

Serving School Garden Produce in the Cafeteria

Question Presented:

May a school cafeteria serve food grown in the school's garden to students?

Short Answer:

Federal law does not directly govern serving fruits and vegetables grown in school gardens in school cafeterias. Most school cafeterias, however, are subject to regulations under the National School Lunch Program (“NSLP”), which neither expressly authorize nor prohibit the use of school-grown produce by school cafeterias. The NSLP does, however, support the concept of school garden-to-cafeteria programs by requiring the Secretary of Agriculture to provide competitive grants to schools to implement farm-to-school programs, including school garden programs. Further, the United States Department of Agriculture (“USDA”), which administers the NSLP, has stated that schools can serve school garden produce as part of reimbursable school lunch programs, provided that school cafeterias comply with any state or local health and sanitation requirements. Accordingly, from a legal standpoint, there are no federal impediments to using school garden produce in school lunch meals. On the contrary, current federal policy encourages such programs.

As of May 1, 2013, laws in four states, Alaska, California, Oregon, and Washington, and the District of Columbia expressly allow school cafeterias to serve school garden produce. In addition, state retail food codes impose health and sanitation requirements on food establishments, including school cafeterias. All fifty states have adopted some version of the United States Food and Drug Administration’s Model Food Code (“MFC”), which does not specifically address the use of school garden produce by school cafeterias. The MFC sets standards for the storage, handling, and preparation of food, including produce. Provided that school-grown produce is treated with the same care as produce from other sources, the MFC does not prohibit a school cafeteria from selling school garden produce. Before serving school garden produce to students, however, school districts should review state law to ensure it does not deviate from the MFC in a way that would affect a school garden program.

I. Introduction

As school gardens become increasingly popular, there is growing interest in serving the fresh produce from school gardens in school cafeteria meals.¹ This memo reviews state and federal laws and policies that may potentially impact such programs. It also briefly touches on local policy issues.

II. Federal Laws

A. National School Lunch Act

No federal law directly governs the use of food produced by school gardens. Most school cafeterias, however, are subject to regulations under the NSLP, which was created by the National School Lunch Act.² The NSLP (currently operating in more than 100,000 schools and residential child-care facilities) provides participating public and nonprofit private schools with cash subsidies and food donations to provide lunches to students as long as the schools satisfy certain requirements.³

These requirements, set forth in extensive federal regulations, boil down to the following:

1. Lunches must meet minimum nutritional requirements and be available for free or at a reduced price to eligible students;
2. Schools must accept and use, as much as possible, foods donated by the Department of Agriculture;
3. Food must be stored, prepared, and served in compliance with all state sanitation and health standards; and
4. Schools must comply with various financial guidelines regarding accounting, reimbursement procedures, and revenues derived from its school food service.⁴

None of these requirements is inconsistent with the use of school garden produce by school cafeterias participating in the NSLP.

In 2004, Congress adopted amendments that support the concept of school garden-to-cafeteria programs. Specifically, Congress authorized, effective October 21, 2009, various pilot programs, one of which involves “access to local foods and school gardens.”⁵ Specifically, it permits the Secretary of Agriculture to “provide assistance, through competitive matching grants and technical assistance, to schools and nonprofit entities for projects that – (A) improve access to local foods in schools and institutions participating in programs . . . through farm-to-cafeteria activities, *including school gardens*, that may include the acquisition of food and appropriate equipment and the provision of training and education.”⁶ While this section focuses on farm-to-cafeteria programs, it clearly demonstrates that school gardens could also be a vehicle for increasing school district access to local foods.

