



Food and
Nutrition
Service

May 17, 2022

Braddock
Metro Center

Kimberly Vumbaco
New York State Education Department
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Dear Kimberly Vumbaco:

This letter is in response to the New York State Education Department's (NYSED) May 16, 2022, request to provide operational flexibilities in the National School Lunch Program (NSLP), School Breakfast Program (SBP), Special Milk Program (SMP), Fresh Fruit and Vegetable Program (FFVP), Summer Food Service Program (SFSP), and/or the National School Lunch Program Seamless Summer Option (SSO) for summer 2022 and school year (SY) 2022-2023. Program operators continue to respond to and recover from the COVID-19 pandemic, including managing challenges related to increased administrative burden and staffing issues, which are demanding significant Program operator resources. In order to support access to nutritious meals while State agencies continue to mitigate the administrative, fiscal, and operational challenges exacerbated by COVID-19, FNS recognizes that continued operating flexibilities may be necessary.

FNS did not receive legislative authorization to issue new nationwide waivers beyond SY 2021-2022, as previously provided under the Families First Coronavirus Response Act (FFCRA) (P.L. 116-127), as extended by the Continuing Appropriations Act, 2021 and Other Extensions Act (P.L. 116-159). Therefore, State agencies must request a statewide waiver under Section 12(l) of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1760(l), to obtain approval for certain flexibilities previously provided under the nationwide waiver authority.

To grant a Section 12(l) waiver, the NSLA requires that the waiver must facilitate the purpose of the program, the public must receive notice and information regarding the proposed waiver, and the waiver will not increase the overall cost of the Program to the Federal Government. FNS finds that NYSED's waiver request satisfies these statutory requirements.

Specifically, NYSED requested a statewide waiver of the requirements explained below.

Summer Operations (SFSP/SSO)

The waivers in this section apply to the SFSP and the SSO for summer 2022. These waivers are effective May 17, 2022, through September 30, 2022. However, FNS expects that flexibilities under the waivers in this section will only be implemented by Program operators when congregate meal service is limited by the COVID-19 pandemic.

Waiver 1: Non-Congregate Meal Service during Summer 2022 (SFSP/SSO)

Under the NSLA, 42 U.S.C. 1753(b)(1)(A), 42 U.S.C. 1761(a)(1)(D), and program regulations at 7 CFR 225.6(e)(15), meals must be served in a congregate setting and must be consumed by participants on site.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirements to serve meals through the SFSP in a congregate setting this summer. Any other requirements referenced in these provisions remain in effect. FNS also extends the non-congregate feeding flexibilities to SSO for the duration of this waiver.

Waiver 2: Parent and Guardian Meal Pick Up during Summer 2022 (SFSP/SSO)

Under the NSLA, 42 U.S.C. 1761(f)(3) and program regulations at 7 CFR 210.10(a), 7 CFR 220.2 (Breakfast), 7 CFR 220.8(a), 7 CFR 225.2 (Meals), and 7 CFR 225.9(d)(7) meals must be served to eligible children.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirement that meals may only be served directly to children this summer. Any other requirements referenced in these provisions remain in effect. FNS also extends the parent and guardian pick up flexibility to SSO for the duration of this waiver. State agencies must have a plan for ensuring that program operators are able to maintain accountability and program integrity. This includes putting in place processes to ensure that meals are distributed only to parents or guardians of eligible children, and that duplicate SFSP or SSO meals are not distributed to any child.

School Year Operations (NSLP/SBP)

The waivers in this section are intended to provide needed flexibility to support school food authorities (SFAs) in continuing to offer nutritious meals. While these waivers are available through June 30, 2023, flexibilities under these waivers should only be implemented by Program operators when congregate meal service is limited by the COVID-19 pandemic.

Waiver 3: Non-Congregate Meal Service (NSLP and SBP)

Under the NSLA, 42 U.S.C. 1753(b)(1)(A), the Child Nutrition Act, 42 U.S.C. 1773(b)(1)(A), NSLP and SBP meals must be served in a congregate setting and must be consumed by participants on site.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirements to serve meals through the NSLP and SBP in a congregate setting. Any other requirements referenced in these provisions remain in effect.

