



# Legal and Practical Considerations

## *in the Operation of Federal School Nutrition Programs*

Federal school nutrition programs are increasingly seen as a critical component in national efforts to reduce childhood obesity. At the same time, school officials are faced with a complex system of legal requirements and practical challenges to getting nutritious food on children's trays.\*

### **How Do Schools Obtain Food Used in School Nutrition Programs?**

Schools generally obtain the food used in their school nutrition programs in two ways: (1) by purchasing food (often referred to as procurement) and (2) by participating in the United States Department of Agriculture's USDA Foods Program.

### **What Are the Main Federal School Nutrition Programs?**

The following federal school nutrition programs provide support for meals and snacks served before, during, and after the school day, as well as continuing support for meals when school is not in session.<sup>1</sup>

- National School Lunch Program
- School Breakfast Program
- Afterschool Snack Program



- Summer Food Service Program and Seamless Summer Option
- Special Milk Program for Children
- Fresh Fruit and Vegetable Program

## Who Administers Federal School Nutrition Programs?

School nutrition programs are administered by public agencies at the federal, state, and local level. These agencies work with private parties that sell food, supplies, and services to local school nutrition programs in order to put food on children's trays.

### Federal agencies

The Food and Nutrition Service at the *United States Department of Agriculture* (USDA) administers school nutrition programs at the federal level,<sup>2</sup> provides technical assistance and clarification on regulations, and reimburses schools for the administrative costs of these programs<sup>3</sup> and each meal served.<sup>4</sup> The USDA partners with the *United States Department of Defense* (DoD) to distribute fresh fruits and vegetables to schools through the *DoD Fresh Fruit and Vegetable Program* (DoD Fresh).<sup>5</sup> The *United States Food and Drug Administration* (FDA) develops food safety standards<sup>6</sup> and produces the Model FDA Food Code, which states use as guidance for state-level food safety and licensing requirements.<sup>7</sup>

### State agencies

In each state, a designated state agency (typically the *department of education*) oversees the statewide operation of the local school nutrition programs,<sup>8</sup> provides training and technical assistance to local school food authorities,<sup>9</sup> and ensures compliance of programs with legal requirements.<sup>10</sup> Depending on the state, the *department of health* or *department of agriculture* is responsible for state-level food safety and licensing requirements, which impact school nutrition programs.<sup>11</sup> These agencies may also work with the department of education and local government agencies to support school efforts to serve safe and healthy food to students.<sup>12</sup>

### Local authorities

A *local educational agency* is the public board of education or other public or private nonprofit authority created under state law to provide administrative control or other services for public or private nonprofit elementary schools or secondary schools within a state.<sup>13</sup> Local educational agencies, called a school district in most states, provide the school structure in which school nutrition programs exist.

Federal school nutrition programs are operated at the local level by *school food authorities* (SFA).<sup>14</sup> An SFA is the governing body responsible for the local administration of federal school nutrition programs in one or more schools. An SFA has the legal authority to operate the federal school nutrition program.<sup>15</sup>

## How Do SFAs Operate School Nutrition Programs?

Most SFAs (81%) have self-operated food service programs in which the SFA operates the entire food service program, including purchasing food according to federal and state procurement standards.<sup>16</sup> SFAs may conduct their food purchasing independently (*direct purchasing*) or together with other SFAs, buying cooperatives, or group purchasing organizations (*collective purchasing*). An SFA may contract with many different types of food suppliers, including local, regional, or national food producers (i.e., farmers, ranchers), manufacturers, or distribution companies. The remaining 19% of SFAs contract with *food service management companies* to manage their food service operations.<sup>17</sup>

