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DIVISION OF SOCIAL JUSTICE

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via Federal eRulemaking Portal at www.regulations.gov

Cindy Long, Administrator
Tina Namian, Director, School Meals Policy Division
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Food and Nutrition Service
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Re: Comments of State Attorneys General on USDA's *Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans*, Docket No. FNS-2022-0043, 88 Fed. Reg. 8,050 (Feb. 7, 2023) (Proposed Rule)

Dear Administrator Long and Division Director Namian:

The Attorneys General of New York, California, Connecticut, Delaware, the District of Columbia, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, and Vermont (the "Attorneys General") submit these comments on several aspects of USDA's proposals to revise the federal nutrition standards that apply to school breakfasts and lunches nationwide.

The Attorneys General believe that the proposed rule generally advances USDA's stated goal to "further align school meal nutrition standards with the goals of the Dietary Guidelines, 2020–2025."[1] The Attorneys General focus our comments on two issues: the final sodium targets for school meals, and the current fluid milk substitution process.[2]

[1] 88 Fed. Reg. 8050, 8,051 (Feb. 7. 2023).

[2] *Id*. at 8,061, 8,069.

USDA Should Further Reduce the Final Sodium Targets for School Meals To Align With the Dietary Guidelines' Sodium Intake Limits.

USDA requests public comments on its "proposed schedule for incremental sodium reductions, including both the number and level of sodium reductions and the timeline."[3] The Attorneys General agree with USDA that a "gradual approach to sodium reduction . . . is more likely to be achieved and thus would better meet the needs of schools and students."[4] But at the same time USDA is required to comply with the statutory requirements that school meals be (1) "consistent with the goals of the most recent Dietary Guidelines for Americans" and (2) "based on recommendations of the Food and Nutrition Board of the National Research Council of the National Academy of Sciences ("Nutrition Board")."[5] The Attorneys General are concerned that the combined final sodium limits that USDA proposes for school breakfasts and lunches are inconsistent with the daily sodium intake limits in the 2020-2025 Dietary Guidelines ("Dietary Guidelines") because the limits do not reflect the Nutrition Board's benchmarks for the proportion of children's daily intake limits that school breakfasts and lunches should comprise. The final sodium targets for school meals in USDA's 2012 rule generally met those benchmarks when measured against the sodium limits recommended by the Nutrition Board at that time, which were higher than the Dietary Guidelines' current limits.[6] The Attorneys General recommend restoring the sodium limits in the 2012 rule, while providing schools four additional school years after SY 2029-30 to achieve them.

The final sodium targets for school meals are too high as a proportion of limits on daily sodium intake. The Nutrition Board has recommended that nutrient limits for school breakfasts and lunches represent approximately 54 percent of the daily intake limit for that nutrient. USDA's proposed final sodium limits for school meals significantly exceed 54 percent of the daily intake limits in the Dietary Guidelines, particularly for younger children.

To establish daily sodium limits, the Dietary Guidelines relied on limits that were adopted by the National Academies of Sciences, Engineering, and Medicine

[3] *Id.* at 8,069.

[4] *Id.* at 8,065.

[5] 42 U.S.C. §§ 1758(f)(1).

[6] USDA, *Nutrition Standards in the National School Lunch and School Breakfast Programs*, 77 Fed. Reg. 4,088, 4,098 n.2 (Jan. 26, 2012) (Final Rule).

based on "Chronic Disease Risk Reduction" (CDRR) levels.[7] Those CDRR levels were established "using evidence of the benefit of reducing sodium intake on cardiovascular risk and hypertension risk."[8] The Dietary Guidelines thus recommend limiting sodium intake as follows:

- 1,500 mg/day for ages 4 through 8 years old;
- 1,800 mg/day for ages 9 through 13 years old; and
- 2,300 mg/day for all other age groups (i.e. ,14 years and older).[9]

