



**DEPARTMENT OF AGRICULTURE**

**Food and Nutrition Service**

**7 CFR Parts 210 and 220**

**[FNS-2014-0010]**

**RIN 0584-AE25**

**Local School Wellness Policy Implementation under the Healthy,  
Hunger-Free Kids Act of 2010**

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule requires all local educational agencies that participate in the National School Lunch and School Breakfast Programs to meet expanded local school wellness policy requirements consistent with the requirements set forth in section 204 of the Healthy, Hunger-Free Kids Act of 2010. The final rule requires each local educational agency to establish minimum content requirements for the local school wellness policies, ensure stakeholder participation in the development and updates of such policies, and periodically assess and disclose to the public schools' compliance with the local school wellness policies. These regulations are expected to result in local school wellness policies that strengthen the ability of a local educational agency to create a school nutrition environment that promotes students' health, well-being, and ability to learn. In addition, these regulations will increase transparency for the

public with regard to school wellness policies and contribute to integrity in the school nutrition program.

**DATES:** This rule is effective [insert 30 days from publication in Federal Register].

Compliance with the provisions of this rule must begin [insert date 30 days from publication in Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Tina Namian, School Programs Branch, Policy and Program Development Division, Food and Nutrition Service, at (703) 305-2590.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Healthy, Hunger-Free Kids Act of 2010 (HHFKA), Public Law 111-296, required significant changes in the Child Nutrition Programs to give eligible children access to nutrition benefits, improve children's diets and reduce childhood obesity, and strengthen integrity in the Child Nutrition Programs. Section 204 of the HHFKA added a new section 9A to the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1758b) to expand the scope of wellness policies; bring additional stakeholders into the development, implementation, and review of local school wellness policies; and require periodic assessment and public updates on the implementation of the wellness policies. The local school wellness policies are an important tool for parents, local educational agencies (LEAs), and school districts in promoting student wellness and academic success through the National School Lunch Program (NSLP) and School Breakfast Program (SBP).

The local wellness policy requirement was established by the Child Nutrition and WIC Reauthorization Act of 2004, and further strengthened by the HHFKA. As of school year (SY)

2006-2007, all LEAs participating in the NSLP and/or SBP were required to establish a local school wellness policy to promote the health of students and address the growing problem of childhood obesity. The responsibility for developing a local school wellness policy was placed at the LEA level so the unique needs of each school under the jurisdiction of the LEA can be addressed. By SY 2010, 99 percent of students in public schools were enrolled in a district that had a wellness policy in place. However, far fewer students were in a district that specifically required all five wellness policy elements: nutrition education, school meals, physical activity, implementation and evaluation, and competitive foods.<sup>1</sup>

HHFKA authorized the United States Department of Agriculture (USDA) Food and Nutrition Service (FNS) to consult with the Departments of Education (ED) and Health and Human Services (HHS), acting through the Centers for Disease Control and Prevention (CDC), to provide information and technical assistance to local educational agencies, school food authorities, and State educational agencies for use in establishing healthy school environments that are intended to promote student health and wellness. FNS worked with other Federal agencies and national partners to conduct several needs assessment activities with stakeholders and create a comprehensive school nutrition environment and wellness resources website available at <http://healthymeals.nal.usda.gov/school-wellness-resources-2>. FNS also developed a customizable model local school wellness policy template, published a resource featuring stories from schools that have put wellness policies into action, and issued a joint statement of collaboration with over two dozen national associations and organizations in support of local school wellness policies, and more. FNS will update existing technical assistance materials with

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<sup>1</sup> [http://www.bridgingthegapresearch.org/\\_asset/13s2jm/WP\\_2013\\_report.pdf](http://www.bridgingthegapresearch.org/_asset/13s2jm/WP_2013_report.pdf)

the final regulatory changes and continue to work with partners to provide technical assistance that is consistent with the specific needs of local educational agencies.

FNS issued a proposed rule (79 FR 10693) on February 26, 2014, seeking to amend the NSLP and SBP regulations to expand the wellness policy requirements consistent with amendments made to the NSLA by the HRFKA. The rule proposed specific content for the local school wellness policies. At a minimum, policies were required to include:

- Specific goals for nutrition promotion and education, physical activity, and other school-based activities that promote student wellness and rely on evidence-based strategies.
- Standards and nutrition guidelines for all foods and beverages available for sale on the school campus during the school day consistent with applicable Federal meal pattern and competitive food regulations.
- Standards for all other foods and beverages available on campus, but not sold, such as those provided at classroom parties and school celebrations and as rewards and incentives.

The proposed rule also required LEAs to establish, at a minimum, wellness policy leadership of one or more LEA and/or school official(s) who have the authority and responsibility to ensure each school complies with the policy. It also proposed stakeholder participation in the development of such policies, periodic assessment of local school wellness policy compliance, and public updates on the progress toward achieving the goals of the local wellness policy.

## **II. Summary of Changes to Proposed Rule**

As discussed in more detail below, following publication of the proposed rule, FNS considered commenters' concerns and suggestions on the proposal. The following is a summary of the changes and clarifications being made in this final rule at 7 CFR Part 210.

#### Administrative Reviews

The final rule requires the State agency to ensure that the LEA complies with the local school wellness policy requirements. This provision was proposed at §210.18(h)(7), but will be codified at §210.18(h)(8).

#### Nutrition Guidelines for All Foods

The final rule clarifies that, in addition to including nutrition guidelines for all foods offered to students for sale that are consistent with the meal pattern requirements and nutrition standards for competitive foods, the local school wellness policy also must include standards for other, non-sold foods and beverages made available on the school campus during the school day. See §210.30(c)(2) and §210.30(c)(3).

#### Policies for Food and Beverage Marketing

The final rule clarifies that in-school marketing of food and beverage items must meet competitive foods standards. See §210.30(c)(3).

Additionally, the final rule clarifies what is and is not subject to policies for food and beverage marketing in schools. See §210.30(c)(3).

#### Implementation, Assessments and Updates:

The final rule requires each LEA to assess compliance with its local school wellness policy and make this assessment available to the public at least once every three years, but removes the requirement for LEAs to annually report progress of local school wellness policies. See §210.30(e)(2).

### Recordkeeping

The final rule establishes that records retained by LEAs must include, at a minimum, the written local school wellness policy, documentation demonstrating compliance with community involvement requirements, documentation of the triennial assessment, and documentation to demonstrate compliance with the public notification requirements in §210.30(f).

### Implementation Timeline

The final rule requires LEAs to begin developing a revised local school wellness policy by [insert date 30 days from publication in Federal Register]. LEAs must fully comply with the requirements of the final rule by June 30, 2017.

## **III. Public Comments**

The proposed rule was published in the Federal Register on February 26, 2014 (79 FR 10693). The rule was posted for comment on [www.regulations.gov](http://www.regulations.gov), and the public had the opportunity to submit comments on the proposal during a 60-day comment period that ended on April 28, 2014.

FNS appreciates the valuable comments provided by stakeholders and the public. FNS received 57,838 public comments that included 546 distinct submissions, 57,285 form letters that were submitted through four large letter campaigns and four small letter campaigns, and 7 duplicate submissions. Although not all commenters identified their group affiliation or commenter category, commenters included:

- School districts - 7
- Associations (national, State, local and others) - 30
- State and/or local agencies - 11

- Advocacy groups (national and State levels) - 52
- Non-profit organizations - 36

Overall, approximately 57,420 comments voiced support for the proposal and 130 comments expressed opposition. The remaining 288 did not expressly state support or opposition.

Supporters stated that local school wellness policies reinforce existing Federal regulations established to promote healthy eating in schools and help create learning environments free from unhealthy commercial influences. They affirmed that strengthening local school wellness policies improves accountability and public transparency with parents, students, and the community. Many organizations commended FNS for developing strong, comprehensive policies that will strengthen the existing regulation and lead to more effective leadership, implementation, and stakeholder involvement.

Proponents noted that childhood obesity is an ongoing concern, and that most children fail to meet not only the Dietary Guidelines for Americans, but also recommendations for daily physical activity. As a result of the high childhood obesity rates, nearly all of the commenters supported local wellness policies that promote healthy eating and physical activity. Commenters also stated that strong, comprehensive school wellness policies are especially important to low-income children who often have inadequate access to healthy food and physical activity and who rely heavily on their schools to fill these gaps. FNS agrees that schools play a powerful role in preparing students for a successful future, and believes that the guidance outlined in this final rule will further support efforts to create a school environment that teaches, supports and encourages students to develop lifelong healthy habits.

Opponents generally expressed concern about the potential for misunderstanding of specific provisions. All comments were considered and, in cases of misunderstandings, clarifications are

being made in this final rule. Many of the opponents expressed concern about Federal overreach and others indicated that the proposal could create operational and financial hardship for LEAs.

Some commenters questioned FNS's legal and constitutional authority to regulate nutrition standards for all foods available in schools, and others suggested this requirement is an unfunded mandate. In response to these comments, FNS notes that the HHFKA amended the NSLA to require that local school wellness policies address nutrition guidelines for all foods available to children on the school campus during the school day. USDA provides cash and donated food assistance to States and schools participating in the NSLP and SBP to manage and operate school nutrition programs for children. In exchange, State agencies and participating LEAs agree to comply with the regulations set forth in 7 CFR parts 210, 220, and 245.

Other commenters were not clearly in favor of or opposed to the proposal but requested clarification on specific provisions.

FNS considered all comments in the development of this final rule. FNS greatly appreciates the public comments submitted as they have been essential in developing a final rule that is expected to result in stronger local wellness policies and school environments that support student wellness and achievement. Given the volume and complexity of comments on the proposed rule, FNS developed a comprehensive comment summary and analysis which includes detailed information on the comments, including the source of the comments. The comprehensive comment summary and analysis is available at <http://www.fns.usda.gov/school-meals/local-school-wellness-policy>.

This preamble focuses on general comment themes, most frequent comments, and those that influenced revisions to the proposed rule. The preamble also discusses modifications made to the proposed regulatory text, including paragraph numbering, in response to public input. To

view all public comments received on the proposed rule, go to [www.regulations.gov](http://www.regulations.gov) and search for public submissions under docket number FNS-2014-0010. Once the search results populate, click on the blue text titled, “Open Docket Folder.”

The following is a summary of the public comments on the key provisions.

### **Administrative Reviews**

Proposed Rule: The proposed rule at §210.18(h)(7) would require State agencies to ensure school food authorities (SFAs) comply with local school wellness policy requirements as part of the general areas of the administrative review. State agencies conduct administrative reviews of LEAs at least once every three years.

Public Comments: Sixty commenters addressed the administrative review provision in the proposed rule. Fifty commenters supported the proposed requirement and stated that incorporating compliance with local school wellness policies into the administrative review will promote more effective implementation of the policies.

Ten commenters expressed their opposition to the proposed monitoring and oversight requirements stating it will reduce the ability of staff to provide technical assistance to schools and places an undue burden on State nutrition program staff. A coalition of school districts and five individuals recommended placing the responsibility for compliance on the LEA, rather than the SFA, since the food service department does not have the authority to control all elements of the wellness policies. Some commenters asked FNS to explain the enforcement strategy and the documents needed to show compliance with the requirements.

