



## SEGREGATED LUNCH LINES & PAYMENT METHODS FOR NSLP REIMBURSABLE MEALS VS. A LA CARTE FOOD: A LEGAL ANALYSIS

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### SYNOPSIS

In many school districts across the nation, school cafeterias have separate lunch lines for meals offered to students for free or reduced price through the National School Lunch Program (“NSLP”) and full priced food offered a la carte. In some schools, students who can afford to do so largely use the a la carte line, while low-income students who need a free or reduced price (“FRP”) meal must obtain lunch through the NSLP reimbursable meal line—or go without. Where, as occurs in such cases, one’s poverty status is identified by virtue of his or her lunch line, this practice is in clear violation of the letter and spirit of the National School Lunch Act’s (“NSLA” or “the Act”) prohibition of “overt identification” of students eligible for FRP meals. Where this occurs, school districts around the country are violating the law and potentially causing detriment to the health and well-being of low-income children. Additionally, where school cafeterias use different payment methods for FRP meal participants than for paying students at the point of sale (*e.g.*, where paying students pay for the reimbursable meal in cash but FRP meal recipients do not), they are also operating in violation of the Act’s “overt identification” prohibition. The United States Department of Agriculture (“USDA”) should take prompt action to provide guidance to districts on the meaning of the NSLA’s “overt identification” prohibition in the modern era, where a la carte food is nearly ubiquitous and electronic payment systems are common, and then vigorously enforce this important protection for low-income students. The need to correct districts’ unlawful practices is even more pressing in light of the current economic crisis and the growing numbers of poor students eligible for free and reduced price meals under the NSLA.<sup>1</sup>

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<sup>1</sup> Peter Eisler & Elizabeth Weise, *More Students On Free Lunch Programs*, USA TODAY (June 11, 2009) (noting that enrollment in the free lunch program is up 6.3% nationwide over last year, with some states such as California up 17%).

## I. INTRODUCTION

*For most students at San Francisco’s Balboa High School, the lunch bell is a welcome sound. Growing teenagers need their food and enjoy the opportunity to socialize with friends.<sup>2</sup>*

*For students like 14-year-old freshman Francisco, however, the lunch bell signals a whole different set of feelings: embarrassment, shame, or a hunger that may go unabated. That’s because Francisco, and a host of other students across the nation who are eligible for the National School Lunch Program’s free and reduced price meals, will face a difficult choice when it comes time to eat: to get into the lunch line or not? As their more affluent peers stream into the a la carte line, where popular food items are offered to paying students, students like Francisco don’t have that choice. Their only choice is whether or not to get into the NSLP line, where low-income students get a free or reduced price meal... along with the stigma that comes with it. Every day in America, thousands of children face the same choice, and a good many choose not to eat at all<sup>3</sup>—a decision that has profound consequences for their education, and a decision that they should never have to make at all.*

This paper addresses the following legal questions: **Does the practice of having (1) segregated lunch lines for meals reimbursed through the National School Lunch Program versus food offered a la carte or (2) separate payment methods for students participating in the free and reduced price meal program versus others violate the National School Lunch Act’s prohibition on the overt identification of students participating in the free and reduced price meal program?** Public Advocates, a California-based nonprofit law firm and advocacy organization with a long history of work at the intersection of public education and children’s health, conducted this legal analysis at the request of the Campaign for Better Nutrition. Part II of this paper provides a context for this analysis by describing the practice of segregated lunch lines and the detrimental consequences this has on low-income students’ educational opportunities. Part III provides a legal analysis of the segregated lunch line practice under federal law, including a review of the legislative history of the NSLA’s “overt identification” clause. It is important to note that the NSLA, from its inception in 1946, prohibited any physical segregation of or other discrimination against FRP lunch participants. However, as illustrated by the legislative history, the 1970 amendments—which added the “overt identification” clause—made it clear that, in addition to outlawing *intentional* discrimination, the Act prohibits any practices that have the unintended *effect* of identifying FRP lunch participants. Part III also addresses the related practice of using separate payment methods at the point of sale for FRP recipients than for paying students.

