

within the jurisdiction being reviewed at least once every two years. 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 or general review areas, the school food authority shall ensure that the school implements corrective action, and within 45 days of the review, conduct 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 and that the counting system, as implemented, yields the actual number of reimbursable free, reduced price and paid breakfasts, 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 breakfast 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 breakfasts served on any day of operation to children currently eligible for such breakfasts.

\* \* \* \* \*

■ 20. In § 220.13:

- a. In the sixth sentence of paragraph (b)(2), remove "SF-269" and add in its place "FNS-777";
- b. Revise paragraphs (f)(2) through (4);
- c. Revise paragraph (g); and
- d. Amend paragraph (j) by removing the words "supervisory assistance" and adding in their place the word "administrative" in the first sentence.

The revisions read as follows:

§ 220.13 Special responsibilities of State agencies.

\* \* \* \* \*

(f) \* \* \*

(2) State agencies must conduct administrative reviews of the school meal programs specified in § 210.18 of this chapter to ensure that schools participating in the designated programs comply with the provisions of this title. The reviews of selected schools must focus on compliance with the critical and general areas of review identified in § 210.18 for each program, as applicable, and must be conducted as specified in the FNS *Administrative Review Manual* for each program. 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 chapter or

by FNS under § 210.29(d)(2) of this chapter. Any such appeal shall be subject to the procedures set forth under § 210.18(p) of this chapter or § 210.29(d)(3) of this chapter, as appropriate.

(3) For the purposes of compliance with the meal requirements in §§ 220.8 and 220.23, the State agency must follow the provisions specified in § 210.18(g) of this chapter, as applicable.

(4) State agency assistance must include visits to participating schools selected for administrative reviews under § 210.18 of this chapter 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.

\* \* \* \* \*

(g) State agencies shall adequately safeguard all assets and monitor resource management as required under § 210.18 of this chapter, and in conformance with the procedures specified in the FNS *Administrative Review Manual*, to assure that assets are used solely for authorized purposes.

\* \* \* \* \*

§ 220.14 [Amended]

■ 21. In paragraph (h), add the words "food authority" after the word "school" and remove the words "§ 220.8(g), § 220.8(i)(2) and (i)(3), whichever is applicable" and add in their place the words "§ 220.8 of this part".

■ 22. Revise § 220.22 to read as follows:

§ 220.22 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control No.
220.3(e) .....	0584-0067
220.7(a),(d), (e) .....	0584-0012
220.8(a)(3), (o) .....	0584-0012
220.9(a) .....	0584-0012
220.11 (a)-(b) .....	0584-0012
220.13 (a-1), (b), (c), (e), (f) .....	0584-0012
220.14(d) .....	0584-0594
220.15 .....	0584-0012

PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS

■ 23. The authority citation for part 235 continues to read as follows:

**Authority:** Secs. 7 and 10 of the Child Nutrition Act of 1966, 80 Stat. 888, 889, as amended (42 U.S.C. 1776, 1779).

■ 24. In § 235.2, add in alphabetical order a definition for "Large school food authority" to read as follows:

§ 235.2 Definitions.

\* \* \* \* \*

*Large school food authority* means, in any State:

(1) All school food authorities that participate in the National School Lunch Program (7 CFR part 210) and have enrollments of 40,000 children or more each; or

(2) 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 National School Lunch Program (7 CFR part 210) and have enrollments of 2,000 children or more each.

\* \* \* \* \*

Dated: June 13, 2016.

**Yvette S. Jackson,**

*Acting Administrator, Food and Nutrition Service.*

[FR Doc. 2016-17231 Filed 7-28-16; 8:45 am]

BILLING CODE 3410-30-P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 245

[FNS-2011-0027]

RIN 0584-AE16

National School Lunch Program and School Breakfast Program: Eliminating Applications Through Community Eligibility as Required by the Healthy, Hunger-Free Kids Act of 2010

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

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes requirements for State agencies, local educational agencies, and schools operating the Community Eligibility Provision, a reimbursement option that allows the service of school meals to all children at no-cost in high poverty schools without collecting household applications. By eliminating the household application process and streamlining meal counting and claiming procedures through the Community Eligibility Provision, local educational agencies may substantially reduce administrative burden related to operating the National School Lunch and School Breakfast Programs. This rule codifies many requirements that were implemented through policy guidance following enactment of the Healthy, Hunger-Free Kids Act of 2010, as well as provisions of the proposed rule. These requirements will result in consistent, national implementation of the Community Eligibility Provision.

**DATES:** This rule is effective August 29, 2016. Compliance with the provisions of this rule must begin August 29, 2016.

**FOR FURTHER INFORMATION CONTACT:** Tina Namian, School Programs Branch, Policy and Program Development Division, Food and Nutrition Service, at (703) 305-2590.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Healthy, Hunger-Free Kids Act of 2010 (HHFKA), Public Law 111-296, required significant changes in the Child Nutrition Programs to reduce childhood obesity, increase eligible children's access to school nutrition benefits, and improve program integrity. Notably, HHFKA mandated the most substantial update to the nutritional requirements of the school meal programs in more than 30 years, increasing the amount of fruits, vegetables, and whole grain-rich foods served, and limiting sodium and *trans* fats. HHFKA also required USDA to establish hiring and training standards for school food service professionals and, for the first time, set nutritional standards for snacks sold to students throughout the school day.

Section 104 of the HHFKA amended section 11(a)(1) of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1759a(a)(1)) by adding paragraph (F), "Universal Meal Service in High Poverty Areas." This provision resulted in the creation of the Community Eligibility Provision (CEP), a reimbursement alternative for eligible, high-poverty local educational agencies (LEAs) and schools participating in both the National School Lunch Program (NSLP) and School Breakfast Program (SBP). CEP aims to combat child hunger in high poverty areas, while reducing administrative burden and increasing program efficiency by using current, readily available data to offer school meals to all students at no cost.

The Food and Nutrition Service (FNS) of the U.S. Department of Agriculture (USDA) published a proposed rule in the **Federal Register** (78 FR 65890) on November 4, 2013, seeking to amend the regulations governing the determination of eligibility for free and reduced price meals and free milk in schools (7 CFR 245) consistent with amendments made to the NSLA by the HHFKA. FNS drew on a range of information to develop the proposed rule, including the statutory language in the NSLA and knowledge gained through the phased-in implementation of CEP in pilot States (school years (SYs) 2011-12 through 2013-14).

The proposed rule sought to establish the following:

- Limit eligibility for CEP to those LEAs and schools that have an identified student percentage (ISP) of at least 40 percent based on data as of April 1 of the school year preceding CEP election. The term "identified students" refers to students directly certified for free school meals based on their participation in other means-tested assistance programs, such as the Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), or the Food Distribution Program on Indian Reservations (FDPIR). Identified students also are those who are categorically eligible for free school meals without an application, and not subject to verification, including:

- Homeless children as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2));

- Runaway and homeless youth served by programs established under the Runaway and Homeless Youth Act (42 U.S.C. 5701);

- Migrant children as defined under section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399);

- Foster children certified through means other than a household application;

- Children enrolled in a Federally-funded Head Start Program or a comparable State-funded Head Start Program or pre-kindergarten program;

- Children enrolled in an Even Start Program; and

- Non-applicant students approved by local education officials, such as a principal, based on available information.

- Require LEAs opting to elect CEP for the following school year to submit (by June 30) to the State agency documentation to support the ISP.

- Require participating schools to offer breakfasts and lunches at no cost to all students, and count the number of reimbursable breakfasts and lunches served to students daily.

- Prohibit LEAs from collecting free and reduced price meal applications on behalf of children in CEP schools.

- Establish procedures to determine the percentages of meals to be claimed at the free and paid rates at CEP schools.

- Require LEAs to pay, with non-Federal funds, the difference (if any) between the cost of serving meals at no cost to all students and the Federal reimbursement.

- Specify that participating LEAs and schools that are still eligible for CEP at the end of the 4-year cycle may, with the State agency's concurrence, immediately start a new 4-year cycle in

the next school year using ISP data as of the most recent April 1 (year 4 of the current cycle). Alternatively, participating LEAs and schools in year 4 of a CEP cycle with an ISP below 40 percent, but at least 30 percent, may continue to operate CEP for a "grace year."

- Require State agencies to notify LEAs of district-wide eligibility status by April 15 annually and to provide guidance and information to eligible LEAs on how to elect CEP.

- Require LEAs to submit school-level eligibility information to the State agency annually by April 15.

- Require State agencies to publish lists of eligible LEAs and schools on a public Web site and submit the link to FNS annually by May 1.

- Clarify that the ISP multiplied by 1.6 may be used for CEP schools in lieu of the free or free and reduced-price percentage when this data is used to determine eligibility for other Child Nutrition Programs (e.g., Fresh Fruit and Vegetable Program, Child and Adult Care Food Program, Summer Food Service Program, NSLP Afterschool Snacks, and NSLP Seamless Summer Option).

- Require participating LEAs and schools to retain documentation and records (e.g., direct certification lists) used for the ISP calculation.

- Specify that LEAs and schools operating CEP may stop operating CEP and return to standard certification and counting and claiming procedures at any time during the school year or for the following school year.

- Require that students receiving meals at a school using special assistance certification and reimbursement alternatives under 7 CFR 245.9 (hereafter referred to as Provision schools) continue to receive reimbursable meals at no charge for up to 10 operating days when they transfer to a school using standard counting and claiming procedures (hereafter referred to as non-Provision schools) in the same LEA during the school year. For student transfers involving different LEAs, the receiving LEA would have discretion to provide such students free meals for up to 10 operating days.

Prior to national implementation in SY 2014-15, CEP was gradually phased in over a three-year period. Prior to each school year of the phase-in, FNS solicited applications from State agencies that were interested in CEP early implementation and made selections based on State and local support, eligibility of schools within the State, and the State's overall level of readiness for CEP. In SY 2011-12, Illinois, Kentucky, and Michigan

became the first three States: 665 schools participated in the initial year of CEP implementation. For SY 2012–13, New York, Ohio, West Virginia, and the District of Columbia joined the three initial States, making CEP available in a total of six States and the District of Columbia. In SY 2013–14, the final year of the phase-in, CEP was expanded to Florida, Georgia, Maryland, and Massachusetts. By the end of the pilot phase, CEP was operating in more than 4,000 schools and serving more than 1.5 million students in 10 States and the District of Columbia.

Throughout the CEP phase-in period, FNS provided technical assistance through a webinar series and monthly conference calls with State agencies. FNS also presented information about CEP at an array of national conferences and received feedback from key stakeholders, including State child nutrition directors, school food service staff, the Council of Great City Schools, and several professional organizations, including the National Association of State Title I Directors, the Council of Chief State School Officers, the National Association of Federal Education Program Administrators, the National Parent Teacher Association, the National School Boards Association, and the National Association of Elementary School Principals.