## What Legal Requirements Impact How Schools Purchase Food?

Schools must follow both federal and state *procurement standards* when purchasing food used in federal school nutrition programs.<sup>18</sup> One of the goals

of government procurement standards is to create an open and competitive environment so that taxpayers will generally pay the lowest price possible.<sup>19</sup> Federal procurement standards require the use of either *competitive sealed bids* or *competitive proposals* for purchases estimated to exceed \$150,000.<sup>20</sup> For the procurement of food, services or supplies falling beneath the small purchase threshold of \$150,000, SFAs may use a more informal procurement method known as the *small purchase method*.<sup>21</sup> The 2008 Farm Bill added an additional component to federal procurement standards called *geographic preference*, which allows SFAs to award preference points to local food suppliers offering unprocessed food grown or raised within the local area defined by the school.<sup>22</sup>

While some state laws may have less restrictive purchasing requirements for governmental entities than federal standards, SFAs must follow the most restrictive to ensure compliance with both state and federal laws.<sup>23</sup> State laws can also provide additional tools that SFAs can use to lower costs by purchasing food collectively through *joint powers authorities* and *state purchasing cooperatives*.<sup>24</sup>

## PROCUREMENT STANDARDS

The term *procurement standard* refers specifically to the standards schools are legally required to meet when purchasing food or services for use in school nutrition programs. Schools must follow both federal and state procurement standards.

**Sources:** 7 C.F.R. § 3016.36 (2012); 42 U.S.C. § 1760(n) (2006).

## How Does the USDA Foods Program Support School Nutrition Programs?

The *USDA Foods* program is a food distribution program that distributes domestic agricultural

products to schools for use in school nutrition programs.<sup>25</sup> Schools must pay for any processing and delivery associated with these foods, but not the food received.<sup>26</sup> Participating local school nutrition programs receive a certain amount of food from the USDA Foods Program based on the number of school lunches served (known as an *entitlement*),<sup>27</sup> plus additional *bonus commodities* periodically offered to states on a fair share basis.<sup>28</sup> In 2009–2010, USDA Foods provided 15–20% of the food in each school lunch (including processed foods containing USDA Food ingredients), making the program an important source of food for federal school nutrition programs.<sup>29</sup> A partnership between USDA and the Department of Defense also allows SFAs to use their USDA Foods entitlement to obtain fresh produce through DoD Fresh.

## What Other Legal Requirements Must School Nutrition Programs Meet?

School food authorities must ensure that federal school nutrition programs meet other federal, state, and local laws, including:<sup>30</sup>

- Nutrition Standards;<sup>31</sup>
- Food Safety Standards;<sup>32</sup> and
- Food Licensing Requirements.<sup>33</sup>

## How Can Schools Utilize Purchasing Practices to Improve Nutritional Quality of School Meals?

Schools can, and are, adopting innovative purchasing practices to improve nutrition. Opportunities exist to expand *farm to school programming* through federal<sup>34</sup> and state<sup>35</sup> grant funding. Emerging pilot programs may provide new ways for schools to use USDA Foods to obtain local foods,<sup>36</sup> while USDA, state agencies, and SFAs are continuing to improve the nutritional profile of USDA Foods.<sup>37</sup> *Collective*

*purchasing* can help SFAs maximize buying power and affordably provide a high quality and variety of food to students. *School wellness policies*, required in all local educational agencies, provide an opportunity

for public health and other school stakeholders to provide input on the type of school food environment they would like to see implemented in the district.<sup>38</sup>

While much has been done to support school efforts to improve the nutritional quality of food in federal school nutrition programs, more can still be done to improve access to healthy food in schools. Creating a healthier school food environment requires reexamining how schools get food, investing in new strategies, and developing partnerships that can increase a school's ability to purchase high quality foods at the best price. As the purpose and scope of federal school nutrition programs continues to expand, policy and practice changes will be needed in order to achieve the complementary goals of nourishing healthy children and supporting healthy agriculture.

\* For more detailed discussion of these topics, see Mary Winston Marrow and Jennifer E. Pelletier, *Feeding America's Schoolchildren: Navigating the Complicated Legal Terrain of Federal School Nutrition Programs* (2013) at <http://publichealthlawcenter.org>. This fact sheet and accompanying report focus on food served as part of federal school nutrition programs. Food served outside of these programs, also called "competitive school food" is not specifically discussed as there are different legal and policy issues impacting this type of school food.