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<sup>2</sup> This description draws from a 2008 front page *New York Times* article highlighting the issue of segregated lunch lines. See Carol Pogash, *Free Lunch Isn’t Cool, So Some Students Go Hungry*, NEW YORK TIMES (Mar. 1, 2008).

<sup>3</sup> Only 37 percent of eligible high school students in San Francisco take advantage of the subsidized meal program. *Id.*

The paper concludes that the practice of having participants in the NSLP reimbursable meal program—who, at least in some schools, are overwhelmingly students eligible for free and reduced price meals—obtain their lunch in one line where students who can afford to do so obtain their lunch in a separate a la carte line violates both the letter and the spirit of the NSLA’s prohibition on the “overt identification” of FRP meal participants and is therefore unlawful. *See* 42 U.S.C. § 1758(b)(10). The paper also concludes that having different payment methods at the point of sale for FRP lunch recipients and paying students—*i.e.*, where paying students pay in cash in the school cafeteria while FRP students do not—similarly violates the NSLA’s “overt identification” clause. This latter type of overt identification may occur in situations where all students—paying and FRP lunch participants—use a single lunch line, in addition to situations where there are segregated lunch lines for the NSLP reimbursable meal and a la carte.

## II. THE PROBLEM OF SEGREGATED LUNCH LINES

A front page article in the *New York Times* recently identified an alarming national trend regarding the health and nutrition of poor children.<sup>4</sup> As reported there, it appears to be common practice for school districts to structure their school lunch programs in a way that segregates poor students who are eligible for free or reduced price meals through the NSLP from most of their more affluent peers. In a 2008 survey of nearly 200 school districts nationwide, **over one-third of respondents stated that their schools sold reimbursable meals and a la carte foods in separate serving areas.**<sup>5</sup>

Further study is needed into how widespread the practice of segregated lunch lines is nationwide. This much, however, is clear: in at least some districts, poor students who want to eat lunch face a Hobson’s choice between standing in a line with other poor students to obtain a free or reduced price meal and accepting the stigma that comes from being too poor to pay for lunch, or going without lunch at all. In contrast, a more affluent student has the option of paying for the reimbursable meal, entering a separate a la carte line to purchase what are usually more attractive food items, or, as is the case in many schools, leaving the campus altogether to purchase lunch at a local restaurant. The effect of this stigma on reducing NSLP participation rates is well-documented.<sup>6</sup>

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<sup>4</sup> Carol Pogash, *Free Lunch Isn’t Cool, So Some Students Go Hungry*, NEW YORK TIMES (Mar. 1, 2008).

<sup>5</sup> *Reimbursable Meal Participation Study*, Campaign for Better Nutrition (Oct. 2009). A 2005 GAO study on competitive foods at schools found that 75% of schools (and over 90% of high schools) offer competitive foods for sale through an a la carte program available in the school cafeteria. United States Government Accountability Office, *School Meal Programs* (Aug. 2005) at 14. Consistent with the Campaign for Better Nutrition survey findings, the GAO study presents a typical competitive food structure in which a la carte items and NSLP reimbursable meals are sold in separate meal lines. *See id.* at 25 (diagram indicating separate lunch lines).

<sup>6</sup> *See* Frederic B. Glantz, et al, *School Lunch Eligible Non-Participants: Final Report*, USDA Food and Nutrition Service (December 1994), available at <http://fns.usda.gov>, at 3-2, 3-21 (middle and high school students likely to view the free lunch program as “for the poor” and “uncool”).

