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Stolen Lunch Money

FUNDS FOR LOW-INCOME NSLP MEALS BEING USED
TO OFFSET LOSSES IN CANDY & PIZZA SALES

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Abstract

Many middle and high schools in the U.S. operate two lunch programs. The primary program is the federally reimbursable school lunch program available to all students and offered for free or reduced price to low-income students. The secondary program, operating in competition with the federal school lunch program, is one of various models of à la carte programs that usually offer more attractive entrées and snacks, which most often are candy, cookies, and pizza that are not discounted for low-income students.

The USDA's 2008 *School Lunch and Breakfast Cost Study-II* showed that the average school district underprices its competitive food by 39%. The report also shows that districts are underpricing their full-priced reimbursable meals by 43%. Though districts could use guidance on how to set reimbursable pricing so that they maximize revenues and participation, the practice of underpricing reimbursable meals is legal and, if done correctly, can benefit NSLP meals overall. Underpricing competitive foods, however, is not. Districts that are underpricing competitive food are using funds appropriated for the reimbursable school lunch program (National School Lunch Program or NSLP) to make up for the shortfall in their competitive food revenues. This violates the National School Lunch Act (NSLA). The NSLA states that the funds given to states and districts for the reimbursable school lunch program must be used only for meals that meet the criteria of that program. The criteria include requirements that the food be offered for no or reduced cost to low-income children and that the meals meet the nutrition guidelines based on the Dietary Guidelines for Americans (DGA). Further, districts are required by the NSLA to keep accounts showing they are using their NSLP funds properly.

To help districts come into compliance with the NSLA, the USDA should require food service programs to use accepted standard accounting and to ensure that NSLP funds are used only for reimbursable meals. The USDA should also develop guidelines to help districts set optimal prices of full-price meals.

Background

Many middle and high schools operate two lunch programs. The reimbursable school lunch program is subsidized by the federal government, as well as some state and local governments. Reimbursable school lunches (in addition to other requirements) must meet federal nutrition standards based on the DGA and must be offered for free and reduced price to students meeting federal income guidelines. The federal government reimburses the school for the full or partial cost of the meals served to low-income students. Students who are not from low-income families may purchase reimbursable meals, for which the school receives a smaller subsidy.

Competitive foods are not subsidized. Typically, competitive food programs offer candy, soda and chips, as well as entrées that are often more appealing than reimbursable lunches. These foods are not discounted for low-income students and have a much lower federal nutrition standard,¹ though Congress is debating improving those standards.

Two reports by the USDA, *School Meals Dietary Assessment Study-III* (2007) and the *School Lunch and Breakfast Cost Study-II* (2008), presented the following data on school food revenues and pricing:

- Of a typical district's food service revenue, 84% is from funds intended for NSLP meals, 16% from competitive food sales, and less than 1% from other sources.²
- Most school districts unintentionally underprice their competitive foods, *i.e.*, their competitive food program expenses exceed their revenues by 39%.³
- The average student payments for full price reimbursable meals do not cover the full meal cost.⁴

The result of this is that many districts are using federal funds distributed to them for reimbursable meals—most of which are intended to provide meals to low-income students for free or at a reduced price—(i) to cover their revenue shortfall in their competitive food programs, and (ii) to underprice reimbursable meals sold

¹ 7 CFR 210.11 (*requires competitive foods exclude only "foods of minimal nutritional value" such as gum and hard candy. Some state and local standards are more restrictive.*)

² Bartlett, S., Glantz, F., and Logan, C. for USDA FNS, *School Lunch and Breakfast Cost Study-II* (Meal Cost Study), April 2008, p. xi.

³ Meal Cost Study, Executive Summary: p. xiii, and Full Report: Chapter 7, p.-11 (*based on districts' full cost of providing competitive foods as determined by USDA, not reported costs, which were self-reported and under-reported by districts*).

