

Date: January 7, 2011

QUESTION PRESENTED:

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

SHORT ANSWER:

Federal law does not directly govern the use of food produced in school gardens. Most school cafeterias, however, are subject to regulations under the National School Lunch Program ("NSLP"), which was created by the National School Lunch Act. Nothing in the NSLP or its regulations either expressly authorize or 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.

Nor is it likely that state law would pose an obstacle. Health and sanitation requirements imposed on food establishments, including school cafeterias, are established by state law. An analysis of each state's food code is beyond the scope of this memorandum. 49 of 50 states, however, have adopted a version of the United States Food and Drug Administration's "Model Food Code." The Model Food Code (most recently updated in 2009) does not specifically address the use of school garden produce by school cafeterias. Thus, there is nothing in the Model Food Code that would expressly preclude a school garden to cafeteria program. The Food Code 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 Food Code does not prohibit a school cafeteria from selling school garden produce. Before serving school garden produce to students, however, the school should review the law of its state to ensure it does not deviate from the Model Food Code in some way that would impact a school garden program.

I. INTRODUCTION

As school gardens become increasingly popular, there is mounting interest in using the fresh produce students grow in the lunches prepared by school cafeterias.ⁱ We have not, however, located a legal analysis of “school garden to cafeteria” programs available to the public. Accordingly, this memo looks at federal laws and policies that may bear on such programs. It also analyzes the model version of the Food Code utilized by most states, and provides a more detailed look at one state, California. Finally, the memo briefly touches on the issue of policies at the local level.

II. FEDERAL LAWS

A. National School Lunch Act

There is no federal law that directly governs the use of food produced by school gardens. Most school cafeterias, however, are subject to regulations under the National School Lunch Program (“NSLP”), which was created by the National School Lunch Act.ⁱⁱ The NSLP (currently operating in over 101,000 schools and residential child care facilities) provides participating public and non-profit private schools with cash subsidies and food donations to provide lunches to students provided the schools satisfy certain requirements.ⁱⁱⁱ

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 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.^{iv}

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

In 2004, Congress adopted amendments which 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.”^v 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.”^{vi} While this section

focuses on “farm-to-cafeteria” programs, it clearly contemplates that school gardens could also be a vehicle for increasing school district access to local foods.

The 2004 amendments also require that every school district participating in the NSLP establish local school “wellness policies” that, at a minimum, include nutrition guidelines and are designed to promote student health and reduce childhood obesity.^{vii} While this section does not refer to school gardens specifically, use of healthy, fresh school garden produce in school lunches is consistent with both Congress’ “wellness policy” and the overall stated purpose of the National School Lunch Act, which is to serve “nutritious lunches to children each school day” and safeguard “the “health . . . of the Nation’s children.”^{viii}

On December 2, 2010, Congress enacted additional amendments to the NSLP in the Healthy, Hunger-Free Kids Act (S.3307) which further underscore federal support for school garden programs. This time, the 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.^{ix}

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”),^x specify a formal procurement procedure for larger purchases and a simplified acquisition procedure for smaller purchases.^{xi} There does not, however, appear to be anything in the FPPA that would preclude schools from purchasing produce from school gardens. Nor does it in any way prohibit donations of produce from school gardens. 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 USDA (Food and Nutrition Service) which is charged with implementing the NSLP. The memo, titled “School Garden Q & As” provides a response to “several questions [received] regarding the operation of a school garden.”^{xii} In response to the question “Can a school sell food grown in their school garden that was funded using the nonprofit school food service account?” the answer is “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. . .*”^{xiii} The memo also states that the “*school food service may purchase produce from a garden run by a school organization* such as FFA [Future Farmers of America], which is an agricultural education program for students.”^{xiv} Accordingly, the USDA clearly views school garden to cafeteria programs as fully compatible with the NSLP.

Given all of the above, there is nothing in the National School Lunch Act itself or the amendments of 2004 or 2010 that 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 national school lunch program.

As the Food and Nutrition Service 2009 memo also points out, however, school gardens must comply with whatever “health and sanitation” requirements may be imposed by either their local or state jurisdictions or federal law.^{xv} These health and sanitation issues are addressed by both federal agencies and state laws, as discussed below.