During the phase-in, FNS also conducted a formal program evaluation of CEP. This evaluation and addendum (published in February 2014 and January 2015, respectively) assessed the experiences and performance of the pilot States, and included an implementation analysis and an impact analysis. Specifically, the evaluation study sought to identify and assess the attractiveness of CEP to LEAs, possible barriers for LEAs that might discourage their adoption of CEP, operational issues that LEAs encountered in administering CEP, and the overall impact of CEP in participating LEAs. The evaluation study found positive outcomes for CEP schools, providing further credibility to many anecdotal narratives collected by FNS from State and local officials that were overwhelmingly supportive of CEP. In addition to demonstrating high CEP uptake and popularity among eligible LEAs, the study indicated that CEP schools experienced significant participation growth in their school meal programs. On average, CEP schools saw a 5 percent increase in their NSLP participation rate, and a 9 percent increase in their SBP participation rate. This finding confirmed that CEP was achieving its primary objective to expand access to school meals for low

income students. Furthermore, the study found that the first seven pilot States experienced sustained, rapid second year growth in the number of eligible districts participating in CEP. Lastly, the study results demonstrated that CEP was consistently achieving a second objective: Reducing administrative burden and improving the efficiency of school meal program operations. Among the related findings, CEP was shown, on average, to:

- Result in net increases or have no adverse effect on school food service revenues,
- reduce the overall rate of certification errors, and
- generate time savings for LEA foodservice administrative staff, school food service workers, and school administrators.

The evaluation study also identified potential barriers. States expressed a desire for more time to make election decisions. States and LEAs also expressed concerns regarding the loss of free and reduced price meal application data as a measure of socioeconomic status and the impact that loss could have on other programs and funding streams. Because CEP is a novel way of operating the school meal programs, States and LEAs were also concerned about the financial impact of CEP in general. As a result, FNS developed extensive guidance and technical assistance tools, such as reimbursement calculators, and worked closely with other agencies administering programs that have traditionally relied on household application data (e.g., Title I, E-Rate) to produce timely joint guidance and facilitate CEP implementation.

Overall, the evaluation study indicated that CEP was working well and fulfilling its promised benefits in the pilot States and LEAs. CEP was demonstrated to have a clear and positive impact on participation and school food service administration, and participating LEAs were highly satisfied with the provision and likely to continue participating in CEP.

In SY 2014–15, CEP's first year of nationwide availability, State and local officials in all parts of the country enthusiastically embraced the new provision, resulting in explosive participation growth. As of September 2014, almost 14,000 schools in more than 2,000 school districts located in 49 States and the District of Columbia were participating in CEP. Together, these schools were offering free meals to about 6.4 million students daily. Significantly, these data indicated that a broad range of LEAs were choosing to elect CEP. About two thirds of the 75 largest highly eligible school districts

identified by FNS elected CEP for at least some of their schools in SY 2014–15. Conversely, about half of electing LEAs had enrollments of 500 or less. These figures indicated that CEP was working for schools and districts of all sizes and characteristics. During this time, FNS continued to provide extensive guidance and technical assistance through conference calls, public speaking appearances, webinars, guidance publications, in-person visits, collaboration with partner organizations, and focused contact with States and LEAs.

Building on the successes of the previous school year, CEP participation continued to grow in SY 2015–16. In the second year of nationwide implementation, more than 18,000 schools in almost 3,000 school districts elected CEP. Participating schools are located in all 50 States, the District of Columbia, and Guam, and are serving healthy school meals to more than 8.5 million children daily, ensuring that students in high poverty communities can enter the classroom well-nourished and ready to learn.

Furthermore, because of its widespread popularity and strong success record, CEP has already increased access to nutritious school meals for millions of low income children, while simultaneously reducing administrative burden for local school food service operators across the country.

## II. Public Comments and FNS Response

The proposed rule aimed to increase access to school meals in high-poverty areas, reduce administrative burden, and increase operational efficiency by using readily available and current data to offer meals to all students at no-cost through implementation of CEP. The rule was posted for comment and the public had the opportunity to submit comments on the proposal during a 60-day period that ended January 3, 2014. FNS received 78 public comments, 71 of which were germane. Commenters included State educational agencies, child nutrition advocates, food banks and anti-hunger groups, local school districts, school food service managers, community groups, charter schools, law students, K–12 students, and interested individuals. To view all public comments on the proposed rule, visit [www.regulations.gov](http://www.regulations.gov) and search for public submissions under docket number FNS–2011–0027. FNS greatly appreciates the valuable comments provided. These comments were essential in developing a final rule that is expected to expand access to healthy school meals for students in high

poverty communities, and streamline requirements for Program operators.

Overall, commenters were generally more supportive of the proposed rule than opposed. Sixty-five public comments, including a form letter submitted by 29 program operators and advocates, supported the proposal. Three submissions were neutral, and three expressed general opposition without commenting on specific proposed provisions. Neutral commenters were not clearly in favor of, or opposed to, the proposal but requested clarification on specific provisions.

Commenters supporting the rule recognized the correlation between access to healthy school meals and academic success. Many commenters noted that the rule reduces the stigma sometimes associated with eating school meals, thereby increasing the likelihood that students will participate in the meal programs and benefit from the nutritious meals offered at school. Additionally, commenters noted that providing meals at no-cost also increases meal participation and enhances child nutrition. Combined with recent updates to the school meal pattern, increased participation means that high-need students have more opportunities to consume fruits, vegetables, and whole grain-rich foods. Commenters also praised CEP's reduction of administrative burden: Specifically, the use of readily available data from other assistance programs to determine eligibility in lieu of household applications, eliminating the need for low-income households to complete paperwork, and the streamlined counting and claiming for program operators. Additionally, many commenters suggested ways to strengthen the proposed rule, citing CEP's role in expanding access for children whose only reliable source of nutrition may be school meals.

While most commenters generally agreed with the provisions of the proposed rule, commenters also expressed concerns regarding the impact that CEP might have on the financial integrity of the school meal programs. Commenters noted that CEP could cause financial distress to school districts and schools in cases where Federal reimbursements were unable to meet program costs due to lower than expected savings or revenues. An education advocacy group also noted that CEP may have an unintended, unequal impact on private schools that may have limited resources. However, CEP remains an option for private, nonprofit schools and, like all schools, the financial viability of participation in

the program must be evaluated based on the circumstances of the individual school.

FNS carefully considered the views expressed by commenters, especially those responsible for the oversight and day-to-day operations of the school meal programs. At the same time, FNS is mindful that CEP is uniquely positioned to both increase food security among vulnerable children and reduce program operators' administrative burden. Therefore, this final rule includes several amendments to the provisions of the proposed rule based on public comments. The goal of the rule remains expansion of children's access to school meals and streamlining Program operations.

The following is a summary of the key public comments, focused on the most frequent comments and those that contributed toward USDA revisions to the provisions of the proposed rule.

#### Terms

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(1) would establish terms and definitions as they relate to CEP. This paragraph identified the LEA as the administrative body that may be eligible for and elect CEP. The proposed rule would not make any change to the definitions of "local educational agency" or "school," which apply broadly to the school meal programs and for which definitions were previously established at 7 CFR 245.2 and 210.2, respectively. The proposed rule would further remove the words "school food authority" wherever they appear in § 245.9 and replace them with the words "local educational agency."

**Comments:** Two commenters were confused by the use of the terms LEA, school food authority (SFA), and school and the responsibilities of each with regard to CEP. Commenters suggested that FNS develop one term in all program regulations to define the legal entity responsible for meeting all program requirements.

**FNS Response:** The terms *local educational agency*, *school food authority*, and *school* are codified and apply broadly to local program operators. Section 11(a)(1)(F) of the NSLA, 42 U.S.C. 1759a(a)(1)(F), as amended by Section 104 of HHFKA, uses the term "LEA" in connection with CEP; therefore, the CEP proposed and final rules are consistent with the NSLA. For consistency among the special assistance certification and reimbursement alternatives, the final rule uses the term "LEA" in § 245.9 with regard to CEP and Provisions 1, 2, and 3. LEAs are broader entities in a school district that typically perform

SFA functions, in addition to those unrelated to administration of the Child Nutrition Programs. This editorial change, made for internal consistency and agreement with the NSLA, does not indicate a change in the regulatory requirements for the Provisions 1, 2 and 3, nor how these special assistance provisions are monitored.

Accordingly, this final rule replaces the term "school food authority" with the term "local educational agency" throughout § 245.9.

#### Grouping

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(1)(iii) would permit the ISP to be determined by an individual participating school, a group of participating schools in the LEA, or in the aggregate for the entire LEA if all schools participate. The proposed rule at 7 CFR 245.9(f)(3)(i) would establish a minimum ISP of 40 percent as of April 1 of the school year prior to participating in CEP, though does not detail specific requirements based on how schools are grouped.

**Comments:** Thirty-three commenters recommended clarifying how LEAs may group schools. Specifically, the commenters recommended incorporating into the regulatory language the policy of allowing groups within an LEA to be formed based on any criteria, and explaining that individual schools within the group may have less than 40 percent identified students, as long as the group meets the minimum 40 percent ISP and other criteria.

Two commenters recommended adding guidance for LEAs on how to manage groups of schools. For example, commenters suggested that FNS develop guidance for CEP schools that consolidate with non-CEP schools (*e.g.*, CEP schools that take in students from non-CEP schools that are closing) and for situations in which some schools are removed from a CEP group during the school year.

One commenter stated that it is not advantageous for schools with a higher ISP to be grouped with schools with a lower ISP. Another commenter suggested giving LEAs discretion to use an average claiming percentage for schools in a CEP group.

**FNS Response:** FNS appreciates that grouping is a flexible characteristic of CEP that may be used to maximize Federal reimbursements and administrative efficiencies. As such, school grouping under CEP represents a strategic decision for some LEAs. Because Federal reimbursements are made at the LEA level, rather than at the individual school level, the final rule

provides LEAs flexibility to group schools to maximize benefits, based on the unique characteristics of each LEA.

To facilitate the use of grouping, and in response to requests from several commenters, FNS has provided extensive technical assistance on grouping through multiple guidance documents. These include the CEP Planning and Implementation Guidance and SP 19–2016, Community Eligibility Provision: Guidance and Updated Q&As (both available at: <http://www.fns.usda.gov/school-meals/community-eligibility-provision-resource-center>). These resources respond to several real and hypothetical grouping scenarios posed by State agencies and LEAs.