*Last updated: January 2013*

This publication was prepared by the Public Health Law Center at William Mitchell College of Law, St. Paul, Minnesota, with financial support provided by the Minnesota Department of Health and the American Heart Association through the Centers for Disease Control's Communities Putting Prevention to Work State and Territory Initiative.



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## Endnotes

- <sup>1</sup> For more information, see *Child Nutrition Programs*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/child-nutrition-programs> (last visited Jan. 29, 2013).
- <sup>2</sup> See 42 U.S.C. §§ 1751–1769 (2012); *Nutrition Assistance Programs*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/fns/> (last updated Oct. 31, 2012).
- <sup>3</sup> *About FNS*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/fns/about.htm> (last updated Oct. 31, 2012).
- <sup>4</sup> *National School Lunch Program*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC. (Aug. 2012), <http://www.fns.usda.gov/cnd/lunch/aboutlunch/NSLPPFactSheet.pdf>. For the current rate of reimbursement for school lunch and breakfasts, see *Reimbursement Rates*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/cnd/governance/notices/naps/naps.htm> (last updated Aug. 2, 2012).
- <sup>5</sup> *Department of Defense Fresh Fruit and Vegetable Program*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC. (2011), [http://www.fns.usda.gov/fdd/programs/dod/DOD\\_FreshFruitandVegetableProgram2011.pdf](http://www.fns.usda.gov/fdd/programs/dod/DOD_FreshFruitandVegetableProgram2011.pdf).
- <sup>6</sup> FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011).
- <sup>7</sup> See *FDA Food Code*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., <http://www.fda.gov/food/foodsafety/retail-foodprotection/foodcode/default.htm> (last updated Feb. 14, 2012).
- <sup>8</sup> See *National School Lunch Program*, *supra* note 4.
- <sup>9</sup> National School Lunch Program, 7 C.F.R. § 210.3 (2012); Special Milk Programs for Children, 7 C.F.R. § 215.3 (2012); School Breakfast Program, 7 C.F.R. § 220.3 (2012); Summer Food Service Program, 7 C.F.R. § 225.3 (2012); Fresh Fruit and Vegetable Program, 77 Fed. Reg. 10992 (Feb. 24, 2012) (to be codified at 7 C.F.R. § 211).
- <sup>10</sup> 7 C.F.R. § 210.18 (2012).
- <sup>11</sup> Michael R. Taylor & Stephanie D. David, *Stronger Partnerships for Safer Food* (2009), [http://www.thefsrc.org/StateLocal/Stronger\\_Partnerships\\_Report.pdf](http://www.thefsrc.org/StateLocal/Stronger_Partnerships_Report.pdf); FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., *Guidance for School Food Authorities: Developing a School Food Safety Program Based on the Process Approach to HACCP Principles* (June 2005), <http://www.fns.usda.gov/fns/safety/pdf/HACCPGuidance.pdf>.
- <sup>12</sup> See Taylor & David *supra*, note 11; FOOD & NUTRITION SERV., *supra* note 11.
- <sup>13</sup> See 7 C.F.R. §§ 210.2, 215.2, 220.2, 225.2 (2012); Fresh Fruit and Vegetable Program, 77 Fed. Reg. 10992 (Feb. 24, 2012) (to be codified at 7 C.F.R. § 211).
- <sup>14</sup> See, e.g., National School Lunch Program, 7 C.F.R. § 210.2 (2012); Special Milk Programs for Children, 7 C.F.R. § 215.2 (2012); School Breakfast Program, 7 C.F.R. § 220.2 (2012); Summer Food Service Program, 7 C.F.R. § 225.2 (2012); Fresh Fruit and Vegetable Program, 77 Fed. Reg. 10992 (2012) (to be codified at 7 C.F.R. § 211).
- <sup>15</sup> See C.F.R., *supra* note 13; Fresh Fruit and Vegetable Program, *supra* note 13. 42 U.S.C. 1761(a)(8) (2006).
- <sup>16</sup> FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., 1 *School Nutrition Dietary Assessment Study IV: School Foodservice Operations, School Environments, and Meals Offered and Served 2–24* (Nov. 2012), [http://www.mathematica-mpr.com/publications/PDFs/nutrition/snda-iv\\_vol1.pdf](http://www.mathematica-mpr.com/publications/PDFs/nutrition/snda-iv_vol1.pdf).
- <sup>17</sup> See *id.*
- <sup>18</sup> 7 C.F.R. § 3016.36 (2012); 42 U.S.C. § 1760(n) (2006).
- <sup>19</sup> *Farm To School FAQs — Procurement*, Question 1, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., [http://www.fns.usda.gov/cnd/f2s/faqs\\_procurement.htm](http://www.fns.usda.gov/cnd/f2s/faqs_procurement.htm) (last updated Jan. 25, 2013).
- <sup>20</sup> Federal Acquisition Regulation; Inflation Adjustment of Acquisition – Related Thresholds, 75 Fed. Reg. 53129–53135 (Aug. 30, 2010). See Memorandum from Cynthia Long, Director, Child Nutrition Division, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., to Regional Directors of Special Nutrition Programs & State Directors of Child Nutrition Programs on Federal Small Purchase Threshold Adjustment (Oct. 2, 2012), [http://www.fns.usda.gov/cnd/care/Regs-Policy/policymemo/2013/SP01\\_CACFP01\\_SFSP01-2013.pdf](http://www.fns.usda.gov/cnd/care/Regs-Policy/policymemo/2013/SP01_CACFP01_SFSP01-2013.pdf).
- <sup>21</sup> 41 U.S.C. § 1901(a)(1) (2006); 7 C.F.R. § 3016.36(d)(1) (2012). See note 19; Federal Acquisition Regulation note 20; Memorandum note 20.