Congress enacted additional amendments to the NSLP via passage of the Healthy, Hunger-Free Kids Act of 2010, which further underscore federal support for school garden programs. The 2010 amendments require, rather than simply permit, the Secretary of Agriculture to provide competitive grants and technical assistance to schools to implement farm-to-school programs that improve access to local foods, and expressly state that such grants can be used to develop school gardens.⁷ In 2011, the USDA announced the launch of the People’s Garden School Pilot Program, a nationwide research grant that will bring gardens to 70 high-poverty schools. Under the Pilot Program, the schools’ meal services programs will incorporate fresh school garden produce into their meal and snack programs.⁸

In addition to the above laws and regulations governing the NSLP, Congress has set forth specific procedures schools must follow when purchasing food to be used in the NSLP. These procedures, set forth in the Office of Federal Procurement Policy Act (“FPPA”),⁹ specify a formal procurement procedure for larger purchases and a simplified acquisition procedure for smaller purchases.¹⁰ Nothing in the FPPA precludes schools from purchasing produce from school gardens or accepting a donation. In fact, the NSLP endorses the concept of donations since it requires that school districts accept donations of food from the USDA.

The above conclusions are fully consistent with a July 29, 2009 memo issued by the Food and Nutrition Service of the USDA, which is charged with implementing the NSLP. The memo, entitled “School Garden Q&As,” provides a response to “several questions [received] regarding the operation of a school garden,” including:

Q: Can a school sell food grown in their school garden that was funded using the nonprofit school food service account?

A: Yes, as long as the revenue from the sale of the food accrues back to the nonprofit school food service account. Schools can serve the produce as part of a reimbursable meal or sell it a la carte, to parents, to PTA members, at a roadside stand, etc.

Q: Can the school food service purchase produce from another school organization that is maintaining and managing the garden, such as Future Farmers of America (FFA)?

A: Yes, the school food service may purchase produce from a garden run by a school organization such as FFA, which is an agricultural education program for students.¹¹

Accordingly, the USDA clearly views school garden-to-cafeteria programs as fully compatible with the NSLP.

Given all of the above, neither the National School Lunch Act itself, nor the amendments of 2004 or 2010, pose an obstacle to the use of produce from a school garden in a school cafeteria. On the contrary, the 2004 and 2010 amendments embrace the school garden-to-cafeteria concept, which on its face is clearly consistent with congressional policies to improve child nutrition and wellness through the NSLP.

B. Federal Policies Regarding Safe Agricultural Practices for School Gardens

Federal health and sanitation laws do not specifically address school gardens. However, the USDA has indicated that school gardens must comply with health and sanitation requirements and food safety must be a primary concern when serving school garden produce in the cafeteria.¹² The USDA website section on School Meals offers the following advice:

Q: Is there a resource that explains how to incorporate school garden produce into the school meal program?

A: We are especially concerned about food safety and sanitation issues. It is important to ensure that safe growing principles are used to grow produce from any source, including gardens. Before using any produce from a school garden, visit the garden and ask the master gardener about growing practices, including the history of the land use, water sources, soil sampling and results, use of fertilizers and pesticides, and animal control measures

Q: Can local or State agencies have stricter policies when it comes to allowing produce from the school garden to be used in the Child Nutrition Programs?

A: Local and State agencies may have stricter food safety policies related to allowing produce from school gardens to be used in Child Nutrition Programs. It is best to contact your local school district or the State agency that administers the Child Nutrition Programs for more information.¹³

The USDA has produced a number of resources to help school gardens and meal service programs follow sound health and safety practices, including “Safety Tips for Growing School Garden Produce”¹⁴ and “Best Practices: Handling Fresh Produce in Schools”.¹⁵ The USDA highlights additional resources on its Farm to School webpage.¹⁶

III. State Law

A. State Education Codes

As of May 1, 2013, four states and the District of Columbia have enacted laws that specifically address serving school garden produce in school cafeterias:

Alaska: A school district may authorize or operate a school garden, greenhouse, or farm ... [that] must be used for educational purposes and for growing fruits and vegetables for consumption by the students through the school district's meal and snack program.¹⁷

California: A school district, charter school, or county office of education that is operating a school garden may sell produce grown in the school garden ... if [it] complies with applicable federal, state, and local health and safety requirements for the production, processing, and distribution of the produce.¹⁸

District of Columbia: As permitted by federal law, when tests show the soil is safe and when produce is handled safely, produce grown in school gardens may be identified and served to students at the school, including in the cafeteria....¹⁹