Accordingly, this final rule retains in § 245.9(f)(3) the requirement for a school or group of schools in an LEA to have a minimum ISP of 40 percent to elect CEP for a 4-year cycle. In response to comments, FNS also added language § 245.9(f)(3)(i) to clarify that LEAs have discretion in how to group schools to optimize CEP benefits and operational ease. This includes explaining that individual schools in a CEP group may have an ISP less than 40 percent, as long as the ISP of the group is at least 40 percent.

#### Eligibility Criteria

##### Minimum Identified Student Percentage

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(3)(i) would require an LEA, group of schools, or individual school electing CEP to have an ISP of at least 40 percent, as of April 1 of the school year prior to participating in CEP, unless otherwise specified by FNS.

**Comments:** FNS received 37 comments requesting greater flexibility to determine the timing of the ISP. Some commenters requested that the ISP be established “on or before” rather than “as of” April 1. Three additional individual commenters suggested that the rule should be expanded to provide meals at no cost to all children in all schools, instead of only schools that have an ISP of at least 40 percent.

**FNS Response:** The final rule maintains the requirement for the ISP to be generated using data as of April 1 in the school year preceding CEP implementation, as well as the requirement for the ISP used by an individual school, group of schools, or entire school district to be at least 40 percent. The April 1 date is a statutory requirement in section 11(a)(1)(F)(iii) and (iv) of the NSLA, 42 U.S.C. 1759a(a)(1)(F)(iii) and (iv), and must be maintained in this final rule.

The requirement to ensure that all data is reflective of April 1 is intended to accurately capture the composition of the student population to form the basis of the reimbursement rate the LEA, group of schools, or school may receive throughout the 4-year CEP cycle. Using the phrase “as of” ensures that identified student data generally reflects April 1, but also can accommodate variation in State direct certification systems. This allows States to use the best available data that reflects April 1, without creating additional administrative burden. For example, if a State conducts direct certification monthly on the fifth day of each month, the term “as of” allows the State to use data from April 5 to generate the ISP, rather than March 5. The suggested phrase “on or before” is more restrictive because it would not permit a State to use data from April 5, if that is when the State usually conducts direct certification. It also would permit any data drawn prior to April 1 to be used, which may not accurately reflect the student population as well as data drawn later in the school year. The ISP is the basis for the Federal reimbursement for an entire 4-year CEP cycle, so it is important that the ISP accurately reflects the student population in participating schools.

Although the statute permits FNS to employ a threshold of less than 40 percent in section 11(a)(1)(F)(viii) of the NSLA, the 40 percent ISP threshold for CEP eligibility is intended to best ensure that participating schools are able to maintain the financial integrity of their school meal programs. CEP is specifically designed to improve access to the school meal programs for students in high poverty schools, where hunger may be a barrier to academic achievement. As such, CEP is most financially viable at schools with an ISP of at least 40 percent because these schools are better able to maximize Federal reimbursements through a high claiming percentage. It is important to note that through grouping, LEAs still have discretion to include schools with ISPs lower than 40 percent as long as the group’s aggregate ISP meets the 40 percent threshold.

Accordingly, this final rule retains in § 245.9(f)(3) the requirement to have an ISP of at least 40 percent as of April 1.

##### Breakfast and Lunch Participation

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(3)(ii) would require an LEA or school to participate in both the NSLP and SBP to elect CEP.

**Comments:** One commenter requested clarity about the requirement for CEP schools to serve both breakfast and

lunch, and asked whether an LEA that currently offers only lunch may elect CEP if the LEA plans to offer breakfast after CEP election. Another commenter recommended that FNS exempt charter schools and alternative schools from the requirement to offer both breakfast and lunch.

**FNS Response:** The NSLA, in section 11(a)(1)(F)(ii)(I)(aa), requires that LEAs and schools participating in CEP must participate in both the NSLP and SBP. LEAs and schools that participate in only one Program—either the NSLP or SBP—may elect CEP for the next school year if an agreement is established with the State agency to operate both Programs by the time CEP is implemented. Because participation in both the NSLP and SBP is required by statute, this final rule does not exempt charter or alternative schools from the requirement to offer both breakfast and lunch. However, schools that operate on a limited schedule (e.g., half-day kindergarten buildings) where it is not operationally feasible to offer both lunch and breakfast may elect CEP with FNS approval.

Accordingly, the final rule retains in § 245.9(f) the requirement to offer breakfasts and lunches at no cost to students under CEP.

#### Community Eligibility Provision Procedures

##### Election Deadline

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(4)(i) would require that LEAs intending to elect CEP for the following school year must submit to the State agency no later than June 30 documentation demonstrating that the LEA, school, or group(s) of schools meet(s) all eligibility requirements.

**Comments:** Two commenters recommended that schools be permitted to enroll in CEP at any time prior to the start of the applicable school(s) academic year.

**FNS Response:** The NSLA, in section 11(a)(1)(F)(x)(I), requires that LEAs electing CEP notify the State agency and provide documentation establishing eligibility by the June 30 prior to the applicable school year. To facilitate election of CEP during the first three years of nationwide availability, FNS published guidance extending the deadline for CEP elections to August 31 for SYs 2014–15, 2015–16, and 2016–17. For SY 2016–17, this flexibility was detailed in SP 30–2016, Extension of the Deadline for Local Educational Agencies to Elect the Community Eligibility Provision for School Year 2016–17 (available at: <http://www.fns.usda.gov/extension-deadline-leas-elect-cep>).

sy2016-17). These guidance documents also granted further discretion to State agencies, permitting them to allow CEP elections to occur in the middle of a school year, provided that doing so would be logistically and administratively feasible.

These deadline extensions were offered as flexibilities to facilitate the initial implementation of CEP. As a new counting and claiming option, many State and local officials were initially unfamiliar with CEP's operational requirements and requested that FNS extend the election window to allow for careful decision-making. In SY 2014–15, the deadline extension to August 31 facilitated a 22 percent overall increase in CEP elections, significantly increasing children's access to nutritious meals in high-need schools.

However, because the June 30 deadline is required by statute, FNS is maintaining this deadline in the final rule. Additionally, it should be noted that CEP now has been available on a nationwide basis for multiple school years and State and local officials have gained a better understanding of the provision through experience and the availability of FNS-published guidance. As such, FNS does not anticipate granting permanent flexibility on the election deadline. Instead, FNS will evaluate the need for an extension of the June 30 deadline and provide guidance, as appropriate.

Accordingly, this final rule retains in § 245.9(f)(4)(i) the requirement to elect CEP by submitting required documentation no later than June 30 of the prior school year.

#### State Agency Concurrence

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(4)(ii) would require an LEA seeking to elect CEP to obtain concurrence from the State agency that election documentation submitted is complete and accurate, and that the LEA meets all eligibility requirements.

**Comments:** Two commenters, a program operator and an advocacy group, recommended allowing State agencies to shift administrative responsibility for reviewing the accuracy of LEA-submitted election documentation and confirming CEP eligibility status to the LEA level. These commenters also suggested changing the word "concurrence" at 7 CFR 245.9(f)(4)(ii) in the proposed rule to "confirmation," in addition to incorporating clarifying language into the preamble of the final rule.

Thirty-two commenters, including advocates and State agencies, asked FNS to clarify the criteria to be used when State agencies review LEAs seeking to

implement CEP. One commenter suggested allowing State agencies a window of up to 30 days following an LEA's notification of intent to elect CEP to confirm that the LEA in question is eligible.

**FNS Response:** The intent of the statute, detailed throughout section 11(a)(1)(F) of the NSLA, is for State agencies to serve in a supervisory capacity when identifying and confirming documentation from LEAs eligible to elect CEP. State agencies must collect and compile LEA and school-level eligibility lists as part of the CEP public notification process. Section 11(a)(1)(F)(x)(I) of the NSLA requires LEAs to submit documentation supporting the ISP to the State agency to establish CEP eligibility and the claiming percentages. This documentation is subject to review by the State agency upon election, and as part of the Administrative Review process. Considering the mandated and overarching responsibilities of the State agency in these regards, this final rule maintains the requirement for State agencies to review CEP elections made by LEAs. However, FNS agrees with and accepts commenters' recommended change in language from "concur" to "confirm." The use of the word "confirm" more accurately reflects the State responsibilities to ensure that the ISP and claims for reimbursement are accurate. This change is reflected in the regulatory text of the final rule in § 245.9(f)(4)(ii).

Required criteria for State agency review of CEP documentation were not detailed in the proposed rule and an informal FNS inquiry revealed that policies varied greatly among State agencies. In some cases, initial reviews were being conducted at or around the time of election for all or a substantial portion of ISP records. Alternatively, some States conducted less thorough reviews or did not associate "concurrence" with a review of election documents, waiting until the LEA's next administrative review before checking the accuracy of ISP documentation.

State agencies are required to confirm the eligibility status of any school or LEA seeking to claim meals under CEP, and must substantiate any documentation submitted to ensure the accuracy of the ISP. Doing so mitigates the subsequent risk of inaccurate claims for reimbursement and/or fiscal action. This final rule retains the State agency's responsibility to confirm an electing LEA's eligibility for CEP and the ISP that is the statutory basis of the Federal reimbursement.

To clarify the State agency's responsibilities during the CEP election

process, FNS issued detailed guidance in policy memo SP 15–2016, Community Eligibility Provision: State Agency Procedures to Ensure Identified Student Percentage Accuracy (available at: <http://www.fns.usda.gov/sites/default/files/cn/SP15-2016os.pdf>), and in comprehensive CEP Planning and Implementation Guidance (available at: <http://www.fns.usda.gov/school-meals/community-eligibility-provision-resource-center>), which provides in-depth information on this topic. To facilitate this process, FNS made available sample checklist worksheets for both LEAs and State agencies to use when determining or confirming an ISP (available at: <http://www.fns.usda.gov/school-meals/community-eligibility-provision-resource-center>). Regardless of the initial review process, State agencies must confirm eligibility before LEAs are permitted to claim meals under CEP. Accordingly, the regulatory text of the final rule, in § 245.9(f)(4)(ii), requires State agencies to "confirm" an LEA's eligibility to elect CEP.

#### Meals at No Cost

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(4)(iii) would require an LEA to ensure that participating schools offer no-cost reimbursable breakfasts and lunches to all students during the 4-year cycle, and count the number of reimbursable breakfasts and lunches served each school day.

**Comment:** One commenter requested clarity on whether the count of reimbursable meals represented a count of meals served or a count of students served, and suggested that there may be a conflict between counting reimbursable meals versus counting students served.

**FNS Response:** Schools participating in CEP must have an adequate point of sale system to ensure that reimbursable breakfasts and lunches served are separately and accurately counted each day. These counts are needed because the free and paid claiming percentages are applied to the total number of reimbursable breakfasts and lunches served each month to determine the reimbursement under CEP.

Accordingly, this final rule retains the meal counting requirement in § 245.9(f)(4)(iii).