Presently, many children exceed those intake levels: 97% of girls ages 5-8;, 96% of girls ages 9-13; 77% of girls ages 14-18; and 97% of boys ages 5-18. Children also exceed those levels dramatically: the *average* daily sodium intake is 86% above the recommended limits for boys ages 5-8; 92% for boys ages 9-13, 69% for boys ages 14-18, 68% for girls ages 5-8 and 9-13; and 25% for girls ages 14-18.[10]

The Nutrition Board's 2010 Report *School Meals: Building Blocks for Healthy Children* determined that nutrient limits for school breakfasts and lunches should represent 21.5 percent and 32 percent, respectively, of the daily limit (the "Target Median Intake").[11] Thus, school breakfasts and lunches together should account for no more than approximately 54% of children's daily sodium intake.

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[7] 2020-2025 Dietary Guidelines for Americans ("Dietary Guidelines"), page 46, https://www.dietaryguidelines.gov/sites/default/files/2021-03/Dietary_Guidelines_for_Americans-2020-2025.pdf.

[8] Id.

[9] Id.

[10] Population Exceeding Recommended Sodium Limit, October 2021, https://www.fda.gov/media/152751/download

[11] Stallings et al., *School Meals: Building Blocks for Healthy Children* (National Academies Press 2010) ("2010 Nutrition Board Study"), pages 7, 73-74, https://www.ncbi.nlm.nih.gov/books/NBK219975/pdf/Bookshelf_NBK219975.pdf.

This table shows the final sodium targets for school meals in USDA's proposed rule:

Grade Range	Final Sodium Limit for Lunches (eff. 7-1-29)[12]	Final Sodium Limit for Breakfasts (eff. 7-1-27)[13]	School Meals' Combined Final Sodium Limit
K – 5	810 mg	435 mg	1,245 mg
6 – 8	895 mg	485 mg	1,380 mg
9 – 12	935 mg	520 mg	1,455 mg

Based on those limits, school meals will comprise the following proportions of the Dietary Guidelines' daily sodium limits:

Grade Range	Corresponding Age Range in Dietary Guidelines	School Meals' Combined Final Sodium Limit	Daily Sodium Limit in 2020-2025 Dietary Guidelines[14]	% of Daily Sodium Limit Accounted for by Final Sodium Limits for School Meals
K - 3	4-8 years old	1,245 mg	1,500 mg	83.0 %
4 - 5	9-10 years old	1,245 mg	1,800 mg	69.1 %
6 - 8	11-13 years old	1,380 mg	1,800 mg	76.7 %
9 – 12	14-17 years old	1,455 mg	2,300 mg	63.2 %

These percentages are far in excess of the Nutrition Board recommendation that school meals account for approximately 54% of students' daily intake, especially for elementary and middle school children.

The high percentages are particularly concerning because children's average daily sodium consumption at home easily exceeds 1,000 milligrams according to

[12] 88 Fed. Reg. at 8,067 (Proposed National School Lunch Program Sodium Limits).

[13] 88 Fed. Reg. at 8,067 (Proposed School Breakfast Program Sodium Limits).

[14] Dietary Guidelines, page 46.

data compiled by USDA's Economic Research Service.[15] Moreover, sodium consumption rates are higher than the national average in households with a household income of 185% to 300% above the poverty line, which are often the households whose children qualify for free or reduced-price school meals.[16]

The high percentages are also concerning for Black and Hispanic children because they participate in school meal programs at higher rates than white children[17] and are at greater risk than white Americans for chronic diseases related to sodium intake. According to the CDC, over 35% of non-Hispanic Black Americans have hypertension or high blood pressure, which exceeds the hypertension rate for non-Hispanic White Americans by 20%.[18] CDC data also indicates that Hispanic Americans are diagnosed with diabetes at a rate that is 70% greater than for non-Hispanic white Americans.[19] Thus, lowering the final sodium targets for school meals is an important way to address health disparities for Black and Hispanic Americans over the long term.

