participating in the SFMNP in the State's jurisdiction during the disqualification period.

[71 FR 74630, Dec. 12, 2006, as amended at 74 FR 48375, Sept. 23, 2009]

### § 249.11 Financial management system.

(a) *Disclosure of expenditures.* The State agency must maintain a financial management system that provides accurate, current and complete disclosure of the financial status of the SFMNP. This must include an accounting for all property and other assets and all SFMNP funds received and expended each fiscal year.

(b) *Internal controls.* The State agency shall maintain effective controls over and accountability for all SFMNP funds. The State agency must have effective internal controls to ensure that expenditures financed with SFMNP funds are authorized and properly chargeable to the SFMNP.

(c) *Record of expenditures.* The State agency must maintain records that adequately identify the source and use of funds expended for SFMNP activities. These records must contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays, and income.

(d) *Payment of costs.* The State agency must implement procedures that ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost principles and standard provisions of this part, part 3016 of this title, and FNS guidelines and Instructions.

(e) *Identification of obligated funds.* The State agency must implement procedures that accurately identify obligated SFMNP funds at the time the obligations are made.

(f) *Resolution of audit findings.* The State agency shall implement procedures that ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Reconciliation of food instruments.* The State agency must reconcile SFMNP coupons in accordance with § 249.10(h).

(h) *Transfer of cash.* The State agency must establish the timing and amounts of its cash draws against its Letter of Credit in accordance with 31 CFR part 205.

**§ 249.12 SFMNP costs.**

(a) *General*—(1) *Composition of allowable costs.* In general, a cost item will be deemed allowable if it is reasonable and necessary for SFMNP purposes and otherwise satisfies allowability criteria set forth in part 3016.22 of this title and this part. SFMNP purposes include the administration and operation of the SFMNP. Allowable SFMNP costs may be classified as follows:

(i) *Food costs and administrative costs.* Food costs are the costs of eligible foods provided to SFMNP participants. Administrative costs are the costs associated with providing SFMNP benefits and services to participants and generally administering the SFMNP. Specific examples of allowable administrative costs are listed in paragraph (b) of this section. A State agency may use up to 10 percent of its total Federal SFMNP grant to cover administrative costs. Any costs incurred for food and/or administration above the Federal grant level will be the State agency's responsibility.

(ii) *Direct and indirect costs.* Direct costs are food and administrative costs incurred specifically for the SFMNP. Indirect costs are administrative costs that benefit multiple programs or activities, and cannot be identified to any one program or activity without effort disproportionate to the results achieved. In accordance with the provisions of part 3016 of this title, a claim for reimbursement of indirect costs shall be supported by an approved allocation plan for the determination of such costs. An indirect cost rate developed through such an allocation plan may not be applied to a base that includes food costs.

(2) *Costs allowable with prior approval.* A State or local agency must obtain prior approval in accordance with part 3016.22 of this title before charging to the SFMNP any capital expenditures and other cost items designated by part 3016.22 of this title as requiring such approval.

(3) *Unallowable costs.* Costs that are not reasonable and necessary for SFMNP purposes, or that do not otherwise satisfy the cost principles of part 3016.22 of this title, are unallowable. Notwithstanding any other provision of part 3016 of this title or this Part, the cost of constructing or operating a farmers' market is unallowable. The use of SFMNP funds to supplement congregate meal programs is prohibited. Unallowable costs may never be claimed for Federal reimbursement.

(b) *Specified allowable administrative costs.* Allowable administrative costs include the following:

(1) The costs associated with administration and start-up;

(2) The costs associated with the provision of nutrition education that meets the requirements of § 249.9;

(3) The costs of SFMNP coupon issuance, or participant education covering proper coupon redemption procedures;

(4) The cost of eligibility determinations and outreach services;

(5) The costs associated with the coupon and market management process, such as printing SFMNP coupons, processing redeemed coupons, purchasing bags or other containers to be used in home-delivery and bulk purchase operations, and training farmers, market managers, and/or farmers who operate CSA programs on SFMNP operations;

(6) The cost of monitoring and reviewing Program operations;

(7) The cost of SFMNP training;

(8) The cost of required reporting and recordkeeping;

(9) The cost of determining which local sites will be utilized;

(10) The cost of recruiting and authorizing farmers, farmers' markets, roadside stands, and/or CSA programs to participate in the SFMNP;

(11) The cost of preparing contracts for farmers, farmers' markets, roadside stands, and/or CSA programs;

(12) The cost of developing a data processing system for redemption and reconciliation of SFMNP coupons;

(13) The cost of designing program training and informational materials; and

(14) The cost of coordinating SFMNP responsibilities between designated administering agencies.