Oregon: [The Department of Education's Oregon Farm-to-School and School Garden Program] shall ... (a) Assist school districts that participate in the United States Department of Agriculture's National School Lunch Program and School Breakfast Program in using Oregon food products and produce from school gardens....²⁰

Washington: School districts may operate school gardens or farms, as appropriate, for the purpose of growing fruits and vegetables to be used for educational purposes, and, where appropriate, to be offered to students through the district nutrition services meal and snack programs. All such foods used in the district's meal and snack programs shall meet appropriate safety standards.²¹

A similar bill was introduced in the Hawaii state legislature in 2013. The proposed Hawaii legislation would allow school meal programs to use school garden foods so long as the garden has been "certified as safe" by the state department of education.²² The inclusion of references to health and safety requirements in many of these state laws likely reflects the USDA's emphasis on this issue.

B. State Food Codes

Each state also adopts its own law regulating food safety for food retail and food service, including school cafeterias. All states have patterned their laws on the Model Food Code (MFC), which is published and periodically updated by the United States Food and Drug Administration (FDA). All 50 states and three of the six United States territories have adopted retail food laws patterned after a version of the MFC dated 1993 or later.²³ The MFC (most recently updated in 2009) does not specifically address the use of school garden produce by school cafeterias. Thus, there is nothing in the MFC that expressly precludes a school garden-to-cafeteria program. Nor are there any other provisions that prevent school cafeterias from using produce from a school garden.

Chapter 3-2 of the MFC addresses food sources. This section (1) prohibits food retail establishments from offering food prepared in a private home and (2) imposes specific restrictions on sources for certain foods that carry particular risks such as fish, shellfish, meat, poultry, dairy, and wild mushrooms (these foods must come from an "approved source").²⁴ For all other foods, which would include produce, the MFC simply requires that food "be obtained from sources that comply with [applicable local, state, and federal] law."²⁵ As the code does not place any particular restriction on produce grown on a farm or garden, produce grown in a school garden constitutes a source that complies with the MFC.²⁶ However, as each

state food code may vary, each state's laws should be individually analyzed to determine their impact, if any, on a school garden-to-cafeteria program.²⁷

Even though, on its face, the MFC does not preclude school garden-to-cafeteria programs, its lack of clear, explicit language has led some school districts to refuse to allow cafeterias to serve school garden produce. For example, in 2007 the Los Angeles Unified School District's ("LAUSD") Food Services Branch issued a memo that concluded California's retail food code "prevents the usage of produce grown in [a] school garden in school cafeterias" because school gardens are not an "approved source."²⁸ The California Education Code section quoted above, which was adopted in 2012, should help to assure school districts that garden-to-cafeteria programs are allowable under state law. And, in fact, in 2012, the LAUSD School Board adopted an "Improving Food and Nutrition Policy" that explicitly calls for the District to "create comprehensive requirements for the use of salad bars and school garden produce in order to facilitate those programs and maximize student consumption of fresh fruits and vegetables."²⁹

IV. Policies at the Local Level

Individual school districts or private schools may also have policies that impact school garden-to-cafeteria programs.³⁰ While a number of school garden-to-cafeteria programs are thriving throughout the country, local policies can impose restrictions. For example, in 2010 Chicago Public Schools and its meal supplier Chartwells received considerable attention for rules that prohibited schools from using garden produce in the cafeteria.³¹ Since then, Chartwells has published a School Garden Guide that includes information on "Safety and Sanitation in Gardens," "Harvesting and Serving Garden Produce in Schools," and a "Protocol for Garden Produce in School Meals."³²

The organization Farm to School advises, "Be sure your school garden program is aligned with any relevant school district policies including, but not limited to, wellness policies, school procedures for receiving gifts and donations, working with parent and community volunteers, and liability policies."³³ School districts with the most developed school garden-to-cafeteria programs have specific school garden-to-cafeteria protocols that address health and safety concerns, as well as the logistics of incorporating school garden produce into school meal programs. For example, the Denver Public Schools' Garden to Cafeteria Program has developed food safety protocols for harvesting, cleaning, and storing school garden produce.³⁴

V. Conclusion

Starting a school garden-to-cafeteria program involves additional coordination, effort, and logistics. Implementation can be simple or complex depending on the size and scope of the school garden-to-cafeteria program (which could range from including greens or tomatoes in a salad bar in a single school to integrating produce into a district-wide lunch menu). If the school district contracts with a management company or other vendor to supply school lunches, an adjustment to the contract may be necessary.