#### Household Applications

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(4)(iv) would prohibit an LEA from collecting applications for free and reduced price school meals on behalf of children in schools participating in CEP. Any LEA seeking to obtain socioeconomic data from children receiving free meals under this

section must develop, conduct, and fund that effort totally separate from, and not under the auspices of, the NSLP or SBP.

*Comments:* Six commenters, including individuals, program operators, and advocates, recognized that, because of widespread reliance on free and reduced price data as a poverty measure, the loss of this data in CEP schools could impact the delivery of benefits to high poverty schools and students. Additionally, six commenters suggested that, in the absence of household applications, FNS develop an alternative method for assessing the socioeconomic status of student populations. One commenter recommended multiplying TANF data by the CEP multiplier to determine Federal Title I funding.

Two commenters requested that FNS publish specific language reminding LEAs transitioning to CEP to consider, and plan for, potential issues surrounding the loss of traditional free and reduced price application data. These commenters indicated that advance planning and communication with other stakeholders might better ensure a fully successful implementation of CEP, while preventing unnecessary paperwork for families and schools.

*FNS Response:* The definition of “identified students,” which serves as the basis for assessing socioeconomic status under CEP, is expressly established in section 11(a)(1)(F)(i) of the NSLA as “students certified based on documentation of benefit receipt or categorical eligibility as described in section 245.6a(c)(2) of title 7, Code of Federal Regulations (or successor regulations).” This provision is a key component of CEP in that it leads directly to the reduction in administrative burden and program integrity by relying on existing information obtained through the direct certification process.

One of the most important benefits of CEP election is the potential to substantially reduce administrative paperwork related to the Federal school meal programs by eliminating the household application process. This message has been communicated extensively to stakeholders, and State agencies have been encouraged to minimize paperwork burdens for households and school officials wherever possible. The USDA’s creation of a separate method for assessing the socioeconomic status of student populations would not be consistent with the intent of the HHFKA amendments, which eliminated the collection of household applications

under CEP as part of a broad effort to enhance the administrative efficiency of the school meal programs in high poverty LEAs. HHFKA did not amend the NSLA with any provision for the replacement at CEP schools of the socioeconomic data that would have been collected previously by way of household applications. As a result, the cost of any such data collection would not be an allowable program cost since no purpose related to the NSLP and SBP is served.

To facilitate funding in Federal, State, and local education programs, some States have chosen to replicate free and reduced price data by way of an alternate income form developed with non-program funds. Many States and LEAs have historically used school meals application data as a poverty measure. FNS recognizes that, to facilitate CEP implementation, some States may require LEAs to collect household income information to maintain education funding and/or benefits to low-income schools and students. However, any such collections may not be conducted under the auspices of the NSLP or SBP. Furthermore, participation in these collections may never be presented to the household as a condition for receiving a school meal, or present a real or perceived barrier to participation in any of the school meal programs. FNS encourages States to develop alternative measures of income that do not involve the reintroduction of paperwork that is eliminated by CEP participation. FNS cannot limit or prohibit the use of such alternative measures of income if the State agency or LEA has determined that such a method is needed, other than, as noted above.

While FNS is unable to specifically require or endorse any other approach to collecting socioeconomic data, we understand that the loss of free and reduced price meal application data may present a barrier for some LEAs to electing CEP. FNS has worked extensively to ensure that State agencies and eligible LEAs are aware of alternative means of assessing socioeconomic status. FNS has coordinated meetings and webinars to share best practices related to assessing socioeconomic status in the absence of household applications. In addition, FNS worked with the National Forum on Education Statistics to develop a guide on alternative measures of socioeconomic status for use in education data systems<sup>1</sup> (available at:

<http://nces.ed.gov/pubs2015/2015158.pdf>).

Funding allocations under the U.S. Department of Education’s (DoED) Title I program do not fall under the jurisdiction of USDA; therefore, FNS does not have authority to establish requirements related to how this funding is distributed. DoED has published comprehensive Title I guidance for State and local agencies to clarify options and program requirements for CEP schools (available at <http://www.fns.usda.gov/updated-title-i-guidance-schools-electing-community-eligibility>). FNS has worked extensively with DoED to develop this guidance and has provided technical assistance to various stakeholders as needed.

Accordingly, this final rule does not authorize alternative methods to assess socioeconomic status in the absence of household applications which would in any way relate to the NSLP or SBP. Furthermore, the final rule states in § 245.9(f)(4)(iv) that household applications may not be used under CEP, and that other alternative measures of income developed by a State agency or LEA may not be developed, conducted, or funded with NSLP or SBP funds.

#### Direct Certification

*Proposed Rule:* The proposed rule at 7 CFR 245.6(b)(1)(v) would require LEAs or schools electing CEP under § 245.9(f) to conduct direct certification only in the year prior to the first year of a CEP cycle or, if seeking to update the ISP, in the second, third, or fourth year of a cycle.

*Comments:* Two advocacy organizations requested that FNS require LEAs to conduct a student data match between SNAP and student enrollment records each year while enrolled in CEP to ensure that LEAs have the opportunity to update their ISP in the event that match rates improve from one year to the next.

*FNS Response:* FNS agrees that there is significant value to be gained from requiring a student data match with SNAP at least once each year. Conducting this match with SNAP will enable schools to take advantage of any increases in ISPs and examine trends to facilitate planning for upcoming school years. To this end, this final rule requires LEAs to conduct a data match between SNAP records and student enrollment records at CEP schools at least once annually. The rule further

<sup>1</sup> National Forum on Education Statistics. (2015). *Forum Guide to Alternative Measures of Socioeconomic Status in Education Data Systems*.

(NFES 2015–158). U.S. Department of Education. Washington, DC: National Center for Education Statistics.



specifies that State agencies may conduct SNAP data matching on behalf of LEAs and exempt LEAs from the requirement. This final rule also extends this requirement to Provision 2 and Provision 3 schools to ensure consistency among schools operating special assistance certification and reimbursement alternatives. It should be noted, however, that this data matching process may not be used to assess individual student eligibility for free or reduced price school meals at CEP schools, or at schools operating Provisions 2 or 3. All students in CEP and Provision 2 and 3 schools already have access to meals at no cost.

Because student data matching with SNAP will be required annually, States will retain two options for reporting Data Element #3 on the FNS-834, State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report. States may report data matching efforts between SNAP records and student enrollment records from October each year or, alternatively, may choose to include, for CEP schools, the count from the SNAP match conducted as of April 1 of the same calendar year, whether or not it was used in the CEP claiming percentages.

Accordingly, FNS has modified the proposed language in § 245.6(b)(1)(v) to require LEAs to conduct a data match between SNAP records and student enrollment records at CEP schools, and schools operating Provision 2 or Provision 3 special assistance certification and reimbursement alternatives, at least once annually. Additionally, FNS has modified the language in § 245.13(c)(3) to specify options State agencies have for reporting data matching efforts.

#### Free and Paid Claiming Percentages

*Proposed Rule:* The proposed rule at 7 CFR 245.9(f)(4)(v) would require Federal reimbursements for CEP schools to be based on free and paid claiming percentages applied to the total number of reimbursable lunches and breakfasts served each month. Reduced price students are accounted for in the free claiming percentage, eliminating the need for a third claiming rate. The free claiming percentage would be calculated by multiplying the ISP by a factor of 1.6. The paid claiming percentage would be represented by any remaining share of students, up to 100 percent.

*Comments:* One State agency recommended that the share of meals reimbursed at the paid rate at CEP schools be calculated by subtracting the number of meals served at no cost (calculated by applying the free

claiming percentage) from the total number of meals served, because it is similar to how claiming percentages are calculated for Provision 2 schools. Two additional commenters suggested that rounding rules be applied when determining free and paid claiming percentages.

*FNS Response:* Section 11(a)(1)(F)(iii) of the NSLA establishes that special assistance payments under CEP must be calculated on a percentage basis. When claiming percentages are applied as specified in the statute, the result should not be substantively different from the methodology described by the commenter (subtracting free meals served from total meals served), and is consistent with Provision 2. The total number of meals reimbursed at the free and paid rates must equal the total number of breakfasts and lunches served.

Since publication of the proposed rule, FNS issued guidance to clarify rounding rules for calculating claiming percentages (see Question #52 in SP 19-2016, Community Eligibility Provision: Guidance and Updated Q&As, available at: <http://www.fns.usda.gov/school-meals/community-eligibility-provision-resource-center>). This is to ensure the accuracy of claiming and Federal reimbursements under the school meal programs, consistent with existing program requirements. Simple rounding is permitted when calculating the number of meals to be reimbursed at the free rate to ensure that meals claimed for reimbursement are expressed in whole numbers that match daily meal counts.

Accordingly, this final rule retains the proposed calculation and rounding methodology for determining the free and paid claiming percentages and codifies it in § 245.9(f)(4)(v).

#### Multiplier Factor

*Proposed Rule:* The proposed rule at 7 CFR 245.9(f)(4)(vi) would require a 1.6 multiplier factor to be used for an entire 4-year cycle to calculate the percentage of lunches and breakfasts to be claimed at the Federal free rate.

*Comments:* Section 11(a)(1)(F)(vii)(II) of the NSLA provides the Secretary the option to establish the CEP multiplier between 1.3 and 1.6. Thirty-two comments were received from various stakeholders recommending that FNS retain the 1.6 multiplier permanently in the final rule to provide program operators with certainty as to the reimbursements that will be received. Some commenters also suggested removing the Secretary's discretion to adjust the multiplier. Commenters were

nearly unanimous in their support for retaining the multiplier at 1.6.

*FNS Response:* FNS agrees with commenters that providing stability around the multiplier factor will minimize administrative uncertainty and give program operators greater confidence when planning program operations. The 1.6 multiplier is identified in the NSLA as the default initial multiplier. An analysis conducted around the time that the HHFKA was being drafted showed that, for every 10 children directly certified, up to 6 additional children relied on the application process to access free or reduced price meal benefits. An evaluation of CEP in pilot States also showed that the 1.6 multiplier appears to be an accurate reflection of the relationship between the free and reduced-price student percentage and the ISP in a typical participating LEA.<sup>2</sup>

Accordingly, § 245.9(f)(4)(vi) of this final rule retains 1.6 as the multiplier to be used to determine CEP claiming percentages for an entire 4-year CEP cycle.

#### Cost Differential

*Proposed Rule:* The proposed rule at 7 CFR 245.9(f)(4)(vii) would require the LEA of a CEP school to pay, with funds from non-Federal sources, the difference between the cost of serving lunches and breakfasts at no charge to all participating children and the Federal reimbursement received.

