

THE U.S. DEPARTMENT OF AGRICULTURE  
FOOD AND NUTRITION SERVICE

Child Nutrition Programs:  
Transitional Standards for Milk,  
Whole Grains, and Sodium

Docket No. FNS-2020-0038

COMMENTS OF THE  
CENTER FOR SCIENCE IN THE PUBLIC INTEREST

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March 23, 2022

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**Re: Docket No. FNS-2020-0038; Child Nutrition Programs: Transitional Standards for Milk, Whole Grains, and Sodium**

The Center for Science in the Public Interest<sup>1</sup> submits these comments in response to the U.S. Department of Agriculture’s (USDA) “Child Nutrition Programs: Transitional Standards for Milk, Whole Grains, and Sodium” final rule (87 FR 6984), which will provide necessary flexibility to schools for SY 2022-2023 and SY 2023-2024 as they respond to and recover from the COVID-19 pandemic. CSPI urges the USDA to align school meals with the 2020-2025 Dietary Guidelines for Americans (DGA), particularly with respect to added sugars, sodium, and whole grains in the rulemaking expected later this year.<sup>2</sup>

This rule finalizes, with some modifications, the “Restoration of Milk, Whole Grains, and Sodium Flexibilities” proposed rule (85 FR 75241, November 25, 2020), which would have codified the 2018 rollbacks to the School Breakfast Program (SBP) and National School Lunch Program (NSLP) on sodium, whole grains, and flavored milk requirements (83 FR 63775, December 12, 2018). The 2018 rule proposed to halve the amount of whole-grain-rich grains required (from all grains to half of grains be 50-percent whole grain), delay the second set of sodium reduction targets (Target 2) from SY 2017-2018 to SY 2024-2025, eliminate Target 3 (originally set to go into effect SY 2022-2023), and permit low-fat (1 percent) flavored milk. The 2018 rule was widely opposed by the public<sup>3</sup> and invalidated by a federal court in 2020 over a lack of notice on key provisions.<sup>4</sup>

Instead of permanently weakening several key nutrition standards, this final transitional rule provides short-term flexibility over the next two school years by: 1. changing the whole-grain-rich requirement from 100 to 80 percent; 2. establishing an interim sodium-reduction target (Target 1A) which is a 10-percent reduction in sodium for school lunches only by SY 2023-2024 (effective July 1, 2023), committing to address longer-term sodium reduction in the future;<sup>5</sup> and

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<sup>1</sup> CSPI has worked since 1971 to improve the public’s health through better nutrition and safer food. It is a non-profit consumer education and advocacy organization, supported by donations from individuals and foundations and its members and subscribers to its *Nutrition Action* magazine.

<sup>2</sup> The USDA’s regulatory agenda includes proposed rulemaking on “Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans” for release as early as October, 2022. See: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0584-AE88>

<sup>3</sup> 83 Fed. Reg. 63775. Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements.

<sup>4</sup> *CSPI v. Perdue*, 438 F. Supp. 3d 546 (D. Md. 2020).

<sup>5</sup> See 87 Fed. Reg. 6998-9: “The approach in this final rule positions SFAs [School Food Authorities] on an achievable path toward further sodium reduction in school meals, and responds to school concerns about product

3. allowing low-fat flavored milk with the requirement that schools serve unflavored milk if serving flavored milk. Given the unprecedented nature of global supply chain disruptions and labor shortages that have placed immense challenges on schools, this temporary relief is warranted. The USDA has made clear that this final rule is a bridge to rulemaking in the fall of 2022 that will strengthen the school meal nutrition standards to be consistent with the 2020 Dietary Guidelines for Americans, as required by law,<sup>6</sup> and provide longer-term certainty to schools and the school food service industry. As such, the remainder of this comment pertains to recommendations related to the fall rulemaking stage of the USDA’s transitional approach—the issuance of a proposed rule in fall 2022 that will address school meal nutrition standards for SY 2024-2025 and beyond (“Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans”).<sup>7</sup>

CSPI urges the USDA in the fall rulemaking to:

- 1. Establish a new added sugars standard for school meals consistent with the quantitative recommendation for limiting added sugars in the 2020 DGA and establish a similar standard for competitive foods (Smart Snacks) through rulemaking.** The 2020 DGA recommends that added sugars contribute no more than 10 percent of daily calories.<sup>8</sup> A DGA-aligned added sugars standard could be based on the average meal calories over the week, similar to the sodium and saturated fat standards, and would help address, among many things, the amount of added sugars that flavored milks, which are the top source of added sugars in school meals, contribute.<sup>9</sup> As part of

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availability ... USDA will promulgate a new rulemaking to address sodium standards in SY 2024-2025 and beyond. Since USDA intends the standards in this final rule as transitional standards, this rule eliminates Target 2 or any stricter sodium standard for SY 2024-2025 and beyond. However, this does not mean USDA intends to permanently eliminate stricter sodium standards in the long-term. Rather, this rule implements transitional sodium standards until USDA develops long term standards that will further advance nutrition security.”

<sup>6</sup> Richard B. Russell National School Lunch Act, P. L. No. 79-396, 60 Stat. 230, (codified as amended at 42 U.S.C. §§ 1751 *et seq.*)

<sup>7</sup> See 87 Fed. Reg. 6988-89: “In the second stage, USDA intends to issue a proposed rule in fall 2022 which will address school meal nutrition standards for SY 2024-2025 and beyond. The new rulemaking will advance permanent standards that further demonstrate USDA’s commitment to nutritious school meals. It will thoughtfully consider the areas addressed through this final rule and ensure that the long-term standards are consistent with the goals of the *Dietary Guidelines, 2020-2025* and nutrition science, as required by the National School Lunch Act. The new rulemaking will incorporate meaningful stakeholder input, and will meet the nutritional needs of America’s schoolchildren. USDA intends for the new rule to be finalized in summer 2023, well in advance of procurement cycles for SY 2024-2025.”

<sup>8</sup> U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines for Americans, 2020–2025*. 9th Edition. December 2020.

<sup>9</sup> Fox MK, Gearan EC, Schwartz C. Added Sugars in School Meals and the Diets of School-Age Children. *Nutrients*. 2021;13:471.

The top ten sources of added sugars in school breakfast and percent contribution to total amount are: flavored skim milk (29 percent); sweetened cereals (13 percent); condiments and toppings (11.8 percent); muffins and sweet/quick breads (7.3 percent); granola bars and breakfast bars (5 percent); toaster pastries (4.3 percent); pancakes, waffles, and French toast (3.8 percent); crackers, croutons, pretzels (3.6 percent); cinnamon buns (2.8 percent); and yogurt (2.8 percent). The top ten sources of added sugars in school lunch and percent contribution to total amount are: flavored skim milk (46.9 percent); condiments and toppings (9 percent); flavored 1-percent milk (3.2 percent); breads, rolls, bagels, and other plain breads (2.7 percent); canned peaches (2.4 percent); cookies, cakes, brownies (2.3 percent); sandwich with breaded meat, poultry, or fish (2.1 percent); juice (1.8 percent); black, baked, and other beans (1.8 percent); and hamburgers and similar beef pork sandwiches (1.8 percent).

establishing such a standard, we urge the USDA to eliminate certain low-calorie sweeteners that that could be substituted for added sugars, particularly aspartame (NutraSweet® and Equal®), acesulfame-K (Sweet One®), saccharin (Sweet’N Low®), and sucralose (Splenda®) primarily due to cancer concerns. Finally, the total sugar standard for competitive foods is outdated and must be replaced with an added sugars standard.

2. **Establish sodium reduction targets aligned with the 2020 DGA recommendations for safe sodium consumption.** The 2020 DGA maintains that no more than 2,300 mg/day sodium is safe for ages 14 years and up and reduced the amount of sodium considered safe for children to  $\leq 1,500$  mg/day for children ages 4-8 years and to  $\leq 1,800$  mg/day for children ages 9-13 years.<sup>10</sup>
3. **Establish a whole grain requirement consistent with the 2020 DGA.** The DGA recommends that at least half of grains consumed be whole.<sup>11</sup> The 100 percent whole-grain-rich requirement (all grains be at least 50-percent whole grain) was consistent with the 2020 DGA. If the USDA considers an alternative to the 100 percent whole-grain-rich requirement, the standard must be consistent with the 2020 DGA.

Detailed comments follow.

**Added Sugars: The USDA must establish an added sugars standard for school meals aligned with the 2020 DGA. Similarly, the USDA must replace the total sugars with an added sugars standard for competitive foods. In phasing out added sugars, the USDA should disallow certain low-calorie sweeteners of concern.**

Among children, intake of added sugars has been associated with weight gain, dental decay, and an increase in risk factors for cardiovascular disease.<sup>12,13</sup> The current school nutrition standards do not address added sugars as the 2010 DGA, upon which they are based, did not include a quantitative added sugars recommendation.<sup>14</sup> Since then, both the 2015 and 2020 DGA have recommended that no more than 10 percent of daily calories come from added sugars.<sup>15,16</sup> In the absence of a requirement to limit added sugars, unsurprisingly, school meals contain added

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<sup>10</sup> U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines for Americans, 2020–2025*. 9th Edition. December 2020.