**§ 249.13 Program income.**

*Program income* means gross income the State agency earns from grant supported activities. It includes fees for services performed and receipts from the use or rental of real or personal

property acquired with Federal grant funds, but does not include proceeds from the disposition of such property. The State agency must retain Program income earned during the agreement period and use it for Program purposes in accordance with the addition method described in part 3016.25(g)(2) of this title. Fines, penalties or assessments paid by local agencies or farmers, farmers' markets, roadside stands, and/or CSA program are also deemed to be Program income. The State agency must ensure that the sources and applications of Program income are fully documented.

### § 249.14 Distribution of funds to State agencies.

(a) *State Plan and agreement.* As a prerequisite to the receipt of Federal funds, a State agency must have its State Plan approved and must execute an agreement with FNS in accordance with § 249.3(c).

(b) *Distribution of SFMNP funds to previously participating State agencies.* Provided that sufficient SFMNP funds are available, each State agency that participated in the SFMNP in any prior fiscal year shall receive not less than the amount of funds the State agency received in the most recent fiscal year in which it received funding, if it otherwise complies with the requirements established in this Part.

(c) *Ratable reduction.* If amounts appropriated for any fiscal year for grants under the SFMNP are not sufficient to pay to each previously participating State agency at least an amount as identified in paragraph (b) of this section, each State agency's grant must be ratably reduced. However, to the extent permitted by available funds, each State agency shall receive at least $75,000 or the amount that the State agency received for the most recent prior fiscal year in which the State participated, if that amount is less than $75,000.

(d) *Expansion of participating State agencies and establishment of new State agencies.* Any SFMNP funds remaining for allocation after meeting the requirements of paragraph (b) of this section shall be allocated in the following manner:

(1) Of the remaining funds, 75 percent shall be made available to State agencies already participating in the SFMNP that wish to serve additional participants or increase the current benefit level. If this amount is greater than that necessary to satisfy all State Plans approved for expansion, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(2) of this section.

(2) Of the remaining funds, 25 percent shall be made available to State agencies that have not participated in the SFMNP in any prior fiscal year. If this amount is greater than that necessary to satisfy the approved State Plans for new States, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(1) of this section. FNS reserves the right not to fund every State agency with an approved State Plan.

(e) *Expansion for current State agencies.* In providing funds to State agencies that participated in the SFMNP in the previous fiscal year, FNS must consider on a case-by-case basis the following factors:

(1) Whether the State agency utilized at least 80 percent of its prior year food grant. States that did not spend at least 80 percent of their prior year food grant may still be eligible for expansion funding if, in the judgment of FNS, good cause existed which was beyond the management control of the State, such as severe weather conditions or unanticipated decreases in participant caseload;

(2) Documentation supporting the funds expansion request as outlined in § 249.4(a)(23); and

(3) Whether the State agency currently issues a participant benefit greater than $50. Such State agencies will not be eligible to receive additional SFMNP funds for expansion until the maximum participant benefit no longer exceeds $50.

(f) *Funding of new State agencies.* Funds will be awarded to new SFMNP State agencies in accordance with § 249.5.

(g) *Administrative funding.* A State agency will have available for administrative costs an amount not greater than 10 percent of the total SFMNP funds it receives.

(h) *Recovery of unused funds.* State agencies must return to FNS any unexpended funds made available for a given fiscal year by February 1 of the following fiscal year.

### § 249.15 Closeout procedures.

(a) *General.* State agencies must submit to FNS a final closeout report for the fiscal year on a form prescribed by FNS and on a date specified by FNS.

(b) *Grant closeout procedures.* When grants to State agencies are terminated, the following procedures shall be followed in accordance with part 3016 of this title.

(1) FNS may disqualify a State agency's participation under the SFMNP, in whole or in part, or take such remedies as may be appropriate, whenever FNS determines that the State agency failed to comply with the conditions prescribed in this part, in its Federal-State Agreement, or in FNS guidelines and Instructions. FNS will promptly notify the State agency in writing of the disqualification together with the effective date.

