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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 226

[FNS–2007–0022]

RIN 0584–AD15

Child and Adult Care Food Program: At-Risk Afterschool Meals in Eligible States

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the Child and Adult Care Food Program (CACFP) regulations to implement provisions from the Agricultural Risk Protection Act of 2000, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2002, the Consolidated Appropriations Act of 2008 the Omnibus Appropriations Act of 2009 and the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2010, that authorize reimbursement to eligible States for a meal (normally a supper) served by at-risk afterschool care programs in eligible States.

DATES: *Effective Date:* This final rule is effective May 3, 2010.

FOR FURTHER INFORMATION CONTACT: Melissa Rothstein, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302, phone (703) 305–2590.

SUPPLEMENTARY INFORMATION:

I. Background

In the Department's at-risk afterschool care program, afterschool meals are served to children participating in eligible afterschool care programs under

CACFP in selected States, as authorized by law. At-risk afterschool meals and snacks are available to children through age 18 (or individuals of any age if disabled) who are participating in an afterschool care program under the CACFP. At-risk care programs under the CACFP are those operated at sites located in an area in which at least 50 percent of local school children are certified eligible for free or reduced price meals.

Although reimbursement for at-risk afterschool snacks is available in all States, at-risk afterschool meals are only available in States authorized by section 17(r)(5) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1766 (r)(5))—currently, Connecticut, Delaware, Illinois, Maryland, Michigan, Missouri, Nevada, New York, Oregon, Pennsylvania, Vermont, West Virginia, Wisconsin, and the District of Columbia. To be eligible, afterschool care programs must be organized primarily to provide care to at-risk school children after school, or on weekends, holidays, or school vacations and must provide educational or enrichment activities. Programs may participate only if the basic purpose is to provide afterschool care and if the program is open to all eligible children. FNS supports physical activity as an important component in encouraging healthy lifestyle choices to children and in addressing childhood obesity. However, sports and athletic teams that limit membership for reasons other than space, security, or licensing requirements may not be approved for participation. At-risk meals and snacks must be served free of charge to the participants and are reimbursed at the applicable free rates for meals and snacks.

On March 27, 2008 (73 FR 16213), FNS published a proposed rule to add new definitions of “at-risk afterschool meal” and “at-risk afterschool snack” to the CACFP regulations. The rule also proposed to add “meals” to the at-risk afterschool component and revise the requirements for Program participation to reflect the provision of at-risk afterschool snack and at-risk afterschool meal provision.

II. Discussion of Public Comments

The comment period began on March 27, 2008, and ended May 27, 2008. Five comments were received on the proposed rule, four of which generally

supported the proposed rule. One commenter represented a State agency, three represented advocacy groups and one was an individual citizen.

Three commenters objected to the clause “with State agency approval” that was added in the proposed rule to 7 CFR 226.17a(m)(1) and (2), which would give State agencies the discretion to approve snack and meal service during weekends and vacations during the regular school year. The commenters were concerned that State agencies should not have the authority to deny meal service on weekends or school holidays and therefore requested that FNS remove the clause “with State agency approval” from any other corresponding reference.

Centers and sponsors of centers that wish to participate in CACFP must demonstrate, to the satisfaction of the State agency through Program applications, agreements and regular reviews by the State agency, that an institution has the financial viability, administrative capability and Program accountability to properly operate CACFP. If the State agency determines that an institution is unable to properly manage weekend or vacation meals, the State agency may deny the request to serve those meals. FNS deems this process a necessary step in ensuring the ongoing integrity of the CACFP. Therefore, this final rule retains the provision as set forth in the proposed rule.

Three commenters asked that USDA clearly state in the final regulations that afterschool meals can be served at any point during the afterschool program. They stated that the second CACFP integrity rule gave State agencies too much authority to determine appropriate serving times for CACFP, and that sponsors of at-risk afterschool care centers should be able to set their own meal service timeframes.

Meal service requirements, which were a component of an interim rule, “Child and Adult Care Food Program; Improving Management and Program Integrity,” published September 1, 2004 (69 FR 53501), provided State agencies with broad authority to impose limits on the duration of meal services and the time between meal services. The proposed rule did not alter State agencies' authority in the existing provisions of the interim rule,

authorized at 7 CFR 226.20(k). They will therefore remain unchanged.