From a legal standpoint, however, school garden-to-cafeteria programs face few impediments. Neither the NSLP nor other federal law prevents school cafeterias from using school garden produce. On the contrary, current federal policy encourages such programs. A small but growing number of states have enacted laws encouraging school meal programs to incorporate fresh produce grown in school gardens so long as food safety requirements are met. The MFC, upon which most state retail food codes are patterned, does not prohibit school cafeterias from utilizing produce grown in a school garden. Each state's law, however, may differ and should be individually reviewed. State regulations implementing a state retail food code may also impose additional requirements (e.g. regarding soil safety, record keeping, and obtaining a permit or license). Finally, local public school district (or private school) policies can vary widely and should be consulted on an individual basis.



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¹ School garden-to-cafeteria programs are successfully operating in various schools in several states, including Oregon, California, Kansas, Colorado, Massachusetts, Washington, and New York.

² Richard B. Russell National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 239 (1946) (codified at 42 U.S.C. § 1751 et seq.).

³ “National School Lunch Program Fact Sheet.” United States Department of Agriculture, Food and Nutrition Services, 2012. www.fns.usda.gov/cnd/lunch/AboutLunch/NSLPFactSheet.pdf

⁴ See 7 C.F.R. §§ 210.1 et seq.

⁵ 42 U.S.C. § 1769(g).

⁶ *Id.* (emphasis added).

⁷ Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 243, 124 Stat. 3183, 3236-3238 (2010) (“Access to Local Foods: Farm to School Program”) (codified at 42 U.S.C. § 1769(g)).

⁸ “Peoples Garden School Pilot Program Award Announced.” United States Department of Agriculture, Food and Nutrition Services. Last modified March 20, 2012. www.fns.usda.gov/outreach/grants/garden.htm More information about the People’s Garden School Pilot Program is available at <http://extension.wsu.edu/peoplesgarden/Pages/default.aspx>

⁹ 41 U.S.C. § 404 et seq. See also Braaten D and Coit M. “Legal Issues in Local Food Systems.” *Drake Journal of Agricultural Law*, 15: 9-32, 24-26, 2010.

¹⁰ 41 U.S.C. §§ 403(11), 427 (authorizing simplified acquisition procedure for purchases under \$100,000).

¹¹ Long C. *School Garden Q&As*. FNS Memorandum 32-2009, United States Department of Agriculture, 2009. www.fns.usda.gov/cnd/governance/Policy-Memos/2009/SP_32-2009_os.pdf. Unlike the FDA, the USDA is not authorized to issue formal Advisory Opinions; however, divisions within the USDA can provide informal opinions at their discretion in response to queries.

¹² *Id.* In response to the question “Are there health/safety issues involved with school gardens?” the memo states that “[School Food Authorities] need to familiarize themselves with the Federal, State, and local requirements regarding health and sanitation issues.”

¹³ See “Farm to School FAQs – Food Safety.” United States Department of Agriculture, Food and Nutrition Services. Last modified January 25, 2013. www.fns.usda.gov/cnd/F2S/faqs_safety.htm

¹⁴ “Food Safety Tips for School Gardens.” United States Department of Agriculture. Last visited April 2, 2013. www.fns.usda.gov/cnd/Guidance/foodsafety_schoolgardens.pdf

¹⁵ “Best Practices: Handling Fresh Produce in Schools.” United States Department of Agriculture. Last visited April 2, 2013. www.fns.usda.gov/fns/safety/pdf/best_practices.pdf

¹⁶ See “Implementing Farm to School Activities: Food Safety.” United States Department of Agriculture. Last modified January 25, 2013. www.fns.usda.gov/cnd/f2s/implementing/safety.htm#Gardens

¹⁷ Alaska Stat. § 14.30.375(a) (2013).