*Comments:* Thirty-one comments were received from various stakeholders, including individuals, advocates, and program operators, requesting that FNS provide a more detailed explanation of the requirements surrounding the use of non-Federal dollars in CEP schools to cover operating costs that exceed Federal reimbursements. The commenters requested specific language to clarify that an additional funding stream is not required when Federal reimbursements cover all operating costs. In addition, one commenter expressed general concern regarding an LEA's ability to cover the cost of meals not reimbursed at the free rate.

*FNS Response:* Subsequent to publication of the proposed rule, FNS published specific guidance related to the use of non-Federal funds as part of SP 19-2016, Community Eligibility

<sup>2</sup> Logan, Christopher W., Patty Connor, Eleanor L. Harvill, Joseph Harkness, Hiren Nisar, Amy Checkoway, Laura R. Peck, Azim Shivji, Edwin Bein, Marjorie Levin, and Ayesha Enver. *Community Eligibility Provision Evaluation*. Project Officer: John R. Endahl. Prepared by Abt Associates for the U.S. Department of Agriculture, Food and Nutrition Service, February 2014.



Provision: Guidance and Updated Q&As (available at: <http://www.fns.usda.gov/school-meals/community-eligibility-provision-resource-center>). This guidance clarifies that the use of non-Federal funds is not required if all operating costs are covered by the Federal reimbursement and other assistance provided under the NSLA and the Child Nutrition Act of 1966. It is important to remember that participation in CEP is a local-level decision that requires LEAs to evaluate their financial capacity to operate successfully. When deciding whether to elect CEP, eligible schools must consider their ability to cover their operating costs with the Federal reimbursement and any other available funds, including those provided by the State agency either to meet revenue matching requirements outlined in Section 7 of the NSLA or additional funds provided by State or local authorities on a separate, discretionary basis. To assist LEAs with making sound financial decisions related to CEP participation, FNS has provided extensive guidance and technical assistance to State and local agencies. FNS has also developed practical tools to assist LEAs in estimating the level of Federal reimbursement under CEP. These resources are available online at the FNS CEP Resource Center: <http://www.fns.usda.gov/school-meals/community-eligibility-provision-resource-center>.

Accordingly, § 245.9(f)(4)(vii) of this final rule retains the cost differential requirement but includes new language to clarify that the use of non-Federal funds is not required if all operating costs are covered by the Federal assistance received.

#### New 4-Year Cycle

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(4)(viii) would require that, to begin a new 4-year cycle, LEAs or schools must establish a new ISP as of April 1 of the fourth year of the previous cycle. If the LEA or school meets all eligibility criteria, it may begin a new 4-year cycle, subject to State agency confirmation.

**Comments:** Thirty-two comments from various stakeholders, including individuals, program operators, and advocates, recommended that LEAs be permitted to begin a new 4-year cycle for any school year, to avoid creating a disincentive to immediate enrollment among LEAs that have reason to believe that their ISP may increase in a future school year.

**FNS Response:** Section 11(a)(1)(F)(iv) of the NSLA permits LEAs to recalculate their ISP each school year. FNS agrees

with commenters that ensuring LEAs are able to begin a new 4-year cycle when a higher ISP may be selected is an important element of CEP, and also serves as an incentive for LEAs to continue participating in CEP over time.

Accordingly, § 245.9(f)(4)(viii) of this final rule allows for the recalculation of the ISP and the start of a new 4-year cycle each school year.

#### Grace Year

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(4)(ix) would permit a LEA or school in the fourth year of a CEP cycle with an ISP of less than 40 percent but equal to or greater than 30 percent as of April 1 to continue using CEP for one additional year, referred to as a grace year.

**Comments:** One comment requested additional information on how to calculate the ISP accurately during the fourth year of the cycle and requested clarification on whether the 1.6 multiplier is guaranteed to carry forward into a fifth year if an LEA takes advantage of the CEP grace year.

**FNS Response:** Schools and LEAs in the fourth year of a 4-year CEP cycle will compile new identified student data reflective of April 1 of the cycle's fourth year to: (1) Support a new 4-year CEP cycle with a new ISP; and (2) meet the following school year's publication and notification requirements as outlined in the final rule at § 245.9(f)(5). Should the LEA determine that a new 4-year cycle may not be immediately elected because their ISP is less than 40 percent but at least 30 percent, the LEA may elect to participate in CEP for an additional grace year using the ISP as of April 1 of the fourth year of their current CEP cycle. The Federal reimbursement in the grace year is based on the ISP as of April 1 in the fourth year of the CEP cycle multiplied by 1.6. If the ISP as of April 1 of the grace year does not meet the 40 percent ISP requirement, the LEA must return to standard counting and claiming, or enroll in another special provision option for the following school year.

Accordingly, this final rule retains the grace year provision in § 245.9(f)(4)(ix) and clarifies that the 1.6 multiplier is used in the grace year to determine the claiming percentage.

#### Identification of Potential CEP LEAs and Schools

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(5) would require that, no later than April 15 of each school year, each State agency must notify LEAs of district-wide eligibility, including LEAs: (1) With a district-wide ISP of at least 40 percent; (2) with a district-wide ISP

of less than 40 percent but at least 30 percent; (3) Currently operating CEP district-wide; and (4) LEAs operating CEP district-wide in the fourth year of the CEP cycle and eligible for a grace year. In addition, annually by April 15, LEAs must submit to the State agency a list(s) of schools: (1) With an ISP of at least 40 percent; (2) an ISP less than 40 percent but at least 30 percent; and (3) schools in the fourth year of a CEP cycle eligible for a grace year. The State agency may exempt LEAs from this requirement if the State agency already collects the required information.

**Comments:** One commenter requested that FNS change the notification requirements so two requirements do not share an April 15 deadline.

**FNS Response:** Section 11(a)(1)(F)(x) of the NSLA requires that States publish, annually by May 1, lists of LEAs and schools eligible and nearly eligible to elect CEP for the next school year. To meet this requirement, States must notify LEAs of eligibility, and LEAs must notify State agencies of school-level eligibility. Requiring this exchange of information by April 15 allows States to meet the May 1 publication deadline. States and LEAs may share the required information with each other prior to the April 15 deadline. Further, State agencies that have access to school-level eligibility information may exempt LEAs from this requirement.

Accordingly, this final rule retains in § 245.9(f)(5) and (6) the requirements that LEAs and State agencies, respectively, must exchange, by April 15, lists of LEAs and schools potentially eligible to elect CEP. Further, State agencies must publish the lists online and submit the information to FNS.

#### Public Notification Requirements

**Proposed Rule:** The proposed rule at 7 CFR 245.9(f)(7) would require State agencies, by May 1 of each school year, to make available comprehensive and readily accessible information, in a format prescribed by FNS, regarding the eligibility status of LEAs and schools to participate in CEP in the next school year.

**Comments:** Thirty-one commenters recommended that FNS ensure that State agencies publicly post the lists of eligible and nearly eligible LEAs and schools by the May 1 deadline to allow adequate time for outreach and to give LEAs time to make an election decision before the traditional school year ends. One commenter suggested that FNS develop guidelines for the length of time that State agencies must post the required lists. Another commenter

requested clarification on the public notification requirements.

*FNS Response:* Section 11(a)(1)(F)(x)(III) of the NSLA requires, annually by May 1, State agencies to submit to FNS lists of LEAs eligible to elect CEP. This final rule requires States to publish lists of eligible and nearly eligible LEAs and schools on the State agency's Web site in a readily accessible format prescribed by FNS. To facilitate outreach, FNS publishes links to each State's lists at: <http://www.fns.usda.gov/school-meals/community-eligibility-provision-status-school-districts-and-schools-state>. FNS maintains a map linking to each State's lists for the duration of the school year, until new lists are published for the forthcoming school year. Since publishing the proposal, FNS has provided technical assistance to clarify the notification and publication requirements for State agencies and LEAs, including addressing frequently asked questions, issuing policy memos, developing a template to organize eligibility information, and conducting multiple webinars to explain the publication and notification requirements.

Accordingly, § 245.9(f)(7)(iii) of this final rule maintains the requirement for State agencies to publish lists of eligible and nearly eligible LEAs and schools on the State agency Web site and includes additional language requiring States to maintain eligibility lists on their Web site until the following May 1, when new eligibility lists are published.

#### *Notification Data*

*Proposed Rule:* The proposed rule at 7 CFR 245.9(f)(8) would require that data compiled by the State agency for the purposes of fulfilling annual CEP notification requirements be representative of the current school year and reflective of April 1, and use the ISP as a basis for determining the projected eligibility status. If data reflective of April 1 are not available for the notification process, the State agency would be required to ensure the presence of a notation that indicates the data are intended for informational purposes and do not confer eligibility for community eligibility.

*Comments:* One commenter recommended using ISP data from October to meet notification requirements because it is more accurate and less burdensome. Another commenter expressed concern that direct certification data may not be used in lieu of the ISP. In contrast to those comments, one commenter recommended that no proxy data be allowed to meet notification requirements and, instead, that

eligibility lists reflect only data documenting the actual numbers of identified students.

*FNS Response:* To ease administrative burden, October data reported on the FNS-742, School Food Authority Verification Summary Report, and data used to complete the FNS-834, State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report (for current Provision schools), may be used to meet the CEP notification requirements only. If school-specific identified student data is not readily available, State agencies or LEAs may use the number of directly certified students (e.g., with SNAP and/or with other assistance programs, as applicable) as a proxy for the number of identified students. If direct certification data is used, it must be clearly noted on the eligibility lists that the data does not fully reflect the number of identified students. Further, if data used to generate notification lists are not reflective of April 1 of the current school year, the lists must include a notation that the data are intended for informational purposes only and do not confer eligibility to elect CEP.

Accordingly, § 245.9(f)(8) of this final rule retains the flexibility for State agencies and LEAs to meet notification requirements and generate CEP eligibility lists using direct certification data. However, data not reflective of April 1 may not be used to elect CEP and may not be used as the basis for determining the ISP/claiming percentages, unless approved by FNS.

#### *Transfer and Carryover of Free Meal Eligibility*

*Proposed Rule:* The proposed rule at 7 CFR 245.9(l) would require that a student's access to free meals be extended for up to 10 operating school days when transferring from a CEP to a non-CEP school within the same LEA. For student transfers between two separate LEAs, free meals may be offered for up to 10 operating school days at the discretion of the receiving LEA.

*Comments:* FNS received 32 similar comments from advocates and State agencies recommending greater protection for students from low-income households who transfer from CEP schools to non-CEP schools during the school year. Commenters highlighted the importance of ensuring that these students have continuous access to no-cost school meals when changing schools, particularly because households accustomed to CEP may not know they need to complete an application for children to receive school meal benefits. Specifically,

commenters recommended providing up to 30 days of meals at no cost to students who transfer from a CEP to a non-CEP school, both within an LEA and between LEAs.