III. Procedural Matters

Executive Order 12866

This rule has been determined to be significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

Regulatory Impact Analysis

Regulatory Impact Analysis

The Regulatory Impact Analysis completed for this final rule is available from: Melissa Rothstein, Chief Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302, phone (703) 305-2590. The analysis is summarized below.

Need for Action

The Child and Adult Care Food Program's at-risk afterschool meals component, authorized by the Agricultural Risk Protection Act of 2000 (Pub. L. 106-224) (42 U.S.C. 1766(r)), has been governed by FNS guidelines since its creation. This rule will align CACFP regulations to statutory provisions that provide an additional meal for at-risk children through age 18 who are participating in afterschool programs in eligible States.

Benefits

Among the motivating factors to establish the at-risk afterschool snack program was a desire to support educational and enriching afterschool care programs for children up to 18 years of age in at-risk neighborhoods in order to reduce juvenile crime and educational underachievement. FNS cannot quantify the impact of the at-risk afterschool meals program on juvenile crime or educational achievement. However, participation in these programs is growing and thus these outcomes are to some extent fostered. In the first four years of the program, growth in afterschool meals served in the seven States eligible at that time ranged from 2 to 8 percent higher than afterschool meals served by non-participating States. However, data reported since 2004 for these seven States suggests that this disparity in growth has ended, at least temporarily, and it is too soon to credit the program with a sustained long-term impact on afterschool program attendance.

Although some at-risk afterschool meals replaced meals served by outside-school-hours care centers, there is also considerable evidence that the total

number of children reached by CACFP has increased, to date, as a result of this program. The percentage of at-risk afterschool meals that would have been served in traditional child care centers in the absence of the at-risk care center program is, of course, uncertain. However, it may be as high as 65 percent. That figure suggests that nearly 35 percent of total at-risk afterschool participants, or roughly 49,000 children on an average school day during fiscal year (FY) 2008, would not have received a Federally-reimbursable supper if not for the at-risk afterschool care center program. The program benefits those 49,000 children by providing them with a meal that conforms to USDA meal patterns. In addition, all children served by the at-risk afterschool care center program, approximately 142,000 per day during FY 2008, benefit from the program's structured educational or enrichment elements.

Costs

Costs associated with the at-risk afterschool program include both the reimbursement rate that the Federal government pays for each meal, as well as the commodity assistance given to the program. Reimbursement and commodity assistance estimates alone however do not give a full sense of the economic impact of the program.

While many of the CACFP free meal reimbursements have simply shifted from non at-risk afterschool care centers to at-risk afterschool care centers with no increase to program cost, meals previously provided by child care centers at full or reduced price are now provided free in at-risk centers. This shift increases reimbursement costs while serving no additional children. The economic impact of this shift appears to be modest and is estimated to increase reimbursement costs by approximately \$6.7 million during FY 2002-2008. For FY 2009-2013 the projected costs associated with this shift are \$8.0 million.

While a large percentage of meals served in at-risk afterschool care centers simply replace meals that would have been served in non at-risk centers, it is estimated that 35% of the suppers served in at-risk afterschool care centers are served to children who would not have received CACFP meals in the absence of the at-risk program. The net increase in meals served in at-risk centers represents a cost of an estimated \$80.5 million during FY 2002-2008 and a cost of approximately \$103.3 million during FY 2009-2013.

The total economic impact of both the shift in meals from reduced price and paid to free and the net increase in

meals for FY 2009-2013 is estimated to be \$111.3 million. This estimate, however, is sensitive to the assumption about the rate of growth that would have prevailed in the at-risk States in the absence of the at-risk afterschool care program. Because this rate is unknown, the cost estimate is subject to uncertainty.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). Mr. Kevin Concannon, Under Secretary for Food, Nutrition, and Consumer Services, has certified that this rule will not have a significant impact on a substantial number of small entities. At-risk afterschool care centers in the eligible States choose whether they wish to participate in this additional meal service. Most of the institutions that will choose to add a meal service are already providing snacks under the at-risk component of the CACFP. The additional meal service will not have a significant paperwork or reporting burden because it is incorporated under the existing agreement and claim for reimbursement.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under regulatory provisions of Title II of the UMRA) that impose costs on State, local, or Tribal governments or the private sector of \$100 million or more in any one year. Therefore, this rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

