

Fall 3-2-2004

## Make an Investment in our School Children: Increase the Nutritional Value of School Lunch Programs

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### Recommended Citation

Clint G. Salisbury, *Make an Investment in our School Children: Increase the Nutritional Value of School Lunch Programs*, 2004 BYU Educ. & L.J. 331 (2004).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2004/iss2/6>

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MAKE AN INVESTMENT IN OUR SCHOOL CHILDREN:  
INCREASE THE NUTRITIONAL VALUE OF SCHOOL LUNCH  
PROGRAMS

*Clint G. Salisbury\**

I. INTRODUCTION

Obesity runs rampant among our nation's children and public schools contribute to the problem. Coupling poor school lunch programs with a decrease in physical education classes not only sends the wrong message to children and parents but also creates an unhealthy learning environment that supports the obese lifestyle. While the elimination of physical education classes is cause for concern, this paper focuses on the nutritional ineptness of public school lunch programs, which, if left unfixed, will continue to be a substantial cause of obesity.

*A. Obesity*

Eating food is necessary and pleasurable but when done in excess it may also result in premature death, or at the very least, loss of enjoyment of life. Why is obesity such an epidemic?<sup>1</sup> The answer may simply be human nature. For most of human existence "food was scarce, and getting ahold of it required a great deal of physical energy. Those who ate as many calories as they could were protected against famine and had the energy to reproduce."<sup>2</sup> As a result, Kelly Brownell, Director of the Yale Center for Eating and Weight Disorders, concludes that "humans are hard-wired to prefer rich diets, high in fat, sugar, and variety."<sup>3</sup> This presents a problem for today's school children. Rich diets that are high in fat and sugar are as easy to come by as hefting a five dollar bill over the

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1. Benedict Carey, *Soda Ban: A Drop in the Bucket*, L.A. Times S1 (Sept. 2, 2002) (noting that public health officials have referred to "an epidemic of childhood obesity").

2. Amanda Spake & Mary Brophy Marcus, *A Fat Nation*, 133 U.S. News & World Rpt. 40 (Aug. 19, 2002).

3. *Id.*

counter. Exorbitant intake of nutritionally deficient food combined with minimal energy output has resulted in a doubling in two decades of the “percentage of 6- to 11-year-olds who are overweight . . . and for adolescents the percentage has tripled.”<sup>4</sup>

### *B. Change in Attitude Needed*

Our generation is now responsible for de-programming human nature’s bias towards rich diets that are high in fat and sugar, and planting seeds for a new kind of human nature—nutritional, healthy-minded eating.<sup>5</sup> Because children are the best people with which to begin social change, the United States public school system must make a significant contribution to this effort.<sup>6</sup> More than 27 million children in 96,000 schools eat school lunch every day.<sup>7</sup> American school lunch programs must play a leading role both in offering nutritional meals and in eliminating unhealthy alternatives. De-programming human nature’s desire for unhealthy foods will require a concerted effort at all levels of government and particularly among school officials. Unfortunately, to date, that has not been the case.

Some school officials posit that “as long as McDonald’s and Pizza Hut are available in schools, school food-service[s] . . . have no choice but to offer cheeseburgers, french fries and pizza . . . .”<sup>8</sup> As will be more fully outlined below, this mindset has resulted in most schools providing school lunches that fail to meet federal nutritional guidelines. Little will change until public school officials improve their attitudes about school lunch.

This paper focuses on the problems associated with public school lunch programs and offers an overview of how federal and state legislation are attempting to fix the problems. Part II offers a brief history of the nutritional aspects of the National School Lunch Act and

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4. *Id.*

5. See Carey, *supra* n. 1, at S1 (quoting Barbara Schneeman, a nutrition professor at U. Cal. Davis, who said that “[i]t’s a matter of total lifestyle, of changing not only what we eat but how we live”).

6. See Dan Freedman, *School Lunch Programs Struggle to Fight War on Fat*, Houston Chron. A11 (Sept. 22, 2002) (quoting Marion Nestle, an N.Y.U. nutritionist, who said that “[l]ike it or not, schools ‘have been delegated the responsibility for teaching children about appropriate food choices and setting an example in practice’”); Laura Pappano, *The Chalkboard: Biting Criticism: School Lunch Nutrition Called into Question*, Boston Globe A30 (Oct. 6, 2002) (explaining that “there is increasing clamor for schools to play a bigger role—not just in serving healthier foods, but in getting students to embrace healthier lifestyles”).

7. *National School Lunch Week, 2002*, Exec. Procl. 7609, 67 Fed. Reg. 64029 (Oct. 11, 2002) (available at <<http://www.whitehouse.gov/news/releases/2002/10/20021011-11.html>>).