FNS response: FNS recognizes that the first few years of implementation may be a period of transition as strengthening local school wellness policies may involve significant changes for

some LEAs. During this transition period, State agencies are expected to focus on providing guidance and technical assistance to help LEAs move toward compliance. State agencies should work closely with LEAs experiencing challenges to help them resolve unique issues. In order to assist LEAs in implementing these requirements, FNS will continue to provide support to States. This will include identifying best practices and success stories and sharing other technical assistance materials that will assist LEAs in developing, updating, and assessing their policies.

FNS also recognizes that local school wellness policy compliance must be the responsibility of the LEA, since the provisions of the NSLA, as amended by HHFKA, place responsibility for all other aspects of local school wellness policy implementation on the LEA. Accordingly, this final rule clarifies that the responsibility is at the LEA level rather than the SFA level and codifies the State agency's monitoring responsibilities in §210.18(h)(8).

Pursuant to provisions of the NSLA amended by HHFKA, State agencies conduct administrative reviews at least once every three years. When program responsibilities fall to entities outside of school food service, the State agency must assess the compliance of the LEA's program responsibilities. FNS recognizes that LEAs will need time to fully develop their updated policies. During administrative reviews conducted in SY 2016-2017, State agencies should focus on providing technical assistance on the development and implementation of new local wellness policies. Full compliance will be expected by June 30, 2017, and therefore, will be assessed in administrative reviews conducted during SY 2017-2018. Information on the content of the review and methods States can use to assess compliance with local school wellness policies will be provided through an update to the Administrative Review Manual and related tools and forms for SY 2017-2018. As part of the general areas of review, the State agency is expected to examine records, including:

- A copy of the current Local School Wellness Policy;
- Documentation demonstrating the Local School Wellness Policy has been made available to the public;
- Documentation of efforts to review and update the Local School Wellness Policy, including an indication of who is involved in the update and methods the district uses to make stakeholders aware of their ability to participate;
- The most recent assessment on the implementation of the Local School Wellness Policy; and
- Documentation demonstrating the most recent assessment on the implementation of the Local School Wellness Policy has been made available to the public.

### **Definitions**

Proposed Rule: FNS proposed in §210.30(b) to use the definitions for the terms *school campus* and *school day* codified in the competitive foods regulations at §210.11(a) for the purpose of the local school wellness policies. *School campus* is defined as all areas of the property under the jurisdiction of the school that are accessible to students during the school day. *School day* is defined as the period from the midnight before to 30 minutes after the end of the official school day.

Public Comments: The definitions in the proposed rule were addressed by 2,434 commenters, and some commenters provided suggested alternative model language. Most of these comments were submitted as part of several form letter campaigns. A State department of education commenter recommended the definitions for school campus and school day be included in the rule rather than cross-referencing §210.11(a). A health research and policy

organization expressed support for the proposed definition of school campus while an individual commenter suggested the definition of school campus be limited to areas where breakfast and lunch are served.

Several commenters were concerned with the proposed definitions. An individual commenter was concerned that the proposed definition of school day was too narrow and would force their school's weekend meal program to terminate because the meals do not meet competitive foods standards. Some commenters suggested the definition of school day be expanded to apply to extracurricular activities, to ensure that students are provided healthy options during after-school events including athletic events.

Approximately 2,420 commenters stated that other terms should be defined in §210.30(b) of the final regulations and provided suggested model language to define those terms. Most of these comments were submitted as part of several form letter campaigns. Commenters encouraged FNS to include specific definitions of local school wellness policy, nutrition promotion and education, physical activity, physical education, and food and beverage marketing. Some commenters expressed concerns that the proposed rule failed to direct schools to include efforts to expand participation in the healthy school meals programs and suggested including definitions of "student wellness" and "other school based activities to promote wellness."

Forty commenters, including advocacy groups, education associations, and individuals, recommended that additional terms be defined in the final rule and provided suggested model language to define those terms. The recommended terms include: brand, copycat snacks, designated local education or school official(s), family engagement, commercial entity, student

wellness, and healthy eating. Commenters also suggested defining all foods served at school during the day as competitive foods.

FNS Response: After careful consideration, this final rule maintains the definitions of school campus and school day from §210.11(a) and does not include additional definitions in §210.30. FNS acknowledges that additional definitions may increase consistency across LEAs and schools implementing the local school wellness policies. However, defining additional terms would add to existing requirements and limit decision-making at the local level. The ability of LEAs and schools to establish additional standards, including their own definitions or terms, that do not conflict with Federal requirements is consistent with the intent of the HHFKA and with the operation of the Federal school meal programs in general. That local discretion also provides an appropriate level of flexibility to LEAs and schools in crafting policies that reflect their particular circumstances.

As noted above, a few commenters recommended changes to the current definitions of school campus and school day. As proposed, the school campus definition ensures that the local wellness policy addresses locations that are accessible to students. The timeframe for the school day definition starting the “midnight before” ensures that the local wellness policy would apply before school starts to ensure foods and beverages offered during a variety of before-school programs are also addressed. In addition, these terms were previously defined in the competitive foods interim final rule at §210.11(a) and, if modified, would result in inconsistencies when operating the child nutrition programs. Accordingly, this final rule codifies the definitions for school campus and school day in §210.30(b), without change.

### **Establishing a Local School Wellness Policy**

## Local School Wellness Policy Leadership

Proposed Rule: FNS proposed in §210.30(e)(1) that each LEA must designate one or more LEA or school official(s) to ensure each participating school complies with the local school wellness policy and proposed in §210.30(c)(3) that local wellness policies must identify the position of the LEA or school official(s) responsible for oversight of the local school wellness policy to ensure each school's compliance.

Public Comments: The proposed requirements related to local school wellness policy leadership were addressed by approximately 54,800 commenters; 54,790 of these commenters were supportive of the leadership requirement. The majority of these commenters submitted comments as part of several large form letter campaigns. Approximately 60 commenters suggested requiring that LEAs publish the name, position title, and contact information for the designated official. A health advocacy organization recommended that the designated official's private contact information remain confidential. One association and two individuals opposed the proposed requirements stating that they would be unfunded and overly burdensome.

Several commenters, including advocacy organizations and nutrition and education associations, addressed who should be designated responsible for overseeing the wellness policies. Many of these commenters stated that the designated official should be in a position of administrative leadership, preferably the superintendent or the principal. Others recommended that the designated official(s) should be a committee of officials, a district leader, or someone with authority to make decisions and recommendations. Many commenters suggested more than one person should be appointed to assist the designated official.

FNS Response: The final rule requires LEAs to identify only the position title of the LEA or school official(s) responsible for oversight. FNS agrees that the community should be able to

easily access the designated official(s) to provide suggestions and for accountability purposes, but that LEA's should not be required to publicize an individual's private contact information. However, we strongly encourage LEAs to provide a means of contacting the LEA or school official(s) responsible for oversight by designating an LEA or school-based phone number and/or email address for this purpose.

In response to comments regarding who should be designated responsible for overseeing the wellness policies, this final rule allows LEA discretion. The LEA is most qualified to identify the best candidate for local school wellness policy leadership as size, resources, and needs vary greatly among LEAs and schools. Accordingly, this final rule codifies in §210.30(c)(4) the leadership requirements proposed in §210.30(e)(1) and §210.30(c)(3).

#### Public Involvement in Local School Wellness Policy Development

Proposed Rule: FNS proposed in §210.30(d)(1) that each LEA must allow parents, students, representatives of the SFA, teachers of physical education, school health professionals, the school board, school administrators, and the general public to participate in the development, implementation, and periodic review and update of the local school wellness policy, and in §210.30(c)(4) that LEAs include in the written local school wellness policy a plan for involving those stakeholders.

Public Comments: The public involvement provisions in §210.30(d)(1) and §210.30(c)(4) of the proposed rule were addressed by approximately 54,900 commenters. The majority of these commenters submitted comments as part of several large form letter campaigns. Approximately 54,840 commenters stated support for the proposed rule's requirements related to community

and public involvement in local school wellness policy development. Commenters provided the following reasons for supporting the public involvement requirements:

- Broad stakeholder involvement ensures coordination across the school environment and throughout the community.
- Transparency and inclusion are important aspects of the implementation process.
- No single department or group has all of the necessary information to develop comprehensive policies.
- Parents spend the most time with their children and best understand their children's food habits and choices.

Nine commenters expressed their opposition to public involvement stating the requirements would be overly burdensome. Many of them recommended that FNS require, rather than encourage, LEAs to make wellness committee member's names, position titles, and relationship to the school available to the public, but not their contact information. Several commenters suggested that FNS require, rather than permit, involvement from specific categories of stakeholders on local school wellness policy committees. Most of those commenters also suggested that FNS require parent involvement on the committees. Several commenters expressed concern that the language of the proposed rule was too vague and could allow LEAs and schools to hand select participants or reduce parent participation. Ten commenters provided additional categories of stakeholders they wanted FNS to either specifically identify in the final rule or encourage LEAs and schools to consider, such as student representatives, paraprofessionals, and classroom teachers to name a few.

FNS Response: In response to commenters' concerns about omitting important stakeholders, this final rule requires LEAs to allow parents, students, SFA representatives, teachers of physical

education, school health professionals, the school board, school administrators, and members of the general public to participate in the development, implementation, and periodic review and update of the local school wellness policy. LEAs are also encouraged to include Supplemental Nutrition Assistance Program Education (SNAP-ED) coordinators or educators on the local school wellness policy committee, as appropriate.

However, LEAs have discretion in exactly how they implement this requirement. While FNS expects LEAs to actively seek members for the local school wellness policy committee that represent the categories described in the statute, and to the extent practicable, allow them to participate, there are a variety of factors to consider when seeking the right combination of representatives. Each LEA is best suited to determine the distinctive needs of the community it serves. For example, school health professionals may include a health education teacher, school health services staff, or a social services staff. An example of the general public may include a local dietitian, business representative, health care professional or community or civil leader interested in children, nutrition, education, health, and physical activity.

Once members of the local school wellness policy committee are identified, the LEA is encouraged to make available to the public and school community, a list of names and position titles (or relationship to the school) of individuals who are a part of the wellness policy committee; as well as the name, position title, and school-based contact information of the lead individual(s) or coordinator(s) for the LEA, and for each school as applicable. Committee members can be identified on the LEA or school's website, in parent newsletters, or in other regular channels of communication that the LEA utilizes.

Accordingly, this final rule codifies in §210.30(d)(1) the requirement that LEAs allow certain stakeholders to participate in the development, implementation, and periodic review and

updating of the local school wellness policy. The rule also codifies in §210.30(c)(5) the requirement proposed in §210.30(c)(3) that LEAs include in the written local school wellness policy a plan for involving the required stakeholders.

### **Content of the Local School Wellness Policy**

#### **Nutrition Promotion and Education, Physical Activity, and Other School-Based Activities**

Proposed Rule: Under proposed §210.30(c)(1), local school wellness policies must include specific goals for nutrition promotion and education, physical activity, and other school-based activities that promote student wellness. In developing these goals, LEAs must review and consider evidence-based strategies and techniques.

