



# LEGAL ISSUES IMPACTING FARM TO SCHOOL AND SCHOOL GARDEN PROGRAMS IN MINNESOTA

June 2011

This legal synopsis provides an overview of the key legal issues involved in farm to school and school garden programs in Minnesota. Some schools consider school gardens, both on and off of school property, as a farm to school program. Legal issues affecting the use of produce from these school gardens may be different from legal issues associated with other farm to school programs between schools and local farmers or distributors. The following discussion will distinguish between issues impacting “school gardens” and issues affecting other “farm to school” programs. This overview is not meant to be an exhaustive analysis of all of the legal or policy issues which may be presented but is intended to highlight the areas of primary concern for schools and farmers.

## WHAT IS FARM TO SCHOOL?

Farm to School is a program that connects schools with local farms. Specific aspects of these programs may be different depending on the individual farm to school program. However, farm to school programs are generally created for three purposes:

1. Help students eat more nutritious foods and promote healthier lifelong eating patterns;
2. Support the local economy and local farmers; and
3. Teach students about the origins of their foods and how their food is grown.

Schools can obtain food for a farm to school program through different sources. The most common sources for a farm to school program are local distributors and local farmers.<sup>1</sup> However, some schools consider school gardens, on or off of school property, to be a farm to school program as well. School gardens usually involve gardens operated by a school or school district, on or off school property, to produce food for use in the school food program and to promote nutrition, physical activity, and/or curricular and co-curricular activities. For purposes of this discussion, “farm to school” will refer to situations wherein a school obtains food from a local distributor or local farmer. “School garden” will refer to gardening programs which are operated by a school or school district.

Many farm to school programs begin by providing locally grown unprocessed fresh fruits and vegetables to schools. At the same time, some farm to school programs may also include locally produced meat, poultry and dairy products, wild rice, cereal and other grain products, and herbs, in addition to fresh vegetables and fruits. Different legal issues may develop as schools expand their farm to school programs beyond providing unprocessed fresh vegetables and fruits.

## KEY LEGAL ISSUES IMPACTING FARM TO SCHOOL AND SCHOOL GARDEN PROGRAMS

- » Food Safety
- » Minnesota Food Licensing Requirements
- » Liability Issues
- » Local Preference for Procurement of Local Foods
- » Healthy, Hunger-Free Kids Act

### 1. FOOD SAFETY

The concerns about food safety with both farm to school and school garden programs usually involve unprocessed fresh produce obtained from small farmers or school gardens. Food safety generally means reducing or removing the potential for foodborne illness caused by microbiological pathogens, chemical additives, and environmental contaminants. Generally, the food safety requirements that apply to both farm to school and school garden programs are the same as the food safety requirements for other school food. There do not appear to be any restrictions on the use of food obtained through either a farm to school or school garden program in either the classroom or cafeteria. Both state and federal legal requirements impact food safety for schools and apply to food obtained through both farm to school and school garden programs. In addition, some voluntary food safety guidelines may be useful as a guide when considering food safety with farm to school and school garden programs.

#### Federal Food Safety Requirements:

Federal law requires that schools serving meals under the National School Lunch Program (“NSLP”) and School Breakfast Program (“SBP”) obtain two food safety inspections per year, keep proper documentation of these inspections, and maintain proper sanitation and health standards that follow all applicable state and local laws and regulations.<sup>2</sup> These same requirements apply to foods obtained through farm to school and school garden programs. Additional information on serving food grown in school gardens in school cafeterias and federal laws and policies regarding the use of food from school gardens is available at: <http://www.phlpnet.org/childhood-obesity/products/school-garden-produce>

The Food Safety Modernization Act may also affect farm to school programs. It does not appear that the Act generally applies to school gardens, either on or off of school property. The Act was passed in early 2011 to improve food safety and management and reduce the risk of foodborne illness. The Act requires the FDA to develop regulations for its implementation, and ensure that any proposed regulations do not place an undue burden on farm to school programs.<sup>3</sup> The Act also exempts some small farms from certain requirements of the Act.