<sup>11</sup> U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines for Americans, 2020–2025*. 9th Edition. December 2020.

<sup>12</sup> Vos MB, et al. Added Sugars and Cardiovascular Disease Risk in Children: A Scientific Statement From the American Heart Association. *Circulation*. 2017 May 9; 135(19):e1017-e1034.

<sup>13</sup> Moynihan PJ, Kelly SA. Effect on caries of restricting sugars intake: systematic review to inform WHO guidelines. *J Dent Res*. 2014;93(1):8-18.

<sup>14</sup> U.S. Department of Health and Human Services and U.S. Department of Agriculture. *2010-2015 Dietary Guidelines for Americans*. U.S. Department of Agriculture. 2010. <https://health.gov/sites/default/files/2020-01/DietaryGuidelines2010.pdf>. Accessed October 11, 2021.

<sup>15</sup> U.S. Department of Health and Human Services and U.S. Department of Agriculture. *2015-2020 Dietary Guidelines for Americans*. U.S. Department of Agriculture. 2015. <https://health.gov/our-work/nutrition-physical-activity/dietary-guidelines/previous-dietary-guidelines/2015>. Accessed October 4, 2021.

<sup>16</sup> U.S. Department of Health And Human Services. and U.S. Department of Agriculture, 2020. [https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary\\_Guidelines\\_for\\_Americans\\_2020-2025.pdf](https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary_Guidelines_for_Americans_2020-2025.pdf). Accessed March 18, 2022.

sugars in excess of the limit recommended by the DGA.<sup>17</sup> Nine out of ten schools exceed the 2020 DGA limit for added sugars for breakfast meals, and nearly seven out of ten schools exceed the limit for lunch.<sup>18</sup> At current levels, a typical school breakfast can easily exceed an entire day's worth of added sugars for a young child.

To align the school meal programs with the DGA, the USDA must establish an added sugars standard for the NSLP, SBP, and competitive foods. We propose that the standard for breakfast and lunch should limit added sugars to less than 10 percent of calories on average over the week, similar to the current saturated fat standard, which is also that less than 10 percent of total calories can come from saturated fat over the week. The current sodium standards are also stated as weekly averages. Below shows a proposed added sugars standard for school meals (not currently in effect), based on the DGA recommendation of no more than 10 percent of calories from added sugars daily. We calculated this standard by dividing the total calories allowed by age group by four (four calories per one gram of sugar).

<b>Grade Group (Calorie Range Allowed per Meal)</b>	<b>Added Sugars Standard based on 10 Percent of the Maximum Calories Allowed per Meal and Grade Group from Added Sugars*</b>
<b>Breakfast<sup>19</sup></b>	
K-5 (350-500 calories)	≤ 12.5 g
6-8 (400-550 calories)	≤ 13.75 g
9-12 (450-600 calories)	≤ 15 g
<b>Lunch<sup>20</sup></b>	
K-5 (550-650 calories)	≤ 16.25 g
6-8 (600-700 calories)	≤ 17.5 g
9-12 (750-850 calories)	≤ 21 g

\*Calculated by dividing the total calories by four (four calories per one gram of sugar) and multiplying by 10 percent (DGA daily allowance).

To assist schools in meeting this standard, the department should prioritize reducing the leading sources of added sugars in school meals, particularly for breakfast, which tends to be higher in

<sup>17</sup> Fox, 2021

<sup>18</sup> Fox, 2021.

<sup>19</sup> U.S. Department of Agriculture. *School Breakfast Program Meal Pattern Chart*. February 24, 2022. <https://www.fns.usda.gov/sbp/meal-pattern-chart>. Accessed March 17, 2022.

<sup>20</sup> U.S. Department of Agriculture. *National School Lunch Program Meal Pattern Chart*. February 24, 2022. <https://www.fns.usda.gov/nslp/national-school-lunch-program-meal-pattern-chart>. Accessed March 17, 2022.

added sugars than lunch. The leading sources of added sugars at breakfast are flavored milks; sweetened cereals; condiments and toppings; and muffins and sweet/quick breads.<sup>21</sup>

CSPI assessed the extent to which major K-12 companies' products could meet an added sugars standard as proposed and found that compliance ranges for our proposed added sugars standard were high (all companies were  $\geq 75$  percent) for more than three-fourths (14 of the 18) of applicable minor food groups for grades K-5 through 9-12 breakfast.<sup>22</sup> Compliance ranges indicate the percentage of products in a given minor food group that meet the proposed standard for each company. As noted, this is particularly important given that the top sources of added sugars are from foods served at breakfast. However, there is room for improvement. For instance, one major K-12 company Post Foodservice's Marshmallow Mateys cereal has more than three quarters of a day's worth of added sugars for an elementary school student, four synthetic food dyes, and more salt than a slice of pizza. Yet Post Foodservice also sells a Frosted Strawberry Shredded Wheat cereal that is only one-third a day's worth of added sugars for the same child, with no food dyes, and hardly any sodium.<sup>23</sup> From another company, General Mills Convenience and Foodservice, a school can choose between Yoplait Smooth with 11 grams of added sugar or Trix yogurt with a modest 5 g of added sugars (and no artificial sweeteners or synthetic dyes). For lunch, CSPI found that compliance ranges were high (all companies were  $\geq 75$  percent) for virtually all (18 of the 20) applicable minor food groups. CSPI's report indicates that there is no shortage of products from major suppliers that could comply with the added sugars standards sought here.

Finally, we urge the USDA to work closely with the food industry and help schools by providing training and technical assistance in meeting a new added sugars standard. Should the USDA consider setting product-specific targets in order to provide clear direction to industry, we urge the USDA to do so *in addition* to a meal standard over the week. Product-specific targets alone, while useful for moving industry, would not ensure that meals align with the DGA.

#### *Disallow low-calorie sweeteners (LCS) of concern*

We urge the USDA to disallow low-calorie sweeteners (LCS) of concern—aspartame, saccharin, acesulfame-K, and sucralose—as part of establishing an added sugars standard. The safety of LCS—sometimes called non-nutritive sweeteners (NNS) or high-intensity sweeteners—has been the subject of significant debate. The 2015 Dietary Guidelines Advisory Committee report recommended that, “added sugars should be reduced in the diet and not replaced with low-calorie sweeteners, but rather with healthy options, such as water in place of sugar-sweetened beverages.”<sup>24</sup> Other experts, such as Robert Wood Johnson Foundation's Healthy Eating

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<sup>21</sup> Fox, 2021.

<sup>22</sup> Center for Science in the Public Interest. 2021 *School Meals Corporate Report Card*. 2021. [https://www.cspinet.org/sites/default/files/2022-02/2021\\_SchoolMealsCorporateReportCard\\_online\\_1.pdf](https://www.cspinet.org/sites/default/files/2022-02/2021_SchoolMealsCorporateReportCard_online_1.pdf). Accessed March 9, 2022.

<sup>23</sup> Center for Science in the Public Interest. 2021. The verdict is in: Companies can make tasty, healthier products. [https://www.cspinet.org/sites/default/files/2022-02/2021\\_SchoolMealsCorporateReportCard\\_factSheet\\_1.pdf](https://www.cspinet.org/sites/default/files/2022-02/2021_SchoolMealsCorporateReportCard_factSheet_1.pdf). Accessed March 18, 2022.

<sup>24</sup> Dietary Guidelines Advisory Committee. *Scientific Report of the 2015 Dietary Guidelines Advisory Committee: Advisory Report to the Secretary of Health and Human Services and the Secretary of Agriculture*. Washington, DC: U.S. Department of Agriculture; 2015.

Research program, recommend that children and youth aged 5 to 13 drink water with no added sweeteners; unflavored, low-fat and nonfat milk; and 100% fruit juice. All beverages are recommended to be free of additives such as electrolytes and artificial flavors.<sup>25</sup> The American Academy of Pediatrics (AAP) concludes that, “the long-term safety of NNS in childhood has not been assessed in humans.”<sup>26</sup> In 2018, the American Heart Association (AHA) Scientific Advisory concluded, “it is prudent to advise against prolonged consumption of LCS beverages by children.”<sup>27</sup> Based on the available evidence, which is relatively limited, CSPI advises that children avoid no/low calorie sweeteners. CSPI is especially concerned about aspartame (NutraSweet® and Equal®), acesulfame-K (Sweet One®), saccharin (Sweet’N Low®), and sucralose (Splenda®). CSPI’s website Chemical Cuisine, which ranks the safety of food additives as “safe,” “caution,” “cut back,” “certain people should avoid,” or “avoid,” rates these four as, “avoid,” primarily due to cancer concerns.<sup>28</sup> There is particularly compelling evidence that aspartame is a carcinogen.<sup>29</sup>

Although there is no required standard for LCS in the DGA, most products from the major K-12 companies do not contain LCS of concern according to CSPI.<sup>30</sup> Only 5 of 36 applicable minor food groups included any products with LCS (*e.g., yogurt or condiments and toppings* products) and within each of these minor food groups there was at least one company with no products containing LCS of concern to CSPI.