Public Comments: Approximately 54,700 commenters addressed the proposed content of the local school wellness policy. The majority of these commenters submitted comments as part of several large form letter campaigns. Only two commenters, including a coalition of school districts and an individual, generally opposed the proposal, while the majority of commenters stated support.

Approximately 200 commenters stated specific support for the inclusion of nutrition promotion and education components in local school wellness policies. Most of these comments were submitted as part of two form letter campaigns. Commenters suggested that FNS include a recommended amount of nutrition education. An advocacy organization suggested 30-50 hours per year and an association suggested 50 hours per year. Commenters also suggested activities for nutrition education that were not included in the proposal, including cooking with children, social marketing for members of the school community, educating students about food systems,

utilizing school gardens and farm-to-school programs as vehicles for nutrition education, and inviting parents to participate in physical activity opportunities and school meals.

Approximately 2,700 commenters mentioned they were in favor of including a physical activity component in local school wellness policies. Most of these comments were submitted as part of two form letter campaigns. Approximately 80 commenters submitted other comments related to the inclusion of a physical activity component and many of these commenters stated that shared use of facilities is an important way to foster physical activity opportunities. Some commenters, including education associations, health associations and advocacy organizations, suggested that FNS require, rather than recommend, 60 minutes of physical activity per day. Several commenters suggested requiring other minimum daily times for physical activity including 50 minutes a day, at least 30 minutes a day, and at least 15 minutes for every 1.5 hours of classroom instruction. A health advocacy organization also recommended that FNS require moderate to vigorous physical activity during 50 percent or more of physical education class time. In addition to comments on physical activity, 20 commenters recommended including a physical education component as a required goal in local school wellness policies. Other comments addressed class frequency and size, teacher qualifications, teacher training, and benefits of physical education.

Approximately 150 commenters stated support for including an educational component related to school-based activities other than nutrition education and promotion, and physical activity in local school wellness policies. Most of these comments were submitted as part of a form letter campaign. Two advocacy organizations and a local department of health suggested that FNS include in the final rule examples of other school-based activities and programs that promote a healthy school environment. These commenters also recommended specific examples

including Smarter Lunchrooms, farm to school, recess before lunch, the HealthierUS School Challenge, and others. A commenter also recommended that FNS require goals ensuring students have adequate time to eat.

Five commenters, including State departments of education and an advocacy organization, stated support for, and a State department of education expressed opposition to, the proposed requirement that LEAs consider evidence-based strategies and techniques in establishing goals for nutrition promotion and education, physical activity and other school-based activities that promote student wellness. The opponent raised concerns about LEAs having the resources or capacity to review evidence-based strategies in establishing goals. Two commenters, an advocacy organization and a department of health, encouraged FNS to require LEAs to review Smarter Lunchroom tools and strategies to incorporate some of the low- and no-cost strategies in the wellness policies.

FNS Response: This final rule requires the local school wellness policy to include measurable goals for nutrition promotion and education, physical activity, and other school-based activities that promote student wellness. In developing these goals, LEAs must review and consider evidence-based strategies and techniques.

Nutrition education teaches behavior-focused skills and may be offered as part of a comprehensive, standards-based program designed to provide students with the knowledge and skills necessary to safeguard their health and make positive choices regarding food and nutrition. A standards-based program is a system of instruction, assessment, grading, and reporting based on students demonstrating understanding of the knowledge and skills they are expected to learn. FNS does not recommend a specific number of hours for nutrition education, but instead that nutrition education is part of comprehensive health education curricula as well as integrated into

other core subjects, such as math, science, language arts, and social sciences. FNS' Team Nutrition initiative has standards-based lesson plans and curricula for pre-kindergarten through Grade 8, available free of charge for schools that participate in Federal child nutrition programs (<http://www.fns.usda.gov/tn/resource-library>). The amount of time recommended for nutrition education is dependent on many factors including expected results, content of curriculum, and quality of instruction. Local school wellness policy goals related to nutrition education may include activities such as integrating nutrition education into other academic subjects, including nutrition education as part of health education classes and/or stand-alone courses for all grade-levels, and any other activities that are appropriate such as those suggested above by commenters.

Although FNS sets the standards for the operation of school meal programs, FNS does not have the authority to require a minimum time for physical activity during the school day. The Richard B. Russell National School Lunch Act, section 12(c), 42 U.S.C. 1760(c), prohibits USDA from imposing any requirement in relation to curriculum and methods of instruction. This includes prohibiting USDA from imposing a specific instruction time requirement for the nutrition education component. USDA has long adhered to the position that the intent of the provision is to allow LEAs to retain the primary authority to manage their school day, but understands commenters' concerns related to physical activity and appreciates recommendations for a daily requirement.

FNS agrees with commenters that 60 minutes of physical activity is important for students to achieve and maintain optimal health. The Centers for Disease Control and Prevention (CDC)

recommends 60 minutes of physical activity each day for children and adolescents<sup>2</sup>. While it may be difficult for schools to meet the recommended requirement due to other demands, FNS strongly encourages schools to offer time for students to meet the 60 minute goal since children spend many hours of their day at school. Some recommendations for fitting physical activity into the school day include outdoor and indoor recess, classroom-based physical activity breaks, and opportunities for physical activity before and after school to increase focus or teach academic content via physical movement.

Physical education was not included as a required element of the local school wellness policy in the proposed rule. However, FNS agrees that physical education opportunities complement a healthy school environment by instilling an understanding of the short-term and long-term benefits of a physically active and healthy lifestyle and FNS encourages LEAs and schools to offer physical education for every grade level.

FNS appreciates comments and suggestions for other school-based activities supporting nutrition and health, and encourages LEAs to consider commenters' suggestions when developing or updating their local school wellness policies. Local school wellness policies could include the availability of safe facilities and equipment in sufficient quantities for all students to be active (including the frequency of inspections and replacements, as necessary); the community use of school grounds/facilities for physical activity outside of school hours; and strategies/events to promote safe, active routes to school (for example, "walk to school day," crossing guards stationed around the school, and bicycle parking). Further examples of other school-based activities that may be included into the local school wellness policy could include

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<sup>2</sup> U.S. Department of Health and Human Services. *2008 Physical Activity Guidelines for Americans*. Washington (DC): U.S. Department of Health and Human Services; 2008. ODPHP Publication No. U0036. Available at: <http://www.health.gov/paguidelines>.

offering staff wellness activities and professional development opportunities related to health and nutrition, applying for or being awarded a Healthier US School Challenge, Smarter Lunchrooms recognition, sponsoring health fairs, offering a TV turnoff week, and promoting family wellness activities. Local school wellness policies also may include the development and/or promotion of farm to school activities, such as school gardens, nutrition, culinary, and agriculture education, and use of local foods in child nutrition programs (for more information, see [www.fns.usda.gov/farmentoschool](http://www.fns.usda.gov/farmentoschool)).

While nutrition education and promotion and physical activity are critical components in providing a healthy school nutrition environment, other school activities supporting nutrition and health are equally important. Wellness policy activities can and should be integrated across the entire school setting rather than limited to the cafeteria, other food and beverage venues, and school physical activity facilities. An LEA can take a coordinated approach to developing and implementing a wellness policy by addressing nutrition and physical activity through health education, physical education, school nutrition services, the physical environment, such as school gardens, family engagement, community involvement, health services, and social services.<sup>3</sup>

Under the final rule at §210.30(c)(1), LEAs are also required to review and consider evidence-based strategies and techniques in establishing goals for nutrition promotion and education, physical activity, and other school based activities that promote student wellness. At a minimum, FNS expects LEAs to review “Smarter Lunchroom” tools and strategies, which are evidence-based, simple, low-cost or no-cost changes that are shown to improve student participation in the school meals program while encouraging consumption of more whole grains,

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<sup>3</sup> <http://www.cdc.gov/healthyyouth/wsc/index.htm>

fruits, vegetables, and legumes, and decreasing plate waste (for more information, see <https://healthymeals.nal.usda.gov/healthierus-school-challenge-resources/smarter-lunchrooms>).

The following are examples of evidence-based strategies that have been shown to improve the likelihood that children will make the healthier choice: using creative names for fruits and vegetables and targeted entrees, training staff to prompt students to select fruits and vegetables, placing unflavored milk in front of other beverage choices, and bundling “grab and go” meals that include fruit and vegetable items.

Accordingly, this final rule codifies §210.30(c)(1) to include goals for nutrition promotion and education, physical activity, and other school-based activities that promote student wellness. In developing these goals, LEAs must review and consider evidence-based strategies and techniques.

#### Nutrition Guidelines for All Foods

Proposed Rule: The proposed rule would require in §210.30(c)(2) that the local school wellness policy include nutrition guidelines for all foods and beverages available to students on each participating school campus under the LEA during the school day. This requirement, consistent with HHFKA, ensures that policies include guidance about foods and beverages available for sale that is consistent with the regulations governing school meals and competitive foods for sale in schools (Smart Snacks in Schools), and also encourages districts to establish standards for foods made available, but not sold, during the school day on school campuses.

Public Comments: Approximately 55,000 commenters stated support for wellness policies including nutrition guidelines for all foods available in schools. The majority of these commenters submitted comments as part of several large form letter campaigns. Only four individuals generally opposed the proposed requirement. Other comments opposed application

of the nutrition guidelines in certain specific settings or under specific circumstances.

Approximately 20 commenters specifically opposed requiring that local school wellness policies containing nutrition guidelines for food sold during school fundraisers be consistent with the competitive food standards established in §210.11. An additional 30 commenters opposed the requirement that food and beverages served during classroom parties be consistent with competitive food standards.

Approximately 60 commenters generally addressed the requirement that local wellness policies include nutrition guidelines for foods that are available but not sold on school campuses during the school day. Most of those commenters expressed general support and five commenters generally opposed the requirement. Others suggested that FNS encourage, but not require, that the wellness policies contain guidelines that are consistent with the competitive foods standards for foods available, but not sold on school campuses.

A few commenters expressed support but many commenters opposed requiring foods served during classroom parties and school celebrations to be consistent with competitive food standards. Most commenters opposed to the requirement, stated that telling parents what they can and cannot bring to school for classroom parties is overreach by the Federal Government. Commenters also specifically addressed policies governing food-related rewards and incentives, and several commented that foods used as rewards and incentives should not have to meet competitive food standards.

FNS Response: Section 9A(b)(2)(A) of the NSLA, 42 U.S.C. 1758b(b)(2)(A) requires that each local school wellness policy must include nutrition guidelines for all foods and beverages available for sale on the school campus during the school day to ensure they are consistent with the statutory and regulatory provisions governing school meals (§§220.8 and 220.10) and

competitive foods (§210.11) as applicable. HHFKA also requires that the policy address standards for foods and beverages available on the school campus during the school day that are not sold (for example, foods provided at classroom parties and school celebrations and food offered as rewards and incentives). Standards included in the local school wellness policy for sold and non-sold foods could include information on the types of foods and beverages available on the school campus during the school day, and as appropriate and applicable, the general or specific nutrient profile of those foods and beverages. FNS encourages LEAs to support lifelong healthy eating habits as well as consider the nutrition and energy needs of children when establishing standards for these foods and beverages.