The specific impact of the Act on farm to school and school garden programs and small local farmers will not be known until the FDA passes final regulations implementing the Act. Additional information about the Food Safety Modernization Act can be found through the FDA’s website at: <http://www.fda.gov/Food/FoodSafety/fsma/default.htm>

#### State Food Safety Requirements

On a state level, the food safety requirements that apply to farm to school and school garden programs are the same as the food safety requirements for other school food. Minnesota has no specific state legal requirements addressing food safety requirements for farm to school or school garden programs. However, farmers and schools involved in farm to school or school garden programs should follow accepted food safety practices and have a food safety plan to reduce the risk of foodborne illnesses from these programs.

Additional information regarding food safety issues and best practices has been developed by the University of Minnesota Extension services and the Minnesota Departments of Health and Agriculture. These resources can be obtained at:

<http://www.extension.umn.edu/farm-to-school/sourcing-food/regulations.html>  
<http://www.health.state.mn.us/foodsafety/business/schools.html>

**Voluntary Food Safety Guidelines:**

Schools are sometimes hesitant to have farm to school programs, usually from a lack of familiarity in doing business with small farmers. Likewise, schools may be concerned about using food grown in a school garden in the cafeteria due to concerns about food safety. To provide assurance about the safety of food from farm to school or school garden programs, farmers involved in farm to school programs and schools implementing school garden programs should follow accepted food safety practices and have a food safety plan. While there are currently no legally mandated food safety requirements,<sup>4</sup> many farmers follow voluntary food safety practices to ensure a standard of care for their products and reassure buyers regarding steps taken to reduce risks of food-borne illness. These voluntary food safety practices could also be modified for use with a school garden.

Voluntary food safety guidelines have been developed to ensure food safety from farm to market. These guidelines apply equally to ensure food safety from school garden to cafeteria. These guidelines recommend that farmers develop a food safety plan, train employees in proper food safety management, and document farm practices to reduce the risk of dangerous bacteria or toxins in farm products. While farmers can obtain certification of food safety practices under one voluntary food safety program, the Good Agricultural Practices Program (“GAP”), obtaining official certification may be difficult for small farmers as a result of the cost, time and paperwork involved in certification. However, even if a farmer does not obtain official certification, the farmer can still follow recommended practices for food safety management and document farm practices to reassure schools that food sold as part of a farm to school program is handled properly. For more information on recommended food safety practices and developing a food safety plan, see:

<http://safety.cfans.umn.edu/pdfs/FSP4U.pdf>  
<http://www.health.state.mn.us/divs/eh/food/fs/localgrown.html>

**2. MINNESOTA FOOD LICENSING REQUIREMENTS**

In general, Minnesota law requires that anyone in the business of manufacturing, processing, selling, handling, or storing food obtain a license for these activities.<sup>5</sup> However, Minnesota law allows farmers to sell unprocessed or minimally processed foods without a license if the farmer occupied the farm and grew the products being sold.<sup>6</sup> In general, these food licensing requirements should not apply to school garden programs unless the school garden program is selling processed foods from the garden. Even if a farmer or school is not required to obtain a license to sell unprocessed or minimally processed foods, other laws still apply, including laws about pesticide application and other production practices, and laws about food handling and storage.<sup>7</sup> For example, farmers selling minimally processed meats as part of a farm to school program do not need a license but are still required to have that meat slaughtered and processed under inspection and to have an inspected and approved meat storage facility.<sup>8</sup>

For more information about license requirements in Minnesota, and whether exceptions to the requirements apply to your farm to school or school garden products, contact the Minnesota Department of Agriculture, Dairy and Food Inspection Division at 651-201-6027. Additional information on Minnesota’s food licensing requirements can be obtained at:

[http://www.health.state.mn.us/healthreform/ship/techassistance/locally\\_grownfactsheet.pdf](http://www.health.state.mn.us/healthreform/ship/techassistance/locally_grownfactsheet.pdf)