8. Laura Bird, *An Unbalanced Diet*, Sun-Sentinel (Ft. Lauderdale, Fla.) 1F (July 7, 2002).

the Child Nutrition Act. Part III provides a detailed analysis of *National Soft Drink Association v. Block*, the only case addressing nutritional aspects of school lunch programs. Part IV contains an overview of the challenges the United States Department of Agriculture (USDA) faces in implementing its nutritional goals into school lunch programs and Part V outlines USDA's ideas for remedying the problems. Part VI provides reasons why USDA is responsible for its own school lunch problems. In Part VII, the paper discusses recent federal and state legislation which may improve school lunch programs. The paper concludes in Part VIII.

## II. THE NATIONAL SCHOOL LUNCH ACT AND THE CHILD NUTRITION ACT

Shortly after World War II, Congress passed the National School Lunch Act<sup>9</sup> (NSLA). The creation of NSLA was spurred by a concern for the nation's poor<sup>10</sup> and for the many World War II recruits that were malnourished and weak.<sup>11</sup> However, the purposes behind NSLA were more broad. NSLA "was enacted to safeguard the health and well-being of all the nation's schoolchildren by insuring that they were provided with at least one low-cost, nourishing meal per day, and to encourage the domestic consumption of the nation's agricultural commodities."<sup>12</sup> In order to achieve these goals, NSLA "assist[s] the states, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment"<sup>13</sup> of effective school lunch programs. Grant allocations to the various states are dependant upon a complex formula.<sup>14</sup> Most importantly for school lunch nutritional purposes, NSLA

establishes a National Advisory Council on Child Nutrition, consisting of 13 members appointed by the Secretary of Agriculture. The members of the Council serve without pay . . . and it is their function to make a continuing study of the operation of the programs carried out . . . with a view toward submitting an annual report concerning any recommendations for administrative and legislative changes they might deem appropriate.<sup>15</sup>

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9. 42 U.S.C.S. § 1751 (LEXIS L. Publg. 2003).

10. Donald T. Kramer, *Construction and Application of National School Lunch Act (42 U.S.C.A. §§ 1751 et seq.) and Child Nutrition Act of 1966 (42 U.S.C.A. §§ 1771 et seq.)*, 14 A.L.R. Fed. 634, 636 (1973).

11. Elizabeth Becker & Marian Burros, *Eat Your Vegetables? Only at a Few Schools*, N.Y. Times A1 (Jan. 13, 2003).

12. Kramer, *supra* n. 10, at 636-637.

13. *Id.* at 639.

14. *Id.*

15. *Id.* at 643.

In 1966, Congress supplemented NSLA with the Child Nutrition Act (CNA), which “established a milk program, a school breakfast program, a noncash assistance program to help schools initiate the food programs, and a preschool program to reach children not yet in elementary schools.”<sup>16</sup> CNA was developed “[i]n recognition of *the demonstrated relationship between food and good nutrition and the capacity of children to learn and develop.*”<sup>17</sup> CNA highlights the importance of school lunches that adhere to sound, established nutritional standards, explaining that children learn and develop more properly under those conditions.

### A. Nutritional Standards

Under the authority of NSLA and CNA, the United States Department of Agriculture (USDA) has established nutritional standards for school lunch programs. While the standards have slightly changed over time, current federal law requires that school lunch “provide one-third of the USDA’s daily requirements for protein, vitamin A, vitamin C, iron, calcium and calories.”<sup>18</sup> Furthermore, current federal law “limits the amount of calories that a school lunch can derive from fat. On average, no more than 30 percent of school-lunch calories can come from fat—and less than 10 percent of all calories can come from saturated fat.”<sup>19</sup>

### B. Regulatory Authority

NSLA granted regulatory authority over the school lunch programs to the Secretary of Agriculture. Beginning in 1970, NSLA underwent a series of important amendments. The first amendment authorized the Secretary of Agriculture “to regulate foods sold in competition to the school nutritional program,”<sup>20</sup> most notably soda pop and candy bars. The purpose of the authorization was to allow the Secretary of Agriculture to study the nutritional effects of soda pop and candy bars in competition with school lunch. As a result, the Secretary formed a regulation restricting “the sale of extra food items at the *same time and place* as the non-profit program in the schools.”<sup>21</sup>

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16. *Id.* at 637.

17. *Id.* at 643 (emphasis added).

18. Freedman, *supra* n. 6, at A11.

19. *Id.*

20. *Natl. Soft Drink Assn. v. Block*, 721 F.2d 1348, 1350 (D.C. Cir. 1983) [hereinafter *National Soft Drink*].

21. *Id.* (emphasis added).