It is important to remember that the Federal competitive food standards are minimum standards. State agencies and LEAs have discretion to adopt more stringent standards for the types of food and beverages allowed to be sold and also may limit the frequency of fundraisers that may include foods that do not meet Federal competitive foods standards. A local school wellness policy can be an excellent tool for establishing LEA-specific standards and communicating them to students, parents, and other stakeholders. Further, local school wellness policies can serve as a vehicle to explain to the public and the school community the nutrition standards for school meals as well as other State or local policies related to school meals, other foods available in schools, and broader wellness policies.

Neither the proposed rule nor this final rule would require schools to apply competitive food standards to foods and beverages that are simply available but not sold in school during the school day. Foods sold must meet competitive foods and meal pattern requirements, unless exempted under law or regulations, but foods available for classroom parties or provided as a reward to students are not required to meet those same standards. LEAs simply need to have a

policy in place that addresses foods provided in school, but not made available for sale. Because local governments are in the best position to make individual food choices for their communities, FNS agrees that decisions about foods available in school during the school day should be made at the LEA or school level with community input. The proposed rule did not delineate the standards LEAs were required to use when developing policies for foods and beverages provided on campus, but not available for sale. Instead, FNS provided examples of policies that LEAs may want to address, including those related to classroom parties or school celebrations that involve food, food-related rewards or incentives, and other State or local policies or nutrition standards for foods and beverages available that promote student health and reduce childhood obesity. This rule does not require LEAs to address standards for food brought from home for individual consumption.

To clarify the difference in requirements between all foods sold and all foods provided, but not sold, during the school day, FNS has separated these provisions in the final rule. The final rule requires that the local school wellness policy include standards and nutrition guidelines for all foods sold in schools and requires that those guidelines are consistent with the applicable Federal school meal requirements and competitive foods standards, as defined by statute and regulation. In addition, the final rule requires that local school wellness policies include standards for all foods provided, but not sold, in schools during the school day. However, the final rule does not require that local school wellness policy standards for foods provided in schools during the school day but not available for sale conform to the school meal requirements or the competitive foods standards. Again, it should be noted that with regard to foods provided, but not sold, in schools, local jurisdictions have the discretion to adopt standards that conform to Federal school meal and competitive food standards or to adopt more or less stringent standards.

Accordingly, this final rule codifies in §210.30(c)(2) a provision requiring that local school wellness policies include a local jurisdictions' own standards for all foods and beverages provided, but not sold, during the school day on each participating school campus. In addition, this final rule includes a new paragraph §210.30(c)(3) that incorporates the proposed provision requiring local school wellness policies to include nutrition guidelines for all foods sold under the jurisdiction of the local educational agency that are consistent with the applicable school meal requirements and competitive food standards.

#### Policies for Food and Beverage Marketing

Proposed Rule: FNS proposed in §210.30(c)(2)(iii) that local school wellness policies permit marketing on the school campus during the school day of only those foods and beverages that meet the competitive foods requirements.

Public Comments: The proposed requirement that local school wellness policies restrict food and beverage marketing in schools was addressed by approximately 57,300 commenters. Most of those comments were submitted as part of several large form letter campaigns. Most of the commenters expressed support for the proposed requirement, while only eight commenters generally opposed the requirement that local school wellness policies include a component restricting food and beverage marketing. A few commenters questioned USDA's authority to regulate food and beverage marketing in schools while one commenter stated the proposed limitations on marketing did not go far enough. A school district and an individual suggested the restriction would be a burden to schools.

Eighty commenters who were generally supportive of the proposed food and beverage marketing restrictions stated that the competitive food nutrition standards should be the minimum standard for food and beverage marketing policies. Most of these commenters further

stated that LEAs should be assured that they are free to implement stronger standards for marketing, including extending the marketing standards beyond the school day, using local or State competitive food standards if those local or State standards go beyond the Federal competitive food standards, or restricting all marketing of food and beverages in schools. Seven commenters recommended that FNS should allow in-school marketing of food and beverage items that fit within the NSLP and SBP nutrition standards.

Approximately 200 commenters stated that there should be a prohibition against brand marketing unless every food and beverage product manufactured, sold, or distributed under the brand name meets the competitive foods nutrition standards or the school's more stringent competitive food standards. Most of those comments were submitted as part of two form letter campaigns. Two advocacy organizations also addressed the issue of copycat products, where a company reformulates one product in a brand's otherwise unhealthy product portfolio to meet school nutrition standards. These commenters stated that the marketing of such products should be explicitly prohibited by local school wellness policies because they undermine school nutrition education efforts and overall healthy eating.

Commenters provided examples of other types of food and beverage marketing that should be prohibited or otherwise restricted by the final rule including incentive programs and other corporate-sponsored programs; advertisements on school-owned, leased, operated, or used buildings, equipment, supplies, etc.; market research activities; free samples; and corporate-sponsored scholarships. Additionally, most of those commenters urged FNS to clarify that materials developed for academic settings such as curricula, textbooks, websites, and radio and television content sponsored by companies, should all be covered by the policy.

Commenters also provided examples of other types of food and beverage marketing that should not be prohibited or otherwise restricted by the final rule. A large number of those commenters said that materials used for educational purposes, with incidental marketing, should not be prohibited.

Several commenters suggested that corporate-sponsored activities where there is only an incidental or unintentional advertising impact should be exempt from the marketing restriction. A commenter asked FNS to clarify that the regulation is intended to address only communications intentionally directed to the school environment as opposed to communications that may incidentally reach the school environment. Another commenter sought clarification as to whether partnerships with community restaurants who sponsor fundraising nights where a portion of the restaurant's profits that night go to the school would be considered food and beverage marketing, and therefore prohibited by the rule.

FNS Response: For purposes of this final rule, marketing is defined as advertising and other promotions in schools. Food marketing commonly includes oral, written, or graphic statements made for the purpose of promoting the sale of a food or beverage product made by the producer, manufacturer, seller, or any other entity with a commercial interest in the product.<sup>4</sup> Food and beverage marketing are commonly present in areas of the school campus that are owned or leased by the school and used at any time for school-related activities such as the school building or on the school campus, including on the outside of the school building, areas adjacent to the school building, school buses or other vehicles used to transport students, athletic fields and stadiums (e.g., on scoreboards, coolers, cups, and water bottles), or parking lots.

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<sup>4</sup> National Policy & Legal Analysis Network to Prevent Childhood Obesity. District Policy Restricting Food and Beverage Advertising on School Grounds. Available from: <http://changelabsolutions.org/publications/district-policy-school-food-ads>.

FNS agrees with the majority of commenters who support permitting marketing on the school campus during the school day of only those foods and beverages that meet competitive foods standards. Food and beverage marketing is prevalent in schools, and the majority of foods and beverages marketed to children are low in nutritional value and high in fat and sodium.<sup>5</sup> Many of the foods and beverages that are heavily marketed to children contribute to poor diet quality, high calorie intake, and excess weight gain.<sup>6</sup> However, the majority of schools do not have policies restricting food and beverage marketing to children. Therefore, in this final rule, for those LEAs that choose to allow marketing of food and beverages to students, the LEAs are required to include in their local school wellness plans policies that allow the marketing of only those foods and beverages that may be sold on the school campus during the school day (i.e., that meet the competitive foods standards).

The marketing of products on the exterior of vending machines, through posters, menu boards, coolers, trash cans, and other food service equipment, as well as cups used for beverage dispensing are all subject to local school wellness policy standards. Under these standards, the logos and products marketed in these areas and items are required to meet the competitive foods standards for foods sold in schools.

Although the Federal Local Wellness policy standards for marketing do not apply to marketing that occurs at events outside of school hours such as after school sporting or any other

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<sup>5</sup> Federal Trade Commission. *A Review of Food Marketing to Children and Adolescents: Follow Up Report, 2012*. <https://www.ftc.gov/sites/default/files/documents/reports/review-food-marketing-children-and-adolescents-follow-report/121221foodmarketingreport.pdf>.

<sup>6</sup> Cheyne A, Mejia P, Nixon L, Dorfman L. *Food and Beverage Marketing to Youth. Current Obesity Reports*. 2014. [http://www.bmsg.org/sites/default/files/bmsg\\_food\\_and\\_bev\\_mktg\\_to\\_youth.pdf](http://www.bmsg.org/sites/default/files/bmsg_food_and_bev_mktg_to_youth.pdf).

events, including school fundraising events, LEAs have discretion to enact broader policies that address these situations.

The rule does not require schools to immediately replace menu boards, coolers, tray liners, beverage cups, and other food service equipment with depictions of noncompliant products or logos to comply with new local school wellness policy standards. This final rule also is not intended to require that an LEA must remove or replace an existing scoreboard on a sports field or in a gymnasium in order to comply with this requirement. However, as the school nutrition services review/consider new contracts and as scoreboards or other such durable equipment are replaced or updated over time, replacement and purchasing decisions should reflect the applicable marketing guidelines established by the LEA in the wellness policy.

This final rule does not require local school wellness policies to include standards that establish limits on personal expression, opinions, or products. For example, this regulation would not apply to clothing or personal items used by students or staff, or the packaging of products brought from home for personal consumption. In addition, the requirements of the final rule for local school wellness policies do not apply to materials used for educational purposes in the classroom, such as teachers' use of soda advertisements as a media education tool; or when implementing a health or nutrition education curriculum. It is also not intended to imply that schools must allow food or beverage marketing on campus. This regulation requires local school wellness plans to establish only minimum standards for food and beverage marketing restrictions. State agencies and LEAs may choose to adopt more stringent policies for food and beverage marketing.

FNS would like to respond to the recommendation that the final rule allow in-school marketing of foods and beverages that meet the NSLP and SBP meal pattern standards. School

meals are considered a unit that is comprised of several food components. Alternatively, competitive foods standards look at the nutrition standards of an individual food item. Because school meal programs do not have standards for individual food items, it would be difficult, and even inconsistent, to allow marketing of foods and beverages that “meet the school meal patterns.”

Regarding brand marketing and copycat products, FNS understands commenters’ concerns with companies advertising brands that market unhealthy foods in addition to healthy food products. The final rule provides discretion enabling LEAs to determine what is in the best interest of their respective school communities. LEAs may choose to include a more stringent marketing standard for brand marketing and copycat products in their local school wellness policy; they may simply eliminate advertising of all brands that market unhealthy foods; or they may allow both brand marketing and copycat products to be marketed in schools as long as food and beverages to be marketed in schools as long as they meet competitive foods standards.

Accordingly, this final rule codifies proposed §210.30(c)(3)(iii) and permits marketing on the school campus during the school day of only those foods and beverages that meet competitive foods standards in §210.11.

#### Public Notification

Proposed Rule: The proposed rule would require in §210.30(d)(2) that LEAs inform the public about the content of the local school wellness policy and make the local school wellness policy and any updates to the policy available to the public on an annual basis.