When low-income students choose not to eat the reimbursable meal in order to avoid stigmatization, their education suffers. Research shows that poor nutrition is a major risk factor for cognitive and behavioral setbacks, including suspension from school.<sup>7</sup> The link between malnourishment and negative motivational and emotional effects is widely accepted in the scientific community: malnourishment leads to irritability, anxiety and apathy, and consequent impairment of problem-solving ability and disengagement with learning.<sup>8</sup>

The impact of segregated lunch lines is not visited solely on a school's low-income students. When eligible low-income students choose not to accept the reimbursable meal, their districts lose out on funding from the federal government. This raises the district's overall cost-per-meal, and can compromise the quality of the reimbursable meals that schools provide to all children.

### **III. FEDERAL LAW PROHIBITS THE PRACTICE OF SEGREGATED LUNCH LINES AND SEPARATE PAYMENT METHODS**

#### **A. Federal Law**

Numerous provisions of the National School Lunch Act<sup>9</sup> and the U.S. Department of Agriculture's ("USDA") implementing regulations plainly prohibit participating local educational agencies and schools from overtly identifying, physically segregating, or otherwise discriminating against children eligible for free and reduced price meals. The NSLA provides:

No physical segregation of or other discrimination against any child eligible for a free lunch or a reduced price lunch under this subsection [establishing income eligibility guidelines] shall be made by the school *nor shall there [be] any overt identification of any child by special tokens or tickets, announced or published lists of names, or by other means.* 42 U.S.C. § 1758(b)(10) (emphasis added).

This broad, unambiguous mandate prohibiting the "overt identification" of FRP students is echoed, in nearly identical language, throughout existing federal child nutrition laws and regulations.<sup>10</sup> Further, USDA regulations explicitly provide that the use of separate serving lines

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<sup>7</sup> Katherine Alaimo, Christine M. Olson & Edward A. Frongillo, *Food Insufficiency and American School-Aged Children's Cognitive, Academic, and Psychosocial Development*, 108 *Pediatrics* 44 (July 2001), at 46. On tests of basic academic skills and cognition, children from self-reported food-insufficient households scored, on average, 1.3 to 2.5 points lower (on a scale of 20) than children from food-sufficient families. Teenagers from food-insufficient families were more likely to have behavioral and interpersonal problems. These teens were significantly more likely than their peers to see a psychologist, be suspended from school and have no friends.

<sup>8</sup> Barbara J. Strupp & David A. Levitsky, *Enduring Cognitive Effects of Early Malnutrition: A Theoretical Reappraisal*, 125(8) *Journal of Nutrition* 2221S (1995), at 2222S-2223S. See also *Justice v. Board of Education*, 351 F.Supp. 1252, 1257 (S.D.N.Y. 1972).

<sup>9</sup> 42 U.S.C. §§ 1751-1769.

<sup>10</sup> See 42 U.S.C. § 1758(b)(11) (similarly prohibiting physical segregation and overt identification of children eligible for NSLP because their parents become unemployed); 42 U.S.C. § 1759a(e) (similarly prohibiting physical

constitutes unlawful discrimination. 7 C.F.R. § 245.8(d). Certainly, Congress intended to prohibit the specific practices of using “special tokens or tickets” and “announced or published lists of names” to identify FRP lunch participants. 42 U.S.C. § 1758(b)(10). But Congress’s inclusion of the phrase “or by other means” indicates that it intended to prohibit *any practice* which has the effect of overtly identifying FRP lunch recipients. The legislation also does not carve out any exceptions to these protections, which apply broadly to eligible students throughout the school day.<sup>11</sup>

## B. Legislative History

The rich legislative history of the NSLA’s “overt identification” clause illustrates the type of harm Congress intended to prevent, namely, the stigma associated with being identified as a recipient of a free or reduced price lunch. The clause was added to the NSLA as part of the 1970 amendments.<sup>12</sup> The “purpose of the bill [was] to strengthen the National School Lunch Act and the Child Nutrition Act” by “prohibit[ing] any identification of those children who are being