B. Federal Policies Regarding Safe Agricultural Practices for School Gardens

There do not appear to be any federal health or sanitation laws that are specifically addressed to school gardens. Nor has the USDA issued its own protocols. Notably, the USDA states on its web site that “[c]urrently, USDA has not published a specific resource on food safety related to school gardens.”^{xvi} Rather, the USDA’s website section on “School Garden Food Safety” refers viewers to safe gardening protocols developed by state agencies or universities. Specifically, it identifies the following three protocols as resources: (1) “Food Safety in the School Garden,” prepared by the University of Maryland Extension Food Gardening Network, (2) “Fresh, Healthy, and Safe Food: Best Practices for using Produce from School Gardens,” prepared by the Virginia Department of Agriculture and Consumer Services, and (3) “Five Steps to Food Safe School Gardening,” prepared by the University of Connecticut College of Agriculture and Natural Resources Cooperative Extension System.”^{xvii}

The USDA website section on “School Meals” also offers the following advice to school cafeterias seeking to use school garden produce in a “Food Safety Q & A”:

Q: Is there a resource that explains how to follow good food safety practices when incorporating school garden produce into the school meal program?

A: 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 . . . [M]any resources are available on growing produce safely in gardens. Contact your local extension office for specific resources. One such resource is from the [University of Maryland’s Extension on food safety and school gardens](#). [cited above, note 18].^{xviii}

In short, from the perspective of the NSLP/USDA, safety and sanitation issues will be satisfactorily addressed so long as safe growing practices are followed consistent with the resources identified above.

III. STATE LAW

A. Analysis of the “Model Food Code” for States

While each state adopts its own law governing the retail of food, most states have patterned their laws on a “Model Food Code,” which is published and periodically updated by the United States Food and Drug Administration (“FDA”). As of September 2010, 49 of the 50 states and 3 of the 6 United States territories had adopted retail food laws based on the Model Food Code, representing 97% of the United States population.^{xix}

The Model Food Code (most recently updated in 2009) does not specifically address the use of school garden produce by school cafeterias. Thus, there is nothing in the Model Food Code that would expressly preclude 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 FDA Food Code 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.^{xx} For all other foods, which would include produce, the Food Code simply requires that food “be obtained from sources that comply with law.”^{xxi} 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 Model Food Code.^{xxii}

B. Case Study: California

In California, the sale of food by school cafeterias is governed by the California Retail Food Code (“Calif. Food Code”), set forth in the California Health and Safety Code.^{xxiii} Patterned after the Model Food Code, its purpose is to ensure that the food provided to consumers is “safe, unadulterated, and honestly presented.”^{xxiv}

While the Calif. Food Code does not specifically address school gardens, there is nothing in the provisions generally applicable to school cafeterias and other retail food facilities that would prohibit the use of produce from a school garden.

Chapter 4 of the Calif. Food Code sets forth the “General Food Safety Requirements.” Article 3 of this Chapter addresses “Food from Approved Sources.” Consistent with the FDA Model Food Code, this section prohibits the sale of food prepared in a private home and imposes various strict requirements regarding sources of particularly risky foods such as fish, shellfish, and egg products.^{xxv} It also requires that “game animals” come from an “approved source.”^{xxvi} Produce, however, falls within the general provision that “Food shall be obtained

from sources that comply with all applicable laws.”^{xxvii} “Applicable laws” is defined as “all applicable local, state and federal statutes, regulations and ordinances.”^{xxviii}

As discussed above, there are no federal laws that would prohibit a school garden as a source of produce. Nor as noted above, does the Calif. Food Code prohibit a school garden as a source of produce. The Code does, of course, require that all produce -- from any source -- be handled properly. Specifically, it requires that produce be thoroughly washed in potable water to remove soil and other contaminants, and that any chemicals used to wash or peel produce meet certain requirements.^{xxix} So long as these proper handling practices are followed, there is no impediment in the Calif. Food Code to using produce from a school garden in a school cafeteria.^{xxx}

In 2007, a memo prepared by the Food Services Branch of the Los Angeles Unified School District (“LAUSD”) concluded that the “California Health and Safety Code prevents the usage of produce grown in [a] school garden in school cafeterias.”^{xxxi} Specifically, the memo states that school cafeterias cannot use school garden produce because (1) such produce must come from an “approved source,” and (2) an “approved source,” as defined by the Calif. Food Law, requires that “a producer, manufacturer, distributor and transporter meet all of the requirements in Section 113982, which “enumerates an extensive list of regulations, requirements, and conditions which must be met.” Neither assertion is correct.

