

# USDA Authority to Set Nutrition Standards for All Competitive Foods

## Question Presented:

**Does the Healthy, Hunger-Free Kids Act (“Act”) require nutrition standards for all foods sold on school campuses?**

## Short Answer:

Yes, the Act expressly requires the United States Department of Agriculture (USDA) to set nutrition standards for all foods sold on school campuses at any time during the day. The Act requires the USDA to set nutrition standards for reimbursable meals sold as part of the National School Lunch Program (NSLP) and School Breakfast Program (SBP), and also to set nutrition standards for all foods sold on campus at any time of day. Accordingly, the USDA must set nutrition standards not only for full meals sold under the NSLP and SBP, but also for individual components of the meal (i.e., entrée, beverage, side dishes) if they are sold individually to students.

## Analysis:

In 2010, Congress passed the Act, which reauthorized funding for, facilitates access to, and sets policy for the USDA’s core child nutrition programs: the NSLP, the SBP, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the Summer Food Service Program, and the Child and Adult Care Food Program. In addition, the Act improves the entire nutrition environment in schools, including food sold outside of the nutrition programs.<sup>1</sup>

**The Act requires the USDA to set nutrition standards for reimbursable meals provided under the NSLP.** The Act amended the NSLP, the federally assisted meal program operating in over 101,000 public and nonprofit private schools and residential child care institutions.<sup>2</sup> School districts and independent schools that choose to take part in the lunch program get cash subsidies and USDA foods for each meal they serve (“reimbursable meals”). In return, they must serve lunches that meet federal requirements, and must offer free or reduced-price lunches to eligible children.<sup>3</sup>

The Act expressly requires the USDA to issue regulations to update the meal patterns and nutrition standards for the NSLP.<sup>4</sup> On January 26, 2012, the USDA issued its final rule doing so, Nutrition Standards in the National School Lunch and School Breakfast Programs.<sup>5</sup>

**The Act also requires the USDA to set nutrition standards for all competitive foods.** Schools, including those participating in the NSLP, also sell to students food and beverages that are not part of the reimbursable meals programs. Foods and beverages are sold in vending machines and school stores, through fundraising sales, and in cafeterias before, during, and after meal times are collectively referred to as competitive foods. During meal times, many school cafeterias sell reimbursable meals, but also sell individually to students the beverages, snacks, side dishes, and entrées that compose the reimbursable

meal, as well as other foods and beverages. The foods sold outside of the reimbursable meals program – including entrees, side dishes, and beverages that are sold individually in the cafeteria to students – are known as *a la carte foods*.

The Act authorizes the USDA, generally, to “prescribe such regulations as the Secretary may deem necessary” to carry out the NSLP, “including regulations relating to the service of food in participating schools and service institutions *in competition with*” the NSLP.<sup>6</sup> In addition, the Act expressly authorizes the USDA to set nutrition standards for all competitive foods, which includes a la carte foods sold to students. The Act states:

The Secretary shall –

- (i) establish science-based nutrition standards for foods sold in schools other than foods provided under this chapter and the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) . . .

(B) Application

The nutrition standards shall apply to all foods sold –

- (i) outside the school meal programs;
- (ii) on the school campus; and
- (iii) at any time during the school day.<sup>7</sup>

Congress’ language is explicit and clear: The USDA must establish nutrition standards to apply to all foods sold outside the reimbursable meal programs on campus at any time during the school day. “[I]n the absence of a ‘clearly expressed legislative intention to the contrary,’ the language of the statute itself ‘must ordinarily be regarded as conclusive.’”<sup>8</sup> Here, Congress has made its intentions clear through the language of the Act. Section 1753, discussed directly above, requires the USDA to set nutrition standards for reimbursable meals. And section 1779 requires the USDA to set nutrition standards for all other foods sold on school campuses, including individual components of the meal (i.e., entrée, beverage, side dishes) if they are sold as individual items to students.

<sup>1</sup> Public Law 111–296, Dec. 13, 2010, 124 Stat. 3183.

<sup>2</sup> National School Lunch Program Fact Sheet, USDA Food Nutrition Service (October 2011). Available on the USDA website at: [www.fns.usda.gov/cnd/Lunch/](http://www.fns.usda.gov/cnd/Lunch/).

<sup>3</sup> *Id.*

<sup>4</sup> 42 U.S.C. 1753(b)(3)(A).

<sup>5</sup> 7 CFR Parts 210 and 220; 77 Fed. Reg. 17 (Jan. 26, 2012).

<sup>6</sup> 42 U.S.C. 1779(a), emphasis added.

<sup>7</sup> 42 U.S.C. 1779(b).

<sup>8</sup> *Burlington Northern Rail. Co. v. Oklahoma Tax Comm.*, 481 U.S. 454 at 461, 1987, (1987) citations omitted.