*FNS Response:* FNS acknowledges that changing schools may be a significant transition for students and households. Adjusting to a new school environment can present unique challenges, particularly for low-income households whose circumstances may have necessitated the transfer. FNS agrees with commenters and seeks to ensure that vulnerable children have uninterrupted access to healthy school meals during these critical transitions.

FNS discussions around transfer (within the school year) and carryover (between school years) eligibility when students move from CEP to non-CEP schools unveiled policy inconsistencies among CEP and other alternative reimbursement options: Provision 2 and Provision 3 (described in §§ 245.9(b) and (d), respectively). Conversations with State agencies at national and regional meetings emphasized the need for consistent policies and operational ease related to the transfer of students from Provision to non-Provision schools. These conversations also revealed possible gaps in benefits when students from low-income households move to new schools, particularly between LEAs, both during and between school years. While many students are likely to change schools at least once, data from the DoED shows that poor and minority students change schools more often than their peers. Research suggests that mobility has a negative impact on academic achievement, leading to lower test scores and higher dropout rates. Supporting low-income, highly-mobile students by providing them access to school meals during a transition is an important, practical investment in our high-need communities, and in our nation's future.<sup>3</sup>

Schools face a range of challenges in meeting the academic, social, and emotional needs of students who change schools. Teachers report that new and transfer students often have difficulty coping with changes in curriculum content and instruction. Teachers and principals also report that schools have to address the needs of these students' households and the circumstances which often underlie frequent school changes.<sup>4</sup> Further, students may arrive

<sup>3</sup> U.S. Government Accountability Office. (2010). *Many Challenges Arise in Educating Students Who Change Schools Frequently*. (GAO Publication No. 11-40). Washington, DC: U.S. Government Printing Office.

<sup>4</sup> Id.

without records or with incomplete records, making it difficult for school food service staff to immediately determine eligibility for school meals. Given the many challenges involved with school transfers and moves, it is crucial to ensure that students from low-income households have consistent access to school meals during these transitions.

Based on the public comments received and information gained from national implementation and internal policy analysis, § 245.9(l) of this final rule requires that a receiving LEA provides free meals to students transferring from Provision schools to non-Provision schools for up to 10 operating days or until a new eligibility determination is made. For student transfers within an LEA, this requirement is effective upon implementation of the final rule. FNS recognizes the logistical challenges traditionally associated with the transfer of student records between LEAs, where systems allowing for the sharing of information may not be in place. Therefore, for student transfers between different LEAs, this requirement will apply no later than July 1, 2019. This provides program operators time to establish procedures for ensuring that students transferring from a Provision school in another LEA during the school year are promptly identified.

Further, for transfers within and between LEAs, the receiving LEA may, at the State agency's discretion, provide the transferred student free reimbursable meals for up to 30 operating days or until a new eligibility determination is made, whichever comes first. This discretion is effective upon implementation of the final rule.

Additionally, section 245.6(c) of this final rule protects students from low-income households moving from a Provision school to a non-Provision school between school years. At the discretion of the State agency, all LEAs receiving students who had access to free meals in the prior year at a Provision school may be offered free reimbursable meals for up to 30 operating days or until a new eligibility determination is made in the current school year, whichever comes first. This discretion, effective upon implementation of the final rule, is intended to protect students who move to a non-Provision school within the same LEA or in a different LEA between school years by giving them access to what is commonly referred to as carryover eligibility.

Accordingly, § 245.9(l) of this final rule retains the requirement that students who transfer from CEP to non-

CEP schools during the school year must receive up to 10 days of free meals. Additionally, this requirement (*i.e.*, up to 10 days of free meals) is expanded to benefit students transferring from Provision schools under § 245.9 to non-Provision schools both within and between LEAs during the school year. Delayed implementation (not later than July 1, 2019) is included for student transfers between LEAs. Finally, §§ 245.9(l) and 245.6(c)(2) have been modified to give States discretion to allow LEAs to provide up to 30 days of meals at no cost to students moving from a Provision school to a non-Provision school during and between school years.

### III. Implementation Resources

FNS promotes ongoing implementation of CEP nationwide, fortifying it as an established model for operating the Federal school meal programs and strives to ensure that all eligible school districts are well informed about CEP and its benefits. Accordingly, FNS provides resources to help school districts make sound decisions when considering CEP elections, and collaborates with State and local partners and their stakeholders in providing this technical assistance. This technical assistance has consisted of a variety of activities to promote CEP that include: Collaborating with partners and stakeholders; executing outreach plans; conducting trainings; and delivering presentations to diverse audiences, particularly targeting education program administrators.

In addition to these activities, FNS has established an online resource center (<http://www.fns.usda.gov/school-meals/community-eligibility-provision-resource-center>) that provides extensive resources for parents, teachers, and school officials at the local, State, and Federal level to better understand CEP and its positive benefits, along with useful tools to help facilitate successful implementation. FNS also developed an estimator tool to help LEAs determine if CEP is financially viable, and to help assess LEA groupings to optimize the Federal reimbursement.

Additionally, FNS has conducted numerous CEP webinars for State and local program operators on a wide range of topics that include: CEP Basics; Outreach to Eligible Districts; Title I and E-Rate Funding; Allocating State and Local Funding without Applications; Administrative Reviews; Successful Implementation Strategies; How to Partially Implement CEP (in some, but not all, schools in an LEA); Direct Certification and Reporting; Publication

and Notification Requirements; and Financial Considerations for CEP. Recordings of all webinars are available online at the CEP Resource Center.

FNS will continue to provide technical assistance, work to eliminate barriers to participation and share best practices for implementation in an effort to reach children in every school that stands to benefit from CEP.

### IV. Procedural Matters

#### *Executive Orders 12866 and 13563*

Executive Orders 12866 and 13563 direct Federal agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

#### *Regulatory Impact Analysis*

This rule has been designated as not significant by the Office of Management and Budget; therefore, a Regulatory Impact Analysis is not required.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Federal agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been determined that this final rule will not have a significant impact on a substantial number of small entities. The final rule will establish requirements for LEAs and schools operating the CEP. The provisions of this final rule were developed with stakeholders' input, and are intended to reflect the operational needs of LEAs of all sizes. Furthermore, the final rule is largely consistent with existing sub-regulatory guidance issued by FNS to assist State and local agencies with CEP implementation. No specific additional burdens are placed on small LEAs seeking to operate CEP.

It should be noted that small LEAs generally employ fewer staff in the operation of their school meal programs; many of these individuals may fill

multiple roles for a given school or district. As such, the predicted impact of the final rule on small LEAs is expected to be positive in terms of reducing the paperwork burden. The administrative efficiencies offered by CEP through the elimination of the application process saves officials at small LEAs hours of paperwork that would normally need to be completed each school year. Currently, many small LEAs participate in CEP; in SY 2014–15, about half of the more than 2,000 school districts electing CEP had enrollments of 500 or less.

#### *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 by State, local or tribal governments, in the aggregate, or the private sector, of \$146 million or more (when adjusted for 2015 inflation; GDP deflator source: Table 1.1.9 at <http://www.bea.gov/iTable>) 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 most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$146 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### *Executive Order 12372*

The NSLP, SBP, SAE, SMP, CACFP and SFSP are listed in the Catalog of Federal Domestic Assistance Programs under NSLP No. 10.555, SBP No. 10.553, SAE No. 10.560, SMP No. 10.556, CACFP No. 10.558, and SFSP No. 10.559, respectively and are subject to Executive Order 12372 which requires intergovernmental consultation with State and local officials (See 2 CFR chapter IV).

#### *Federalism Summary Impact Statement*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions

have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency’s considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121.

#### *Prior Consultation With State Officials*

FNS National and Regional Offices have ongoing, formal and informal discussions with State agency officials regarding the Child Nutrition Programs and policy issues. FNS specifically delayed publication of this final rule to allow for at least one full year of nationwide CEP implementation, so as to consult with State and local officials and better inform the rulemaking process. Prior to this rulemaking, FNS interacted extensively with State agencies throughout the Provision’s phased-in implementation, and worked collaboratively to determine which State agencies would participate for each of the three phase-in years. Once selected, FNS consulted regularly with the pilot States to solicit feedback and better inform the process of developing sub-regulatory guidance. More broadly, in an effort to inform stakeholders and solicit feedback, FNS held several conference calls and meetings with State agencies to discuss the statutory requirements that would serve as the foundation for this rule. FNS also discussed CEP statutory requirements with program operators at State and national conferences.

To facilitate nationwide CEP implementation in SY 2014–15, FNS held periodic State agency conference calls that included all State agencies. These cross-regional gatherings served as an opportunity to share and discuss concerns, and for the former pilot States to share their valuable implementation experience. Furthermore, FNS Regional Office staff assisted State agencies with targeted technical assistance where needed, and served as a liaison for policy and implementation questions. FNS outreach has also extended to State education officials, including those administering State and Federal education funding. In addition, FNS received 78 public comments in response to the proposed rule (78 FR 65890), including comments from State agency officials. These various forms of consultation produced valuable input that has been considered in drafting this final rule.

#### *Nature of Concerns and the Need To Issue This Rule*

The key concern raised by State agencies and LEAs was the general feasibility of implementing CEP without

established regulatory and sub-regulatory guidance. Furthermore, many State agency officials were concerned that the elimination of the household application process would limit their ability to collect data on students from low-income households. Traditionally, free and reduced price school meal data, which is at least partially collected through the household application process, has served as an important proxy for poverty status, and has been used as a basis to distribute other forms of funding and benefits.

#### *Extent To Which We Meet Those Concerns*

FNS has considered the impact of this final rule on State and local operators, and has developed a rule that will guide CEP implementation in the most effective and least burdensome manner. The final rule has been informed by the feedback received from State and local officials through this rulemaking process, and through extended consultations with participating and prospective States and LEAs. In an effort to assist State and local agencies prior to the publication of this final rule, FNS published comprehensive sub-regulatory guidance, including memoranda and a *CEP Planning and Implementation Guidance Manual*, which are consistent with the provisions of the final rule. In addition, the final rule will help to alleviate data concerns by requiring States/LEAs to conduct at least one SNAP data match per year.

#### *Executive Order 12988, Civil Justice Reform*

This final 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 and timely implementation. However, FNS does not expect significant inconsistencies between this final rule and existing State or local regulations regarding the provision of school food service operations under CEP. The final rule was developed with input from State and local agencies and was based, in part, on their experience with CEP implementation. CEP has been available as a pilot program since SY 2011–12 and nationwide since SY 2014–15, with successful implementation in all 50 States, the District of Columbia, and Guam. Per statutory requirements outlined in the NSLA, State agencies operating the Federal school meal programs are unable to bar an eligible

LEA from CEP participation. FNS has produced extensive guidance in addition to this rulemaking to ensure a sound operational environment exists for LEAs electing CEP. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures under § 210.18(q) or § 235.11(f) must be exhausted.