The USDA must ensure that adopting an added sugars standard for the NSLP and SBP reimbursable meals and competitive foods does not have unintended public health consequences, particularly with regard to the use of other sweeteners whose safety is not well established.

### **Sodium: The USDA must establish sodium reduction targets aligned with the 2020 DGA.**

Nine out of ten children consume too much sodium,<sup>31</sup> increasing their risk of high blood pressure and heart disease.<sup>32</sup> Children of all ages, on average, consume between 2,525 mg and 3,888 mg of sodium per day.<sup>33</sup> The 2020 DGA recommends that no more than 2,300 mg/day sodium is

<sup>25</sup> Robert Wood Johnson Foundation Healthy Eating Research. *Recommendations for Healthier Beverages*. Durham, NC: Healthy Eating Research, 2013.

<sup>26</sup> Baker-Smith CM, de Ferranti SD, Cochran WJ. The Use of Nonnutritive Sweeteners in Children. *Pediatrics*. 2019;144(5):e20192765.

<sup>27</sup> Johnson R. K., et al. Low-Calorie Sweetened Beverages and Cardiometabolic Health: A Science Advisory From the American Heart Association. *Circulation*, 2018; 138(9), e126–e140.

<sup>28</sup> Center for Science in the Public Interest. *Chemical Cuisine*. <https://www.cspinet.org/eating-healthy/chemical-cuisine>. Accessed October 4, 2021.

<sup>29</sup> Center for Science in the Public Interest. *Aspartame and Cancer: What is the Evidence?* August 2021. <https://cspinet.org/resource/aspartame-and-cancer>.

<sup>30</sup> Center for Science in the Public Interest. *2021 School Meals Corporate Report Card*. 2021.

<sup>31</sup> Jackson SL, et al. Prevalence of Excess Sodium Intake in the United States—NHANES, 2009-2012. *MMWR Morb Mortal Wkly Rep*. 2016;64:1393-7.

<sup>32</sup> Appel LJ, et al. Reducing Sodium Intake in Children: A Public Health Investment. *J Clin Hypertens*. 2015;17:657-62.

<sup>33</sup> U.S. Department of Health and Human Services and U.S. Department of Agriculture. *2020-2025 Dietary Guidelines for Americans*. Average intake for males: children aged 5-8: 2,785 mg; children aged 9-13: 3,451 mg; children aged 14-18: 3,888 mg. Average intake for females: children aged 5-8: 2,525 mg; children aged 9-13: 3,030 mg; children aged 14-18: 2,875 mg. Data source: U.S. Department of Agriculture and U.S. Department of Health and Human Services. *What We Eat in America, NHANES 2015-2016*. Beltsville, MD: USDA, 2016.

safe for ages 14 years and up and reduced the amount of sodium considered safe for children to  $\leq$  1,500 mg/day for children ages 4-8 years and to  $\leq$  1,800 mg/day for children ages 9-13 years based on the National Academies of Sciences, Engineering, and Medicine (NASEM) Dietary Reference Intake (DRI) report for sodium in 2019.<sup>34,35</sup> The DRI report established a Chronic Disease Risk Reduction (CDRR) level for sodium; exceeding these levels would increase chronic disease risk within a healthy population.<sup>36</sup> NASEM, and subsequently the 2020 DGA, made even stronger sodium recommendations for younger school-aged children than was the case when the 2012 school meal standards were finalized, then based on the 2010 DGA.<sup>37</sup>

At the current levels (Target 1), a high school lunch has on average 1,420 mg, or nearly two-thirds of a day's worth of sodium. The interim target established in this final rule for a high school lunch (Target 1A) only brings down that amount of sodium to 1,280 mg, or over half a day's worth. We were disappointed that the final rule effectively removed sodium reduction Targets 2 and 3 but expect that the USDA will put in its absence new sodium reduction targets and timeline. Previously moving from one target to the next (*i.e.*, Target 1 to 2) was about a 10-percent reduction in sodium for breakfast and 25-percent for lunch. The newly established Target 1a is a 10-percent reduction in sodium from Target 1 and roughly halfway in sodium reduction between Target 1 and 2 (no longer established) for lunch. As the USDA noted,<sup>38</sup> this 10-percent reduction in sodium is in line with the Food and Drug Administration's (FDA) recently released voluntary sodium reduction targets for the food industry to be achieved in two-and-a-half years (April 2024), coinciding with the length of this final rule through the next two school years (July 2024).<sup>39</sup> The USDA could re-establish Targets 2 and 3, along with a further sodium reduction target for younger children, with an updated timeline that would continue to follow a 10-percent and 25-percent reduction in sodium between each target for breakfast and lunch, respectively, or alternatively consider new targets.

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<sup>34</sup> U.S. Department of Health And Human Services. and U.S. Department of Agriculture, 2020. [https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary\\_Guidelines\\_for\\_Americans\\_2020-2025.pdf](https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary_Guidelines_for_Americans_2020-2025.pdf). Accessed March 18, 2022.

<sup>35</sup> National Academies of Sciences, Engineering, and Medicine. *Dietary Reference Intakes for Sodium and Potassium*. 2019.

<sup>36</sup> National Academies of Sciences, Engineering, and Medicine. *Dietary Reference Intakes for Sodium and Potassium*. 2019.

<sup>37</sup> 85 Fed. Reg. 75241: Section 9(f)(1) of the Richard B. Russell National School Lunch Act (NSLA), as amended, 42 U.S.C. 1758(f)(1), requires that school meals are consistent with the goals of the latest Dietary Guidelines for Americans (Dietary Guidelines).

<sup>38</sup> See 87 Fed. Reg. 6999: "These transitional standards align with FDA's recent voluntary sodium reduction targets for the food industry... The targets in FDA's guidance, issued in October 2021, seek to support decreasing average U.S. population sodium intake from approximately 3,400 mg to 3,000 mg per day, about a 12 percent reduction. These reductions are anticipated to support a gradual sodium reduction strategy in NSLP and SBP. While FDA is recommending the voluntary targets be met in 2.5 years (April 2024), in advance of that timeframe schools are anticipated to be able to procure additional options that are lower in sodium as the food industry continues reformulation efforts and develops new food products that align with FDA's voluntary targets."

<sup>39</sup> U.S. Food and Drug Administration: Voluntary Sodium Reduction Goals: Target Mean and Upper Bound Concentrations for Sodium in Commercially Processed, Packaged, and Prepared Foods. October 2021. Available at: [www.fda.gov/SodiumReduction](http://www.fda.gov/SodiumReduction).

A substantial number of studies show that as dietary sodium intake rises, so does blood pressure.<sup>40</sup> Studies show a link between high blood pressure in childhood and high blood pressure in adulthood, and high blood pressure in childhood is linked to early development of heart disease and risk for premature death.<sup>41</sup> According to a 2018 report by the Centers for Disease Control and Prevention (CDC), hypertension in youth is on the decline, but more than 1 in 7 youth ages 12 to 19 had high blood pressure or elevated blood pressure during 2013 to 2016. Children who eat higher-sodium diets are 36 percent more likely to have elevated blood pressure than children who eat lower-sodium diets.<sup>42</sup>

Along with the DGA, a number of public health organizations recommend limiting sodium intake to less than 2,300 mg/day for adults.<sup>43</sup> The CDRR level for sodium in children aged 4-8 years and 9-13 years is even lower, at 1,500 mg/day and 1,800 mg/day, respectively.<sup>44</sup>

In anticipation of schools being required to meet the original sodium-reduction targets, companies have worked hard to reformulate their products. CSPI recently published its first-ever School Meals Corporate Report Card. The report provides a detailed picture of the extent to which the products sold by major school food service companies for the K-12 age group would meet sodium Targets 2 and 3 across all age/grade groups. Products were classified into major and minor food groups based on USDA's Food Grouping System for school meals. For instance, CSPI found that all companies met or were very close to meeting Target 2 sodium (lunch) with compliance  $\geq$  94 percent for K-5 and 9-12 in all applicable minor food groups (23 food groups), except for *dark green, other, beans and peas, mixtures, cooked and raw*.<sup>45</sup>

We expect industry efforts will soon intensify to align with the FDA's recently released voluntary sodium-reduction targets for the food industry. The FDA's voluntary targets also complement state and local efforts such as New York City's National Salt and Sugar Reduction Initiative<sup>46</sup> and past efforts such as the Centers for Disease Control and Prevention (CDC)'s Sodium Reduction in Communities Program.<sup>47</sup> A variety of methods and technologies are available to help reduce levels of sodium in many food categories.<sup>48</sup> The USDA should ensure that an added sugars standard is implemented in tandem with sodium reduction targets in order to

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<sup>40</sup> Whelton PK, et al. Sodium, Blood Pressure, and Cardiovascular Disease: Further Evidence Supporting the American Heart Association Sodium Reduction Recommendations. *Circulation*. 2012;126:2880-89.

<sup>41</sup> Appel LJ.