⁴ Gordon, A., Crepinsek, J.K., Nogales, R., Condon, E. for USDA FNS, *School Nutrition Dietary Assessment Study-III* (SNDA III), Vol. 1, Executive Summary, November 2007, p. 5 (*reporting average charge per school meal in 2005 was \$1.60*) and the Meal Cost Study, p. vii (*reporting mean full cost per reimbursable meal was \$2.79 the same calendar year.*)

at full price.⁵ The effect of the former is that funds are being diverted from healthy meals for poor students to more appealing, and oftentimes less healthy, snacks and entrées for students who have cash to pay for them. The effect of the latter is more ambiguous, as discussed later in this document.

The USDA, which is charged with administering the NSLP, has a long history of discouraging sales of competitive foods: they have a lower nutrition content; they can be a financial drain on the reimbursable meal program and sales of competitive food may stigmatize low-income students, leading students without cash to forego reimbursable meals for fear of being labeled as poor by their peers.⁶ The USDA's position, however, is that it lacks the statutory authority to stop districts from using federal reimbursements to balance the losses in their competitive food programs⁷.

As detailed in this paper, CBN believes that the USDA has the authority—and obligation—to regulate the use of federal funds as intended by Congress when it enacted the NSLA. To verify and substantiate this assertion, this paper addresses the following three main legal questions:

1. May school districts use funds distributed to them through Section 4 (42 USC 1753, general assistance for all meals meeting federal standards) and Section 11 (42 USC 1759a, special assistance for meals meeting federal standards served to low-income students for free or at a reduced price) of the NSLA to offset losses in their competitive food programs?
2. May school districts commingle their competitive food and reimbursable meal program funds or must they keep separate accounts for them?
3. May school districts price reimbursable meals below cost for those students who are ineligible for free or reduced-price meals?

⁵ Meal Cost Study: Chapter 7, p.-8.

⁶ USDA FNS *Foods Sold in Competition with USDA School Meals*, Report to Congress and accompanying cover letter to Senator Tom Harkin, January 2001. USDA staff told us on background that though they are concerned that à la carte programs may contribute to stigma and overt identification and believe the best practice is to eliminate à la carte altogether, they do not believe the USDA has the authority to regulate overt identification that may occur because of à la carte programs.

⁷ This information was provided on background by USDA staff.

Legal Analysis

This section presents a review of the NSLA and the applicable federal regulations related to the use of federal NSLP reimbursable meal funds. An analysis of this statutory and regulatory information is used to answer the central questions of this paper.

Question 1: May school districts use funds distributed to them through the NSLA to offset losses in their competitive food programs?

The NSLA clearly defines the “School Lunch Program” and “Competitive Foods” as different programs, as described in detail below.

School Lunch Program: The declaration of policy in the NSLA states the purpose of the Act is “to safeguard the health and well-being of the nation’s children” through the “establishment, maintenance, operation, and expansion of nonprofit school lunch programs.”⁸ The Act defines “school lunch programs” as having the following key elements (other requirements apply as well):

- They must operate as a nonprofit.⁹
- Low-income students are entitled to receive meals for free or at a reduced price.¹⁰
- Low-income students’ eligibility status must be kept private.¹¹
- Meals must meet the standards in the DGAs.¹²

⁸ 42 USC 1751

⁹ 42 USC 1758 (c) (“School lunch programs shall be operated on a nonprofit basis.”)

¹⁰ 42 USC 1758 (b)(1)(A) (“... the Secretary shall prescribe income guidelines for determining eligibility for free and reduced price lunches”)

42 USC 1758 (b)(9)(A) (“Any child [who is determined to meet the] income eligibility guidelines for free lunches . . . shall be served a free lunch.”)

42 USC 1758 (b)(9)(B) (“Any child who is [determined to meet the] income eligibility guidelines for reduced price lunches . . . shall be served a reduced price lunch.”)

¹¹ 42 USC 1758 (b)(6)(A) (“The use or disclosure of any information obtained from an application for free or reduced price meals . . . shall be limited to [certain specified administrators].”)