(2) FNS may terminate a grant when both parties agree that continuation under the SFMNP would not produce beneficial results commensurate with the further expenditure of funds.

(3) Upon termination of a grant, the affected agency may not incur new obligations after the effective date of the disqualification, and must cancel as many outstanding obligations as possible. FNS will allow full credit to the State agency for the Federal share of the noncancellable obligations properly incurred by the State agency prior to disqualification, and the State agency shall do the same for farmers, farmers' markets, roadside stands, and/or CSA programs.

(4) A grant closeout shall not affect the retention period for, or Federal rights of access to, SFMNP records as specified in § 249.23(a). The closeout of a grant does not affect the responsibilities of the State agency regarding property or with respect to any SFMNP income for which the State agency is still accountable.

(5) A final audit is not a required part of the grant closeout and should not be needed unless there are problems with the grant that require attention. If FNS considers a final audit to be necessary, it shall so inform OIG. OIG will be responsible for ensuring that necessary final audits are performed and for any necessary coordination with other Federal cognizant audit agencies or State or local auditors. Audits performed in accordance with § 249.18 may serve as final audits providing such audits meet the needs of requesting agencies. If the grant is closed out without an audit, FNS reserves the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

### § 249.16 Administrative appeal of State agency decisions.

(a) *Requirements.* The State agency shall provide a hearing procedure whereby applicants, participants, local agencies and farmers, farmers' markets, roadside stands, and/or CSA programs adversely affected by certain actions of the State agency may appeal those actions.

(1) *What may be appealed.*

(i) An applicant may appeal denial of certification of SFMNP benefits, except that no appeal is available if certification is denied solely because of the lack of sufficient funding to provide SFMNP benefits to all eligible applicants.

(ii) A participant may appeal disqualification/suspension of SFMNP benefits.

(iii) A local agency may appeal an action of the State agency disqualifying it from participating in the SFMNP.

(iv) A farmer, farmers' market, roadside stand, and/or CSA program may appeal an action of the State agency denying its application to participate, imposing a sanction, or disqualifying it from participating in the SFMNP.

(2) *What may not be appealed.* Expiration of a contract or agreement shall not be subject to appeal.

(b) *Time limit for request.* The State or local agency must provide individuals, local agencies, farmers, farmers' markets, roadside stands, and/or CSA programs a reasonable period of time to request a fair hearing. Such time limit must not be less than 30 days from the

date the agency mails or otherwise issues the notice of adverse action.

(c) *Postponement pending decision.* An adverse action may, at the State agency's option, be postponed until a decision in the appeal is rendered.

(1) In a case where an adverse action affects a local agency or farmer, farmers' market, roadside stand, and/or CSA program, a postponement is appropriate where the State agency finds that participants would be unduly inconvenienced by the adverse action. In addition, the State agency may determine other relevant criteria to be considered in deciding whether or not to postpone an adverse action.

(2) Applicants who are denied benefits at initial certification may appeal the denial, but must not receive SFMNP benefits while awaiting the hearing. Participants who appeal the termination of benefits within the period of time provided under paragraph (b) of this section must continue to receive Program benefits until the hearing official reaches a decision or the certification period expires, whichever occurs first. This does not apply to participants whose certification period has already expired or who become otherwise ineligible for SFMNP benefits. Participants who become ineligible during a certification, or whose certification period expires, may appeal the termination, but must not receive benefits while awaiting the hearing.

(d) *Procedure.* The State agency hearing procedure shall at a minimum provide the participant, local agency or farmer, farmers' market, roadside stand, and/or CSA program with the following:

(1) Written notification of the adverse action, the cause(s) for the action, and the effective date of the action, including the State agency's determination of whether the action shall be postponed under paragraph (c) of this section if it is appealed, and the opportunity for a hearing. Such notification shall be provided within a reasonable timeframe established by the State agency and in advance of the effective date of the action.

(2) The opportunity to appeal the action within the time specified by the State agency in its notification of adverse action.

(3) Adequate advance notice of the time and place of the hearing to provide all parties involved sufficient time to prepare for the hearing.