USDA should adopt the sodium limits in its 2012 rule but phase them in over time. To align the final sodium limits for school meals with the Dietary Guidelines' daily sodium limits, we recommend restoring the final sodium targets from USDA's 2012 final rule,[20] while providing schools four additional school years after SY 2029-30 to achieve those reductions. While the combined sodium limits in the 2012 final rule would still exceed the 54% benchmark of daily sodium limits for students in grades K-5 and 6-8, the exceedance is not as dramatic as the final sodium targets in USDA's proposed rule.

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[15] *See* USDA Economic Research Service, Average Daily Intake of Nutrients by Food Source and Demographic Characteristics, June 21, 2021, https://www.ers.usda.gov/data-products/food-consumption-and-nutrient-intakes/ (last accessed May 10, 2023).

[16] *Id.*

[17] *See* 88 Fed. Reg. at 8,052-53 ("USDA research suggests that Black and Hispanic children participate in the school meal programs at higher rates than white children, making improving the school meal nutrition standards an important part of USDA's efforts to improve access to healthy foods that promote well-being in an equitable way.").

[18] https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=19

[19] https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=63

[20] USDA, Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4,088, 4,098 (Jan. 26, 2012) (Final Rule).

There is evidence that many leading school food service companies' product offerings presently meet sodium limits that would facilitate widespread compliance with (1) the 10% sodium reductions effective July 1, 2023 under the transitional rule and (2) the further 10% sodium reductions proposed for July 1, 2025 under USDA's proposed rule.[21] The Attorneys General recognize that achieving further reductions will present challenges to many school districts. We agree with USDA, though, that it is reasonable to expect "further sodium reductions in school meals to be achievable as even more new and reformulated food products that align with FDA's voluntary [sodium reduction] targets become available over time."[22] We also agree with USDA's assessment that "children's acceptance of school lunches and breakfasts with less sodium" can be expected to grow over time "as the incremental school meal reductions will occur alongside sodium reductions in the broader U.S. food supply."[23]

Thus, to better align the final sodium limits for school meals with the Dietary Guidelines' daily sodium limits, we recommend restoring the final sodium targets from USDA's 2012 final rule,[24] which are closer to the Nutrition Board's 54% benchmark for the proportion of sodium that should be consumed at breakfast and lunch, while providing schools four additional school years after SY 2029-30 to achieve those reductions. Specifically, we recommend that, instead of finalizing the sodium limits for breakfasts in 2027, USDA reduce those limits one more time in 2030 to bring them to the limits in the 2012 rule,[25] as shown here:

[21] Center for Science in the Public Interest, School Meals Corporate Report Card, Nov. 2021, https://www.cspinet.org/sites/default/files/2022-03/SchoolMealsCorpReport_infographic_3_0.pdf.

[22] 88 Fed. Reg. at 8,065.

[23] 88 Fed. Reg. at 8,065-66.

[24] USDA, Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4,088, 4,098 (Jan. 26, 2012) (Final Rule).

[25] See USDA, Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4,088, 4,098 (Jan. 26, 2012) (Final Rule).

Grade Range	USDA's Final Sodium Limit for Breakfasts (eff. 7-1-27)	AGs' Recommended Further Final Sodium Limit for Breakfasts (eff. 7-1-30)
K - 5	435 mg	430 mg
6 - 8	485 mg	470 mg
9 – 12	530 mg	500 mg

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We also recommend that, instead of finalizing the sodium limits for lunches in 2029, USDA impose further interim limits in 2031 and final limits in 2033 to bring them to the final limits in the 2012 rule,[26] as shown here:

Grade Range	USDA's Final Sodium Limit for Lunches (eff. 7-1-29)	AGs' Recommended Further Interim Sodium Limit for Lunches (eff. 7-1-31)	AGs' Recommended Final Sodium Target for Lunches (eff. 7-1-33)
K - 5	810 mg	725 mg	640 mg
6 - 8	895 mg	800 mg	710 mg
9 – 12	935 mg	835 mg	740 mg

At these final sodium targets, the sodium intake that school meals would provide as a proportion of the daily limit in the Dietary Guidelines would be:

[26] See USDA, Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4,088, 4,098 (Jan. 26, 2012) (Final Rule).