42 USC 1758 (b)(10) (“No physical segregation of or other discrimination against any child eligible for a free lunch or a reduced price lunch under this subsection shall be made by the school nor shall there be any overt identification of any child by special tokens or tickets, announced or published list of names, or by any other means.”)

42 USC 1758 (b)(6)(C) (A person who has access to income eligibility information “who publishes, divulges, discloses, or makes known in any manner, or any extent not authorized by Federal law (including a regulation), . . . shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both.”)

¹² 42 USC 1753 Sec. 4 (b)(A-B) (“The Secretary shall make food assistance payments to each State” based on the number of lunches “which meet the minimum nutritional requirements prescribed by the Secretary under section 9(a).”)

42 USC 1758 (f)(1) (“ . . . [S]chools that are participating in the school lunch or school breakfast program shall serve lunches and breakfasts under the program that—(A) are consistent with the goals of the most recent [DGA]”)

Competitive Foods: Competitive food programs are not part of the “school lunch program” (heretofore referred to as the “reimbursable school lunch program”) as defined by the Act or the “NSLP” as defined in regulation 7 CFR 210.2¹³ because they do not meet these criteria. The Act, however, does give the Secretary authority to regulate competitive foods. According to 42 USC 1779 (a), competitive foods are sold “in competition with” the NSLP,¹⁴ and they operate under different statutory rules, including:

- Competitive lunch programs may operate at a profit if the revenues benefit student organizations, the school, or the school food service programs.¹⁵
- Competitive foods are not required to meet the nutrition guidelines in the DGAs.¹⁶
- Competitive foods are not required to be free or reduced in price for low-income students, though privacy protection for low-income students still apply.¹⁷

The purpose of the NSLA is “to safeguard the health and well-being of the Nation’s children and to encourage the domestic consumption of nutritious agricultural commodities and other food”¹⁸ through the operation of (reimbursable) school lunch programs that meet the aforementioned criteria set forth in the statute. By definition, competitive foods do not meet the criteria required to be part of the reimbursable school lunch program and so are not entitled to any funding appropriated under the Act.

Further, the Act states in numerous places that appropriated funds may be used only for reimbursable school lunch programs, and free and reduced-price funds only

42 USC 1758 (a)(1)(A) (“Lunches served by schools participating in the school lunch program under the Act shall meet minimum nutritional requirements as prescribed by the Secretary on the basis of tested nutritional research”)

¹³ 7 CFR 210.2 (“National School Lunch Program means the Program under which participating schools operate a nonprofit lunch program in accordance with this part. General and special cash assistance and donated food assistance are made available to schools in accordance with this part.”)

¹⁴ 42 USC 1779 (a) (“The Secretary shall prescribe . . . regulations relating to the service of food in participating schools and service institutions in competition with the programs authorized under [the NSLA and Child Nutrition Act].”)

¹⁵ 42 USC 1779 (b) (Competitive food sales can generate a profit if the “proceeds . . . will inure to the benefit of the schools or of organizations of students approved by the schools.”)

¹⁶ 42 USC 1779 (a) (authorizes USDA to regulate competitive foods)

CFR 210.11 (b) (*USDA sets the nutrition standard for competitive foods as disallowing “foods of minimum nutrition value,” such as gum and hard candy. Reimbursable meals, however, have to meet the nutrition guidelines in 42 USC 1758 and implementing regulations, based on the DGA.*)

¹⁷ 42 USC 1758(b)(10) (broadly prohibiting “any overt identification of any child by special tokens, or tickets, announced or published list of names, or by any other means”) (emphasis added).

See generally, Public Advocates legal analysis *Segregated Lunch Lines & Payment Methods For NSLP Reimbursable Meals vs. à la Carte Food*. (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.)