**3. LIABILITY ISSUES**

Fears about liability risks are often cited as a reason schools do not pursue farm to school programs or integrate school garden products in the school cafeteria menus.<sup>9</sup> Liability concerns with farm to school and school garden programs primarily involve concerns about injury, death or damages caused by eating food obtained through the farm to school or school garden program. Additionally, farmers and schools may be worried about student injuries that occur during a trip to the farm, or schools may be worried about student injuries that occur as part of the school garden program. As discussed below, liability issues associated with farm to school programs may differ from liability issues impacting school gardens. However, both schools and farmers can take actions to minimize liability risks associated with both farm to school and school garden programs.

## **What is Liability?**

Liability is a legal responsibility for injury, death or damages. The standards for holding someone liable differ depending on what and who caused the injury. Typically, for you to be held liable for someone else's injuries, that person must prove that you had a legal responsibility to protect him or her from harm (otherwise known as a "duty of care."). Then, that person has to show that you failed to protect him or her, and that as a result that person was injured in a way that was foreseeable.<sup>10</sup> What obligation you owe to protect a person depends on the situation. The general expectation is that you act reasonably toward others given the circumstances.<sup>11</sup> Failure to act with as much care as an ordinary, reasonable person in a given situation is called negligence.<sup>12</sup> However, there are situations where the law holds a person or entity to a higher or lower legal responsibility to protect another from harm. Some of those situations are outlined below.

## **Liability for Foodborne Illnesses and Injury from the Sale of Food**

Generally, liability risks involved with food sold through a farm to school program are no different from liability risks associated with food sold by any other source of food. Both schools and farmers are liable for injury, death or damages caused by food sold as part of a farm to school program under the legal concept of "strict liability" or liability without fault. In Minnesota, courts apply "strict liability" to the sale of food items. Strict liability makes all parties involved in the production, distribution, and sale of food items liable for injuries caused by the consumption of the food. Under strict liability, all parties are liable even if they were not at fault, were a "passive seller", exercised all possible care in the preparation and sale of the food item, and did not create the unsafe condition causing the injury.<sup>13</sup>

Minnesota law does provide a potential limit on liability for "passive sellers" who did not contribute or cause the injury, death or damage caused by the sale of a food item. This "sellers exception" or "pass through" statute lessens the impact of strict liability on passive sellers who did not contribute to the unsafe condition that caused an injury. Under the "pass through" statute, a passive seller can be released from liability for damages if the correct identity of the party who caused the unsafe condition is identified and the seller did not contribute to the unsafe condition causing the injury. However, a passive seller can still be held liable for injuries and damages caused by another party if the party who created the unsafe condition is unable to pay for the costs of court awarded damages or for some other reason cannot be located or brought before the court.<sup>14</sup>

Both schools and farmers considering farm to school programs need to be aware of the impact strict liability can have on their operations. Under strict liability, both schools and farmers are liable for injuries caused by the sale and consumption of food obtained through a farm to school program unless the "pass through" statute applies. While a school or farmer may be able to argue that they were not responsible for the unsafe condition and that the "pass through" statute should apply, the school or farmer could still be held liable for any injuries, death or damages caused if the party that created the problem goes bankrupt or for some other reason cannot be brought into a legal action.<sup>15</sup>

## **Liability for Injuries and Illnesses Caused by the Ingestion of Donated Food**

Good Samaritan food donation laws provide some protections against liability from injuries or illness caused by the consumption of donated food for those donating and receiving food donations. Minnesota's Good Samaritan food donation law may remove the strict liability standard, discussed above, for food donations made as part of a farm to school or school garden program.