First, the Calif. Food Code does not require that produce come from an “approved source.” Rather, as discussed above, it only requires that the source “comply with all applicable laws.” Second, even if the definition of an “approved source” was somehow relevant, the Legislature amended the definition in 2009 and deleted the reference to section 113982.^{xxxii} Moreover, produce from a school garden would qualify as an “approved source” under either the prior or most recent definition. Contrary to the memo, even under the old version, an “approved source” did not require compliance with section 113982; rather, an approved source was defined to mean food allowed under any of three different circumstances, only one of which involved compliance with section 113982. Under both the older and current versions food can qualify as coming from an “approved source” so long as it is a source allowed under Article 3 of Chapter 4. As discussed above, produce from a school garden is consistent with Article 3 of Chapter 4.

Finally, nothing in section 113982 precludes a school garden to cafeteria program. Section 113982 governs the safe transportation of food products, requiring that transported food be contained in a “food holding area” that (1) is washable and capable of withstanding frequent cleaning, (2) allows no leaks of liquid wastes on to streets or property and (3) maintains potentially hazardous food at the required temperatures.^{xxxiii} School gardens programs are capable of transporting produce in strong washable containers. To the extent that produce is carried over public roads and streets, the containers can be leak proof. Third, school gardens are not engaged in producing potentially hazardous food that must be maintained at specific temperatures. Given all of the above, the memo’s conclusion that the

California Food Retail Code prohibits school garden to cafeteria programs is flawed on multiple grounds.

C. Summary

The Model Food Code, after which most state retail food codes are patterned, does not prohibit school cafeterias from serving produce from a school garden. California provides an example of a state food retail code that is patterned after the Model Food Code and does not preclude use of school garden produce by a cafeteria. As each state food code may vary, however, each state's law must be individually analyzed to determine its impact, if any, on a school garden to cafeteria program.^{xxxiv}

IV. POLICIES AT THE LOCAL LEVEL

Individual school districts or private schools may have policies that impact a school garden to cafeteria program. The organization Farm to School advises, "[b]e 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."^{xxxv} While a number of school garden to cafeteria programs are thriving around the country, local policies can impose restrictions. For example, in the recently well-publicized case of Chicago, the school district and its meal provider have established rules that prevent school cafeterias from using school garden produce; instead, the fresh fruits and vegetables must be sold or given away.^{xxxvi}

V. CONCLUSION

Starting a school garden to cafeteria program does involve additional coordination, effort, and logistics. These implementation issues 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 lunch menu used district wide).

From a legal standpoint, however, there are no federal impediments. There is no provision in the National School Lunch Program or other federal law that prevents school cafeterias from using school garden produce. On the contrary, current federal policy encourages such programs. Similarly, the model Food Law, upon which most state retail food laws are patterned, does not prohibit school cafeterias from utilizing produce grown in a school garden. Consistent with this, school garden to cafeteria programs in California do not conflict with the California Retail Food Code. Each state's law, however, may differ and would need to be individually reviewed. Finally, local public school district (or private school) policies can vary widely and should be consulted on an individual basis.

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ⁱ So far, “school garden to cafeteria” programs are successfully operating in various schools around the country in at least 7 states (including Oregon, California, Kansas, Colorado, Massachusetts, Washington, and New York).

ⁱⁱ See National School Lunch Act, 42 U.S.C. § 1751 *et seq.*

ⁱⁱⁱ See <http://www.fns.usda.gov/cnd/lunch/AboutLunch/NSLPFactSheet.pdf> (2010)

^{iv} 7 C.F.R. § 210.9 (2010) (“Agreement with State Agency”); § 210.13 (“Facilities Management”)

^v 42 U.S.C. § 1769(g).

^{vi} *Id.* (emphasis added).

^{vii} 42 U.S.C. § 1751(a); see also E. D’Addabbo, *Regulating Childhood Obesity: A Comparison of Federal School Meal Programs in England and the United States*, 12 *Quinnipiac Health Law Journal* 171, 182-184 (2008). Specifically, the statute provides that the “Secretary of Agriculture . . . shall make available to[schools], on request, information and technical assistance for use in-- “(A) establishing healthy school nutrition environments; “(B) reducing childhood obesity; and “(C) preventing diet-related chronic diseases.” 42 U.S.C. § 1751(b).

^{viii} 7 C.F.R. § 210.1 (citing 42 U.S.C. § 1751).

^{ix} Healthy, Hunger Free Kids Act of 2010 (S.3307), § 243 “Access to Local Foods: Farm to School Program” (amending 42 U.S.C. § 1769(g)).

^x 41 U.S.C. § 404 *et seq.* See generally D. Braaten, “Legal Issues in Local Food Systems,” 15 *Drake Journal of Agricultural Law* (Spring 2010) 9, 24-26.