<sup>42</sup> Rosner B, et al. Childhood Blood Pressure Trends and Risk Factors for High Blood Pressure: the NHANES Experience 1988–2008. *Hypertension*. 2013;62:247–54.

<sup>43</sup> Institute of Medicine. *Sodium Intake in Populations: Assessment of Evidence*. Washington, DC: The National Academies Press; 2013.

<sup>44</sup> National Academies of Sciences, Engineering, and Medicine. *Dietary Reference Intakes for Sodium and Potassium*.

<sup>45</sup> Center for Science in the Public Interest. *2021 School Meals Corporate Report Card*. 2021.

<sup>46</sup> New York City Department of Health and Mental Hygiene. National Salt and Sugar Reduction Initiative (NSSRI). <https://www1.nyc.gov/site/doh/health/health-topics/national-salt-sugar-reduction-initiative.page>. Accessed March 2022.

<sup>47</sup> Centers for Disease Control and Prevention. Sodium Reduction in Communities Program (SRCP). [https://www.cdc.gov/dhdsp/programs/sodium\\_reduction.htm](https://www.cdc.gov/dhdsp/programs/sodium_reduction.htm). Accessed December 2020.

<sup>48</sup> Antman EM, et al. Stakeholder Discussion to Reduce Population-Wide Sodium Intake and Decrease Sodium in the Food Supply: A Conference Report from the American Heart Association Sodium Conference 2013 Planning Group. *Circulation*. 2014;129:660-79.

avoid unintended consequences of increasing added sugars. A small observational study in a large, urban school district observed a 1-g increase in sugar among entrées with every 10-mg reduction in sodium.<sup>49</sup>

Prior to the pandemic, many schools had been working hard and were at or very close to meeting Target 2 levels. For example, the school meals program in Elbert County Schools, Georgia has done tremendous work to get their menus down to safe levels of sodium. They have employed tactics such as training staff to analyze sodium content in their menus; educating students on nutrition and menu changes; worked with local and regional companies to find alternative products that met their sodium needs; and re-worked their recipes to keep their foods with less sodium appealing to students.<sup>50</sup> Other schools have also lowered sodium by using spice bars and salad bars that give students more options to provide flavor with less salt. Schools that have shared success stories with us—from Virginia to California, Indiana to Kansas, Oklahoma to New York, and Georgia to North Dakota—have successfully used these best practices in their efforts to meet Target 2 sodium levels. The USDA should put greater effort into elevating and sharing these methods and encouraging their adoption by other schools around the country.

The USDA’s programs like “Team Up for School Nutrition Success” and the “What’s Shaking?” initiative have been beneficial, but the USDA has not kept these programs active. Congress has recognized the need to provide dedicated technical assistance on sodium reduction for schools and included \$1 million in the FY2020<sup>51</sup> and FY2021<sup>52</sup> House Agriculture Appropriations bills and increased overall technical assistance to \$2 million in the FY2022 bills.<sup>53</sup> The USDA needs to focus on targeted technical assistance that delivers more intensive and personalized training for those programs that may still have difficulties lowering sodium. In addition, the USDA Foods (commodities) program has set a good example for schools by providing more moderate-sodium options, such as low-sodium and no salt added vegetables,<sup>54</sup> and that work should continue.<sup>55</sup>

### **Whole Grains: The USDA must establish a whole grain requirement aligned with the 2020 DGA.**

The 2020 DGA recommends that at least half of grains consumed be whole.<sup>56</sup> According to the USDA, eating more whole grains is associated with reduced risk of heart disease and as part of

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<sup>49</sup> Cohen JFW, Richardson S, Roberto CA, Rimm EB. Availability of Lower-Sodium School Lunches and the Association with Selection and Consumption among Elementary and Middle School Students. *J Acad Nutr Diet*, 2021; 121(1), 105-111.e2.

<sup>50</sup> U.S. Department of Agriculture. Training the Teachers in Our Biggest Classrooms. <https://www.usda.gov/media/blog/2016/03/8/training-teachers-our-biggest-classrooms>. Published March 2016. Accessed March 2022.

<sup>51</sup> P.L. 116-94. For more details see H.Rept. 116-107 report to accompany H.R. 3164.

<sup>52</sup> P.L. 116-260. For more details see H.Rept. 116-446 report to accompany H.R. 7610.

<sup>53</sup> FY2022 Explanatory Statement. Division A: Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2022.

<sup>54</sup> U.S. Department of Agriculture. USDA Foods Available List for School Year 2022 for Schools and Institutions. Accessed March 2022.

<sup>56</sup> U.S. Department of Health and Human Services and U.S. Department of Agriculture. *2020-2025 Dietary Guidelines for Americans*.

<sup>56</sup> U.S. Department of Health and Human Services and U.S. Department of Agriculture. *2020-2025 Dietary Guidelines for Americans*.

an overall healthy diet may help with weight management and a healthful source of fiber for digestion.<sup>57</sup> Children ages 5 to 18 do not meet the recommended intake for whole grains and exceed the recommended limit for refined grains.<sup>58</sup>

According to the USDA, less than 15 percent of school food authorities requested a whole grain-rich waiver.<sup>59</sup> CSPI found high compliance ranges among the top K-12 companies (all companies were  $\geq 75$  percent compliant) for the majority of food groups with creditable grains (13 of 18 minor food groups).<sup>60</sup> In 15 of the 18 minor food groups with grains, there was at least one company that achieved 100 percent compliance.<sup>61</sup> The USDA found that for combination lunch entrées, schools provided the whole-grain-rich versions of all types of combination entrées in all grades more frequently on daily lunch menus than non-whole-grain-rich versions (except for *mixtures with meats/meat alternates and vegetables*).<sup>62</sup> Further, the USDA's commodity food program for school meals (USDA Foods) provides whole grain products and the USDA offers resources on providing whole-grain-rich options.<sup>63</sup>

Many schools offer whole-grain-rich products on their menus. Successful strategies for encouraging students to eat more whole grains include student surveys, samples and taste tests, experimenting with new products and recipes, and peer-to-peer sharing of food preparation techniques. These techniques have also been successful in sodium reduction efforts.

Given the flexibilities provided in recent years as a result of the rollbacks and the pandemic waivers, it is reasonable that schools need time to return to serving grains consistent with the DGA. Without a clear commitment from the USDA in recent years around the importance of offering whole-grain-rich products, coupled with the supply chain and labor disruptions of the pandemic, schools and some companies will need time to recommit to whole-grain-rich grains despite the top companies already providing ample options. However, we urge the USDA to set a standard that ensures at least half of all grains students consume at school are whole. One strategy for this is the previous standard that all grains must be whole-grain-rich. We do not recommend that the USDA require half of grain products to be 100 percent whole-grain, as we predict that it may result in the unintended consequences of increased waste (if students take the 100 percent whole grain products but do not eat them), fewer whole grains being served (under Offer vs. Serve), and reduced consumption of whole grains as a result. Lastly, we believe this strategy would reduce incentive for industry to reformulate their products and/or make whole-grain-rich products more palatable.

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<sup>57</sup> U.S. Department of Agriculture. All about the Grains Group. <https://www.choosemyplate.gov/eathealthy/grains>. Accessed March 2022.

<sup>58</sup> U.S. Department of Agriculture and U.S. Department of Health and Human Services. Dietary Guidelines for Americans, 2020–2025. 9th Edition. December 2020.

<sup>59</sup> 82 Fed. Reg. 56703. Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements.

<sup>60</sup> Center for Science in the Public Interest. *2021 School Meals Corporate Report Card*. 2021.

<sup>61</sup> Center for Science in the Public Interest. *2021 School Meals Corporate Report Card*. 2021.

<sup>62</sup> U.S. Department of Agriculture, *School Nutrition and Meal Cost Study Volume 2*. 2019. <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNMCS-Volume2.pdf>. Accessed March 2022.

<sup>63</sup> U.S. Department of Agriculture. Tools for Schools: Serving Whole Grain-Rich. <https://www.fns.usda.gov/cn/tools-schools-serving-whole-grain-rich>. Accessed March 2022.

We urge the USDA to provide training and technical assistance to school districts that are expressing difficulty finding acceptable whole-grain-rich grains.

**The USDA has authority to interpret the National School Lunch Act (NSLA) to require standards that follow DGA recommendations.**

Because “USDA is charged with administering the school lunch and breakfast programs,” courts will “review [the Department’s] construction of these statutes under the familiar two-step process of [*Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)], commonly referred to as the *Chevron* deference doctrine.”<sup>64</sup> As the Supreme Court explained in *Chevron*, courts have “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”<sup>65</sup>

Under the first step of *Chevron*, courts ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>66</sup> In answering this question, a reviewing court employs “traditional tools of statutory construction,”<sup>67</sup> including analyzing the text and structure of the statute.<sup>68</sup>

“If, however, the court determines Congress has not directly addressed the precise question at issue,” the court moves on to the second step.<sup>69</sup> At this stage, “the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.”<sup>70</sup> Instead, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>71</sup>

While CSPI believes that the NSLA unambiguously requires the promulgation of nutrition standards that align with the DGA’s specific recommendations, one district court has held that the relevant statutory provisions are ambiguous.<sup>72</sup> In *CSPI v. Perdue*, the District of Maryland found that the statute could plausibly be read in two different ways—*i.e.*, to require the nutrition standards to be consistent with the DGA’s specific recommendations<sup>73</sup> *or* to require nutrition standards that are only loosely based on the DGA broadly speaking.<sup>74</sup> The *CSPI* decision thus

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<sup>64</sup> *CSPI*, 438 F. Supp. 3d at 561 (citing 42 U.S.C. §§ 1752, 1758(a)(1)(B), (k)(1)(B)).