Waiver 4: Parent and Guardian Meal Pick Up (NSLP and SBP)

Under program regulations at 7 CFR 210.10(a), 7 CFR 220.2 (Breakfast), and 7 CFR 220.8(a), meals must be served to eligible children.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the requirement that meals may only be served directly to children. Any other requirements referenced in these provisions remain in effect. State agencies opting to use this flexibility must have a plan for ensuring that local operators are able to maintain accountability and program integrity. This includes putting in place processes to ensure that meals are distributed only to parents or guardians of eligible children, and that duplicate meals are not distributed to any child.

Waiver 5: Meal Service Times (NSLP and SBP)

Under program regulations at 7 CFR 210.10(l) and 7 CFR 220.8(l), meals served in the NSLP and SBP must follow meal service time requirements.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirements that set meal time parameters for school lunch and breakfast.

Waiver 6: Offer Versus Serve (NSLP)

Under the NSLA, 42 U.S.C. 1758(a)(3) and program regulations at 7 CFR 210.10(e), Program operators of senior high schools (as defined by the State education agency) must participate in offer versus serve at lunch.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the requirement to serve school lunches to senior high school students using offer versus serve. FNS also extends the offer versus serve flexibility to SSO for the duration of this waiver, when there is an unanticipated school closure during the school year.

School Year Administration (NSLP/SBP/SFSP)

The waivers in this section allow State and local Program operators to overcome administrative challenges resulting from COVID-19 and to appropriately allocate their limited staffing resources to meal service to best ensure safe service of meals to children as they respond to and recover from the COVID-19 pandemic. FNS expects program operators to use the flexibilities for only the duration and extent that they are needed.

Waiver 7: Local School Wellness Policy Triennial Assessment (NSLP)

Section 9A(b) of the NSLA, 42 U.S.C. 1758b(b), establishes requirements for local school wellness policies related to implementation, evaluation, and publicly reporting on progress of local school wellness policies. FNS regulations further require at 7 CFR 210.31(e)(2) that, at least once every three years, local educational agencies (LEAs) assess compliance with the local school wellness policy and make assessment results available to the public.

Based on the July 1, 2017, implementation of the local school wellness policy regulations, the first triennial assessments were due June 30, 2020. On April 2, 2020, FNS issued a nationwide waiver delaying the deadline for the first triennial assessment to June 30, 2021, and on June 11, 2021, FNS issued a nationwide waiver delaying the deadline for the first triennial assessment to June 30, 2022. FNS recognizes that States and schools continue to devote additional resources to pandemic recovery and the transition back to normal operations. Due to this ongoing pandemic response and recovery, the resources required to meet the upcoming Local School Wellness Policy triennial assessment deadlines are better spent planning for the upcoming school year and ensuring that students are fed.

Pursuant to the Section 12(l) waiver authority cited above, FNS waives, for Program operators the above referenced statutory and regulatory requirements and provides a new first triennial assessment deadline of June 30, 2023. Accordingly, LEAs required to complete a triennial assessment by June 30, 2022, may choose to accept the new regulatory deadline and instead complete their first assessment by June 30, 2023. These LEAs then would complete a second triennial assessment by June 30, 2026. FNS recognizes that some LEAs may be prepared to complete their triennial assessment by June 30, 2022, and encourages those that are prepared to do so to complete their assessments on time.

Waiver 8: Food Service Management Company (FSMC) Contract Duration (NSLP and SFSP)

Under Program regulations at 7 CFR 210.16(d) and 225.6(h)(7), SFAs and SFSP sponsors with a FSMC may contract for no longer than one year, with options for a yearly renewal not to exceed four additional years. Many SFAs and SFSP sponsor FSMC contracts may be nearing the end of their last renewal year. However, FNS recognizes that during this transition year, requiring SFAs and sponsors to conduct a competitive procurement process for a new FSMC contract may place an undue administrative burden on local operators.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives 7 CFR 210.16(d) and 7 CFR 225.6(h)(7) to permit SFAs and SFSP sponsors to extend existing FSMC contracts that would not otherwise be eligible for extension through SY 2022-2023 or June 30, 2023.