(4) The opportunity to present its case and at least one opportunity to reschedule the hearing date upon specific request. The State agency may set standards on how many hearing dates can be scheduled, provided that a minimum of two hearing dates is allowed.

(5) The opportunity to confront and cross-examine adverse witnesses.

(6) The opportunity to be represented by counsel or, in the case of a participant appeal, by a representative designated by the participant, if desired.

(7) The opportunity to review the case record prior to the hearing.

(8) An impartial decision maker, whose decision as to the validity of the State agency's action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the SFMNP. The basis for the decision shall be stated in writing, although it need not amount to a full opinion or contain formal findings of fact and conclusions of law.

(9) Written notification of the decision in the appeal, within 60 days from the date of receipt of the request for a hearing by the State agency.

(e) *Continuing responsibilities.* When a farmer, farmers' market, roadside stand, CSA program, and/or local agency appeals an adverse action (and is permitted to continue in the SFMNP while its appeal is pending), it continues to be responsible for compliance with the terms of the written agreement or contract with the State agency.

(f) *Judicial review.* If a State level decision is rendered against the participant, local agency, farmer, farmers' market, roadside stand, and/or CSA program and the appellant expresses an interest in pursuing a further review of the decision, the State agency shall explain any further State level review of the decision and any available State level rehearing process. If neither is available or both have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

(g) *Additional appeals procedures for State agencies that authorize farmers'*

*markets and not individual farmers.* A State agency that authorizes farmers' markets and not individual farmers shall ensure that procedures are in place to be used when a farmer seeks to appeal an action of a farmers' market or association denying the farmer's application to participate, or sanctioning or disqualifying the farmer. The procedures shall be set forth in the State Plan and in the agreements entered into by the State agency and the farmers' market and the farmers' market and the farmer.

## Subpart F—Monitoring and Review of State Agencies

### § 249.17 Management evaluations and reviews.

(a) *General.* FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of SFMNP objectives as provided under these regulations, the State Plan, and the written agreement with FNS. FNS will:

(1) Provide assistance to State agencies in discharging this responsibility;

(2) Establish standards and procedures to determine how well the objectives of this part are being accomplished; and

(3) Implement sanction procedures as warranted by State SFMNP performance.

(b) *Responsibilities of FNS.* FNS will establish evaluation procedures to determine whether State agencies carry out the purposes and provisions of this part, the State Plan, and the written agreement with FNS. As a part of the evaluation procedure, FNS will review audits to ensure that the SFMNP has been included in audit examinations at a reasonable frequency. These evaluations shall also include reviews of selected local agencies, and on-site reviews of selected farmers, farmers' markets, roadside stands, and community supported agriculture programs. These evaluations will measure the State agency's progress toward meeting the objectives outlined in its State Plan and the State agency's compliance with these regulations.

(1) FNS may withhold up to 10 percent of the State agency's total SFMNP grant if FNS determines that the State agency has:

(i) Failed, without good cause, to demonstrate efficient and effective administration of its SFMNP; or

(ii) Failed to comply with the requirements contained in this section or the State Plan.

(2) Sanctions imposed upon a State agency by FNS in accordance with this section (but not claims for repayment assessed against a State agency) may be appealed in accordance with the procedures established in § 249.20(a). Before carrying out any sanction against a State agency, the following procedures will be followed:

(i) FNS will notify the chief departmental officer of the administering agency in writing of the deficiencies found and of FNS' intention to withhold administrative funds unless an acceptable corrective action plan is submitted by the State agency to FNS within 45 days after mailing of notification.

(ii) The State agency shall develop a corrective action plan, including timeframes for implementation to address the deficiencies and prevent their future recurrence.

(iii) If the corrective action plan is acceptable, FNS will notify the chief departmental officer of the administering agency in writing within 30 days of receipt of the plan. The letter will advise the State agency of the sanctions to be imposed if the corrective action plan is not implemented according to the schedule set forth in the approved plan.

(iv) Upon notification from the State agency that corrective action has been taken, FNS will assess such action and, if necessary, perform a follow-up review to determine if the noted deficiencies have been corrected. FNS will then advise the State agency of whether the actions taken are in compliance with the corrective action plan, and whether the deficiency is resolved or further corrective action is needed. Compliance buys can be required if, during FNS management evaluations by regional offices, a State agency is found to be out of compliance with its responsibility to monitor and review farmers, farmers' markets, roadside

stands, and community supported agriculture programs.