¹⁸ Cal. Educ. Code §51798 (2012). The “Bill Analysis” prepared by the California Senate Committee on Education references the USDA’s 2009 memo (*supra* note 11) and suggests that this code section is meant to provide clear guidance in the California Education Code for schools that wish to sell garden produce in their cafeterias. See Sen. Com. On Education, Analysis of Assem. Bill No. 2367 (2011-2012 Regular Session) as amended April 26, 2012.

¹⁹ D.C. Code § 38-825.03(d) (2012).

- ²⁰ Or. Rev. Stat. §336.426(1) (2012).
- ²¹ Wash. Rev. Code §28A.320.185(a) (2012).
- ²² H.B. 478, 27th Leg. (Haw. 2013).
- ²³ See “Real Progress in Food Code Adoptions.” United States Food and Drug Administration, Last updated March 12, 2012. www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm. North Carolina adopted the FDA’s 2009 Model Food Code in September 2012. See *North Carolina Food Code Manual*. North Carolina Department of Health and Human Services, 2012. www.ncdhhs.gov/aging/food/NC_Food_Code_Manual_2009.pdf
- ²⁴ FDA Food Code 2009, § 3-201.11-3-201.16.
- ²⁵ FDA Food Code 2009 § 2-201.11(a).
- ²⁶ While some states adopt the Model Food Code as is, others may modify it; thus, the retail food code for each state should be reviewed to make sure that it does not deviate from the model code in some way that would limit use of school garden produce in school cafeterias.
- ²⁷ The National Association of State Boards of Education also maintains a state-by-state “school healthy policy database” which identifies any state policies governing school gardens. See www.nasbe.org/healthy_schools/bs/bytopics.php?topicid=3115&cat:expand%20=acdnbtm_cat
- ²⁸ Inter-Office Correspondence from Dennis Barrett, Director, Food Services Branch, LAUSD to the Board of Education Re “Addressing School Garden Grants.”
- ²⁹ Los Angeles Unified School District, Board of Education. “Improving Food and Nutrition Policy.” Adopted December 11, 2012.
- ³⁰ Such board policies could be in addition to or instead of a district’s interpretation of whether state and federal law allow garden-to-cafeteria programs.
- ³¹ See, e.g., Eng M. “Most Garden Produce is Forbidden Fruit in CPS Lunchrooms.” *Chicago Tribune*, October 19, 2010. www.chicagotribune.com/health/ct-met-school-gardens-20101019,0,4964631.story?page=1&track=rss; see also Loomis I. “Cafeteria Conflicts for School Garden: Strict Regulations Over Food Service Leave Advocates Seeking Resolutions.” *Maui News*, February 5, 2012. www.mauinews.com/page/content.detail/id/557828.html
- ³² See “Chartwells School Dining Services Introduces a School Garden Guide.” Chartwells School Dining Services Press Release, November 8, 2012. www.eatlearnlive.com/News/Press%20Release%2011.12.12%20School%20Gardens.pdf
- ³³ See *Fresh, Healthy, and Safe Food: Best Practices for Using Produce from School Gardens*. National Farm to School Network, n.d. www.farmtoschool.org/files/publications_188.pdf
- ³⁴ See *Slow Food Denver. Denver Public School’s Garden to Cafeteria Program: School Gardens*. Accessed May 1, 2013. www.sfseedtable.org/wp-content/uploads/2011/04/DPS-GTC-protocol-2011.pdf; School districts in Ventura and Santa Barbara, California, Greeley, Colorado, and Corvallis and Portland, Oregon, have also developed protocols for using school garden produce in school cafeterias. These protocols include guidelines for the safe harvesting, cleaning, and handling of fruits and vegetables.