Under Minnesota's Good Samaritan food donation law, a food manufacturer, distributor, processor, or other person who donates or collects "distressed" food to or for a political subdivision for any lawful purpose is not liable for any injury resulting from ingesting the food unless the injury is caused by the gross negligence, recklessness, or intentional misconduct of the food manufacturer, processor, distributor, or other person.<sup>16</sup> Distressed food is defined by statute as perishable food ". . . that may not be readily marketable due to appearance, freshness, grade, surplus, or other considerations and are not suspect of having been rendered unsafe or unsuitable for food use and are adequately labeled".<sup>17</sup> Thus, a farmer or school who donates or collects distressed food to or for a school district for use in an authorized school food program is not liable for any food-borne illness or injury caused by eating the donated food unless the injury or illness was caused by the gross negligence, recklessness or intentional mishandling of the donated food by the farmer or school.

By changing the liability standard to a gross negligence, recklessness or intentional mishandling liability standard, Minnesota's Good Samaritan food donation law provides protections to those donating food or receiving and using donated food in accordance with the law. Those covered by the law will only be liable for food-borne injuries and illnesses if the facts of the situation show that they meet one of the following liability standards:

*Gross Negligence* is negligence that is considered to be excessive or greater than basic negligence and depends on the specific facts of each situation. Negligence is failing to act as an ordinary, reasonable person would in a similar situation.

*Recklessness* involves awareness by a person of how their behavior will negatively affect others and acting in spite of that awareness. It occurs when a person knows, or has a reason to know, that the act they commit, or fail to commit, is prohibited because it will cause harm to others.

*Willful misconduct* is similar to recklessness except that the person performing the act is aware of the risk and acts in a certain way knowing the harm that will happen.

### **Liability Issues Caused by Injury while Participating in Farm to School or School Garden Activities**

Minnesota law and court cases offer some guidance on what legal responsibility the school districts and farmers owe to students who participate in farm to school and school garden activities both on and off of school property, but, it is complicated. The legal responsibility that schools and farmers owe to students may vary depending on the circumstances. For example, the law provides some protection to schools from liability for injuries that occurred when the school property is used for recreational purposes.<sup>18</sup> Likewise, the law provides some protections to landowners who open their property to the public for general recreational use.<sup>19</sup> However, this protection may not apply to farmers and schools if the farmer is specifically inviting students to the farm and the farm is not open to the general public. The applicability of these protections to farm to school or school garden activities depends on the specific circumstances of the farm to school and school garden programs.

It is unclear how these protections apply to farm to school and school garden programs as the current court cases focus on other types of recreational and school activities, not injuries resulting from farm to school or school garden programs. For a more detailed analysis, please refer to individual fact sheets on liability, found at: [www.publichealthlawcenter.org](http://www.publichealthlawcenter.org).

### **Other Liability Considerations Impacting Farm to School and School Garden Programs**

#### *Waivers and Releases*

Schools and farmers can also minimize their risk of liability for injuries caused by participation in farm to school or school garden activities by asking students to sign a waiver before engaging in an activity. A waiver is a written agreement not to sue if something goes wrong. Waivers have to be specifically drafted in order to increase the likelihood of enforcement by the courts. While waivers cannot prevent lawsuits, they can reduce the likelihood that a school will be sued if a student is injured.<sup>20</sup>

#### *Volunteers*

Many schools enlist the help of volunteers to assist with farm to school activities. Under Minnesota law, volunteers will generally not be liable for a child's injuries if the volunteer's actions (1) were in good faith, (2) within the scope of their duties, and (3) not willful or reckless.<sup>21</sup>

#### *Liability Insurance*

Many schools require farmers to carry liability insurance of no less than \$1 million in an effort to minimize liability risks associated with the farm to school program. Liability insurance generally covers the medical and legal expenses of injuries caused if someone gets sick from the farmer's product or injured while on the farm. There are 2 basic types of liability insurance a farmer could carry – product liability insurance and premises liability insurance. Product liability insurance covers risks associated with the food sold by the farmer. Premises liability insurance covers risks associated with any farm to school activity occurring on the farm.



The appropriate type of liability insurance carried by a farmer involved in a farm to school program depends on how the farm to school program is structured. Product liability insurance should be adequate if a farm to school program only involves a farmer providing food as part of the farm to school program. However, both product and premises liability insurance are needed if the farm to school program involves both visits to the farm by children and the provision of food to the school.