(v) If an acceptable corrective action plan is not submitted within 45 days, or if corrective action is not completed according to the schedule established in the corrective action plan, FNS may withhold the award of SFMNP administrative funds. If the 45-day warning period ends in the fourth quarter of a fiscal year, FNS may elect not to withhold funds until the next fiscal year. In such an event, FNS will notify the chief departmental officer of the administering State agency.

(vi) If compliance is achieved before the end of the fiscal year in which the SFMNP administrative funds are withheld, the funds withheld may be restored to the State agency. FNS is not required to restore funds withheld beyond the end of the fiscal year for which the funds were initially awarded.

(c) *Responsibilities of State agencies.* The State agency is responsible for meeting the following requirements:

(1) The State agency must establish evaluation and review procedures and document the results of such procedures. The procedures must include, but are not limited to:

(i) Conducting annual monitoring reviews of participating farmers' markets, roadside stands, and community supported agriculture programs. This includes on-site reviews of a minimum of 10 percent of farmers and 10 percent of each type of authorized outlet (farmers' markets, roadside stands, and community supported agriculture programs), and includes those farmers and authorized outlets identified as being at the highest risk. The first year of operation in the SFMNP shall be considered a high-risk indicator. More frequent reviews may be performed, as the State agency deems necessary. In States where both the SFMNP and the WIC Farmers' Market Nutrition Program are in operation, these reviews may be coordinated to avoid duplication. A review by one program may be counted by the other program toward the monitoring requirement, provided that appropriate sanction action is taken for all violations found.

(ii) Conducting monitoring reviews of all local agencies within the State agency's jurisdiction at least once every 2 years. Monitoring of local agencies shall encompass, but not be limited to, evaluation of management, accountability, certification, nutrition education, financial management systems, and coupon and/or CSA program management systems. When the State agency conducts a local agency review outside of the SFMNP season, a review of documents and procedural plans of the SFMNP, rather than actual SFMNP activities, is acceptable.

(iii) Instituting the necessary follow-up procedures to correct identified problem areas.

(2) On its own initiative or when required by FNS, the State agency must provide special reports on SFMNP activities, and take positive action to correct deficiencies in SFMNP operations.

### § 249.18 Audits.

(a) *Federal access to information.* The Secretary of the U.S. Department of Agriculture, the Comptroller General of the United States, or any of their duly authorized representatives, or duly authorized State auditors shall have access to any books, documents, papers, and records of the State agency and their contractors, for the purpose of making surveys, audits, examinations, excerpts, and transcripts.

(b) *State agency response.* The State agency may take exception to particular audit findings and recommendations. The State agency shall submit a response or statement to FNS as to the action taken or planned regarding the findings. A proposed corrective action plan developed and submitted by the State agency must include specific time frames for its implementation and for completion of the correction of deficiencies and problems leading to the deficiencies.

(c) *Corrective action.* FNS will determine whether SFMNP deficiencies identified in an audit have been adequately corrected. If additional corrective action is necessary, FNS shall schedule a follow-up review, allowing a reasonable time for such corrective action to be taken.

(d) *State sponsored audits.* State and local agencies must conduct independent audits in accordance with parts 3015, 3016 (§ 3016.26 of this title), or

3051 of this title, as applicable. A State or local agency may elect to obtain either an organization-wide audit or an audit of the Program if it qualifies to make such an election under applicable regulations.

### § 249.19 Investigations.

(a) *Authority.* FNS may make an investigation of any allegation of noncompliance with this part and FNS guidelines and instructions. The investigation may include, where appropriate, a review of pertinent practices and policies of any State and local agency, the circumstances under which the possible noncompliance with this Part occurred, and other factors relevant to a determination as to whether the State and local agency has failed to comply with the requirements of this Part.

(b) *Confidentiality.* No State or local agency, participant, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this Part because that person has made a complaint or formal allegation, or has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purposes of this Part, including the conducting of any investigation, hearing, or judicial proceeding.

## Subpart G—Miscellaneous Provisions

### § 249.20 Claims and penalties.

(a) *Claims against State agencies.* (1) If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any SFMNP funds provided to a State agency for food or administrative purposes were, through State agency negligence or fraud, misused or otherwise diverted from SFMNP purposes, a formal claim will be assessed by FNS against the State agency. The State agency must pay promptly to FNS a sum equal to the amount of the administrative funds or the value of coupons and/or eligible foods so misused or diverted.