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

^{xii} July 21, 2009 FNS Memorandum 32-2009 titled “School Garden Q&As” (Prepared by Cynthia Long, Director, Child Nutrition Programs) (available online at http://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.

^{xiii} *Id.* at 2 (emphasis added).

^{xiv} *Id.* (emphasis added).

^{xv} *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.”

^{xvi} http://www.fns.usda.gov/cnd/f2s/Food_Safety_QA.htm.

^{xvii} See http://healthymeals.nal.usda.gov/nal_display/index.php?info_center=14&tax_level=2&tax_subject=231&topic_id=1195. Indeed, there is no shortage of resources to help school gardens follow sound health and safety practices. For example, the Farm to School website also offers a summary of best practices entitled “Fresh, Health, and Safe Food: Best Practices for Using Produce from School Gardens,”

http://www.farmtoschool.org/files/publications_188.pdf. Oklahoma State University has also published a comprehensive guide entitled “Developing a Food Safety Plan for your Fresh Produce Operation,” which is geared in part to school gardens. See <http://www.okfarmtoschool.com/resources/fts-distro-foodsafetymanual/section2-food-safety.pdf>. The FDA also offers a “Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables.” <http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf>. The Agricultural Marketing Service, in partnership with state agriculture departments offers a voluntary, audit based program that verifies adherence to these FDA recommendations. See [http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=Template&leftNav=GradingCertificationandVerification&page=GAPGHPAuditVerificationProgram &acct=fresh_grd_cert](http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=Template&leftNav=GradingCertificationandVerification&page=GAPGHPAuditVerificationProgram&acct=fresh_grd_cert).

^{xviii} http://www.fns.usda.gov/cnd/f2s/Food_Safety_QA.htm.

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<http://www.fda.gov/food/foodsafety/retailfoodprotection/federalstatecooperativeprograms/cm108156.htm>

^{xx} FDA Food Code 2009, § 3-201.11- 3-201.16.

^{xxi} FDA Food Code 2009 § 2-201.11(a).

^{xxii} 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.

^{xxiii} California Health & Safety Code [H&S Code], § 113700 *et seq.* (Revised 2007); § 113789(b)(1) (defining a “food facility covered by the Code to include public and private school cafeterias).

^{xxiv} H & S Code § 113700.

^{xxv} H & S Code § § 114021 – 114029.

^{xxvi} H & S Code 114031

^{xxvii} H & S Code § 114021(a).

^{xxviii} H & S Code § 113816.

^{xxix} H & S Code § 113992.

^{xxx} It is also worth noting that the California legislature has strongly endorsed the concept of school gardens, and in 2004 established a school garden program designed to promote school gardens and school garden salad bars. See Calif. Educ. Code §§ 9000 *et seq.*; § 5179.5.

^{xxxi} June 21, 2007 Inter-Office Correspondence from Dennis Barrett, Director, Food Services Branch, LAUSD to the Board of Education Re “Addressing the School Garden Grants” at 3.

^{xxxii} As amended in 2009, an “approved source” means “a food source allowed under Article 3 (commencing with Section 114021) of Chapter 4, or a producer, manufacturer, distributor or food facility that is acceptable to the enforcement agency based on a determination of conformity with applicable laws, or, in the absence of applicable laws, with current public health principles and practices, and generally recognized industry standards that protect public health.” H. & S. Code § 113735.

^{xxxiii} Specifically, § 113982 requires that transported food be contained in a “food holding area” that (1) is “constructed of smooth, washable, impervious material capable of withstanding frequent cleaning,” (2) allows no leaks of liquid wastes “onto any street, sidewalk, or premises,” and (3) maintains potentially hazardous food at the required temperatures.

^{xxxiv} 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 http://nasbe.org/healthy_schools

/hs/bytopics.php?topicid=3115&catexpand=acdnbtm_catc.

^{xxxv} See “Fresh, Healthy & Safe Food: Best Practices for Using Produce From School Gardens,”

http://www.farmtoschool.org/files/publications_188.pdf

^{xxxvi} [http://www.chicagotribune.com/health/ct-met-school-gardens-](http://www.chicagotribune.com/health/ct-met-school-gardens-20101019,0,4964631.story?page=1&track=rss;)

20101019,0,4964631.story?page=1&track=rss;

http://food.change.org/blog/view/chicago_kids_reap_what_they_sow_but_cant_eat_it?me=nl

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