The cost of liability insurance could be cost-prohibitive for some small farmers. However, considering the risks involved to both the farmer and the school from strict liability, farmers should have liability insurance with farm to school programs.

#### 4. LOCAL PREFERENCE FOR PROCUREMENT OF LOCAL FOODS

Schools should be aware of potential state and federal legal requirements and any school district policies in procuring foods and contracting for farm to school programs. This issue should not impact school gardens.

**Federal Requirements:** The USDA finalized a federal rule, effective May 23, 2011, allowing School Food Authorities to use a geographic preference in the procurement of unprocessed locally grown or locally raised agricultural products for institutions operating Child Nutrition Programs.<sup>22</sup> The Child Nutrition Programs affected by this rule include:

- » National School Lunch Program,
- » School Breakfast Program,
- » Fresh Fruit and Vegetable Program (Note: Funds from the Fresh Fruit and Vegetable Program may only be used to purchase fresh produce),
- » Special Milk Program for Children,
- » Child and Adult Care Food Program, and
- » Summer Food Service Program.

By allowing a geographic preference option to be used in the procurement of unprocessed locally grown or locally raised agricultural products, the USDA allows schools to give food producers in a specified geographic area an advantage in the procurement process. The new rule does not specify the scope of the geographic area within which the local foods must come. School food authorities purchasing the local foods have discretion to determine the local area to which the geographic preference option will be applied. The geographic preference option applies only to “unprocessed locally grown or locally raised agricultural products”. The rule provides specific information regarding which food handling and preservation techniques are allowed for “unprocessed locally grown or locally raised agricultural products”. More information about the procurement process for local foods is available at: [http://www.fns.usda.gov/cnd/f2s/faqs\\_procurement.htm](http://www.fns.usda.gov/cnd/f2s/faqs_procurement.htm)

All other regulatory requirements of the Child Nutrition Programs must be followed when implementing the geographic preference option. In particular, School Food Authorities using a geographic preference to procure food through a farm to school program must still allow for competition to occur, as with other federal Child Nutrition Programs. Purchases of food made as part of the farm to school program may fall within the federal small purchase threshold of \$100,000 and not have to go through the formal bid process.<sup>23</sup> However, the USDA specifically states that the procurement must be conducted in a manner that maximizes full and open competition, recommending that schools obtain and record three quotes from eligible sources, even for purchases that fall within the small purchase threshold. (As discussed below, state contract requirements also apply.) USDA released a memo in February 2011 which provides answers to common questions, especially in regards to the bidding requirements for food obtained through the geographic preference. This memo is available at:

[http://www.fns.usda.gov/cnd/governance/Policy-Memos/2011/SP18-2011\\_os.pdf](http://www.fns.usda.gov/cnd/governance/Policy-Memos/2011/SP18-2011_os.pdf)

**State Contract Requirements:** Minnesota law includes specific requirements for contracts for the purchase of perishable food items by independent school districts. Specifically, Minnesota law states that: “Contracts for the purchase of perishable food items, except milk for school lunches and vocational training programs, in any amount may be made by direct negotiation by obtaining two or more written quotations for the purchase or sale, when possible, without advertising for bids. . . .”<sup>24</sup>

All written quotations for the purchase of these items must be kept on file for at least one year after the goods are received.

If a school is pursuing a farm to school program, a concern may arise regarding the capacity of an individual farmer to reliably provide the amount of food necessary to meet the demands of the school. Some of these issues can be factored into the contract terms between a school and farmer. For example, farm to school contracts could include specific provisions regarding what and how much food the farmer will be providing to the school and what happens if a farmer is unable to meet the terms of the contract due to no fault of the farmer.

**School District Policies on Contracts:** Schools interested in entering into contracts with farmers to formalize their farm to school programs should also review school district policies regarding contracts to make sure that school district-wide contract requirements are followed.