#### *Civil Rights Impact Analysis*

FNS has reviewed this final rule in accordance with the Department Regulation 4300–4, “Civil Rights Impact Analysis,” and 1512–1, “Regulatory Decision Making Requirements,” to identify and address any major civil rights impacts the final rule might have on minorities, women, and persons with disabilities. After a careful review of the proposed rule’s intent and provisions, FNS has determined that this final rule is not intended to limit or reduce in any way the ability of protected classes of individuals to receive benefits on the basis of their race, color, national origin, sex, age or disability, nor is it intended to have a differential impact on minority owned or operated business establishments, and women-owned or operated business establishments that participate in the Child Nutrition Programs. The requirements established in this final rule are intended to improve access to school meals, and support academic achievement for all students in high-poverty LEAs and schools. The requirements are not expected to negatively impact the protected classes.

#### *Executive Order 13175*

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. FNS provides regularly scheduled quarterly consultation sessions as a venue for collaborative conversations with Tribal officials or their designees. The most recent quarterly consultation sessions were held on August 19, 2015; November 18, 2015; February 17, 2016; and May 18, 2016. FNS provided a review of the most recent CEP guidance at the August 2015 consultation. At the November 2013 consultation, FNS discussed the proposed rule with Tribal

officials and encouraged them to submit public comments. At the November 2015 consultation, FNS advised Tribal officials that the final rule was under development. No questions related to CEP arose. FNS will respond in a timely and meaningful manner to any Tribal government request for consultation concerning CEP. At the February 17, 2016 consultation, FNS asked Tribal officials to share best practices for conducting CEP outreach to eligible Tribal schools. FNS is unaware of any current Tribal laws that could be in conflict with this final rule.

#### *Paperwork Reduction Act*

A 60-day notice embedded in the proposed rule, “National School Lunch Program and School Breakfast Program: Eliminating Applications through Community Eligibility as Required by the Healthy, Hunger-Free Kids Act of 2010” published in the **Federal Register** at 78 FR 65890 on November 4, 2013 and provided the public an opportunity to submit comments on the proposed information collection burden resulting from this rule. No changes have been made to the proposed requirements in this final rulemaking. Thus, in accordance with the Paperwork Reduction Act of 1995, the information collection requirements associated with this final rule, which were filed under 0584–0026, have been submitted for approval to OMB. When OMB notifies FNS of its decision, FNS will publish a notice in the **Federal Register** of the action.

#### *E-Government Act Compliance*

The Department 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 245**

Civil rights, Food assistance programs, Grant programs—education, Grant programs—health, Infants and children, Milk, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, 7 CFR part 245 is amended as follows:

#### **PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS**

■ 1. The authority citation for part 245 continues to read as follows:

**Authority:** 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

■ 2. In § 245.6, revise paragraphs (b)(1)(v) and (c)(2) to read as follows:

#### **§ 245.6 Application, eligibility and certification of children for free and reduced price meals and free milk.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(v) Local educational agencies and schools currently operating Provision 2 or Provision 3 in non-base years, or the community eligibility provision, as permitted under § 245.9, are required to conduct a data match between Supplemental Nutrition Assistance Program records and student enrollment records at least once annually. State agencies may conduct data matching on behalf of LEAs and exempt LEAs from this requirement.

\* \* \* \* \*

(c) \* \* \*

(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. The local educational agency must extend eligibility to newly enrolled children when other children in their household (as defined in § 245.2) were approved for benefits the previous year. However, applications and documentation of direct certification from the preceding year shall be used only to determine eligibility for 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. At the State agency’s discretion, students who, in the preceding school year, attended a school operating a special assistance certification and reimbursement alternative (as permitted in § 245.9)) may be offered free reimbursable meals for up to 30 operating days or until a new eligibility determination is made in the current school year, whichever comes first.

\* \* \* \* \*

■ 3. In § 245.9:

■ a. Remove “paragraph (k)” and add in its place “paragraph (m)” in paragraphs (c)(2)(iii)(A) and (B) and (e)(2)(iii)(A) and (B);

■ b. Remove the words “school food authority’s” and add in their place the words “local educational agency’s” in

paragraphs (b)(5), (d)(3) introductory text, and (d)(7);

■ c. Remove “paragraph (g)” and add in its place “paragraph (h)” in paragraph (d)(3) introductory text;

■ d. Revise paragraphs (f) through (j);

■ e. Redesignate paragraph (k) as paragraph (m);

■ f. Add new paragraph (k);

■ g. Add paragraph (l)

■ h. Remove the words “School Food Authority” and “school food authority” and add in their place the words “local educational agency” and remove the words “School food authority” and add in their place the words “Local educational agency” wherever they appear; and

■ i. Remove the words “school food authorities” and add in their place the words “local educational agencies” and remove the words “School food authorities” and add in their place the words “Local educational agencies” wherever they appear.

The revisions and additions read as follows:

**§ 245.9 Special assistance certification and reimbursement alternatives.**

\* \* \* \* \*

(f) *Community eligibility*. The community eligibility provision is an alternative reimbursement option for eligible high poverty local educational agencies. Each CEP cycle lasts up to four years before the LEA or school is required to recalculate their reimbursement rate. LEAs and schools have the option to recalculate sooner, if desired. A local educational agency may elect this provision for all of its schools, a group of schools, or an individual school. Participating local educational agencies must offer free breakfasts and lunches for the length of their CEP cycle, not to exceed four successive years, to all children attending participating schools and receive meal reimbursement based on claiming percentages, as described in paragraph (f)(4)(v) of this section.

(1) *Definitions*. For the purposes of this paragraph,

(i) *Enrolled students* means students who are enrolled in and attending schools participating in the community eligibility provision and who have access to at least one meal service (breakfast or lunch) daily.

(ii) *Identified students* means students with access to at least one meal service who are not subject to verification as prescribed in § 245.6a(c)(2). Identified students are students approved for free meals based on documentation of their receipt of benefits from SNAP, TANF, the Food Distribution Program on Indian Reservations, or Medicaid where

applicable (where approved by USDA to conduct matching with Medicaid data to identify children eligible for free meals). The term identified students also includes homeless children, migrant children, runaway children, or Head Start children (approved for free school meals without application and not subject to verification), as these terms are defined in § 245.2. In addition, the term includes foster children certified for free meals through means other than an application for free and reduced price school meals. The term does not include students who are categorically eligible based on submission of an application for free and reduced price school meals.

(iii) *Identified student percentage* means a percentage determined by dividing the number of identified students as of a specified period of time by the number of enrolled students as defined in paragraph (f)(1)(i) of this section as of the same period of time and multiplying the quotient by 100. The identified student percentage may be determined by an individual participating school, a group of participating schools in the local educational agency, or in the aggregate for the entire local educational agency if all schools participate, following procedures established in FNS guidance.

(2) *Implementation*. A local educational agency may elect the community eligibility provision for all schools, a group of schools, or an individual school. Community eligibility may be implemented for one or more 4-year cycles.

(3) *Eligibility criteria*. To be eligible to participate in the community eligibility provision, a local educational agency (except a residential child care institution, as defined under the definition of “School” in § 210.2), group of schools, or school must meet the eligibility criteria set forth in this paragraph.

(i) *Minimum identified student percentage*. A local educational agency, group of schools, or school must have an identified student percentage of at least 40 percent, as of April 1 of the school year prior to participating in the community eligibility provision, unless otherwise specified by FNS. Individual schools participating in a group may have less than 40 percent identified students, provided that the average identified student percentage for the group is at least 40 percent.

(ii) *Lunch and breakfast program participation*. A local educational agency, group of schools, or school must participate in the National School Lunch Program and School Breakfast

Program, under parts 210 and 220 of this title, for the duration of the 4-year cycle. Schools that operate on a limited schedule, where it is not operationally feasible to offer both lunch and breakfast, may elect CEP with FNS approval.

(iii) *Compliance*. A local educational agency, group of schools, or school must comply with the procedures and requirements specified in paragraph (f)(4) of this section to participate in the community eligibility provision.

(4) *Community eligibility provision procedures*—(i) *Election documentation and deadline*. A local educational agency, group of schools, or school that intends to elect the community eligibility provision for the following year for one or more schools must submit to the State agency documentation demonstrating the LEA, group of schools, or school meets the identified student percentage, as specified under paragraph (f)(3)(i) of this section. Such documentation must be submitted no later than June 30 and must include, at a minimum, the counts of identified students and enrolled students as of April 1 of the school year prior to CEP implementation.

(ii) *State agency review of election documentation*. The State agency must review the identified student percentage documentation submitted by the local educational agency to confirm that the local educational agency, group of schools, or school meets the minimum identified student percentage, participates in the National School Lunch Program and School Breakfast Program, and has a record of administering the meal program in accordance with program regulations, as indicated by the most recent administrative review.

(iii) *Meals at no cost*. A local educational agency must ensure participating schools offer reimbursable breakfasts and lunches at no cost to all students attending participating schools during the 4-year cycle, and count the number of reimbursable breakfasts and lunches served to students daily.

(iv) *Household applications*. A local educational agency, group of schools, or school must not collect applications for free and reduced price school meals on behalf of children in schools participating in the community eligibility provision. Any local educational agency seeking to obtain socioeconomic data from children receiving free meals under this section must develop, conduct, and fund this effort entirely separate from, and not under the auspices of, the National School Lunch Program or School Breakfast Program.

(v) *Free and paid claiming percentages.* Reimbursement is based on free and paid claiming percentages applied to the total number of reimbursable lunches and breakfasts served each month, respectively. Reduced price students are accounted for in the free claiming percentage, eliminating the need for a separate percentage.

(A) To determine the free claiming percentage, multiply the applicable identified student percentage by a factor of 1.6. The product of this calculation may not exceed 100 percent. The difference between the free claiming percentage and 100 percent represents the paid claiming percentage. The applicable identified student percentage means:

(1) In the first year of participation in the community eligibility provision, the identified student percentage as of April 1 of the prior school year.

(2) In the second, third, and fourth year of the 4-year cycle, LEAs may choose the higher of the identified student percentage as of April 1 of the prior school year or the identified student percentage as of April 1 of the year prior to the current 4-year cycle. LEAs and schools may begin a new 4-year cycle with a higher identified student percentage based on data as of the most recent April 1, as specified in paragraph (viii).

