September 14, 2011

Julie Brewer
Chief, Policy and Program Development Branch
Child Nutrition Division, Food and Nutrition Service
Department of Agriculture
3103 Park Center Drive, Room 540
Alexandria, VA 22302-1594

RE: 7 CFR part 210, RIN 0584-AE11, NSLP School Food Service Account Revenue Amendments

Dear Ms. Brewer:

Campaign for Better Nutrition (CBN) strongly supports Sec. 205 and 206 of the Healthy, Hunger-Free Kids Action of 2010, which are implemented in your interim rule on the National School Lunch Program (NSLP) School Food Service Account Revenue Amendments. CBN appreciates the steps you have taken to ensure that the provisions result in increased revenues for paid meals and nonprogram foods without overly burdening school food authorities. In that spirit, in this letter we offer additional research and discussion that the Department should consider, as more clarification in the final rule is necessary to ensure the intent of the law is met and appropriate data is collected.

1. Section 206

1.a. Intent

Goal. Sec. 206 of the Healthy, Hunger-Free Kids Action of 2010 and Sec. 205 have the same goal: to ensure that funds provided by the Federal government for the provision of meals through the National School Lunch Program and School Breakfast Programs (Federal school meal programs) are used solely for that purpose. The history of the intent of Sec. 206 is described the following subsections.

USDA Data Documented the Problem. This goal was set forth based on two important findings in USDA's *School Lunch and Breakfast Cost Study-II*. That report showed that in 2005 the typical school underpriced its competitive foods by 29%.

In addition, the average meal charge for paid meals was 32% below the reported cost of producing that meal.

As estimated in the interim rule, the impact of these two revenue gaps is significant. Without the changes required by Sec. 206 alone, over $7 billion in Federal funds would be drained out of the Federal school meal programs in the next 5 years. Because of this revenue loss in years past, districts have used fewer dollars for the Federal school meal programs than should have been used, resulting in conceivably decades of lower quality food and fewer choices for students.

Additional Reports. Two additional reports highlighted the need to protect Federal school meal revenues. In December 2009, CBN published a report, *Flunking Lunch: How Segregated Lunch Lines and Misused Subsidies Are Undermining the NSLP*, calling to light the underlying accounting practices that enable this revenue drain and the magnitude of its effect per meal funding. The Center on Budget and Policy Priorities called for the similar action in its report published in early 2010, *Who Benefits from federal subsidies for free and reduced price school meals?*

White House Report. In May 2010, First Lady Michelle Obama's Obesity Task Force Report to the President, *Solving the Problem of Childhood Obesity within a Generation,* also called for an end to these practices. Recommendation 3.2 states, "States and local communities should ensure that only costs that support preparation and service of school meals are charged to food service accounts . . . . " (p. 40).

Congressional Intent. The legislative history of the Healthy, Hunger-Free Kids Act of 2010 (P.L. 111-296) makes clear that Congress intended Sec. 205 and 206 to ensure that subsidies for free and reduced-price school meals are used to provide meals to low-income students and that all meal subsidies are used to provide health Federal school meals.

> Senate Agriculture Committee Chart entitled *White House Task Force Report Recommendations Mirror Many Provisions of S.3307.* This official Committee document is a chart comparing provisions in S. 3307 with the recommendations in the White House Obesity Task Force report. It specifically refers to the White House Task Force Recommendation 3.2 quoted in the previous section and states, "Sections 205, 206, and 307 fulfill the Task Force's recommendation that Federal funding for the school meal programs be used only for its intended purpose." (Note that the text of these sections in S. 3307 is identical to the text that was enacted in P.L. 111-296.)

The Senate Agriculture Committee report accompanying S. 3307 also provides the following:

> Sec. 205 Equity in School Lunch Pricing: . . . To ensure that children receiving

> free and reduced price lunches receive the full value of federal funds, this section requires . . .
>
> Sec. 206 Revenue from non-program foods sold in school food authorities: . . The [formula] set forth in this section to make this determination is intended to ease the potential administrative burden that separate accounting could entail.