Executive Order 12372

CACFP is listed in the Catalog of Federal Domestic Assistance under No. 10.558. For the reasons set forth in the

final rule in 7 CFR part 3015, Subpart V and related Notice published at 48 FR 29114, June 24, 1983, this Program is included from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials. Since CACFP is a State administered, Federally funded program, FNS staff at headquarters and in regional offices have ongoing formal and informal discussions with State and local officials regarding Program implementation and policy issues. This arrangement allows State and local agencies to provide feedback that forms the basis for any discretionary decisions made in this and other rules.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section 6(b)(2)(B) of Executive Order 13132. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In CACFP, the administrative procedures are set forth at 7 CFR 226.6(k), which establishes appeal procedures and 7 CFR 226.22 and 7 CFR parts 3016 and 3019, which address administrative appeal procedures for disputes involving procurement by State agencies and institutions.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact

Analysis," to identify any major civil rights impacts the rule might have on children on the basis of age, race, color, national origin, sex, or disability. A careful review of the rule's intent and provisions revealed that the rule's intent does not affect the participation of protected individuals in CACFP.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. The recordkeeping and reporting burden contained in this rule is approved under OMB No. 0584-0055. This final rule does not contain any new information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

E-Government Act Compliance

FNS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 226

Accounting, Aged, Day care, Food assistance programs, Grant programs, Grant programs—health, American Indians, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

■ Accordingly, 7 CFR part 226 is amended as follows:

PART 226—CHILD AND ADULT CARE FOOD PROGRAM

■ 1. The authority citation for part 226 continues to read as follows:

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).

■ 2. In § 226.2:

■ a. Add new definitions of "At-risk afterschool meal" and "At-risk afterschool snack" in alphabetical order; and

■ b. Amend the last sentence of the introductory text of the definition of "For-profit center" by adding the words "and/or meal" after the words "at-risk afterschool snack".

The additions read as follows:

§ 226.2 Definitions.

* * * * *

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.

* * * * *

■ 3. In § 226.4(d):

■ a. Insert "Richard B. Russell" before "National School Lunch Program" where it appears in the first sentence; and

■ b. Add a sentence at the end of the paragraph.

The addition reads as follows:

§ 226.4 Payments to States and use of funds.

* * * * *

(d) * * * 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.

* * * * *

§ 226.9 [Amended]

■ 4. In § 226.9, amend paragraph (b)(2) by removing the words "at-risk afterschool snack component" and adding in their place the words "at-risk afterschool care component".

■ 5. In § 226.10, revise the fourth sentence of the introductory text of paragraph (c) to read as follows:

§ 226.10 Program payment procedures.

* * * * *

(c) * * * However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be considered in determining this eligibility. * * *

* * * * *

■ 6. In § 226.11:

■ a. Revise the second sentence of paragraph (b)(3);

■ b. Revise paragraph (c)(2); and

■ c. Revise the second sentence of paragraph (c)(4).

The revisions read as follows:

§ 226.11 Program payments for centers.

* * * * *

(b) * * *

(3) * * * However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be considered in determining this eligibility. * * *

(c) * * *

(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.

* * * * *

(4) * * * However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be considered in determining this eligibility. * * *

* * * * *

■ 7. In § 226.17, revise the third sentence of paragraph (b)(4) to read as follows:

§ 226.17 Child care center provisions.

* * * * *

(b) * * *

(4) * * * However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be included in this percentage. * * *

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■ 8. In § 226.17a:

■ a. Revise the heading of paragraph (a) and revise paragraph (a)(1) introductory text;

■ b. Add a new paragraph (a)(1)(v);

■ c. Revise paragraph (a)(2);

■ d. Revise paragraphs (c), (j), (k), (l), (m), and (n);

■ e. Revise paragraphs (o)(2), (o)(3), and (o)(4); and

■ f. Revise paragraph (p).

The addition and revisions read as follows:

§ 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.

* * * * *

(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.

* * * * *

(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.

* * * * *

(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) * * *

(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.

* * * * *

Dated: March 19, 2010.

Kevin Concannon,

Under Secretary, Food, Nutrition and Consumer Services.

[FR Doc. 2010-7054 Filed 3-31-10; 8:45 am]

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