¹⁸ 42 USC 1751

for low-income children. According to 42 USC 1752, the funds authorized and appropriated for “school lunch programs” must be used for “the purpose of the Act.”¹⁹ Moreover, the Act states that “(i)n addition to the purchase price of agricultural commodities and other foods” for the reimbursable school lunch program, funds may be used for “the cost of processing, distributing, transporting, storing, or handling thereof.”²⁰ It does not list the purchase, preparation or handling of competitive foods as an authorized use of funds. The Act also specifies that special assistance payments (Section 11 of NSLA) “shall be used . . . to assist schools . . . in providing free and reduced price lunches served to children”²¹ Competitive foods are not available for free or at a reduced price to low-income children.

The USDA regulations reflect these statutory requirements and add a clear definition of the “National School Lunch Program” in 7 CFR 210.2 as “the nonprofit lunch program” for which “general and special cash assistance . . . are made available” General assistance (Section 4 of the NSLA) funds are small subsidies ranging from 24-32 cents²² given to districts for all *reimbursable* school lunches served to students, regardless of income. The purpose of the funds is “for supplying agricultural commodities and other food for the program in accordance with the provisions of this Act.”²³ This clearly sets competitive food programs apart from the NSLP because the general and special cash assistance are authorized only for free, reduced-price and paid reimbursable meals, not competitive foods.

The regulation also states that “reimbursement” refers to funds provided “to participating schools for lunches meeting the requirements of 210.10 (DGA nutrition requirements) and served to eligible children” (7 CFR 210.2), meaning those eligible for free or reduced-price meals.

It further states that reimbursements for low-income meals “are provided for lunches served to children determined eligible for free or reduced-price lunches.” Even general assistance funds are to be used only for “lunches served to children in accordance with the provisions of the NSLP” (7 CFR 210.4 (b)).

¹⁹ See also 42 USC 1756 Sec. 7 (a)(1) (Funds appropriated shall be available for payments “not inconsistent with the provisions of this Act . . . for the purpose of assisting schools within the States in obtaining agricultural commodities and other foods for consumption by children in furtherance of the school lunch program authorized under the Act.”)

²⁰ 42 USC 1757 (d)

²¹ 42 USC 1759 (b)

²² *Federal Register* Vol. 73, No. 130, July 7, 2008.

²³ 42 USC 1753(a)

Question 2: May school districts comingle competitive food and reimbursable meal program funds?

Districts must keep records to show that reimbursements are being used appropriately. The statute and regulations make clear that districts are expected to use funds appropriated for the school lunch program solely for free, reduced and paid reimbursable lunches, *not* to subsidize competitive foods. Section 1760(a) also requires that “States, State educational agencies, and schools participating in the school lunch program under this Act shall keep such accounts and records as may be necessary to enable the Secretary to determine whether the provisions of this Act are being complied with.”²⁴ The Act states that districts may comingle their breakfast and lunch accounts²⁵ but it does not make that allowance for competitive foods.

The USDA, however, does not recognize the difference in comingling reimbursable breakfast and lunch funds verses comingling reimbursable and competitive food funds.²⁶ Because the USDA does not require districts to maintain separate accounts for reimbursable meals and competitive food, districts are not required to show that they are not using NSLP reimbursements to subsidize competitive foods. And, since districts are not required to keep separate accounts for the two programs, many directors do not do so and are unaware that their competitive programs are losing money and that reimbursements are actually subsidizing their competitive food programs. This is an unfortunate irony as the typical reason food service directors give for having competitive food programs is that they raise money for the food service department and subsidize better meals for low-income students.

Question 3: May school districts price reimbursable meals below cost to those students ineligible for free or reduced-price meals?

The statute reflects an expectation that reimbursements for free, reduced, and paid meals will be used specifically for the meals they are intended to subsidize. It also requires that funds appropriated for the NSLP be used only for the school lunch program.²⁷ With certain restrictions, however, the Act does allow districts to use unexpended reimbursements to benefit the general school lunch program;²⁸

²⁴ 42 USC 1760(a)

²⁵ 42 USC 1760(h) (“No provision of this Act . . . shall require any school . . . to account separately for the cost incurred in the school lunch and school breakfast programs.”)