These directives speak to the intent of Sec. 205 and 206. The description of Section 206 clearly assumes that separate accounting of program and nonprogram foods would be the preferable method to determine compliance with the intent behind the amendment, but separate accounting was not required because of the potential administrative burden associated with it. The report makes it clear that the formula is intended to act as a simplified proxy for taking into account all the costs associated with offering nonprogram foods.

USDA Interim Rule Summary. The summary of RIN 0584-AE11 correctly states that,

> This rule also requires that all food sold in a school and purchased with funds from the nonprofit school food service account, other than meals and supplements reimbursed byt the SDepartment of Agriculture, must generate revenue <u>at least equal to the cost of such foods</u>. *(emphasis added)*

As outlined in the next section, however, the regulatory formula used to ensure this intent is met at the district level will fall short for many districts. The interim regulation and the supporting documentation do not discuss this significant caveat nor do they offer other methods or steps for directors to use to ensure funds are not being siphoned out of Federal school meals to pay for nonprogram food losses.

<u>1.b. Proxy Formula Effectiveness in Meeting Intent</u>

Formula Effectiveness Limited. Labor is a significant expense in school food, and in many areas is the largest cost factor in producing Federal school meals. Because labor costs are not included in the statute's formula, the calulation falls short in protecting Federal school meal revenues in districts where labor costs associated with nonprogram foods are a higher percentage of total labor costs than the percentage of labor costs associated with Federal school meals (referred to in the amendment as "program foods"). In those districts, the requirements of the formula could be met while millions of dollars still drain from the Federal school meal program into nonprogram food service, as demonstrated mathematically in the attached chart and explained in the next section.

Nonprogram Foods With High Labor Costs. In some schools, their system for nonprogram food service can require significantly higher labor costs compared to the Federal school meal program in the same district. This is true if the nonprogram

food design requires more labor hours, more skilled labor and/or more management time than Federal school meals relative to revenues.

For example, in districts where both programs are offered, the federal school meals are typically served out of a central location, usually a cafeteria. Food options are limited. Nonprogram foods, however, may be sold at various locations throughout the school—kiosks or pull-up windows situated in hallways, gathering places, and outdoors. Multiple service locations result in a labor to revenue ratio that is much higher than in the federal program. For example, there may be three employees working to serve the NSLP (one of whom oversees both the NSLP and nonprogram foods) but five employees selling a smaller quantity of nonprogram food.

Another labor factor to consider is the classification of the employees in each program. If the competitive food entrees are cooked from scratch at each school site, those employees would typically be classified at a higher hourly rate than a federal program employee who is handing out pre-plated food and who is not qualified to cook or handle raw food.

The third factor to consider is that some school foodservice directors have reported spending a disproportionate amount of central office time running their nonprogram food sales compared to their Federal school meal programs. This can happen when nonprogram foods offer more variety or require scratch cooking. More variety takes more time to order and track. Moreover, individual schools in district may request special food offerings to meet student preferences, requiring even more central office time. This is likely to become more a more significant issue as districts start allocating time to ensure nonprogram foods meet the new Federal nutrition standards.

Including Labor Costs in Formula. Ironically, in districts where nonprogram labor costs are proportionally higher than those of the Federal meal program, using the formula in the regulation and statute would actually legitimize any siphoning of funds that may be occurring from the Federal meal program to the nonprogram food service. For the formula to be an accurate proxy and meet Congressional intent, it needs to contain food AND labor costs. To be sure, there are other costs associated with meal production that would be uneven between the two programs, but these would be very minor compared to labor costs.

Some Districts Already Track Labor Costs. The state of Minnesota requires that school districts use Uniform Financial Accounting and Reporting Standards (UFARS) for school food programs (MN Statutes 124D.111 and 123.77). UFARS requires school districts allocate their expenses by program, divided into categories of food, milk, labor, interest and commodities. They must track all of the eight federal and non federal food programs offered in their schools, including Federal school lunch and breakfast in addition to nonprogram food service (http://education.state.mn.us). Despite concerns raised at the Federal level that foodservice directors may not have the skills to keep separate accounts or that

keeping such accounts may be unduly burdensome, on the ground in Minnesota they have been doing so for years.