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segregation and overt identification of any child eligible for a FRP lunch); 7 C.F.R. § 245.8 (establishing as a nondiscrimination requirement that School Food Authorities and local education agencies (“LEAs”) participating in the NSLP, School Breakfast Program or Special Milk Program or of commodity-only schools “take all actions that are necessary” to ensure that there is “no overt identification of any of the [FRP eligible] children by the use of special tokens or tickets or by any other means” and that eligible “children shall not be required to use a separate dining area, go through a separate serving line, enter the dining area through a separate entrance or consume their meals or milk at a different time”); 7 C.F.R. § 245.1(b) (establishing that state agencies, Food and Nutritional Service Regional Offices, School Food Authorities and LEAs have a responsibility to assure “that there is no physical segregation of, or other discrimination against, or overt identification of children unable to pay the full price for meals or milk”); 7 C.F.R. § 245.6(b) (requiring that LEAs distribute letters and notices with application forms and notice to households of eligibility for benefits through methods that prevent overt identification of children eligible for direct certification for FRP meals); 7 C.F.R. § 245.10(a)(4) (requiring LEAs participating in the NSLP and other child nutrition programs to submit to the state “a free and reduced price policy statement” containing a “description of the method or methods to be used to collect payments from those children paying the full price of the meal or milk, or a reduced price of a meal, which will prevent the overt identification of the children receiving a free meal or free milk or a reduced price meal or a reduced price meal”); 7 C.F.R. § 225.6(c)(4) (requiring programs participating in the Summer Food Service Program under the NSLA to assure that “all children are served the same meals and that there is no discrimination in the course of food service” and that participating summer camps describe the method for collecting payment from paying students to prevent the overt identification of non-paying students as well as assure that “there will be no overt identification of free meal recipients”); 7 C.F.R. § 226.23(c) (requiring a written policy statement by centers participating in the Child and Adult Care Food Program under the NSLA to include a description of methods of collecting payments to “protect the anonymity of the participants receiving a free or reduced-price meal” and an assurance that “there will be no overt identification of free and reduced-price meal recipients”).

<sup>11</sup> Indeed, the Act provides that only certain specified administrators are permitted access to information about students’ income status and eligibility for FRP meals and that any person who discloses such information unlawfully, without the consent of the parent, is subject to criminal penalties. 42 U.S.C. § 1758(b)(6).

<sup>12</sup> The original 1946 language in Section 9 of the NSLA stated simply that “No physical segregation of or other discrimination against any child shall be made by the school because of his inability to pay.” Public Law 79-396, 60 STAT. 233 (June 4, 1946). The 1970 amendment added the following phrase to the end of the segregation prohibition: “nor shall there be any overt identification of any such child by special tokens or tickets, announced or published lists of names, or other means.” Public Law 91-248, 84 STAT. 210 (May 14, 1970).

assisted under the two acts.” 115 CONG. REC. 7039 (Mar. 20, 1969) (statement of Rep. Latta).  
As one Representative noted in debates over the amendments:

We were not seriously concerned then [in 1946], but we are deeply concerned today, with respect to the possible adverse psychological effects upon the children these programs are designed to benefit. There is ever present the possibility that irreparable harm might unwittingly be inflicted upon a recipient child who may smart under the stigma, real or imagined, that he is somehow different from his schoolmates who are not beneficiaries under any of the programs. [The bill] recognizes that a child in need may also be a proud and self-respecting individual. It therefore not only spells out the basis of need criteria, but it also does something which I believe is of equal if not greater importance. *[It specifically provides that the anonymity of the participating school child shall be preserved.* *Id.* at 7047 (statement of Rep. Matsunaga) (emphasis added).