²⁶ Meal Cost Study, xii (“SFAs must accrue all revenues from the school foodservice to a nonprofit foodservice account, including Federal lunch, breakfast, and snack payments; all funds from this account must be used to support the nonprofit school foodservice, which can include other parts of their foodservice operations such as à la carte and adult food sales.”)

²⁷ 42 USC 1752 (Funds in the NSLA and Child Nutrition Act “shall remain available for the purposes of the Act for which appropriated until expended.”)

²⁸ 42 USC 1757 (d) (stating that “[i]n addition to the purchase price of agricultural commodities and other foods” for the school lunch program, funds may be used for “the cost of processing, distributing, transporting, storing, or handling thereof.”)

however, they may not be used for competitive foods provided outside the NSLP.²⁹ The statute also does not prevent districts from using their own general funds to support lower costs for paid meals.

School districts may underprice paid meals to benefit low-income as well as paying students. For example, decreasing the paid meal cost may increase participation, improving a district's economies of scale. This would reduce the overall per meal cost, allowing the district to get better food for less money. Also, if more students who are not low-income participate in the school lunch program, it is less likely the program will be viewed as only for poor students. When the school lunch program is viewed as being only for poor students, those students often decline to participate for fear their peers will discover their income status.³⁰ Since eligibility for free and reduced-price meals is not adjusted for regional cost of living, there is also a reason to underprice NSLP meals significantly in high cost areas because many students who do not qualify for discounted or free meals may not have enough money available to buy a NSLP lunch.

All reimbursable meals at a school consist of the same food, whether it is served for free, reduced price or full price. Districts need to have the flexibility to produce the highest quality reimbursable meals possible while maximizing student participation and protecting low-income students. To make that happen, they may need to underprice their paid meals. This appears to be allowed in the statute.

It is possible to have a paid rate that does not maximize reimbursable meals but actually is set so low that it decreases the quality of reimbursable meals unnecessarily. The USDA does not provide districts with guidance on how to optimize pricing so participation and revenue are maximized. Though underpricing paid meals may be legal, it should be done within well-defined parameters to protect meal quality.

Determining the appropriate meal charge for a student body is a complicated economic measurement of price sensitivity. Most district directors do not have the time, resources, or expertise to analyze their paid meal price in this way. The USDA could help them by analyzing district cohort price elasticity and using that information to provide pricing parameters that would help directors to better price paid meals.

²⁹ See prior section.

³⁰ See Public Advocates analysis.

Conclusion and Recommendations

CBN strives to improve the nutrition that low-income children receive in school meal programs, which means improving the reimbursable meals for all students. The first step in doing this is to ensure that the funds appropriated to serve healthy reimbursable meals are being used judiciously. Based on the research presented here, all too often, this is not happening. There is significant pressure on Congress to provide more funding to allow districts to improve school meal quality. New funding is critical to improving this program, and the changes recommended in this report should not be considered as a substitute for providing new funding for the program. However, it is folly to try to improve the quality of reimbursable meals if existing federal funding for them is not used as Congress intended. To bring districts into compliance with the NSLA and maximize the benefit of existing as well as any new funds, CBN recommends the following:

1. **The USDA should move immediately to provide guidance to districts on how to account for the true cost of competitive foods** and reimbursable school lunches and require they use approved standard accounting practices.
2. **The USDA should inform districts that they must keep separate and accurate competitive food and reimbursable school meal accounts.** Districts must be able to demonstrate that funds intended to provide nutritious meals for all children under the reimbursable school lunch program, particularly to those who are poor, are not being diverted to support purchases of candy, chips, and higher priced entrée s offered in the competitive food program.
3. **The USDA should provide guidance to districts that want to charge less for reimbursable meals than they cost to produce.** The USDA should develop pricing parameters to help districts approximate an appropriate price level based on their district profile.
4. **Congress should use the 2010 reauthorization of the NSLP and Child Nutrition Act to provide the USDA any clarifying language and administrative funding** (for technical assistance to districts) needed to ensure that the benefits authorized for low-income children and reimbursable school meals are being used as Congress intended.