<sup>65</sup> 467 U.S. at 844.

<sup>66</sup> 467 U.S. at 842-43.

<sup>67</sup> 467 U.S. at 843 n.9.

<sup>68</sup> *Cabell Huntington Hosp. Inc. v. Shalala*, 101 F.3d 984, 986 (4th Cir. 1996)

<sup>69</sup> *Chevron*, 467 U.S. at 843.

<sup>70</sup> *Chevron*, 467 U.S. at 843.

<sup>71</sup> *Chevron*, 467 U.S. at 843.

<sup>72</sup> *CSPI*, 438 F. Supp. 3d at 562. We note that this decision is not binding on other courts, which may well find that the statute *does* unambiguously require nutrition standards that align with the DGA’s recommendations. *See Muthana v. Pompeo*, 985 F.3d 893, 901 n.3 (D.C. Cir. 2021) (“[A] decision of our district court does not establish the law of the circuit, nor, indeed, does it even establish the law of the district.” (citations omitted)); *ATSI Comm., Inc. v. Shaar Fund, Ltd.*, 547 F.3d 109, 112 n.4 (2d Cir. 2008) (“The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another.” (internal quotation marks omitted)).

<sup>73</sup> *CSPI*, 438 F. Supp. 3d at 562-63 (acknowledging that “Congress’ requirement that school meals be ‘consistent with the goals’ of the Dietary Guidelines . . . could refer to the specific quantitative recommendations” made by the Dietary Guidelines); *id.* at 563 (“It is plausible that [the statute requires] that USDA’s rules and regulations must be ‘substantially similar’ to the Dietary Guidelines . . .”).

<sup>74</sup> *CSPI*, 438 F. Supp. 3d at 564.

makes clear that the Department may permissibly construe the statute to require alignment with the DGA's recommendations and that such a reading would receive deference by a reviewing court.

***The best reading of the Act requires the nutrition standards to align with the DGA's recommendations.***

In this instance, construing the relevant statutory text to require standards that adhere to DGA recommendations is not only permissible, it is the best reading of the statute. Through three principal provisions, the NSLA requires the Secretary to promulgate nutrition standards that conform with the recommendations made by the Dietary Guidelines. First, the statute requires covered school meals to be “consistent with the goals of the most recent Dietary Guidelines.”<sup>75</sup> Second, this core requirement is achieved through a statutory directive that, since 1994, has required the Department to promulgate nutrition standards that bring school meals “into conformance with the guidelines contained in the most recent ‘Dietary Guidelines for Americans.’”<sup>76</sup> As currently codified, that mandate directs the USDA to establish nutrition standards that are “based on the most recent Dietary Guidelines for Americans, that reflect specific recommendations, expressed in serving recommendations, for increased consumption of foods and food ingredients offered in school nutrition programs.”<sup>77</sup> Third, Congress reinforced this directive in 2010 when it commanded the Department to issue regulations that “update the meal patterns and nutrition standards for the school lunch [and breakfast] program[s] . . . based on recommendations made” in a 2009 report published by the Food and Nutrition Board of the National Research Council on the National Academy of Sciences.<sup>78</sup> The report, known as the IOM Report, was commissioned by the Department for the precise purpose of providing recommendations to bring school nutrition standards into conformance with the dietary guidelines.<sup>79</sup>

To determine the best meaning of these provisions, they must be “read in their context and with a view to their place in the overall statutory scheme.”<sup>80</sup> The goal is to “interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into an harmonious whole.’”<sup>81</sup> Applying that approach here, it is clear that Congress intended that the nutrition standards adhere to nutrition science and, in particular, the specific recommendations of the Dietary Guidelines.

To begin, the core obligation that school meals be “*consistent with* the goals of the most recent Dietary Guidelines”<sup>82</sup> requires that meals be “compatible [with], or conform[] to”<sup>83</sup> the

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<sup>75</sup> 42 U.S.C. § 1758(f)(1)(A).

<sup>76</sup> Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, § 112, 108 Stat. 4699, 4708 (1994).

<sup>77</sup> 42 U.S.C. § 1758(a)(4)(B).

<sup>78</sup> Healthy and Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 201, 124 Stat. 3183, 3214 (2010).

<sup>79</sup> Inst. of Med. of the Nat'l Acads., *School Meals: Building Blocks for Healthy Children 2* (Virginia A. Stallings et al. eds., 2010).

<sup>80</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

<sup>81</sup> *Id.* (citations omitted).

<sup>82</sup> 42 U.S.C. § 1758(f)(1)(A) (emphasis added).

<sup>83</sup> See *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1496 (9th Cir. 1997) (“‘Consistent’ means in agreement with, compatible, or conforming to the same principles or course of action.” (citing Webster’s II New Riverside U. Dictionary (1984))).

Guidelines’ goals—that is, “the object or end” that the Guidelines “strive to attain.”<sup>84</sup> Here, the “object or end” of the Guidelines is found clearly in the explicit, quantitative objectives set forth by the Guidelines in the form of numerical daily targets for consumption. Conversely, meals with sodium or added sugars levels that exceed the Guidelines’ maximum levels, or that lack recommended levels of whole grains, are not consistent with the Guidelines’ goals because such meals “show[] . . . qualities” that “oppos[e], conflict[] . . . or contradict[]” the recommendations made by the Guidelines with respect to sodium and whole grains.<sup>85</sup>

Similarly, the statutory provisions that address the federal nutrition standards also require a close alignment with the DGA’s recommendations. In particular, the command that nutrition standards be “based on the most recent Dietary Guidelines”<sup>86</sup> requires that the Guidelines be the “foundation” for such standards,<sup>87</sup> and that the standards be “substantially similar” to the Guidelines.<sup>88</sup> Likewise, the mandate that the nutrition standards “reflect specific recommendations, expressed in serving recommendations” made by the Guidelines<sup>89</sup> demands that the standards “make manifest or apparent” those specific recommendations.<sup>90</sup>

The legislative history further supports this reading of the text. In 1994, when “school lunches were found to have nearly twice the recommended amount of sodium,”<sup>91</sup> Congress first required that nutrition standards be brought “into conformance with” the Guidelines, setting a deadline of School Year 1996-1997 by which schools would begin serving meals “consistent with” the Guidelines.<sup>92</sup>

When Congress amended the National School Lunch Act (NSLA) in 2004 to require the Department to update nutrition standards “based on” more recent Dietary Guidelines,<sup>93</sup> a key Senate report “encourage[d] the Secretary, for the school year beginning in July 2004, to take action to encourage schools to offer foods that reflect *consumption recommendations* made by the Dietary Guidelines.”<sup>94</sup> And when Congress amended the NSLA in 2010, reiterating that schools must serve meals “consistent with” the Guidelines and that the Department must set nutrition standards “based on” the IOM Report,<sup>95</sup> a committee report explained that

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<sup>84</sup> Webster’s New World C. Dictionary (5th ed. 2018); *see also* *Goal*, Merriam Webster’s C. Dictionary (11th ed. 2007) (defining goal as “the end toward which effort is directed”); *Goal*, Am. Heritage Dictionary of the Eng. Language (5th ed. 2018) (“The object toward which an endeavor is directed; an end.”).

<sup>85</sup> *See Matthews v. Wis. Energy Corp.*, 534 F.3d 547, 556 (7th Cir. 2008) (citing Webster’s Third New Int’l Dictionary 484 (1981)).

<sup>86</sup> 42 U.S.C. § 1758(a)(4)(B)

<sup>87</sup> *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) (citing cases); Webster’s Third New Int’l Dictionary 180 (1971)).

<sup>88</sup> *See Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 828 (7th Cir. 2013) (statutory provision barring *qui tam* claims “based upon [a] public disclosure” applies to claims that are “substantially similar to publicly disclosed allegations”).

<sup>89</sup> 42 U.S.C. § 1758(a)(4)(B) (emphasis added).

<sup>90</sup> *Reflect*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/reflect> (last visited Mar. 1, 2022).

<sup>91</sup> *See* S. Rep. 103-300, at 3 (1994) (noting that school lunches had “nearly twice the recommended amount of sodium”).

<sup>92</sup> *See* Pub. L. No. 103-448, §§ 106, 112, 108 Stat. at 4703, 08.

<sup>93</sup> *See* Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 103, 118 Stat. 729, 732 (2004).

<sup>94</sup> S. Rep. No. 108-279, at 24-25 (2004) (discussing Guidelines’ recommendation to increase whole grain consumption) (emphasis added).