Grade Range	Estimated Corresponding Age Range in Dietary Guidelines	School Meals' Combined Final Sodium Limits Recommended by AGs	Daily Sodium Limit Recommended by 2020-2025 Dietary Guidelines for Americans [27]	% of Daily Sodium Limit Recommended by Dietary Guidelines Accounted for by AGs' Recommended Final Sodium Targets for School Meals
K - 3	4-8 years old	1,070 mg	1,500 mg	71.3 %
4 - 5	9-10 years old	1,070 mg	1,800 mg	59.4 %
6 - 8	11-13 years old	1,180 mg	1,800 mg	65.5 %
9 – 12	14-17 years old	1,240 mg	2,300 mg	54.0 %

While these limits remain above the Nutrition Board's 54% benchmark, except for high school students, and thus do not ensure consistency with daily limits in the Dietary Guidelines, they are closer to that benchmark.[28] The American Heart Association has submitted comments urging USDA to establish final sodium targets that are substantially lower than the limits in USDA's 2012 rule. The Association recommends that USDA achieve those final targets by either lowering the proposed interim limits or imposing a longer timeline to reach the final targets.[29] We encourage USDA to give due consideration to those comments and take appropriate action.

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[27] Dietary Guidelines, page 46.

[28] To support those limits, we recommend expansion of USDA's Healthy School Meals Initiative, which provides grants to small and rural school districts, to address the operational challenges of improving the nutritional quality of school meals through 5th grade. Serving the same breakfasts and lunches to children in all grades risks exposing the youngest children in these schools to excessive quantities of sodium, while providing meals tailored to younger children would not provide adequate nutrition to 4th and 5th graders. *USDA Launches $100 Million Healthy School Meals Initiative, Announces Grant Program for Rural Schools*, Sept, 23, 2022, https://www.fns.usda.gov/news-item/fns-0010.22 (last accessed May 10, 2023).

[29] *See* Comments of American Heart Association to USDA, dated May 2, 2023, page 11, https://www.regulations.gov/comment/FNS-2022-0043-83169

USDA Should Streamline the Fluid Milk Substitution Process and Support a Public Education Campaign Regarding Lactose Intolerance and Milk Allergies.

USDA has "request[ed] public input on the current fluid milk substitute process" because "better understanding challenges associated with the current process may help USDA address the concerns raised by commenters."[30] The Attorneys General urge USDA to (1) expeditiously issue guidance to State agencies encouraging schools to significantly streamline the milk substitution process, and (2) partner with State agencies on a public education campaign to encourage students, parents and caregivers to pursue medical screening of students for possible lactose intolerance and milk allergies.

Presently, federal law[31] provides that schools participating in the National School Lunch Program:

- may provide lactose-free milk;
- are required to provide a substitute for milk for children when a "disability" restricts their diet, as shown by a doctor's written statement; and
- may provide a milk substitute for students who have a "medical or other special dietary need" other than a disability that restricts their diet so long as (1) the substitute is nutritionally equivalent to milk; (2) a parent, legal guardian, or doctor has identified the need for the substitute; and (3) the school assumes any extra costs associated with the milk substitute.

While schools are reimbursed for providing lactose-free milk and for providing a milk substitute to a child with a disability, they are not reimbursed for extra expenses associated with providing milk substitutes for other children.[32]

USDA "recognizes that the specific nutrition and paperwork requirements and cost burden associated with milk substitutes present barriers for schools and

[30] 88 Fed. Reg. at 8,061.

[31] 42 U.S.C. § 1758(a)(2).

[32] 42 U.S.C. § 1758(a)(2)(B)(iii).

families."[33] Additionally, "USDA recognizes that the statute's denial of federal reimbursement for milk substitutes not prompted by a formal finding of disability "means that, due to budget constraints, some schools may opt not to provide a fluid milk substitute requested for non-disability reasons on behalf of a child."[34] This is true for many schools in our states.