(B) To determine the number of lunches to claim for reimbursement, multiply the free claiming percentage as described in this paragraph by the total number of reimbursable lunches served to determine the number of free lunches to claim for reimbursement. The paid claiming percentage is multiplied by the total number of reimbursable lunches served to determine the number of paid lunches to claim for reimbursement. In the breakfast meal service, the free and paid claiming percentages are multiplied by the total number of reimbursable breakfasts served to determine the number of free and paid breakfasts to claim for reimbursement. For any claim, if the total number of meals claimed for free and paid reimbursement does not equal the total number of meals served, the paid category must be adjusted so that all served meals are claimed for reimbursement.

(vi) *Multiplier factor.* A 1.6 multiplier must be used for an entire 4-year cycle to calculate the percentage of lunches and breakfasts to be claimed at the Federal free rate.

(vii) *Cost differential.* If there is a difference between the cost of serving lunches and breakfasts at no cost to all participating children and the Federal

assistance provided, the local educational agency must pay such difference with non-Federal sources of funds. Expenditure of additional non-federal funds is not required if all operating costs are covered by the Federal assistance provided.

(viii) *New 4-year cycle.* To begin a new 4-year cycle, local educational agencies or schools must establish a new identified student percentage as of April 1 prior to the 4-year cycle. If the local educational agency, group of schools, or school meet the eligibility criteria set forth in paragraph (f)(3) of this section, a new 4-year cycle may begin.

(ix) *Grace year.* A local educational agency, group of schools, or school with an identified student percentage of less than 40 percent but equal to or greater than 30 percent as of April 1 of the fourth year of a community eligibility cycle may continue using community eligibility for a grace year that continues the 4-year cycle for one additional, or fifth, year. If the local educational agency, group of schools, or school regains the 40 percent threshold as of April 1 of the grace year, the State agency may authorize a new 4-year cycle for the following school year. If the local educational agency, group of schools, or school does not regain the required threshold as of April 1 of the grace year, they must return to collecting household applications in the following school year in accordance with paragraph (j) of this section. Reimbursement in a grace year is determined by multiplying the identified student percentage at the local educational agency, group of schools, or school as of April 1 of the fourth year of the 4-year CEP cycle by the 1.6 multiplier.

(5) *Identification of potential community eligibility schools.* No later than April 15 of each school year, each local educational agency must submit to the State agency a list(s) of schools as described in this paragraph. The State agency may exempt local educational agencies from this requirement if the State agency already collects the required information. The list(s) must include:

(i) Schools with an identified student percentage of at least 40 percent;

(ii) Schools with an identified student percentage that is less than 40 percent but greater than or equal to 30 percent; and

(iii) Schools currently in year 4 of the community eligibility provision with an identified student percentage that is less than 40 percent but greater than or equal to 30 percent.

(6) *State agency notification requirements.* No later than April 15 of each school year, the State agency must notify the local educational agencies described in this paragraph about their community eligibility status. Each State agency must notify:

(i) Local educational agencies with an identified student percentage of at least 40 percent district wide, of the potential to participate in community eligibility in the subsequent year; the estimated cash assistance the local educational agency would receive; and the procedures to participate in community eligibility.

(ii) Local educational agencies with an identified student percentage that is less than 40 percent district wide but greater than or equal to 30 percent, that they may be eligible to participate in community eligibility in the subsequent year if they meet the eligibility requirements set forth in paragraph (f)(3) of this section as of April 1.

(iii) Local educational agencies currently using community eligibility district wide, of the options available in establishing claiming percentages for next school year.

(iv) Local educational agencies currently in year 4 with an identified student percentage district wide that is less than 40 percent but greater than or equal to 30 percent, of the grace year eligibility.

(7) *Public notification requirements.* By May 1 of each school year, the State agency must make the following information readily accessible on its Web site in a format prescribed by FNS:

(i) The names of schools identified in paragraph (f)(5) of this section, grouped as follows: Schools with an identified student percentage of at least 40 percent, schools with an identified student percentage of less than 40 percent but greater than or equal to 30 percent, and schools currently in year 4 of the community eligibility provision with an identified student percentage that is less than 40 percent but greater than or equal to 30 percent.

(ii) The names of local educational agencies receiving State agency notification as required under paragraph (f)(6) of this section, grouped as follows: Local educational agencies with an identified student percentage of at least 40 percent district wide, local educational agencies with an identified student percentage that is less than 40 percent district wide but greater than or equal to 30 percent, local educational agencies currently using community eligibility district wide, and local educational agencies currently in year 4 with an identified student percentage



district wide that is less than 40 percent but greater than or equal to 30 percent.

(iii) The State agency must maintain eligibility lists as described in paragraphs (i) and (ii) of this section until such time as new lists are made available annually by May 1.

(8) *Notification data.* For purposes of fulfilling the requirements in paragraphs (f)(5) and (6) of this section, the State agency must:

(i) Obtain data representative of the current school year, and

(ii) Use the identified student percentage as defined in paragraph (f)(1) of this section. If school-specific identified student percentage data are not readily available by school, use direct certifications as a percentage of enrolled students, *i.e.*, the percentage derived by dividing the number of students directly certified under § 245.6(b) by the number of enrolled students as defined in paragraph (f)(1) as an indicator of potential eligibility. If direct certification data are used, the State agency must clearly indicate that the data provided does not fully reflect the number of identified students.

(iii) If data are not as of April 1 of the current school year, ensure the data includes a notation that the data are intended for informational purposes and do not confer eligibility for community eligibility. Local educational agencies must meet the eligibility requirements specified in paragraph (f)(3) of this section to participate in community eligibility.

(9) *Other uses of the free claiming percentage.* For purposes of determining a school's or site's eligibility to participate in a Child Nutrition Program, a community eligibility provision school's free claiming percentage, *i.e.*, the product of the school's identified student percentage multiplied by 1.6, serves as a proxy for free and reduced price certification data.

(g) *Policy statement requirement.* A local educational agency that elects to participate in the special assistance provisions or the community eligibility provision set forth in this section must:

(1) Amend its Free and Reduced Price Policy Statement, specified in § 245.10 of this part, to include a list of all schools participating in each of the special assistance provisions specified in this section. The following information must also be included for each school:

(i) The initial school year of implementing the special assistance provision;

(ii) The school years the cycle is expected to remain in effect;

(iii) The school year the special assistance provision must be reconsidered; and

(iv) The available and approved data that will be used in reconsideration, as applicable.

(2) Certify that the school(s) meet the criteria for participating in each of the special assistance provisions, as specified in paragraphs (a), (b), (c), (d), (e) or (f) of this section, as appropriate.

(h) *Recordkeeping.* Local educational agencies that elect to participate in the special assistance provisions set forth in this section must retain implementation records for each of the participating schools. Failure to maintain sufficient records will result in the State agency requiring the school to return to standard meal counting and claiming procedures and/or fiscal action. Recordkeeping requirements include, as applicable:

(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.

(3) *Records for the community eligibility provision.* Local educational agencies must ensure records are maintained, including: data used to calculate the identified student percentage, annual selection of the identified student percentage, total number of breakfasts and lunches served daily, percentages used to claim meal reimbursement, non-Federal funding sources used to cover any excess meal costs, and school-level information provided to the State agency for publication, if applicable. Documentation must be made available at any reasonable time for review and audit purposes. Such records shall be retained during the period the community eligibility provision is in effect, including all extensions, plus three fiscal years after the submission of the last Claim for Reimbursement which was based on the data. In any case, if audit findings have not been resolved, these records must be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(i) *Availability of documentation.* Upon request, the local educational agency must make documentation available for review or audit to document compliance with the requirements of this section. Depending on the certification or reimbursement alternative used, such documentation includes, but is not limited to, enrollment data, participation data, identified student percentages, available and approved socioeconomic data that

was used to grant an extension, if applicable, or other data. In addition, upon request from FNS, local educational agencies under Provision 2 or Provision 3, or State agencies must submit to FNS all data and documentation used in granting extensions including documentation as specified in paragraphs (c) and (e) of this section. Data used to establish a new cycle for the community eligibility provision must also be available for review.

(j) *Restoring standard meal counting and claiming.* Under Provisions 1, 2, or 3 or community eligibility provision, a local educational agency may restore a school to standard notification, certification, and counting and claiming procedures at any time during the school year or for the following school year if standard procedures better suit the school's program needs. If standard procedures are restored during a school year, the local educational agency must offer all students reimbursable, free meals for a period of at least 30 operating days following the date of restoration of standard procedures or until a new eligibility determination is made, whichever comes first. Prior to the change taking place, but no later than June 30, the local educational agency must:

(1) Notify the State agency of the intention to stop participating in a special assistance certification and reimbursement alternative under this section and seek State agency guidance and review regarding the restoration of standard operating procedures.

(2) Notify the public and meet the certification and verification

requirements of §§ 245.6 and 245.6a in affected schools.

(k) *Puerto Rico and Virgin Islands.* A local educational agency in Puerto Rico and the Virgin Islands, where a statistical survey procedure is permitted in lieu of eligibility determinations for each child, may: Maintain their standard procedures in accordance with § 245.4, select Provision 2 or Provision 3, or elect the community eligibility provision provided the applicable eligibility requirements as set forth in paragraphs (a) through (f) of this section are met. For the community eligibility provision, current direct certification data must be available to determine the identified student percentage.

(l) *Transferring eligibility for free meals during the school year.* For student transfers during the school year within a local educational agency, a student's access to free, reimbursable meals under the special assistance certification and reimbursement alternatives specified in this section must be extended by a receiving school using standard counting and claiming procedures for up to 10 operating school days or until a new eligibility determination for the current school year is made, whichever comes first. For student transfers between local educational agencies, this requirement applies not later than July 1, 2019. At the State agency's discretion, students who transfer within or between local educational agencies may be offered free reimbursable meals for up to 30 operating days or until a new eligibility determination for the current school year is made, whichever comes first.

\* \* \* \* \*

■ 4. In § 245.13, revise paragraph (c)(3) to read as follows:

**§ 245.13 State agencies and direct certification requirements.**

\* \* \* \* \*

(c) \* \* \*

(3) *Data Element #3*—The count of the number of children who are members of households receiving assistance under SNAP who attend a school operating under the provisions of 7 CFR 245.9 in a year other than the base year or that is exercising the community eligibility provision (CEP). The proxy for this data element must be established each school year through the State's data matching efforts between SNAP records and student enrollment records for these special provision schools that are operating in a non-base year or that are exercising the CEP. Such matching efforts must occur in or close to October each year, but no later than the last operating day in October. However, States that have special provision schools exercising the CEP may alternatively choose to include, for these schools, the count from the SNAP match conducted as of April 1 of the same calendar year, whether or not it was used in the CEP claiming percentages. State agencies must report this aggregated data element to FNS by December 1 each year, in accordance with guidelines provided by FNS.

\* \* \* \* \*

Dated: June 13, 2016.

**Yvette S. Jackson,**  
*Acting Administrator, Food and Nutrition Service.*

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