<sup>95</sup> Pub. L. No. 111-296, § 201, 208.

“considerable work remains to be done to improve children’s diets and to bring Federally-subsidized meals in line with [the Guidelines],” noting in particular that children’s diets were low in whole grains and high in sodium.<sup>96</sup> Indeed, prior to the 2018 Rollback Rule, the USDA long understood the statutory scheme to function just this way. For example, the 2012 School Nutrition Rule—which implemented compliance targets for both sodium and whole grains that aligned with the Guidelines’ specific recommendations—explained that the statute “requires that . . . meals [be] consistent with the goals of the most recent Dietary Guidelines,” and that “by updating program regulations [*i.e.*, nutrition standards] consistent with the Dietary Guidelines’ goals and aligning the regulations with the requirements placed on schools under the statute, [the 2012 Rule] will ensure that school meal nutrition requirements reflect current nutrition science.”<sup>97</sup> Likewise, the USDA’s 2000 rulemaking asserted that “[f]or school meals, the Dietary Guidelines for Americans must be met,”<sup>98</sup> and the 1995 Rulemaking explained that the “foundation of this final rule is the requirement that . . . school lunches and breakfasts comply with the recommendations of the Dietary Guidelines.”<sup>99</sup>

In sum, the best reading of the statutory provisions governing the School Lunch and Breakfast Programs is one that requires the USDA to promulgate nutrition standards that will ensure compliance with the recommendations in the Dietary Guidelines. Thus, under *Chevron*—and as demonstrated by the federal court decision in *CSPI*—even if the statute does not require this result, the agency has, at a minimum, the discretion to adopt this reading.

***The USDA’s forthcoming rulemaking should expressly adopt this statutory interpretation as the best reading of the statute.***

The USDA should explicitly adopt the above interpretation of the statute’s requirements in its forthcoming rulemaking in order to provide schools and the food industry with a sense of certainty and transparency. Both schools and the food industry made great progress towards coming into compliance with the update of the nutrition standards under the HHFKA. Unfortunately, the 2018 Rollback Rule—which lowered nutrition standards contrary to the DGA’s recommendations—caused some of that progress to slow. The USDA can encourage schools and industry to recommit to providing more nutritious foods by sending a clear signal that nutrition standards will continue to align with the DGA’s recommendations going forward, as required by law.

Clearly stating that the agency believes this interpretation is the best reading of the statute’s requirements will also help ensure that reviewing courts provide deference to the USDA’s construction of the statute. While courts may at times defer to a statutory interpretation that is implicit in an agency action,<sup>100</sup> they are more likely to defer to an interpretation that is

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<sup>96</sup> S. Rep. No. 111-178, at 4-5 (2010).

<sup>97</sup> 77 Fed. Reg. 4088, 4132 (2012).

<sup>98</sup> 65 Fed. Reg. 12429, 12431 (2000).

<sup>99</sup> 60 Fed. Reg. 31188, 3188 (1995).

<sup>100</sup> See, e.g., *Nat’l R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 420 (1992) (deferring to an agency even though it “did not in so many words articulate its interpretation” because the “interpretation . . . was a necessary presupposition of the [agency’s] decision.”); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 242 (D.C. Cir. 2013) (“We give *Chevron* deference to FERC’s view of what constitutes ‘reasonable notice’ even though it comes in this case not explicitly, as a statement of law, but implicitly as a fact-bound determination.”).

explicit.<sup>101</sup> Accordingly, the Department’s forthcoming rulemaking should state clearly that the Department believes that the best reading of the NSLA requires nutrition standards to conform to the DGA’s specific recommendations.

**The USDA should set forth in detail a reasoned basis for changes in policy.**

Any changes in the USDA’s position should be accompanied by an explanation that addresses the USDA’s findings in prior rulemakings. To meet its obligations under the Administrative Procedure Act, an agency that changes its existing position must “‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’”<sup>102</sup> In doing so, an agency should address the “facts and circumstances that underlay . . . the prior policy.”<sup>103</sup> CSPI therefore urges the USDA to provide such an explanation for returning to the longstanding interpretation of the statute that predated the 2018 Rollback Rule. Likewise, the USDA should provide a detailed explanation for updating the nutrition standards to align with the 2020 DGA.

***Statutory Interpretation***

To begin, an explicit discussion of the NSLA’s requirement that nutrition standards align with the DGA should acknowledge that the 2018 Rollback Rule implicitly adopted a different understanding of the statute. By eliminating Target 3 for sodium and requiring that only 50 percent of grains served be whole grain-rich, the 2018 Rollback Rule departed from the 2010 DGA’s recommendations on sodium and whole grains.<sup>104</sup> At the same time, the 2018 Rollback Rule asserted that the lowered nutrition standards “reflect[ed] the most current Dietary Guidelines for Americans.”<sup>105</sup> The 2018 Rollback Rule therefore did not interpret the statute to require nutrition standards that align with the DGA’s specific recommendations.

The USDA should acknowledge this fact and explain that it is now interpreting the statute to require close alignment with the DGA’s recommendations for three reasons. First, this interpretation is the best reading of the text, especially in light of its legislative history as explained above. Second, interpreting the statute to require standards that align with the DGA’s recommendations best serves the purpose of the statute to “safeguard the health and well-being of the Nation’s children.”<sup>106</sup> Indeed, Congress has made clear, with increasing specificity over time, that this purpose is achieved by promulgating school nutrition standards that conform with the most recent nutrition science. Third, this construction is consistent with the USDA’s prior, longstanding interpretation as demonstrated in various rulemakings that predated the 2018 Rollback Rule.

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<sup>101</sup> See, e.g., *Menkes v. Dep’t of Homeland Sec.*, 486 F.3d 1307, 1314 (D.C. Cir. 2007) (declining to afford *Chevron* deference to an implied interpretation because “an implication is not an agency interpretation, and we are disinclined to tease out . . . an interpretation that the agency itself has failed to offer.”). Cf. *CSPI*, 438 F. Supp. 3d at 569 (expressing skepticism that the 2012 School Lunch Rule “represents a legal interpretation of federal law” because “[n]owhere in the earlier rules did USDA explicitly state that federal law required close alignment between the Dietary Guidelines and school nutrition standards”).

<sup>102</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

<sup>103</sup> *Id.* at 222.

<sup>104</sup> 83 Fed. Reg. 63775 (2018).

<sup>105</sup> *Id.* at 63783.

<sup>106</sup> 42 U.S.C. § 1751.

### ***Nutrition Standards***

As part of its explanation for aligning the nutrition standards with the DGA’s recommendations, the USDA should address the prior findings that underlay the nutrition standards established by the 2018 Rollback Rule. Specifically, the 2018 Rollback justified lowering the nutrition standards by finding that schools faced operational challenges, including “decreased student participation and/or meal consumption, difficulties preparing whole grain-rich food items, and limited ability to offer appealing meals with lower sodium content.”<sup>107</sup>

The forthcoming rulemaking should acknowledge these prior findings and explain that nutrition standards that align with the DGA’s recommendations are nevertheless justified because such standards are consistent with the best reading of the statute, consistent with nutrition science, and necessary to reduce various health risks to children, such as the increased risk of high blood pressure, heart disease, and stroke that results from excessive sodium consumption. Moreover, the USDA should explain that the challenges identified by the 2018 Rollback Rule can be addressed while maintaining the requisite nutrition standards. As explained in detail below, student participation is unrelated to nutrition standards; food waste can be addressed by providing students with more time to eat and by implementing “offer vs. serve”; and any technical difficulties faced by schools in preparing foods can be overcome through increased technical assistance.

### ***Additional background***

#### **The COVID-19 pandemic has made school meals more important than ever.**

While the pandemic has necessitated temporary flexibilities for schools, it has also laid bare the critical role that healthy school meals play. The majority of children (76.9 percent in 2020) who participate in the program qualify for free or reduced-price meals based on their household income.<sup>108</sup> The prevalence of food insecurity for all households with children increased in 2020.<sup>109</sup> School meals remain an important tool for providing nutrition assistance to children and weathering some of the economic impacts of the COVID-19 pandemic that many families face.

Given that healthier school meals have been linked to healthier body weight outcomes for children, optimizing their nutritional quality is critical. In 2017-2018, prevalence of overweight, obesity, and severe obesity in children and adolescents aged 2 to 19 years was 41.5 percent<sup>110</sup> According to the CDC, the monthly rate of body mass index (BMI) increase among children and adolescents during the pandemic approximately doubled compared to pre-pandemic.<sup>111</sup> Children with pre-pandemic overweight or obesity and younger school-aged children experienced the largest increases.

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<sup>107</sup> 83 Fed. Reg. 63775.

<sup>108</sup> U.S. Department of Agriculture. *Child Nutrition Tables: National Level Annual Summary Tables: FY 1969-2020*. <https://www.fns.usda.gov/pd/child-nutrition-tables>. Accessed March 2022.