## 5. HEALTHY, HUNGER-FREE KIDS ACT

President Obama signed into the Healthy, Hunger-Free Kids Act of 2010 into law in December 2010.<sup>25</sup> Some provisions of the Act impact farm to school programs. For example, the Act strengthens school food nutrition standards, provides resources for farm to school programs and increases access to and funding for school meals. A new program established under the Healthy, Hunger Free Kids Act provides technical assistance with practical questions that arise in implementing a farm to school program to qualified schools. The Healthy, Hunger-Free Kids Act also strengthens school wellness policies, expands afterschool meals programs for at-risk children, and establishes certification standards for food service personnel.

*The Public Health Law Center provides information and technical assistance on issues affecting public health. The Public Health Law Center does not provide legal representation or advice. This document should not be considered legal advice. For specific legal questions, consult with an attorney. The Public Health Law Center thanks JoAnne Berkenkamp and Lynn Mader with the Institute for Agriculture and Trade Policy; Jane Grimsbo Jewett with the Minnesota Institute for Sustainable Agriculture; and Stephanie Heim, Farm to School Coordinator with the University of Minnesota Extension for their assistance in reviewing and providing feedback on this document.*



For related publications, visit  
[www.publichealthlawcenter.org](http://www.publichealthlawcenter.org)

1 Information on where to find Minnesota Grown Wholesale Producers can be found at: <http://www3.mda.state.mn.us/whsale/>.

2 7 C.F.R. §§210.13, .15 and 7 C.F.R. §220.7.

3 21 U.S.C. § 2223 (d)(6).

4 As discussed previously, federal food safety requirements under the Food Safety Modernization Act may impact farm to school and school garden programs. However, the specific impacts of the Act on farm to school and school garden programs will not be known until the FDA passes final regulations implementing the Act.

5 MINN. STAT. §28A.04, subd. 1.

6 MINN. CONST. art. XIII, §7; MINN. STAT. §28A.15, subds. 1-2; MINN. R. 4626.0130.

7 *Minnesota v. Hartmann*, 700 N.W.2d 449 (2005).

8 Id.

9 *Farm to School in Minnesota: Third Annual Survey of School Foodservice Leaders*, Institute for Agriculture and Trade Policy and the Minnesota School Nutrition Association 8 (March 2011), available at: <http://www.agobservatory.org/library.cfm?refID=107972>.

10 *Lubbers v. Anderson*, 539 N.W.2d 398 (1995).

11 See *Flom v. Flom*, 291 N.W.2d 914, 916 (Minn. 1980); 4 Minn. Dist. Judges Ass'n Minnesota Practice- Jury Instruction Guides- Civil, CIVJIG 25.10 (5th ed.2010).

12 See *Baker v. Amtrak Nat. R.R. Passenger Corp.*, 588 N.W.2d 749, 753 (Minn. Ct. App. 1999).

13 *In re Shigellosis Litig.*, 647 N.W.2d 1, 6 (Minn. Ct. App. 2002).

14 MINN. STAT. §544.41; *In re Shigellosis Litig.*, 647 N.W.2d 1 (Minn. Ct. App. 2002).

15 Id.

16 See MINN. STAT. §604A.10, Subd. 2.

17 Id.

18 MINN. STAT. §466.03 subd. 6e.

19 For more information, please see our fact sheet on *Liability for Minnesota Landowners Who Open Their Land For Public Use* found at <http://publichealthlawcenter.org/sites/default/files/resources/ship-fs-landownerliability-2010.pdf>.

20 Please refer to our *Waivers & Releases Fact Sheet* found at [www.publichealthlawcenter.org](http://www.publichealthlawcenter.org).

21 MINN. STAT. §317A.257.

22 76 FR 22603 (2011); 42 U.S.C. § 1758(j).

23 Specific states may have lower thresholds than the federal requirement.

24 MINN. STAT. §123B.52, subd. 1.

25 Healthy, Hunger-Free Kids Act of 2010, S. 3307, 111th Cong. (2010).