To be sure, the NSLA’s prohibition against physical segregation and discrimination existed prior to 1970. But it is clear from the legislative history and from the subsequent enactment of the “overt identification” by express or “other means” clause that the pre-existing provisions needed further clarification to convey Congress’s intent that any means of overt identification, even if unintended, be prohibited in order to avoid attaching adverse stigma to a FRP lunch recipient. Thus, the prohibition on overt identification was added in order to ensure the “anonymity” of FRP lunch recipients “so as to comfort and keep them from being embarrassed and things of that sort.” Department of Agriculture Appropriations for 1971: Hearings Before a Subcommittee of the Committee on Appropriations, 91st Cong., at 618 (Feb 27, 1970) (statement of Rep. Whitten, Subcommittee Chair). As described by Senator Talmadge, one of the drafters of the 1970 amendments, “[t]he bill is designed to assure such child [*i.e.*, one eligible for FRP meals] access to such meals. These provisions [prohibiting overt identification] would insure that he knows that he is entitled to such a meal *and that he is not prevented by shame or embarrassment from taking it.*” 116 CONG. REC. 4312 (Feb. 20, 1970) (emphasis added). The conference committee report adopted by the Senate offered the same rationale:

The conference report also contains a provision which I believe is most necessary: that there shall be no overt identification of the recipients of free or reduced price lunches. This is of critical importance because of the dignity which it confers upon the poor. *This anonymity is very crucial and is very necessary in order to bring those children into the program who in the past, because of the stigma of identification, did not choose to participate in the program.*

116 CONG. REC. 13607 (Apr. 30, 1970) (statement of Senator Javits) (emphasis added).

As the legislative history illustrates, Congress intended the 1970 amendment to go beyond the existing non-discrimination provisions by protecting FRP lunch recipients from “overt identification” by any means and wholly preserving their anonymity as participants in the program. Congress hoped, thereby, to eliminate *any* stigma associated with accepting a FRP

lunch and increase the number of eligible students who would participate. Accordingly, any practice which has the effect of overtly identifying FRP lunch recipients—such as segregated lunch lines for reimbursable meals and a la carte items or separate payment methods for paying students and FRP lunch recipients (*see* discussion at III.C, *infra*)—is inconsistent with the goals of the amendment as expressed by the legislators who drafted and enacted it.<sup>13</sup>

### C. Legal Analysis

The plain language of the NSLA’s “overt identification” clause as well as its legislative history establish that, not only are districts prohibited from engaging in any type of *intentional* discrimination against students eligible for FRP lunch, but they also have an affirmative obligation to ensure that their practices do not have the *unintended effect* of overtly identifying FRP lunch participants. Further, this protection applies broadly to the child throughout the school day. Thus, as set forth below, it should be considered presumptively unlawful for a school district to: (1) have separate lunch lines for the reimbursable meal and for a la carte foods unless the district can demonstrate the practice does not stigmatize any student eligible for FRP meals, or (2) accept different payment methods at the point of sale from paying students than from FRP meal recipients, where these two practices have the effect of overtly identifying the recipients of the FRP meal.

#### 1. *Separate Lunch Lines*

In schools where the practice of segregated lunch lines for reimbursable meals and a la carte foods results in the “overt identification” of FRP lunch recipients, the practice violates the plain language of the NSLA as well as USDA implementing regulations and is therefore unlawful. 42 U.S.C. § 1758(b)(10); 7 C.F.R. § 245.8(d); *see generally* note 10. By definition, FRP meal recipients have no choice but to stand in the reimbursable line to obtain food, as they cannot typically afford to obtain lunch elsewhere. Meanwhile, in schools that offer an a la carte option, paying peers are free to choose from a variety of food choices. There is no national data on paying students’ participation rates in the reimbursable meal in those schools which also offer a la carte in the cafeteria; however, anecdotal data indicates that, at least in some large schools that offer a la carte options, only a small percentage of paying students choose to purchase NSLP reimbursable meals.<sup>14</sup> Because FRP meal participants do not have the means of other students to

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<sup>13</sup> Non-substantive revisions were made to the segregation and overt identification prohibition with the 1975 amendments to the NSLA, essentially rendering it in its present day form: “No physical segregation or other discrimination against any child eligible for a free lunch or a reduced price lunch shall be made by the school nor shall there be any overt identification of any child by special tokens or tickets, announced or published lists of names, or by other means.” Public Law 94-105, 89 STAT. 513 (Oct. 7, 1975).