- <sup>22</sup> See 42 U.S.C. § 1758(j)(3) (Supp. 2011); Geographic Preference Option for the Procurement of Unprocessed Agricultural Products in Child Nutrition Programs, 76 Fed. Reg. 22603 (Apr. 22, 2011); National School Lunch Program, 7 C.F.R. § 210.21(g) (2012); Special Milk Programs for Children, 7 C.F.R. § 215.14a(e) (2012); School Breakfast Program, 7 C.F.R. § 220.16(f) (2012); Summer Food Service Program, 7 C.F.R. § 225.17(e) (2012). See also Fresh Fruit and Vegetable Program, 77 Fed. Reg. 10981, 10986 (Feb. 24, 2012) (to be codified at 7 C.F.R. § 211).
- <sup>23</sup> Special Procurement Provision, 7 C.F.R. § 3016.60 (2012); Applicability, 7 C.F.R. § 3016.4(b) (2012).
- <sup>24</sup> See *State Procurement Resources*, NATIONAL JOINT POWERS ALLIANCE, <http://www.njpacoop.org/contract-purchasing-solutions/legal-authority/state-procurement-resources> (last accessed Jan. 21, 2013).
- <sup>25</sup> *USDA Foods: Healthy Choices for Our Schools*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC. (May 2011), [http://www.fns.usda.gov/fdd/foods/healthy/USDAFoods\\_FactSheet\\_FINAL.pdf](http://www.fns.usda.gov/fdd/foods/healthy/USDAFoods_FactSheet_FINAL.pdf).
- <sup>26</sup> *Commodity Processing: Frequently Asked Questions*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., [http://www.fns.usda.gov/fdd/processing/cp\\_faqs.htm](http://www.fns.usda.gov/fdd/processing/cp_faqs.htm) (last updated Jan. 2, 2013); Barry Sackin, *Commodity Exchange*, SCHOOL NUTRITION 70 (2012), [http://www.schoolnutrition.org/uploadedFiles/School\\_Nutrition/104\\_CareerEducation/ProfessionalDevelopment/Certification/ToYourCredit/Nov%2012%20Commodity%20Exchange.pdf?n=4504](http://www.schoolnutrition.org/uploadedFiles/School_Nutrition/104_CareerEducation/ProfessionalDevelopment/Certification/ToYourCredit/Nov%2012%20Commodity%20Exchange.pdf?n=4504).
- <sup>27</sup> Provision of donated foods in NSLP, 7 C.F.R. § 250.56 (2012).
- <sup>28</sup> See Melissa D. Ho & Geoffrey S. Becker, *Farm and Food Support Under USDA's Section 32 Program*, RL 34081, CONG. RESEARCH SERV. (Jan. 2010), <http://www.nationalaglawcenter.org/assets/crs/RL34081.pdf>.
- <sup>29</sup> *USDA Foods: More Choices for You. More Options for Them*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., [http://www.fns.usda.gov/fdd/foods/healthy/CNP\\_PPT\\_LONG-FINAL.pdf](http://www.fns.usda.gov/fdd/foods/healthy/CNP_PPT_LONG-FINAL.pdf) (last visited Nov. 30, 2012).
