



Food and  
Nutrition  
Service

August 11, 2022

Braddock  
Metro Center

Cheriee Watterson  
South Dakota Department of Education  
800 Governors Drive  
Pierre, SD 57501

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Alexandria  
VA 22314

Dear Cheriee Watterson:

This letter is in response to the South Dakota Department of Education's (SDDE) August 5, 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), Child and Adult Care Food Program (CACFP), 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 SDDE's waiver request satisfies these statutory requirements.

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

#### **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 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 25: Paid Lunch Equity (NSLP)*

Under Program requirements, SFAs must meet Paid Lunch Equity (PLE) requirements as outlined in Section 12(p) of the NSLA, 42 U.S.C. 1760(p) and implemented in NSLP regulations at 7 CFR 210.14(e). Currently through Section 752, Division A of the Consolidated Appropriations Act of 2022 (P.L. 117-103) enacted on March 15, 2022, Congress provided that only SFAs that had a negative balance in the nonprofit school food service account as of December 31, 2021, shall be required to establish prices for paid lunches according to the PLE provision.

In meeting PLE requirements, SFAs may need to increase paid lunch prices or offset any difference with non-Federal funds. However, FNS recognizes that during this transition year requiring SFAs to increase their paid meal prices could place a burden upon families who have not paid for meals over the last two school years.

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS waives paid lunch equity requirements found at Section 12(p) of the NSLA, 42 U.S.C. 1760(p) and implemented at 7 CFR 210.14(e). This waiver pertains to school lunch prices for SY 2022-2023.

*Waiver 26: Meal Pattern Fiscal Action for Supply Chain Disruptions (NSLP and SBP)*

Under Program regulations at 7 CFR 210.18(1)(2) State agencies are required to take fiscal action for missing meal components or production records and for repeat violations involving milk type and vegetable subgroups. However, FNS recognizes that documented supply chain challenges due to COVID-19 are preventing SFAs from purchasing and receiving food through their regular procurement channels.

Pursuant to the waiver authority granted at Section 12(1) of the NSLA, FNS waives the following regulations when there is a documented supply chain disruption due to COVID-19 that prevents SFAs from procuring foods served under the NSLP or SBP at the schools using this flexibility:

- The requirement to apply fiscal action for missing food components or missing production records as detailed in 7 CFR 210.18(1)(2)(i); and
- The requirement to apply fiscal action for repeated violations involving milk type and vegetable subgroups as detailed in 7 CFR 210.18(1)(2)(ii).

FNS is committed to supporting schools in serving the most nutritious meals possible this school year, and expects schools to meet meal pattern requirements to the greatest extent possible. The flexibilities under this waiver are not available unless States have considered other options, such as the emergency procurement flexibilities at 2 CFR 200.320(c), to ensure meal pattern requirements continue to be met to the greatest extent possible. FNS understands schools are concerned about their ability to meet the meal pattern requirements due to supply chain constraints, and we encourage state agencies to use this flexibility when there is a supply chain disruption due to COVID-19 that is preventing NSLP or SBP meal service during the school year. FNS reminds state agencies that a COVID-19 supply chain disruption with respect to foods served under the NSLP, SBP and SSO is an ongoing condition that must apply to continue using the waiver at a school.

When determining whether this waiver is applicable during an administrative review, State agencies should consider all information SFAs have available that illustrates that a supply chain disruption occurred which impacted their ability to meet the meal pattern requirements. This waiver is effective through June 30, 2023.

States are reminded that under 7 CFR 210.18(1)(2)(iii-iv) fiscal action for repeat violations of the requirements for food quantities and whole grain-rich foods, and for repeat violations of the dietary specifications for calories, saturated fat, sodium, and trans fat is discretionary. FNS strongly encourages State agencies to use this discretion not to take fiscal action for meal pattern violations resulting from supply chain issues when there is a supply chain disruption with respect to foods served under the NSLP or SBP.

*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 15<sup>th</sup> 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 1<sup>st</sup> 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(1) 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(1) 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.

**Child and Adult Care Food Program Operations**

The waivers in this section apply to CACFP. These waivers 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 meal service is limited by the COVID-19 pandemic.

*Waiver 20: Non-Congregate Meal Service (CACFP)*

Under the NSLA, 42 U.S.C. 1753(b)(1)(A) and program regulations at 7 CFR 226.19(b)(6)(iii), CACFP 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 requirement to serve meals through CACFP in a congregate setting. Any other requirements referenced in this provision remain in effect.

*Waiver 21: Parent and Guardian Meal Pick Up (CACFP)*

Under Program regulations at 7 CFR 226.2 (Meals), meals must be served to eligible children and eligible adult participants.



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 and adult participants. Any other requirements referenced in these provisions remain in effect.

*Waiver 22: Meal Service Times (CACFP)*

Under Program regulations at 7 CFR 226.20(k) meals served in the CACFP 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 CACFP institutions and facilities.

**Child and Adult Care Food Program Administration**

The waivers in this section are 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 continue through June 30, 2023.

*Waiver 23: State Agency Onsite Monitoring Visits (CACFP)*

Under Program statute and regulations, State agencies are required to conduct one scheduled visit of CACFP institutions at not less than 3-year intervals. CACFP regulations at 7 CFR 226.6(m)(6) go on to require State agencies to annually review at least 33.3 percent of all CACFP institutions. Additionally, per 7 CFR 226.6(b)(1), State agencies are required to do a pre-approval visit of all new CACFP sponsors. However, FNS recognizes that as the country continues to respond to COVID-19, onsite monitoring may not be possible.

Therefore, pursuant to the Section 12(l) waiver authority cited above, FNS waives the requirement that CACFP monitoring requirements included in 7 CFR 226.6(b)(1) and 226.6(m)(6) be conducted onsite. Please note that to ensure Program integrity during this time, State agencies that elect to use this waiver should continue monitoring activities of Program operations offsite (e.g., through a desk audit).

*Waiver 24: Sponsoring Organization Onsite Monitoring Visits (CACFP)*

Under Program regulations at 7 CFR 226.16(d)(4)(iii), CACFP sponsoring organizations must review each facility three times each year and: 1) at least two of the three reviews must be unannounced; 2) at least one unannounced review must include observation of meal service; 3) at least one review must be made during each new facility's first four weeks of Program operations; and 4) not more than six months may elapse between reviews. However, FNS recognizes that as the country continues to respond to COVID-19, onsite monitoring may not be possible.

Therefore, pursuant to the Section 12(l) waiver authority cited above, FNS waives the requirement that CACFP monitoring requirements included in 7 CFR

226.16(d)(4)(iii) be conducted onsite. Please note that to ensure Program integrity during this time, CACFP sponsoring organizations that elect to use this waiver should continue monitoring activities of Program operations offsite (e.g., through a desk audit).

Pursuant to the waiver authority granted at Section 12(l) of the NSLA, FNS approves SDDE 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 SDDE determine any of these waivers are no longer necessary prior to the expiration date of any waivers above, please notify the Mountain Plains Regional Office (MPRO).

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, SDDE must provide to the FNS MPRO 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 SDDE exceptional effort to meet the nutritional needs of children during this challenging time. If you have questions, please contact the FNS MPRO.

Sincerely,

**Original Signed**

Jessica Saracino  
Director  
Program Monitoring and Operational Support Division

Electronic Copy: Sabina Velasco, MPRO  
Diane Fulton, MPRO