(2) If FNS determines that any part of the SFMNP funds received, coupons printed, and/or eligible foods otherwise lost by a State agency were lost as a result of theft, embezzlement, or unexplained causes, the State agency must, on demand by FNS, pay to FNS a sum equal to the amount of the money or the value of the SFMNP funds or coupons/eligible foods so lost.

(3) The State agency will have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

(4) FNS is authorized to establish claims against a State agency for unreconciled SFMNP coupons, and/or for failure to comply with the terms of duly executed CSA program contracts or agreements. When a State agency can demonstrate that all reasonable management efforts have been devoted to reconciliation and 99 percent or more of the SFMNP coupons issued, or of the eligible foods contracted for delivery by the CSA program, have been accounted for by the reconciliation process, FNS may determine that the reconciliation process has been completed to satisfaction.

(b) *Interest charge on claims against State agencies.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit within 30 days from the date of the first demand letter from FNS, FNS will assess an interest (late) charge against the State agency. Interest accrual shall begin on the 31st day after the date of the first demand letter, bill or claim, and shall be computed monthly on any unpaid balance as long as the debt exists. From a source other than the SFMNP, the State agency shall provide the funds necessary to maintain SFMNP operations at the grant level authorized by FNS.

### § 249.21 Procurement and property management.

(a) *Requirements.* State agencies must comply with the requirements of part 3016 of this title for procurement of supplies, equipment and other services

with SFMNP funds. These requirements are adopted for use by FNS to ensure that such materials and services are obtained for the SFMNP in an effective manner and in compliance with the provisions of applicable laws and executive orders.

(b) *Contractual responsibilities.* The standards contained in part 3016 of this title do not relieve the State agency of the responsibilities arising under its contracts. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the SFMNP. This includes, but is not limited to, disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

(c) *State regulations.* The State agency may use its own procurement regulations provided that:

(1) Such regulations reflect applicable State and local regulations; and

(2) Any procurements made with SFMNP funds adhere to the standards set forth in part 3016 of this title.

(d) *Property acquired with program funds.* State and local agencies shall observe the standards prescribed in part 3016 of this title in their utilization and disposition of real property and equipment acquired in whole or in part with SFMNP funds.

### § 249.22 Nonprocurement debarment/suspension, drug-free workplace, and lobbying restrictions.

The State agency must ensure compliance with the requirements of FNS' regulations governing nonprocurement debarment/suspension (part 3017 of this title) and drug-free workplace (part 3021 of this title), as well as FNS' regulations governing restrictions on lobbying (part 3018 of this title), where applicable.

### § 249.23 Records and reports.

(a) *Recordkeeping requirements.* Each State agency must maintain full and complete records concerning SFMNP operations. Such records must comply with part 3016 of this title and the following requirements:

(1) Records must include, but not be limited to, information pertaining to certification, financial operations, SFMNP coupon issuance and redemption, authorized outlet (farmers, farmers' markets, and CSA program) agreements, authorized outlet monitoring, CSA program agreements, invoices, delivery receipts, equipment purchases and inventory, nutrition education, fair hearings, and civil rights procedures.

(2) All records must be retained for a minimum of 3 years following the date of submission of the final expenditure report for the period to which the report pertains. If any litigation, claim, negotiation, audit or other action involving the records has been started before the end of the 3-year period, the records must be kept until all issues are resolved, or until the end of the regular 3-year period, whichever is later. If FNS deems any of the SFMNP records to be of historical interest, it may require the State agency to forward such records to FNS whenever the State agency is disposing of them.

(3) Records for nonexpendable property acquired in whole or in part with SFMNP funds must be retained for three years after its final disposition.

(4) All records must be available during normal business hours for representatives of FNS of the Comptroller General of the United States to inspect, audit, and copy. Any reports resulting from such examinations shall not divulge names of individuals.

