

Food and Nutrition Service, USDA

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School Lunch Act, FNS may waive provisions of such Act or the Child Nutrition Act of 1966, as amended, and the provisions of this part with respect to a State agency or eligible service provider. The provisions of this part required by other statutes may not be waived under this authority. FNS may only approve requests for a waiver that are submitted by a State agency and comply with the requirements at section 12(1)(1) and the limitations at section 12(1)(4), including that FNS may not grant a waiver that increases Federal costs.

(2)(i) A State agency may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(1)(2) and the provisions of this part.

(ii) A State agency may submit a request to waive specific statutory or regulatory requirements on behalf of eligible service providers that operate in the State. Any waiver where the State concurs must be submitted to the appropriate FNSRO.

(3)(i) An eligible service provider may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(1) and the provisions of this part. Any waiver request submitted by an eligible service provider must be submitted to the State agency for review. A State agency must act promptly on such a waiver request and must deny or concur with a request submitted by an eligible service provider.

(ii) If a State agency concurs with a request from an eligible service provider, the State agency must promptly forward to the appropriate FNSRO the request and a rationale, consistent with section 12(1)(2), supporting the request. By forwarding the request to the FNSRO, the State agency affirms:

(A) The request meets all requirements for waiver submissions; and,

(B) The State agency will conduct all monitoring requirements related to regular Program operations and the implementation of the waiver.

(iii) If the State agency denies the request, the State agency must notify the requesting eligible service provider and state the reason for denying the request in writing within 30 calendar days of the State agency's receipt of

the request. The State agency response is final and may not be appealed to FNS.

[47 FR 36527, Aug. 20, 1982, as amended at 87 FR 57366, Sept. 19, 2022]

Subpart B—Assistance to States

§ 226.4 Payments to States and use of funds.

(a) *Availability of funds.* For each fiscal year based on funds provided to the Department, FNS must make funds available to each State agency to reimburse institutions for their costs in connection with food service operations, including administrative expenses, under this part. Funds must be made available in an amount no less than the sum of the totals obtained under paragraphs (b), (c), (d), (e), (f), (g), and (j) of this section. However, in any fiscal year, the aggregate amount of assistance provided to a State under this part must not exceed the sum of the Federal funds provided by the State to participating institutions within the State for that fiscal year and any funds used by the State under paragraphs (j) and (l) of this section.

(b) *Center funds.* For meals served to participants in child care centers, adult day care centers and outside-school-hours care centers, funds shall be made available to each State agency in an amount no less than the sum of the products obtained by multiplying:

(1) The number of breakfasts served in the Program within the State to participants from families that do not satisfy the eligibility standards for free and reduced-price school meals enrolled in institutions by the national average payment rate for breakfasts for such participants under section 4 of the Child Nutrition Act of 1966;

(2) The number of breakfasts served in the Program within the State to participants from families that satisfy the eligibility standards for free school meals enrolled in institutions by the national average payment rate for free breakfasts under section 4 of the Child Nutrition Act of 1966;

(3) The number of breakfasts served to participants from families that satisfy the eligibility standard for reduced-price school meals enrolled in institutions by the national average payment rate for reduced-price school breakfasts under section 4 of the Child Nutrition Act of 1966;

(4) The number of lunches and suppers served in the Program within the State by the national average payment rate for lunches under section 4 of the National School Lunch Act. (All lunches and suppers served in the State are funded under this provision);

(5) The number of lunches and suppers served in the Program within the State to participants from families that satisfy the eligibility standard for free school meals enrolled in institutions by the national average payment rate for free lunches under section 11 of the National School Lunch Act;

(6) The number of lunches and suppers served in the Program within the State to participants from families that satisfy the eligibility standard for reduced-price school meals enrolled in institutions by the national average payment rate for reduced-price lunches under section 11 of the National School Lunch Act;

(7) The number of snacks served in the Program within the State to participants from families that do not satisfy the eligibility standards for free and reduced-price school meals enrolled in institutions by 2.75 cents;

(8) The number of snacks served in the Program within the State to participants from families that satisfy the eligibility standard for free school meals enrolled in institutions by 30 cents;

(9) The number of snacks served in the Program within the State to participants from families that satisfy the eligibility standard for reduced-price school meals enrolled in institutions by 15 cents.

(c) *Emergency shelter funds.* For meals and snacks served to children in emergency shelters, funds will be made available to each State agency in an amount equal to the total calculated by multiplying the number of meals and snacks served in the Program within the State to such children by the national average payment rate for

free meals and free snacks under section 11 of the National School Lunch Act.

(d) *At-risk afterschool care center funds.* For snacks served to children in at-risk afterschool care centers, funds will be made available to each State agency in an amount equal to the total calculated by multiplying the number of snacks served in the Program within the State to such children by the national average payment rate for free snacks under section 11 of the National School Lunch Act. For at-risk afterschool meals and at-risk afterschool snacks served to children, funds will be made available to each eligible State agency in an amount equal to the total calculated by multiplying the number of at-risk afterschool meals and the number of at-risk afterschool snacks served in the Program within the State by the national average payment rate for free meals and free snacks, respectively, under section 11 of the Richard B. Russell National School Lunch Act.

(e) *Day care home funds.* For meals served to children in day care homes, funds shall be made available to each State agency in an amount no less than the sum of products obtained by multiplying:

(1) The number of breakfasts served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for breakfasts;

(2) The number of breakfasts served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for breakfasts;

(3) The number of breakfasts served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for breakfasts;

(4) The number of lunches and suppers served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for lunches/suppers;

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(5) The number of lunches and suppers served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for lunches/suppers;

(6) The number of lunches and suppers served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for lunches/suppers;

(7) The number of snacks served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for snacks;

(8) The number of snacks served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for snacks; and

(9) The number of snacks served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for snacks.