Public Comments: General support for the proposed requirement was expressed by approximately 57,200 commenters. Most comments were submitted as parts of several large form letter campaigns. Only a local school nutrition association and a State department of

education generally opposed the requirement, stating that it would be an administrative burden on school districts. Approximately 80 of the commenters, including numerous national associations and advocacy organizations, numerous individuals and an institutional investment center, who expressed general support for the proposed requirement that LEAs inform and update the wellness policy specifically expressed support for the proposed requirement that LEAs actively notify households regarding local school wellness policies.

Nine commenters also provided suggestions as to how LEAs and schools can inform the public about the wellness policy and provide as much information as possible about the school nutrition environment. An advocacy organization recommended that FNS require local school wellness policies be posted at the school site, such as in the front office or main entrance. An education association suggested that LEAs be required to post local school wellness policies on the parent or family pages of the LEA or school website. Two advocacy organizations also suggested FNS require LEAs to ensure that the local wellness policy and any public announcement related to the policy, is available in the languages that represent the school community.

FNS Response: This final rule retains the requirement in the proposed rule that LEAs or schools must notify households on an annual basis of the availability of the local school wellness policy information and provide information that would enable interested households to obtain additional details. FNS strongly encourages LEAs to provide as much information as possible to their communities about the school nutrition environment. While FNS agrees that sharing the local school wellness policy in many locations is useful in notifying families about the content and implementation of the policy, FNS recognizes that LEAs are best-suited to determine

specific methods for publicizing the information, since LEAs communicate with households using various methods.

This final rule, therefore, provides LEAs flexibility to determine the most effective method of providing this notification within their communities. For example, LEAs could post the local school wellness policy on the school or LEA's website and send a message to families notifying them of how they may obtain a copy or otherwise access the policy. In addition to the online posting option, a copy of the local school wellness policy could be posted at each physical school site, such as in the front office or main entrance. Furthermore, the LEA could present the information during a meeting with the Parent Teacher Association/Organization, school board, district superintendent, school/district health and wellness committee, or other interested groups or stakeholders. Other examples of methods for public information sharing with the larger community include notifications through local newspapers or the media that link to a Web page on the school or LEA's website. FNS strongly recommends LEAs make concerted efforts to ensure that the local school wellness policy and any public announcement related to the policy is available in the languages that represent the school community. LEAs are also required to make available to the public the results of the triennial assessment, and actively notify households of the availability of the assessment results.

Accordingly, this final rule codifies in §210.30(d)(2), the proposed requirement that LEAs inform the public about the content of the local school wellness policy and make the local school wellness policy and any updates to the policy available to the public on an annual basis.

#### Implementation, Assessments and Updates

Proposed Rule: Under proposed §210.30(e)(2) and (e)(3), LEAs must:

- Annually report on each of its schools' progress toward meeting the local school wellness policy goals over the previous school year;
- Assess compliance with local school wellness policies at least once every three years; and
- Make appropriate updates or modifications to the local school wellness policies based on the triennial assessments and annual reports.

Public Comments:

Approximately 54,700 commenters addressed the proposed requirements related to implementation, assessments, and updates and most of those commenters stated general support for the proposed requirements. Most of those commenters submitted comments as part of several large form letter campaigns. Twelve commenters, including State departments of education, a school district, and nutrition services departments, stated opposition due to concerns regarding administrative burden and redundancy.

Specifically, commenters expressed concern about the monitoring and reporting burden the proposed rule would place on large school districts. Noting the administrative burden to districts of requiring each individual school to annually report on their wellness policies, an individual commenter recommended that all reporting should be done at the district level. To reduce the burden on LEAs, a State department of education recommended annually reporting progress for the LEA and a representative sample of schools under its jurisdiction. Commenters also suggested FNS provide additional information on how the annual progress report differs from the triennial assessment.

FNS also received comments on the contents and format of annual reports as proposed in §210.30(e)(2). Commenters recommended including how implementation will be tracked and measured across all schools in each State, as well as how successful implementation will be

defined. A local health department suggested collecting Body Mass Index (BMI) data of students to measure outcomes of local school wellness policies. A coalition of advocacy organizations suggested FNS identify specific data elements that should be included in these reports. Several commenters stated the school wellness report card format would be useful for the annual reports, and one commenter suggested FNS require in the final rule that LEAs create an annual school wellness report card and specify the contents of the report card. Another commenter recommended FNS allow districts to use existing data collection methods in order to reduce burden.

In response to FNS' inquiry regarding annual reporting of progress on achieving goals, nine commenters said that the annual frequency of progress reporting would be overly burdensome. They specifically noted that monitoring, reporting, preparing, and publishing progress reports annually would be overly burdensome, especially in a large LEA, and would require significant resources. A commenter, while agreeing that the public should be informed, stated that annual reporting would increase staffing needs. In contrast, a commenter recommended the frequency of progress reports should be at least twice per school year as a means to hold schools accountable.

Commenters also addressed the minimum content requirements of the triennial assessment. Three commenters expressed concern that requiring an LEA to assess each of its schools triennially will be overly burdensome. One State department of education suggested establishing a single standard State model local school wellness policy that all LEAs in the State measure against to ensure consistency in a State. One commenter also recommended FNS issue guidance that provides examples of acceptable model wellness policies.

In response to FNS' inquiry as to whether the three-year frequency would keep the community informed without being overly burdensome to LEAs, a State department of education and a school district nutrition services department indicated it would be too burdensome for small districts, and another commenter agreed the frequency is appropriate. In contrast, one State department of education and one individual stated that three years is too long to wait for feedback and may not be sufficient to ensure schools are on target with their goals.

FNS Response: The final rule eliminates the requirement for LEAs to annually report progress made toward meeting local school wellness policy goals, which was included in the proposed rule. However, this final rule retains the requirement in the proposed rule that each LEA assess, at least once every three years (triennially), compliance with the local wellness policy. LEAs are also required to annually notify the public about the content of the local school wellness policy and any updates to the policy.

The intent of these public updates and policy assessment requirements is to promote public transparency and ensure families, including new school enrollees, have regular and easy access to information about the wellness environment of the school their child attends. In developing the final rule, FNS recognized it was important to balance the need to inform families and the community about the implementation of the local school wellness policy with the potential burden of assessing compliance, particularly for LEAs with a large number of schools. Therefore, this final rule requires, at §210.30(d)(2), that LEAs inform families and the public each school year of basic information about the local school wellness policy including its content and implementation. LEAs may determine the optimal time for providing the information, although FNS recommends that the information be provided early in the school year.

In the proposed rule, FNS specifically requested commenters' input regarding the frequency of both the annual reporting and assessments, in order to assess and limit the burden for LEAs. As noted above, commenters stated that the annual frequency of progress reporting in addition to triennial assessments would be overly burdensome. FNS agrees and has removed from the final rule the requirement for LEAs to annually report progress of local school wellness policy implementation. This final rule requires at §210.30(e)(2) an assessment of the local school wellness policy to be conducted, at a minimum, every three years. However, LEAs can choose to assess their policies more frequently to ensure goals and objectives are being met and to refine the policy as needed. The results of this assessment must be made available to the public to showcase the wellness efforts being made by the LEA with indications about how each school under the jurisdiction of the LEA is in compliance with the LEAs' wellness policy. While some commenters also suggested that the triennial assessments would be burdensome, FNS determined there would be less burden for LEAs and schools because the annual reporting requirements have been omitted from the final rule. Additionally, removing the annual reporting requirement eliminates the concern that there would be redundancy in conducting both an annual report and triennial assessment. For LEAs as a whole, eliminating the proposed annual reporting requirement removes an estimated 83,432 hours of burden associated with public disclosure of the proposed report.

There are a variety of methods an LEA may employ to assess compliance by schools and determine progress toward benchmarks, objectives, and goals. Developing a wellness policy with measurable objectives, and realistic annual benchmarks will help when it is time to evaluate progress. Additionally, the local school wellness policy team and leadership can be assets in conducting periodic assessments. Various resources have already been identified or developed

to support LEAs with the wellness policy process. These resources can be accessed at USDA's School Nutrition Environment and Wellness Resources website (<http://healthymeals.nal.usda.gov/school-wellness-resources>), including resources to support LEAs with assessing implementation of their local school wellness policy (<http://healthymeals.nal.usda.gov/local-wellness-policy-resources/local-school-wellness-policy-process/assessment-monitoring-and>) and model wellness policies (<http://www.fns.usda.gov/school-meals/local-school-wellness-policy>). States are welcome to develop their own models for LEAs within their jurisdiction. FNS will continue to work with ED and HHS to identify and update resources and provide technical assistance in this area.

While annual progress reporting has been removed from the final rule, it is important to note that under §210.30(d)(2), the annual public notification requirement is still in place. LEAs or schools must notify households of the availability of the local school wellness policy information, including the website address or other information that would enable interested households to obtain additional information. FNS strongly encourages LEAs to provide as much information as possible to their communities about the school nutrition environment. As discussed previously in this final rule, at a minimum LEAs must annually inform and update the public about the content and implementation of the local school wellness policy. LEAs must also provide the position title of the designated local agency official(s) or school official(s) leading/coordinating the school wellness policy committee. FNS encourages LEAs or schools to include a summary of each school's events or activities related to local school wellness policy implementation, the name and contact information of the designated local agency official(s) or school official(s) leading/coordinating the school wellness policy committee, and information on how the public can get involved with the school wellness policy committee.

Accordingly, the final rule codifies the triennial assessment requirement in §210.30(e)(2) and removes the proposed requirements related to the annual progress reports, including provisions that would have required informing the public about progress toward meeting the goals of the local school wellness policy (proposed §210.30(d)(3)), annual reporting (proposed §210.30(e)(2)), making updates or modifications based on annual progress reports (proposed §210.30(e)(4)), and retaining documentation of annual progress reports for recordkeeping (proposed §210.30(f)(4)).

#### Recordkeeping Requirement

Proposed Rule: Under proposed §210.30(f), each LEA must maintain records to document compliance with local school wellness policy requirements. These records include but are not limited to:

- The written local school wellness policy;
- Documentation demonstrating compliance with community involvement requirements, including requirements to make the local school wellness policy, annual progress reports, and triennial assessments available to the public;
- Documentation of the triennial assessment of the local school wellness policy for each school under its jurisdiction; and
- Documentation of annual local school wellness policy progress reports for each school under its jurisdiction.

Public Comments: Approximately 55 commenters addressed the proposed requirement, and of these, 50 commenters expressed support for the proposed recordkeeping requirements. These commenters included various stakeholders, including 28 participants in a form letter campaign. To avoid additional burden on schools, commenters recommended FNS clarify that the annual

progress reports and the triennial assessments may be used to meet the recordkeeping requirement.

Two individual commenters stated that the proposed recordkeeping requirements are unnecessary to ensure each LEA has an effective wellness policy. One commenter expressed concern that as a result of the administrative burden, some LEAs may withdraw from the school meal programs.