(b) *Financial and participant reports.* State agencies must submit financial and SFMNP performance data on a yearly basis as specified by FNS. Such information must include, but shall not be limited to:

(1) Number of participants served with Federal SFMNP funds;

(2) Value of coupons issued and/or eligible foods ordered under CSA programs;

(3) Value of coupons redeemed and/or eligible foods provided to participants under CSA programs; and

(4) Number of authorized outlets by type; i.e., farmers, farmers' markets, roadside stands, and CSA programs.

(c) *Source documentation.* To be acceptable for audit purposes, all financial and SFMNP performance reports must be traceable to source documentation.

(d) *Certification of reports.* Financial and SFMNP reports must be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(e) *Use of reports.* FNS will use State agency reports to measure progress in achieving objectives set forth in the State Plan, and this part, or other State agency performance plans. If it is determined, through review of State agency reports, SFMNP or financial analysis, or an audit, that a State agency is not meeting the objectives set forth in its State Plan, FNS may request additional information including, but not limited to, reasons for failure to achieve these objectives.

### § 249.24 Data safeguarding procedures.

FNS and SFMNP State agencies will take reasonable steps to keep applicant and participant information/records private to the extent provided by law. Such steps include a requirement for each State agency to restrict the use or disclosure of information obtained from SFMNP applicants and participants to:

(a) Persons directly connected with the administration or enforcement of the SFMNP, including persons investigating or prosecuting violations in the SFMNP under Federal, State or local authority;

(b) Representatives of public organizations designated by the chief State agency officer (or, in the case of Indian Tribal governments acting as SFMNP State agencies, the governing authority) that administer food, nutrition, or other assistance programs that serve persons categorically eligible for the SFMNP. The State agency must execute a written agreement with each such designated organization:

(1) Specifying that the receiving organization may employ SFMNP information only for the purpose of establishing the eligibility of SFMNP applicants and participants for food, nutrition, or other assistance programs that it administers and conducts outreach to SFMNP applicants and participants for such programs; and

(2) Containing the receiving organization's assurance that it will not, in turn, disclose the information to a third party.

(c) The Comptroller General of the United States for audit and examination authorized by law.

### § 249.25 Other provisions.

(a) *No aid reduction.* Any programs for which a grant is received under this part shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 as amended (7 U.S.C. 2011, et seq.) and to any other Federal or State food or nutrition assistance program.

(b) *Statistical information.* FNS reserves the right to use information obtained under the SFMNP in a summary, statistical or other form that does not identify particular individuals.

(c) *Exclusion of benefits in determining eligibility for other programs.* The value of any benefit provided to any eligible SFMNP recipient shall not be considered to be income or resources for any purposes under any Federal, State or local law.

[71 FR 74630, Dec. 12, 2006, as amended at 74 FR 48375, Sept. 23, 2009]

### § 249.26 SFMNP information.

(a) Any person who wishes information, assistance, records or other public material must request such information from the State agency, or from the FNS Regional Office serving the appropriate State as listed below:

(1) Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont: U.S. Department of Agriculture, FNS, Northeast Region, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1066.

(2) Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia: U.S. Department of Agriculture, FNS, Mid-Atlantic Region, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, New Jersey, 08691–1598.

(3) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina,

South Carolina, Tennessee: U.S. Department of Agriculture, FNS, Southeast Region, 61 Forsyth Street, SW., Room 8T36, Atlanta, Georgia 30303.

(4) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: U.S. Department of Agriculture, FNS, Midwest Region, 77 West Jackson Boulevard—20th floor, Chicago, Illinois 60604–3507.

(5) Arkansas, Louisiana, New Mexico, Oklahoma, Texas: U.S. Department of Agriculture, FNS, Southwest Region, 1100 Commerce Street, Room 555, Dallas, Texas 75242.

(6) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming: U.S. Department of Agriculture, FNS, Mountain Plains Region, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

(7) Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory of the Pacific Islands, the Northern Mariana Islands, Washington: U.S. Department of Agriculture, FNS, Western Region, 550 Kearny Street, Room 400, San Francisco, California 94108.

(b) Inquiries pertaining to the SFMNP administered by a federally recognized Indian tribal organization (ITO) should be addressed to the FNS Regional Office responsible for the geographic State in which that ITO is located.

### § 249.27 OMB Control Number.

The information collection requirements for part 249 have been reviewed and approved by the Office of Management and Budget (OMB). The OMB approval number is 0584–0541.

[72 FR 13671, Mar. 23, 2007]