(f) *Administrative funds.* For administrative payments to day care home sponsoring organizations, funds shall be made available to each State agency in an amount not less than the product obtained each month by multiplying the number of day care homes participating under each sponsoring organization within the State by the applicable rates specified in § 226.12(a)(3).

(g) *Start-up and expansion funds.* For start-up and expansion payments to eligible sponsoring organizations, funds shall be made available to each State agency in an amount equal to the total amount of start-up and expansion payments made in the most recent period for which reports are available for that State or on the basis of estimates by FNS.

(h) *Funding assurance.* FNS shall ensure that, to the extent funds are ap-

propriated, each State has sufficient Program funds available for providing start-up, expansion and advance payments in accordance with this part.

(i) *Rate adjustments.* FNS shall publish a notice in the FEDERAL REGISTER to announce each rate adjustment. FNS shall adjust the following rates on the specified dates:

(1) The rates for meals, including snacks, served in tier I and tier II day care homes shall be adjusted annually, on July 1 (beginning July 1, 1997), on the basis of changes in the series for food at home of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be rounded to the nearest lower cent based on changes measured over the most recent twelve-month period for which data are available. The adjustments shall be computed using the unrounded rate in effect for the preceding school year.

(2) The rates for meals, including snacks, served in child care centers, emergency shelters, at-risk afterschool care centers, adult day care centers and outside-school-hours care centers will be adjusted annually, on July 1, on the basis of changes in the series for food away from home of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustment must be rounded to the nearest lower cent, based on changes measured over the most recent twelve-month period for which data are available. The adjustment to the rates must be computed using the unrounded rate in effect for the preceding year.

(3) The rate for administrative payments to day care home sponsoring organizations shall be adjusted annually, on July 1, on the basis of changes in the series for all items of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be made to the nearest dollar based on changes measured over the most recent twelve-month period for which data are available.

(j) *Audit funds.* (1) Funds are available to each State agency in an amount equal to 1.5 percent of the Program funds used by the State during the second fiscal year preceding the fiscal year for which these funds are to be

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made available. These funds are for the expense of conducting audits under § 226.8 and Program monitoring under § 226.6(m).

(2) State agencies may request an increase in the amount of funds made available under this paragraph.

(i) FNS approval for increased funding will be based on the State agency's expressed need for an increase in resources to meet audit requirements, fulfill monitoring requirements, or effectively improve Program management.

(ii) The total amount of audit funds made available to any State agency under this paragraph may not exceed 2 percent of Program funds used by the State during the second fiscal year preceding the fiscal year for which the funds are made available.

(iii) The amount of assistance provided to a State agency under this paragraph in any fiscal year may not exceed the State's expenditures under §§ 226.6(m) and 226.8 during the fiscal year in which the funds are made available.

(k) *Method of funding.* FNS shall authorize funds for State agencies in accordance with 2 CFR part 200, subpart D, and USDA implementing regulations 2 CFR part 400 and part 415, as applicable.

(l) *Special developmental projects.* The State agency may use in carrying out special developmental projects an amount not to exceed one percent of Program funds used in the second prior fiscal year. Special developmental projects shall conform to FNS guidance and be approved in writing by FNS.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36906, Oct. 2, 1987; 53 FR 52588, Dec. 28, 1988; 62 FR 902, Jan. 7, 1997; 63 FR 9728, Feb. 26, 1998; 69 FR 53536, Sept. 1, 2004; 71 FR 4, Jan. 3, 2006; 71 FR 39518, July 13, 2006; 72 FR 41603, 41604, July 31, 2007; 75 FR 16327, Apr. 1, 2010; 76 FR 34569, June 13, 2011; 78 FR 13451, Feb. 28, 2013; 81 FR 66492, Sept. 28, 2016; 88 FR 57851, Aug. 23, 2023]

§ 226.5 Donation of commodities.

(a) USDA foods available under section 6 of this Act, section 416 of the Agricultural Act of 1949 (7 U.S.C. 1431) or purchased under section 32 of the Act of August 24, 1935 (7 U.S.C. 1431), section 709 of the Food and Agriculture Act of 1965 (7 U.S.C. 1446a-1), or other

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authority, and donated by the Department shall be made available to each State.

(b) The value of such commodities donated to each State for each school year shall be, at a minimum, the amount obtained by multiplying the number of reimbursable lunches and suppers served in participating institutions in that State during the preceding school year by the rate for commodities established under section 6(e) of the Act for the current school year. Adjustments shall be made at the end of each school year to reflect the difference between the number of reimbursable lunches and suppers served during the preceding year and the number served during the current year, and subsequent commodity entitlement shall be based on the adjusted meal counts. At the discretion of FNS, current-year adjustments may be made for significant variations in the number of reimbursable meals served. Such current-year adjustments will not be routine and will only be made for unusual problems encountered in a State, such as a disaster that necessitates institutional closures for a prolonged period of time. CACFP State agencies electing to receive cash-in-lieu of commodities will receive payments based on the number of reimbursable meals actually served during the current school year.

[47 FR 36527, Aug. 20, 1982, as amended at 62 FR 23618, May 1, 1997]

Subpart C—State Agency Provisions

§ 226.6 State agency administrative responsibilities.

(a) *State agency personnel.* Each State agency must provide sufficient consultative, technical, and managerial personnel to:

- (1) Administer the Program;
- (2) Provide sufficient training and technical assistance to institutions;
- (3) Monitor Program performance;
- (4) Facilitate expansion of the Program in low-income and rural areas; and
- (5) Ensure effective operation of the Program by participating institutions.

(b) *Program applications and agreements.* Each State agency must establish application review procedures, as