<sup>109</sup> Coleman-Jensen A, et al. *Household Food Security in the United States in 2020*. U.S. Department of Agriculture, Economic Research Service. 2021. <https://www.ers.usda.gov/webdocs/publications/102076/err-298.pdf?v=5485.5>.

<sup>110</sup> Fryar CD, Carroll MD, Afful J. Prevalence of overweight, obesity, and severe obesity among children and adolescents aged 2–19 years: United States, 1963–1965 through 2017–2018. NCHS Health E-Stats. 2020

<sup>111</sup> Lange SJ, et al. Longitudinal Trends in Body Mass Index Before and During the COVID-19 Pandemic Among Persons Aged 2–19 Years — United States, 2018–2020. *MMWR Morb Mortal Wkly Rep* 2021;70:1278–1283.

**Nutrition standards have been a resounding success and have enjoyed widespread public support.**

Prior to the pandemic, virtually all schools<sup>112</sup> participating in the National School Lunch Program (NSLP) and School Breakfast Program (SBP) were making great progress toward serving healthier meals for participating children with less sodium; more whole grains, fruits, and vegetables; and fewer sugary drinks and unhealthy snacks. The Harvard University T.H. Chan School of Public Health concluded that the 2012 update to school meal standards and the 2013 update to competitive foods from the Healthy, Hunger-Free Kids Act of 2010 (HHFKA) is “one of the most important national obesity prevention policy achievements in recent decades.”<sup>113</sup> The researchers estimated that these improvements could prevent more than two million cases of childhood obesity and save up to \$792 million in health-care related costs over ten years. A 2020 study found that for children in poverty, the risk of obesity declined substantially each year after implementation of HHFKA such that the risk of obesity would have been 47 percent higher in 2018 if the nutrition standards had not been updated.<sup>114</sup>

The USDA’s School Nutrition and Meal Cost Study (SNMCS), the only nationally representative study that assessed the nutritional quality and costs of producing school meals before and after implementation of the HHFKA, found significant improvements to the nutritional quality of school meals.<sup>115</sup> The SNMCS demonstrated that nutritional quality of reimbursable school breakfasts and lunches had improved between school year SY 2009-2010 and SY 2014-2015 based on mean total scores on the Healthy Eating Index (HEI)-2010.<sup>116</sup> The HEI-2010 total and component scores for food groups measure how well dietary patterns conform to the recommendations made in the 2010 DGA overall and for each individual food group, where higher scores indicate greater compliance.<sup>117</sup> The mean total HEI-2010 score for lunches increased 41 percent—from 57.9 to 81.5 out of a possible 100.<sup>118</sup> The mean total HEI-2010 score for breakfasts increased 44 percent—from 49.6 to 71.3.<sup>119</sup> According to the authors, these findings suggest that “updated nutrition standards for school meals have had a positive and significant influence on nutritional quality.”<sup>120</sup> Compliance with the whole grain requirement and sodium reduction targets were associated with significantly higher HEI-2010 scores.<sup>121</sup> The

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<sup>112</sup> U.S. Department of Agriculture. *School Meal Certification Data* (as of September 2016). Washington, DC: USDA; 2017.

<sup>113</sup> Gortmaker SL, et al. Three Interventions that Reduce Childhood Obesity Are Projected to Save More Than They Cost to Implement. *Health Aff.* 2015;34:1932-9.

<sup>114</sup> Kenney EL, et al. Impact Of The Healthy, Hunger-Free Kids Act On Obesity Trends. *Health Aff.* 2020;39:1122–1129.

<sup>115</sup> Fox MK, Gearan E. *School Nutrition and Meal Cost Study Summary of Findings*. U.S. Department of Agriculture Food and Nutrition Service. April 2019. [https://The.USDA-prod.azureedge.net/sites/default/files/resource-files/SNMCS\\_Summary-Findings.pdf](https://The.USDA-prod.azureedge.net/sites/default/files/resource-files/SNMCS_Summary-Findings.pdf)

<sup>116</sup> The HEI-2010 is a measure of nutritional quality based on the 2010 Dietary Guidelines for Americans.

<sup>117</sup> Guenther PM, et al. The Healthy Eating Index-2010 Is a Valid and Reliable Measure of Diet Quality According to the 2010 Dietary Guidelines for Americans. *J Nutr.* 2014;144(3): 399–407. <https://doi.org/10.3945/jn.113.183079>

<sup>118</sup> Fox, 2019.

<sup>119</sup> Fox, 2019.

<sup>120</sup> Fox, 2019.

<sup>121</sup> U.S. Department of Agriculture, School Nutrition and Meal Cost Study Volume 2. 2019.

SNMCS also found that schools made significant progress increasing whole grains<sup>122</sup> and reducing sodium.<sup>123</sup>

The SNMCS findings serve to counter some common misconceptions about evidence-based nutrition standards for school meals, one being that healthier meals are less palatable to students, leading to decreased participation or increased food waste. In fact, the higher the nutritional quality of the school lunch, the higher the rate of participation in the NSLP. In particular, the average rate of NSLP participation was 61 percent for schools in the highest quartile of the HEI-2010 distribution and 50 percent for schools in the lowest quartile.<sup>124</sup> Many other factors impact participation, such as sales of competitive foods, increased charges for paid meals, time to eat, long lunch lines, and school closures and consolidations. Furthermore, the study found that the amount of plate waste after the updated nutrition standards was comparable to that found in studies prior to the HHFKA.

Another common assumption is that serving healthier food costs more. On the contrary, the mean reported costs per meal were not significantly higher in schools that had higher scores on the HEI-2010 than in schools that scored lowest on the HEI-2010.<sup>125</sup>

Clearly, aligning nutrition standards with the DGA had a positive impact on the nutritional quality of meals *served*. There is also evidence that participation in the school meals programs since HHFKA is positively related to the healthfulness of meals *consumed*. The SNMCS found that lunches consumed by NSLP participants achieved a higher mean HEI-2010 score than those of matched non-participants (80.1 versus 65.1).<sup>126</sup> In a serial cross-sectional analysis of pre-policy (2007-2010) and post-policy (2013-2016) data from the National Health and Nutrition Examination Survey (NHANES), one study found that diet quality during lunch (measured by HEI-2010 score) improved more for NSLP participants than nonparticipants, a finding that held true across income levels.<sup>127</sup> Additional studies have documented the efficacy of the updated nutrition standards with respect to meals selected<sup>128</sup> and consumed.<sup>129</sup> Notably, a 2021 study found that the foods children consumed from school meals provided the highest mean diet

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<sup>122</sup> The HEI-2010 score for refined grains in school lunches more than doubled from 46 to 96 percent of the maximum score, indicating a dramatic decrease in the concentration of refined grains in lunches over time. The score for refined grains for breakfasts also more than doubled from 45 to 95 percent of the maximum score. The HEI-2010 score for whole grains in school lunches increased from 25 to 95 percent of the maximum score, indicating an increase in the whole grains served in lunch meals. The HEI-2010 score for whole grains in school breakfasts increased from 38 to 96 percent of the maximum score.

<sup>123</sup> The vast majority of schools (85 percent) met or were close to meeting the first sodium-reduction target (Target 1) in the first year that the target was required (SY2014-2015).

<sup>124</sup> Fox, 2019.

<sup>125</sup> Fox, 2019.

<sup>126</sup> Fox, 2019.

<sup>127</sup> Kindernecht BS, Harris C, Jones-Smith J. Association of the Healthy, Hunger-Free Kids Act With Dietary Quality Among Children in the US National School Lunch Program. *JAMA*. 2020;324(4):359-368.

<sup>128</sup> Johnson DB, Podrabsky M, Rocha A, et al. Effect of the Healthy Hunger-Free Kids Act on the Nutritional Quality of Meals Selected by Students and School Lunch Participation Rates. *JAMA Pediatr*. 2016;170:e153918.

<sup>129</sup> Schwartz MB, et al. New School Meal Regulations Increase Fruit Consumption and Do Not Increase Total Plate Waste. *Child Obes*. 2015;11:242-7.

quality of all major US food sources—better than grocery stores, restaurants, worksites, and others.<sup>130</sup>

*Strong public support for nutrition standards*

More than 70 percent of parents with school-age children support the updated school meal nutrition standards, according to a nationally representative poll.<sup>131</sup> Strong nutrition standards have also historically enjoyed bipartisan support. Under the George W. Bush administration, Congress passed the Child Nutrition Reauthorization Act of 2004. This legislation directed the USDA to update federal school meal nutrition standards based on the Dietary Guidelines at the time. Congress enacted the HRFKA with strong bipartisan support.

*Additional challenges can be addressed without lowering nutrition standards.*

*Reducing food waste*

According to board member and former President of the Academy of Nutrition and Dietetics Terri J. Raymond, food waste is, “one of the most pressing challenges of our time and one that is solvable.”<sup>132</sup> A 2019 report suggests that school food waste weighs an estimated 530,000 tons annually, with a value of \$1.7 billion.<sup>133</sup> However, according to the USDA’s School Nutrition and Meal Cost Study, waste has not increased since the implementation of the HRFKA and was a problem well before the meal pattern updates.<sup>134</sup>

As such, weakening nutrition standards is not an evidence-based approach to reducing food waste. Efforts to address school food waste should instead focus on proven strategies such as increased time to eat, timing of meals, recess before lunch, nutrition education, provider technical assistance, utilization of offer vs. serve (explained below), kitchen equipment use (*e.g.*, fruit slicers to make it easier for younger children to eat pre-sliced fruit), involving students in taste tests and meal planning, and renaming and presenting the food in kid-friendly and appealing ways.