The Attorneys General are concerned about the disparate impact of the complex rules and fiscal incentives regarding milk substitutes on students of color. Research indicates that Black Americans and Hispanic Americans experience cows' milk allergies at disproportionate rates relative to their shares of the U.S. population.[35] A 2013 study found that Black children were twice as likely as non-Hispanic white children to have allergic sensitization to milk.[36] In addition, students of color—in particular, Asian Americans, Black Americans, Mexican Americans and Native Americans—have lactose intolerance at markedly higher rates than others and milk substitutes may also accommodate that dietary restriction.[37]

The Attorneys General request that USDA expeditiously implement policies that maximize students' access to milk substitutes. For example, USDA should issue guidance to State agencies making clear that fortified soy beverages are "nutritionally equivalent to fluid milk" based on the nutritional standards in 7 C.F.R. § 215.10(d)(3).[38] In addition, based on the finding by the American Academy

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[33] 88 Fed. Reg. at 8,061.

[34] 88 Fed. Reg. at 8,061.

[35] Warren et al., *The US Population-Level Burden of Cow's Milk Allergy*, World Allergy Organization Journal, Apr. 2022, https://www.sciencedirect.com/science/article/pii/S1939455122000205.

[36] Wegienka et al., *Racial Differences in Allergic Sensitization: Recent Findings and Future Directions*, Current Allergy and Asthma Reports, June 2013, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4888051/

[37] https://www.niddk.nih.gov/health-information/digestive-diseases/lactose-intolerance/definition-facts; (last accessed May 10, 2023); https://www.childrenshospital.org/conditions/lactose-intolerance (last accessed May 10, 2023); https://www.hopkinsmedicine.org/health/conditions-and-diseases/lactose-intolerance (last accessed May 10, 2023).

[38] The Dietary Guidelines (p. 32) now recognize that "fortified soy beverages (commonly known as "soy milk") and soy yogurt—which are fortified with calcium, vitamin A, and vitamin D—are included as part of the dairy group because they are

of Pediatrics that "[u]p to half of children with a cow's milk protein allergy have cross reactivity with soy protein,"[39] USDA should expand its research into whether other milk substitutes provide nutritional benefits equivalent or similar to milk.

Further, to make it easier to meet the statutory requirement that a parent submit a written statement regarding a child's need for a milk substitute, this guidance should make clear that schools can include on their student registration forms (i.e., the paperwork that parents and legal guardians complete at the beginning of each school year) a checkbox that authorizes serving of fortified soy beverages (and any other substitutes that USDA deems to be nutritionally equivalent to milk) to their child. The USDA guidance should also indicate to State agencies that a school's submission of this form satisfies the statutory requirement that schools notify a State agency that they will offer milk substitutes. In any such guidance, USDA may also clarify that schools should continue providing milk to students who prefer it and benefit from it.

Additionally, USDA should support a public education campaign about lactose intolerance and milk allergies. USDA could develop informational fliers to be hung in school cafeterias and sent home with students with basic facts about lactose intolerance and milk allergies and information about community clinics that may provide pediatric screenings for those restrictions.

Conclusion

USDA's proposed revisions to the federal nutrition standards for school meals generally advance the objective of aligning the standards with the goals of the Dietary Guidelines. The Attorneys General urge USDA to further reduce the final sodium targets while providing four additional years for schools to meet those targets, to issue guidance that streamlines the process for fluid milk substitution, and to support a public education campaign in schools on lactose intolerance and milk allergies.

We appreciate the time and attention USDA has committed to ensuring that school meals meet the nutritional needs of children.

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similar to milk and yogurt based on nutrient composition and in their use in meals." To qualify as "nutritionally equivalent to fluid milk," plant-based beverages must be manufactured with defined nutritional values that are set forth at 7 C.F.R. § 215.10(d)(3).

[39] https://www.healthychildren.org/English/healthy-living/nutrition/Pages/Milk-Allergy-Foods-and-Ingredients-to-Avoid.aspx (last accessed May 10, 2023).

Respectfully submitted,

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