<sup>14</sup> San Francisco is one large urban district that has publicly reported its NSLP participation rates. There, among paying students, just 3% of middle school students and 1% of high school students choose to purchase the reimbursable NSLP meal. Presentation of Ed Wilkins, Student Nutrition Services Director, to the SFUSD Board of Education Budget Committee (June 19, 2007). A number of large high schools responding to the Campaign for Better Nutrition survey (*see* note 5, *supra*) indicated similarly low participation rates for paying students in the

join the a la carte line, their consistent use of the reimbursable line—most clearly in those schools that offer a la carte options and in which only a small percentage of paying students choose to purchase the NSLP meal—overtly identifies them as low-income recipients of public assistance. Even when higher percentages of students pay for the reimbursable meal, stigmatization may be occurring for all students in the reimbursable line, FRP students included.<sup>15</sup>

Contrary to the position of at least some USDA regulators, the fact that the Child Nutrition Act and National School Lunch Act permit the sale of competitive foods (42 U.S.C. § 1779(a)-(b)) in no way authorizes the overt identification of FRP meal recipients that results when schools choose to structure their food service programs to have separate lines for reimbursable food versus a la carte food. The NSLA’s overt identification clause broadly prohibits “any overt identification” of “any child eligible for a free or reduced price lunch” “by the school.” 42 U.S.C. § 1758(b)(10). This mandate is unequivocal and unqualified. *A school may not engage in any practice—at any point during the school day or at any place on the school campus—that has the effect of overtly identifying any child eligible for a free or reduced price lunch.* The NSLA does not bar overt identification solely in reimbursable meal lines, and it does not carve out an exception for competitive food lines.

Whether a given district which operates separate lunch lines is violating the “overt identification” provision of the NSLA will depend on the facts on the ground at individual schools in that district. However, based on the Campaign for Better Nutrition’s survey data, it seems clear that overt identification of FRP-eligible students as a result of separate lunch lines is occurring with some frequency. Thus, given USDA’s limited monitoring and enforcement resources and likely inability to conduct a school-by-school analysis in all instances, the practice of separate lunch lines should be considered *presumptively segregative and discriminatory*. Individual school districts could appeal to USDA and the state monitoring agency to separate their lines if they can show that separate lines do not cause overt identification in their circumstances. Similarly, USDA could issue guidance offering examples of segregated lunch line configurations that would not violate the statute, taking into account factors such as: (1) whether the school offers a la carte options, (2) how frequently paying students purchase the reimbursable meal, (3) the payment method used by paying students and FRP lunch recipients (*see* III.A.2, *infra*), and (4) the difference in price and quality between the reimbursable meal and a la carte foods. Best practice would also include interviews with individual students to assess student perceptions of who eats the reimbursable meal.

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reimbursable meal program, where a la carte items were also offered in a separate serving area. *See* Campaign for Better Nutrition, *Reimbursable Meal Participation Study* (November 2009).

<sup>15</sup> Because a la carte foods are typically much more expensive than reimbursable meals—for example \$2.00 for a reimbursable meal compared to \$4.50 for a comparable amount of food in the a la carte line—all students in the reimbursable meal line may be viewed as “poor” by their peers. Thus, the mere presence of a certain percentage of students paying for reimbursable meals does not guarantee compliance with the overt identification statute. The fact that others are incorrectly stigmatized does not relieve the school of the requirement to protect FRP-eligible students from overt identification.

## 2. *Separate Payment Methods at Point of Sale*

Even in schools where paying students participate in the reimbursable meal in significant numbers (e.g., schools with no a la carte or off-campus option) and/or where there is a single lunch line used by all students, when non-FRP eligible students pay in cash at the point of sale while FRP lunch program participants do not, FRP lunch participants are overtly identified in violation of federal law.