1.c. Revisions Needed for Interim Rule Implementing Sec. 206

Based on the research and concerns outlined above, CBN is recommending that the USDA reconsider the interim rule for Sec. 206 to better ensure the Federal school meal funds are being used only for program foods. The language below is provided as an example of how this could be done.

Supplementary Information: (I) Discussion of Interim Rule

Insert the following after the first sentence.

> The intent of Sections 205 and 206 of the Healthy, Hunger-Free Kids Act of 2010 is to ensure that revenue for paid meals and nonprogram foods are equal to or greater than the total costs of selling them. Federal reimbursements for school meals are not intended to cover costs associated with nonprogram foods, and Section 206 is meant to help achieve this goal. Specifically, Section 206 aims to ensure that revenues for nonprogram foods are equal to or greater than the total costs of selling those foods. Section 206 includes a proxy formula that SFAs are to use to show compliance. To simplify the accounting required to comply with this provision, the formula focuses only on *food* costs. In SFAs with high labor costs for nonprogram foods, however, complying with the formula may not result in revenues for nonprogram foods that are equal to or greater than the total costs of selling those foods. Therefore, we urge SFAs to take all necessary steps to ensure that revenues for nonprogram foods are equal to or greater than the total costs of selling those foods. For example, in areas with high labor costs for nonprogram foods, we urge SFAs to identify the labor costs associated with nonprogram foods to assess whether the intent Section 206 is being met. State agencies are required to assist SFAs with complying with Section 206 and to alert FNS of instances in which the proxy formula might not ensure that revenues for nonprogram foods are equal to or greater than the total costs of selling those foods.

List of Subjects:

> §210.9(b)(1) strike the word "competitive" and replace with "nonprogram" for consistency.
>
> § 210.14(f) *Revenue from nonprogram foods*. Federal reimbursements provided under 42 U.S.C. § 1753 and 42 U.C.C. § 1759a are not intended to cover costs associated with nonprogram foods. School food authorities should ensure that revenues for nonprogram foods are equal to or greater

than the total costs of selling those foods. To simplify the accounting necessary to demonstrate compliance with this goal, schools shall use the formula in 210.14(f)(2) beginning July 1, 2011. School food authorities with high labor costs for nonprogram food service are encouraged to include nonprogram food and labor costs and total food and labor costs in the formula to ensure compliance with the intent of this paragraph.

§ 210.19

(2) add the following sentence after the "." "State agencies shall provide technical assistance to SFAs to help them comply with these requirements. State agencies shall also notify the Secretary and school food authorities when which the formula in §210.14(f)(2) might not ensure that revenues for nonprogram foods are equal to or greater than the total costs of selling those foods due to high labor costs associated with the school food authority's nonprogram foods.

2. Section 205

2.a. Intent

The intent of Section 205 is the same as 206, to protect the federal funds for free and reduced-price meals so that they are used for their intended purpose. With the exception of the lack of breakfast price reporting (addressed in next section), the interim rule carries through with the statute's requirements. In particular, the calculation procedures in the rule are helpful in establishing a reasonable path for districts toward this goal. There are a few areas where clarification and reconsideration will help districts understand and follow the rule more thoroughly and easily, as explained in the next section.

2.b. Revisions Needed for Implementing Interim Rule Implementing Sec. 205.

Interim Rule Summary

The intent should be clarified that the statute and rule will help close the gap between the paid meal price and the cost of the paid meal, not bring the price in parity with the cost of the paid meal.