FNS Response: This final rule establishes that each LEA must retain records to document compliance with the local school wellness policy requirements. FNS recognizes schools have many responsibilities and agrees with commenters that it is important to avoid additional burden on schools. However, it is important to remember that schools already maintain records for their existing local school wellness policies; these records are important for the administrative review of programs because they help document LEA activities regarding the local school wellness policy. Having recordkeeping documents already on file will satisfy administrative review requirements as well as allow the review process to go smoothly, which may ultimately reduce the burden schools face. Based on the number of supportive comments and the reduction in the administrative burden in this final rule due to the elimination of the annual reporting requirement, FNS disagrees that LEAs will withdraw from the school meal program due to the administrative burden associated with local wellness policies. Accordingly, this final rule retains the proposed recordkeeping provision, with the exception of documentation of annual progress reports; records retained by LEAs must include:

- The written local school wellness policy;
- Documentation demonstrating compliance with community involvement requirements;
- Documentation of the triennial assessment of the local school wellness policy; and

- Documentation to demonstrate compliance with the annual public notification requirements.

Documentation demonstrating compliance with community involvement requirements may include, for example, a copy of the solicitation on the LEA/school website or school newsletter.

Documentation to demonstrate compliance with the public notification requirements may include, for example, a copy of the LEA/school Web page where the local school wellness policy has been posted or a copy of the school newsletter or local newspaper. FNS will work with State agencies to provide technical assistance on documentation requirements and address questions that may arise during implementation. In addition, FNS will continue working with partners to clarify any implementation issues that may impact participation in the NSLP and SBP.

Accordingly, the final rule codifies in §210.30(f), the proposed requirement that each local educational agency must retain records to document compliance with the requirements of this section.

## **Related Information**

### **Timeline for Implementation**

**Proposed Rule:** The local school wellness policy proposed rule did not propose a date by which LEAs would need to comply with the proposed requirements.

**Public Comments:** The timeline for implementing the requirements was addressed by approximately 55,000 commenters. The majority of those comments were submitted as part of several large form letter campaigns.

In general, commenters expressed support for establishing a timeline for implementation and most of the comments urged FNS to finalize the rule quickly and to work with schools to ensure

full implementation. Many commenters recommended that FNS require implementation between one and two years after the rule is finalized. A department of education explained that the one to two year requirement would provide LEAs with one year of planning time, which would be needed to develop the new infrastructure, and additional time for implementation.

Several commenters, including two health associations and a coalition of school districts, recommended that FNS require implementation within one year to provide schools adequate preparation time and also ensure that children benefit quickly. A health association suggested implementation during the 2015-16 school year because it would most effectively protect children's health and would provide FNS and schools sufficient time to prepare and implement the standards.

A health advocacy organization suggested specifying the date FNS will release the model policies and best practices, and include a deadline for LEAs to publish their wellness policies. Three commenters recommended the timeline be flexible, allowing LEAs and schools sufficient time to adjust to required changes and to account for the variability in existing wellness policies.

A school district suggested that school districts will need multiple years to develop and transition to the proposed assessment system, especially if no new funding is available. Six individual commenters suggested that FNS require LEAs to implement the policies within one to three years following the date the rule is finalized. Two school food service staff expressed concern over the amount of recent regulations and suggested an extended period for implementation. One of the school food service staff urged FNS to wait until schools have had sufficient time to implement competitive foods nutrition standards and suggested waiting two or more years prior to implementation.

Three commenters addressed potential timelines for implementing the proposed marketing requirements. One of the commenters requested that FNS provide significant time, while another recommended FNS ensure the implementation timeline does not impact current contracts between LEAs and vendors. Another of the commenters suggested a three year timeline stating that it will be a challenge for schools to implement wellness policies concurrently with other requirements.

FNS Response: In response to commenters' concerns, this final rule becomes effective on [insert date 30 days from publication in Federal Register]. By that date, LEAs must begin developing a revised local school wellness policy. LEAs must fully comply with the requirements of the final rule by June 30, 2017. By SY 2017-2018, LEAs must complete a triennial assessment.

FNS acknowledges the first few years of implementation may be challenging as new groups work together to establish a healthy school nutrition environment. FNS also recognizes that LEAs need planning time to develop the infrastructure and ensure all parties are well informed and trained to meet the new requirements. State agencies and FNS will assist LEAs in the transition to these new requirements by the focusing on technical assistance during administrative reviews to facilitate implementation of the local school wellness policy requirements.

It is important to understand that 99 percent of students in public schools are enrolled in districts that already have wellness policies in place. LEAs and schools have been implementing local school wellness policies since school year 2006, pursuant to Federal requirements. As discussed in the Regulatory Impact Analysis, most schools have local school wellness policies

that meet at least some of the requirements under the Child Nutrition Act, and many have incorporated elements that were newly required under HRFKA. However, many LEAs will likely need to update their wellness policies to be in full compliance with this final rule. LEAs may begin or continue implementing these provisions prior to the effective date provided in this final rule. FNS currently has available more than 100 tools and resources on the School Nutrition Environment and Wellness Resources website, which LEAs and schools may consult for information and resources on implementing, enhancing, and maintaining local school wellness policies. In addition, FNS continues to regularly offer presentations and webinars to various audiences detailing the requirements of the local school wellness policy.

Accordingly, this final rule is effective on [insert date 30 days from publication in Federal Register], as specified in the DATES section of this preamble.

#### **IV. Implementation Resources**

Healthy eating, physical activity, and wellness among children and adolescents are the goals of several government agencies. In an effort to combine efforts and resources, FNS convened a workgroup including ED and HHS, acting through CDC, in April 2011. This workgroup conducted several needs assessment activities to help determine the training and technical assistance needs of LEAs in implementing the local school wellness policy requirements. Based on this assessment, the workgroup developed a five-year technical assistance plan. The workgroup has identified best practices and success stories for local school wellness policy implementation as well as other technical assistance resources that will support LEAs in developing, updating and assessing their policies.

To assist with implementation of the local school wellness policies, FNS has established a website (<http://www.fns.usda.gov/tn/local-school-wellness-policy>) that provides information about the Federal requirements, local process, technical assistance, tools and resources, monitoring, and funding a local school wellness policy. Tools and resources available on this website include materials to design, implement, promote, disseminate, and evaluate local school wellness policies, as well as overcome barriers to adoption of local school wellness policies. Furthermore, FNS' Team Nutrition initiative has standards-based lessons plans and curricula for pre-kindergarten through Grade 8, classroom-based lesson plans, recipes, guidance to improve the quality of school meals, and other materials for nutrition education and promotion, including songs, games, posters, videos, event-planning booklet, wellness communication toolkit, school garden activities, and a graphics library. These resources and materials are available free of charge for schools that participate in Federal child nutrition programs (<http://www.fns.usda.gov/tn/resource-library>). These materials also are available to the general public for download at no cost.

In addition, the "School Nutrition Environment and Wellness Resources" website, operated by USDA National Agricultural Library's Healthy Meals Resource System (Team Nutrition's training and technical assistance component), helps LEAs find the resources they need to meet the local school wellness policy requirements and recommendations to establish a healthier school nutrition environment (<http://healthymeals.nal.usda.gov/school-wellness-resources>). The "School Nutrition Environment and Wellness Resources" website has information and resources on:

- Local School Wellness Policy Process steps to put the policy into action;
- Required Wellness Policy Elements to meet the Federal requirements;

- Healthy School Nutrition Environment improvements related to food and physical activity;
- Samples, Stories, and Guidance ideas for schools including sample model wellness policies, and State school health policies and resources;
- Research Reports on school wellness; and
- Grants and funding opportunities related to child nutrition and physical activity.

FNS and CDC have made available a collection of stories from a diverse group of schools that succeeded in improving students' nutritional and physical activity status through their local school wellness policy. LEAs can read each story to gather implementation ideas on the steps and strategies other schools have used to implement wellness policies, including activities in key areas such as improving school meals and increasing physical activity levels among students. Best practice stories and strategies are available on the "School Nutrition Environment and Wellness Resources" website at <http://healthymeals-u.nal.usda.gov/local-wellness-policy-resources/samples-stories-and-guidance/success-storiesbest-practices>.

LEAs can use the Model Local School Wellness Policy to help create their local school wellness policy and meet the minimum Federal requirements for local school wellness policy implementation. This model local school wellness policy template was developed by the Alliance for a Healthier Generation, has been thoroughly reviewed by the FNS, and is in compliance with the statutory requirements for local school wellness policies, as well as this final regulation. This model wellness policy will be revised by the Alliance for a Healthier Generation to be consistent with this final regulation and reviewed by FNS to confirm compliance. Once completed, it will be made available, along with other sample wellness

policies, on the “School Nutrition Environment and Wellness Resources” Web site at <http://healthymeals.nal.usda.gov/local-wellness-policy-resources/model-wellness-policies>.

FNS will continue to identify, develop, and post resources to the Team Nutrition and “School Nutrition Environment and Wellness Resources” websites including guidance materials, Frequently Asked Questions, sample and model local school wellness policies that will help LEAs assess the extent to which the local school wellness policy compares to model local school wellness policies, as required under the triennial assessment. In addition, best practices and other technical assistance will be provided by FNS as needed to develop, implement, assess, and report on local school wellness policies that promote healthy school nutrition environments.

## **PROCEDURAL MATTERS**

### Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been designated a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

### Regulatory Impact Analysis Summary

As required for all rules that have been designated significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this proposal. A summary is presented below. The complete RIA is included in the docket for this rule at [www.regulations.gov](http://www.regulations.gov).

### Need for Action

The final rule updates the regulations governing the administration of USDA's Child Nutrition Programs in response to statutory changes made by The Healthy, Hunger-Free Kids Act of 2010.<sup>7</sup> Section 204 of the Healthy, Hunger-Free Kids Act of 2010 added section 9A to the Richard B. Russell National School Lunch Act. This new section requires local educational agencies (LEAs) to establish local wellness policies and expands the scope of existing wellness policies; brings additional stakeholders into the development, implementation, and review of local school wellness policies; and requires public updates on the content and implementation of the wellness policies.

### Benefits

The 2004 legislation placed the responsibility for developing a local school wellness policy at the local level, so the unique needs of each school under the jurisdiction of the LEA could be addressed. Each LEA was required to establish a local school wellness policy that set goals for nutrition education, physical activity, and other school-based activities designed to promote student wellness, and to include nutrition guidelines for all foods available on the school campus during the school day. The legislation tasked the Secretary with developing regulations providing the framework and guidelines for LEA's local school wellness policies, including minimum goals, nutrition guidelines, and requirements.

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<sup>7</sup> Public Law 111-296.

The final rule expands the scope of existing wellness policies, bringing additional stakeholders into the development, implementation, and review of local school wellness policies, and it also requires public updates on the content and implementation of the wellness policies. Specifically, it provides guidelines for local educational agencies and the Department regarding their roles in these policies, as required by the Healthy, Hunger-Free Kids Act of 2010.

As documented in the Bridging the Gap study,<sup>8</sup> there is substantial variability in local wellness policies, in the strength of those policies, and in policy enforcement, meaning that not all school children are benefitting from the policies in their schools.

The final rule strengthens the requirements for the local wellness policies. Under the final rule, LEAs and schools are encouraged to identify specific, measurable objectives with attention to both long- and short-term goals. The wellness committee responsibilities have also been expanded to include oversight on policy implementation. LEAs must now designate at least one LEA official to be responsible for periodically determining the extent to which schools are in compliance with their wellness policies and the extent to which the policy compares with model policy.