The legislative history sheds light on what steps a district can take to protect FRP lunch recipients from such overt identification. In hearings before a subcommittee of the Committee on Appropriations, a Department of Agriculture official described a number of successful practices used to protect the anonymity of FRP lunch recipients—none of which involve the exchange of cash in the cafeteria:

- (1) Payments shall be collected by cafeteria manager by selling weekly tickets to any child in school who wishes to purchase a ticket. Students will come at an appointed time to purchase tickets. Cafeteria manager will have a listing by homerooms of all children, indicating the price each child is to pay as has been determined by principal's authorization. Tickets must be presented to cashier upon receipt of meal. Tickets will be punched and meals counted. The same ticket will be in use by all lunch children whether it be a free, reduced price or regular price lunch ticket. Children paying regular price will be encouraged to purchase weekly ticket, but shall not be required to do so. All tickets are to be coded by cafeteria manager in order to identify the proper category in which to record the lunch. The code will not remain constant, managers are instructed to vary code in order to avoid overt discrimination or identification of children when presenting ticket for receipt of lunch.
- (2) The cafeteria manager keeps all of the records of payment for our school lunches. Some children pay daily, some weekly, some monthly, so there is no way for any of the children to know the payment status of any other child. We have no published lists showing this information.
- (3) Lunch money is paid to the secretary of the school outside of school hours—on a weekly basis. The identity of the children receiving free and reduced price lunches is confidential.
- (4) All such matters are handled directly between the school office and the family via direct monthly billing.
- (5) Meal tickets are issued privately to children, either gratis, at reduced price or at full price. No one in the food line knows or cares how meal ticket is acquired. All meal tickets are the same and equally valid.

Department of Agriculture Appropriations for 1971: Hearings Before a Subcommittee of the Committee on Appropriations, 91st Cong., at 618-619 (Feb 27, 1970). While this is by no means an exhaustive list—nor is it one that takes into account present-day technological advances such

as electronic Point-of-Sale systems—these practices serve to illustrate what Congress envisioned when it instructed school districts to protect FRP lunch recipients from overt identification, namely, a system in which all students—subsidized and paying—“paid” for their lunch at the point of sale using an undifferentiated method (*e.g.*, tickets) and in which no cash changed hands in public view of other students.

#### D. Judicial Decisions

While there is little case law interpreting the “overt identification” provisions of the NSLA and the related federal regulations, what little there is strongly supports a conclusion that the practice of segregated serving lines and different payment methods for FRP lunch program participants violates the Act. In *Justice v. Board of Education*, 351 F.Supp. 1252 (S.D.N.Y. 1972), children eligible for FRP lunch challenged, among other practices, a school lunch distribution system that overtly identified recipients of FRP lunch by requiring them to use special tickets to obtain their lunches. Although paying students could purchase and use tickets, in practice only 1.1% of them did so, while the vast majority of paying students paid in cash. In concluding that the use of special tickets in this case constituted “overt identification” of students in violation of the NSLA, the court noted:

The fact that some may “choose” to purchase tickets ought to be too patently trivial to mention. That some may prefer the back of the bus or the balcony has not seemed relevant for at least the last generation or so. It is sufficient for our purposes that whether poverty is an inconvenience or a disgrace, many youngsters are ashamed to have it seen, and federal lawmakers and administrators have decreed respect for their feelings. *Id.* at 1263-1264.

Just as the *Justice* court concluded that a system of special tickets violated the “overt identification” prohibition in the NSLA, so too does the use of either different payment methods or separate lunch lines that result in the “overt identification” of FRP lunch recipients. As in *Justice*, FRP lunch recipients are overtly identified where they use one method of “paying” for their lunch while non-FRP students pay in cash. Moreover, like the special tickets in *Justice*, reimbursable meal lines in many schools are used almost exclusively by FRP lunch recipients—despite the fact that, in theory, paying students may also enter the line. Thus, in these schools the practice of having different payment methods and/or separate lunch lines for the reimbursable meal versus a la carte items results in FRP meal participants’ “identification to everyone as recipients of public largesse, contrary to the command of the federal statute forbidding such stigmatization.” *Id.* at 1254.