Calculation of Non-Federal Revenues

Requiring districts to use the number of lunches over the entire year for their pricing calculation is problematic. School nutrition departments may need to present their budgets as early as January to their boards for the following year. This

budget must contain any request for additional funding or price increases. October claims are often used to estimate annual participation. Allowing districts to use October data, or data from another time frame such as the first 8-10 weeks of operation, would allow foodservice directors to plan their budgets and school board requests for the following year in the appropriate time frame.

The rule also should be clarified so that it does not interfere with districts choosing any of the universal feeding options.

The provision in the rule in Sec. 245.14(e)(6)(i) to require districts to use unrounded numbers for calculating meal prices for the next year is critical to carrying out the intent of this legislation and should remain in the rule.

In addition, allowing districts to make larger pricing increases and count them toward future increase requirements is critical to good management. Districts may not want to present parents with yearly increases in prices at the penny level. For many, it will be easier with logistics and with communication with parents if they can increase in increments every few years. It is also important that districts still accepting cash be able to round their prices to the ten cent mark. Otherwise, they and parents have to deal with pennies for payment, which is unnecessarily complicated and expensive to deposit at the bank.

Reporting Requirements

In 42 U.S.C. Sec. 1760(p)(4) the statute calls for USDA to collect data on the prices being charged for all paid meals, which means lunch and breakfast, and does not make that collection optional or at the discretion of the Secretary. The rule only requires data collection for lunch and should be corrected to comply with the statute.

2.c. Revisions Needed for Interim Rule Implementing Sec. 205

Modifications should be made to the rule to accommodate the issues discussed above. The language below is provided as an example of how this could be done.

Summary (page 1):

> This rule requires school food authorities (SFAs) participating in the NSLP to ~~provide~~ take certain steps toward providing the same level of financial support for lunches served to students who are not eligible for free or reduced price lunches as is provided for lunches served to students eligible for free lunches.

List of Subjects:

245.14(e)(5)(i) " . . . The minimum that must be added is the product of: (A) An estimate of the ~~The~~ number of paid lunches to be claimed by the school food authority for ~~in~~ the previous school year based on actual claims through October, which excludes paid lunches claimed at schools operating under an option available in 42 U.S.C.1759a, multiplied by . . . "

Sec. 210.15(a)(8) The prices of paid lunches and breakfasts charged by the school food authority.

Sec. 210.20(a)(9) The prices of paid lunches and breakfasts charged by each school food authority.

In conclusion, the implementation of Sec. 205 and 206 will result in many positive outcomes for Federal school food programs, infusing many of them with significant revenue. In some districts, the additional (or redirected) revenue will help them shore up deficits; in others it will provide resources needed to implement new nutrition standards. Still others may find the extra revenues allow them to provide more fresh, local produce and more freshly cooked entrees. Keeping appropriate records to show the effectiveness of the formula in Sec. 206 and to track breakfast prices will help firm the financial footing of the Federal school meal programs.

Because of the potential magnitude of the benefit of proper implementation of these sections, we hope that you will carefully consider our comments and recommendations in this response and thank you for your time in doing so.

Sincerely,

Colleen Kavanagh
Executive Director

Attachment: Description and Chart of Analysis for Sec. 206

DESCRIPTION OF CHART OF ANALYSIS FOR SEC. 206

The districts in this chart are fictitious. They have a basic profile of serving 20,000-25,000 NSLP meals a day and have a sizable competitive food program (non-program food or NPF).

District A: Baseline district. This district has even distribution of labor and food costs for producing NSLP and NFP meals. The formula would confirm that this school district is not moving revenues from NSLP to support NPF.

District B: This district is similar to A in NSLP costs, but its NPF labor costs are higher than its NPF food cost. This is because the district's schools do some scratch cooking for their NPF, while the NSLP is vended as a pre-plated, frozen meal. They sell some snacks. Even though the formula does not account for labor, the formula is still a valid measurement, accurately showing the district is not moving revenues from NSLP to NPF.