The final rule also includes a provision requiring that LEA local school wellness policies include standards that limit in-school marketing to only those foods and beverages that meet the

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<sup>8</sup> Chriqui JF, Resnick EA, Schneider L, Schermbeck R, Adcock T, Carrion V, Chaloupka FJ. *School District Wellness Policies: Evaluating Progress and Potential for Improving Children's Health Five Years after the Federal Mandate. School Years 2006–07 through 2010-11*. Volume 3. Chicago, IL: Bridging the Gap Program, Health Policy Center, Institute for Health Research and Policy, University of Illinois at Chicago, 2013, [www.bridgingthegapresearch.org](http://www.bridgingthegapresearch.org)[www.bridgingthegapresearch.org](http://www.bridgingthegapresearch.org). The Bridging the Gap study examined hard copies of written wellness policies from nationally representative samples of between 579 and 679 public school districts for each school year from SY 2006-2007 through SY2010-2011. Response rates in all years exceeded 90 percent. See p. 45 of the Bridging the Gap study for additional methodological information.

standards in the Smart Snacks in Schools final rule. The new marketing requirement for local school wellness policies will mean that children are presented with images and signs that promote healthier foods and beverages and that the products that are marketed will match the snack foods and beverages that will be available in schools.

Under the final rule, schools must also inform and update the public about the content of their policies and the status of policy implementation. LEAs must also formally assess their policies to ensure that goals and objectives are being met. With greater transparency on the effectiveness of these policies, parents and other community stakeholders will be better informed and positioned to improve the school nutrition and wellness environment.

As cited in *Bridging the Gap*, increasing numbers of peer-reviewed studies demonstrate the correlation between healthy nutrition and physical activity on the one hand and improved academic performance and improved classroom behavior on the other.<sup>9</sup> A recent Institute of Medicine report found that “increasing physical activity and physical fitness may improve academic performance and that time in the school day dedicated to recess, physical education class, and physical activity in the classroom may also facilitate academic performance.... Available evidence suggests that mathematics and reading are the academic topics that are most influenced by physical activity. These topics depend on efficient and effective executive function, which has been linked to physical activity and physical fitness.”<sup>10</sup> Similar correlations between better fitness and better academic performance have been found in Texas among

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<sup>9</sup> Chriqui et al., 2013, p. 4.

<sup>10</sup> Committee on Physical Activity and Physical Education in the School Environment, Food and Nutrition Board, Institute of Medicine, *Educating the Student Body: Taking Physical Activity and Physical Education to School*, edited by Kohl and Cook HD (Washington, DC: National Academies Press, 2013), available online at <http://www.ncbi.nlm.nih.gov/books/NBK201501/>.

students in grades 3-12, among Massachusetts middle school students, and among Illinois 3<sup>rd</sup> and 5<sup>th</sup> graders.<sup>11</sup>

A literature review of 33 peer-reviewed papers (including six studies using large, nationally representative studies) finds increasing evidence supporting the idea that schools' policies on foods, beverages, and physical activity are correlated with calories consumed and expended by school age children, and even to children's body mass indexes.<sup>12</sup> Consequently, we believe that strengthening local wellness policies will have real positive effects on the health outcomes for students, though these benefits cannot be quantified nationally with precision using existing data given the lack of baseline or ongoing data about student health status.

Finally, the rule requires LEAs to give increased attention to their implementation of the new school meal pattern requirements and the Smart Snacks in Schools requirements. As described in the regulatory impact analysis published with the school meals rule,<sup>13</sup> the benefits of the new school meal pattern requirements include improved nutrition and diets to students and likely improved health outcomes. Furthermore, as described in the regulatory impact analysis published with the Smart Snacks in Schools rule, the benefits of the Smart Snacks in Schools rule likely include decreased consumption of solid fats and added sugars and decreased obesity rates.

### Costs / Administrative Impact

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<sup>11</sup> Troust, SG, Active Living Research, "Active education: physical education, physical activity, and academic performance." Available online at [http://activelivingresearch.org/files/ALR\\_Brief\\_ActiveEducation\\_Summer2009.pdf](http://activelivingresearch.org/files/ALR_Brief_ActiveEducation_Summer2009.pdf).

<sup>12</sup> Chriqui et al., 2013, p. 4. Chriqui FJ, Healthy Eating Research, Bridging the Gap, "Influence of competitive food and beverage policies on children's diets and childhood obesity," p. 6. Available online at [http://healthyeatingresearch.org/wp-content/uploads/2013/12/Competitive\\_Foods\\_Research\\_Review\\_HER\\_BTG\\_7-2012.pdf](http://healthyeatingresearch.org/wp-content/uploads/2013/12/Competitive_Foods_Research_Review_HER_BTG_7-2012.pdf).

<sup>13</sup> *Federal Register*, Vol. 77, No. 17, pp. 4088-4167.

There are no transfers as a result of this rule, and we estimate that there is no quantifiable economic impact beyond the new administrative, recordkeeping, and reporting requirements for LEAs established as a result of this rule. LEAs will face increased administrative, recordkeeping, and reporting burdens in order to conduct triennial assessments of wellness policies and policy implementation and retain documentation of these assessments. We estimate these costs to be approximately \$4 million per year across the entire United States and note that they are attributable to statutory requirements, rather than discretionary regulatory requirements. A summary table of the estimated costs of the final rule is provided below.

**Record and Reporting Requirement Costs for Local School Wellness Policies**

Administrative Burden on LEAs	Fiscal Year (millions)					
	2016	2017	2018	2019	2020	Total
<b>Additional Reporting Burden on LEAs</b>						
LEA must establish and/or update local wellness policies for all schools participating in NSLP	\$2.6	\$2.6	\$2.7	\$2.8	\$2.9	<b>\$13.6</b>
LEA must inform the public annually about the content and implementation of the local school wellness policy and any updates	\$0.5	\$0.5	\$0.5	\$0.6	\$0.6	<b>\$2.7</b>
LEA must conduct triennial assessments of schools' compliance with the local school wellness policy and inform public about progress	\$0.9	\$0.9	\$0.9	\$0.9	\$1.0	<b>\$4.5</b>
<b>Total Estimated Reporting Burden</b>	<b>\$3.9</b>	<b>\$4.0</b>	<b>\$4.2</b>	<b>\$4.3</b>	<b>\$4.4</b>	<b>\$20.9</b>
<b>Additional Recordkeeping Burden on LEAs</b>						

SFA/LEA must retain records to document compliance with the local school wellness policy requirements	\$0.1	\$0.1	\$0.1	\$0.1	\$0.1	<b>\$0.7</b>
<b>Total Additional Administrative Burden on LEAs</b>	<b>\$4.1</b>	<b>\$4.2</b>	<b>\$4.3</b>	<b>\$4.4</b>	<b>\$4.6</b>	<b>\$21.6</b>

\*The BLS, FY2014 employer cost for State and local government public administration employee wage rate is used in this estimate and inflated on a fiscal year basis by State and Local Price Index used in PB2016.

Regulatory Flexibility Act Summary

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA) of 1980, (5 U.S.C. 601–612). It has been certified that this rule will have a significant impact on a substantial number of small entities. A summary is presented below. The complete RFA is included in the docket for this rule at [www.regulations.gov](http://www.regulations.gov).

The requirements established by this final rule will apply to LEAs which meet the definitions of “small governmental jurisdiction” and “small entity” in the Regulatory Flexibility Act. The regulatory flexibility analysis considers the impact of the final rule on small businesses. The final rule has the potential to affect approximately 20,000 local educational agencies and some 105,000 schools operating in the U.S. We estimate that the administrative cost for schools will be on average about \$41 per school per year. The marketing limitations in the final rule could affect vending machine operators and marketing companies as they change existing marketing to meet the requirements. Because of the changes in products available in schools due to the Smart Snacks in Schools interim rule, we believe that much of that change will already have occurred, but there may still be some labor costs associated with changing the marketing campaigns. It is expected that marketing in schools will not decrease; it will be updated to promote healthier foods and beverages.

## Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$146 million or more (when adjusted for 2016 inflation; GDP deflator source: Table 1.1.9 at <http://www.bea.gov/iTable>) in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

A school district and six individuals submitted comments asserting that the proposed rule represents an unfunded mandate. One individual commenter noted that this additional duty should not be placed on child nutrition directors without additional funding. The school district stated that FNS is estimating implementation costs to be quite low so that the Unfunded Mandates Reform Act does not apply. The other individual commenters made general statements that this rule results in an unfunded mandate.

The provisions in this regulation are statutory requirements, not discretionary. Furthermore, FNCS has provided flexibilities for LEAs. For example, the rule allows the LEA to choose the appropriate LEA or school official responsible for oversight of the local wellness policy. Schools were previously required to have local wellness policies in place, the effort required to

update local wellness policies to bring them into compliance with the requirements of this rule is estimated to be less than \$5 million dollars per year. This is well below the \$146 million threshold that triggers the cost benefit analysis required for unfunded mandates. The cost estimates for this rule are discussed in more detail above and in the complete Regulatory Impact Analysis included in the docket for this rule at [www.regulations.gov](http://www.regulations.gov).

Based on these cost estimates, FNS has determined that this final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of \$146 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### Executive Order 12372

The National School Lunch Program (NSLP), School Breakfast Program (SBP), State Administrative Expenses (SAE), Special Milk Program (SMP), Child and Adult Care Food Program (CACFP), and Summer Food Service Program (SFSP) are listed in the Catalog of Federal Domestic Assistance Programs under NSLP No. 10.555, SBP No. 10.553, SAE No. 10.560, SMP No. 10.556, CACFP No. 10.558, and SFSP No. 10.559, respectively and are subject to Executive Order 12372 which requires intergovernmental consultation with State and local officials (See 2 CFR chapter IV). The Child Nutrition Programs are federally funded programs administered at the State level. The Department headquarters and regional office staff engage in ongoing formal and informal discussions with State and local officials regarding program operational issues. This structure of the Child Nutrition Programs allows State and local agencies to provide feedback that forms the basis for any discretionary decisions made in this and other rules.

### Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. USDA has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation, however, FNS is not aware of any specific situations in which this would occur. This rule is not intended to have retroactive effect unless specified in the **DATES** section of the final rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions all applicable administrative procedures in § 210.18(q) or § 235.11(f) must be exhausted.

### Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with Departmental Regulations 4300-4, "Civil Rights Impact Analysis," and 1512-1, "Regulatory Decision Making Requirements." After a

careful review of the rule's intent and provisions, FNS has determined that this rule is not intended to limit or reduce in any way the ability of protected classes of individuals to receive benefits on the basis of their race, color, national origin, sex, age or disability nor is it intended to have a differential impact on minority owned or operated business establishments and woman-owned or operated business establishments that participate in the Child Nutrition Programs.

### Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. This rule contains information collection requirements subject to approval by OMB.

A 60-day notice was embedded into the proposed rule, "7 CFR Parts 210 and 220 Local School Wellness Policy Implementation Under the Healthy, Hunger-Free Kids Act of 2010," published in the Federal Register at 79 FR 10693 on February 26, 2014, which provided the public an opportunity to submit comments on the information collection burden resulting from this rule.