Waiver 9: Administrative Review Onsite Requirements (NSLP and SBP)

Under Program regulations at 7 CFR 210.8(a)(1), 210.9(c)(7), 210.16(a)(3), 210.18, 220.7(d)(1)(iii), and 220.11(d)(1), SFAs are required to conduct portions of the administrative review onsite. However, FNS recognizes that during this transition year and in order to provide meals and meal supplements and ensure continuity of operations, suspending onsite monitoring is vital.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives 7 CFR 210.8(a)(1), 210.9(c)(7), 210.16(a)(3), 210.18, 220.7(d)(1)(iii), and 220.11(d)(1) to exclude the onsite monitoring requirements. Please note that to ensure Program integrity during this time, State agencies and SFAs should continue monitoring activities of Program operations offsite (e.g., through a desk audit). This waiver is effective when the public health emergency, which was declared on January 31, 2020, by the United States Department of Health and Human Services, ends and continues through June 30, 2023.

Waiver 10: FNS-874 Second (Independent) Review of Applications (NSLP)

Under 42 U.S.C 1769c(b)(6)(E)(iii) and program regulations at 7 CFR 245.11(b)(2), each State agency must submit a report, as specified by FNS, describing the results of the second reviews of eligibility determinations conducted by each LEA in their State. The report must provide information about applications reviewed in each LEA and include activities required under 7 CFR 245.11. This report is due March 15th of each year.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives 7 CFR 245.11(b)(2) to permit States the time to focus on continuity of operations during this transition year, and in recognition of the fact that nationwide waiver flexibilities adopted by State agencies during the prior two school years extensively impacted free and reduced price certifications, as well as oversight activities. This waiver pertains to the requirement to submit the FNS-874 report due March 15, 2023, which would provide information about application reviewed in each LEA and include activities required under 7 CFR 245.11.

This waiver only applies to the reporting requirements associated with the independent review process. The underlying requirement for LEAs that collect school lunch program applications in SY 2022-2023 to conduct independent reviews as applicable remains in effect.

Waiver 11: FNS-640 Administrative Review Data Report (NSLP)

Under the NSLA, 42 U.S.C. 1769c(b)(1)(C)(iv) and program regulations at 7 CFR 210.18(n), State agencies shall submit to FNS each year the FNS-640 report containing the results of the reviews conducted in the preceding school year. This report is due March 1st of each year.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives 7 CFR 245.11(b)(2) to permit States the time to focus on continuity of

operations, and in recognition that the FNS-640 report for SY 2022-2023 would cover a time period during which operations were extensively impacted by nationwide waiver flexibilities. This waiver pertains to the requirement to submit the FNS-640 report due March 1, 2023, which would provide data collected from conducted administrative reviews for SY 2021-2022.

Special Milk Program Operations

The waivers in this section are intended to provide needed flexibility to support schools and institutions in continuing to offer milk service. The waivers in this section are effective July 1, 2022, through June 30, 2023. However, FNS expects that flexibilities under these waivers will only be implemented by Program operators when congregate service is limited by the COVID-19 pandemic.

Waiver 12: Non-Congregate Milk Service (SMP)

Section 3(a)(1) of the Child Nutrition Act of 1966 (42 U.S.C. 1772(a)(1)) and program regulations at 7 CFR 215.1 require SMP milk to be served and consumed in nonprofit schools, which do not participate in a meal service program authorized by the NSLA, or other eligible institutions devoted to the care of children.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirements, which require the service of SMP milk in a congregate setting. This flexibility will allow milk to be made available and consumed off site.

Waiver 13: Parent and Guardian Milk Pick Up (SMP)

SMP distribution requirements at Section 3(a)(7) of the Child Nutrition Act of 1966 (42 U.S.C. 1772(a)(7)) and 7 CFR 215.7(d)(2)(i) and 215.13a(a) require SMP operators to provide milk directly to children, not to parents and guardians.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirements to allow the distribution of SMP milk to a parent or guardian to take home to their children. State agencies opting to use this flexibility must have a plan for ensuring that Program operators are able to maintain accountability and program integrity. This includes putting in place processes to ensure that SMP milk is distributed only to parents or guardians of eligible children, and that duplicate servings are not distributed to any child.

Fresh Fruit and Vegetable Program Operations

The waivers in this section are effective July 1, 2022, through June 30, 2023. However, FNS expects that flexibilities under these waivers will only be implemented by Program operators when congregate service is limited by the COVID-19 pandemic.