District C: This district's schools do not sell beverages or snack items (which are low labor cost/high food cost products) but they do offer several NPF options cooked by scratch by certified chefs. The chefs are paid at a higher rate than the NSLP cafeteria staff. As a result, the district's NPF food costs are lower but its NPF labor and total NFP costs are relatively higher than district A. Its NSLP costs are lower than district A because its labor costs are lower across the board and its NSLP pre-plated meal price costs less to produce. The formula would not reveal if this district covered its NPF deficit of $750,000 with NSLP revenues.

District D: This is a district consisting of only high schools. It is similar to district C in that it scratch cooks all NPF meals and vends low-cost, pre-plated meals for NSLP. The NPF is not sold in cafeterias but at kiosks and pull-up windows situated throughout the schools—in hallways and outside. A staff person at the main office is dedicated solely to managing the NPF system, from food ordering to staff management. Each school in this district has 5 NPF meal choices daily and the NPF cooks are paid at a higher rate than the NSLP line operators. The NSLP food is managed by a director who oversees both the NSLP and NPF programs. The state contributes an additional reimbursement for free and reduced-price meals, which increases the district's NSLP revenue. The formula would not reveal if this district covered its NPF deficit of $2,250,000 out of its NSLP revenues.

District E: This district scratch cooks one NPF meal daily, served only at its high schools, but it has a significant number of staff people who sell NPF from kiosks and pull-up windows throughout its campuses. Its labor rates are lower than district D and labor hours for NSLP are relatively low, as it has fewer, but larger and more impacted, schools. Its NPF food costs are higher because they sell higher cost items like drinks and prepackaged snacks. The formula would not reveal if District E offset its NPF deficit of $1,500,000 with revenues from its NSLP.

Analysis of Section 206 of the Healthy, Hunger-Free Kids Act of 2010

Examples of the formula's ineffectiveness in preventing diversion of NSLP funds to cover losses in non-program food (NPF) sales when NPF labor costs are high relative to the NSLP.

	District A	District B	District C	District D	District E
NSLP food	$4,500,000	$4,500,000	$3,750,000	$3,750,000	$3,750,000
NSLP labor	$4,500,000	$4,500,000	$3,750,000	$3,000,000	$2,250,000
NSLP total costs	$9,000,000	$9,000,000	$7,500,000	$6,750,000	$6,000,000
NSLP total revenue	$9,000,000	$9,000,000	$9,000,000	$10,500,000	$9,000,000
NPF food costs	$3,000,000	$2,250,000	$2,250,000	$2,250,000	$3,000,000
NPF labor costs	$3,000,000	$3,750,000	$4,500,000	$6,750,000	$6,000,000
NPF total costs	$6,000,000	$6,000,000	$6,750,000	$9,000,000	$9,000,000
NFP total revenue	$6,000,000	$6,000,000	$6,000,000	$6,750,000	$7,500,000
Total Revenue	$15,000,000	$15,000,000	$15,000,000	$17,250,000	$16,500,000
NFP Deficit (not accounted for by formula)	**$-**	**$-**	**$(750,000)**	**$(2,250,000)**	**$(1,500,000)**

Current formula in section 206

$$\frac{\text{NPF Revenue}}{\text{Total Revenue}} >= \frac{\text{NFP Food Costs}}{\text{Total Food Costs}}$$

NFP Rev/Total Rev	0.40	0.40	0.40	0.39	0.45
NFP Food/Total Food Costs	0.40	0.33	0.38	0.38	0.44
Ratio (law requires >=1.0)	1.00	1.20	1.07	1.04	1.02

Formula adjusted to include all labor costs

$$\frac{\text{NPF Revenue}}{\text{Total Revenue}} >= \frac{\text{Total NPF Food \& Labor Costs}}{\text{Total Food \& Labor Costs}}$$

NPF Revenues/Total Revenue	0.40	0.40	0.40	0.39	0.45
Total NPF Food & Labor Costs/Total Food & Labor Costs	0.40	0.40	0.47	0.57	0.60
value of <1 indicates formula failure to protect NSLP funds	1.00	1.00	0.84	0.68	0.76