*Full Use of Offer vs. Serve (OVS)*

The goal of OVS is to reduce food waste while allowing students to choose the foods they want to eat. The USDA’s own data shows that OVS helps to reduce food waste.<sup>135</sup> When students and cafeteria staff understand OVS, meal lines move smoothly, allowing students to make the most of mealtime and enjoy the wholesome and appealing foods they are served. OVS also helps

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<sup>130</sup> Liu J et al. Trends in Food Sources and Diet Quality Among US Children and Adults, 2003-2018. *JAMA Netw Open*. Apr 1 2021;4(4):e215262.

<sup>131</sup> Hart Research Associates and Ferguson Research. Nationwide Polling Regarding Parents’ Views of School Meal and Smart Snacks Standards telephone poll among 1,112 parents. 2014. Accessed March 2022.

<sup>132</sup> Terri J. Raymond as quoted in Academy of Nutrition and Dietetics. “Academy Applauds New Legislation to Prevent Food Waste in Schools” January 2020. <https://www.eatrightpro.org/news-center/on-the-pulse-of-public-policy/from-the-hill/academy-applauds-new-legislation-to-prevent-food-waste-in-schools>. Accessed on February 16, 2020.

<sup>133</sup>World Wildlife Fund. Food Waste Warriors: A Deep Dive into food waste in US Foods. [https://c402277.ssl.cf1.rackcdn.com/publications/1271/files/original/FoodWasteWarriorR\\_CS\\_121819.pdf?1576689275](https://c402277.ssl.cf1.rackcdn.com/publications/1271/files/original/FoodWasteWarriorR_CS_121819.pdf?1576689275). Accessed on February 16, 2020.

<sup>134</sup> U.S. Department of Agriculture, School Nutrition and Meal Cost Study Volume 4. 2019.

<sup>135</sup> U.S. Department of Agriculture, School Nutrition and Meal Cost Study Volume 4. 2019.

reduce the overall cost of food.<sup>136</sup> Currently, OVS is mandated only for high school students. With proper guidelines and education, schools can use OVS in elementary and middle schools.<sup>137</sup>

### ***Increasing Time for Children to Eat***

The USDA has recommended schools have a 20 or 30-minute lunch period as a strategy to mitigate plate waste.<sup>138</sup> The CDC recommends that students should be given at least 10 minutes for breakfast and 20 minutes for lunch once they have received their meal.<sup>139</sup> However, nearly 50 percent of schools do not require, or even recommend, any amount of time for breakfast, nor do about 25 percent of schools for lunch.<sup>140</sup> A randomized control trial that evaluated seat times and food consumption and waste found that during 10 minutes of seated lunch time, participants consumed significantly less fruit and vegetables compared with 20 minutes of seated lunch time.<sup>141</sup>

Schools should provide 30-minute lunch periods to account for time to stand in line and acquire a meal as well as schedule lunch after recess.<sup>142</sup> School nutrition programs can train staff to efficiently move children through the meal line, offer kiosks and grab-n-go style service throughout the school building, prepare fruits and vegetables that are easier to consume, and, most importantly, take advantage of universal school meal options like the Community Eligible Program (CEP) to help reduce waste.<sup>143</sup> The USDA, CDC, and the Department of Education (DoE) must work together to promote and incentivize best practices around time for children to eat.

We urge the USDA, in coordination with CDC and DoE, to issue guidance that recommends best practices for time to eat and timing of meals, particularly for lunch. A similar request has been made in Congress with the legislation Healthy Meal Time Act (H.R. 6526) introduced by Representatives Kim Schrier, M.D. (WA-08) and Suzanne Bonamici (OR-01), chair of the House Education and Labor Subcommittee on Civil Rights and Human Services. Further, such provisions could be included in local wellness policy requirements.

### ***Providing Additional Technical Assistance and Greater Transparency***

A meaningful investment in technical assistance for school nutrition professionals is imperative to not only help them meet and exceed nutrition standards but to prepare, present, and serve the food in ways that promote consumption and reduce waste. Simple strategies such as cooking

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<sup>136</sup> U.S. Department of Agriculture. Offer vs. Serve Tip Sheet. <https://www.fns.usda.gov/tn/offer-vs-serve-lunch-program-tip-sheet>. Accessed March 2022.

<sup>137</sup> World Wildlife Fund, 2019.

<sup>138</sup> U. S. Department of Agriculture. *Reducing Food Waste at K-12 Schools*. <https://www.usda.gov/foodlossandwaste/schools>. Accessed March 2022.

<sup>139</sup> Centers for Disease Control and Prevention. *Results from the School Health Policies and Practices Study 2016*. [https://www.cdc.gov/healthyyouth/data/shpps/pdf/shpps-results\\_2016.pdf](https://www.cdc.gov/healthyyouth/data/shpps/pdf/shpps-results_2016.pdf). Accessed March 2022.

<sup>140</sup> Centers for Disease Control and Prevention. *Results from the School Health Policies and Practices Study 2016*.

<sup>141</sup> Burg X, et al. Effects of Longer Seated Lunch Time on Food Consumption and Waste in Elementary and Middle School-age Children: A Randomized Clinical Trial. *JAMA Netw Open*. 2021;4(6):e2114148. doi:10.1001/jamanetworkopen.2021.14148

<sup>142</sup> Centers for Disease Control and Prevention. *Making Time for School Lunch*.

<sup>143</sup> Centers for Disease Control and Prevention. *Making Time for School Lunch*.

with spices and placing food items at certain points on the service line can help promote healthy food choices.

According to the USDA, when operators were asked to list challenges they encountered while implementing the new meal patterns they ranked staff training as a three on a five-point scale, indicating that it was a significant challenge.<sup>144</sup> To make lasting change in the NSLP, there must be adequate investment in supporting those expected to make the changes. The solution to operations challenges is to double down and support efforts that have been shown to significantly improve the nutrition quality of food offered to children at school. This is particularly important as schools weather supply chain and labor shortage issues.

We urge the USDA to reinstitute technical assistance trainings and peer-to-peer convenings such as Team Up for School Nutrition Success; initiatives focused on certain standards such as *What's Shaking in School Meals?* for sodium and create a similar one for whole grains and added sugars; and recognition programs such as the HealthierUS School Challenge. The USDA must summarize and assess the materials, trainings, and other products developed through Team Nutrition funding and other federal nutrition education programs and disseminate best practices to schools about how to use these resources effectively.

As part of this, the USDA must regularly report to Congress and the public on technical assistance efforts, particularly on sodium, whole-grain-rich grains, and added sugars. This should include progress by schools to meet the standards and efforts by the USDA to work with industry to provide products that meet the standards. The USDA must also report the compliance with the nutrition standards, which was last publicly posted in 2016, after years of updating these figures quarterly.

### ***Providing Additional Equipment and Infrastructure Investment***

Schools are responsible for supplying high-quality meals that appeal to students and meet nutrition standards.<sup>145</sup> One barrier to child health in schools is outdated infrastructure for food storage and preparation. Since 2009, USDA has provided grants of approximately \$160 million in kitchen equipment funding, which is appropriated annually through Congress.

There have been positive effects of these USDA grants. However, nearly 9 in 10 school districts (88 percent) need at least one additional piece of kitchen equipment, and more than half (55 percent) need infrastructure modifications to serve healthier meals that meet science-based nutrition standards.<sup>146</sup> In a study released by the World Wildlife Fund (WWF), schools reported using equipment to mitigate food waste including the purchase of bulk milk machines, which were recommended as a strategy by WWF to increase milk consumption and reduce food, energy, and packaging waste.<sup>147</sup> An investment in school kitchen equipment is an investment in healthy children.

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<sup>144</sup> U.S. Department of Agriculture, 2019.

<sup>145</sup> Position of the Academy of Nutrition and Dietetics, Society for Nutrition Education and Behavior, and School Nutrition Association: Comprehensive Nutrition Programs and Services in Schools.

<sup>146</sup> The Pew Charitable Trusts and the Robert Wood Johnson Foundation. *Serving Healthy School Meals*. 2013. [https://www.pewtrusts.org/-/media/assets/2013/12/kits\\_equipment\\_report.pdf](https://www.pewtrusts.org/-/media/assets/2013/12/kits_equipment_report.pdf). Accessed August 1, 2021

<sup>147</sup> World Wildlife Fund, 2019.

**Conclusion**

In conclusion, we urge the USDA to establish a new added sugars standard for school meals and competitive foods and update the sodium reduction and whole grain requirements to be aligned with the 2020 DGA recommendations. We urge the USDA to work closely with the food industry and help schools by providing training and technical assistance in meeting these standards.

Sincerely,

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