- <sup>30</sup> See regulations *supra* note 22, at § 210, § 215, § 220, § 225.
- <sup>31</sup> *Final Rule Nutrition Standards in the National School Lunch and School Breakfast Programs*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC. (Jan. 2012), <http://www.fns.usda.gov/cnd/governance/legislation/dietaryspecs.pdf>.
- <sup>32</sup> Food Safety Modernization Act, 21 U.S.C. § 350h (2011); Facilities management, 7 C.F.R. § 210.13(c) (2010) (describing Hazard Analysis and Critical Control Point (HACCP) requirements); Requirements for Participation, 7 C.F.R. § 220.7(a)(3) (2011). See *Introduction to Hazard Analysis and Critical Control Point (HACCP)*, U.S. DEP'T OF AGRIC. (2009), [http://teammnutrition.usda.gov/Resources/servingsafe\\_chapter6.pdf](http://teammnutrition.usda.gov/Resources/servingsafe_chapter6.pdf). See also state specific legal requirements. (For Minnesota requirements see, *Minnesota Food Code*, Minn. R. Ch. 4626, <http://www.health.state.mn.us/divs/eh/food/code/index.html> (listing food safety laws for Minnesota).
- <sup>33</sup> See specific state requirements. (For Minnesota requirements see, MINN. STAT. 28A.15 (2006); MINN. CONST. art. 13, § 7; Minn. Dep't of Agric., Minn. Dep't of Health, Univ. of Minn. Extension. *Serving Locally Grown Produce in Food Facilities* (June 2010), <http://www.extension.umn.edu/farm-to-school/toolkit/sourcing-food/docs/produce-fact-sheet.pdf>. Food licensing requirements may differ between states.
- <sup>34</sup> Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, Sec. 243, 124 Stat. 3187 (2010).
- <sup>35</sup> See, e.g., *Nutrition: Farm to School*, MINN. DEP'T OF HEALTH, <http://www.health.state.mn.us/divs/hpcd/chp/cdrr/nutrition/FTS/> (last visited Jan. 21, 2013).
- <sup>36</sup> *Fresh Produce for Schools*, U.S. DEP'T OF AGRIC., <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=produceforschools.html> (last visited Sept. 28, 2012). See The Network for Public Health Law, Issue Brief, Public Health and the Farm Bill: Provisions Relevant to Public Health in the Agriculture Reform, Food and Jobs Act, [http://www.networkforphl.org/\\_asset/7htrwv/Farm-Bill-Provisions-fact-sheetFINAL.pdf](http://www.networkforphl.org/_asset/7htrwv/Farm-Bill-Provisions-fact-sheetFINAL.pdf).
- <sup>37</sup> See USDA Foods, *supra* note 29.
- <sup>38</sup> Healthy, Hunger-Free Kids Act of 2010 § 9A(3), Pub. L. No. 111-296, 124 Stat. 3183 (2010).