Waiver 14: Parent and Guardian Pick Up (FFVP)

Section 19(b) of the NSLA (42 U.S.C. 1769a), requires Program operators to provide FFVP foods directly to students, not to parents and guardians.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, this waiver allows the State agency to approve SFAs participating in FFVP to provide FFVP foods to parents or guardians of children whose elementary school is closed and who are learning virtually.

Waiver 15: Alternate Site (FFVP)

Section 19(a) of the NSLA (42 U.S.C. 1769a(a)), limits availability of FFVP foods to elementary schools.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, this waiver allows the State agency to approve SFAs participating in FFVP to provide FFVP foods at sites that are not FFVP elementary schools when FFVP elementary schools are closed.

Unanticipated School Closures

The waivers in this section apply to the SFSP and the SSO during unanticipated school closures. These waivers are effective October 1, 2022, through April 30, 2023. However, FNS expects that flexibilities under these waivers will only be implemented by Program operators when congregate meal service is limited by the COVID-19 pandemic.

Waiver 16: Non-Congregate Meal Service during Unanticipated School Closures (SFSP/SSO)

Under NSLA, 42 U.S.C. 1753(b)(1)(A), 42 U.S.C. 1761(a)(1)(D), and program regulations at 7 CFR 225.6(e)(15), SFSP meals must be served in a congregate setting and must be consumed by participants on site.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirements to serve meals through the SFSP during an unanticipated school closure in a congregate setting. Any other requirements referenced in these provisions remain in effect. FNS also extends the non-congregate feeding flexibility to SSO for the duration of this waiver.

Waiver 17: Parent and Guardian Meal Pick-Up during Unanticipated School Closures (SFSP/SSO)

Under the NSLA, 42 U.S.C. 1761(f)(3) and Program regulations at 7 CFR 210.10(a), 7 CFR 220.2 (Breakfast), 7 CFR 220.8(a), 7 CFR 225.2 (Meals), and 7 CFR 225.9(d)(7) meals must be served to eligible children.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirement that meals may only be served directly to

children. Any other requirements referenced in these provisions remain in effect. FNS also extends the parent and guardian pick up flexibility to SSO for the duration of this waiver.

Waiver 18: Meal Service Times for Unanticipated School Closures (SFSP/SSO)

Under program regulations at 7 CFR 225.16(c)(1) and (2) meals served in the SFSP must follow meal service time requirements.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirements that set meal time parameters for SFSP sites. Any other requirements referenced in these provisions remain in effect. FNS also extends the meal service times flexibility to SSO for the duration of this waiver.

Waiver 19: Service of Meals at School Sites during Unanticipated School Closures

Under the NSLA, 42 U.S.C. 1761(c)(1) and program regulations at 7 CFR 225.6(d)(1)(iv), State agencies are required to only approve meal service operations at non-school sites during unanticipated school closures.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives the aforementioned requirement that limits the operation of SFSP during an unanticipated school closure to non-school sites. FNS also extends the service of meals at school sites during unanticipated school closures flexibility to SSO for the duration of this waiver.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS approves NYSED waiver request for the provisions mentioned above. Effective dates of each waiver are listed in the associated sections above. The State agency should inform Program operators of the flexibilities provided by this waiver as quickly as possible. Should the NYSED determine any of these waivers are no longer necessary prior to the expiration date of any waivers above, please notify the Northeast Regional Office (NERO).

The waiver authority at Section 12(l) of the NSLA requires FNS to review the performance of any State or eligible service provider that was granted a waiver. Therefore by October 30, 2023, NYSED must provide to the FNS NERO a report quantifying the impact of the waivers included in this approval as described below.

State agencies may submit one report for all waivers included in this approval. The report must include the following:

- A description of how the waivers impacted meal service operations at participating sites;
- A description of whether the waivers resulted in improved services to children;
- A description of how the waivers reduced the quantity of paperwork necessary to administer the Program; and
- The number of program operators that used the waivers.

FNS appreciates NYSED exceptional effort to meet the nutritional needs of children during this challenging time. If you have questions, please contact the FNS NERO.

Sincerely,

Original Signed

Sarah Smith-Holmes
Director
Program Monitoring and Operational Support Division

Electronic Copy: Martine Cherry; NSLP