#### IV. CONCLUSION

The plain language of the NSLA as well as the legislative history surrounding the “overt identification” provision unambiguously demonstrate Congress’s intent to prohibit not only

explicit discrimination against FRP meal recipients, but also any practice that results in their “overt identification.” Congress’s goal was clear: to preserve the anonymity of low-income children who participate in the NSLP, safeguarding their social and psychological well-being from the harmful stigma associated with poverty. Thus, it matters not to Congress whether the disclosure of poverty status occurs intentionally or not or in settings where competitive food is sold or not. As the statutory language, the legislative history and the court’s decision in *Justice* make clear, the practice of having separate lunch lines for reimbursable NSLP meals and a la carte items—at least in those schools where, as commonly occurs, the vast majority of students in the NSLP reimbursable meal line are FRP meal recipients—violates both the letter and the spirit of the Act’s broad prohibition on “overt identification.” *Thus, to ensure that FRP lunch recipients are protected from unlawful stigmatization as Congress intended while also recognizing USDA’s limited monitoring and enforcement resources, separate lunch lines should be considered presumptively unlawful and prohibited unless specifically reviewed site-by-site and approved by USDA as not resulting in the overt identification of FRP lunch recipients. Additionally, the practice of having separate payment methods at the point of sale for FRP lunch recipients and paying students—e.g., where students not eligible for free meals pay in cash in the school cafeteria—on its face violates the Act’s “overt identification” prohibition and should be strictly prohibited.*

USDA, the agency charged with implementation of the NSLA, should take prompt action to correct state agencies’ and school districts’ pervasive misunderstanding of the Act’s prohibition on “overt identification.” We urge USDA to immediately issue guidance to the field that:

- 1) States clearly that the two practices described in this paper—segregated lunch lines and separate payment methods at the point of sale—violate the NSLA’s prohibition on “overt identification” and are therefore unlawful. The practice of separate payment methods at the point of sale is *on its face* unlawful. The practice of segregated lunch lines will be presumed unlawful. A case-by-case analysis may be done to determine whether or not it is unlawful in any given instance; however, existing evidence indicates the practice typically operates to overtly identify FRP meal participants.
- 2) Directs School Food Authorities wanting to have separate lines for reimbursable NSLP meals and a la carte foods to appeal to their state agency to obtain a determination as to whether or not their lines result in an overt identification violation. Relevant facts include, but are not limited to: (1) paying students’ participation rate in the NSLA’s reimbursable meal program; (2) the quality and price differential in reimbursable and a la carte foods; and (3) whether, within the NSLP reimbursable meal line, FRP lunch recipients and paying students are identifiable because they use separate payment methods.
- 3) Notifies School Food Authorities that, if there are facts present that indicate overt identification is occurring, they could be at risk of losing their NSLP funding.

- 4) Provides School Food Authorities with specific information and technical assistance on how to avoid the unlawful practices described in this paper, including but not limited to examples of how to transition to a cashless cafeteria system.

Firm leadership from federal policymakers is necessary to ensure that USDA correctly interprets and enforces the Act's intent to provide all low-income students with a nutritious school meal—served free of the possibility of being stigmatized by one's economic status.

**Public Advocates Inc.** is a nonprofit law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity. We spur change through collaboration with grassroots groups representing low-income communities, people of color and immigrants, combined with strategic policy reform, media advocacy and litigation, “making rights real” across California since 1971.

Public Advocates has a long history of civil rights advocacy on issues at the intersection of public education and children's health. Public Advocates served as co-lead counsel on the educational equity class action, *Williams v. California*, which resulted in a landmark settlement in August 2004 to help ensure that all California public school students have access to clean and safe school facilities, sufficient textbooks and qualified teachers. In 2000, Public Advocates successfully brought suit against the California Department of Health Services for violating the Childhood Lead Poisoning Prevention Act, which requires that children in California be screened and treated for lead poisoning, a major cause of learning disabilities. In 1977, Public Advocates successfully challenged General Foods' widespread practice of marketing sugared cereals to children.

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