One commenter stated that this rule adds significant paperwork to already overworked Food Service Directors nationwide, specifically noting that the current three-year review cycle takes a month for preparation. The majority of the estimated burden for this final rule is in establishing local school wellness polices as required by the HHFKA. This is a one-time occurrence, but comprises an estimated 99,110 hours (63 percent) of the total estimated 156,923 hours. It is likely that the majority of LEAS have already established these policies; however,

the burden needs to be accounted for in this final rule. Once every three years, a triennial assessment is required by the HHFKA and accounts for an estimated 33,035 hours annually (21 percent). Annually, the HHFKA required that LEAs inform the public and make any updates available to the public and this accounts 12.6 percent of the total burden. Retaining records accounts for an estimated 3 percent of the total burden. The burden associated with the Administrative Review, occurring every three years, is not part of this final rule.

Another commenter suggested that the workload burden at the LEA level would be greater than USDA's anticipated burden for larger districts. Based on comments received, FNS has removed from the final rule the proposed 210.30(e)(2) which would have required annual reporting of each school's progress in meeting policy goals. Eliminating the proposed annual reporting requirement caused a significant reduction of 83,432 responses and 83,432 burden hours for public disclosure of the proposed report. The final rule clarifies that only LEAs are required to establish local school wellness policies, not each individual school which decreased the number of responses by 83,432; however, the estimated hours per response were increased accordingly to respond to comments regarding burden hours to ensure no decrease in the burden hours for this provision.

In response to these comments, the changes between the proposed burden and the burden for the final rule resulted in an overall decrease of 63,565 hours for public disclosure and a decrease of 21,117 hours for recordkeeping.

This is a new collection. The provisions in this final rule create new burden which will be merged into a currently approved information collection titled "National School Lunch Program" (NSLP), OMB Number 0584-0006, which expires on April 30, 2016.

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements associated with this final rule, which were filed under 0584-0592, have been submitted for approval to OMB. When OMB notifies FNS of its decision, FNS will publish a notice in the Federal Register of the action.

FNS is requesting an estimated 151,967 hours for LEAs to publicly disclose local school wellness policies and their triennial assessment results. FNS is requesting an estimated 4,956 hours for recordkeeping requirements for LEAs. The following table reflects estimated burden associated with the new information collection requirements:

**ESTIMATED ANNUAL BURDEN FOR 0584-0592,  
LOCAL WELLNESS POLICY IMPLEMENTATION UNDER THE HEALTHY,  
HUNGER-FREE KIDS ACT OF 2010  
7 CFR PARTS 210 and 220**

<b>Affected Public</b>	<b>7 CFR Reference</b>	<b>Estimated Number of Respondents</b>	<b>Frequency of Response</b>	<b>Total Annual Responses</b>	<b>Estimated Hours per Response</b>	<b>Estimated Annual Burden Hours</b>
<b>Reporting</b>						
Each LEA must update local wellness policies for all participating schools	210.30(a) 210.30 (c)(5)	19,822	1	19,822	5	99,110
LEAs must inform the public annually about the local wellness policy and make any updates available to the public.	210.30 (d)(2) 220.7	19,822	1	19,822	1	19,822
LEAs are required to conduct triennial assessments and make assessment results and any updates available to public	210.30(d) (3), (e)(2), (e)(3)	6,607	1	6,607	5	33,035
<b>Total Estimated Reporting Burden</b>		<b>19,822</b>	<b>2.3333</b>	<b>46,251</b>	<b>3.2857</b>	<b>151,967</b>

<b>Recordkeeping</b>						
LEAs must retain records to document compliance with local school wellness policy requirements.	210.15 (b)(9) 210.30(f)	19,822	1	19,822	0.25	4,955.5
Total Estimated Recordkeeping Burden		19,822	1	19,822	0.25	4,955.5

<b>Total of Reporting and Recordkeeping</b>						
		<b>Estimated Number of Respondents</b>	<b>Frequency of Response</b>	<b>Total Annual Responses</b>	<b>Estimated Hours per Response</b>	<b>Estimated Annual Burden</b>
Reporting		19,822	2.3333	46,251	3.2857	151,967
Recordkeeping		19,822	1	19,822	0.25	4,955.5
<b>Total</b>		<b>19,822</b>	<b>3.3333</b>	<b>66,073</b>	<b>2.375</b>	<b>156,923</b>

<b>SUMMARY OF BURDEN (OMB #0584-0592)</b>	
TOTAL NO. RESPONDENTS	19,822
AVERAGE NO. RESPONSES PER RESPONDENT	3.3333
TOTAL ANNUAL RESPONSES	19,822
AVERAGE HOURS PER RESPONSE	2.375
<b>TOTAL NEW BURDEN REQUESTED WITH NEW RULE)</b>	<b>156,923*</b>

\* Upon approval by OMB these 156,923 hours will be merged with OMB #0584-0006.

### E-Government Act Compliance

The Food and Nutrition Service is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased

opportunities for citizen access to Government information and services and for other purposes. This rule promotes use of Internet for posting policy content and making implementation and updates transparent to public.

#### Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Food and Nutrition Service has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175. If a Tribe requests consultation, the Food and Nutrition Service will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

#### **List of Subjects**

#### **7 CFR Part 210**

Grant programs-education; Grant programs-health; Infants and children; Nutrition; Reporting and recordkeeping requirements; School breakfast and lunch programs; Surplus agricultural commodities.

**7 CFR Part 220**

Grant programs-education; Grant programs-health; Infants and children; Nutrition; Reporting and recordkeeping requirements; School breakfast and lunch programs.

Accordingly, for the reasons set forth in the preamble, 7 CFR parts 210 and 220 are amended as follows:

**PART 210—NATIONAL SCHOOL LUNCH ACT**

1. The authority citation for part 210 continues to read as follows:

**Authority:** 42 U.S.C. 1751–1760, 1779.

2. In § 210.12, revise the section heading and add paragraph (e) to read as follows:

**§ 210.12 Student, parent, and community involvement.**

\* \* \* \* \*

(e) Local school wellness policies. Local educational agencies must comply with the provisions of § 210.30(d) regarding student, parent, and community involvement in the development, implementation, and periodic review and update of the local school wellness policy.

3. In § 210.15, add paragraph (b)(9) to read as follows:

**§ 210.15 Reporting and recordkeeping.**

\* \* \* \* \*

(b) \* \* \*

(9) Records to document compliance with the local school wellness policy requirements as set forth in § 210.30(f).

4. In § 210.18, add paragraph (h)(8) to read as follows:

**§ 210.18 Administrative reviews.**

\* \* \* \* \*

(h) \* \* \*

(8) Local school wellness. The State agency must ensure the local educational agency complies with the local school wellness requirements set forth in § 210.30.

\* \* \* \* \*

**§§ 210.30, 210.31, and 210.32 [Redesignated as §§ 210.31, 210.32, and 210.33]**

5. Redesignate §§ 210.30, 210.31, and 210.32 as §§ 210.31, 210.32, and 210.33 respectively.

6. Add a new § 210.30 to read as follows:

**§ 210.30 Local school wellness policy.**

(a) General. Each local educational agency must establish a local school wellness policy for all schools participating in the National School Lunch Program and/or School Breakfast Program under the jurisdiction of the local educational agency. The local school wellness policy is a written plan that includes methods to promote student wellness, prevent and reduce childhood obesity, and provide assurance that school meals and other food and beverages sold and otherwise made available on the school campus during the school day are consistent with applicable minimum Federal standards.

(b) Definitions. For the purposes of this section:

(1) School campus means the term as defined in § 210.11(a)(4).

(2) School day means the term as defined in § 210.11(a)(5).

(c) Content of the plan. At a minimum, local school wellness policies must contain:

(1) Specific goals for nutrition promotion and education, physical activity, and other school-based activities that promote student wellness. In developing these goals, local educational agencies must review and consider evidence-based strategies and techniques;

(2) Standards for all foods and beverages provided, but not sold, to students during the school day on each participating school campus under the jurisdiction of the local educational agency;

(3) Standards and nutrition guidelines for all foods and beverages sold to students during the school day on each participating school campus under the jurisdiction of the local educational agency that;

(i) Are consistent with applicable requirements set forth under §§ 210.10 and 220.8 of this chapter;

(ii) Are consistent with the nutrition standards set forth under § 210.11;

(iii) Permit marketing on the school campus during the school day of only those foods and beverages that meet the nutrition standards under § 210.11; and

(iv) Promote student health and reduce childhood obesity.

(4) Identification of the position of the LEA or school official(s) or school official(s) responsible for the implementation and oversight of the local school wellness policy to ensure each school's compliance with the policy;

(5) A description of the manner in which parents, students, representatives of the school food authority, teachers of physical education, school health professionals, the school board, school

administrators, and the general public are provided an opportunity to participate in the development, implementation, and periodic review and update of the local school wellness policy; and

(6) A description of the plan for measuring the implementation of the local school wellness policy, and for reporting local school wellness policy content and implementation issues to the public, as required in paragraphs (d) and (e) of this section.

(d) Public involvement and public notification. Each local educational agency must:

(1) Permit parents, students, representatives of the school food authority, teachers of physical education, school health professionals, the school board, school administrators, and the general public to participate in the development, implementation, and periodic review and update of the local school wellness policy;

(2) Inform the public about the content and implementation of the local school wellness policy, and make the policy and any updates to the policy available to the public on an annual basis;

(3) Inform the public about progress toward meeting the goals of the local school wellness policy and compliance with the local school wellness policy by making the triennial assessment, as required in paragraph (e)(2) of this section, available to the public in an accessible and easily understood manner.

(e) Implementation assessments and updates. Each local educational agency must:

(1) Designate one or more local educational agency officials or school officials to ensure that each participating school complies with the local school wellness policy;

(2) At least once every three years, assess schools' compliance with the local school wellness policy, and make assessment results available to the public. The assessment must measure the implementation of the local school wellness policy, and include:

- (i) The extent to which schools under the jurisdiction of the local educational agency are in compliance with the local school wellness policy;
  - (ii) The extent to which the local educational agency’s local school wellness policy compares to model local school wellness policies; and
  - (iii) A description of the progress made in attaining the goals of the local school wellness policy.
- (3) Make appropriate updates or modifications to the local school wellness policy, based on the triennial assessment.
- (f) Recordkeeping requirement. Each local educational agency must retain records to document compliance with the requirements of this section. These records include but are not limited to:
- (1) The written local school wellness policy;
  - (2) Documentation demonstrating compliance with community involvement requirements, including requirements to make the local school wellness policy and triennial assessments available to the public as required in paragraph (e) of this section; and
  - (3) Documentation of the triennial assessment of the local school wellness policy for each school under its jurisdiction.

**PART 220—SCHOOL BREAKFAST PROGRAM**

7. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779, unless otherwise noted.

8. In § 220.7, add paragraph (h) to read as follows:

**§ 220.7 Requirements for participation.**

\* \* \* \* \*

(h) Local educational agencies must comply with the provisions of § 210.30 of this chapter regarding the development, implementation, periodic review and update, and public notification of the local school wellness policy.

Dated: June 21, 2016.

Kevin W. Concannon  
Under Secretary

Food, Nutrition, and Consumer Services

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