However, by 1972, schools had discovered the financial benefit of selling foods in competition with school lunch meals. As a result, some schools “initiated and maintained programs where either the school or a student organization of the school realized financial gain from the sale of pop, candy, and other items not provided under [NSLA].”<sup>22</sup> In response to this trend, Congress supported the schools’ efforts “by eliminating the authority of the Secretary to regulate competitive food sales if the proceeds from the sales inured to the benefit of the schools or organizations approved by the schools. Profit had triumphed over nutrition”<sup>23</sup>—but not for long. In 1977, sensing an “abuse of the food service program through competitive sale of junk foods in schools,”<sup>24</sup> Congress restored the Secretary’s authority “to prohibit the sale of some foods even though the proceeds from the sale inured to the benefit of the school or its satellites.”<sup>25</sup> Relying on a 15,000 page record, the Secretary then created a regulation “eliminat[ing] the sale of soda water (soda pop), water ices, chewing gum and certain candies on the *school premises* until after the last lunch period.”<sup>26</sup>

This brief history of NSLA and CNA highlights the continuing tension between profits, generated by competitive sale of junk food, and USDA’s goal of providing children with a nutritionally well-balanced meal. The tension was addressed in *National Soft Drink*, a 1983 D.C. Circuit case. It was a court battle won by the soda pop companies.

### III. NATIONAL SOFT DRINK ASSOCIATION V. BLOCK

*National Soft Drink* is the only case to address the issue of nutrition under NSLA and CNA. Specifically, it addressed USDA’s concern about junk foods directly competing with the school lunch programs. It was apparent early on that foods in competition with school lunch were undermining the nutritional goals set out by USDA. In *National Soft Drink*, the soda pop companies brought suit against the Secretary of Agriculture, complaining that the recently promulgated regulation to prohibit the sale of soda pop “throughout the public schools where Federally subsidized . . . lunch programs are authorized . . . until after the last lunch meal of the day”<sup>27</sup> was outside the scope of the Secretary’s authority and was otherwise an arbitrary and capricious exercise of

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22. *Id.* (footnote omitted).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1351 (emphasis added).

27. *Id.* at 1350.

authority.<sup>28</sup>

The lower federal district court granted the Secretary's motion for summary judgment, finding that the "time and place approach chosen by the Secretary was entirely reasonable and consistent with congressional objectives."<sup>29</sup> The lower court further explained that the "clear purpose of [NSLA] would be frustrated if foods identified as non-nutritious could be sold fifteen minutes before lunch or in vending machines located down a corridor from the cafeteria."<sup>30</sup> The district court was convinced that "a vending machine, no matter where located, can operate as a magnet for any child who inclines toward the non-nutritious."<sup>31</sup>

The soda pop association appealed to the D.C. Circuit Court of Appeals, arguing that the plain language of the statute "clearly limited the [Secretary's authority] to the actual areas w[h]ere food was prepared and served and limited the time to those times in which there was an actual service of food."<sup>32</sup> The soda pop association then contended that the language of the statute "constituted a time and place limitation and . . . therefore . . . regulations barring the sale of competitive foods *throughout the entire school until after the last lunch serving* was without lawful authority."<sup>33</sup>

Citing legislative history of NLSA, the circuit court decided in favor of the soda pop association, holding that although the Secretary "was fully authorized [by Congress] to regulate the sale of soda pop," he exceeded his authority when he "promulgated the time and place regulations barring the sale of competitive foods throughout the school and until after the end of the last service of the day."<sup>34</sup>

Despite losing the case, the Secretary of Agriculture could still take heart in knowing that the court of appeals found that the regulation was not arbitrary and capricious, that the 15,000 page record did support the regulation, and that the classification of soft drinks as a food of minimal nutritional value was not irrational.<sup>35</sup> The problem with the Secretary's regulation was that Congress had not granted the Secretary broad enough authority to carry out his responsibility of ensuring nutritional environments in the schools. Inexplicably, Congress and USDA would wait several years before increasing the Secretary's authority to regulate

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28. *See id.* at 1351.

29. *Id.* at 1352.

30. *Id.* at 1351.

31. *Id.* at 1351-1352.

32. *Id.* at 1352.

33. *Id.* (emphasis added).

34. *Id.* at 1353.

35. *Id.* at 1353-1355.

food of minimal nutritional value sold in competition with school lunch.

#### IV. USDA'S CHALLENGES WITH SCHOOL LUNCH PROGRAMS

In 2000, Congress requested in the House Appropriations Committee Report that USDA make a report to Congress concerning the food sold in competition with public school lunches. Inasmuch as "USDA invests a significant amount of money in the school nutrition programs," Congress wanted to know the "effect foods sold in competition with the school meal programs may be having on the integrity of the program[s]."<sup>36</sup> USDA had long been concerned about this issue and gladly submitted the Report.<sup>37</sup> The general concerns of USDA are outlined below.

##### A. Glitzy Advertising

The competition that alarmed Congress and had USDA up-in-arms was the kind that promulgates "multi-million-dollar, glitzy, and sophisticated advertising campaigns"<sup>38</sup> that make schools look like "a 7-Eleven with books."<sup>39</sup> For example, a recent national survey by the Centers for Disease Control and Prevention found "that a fifth of all schools in the country offer brand-name fast foods such as Pizza Hut or Taco Bell at least once a week."<sup>40</sup> Furthermore, many school districts "permit Channel One, the television network for schools, to broadcast two minutes a day of commercials by McDonald's, Hershey, PepsiCo, Coca-Cola, Frito-Lay and the like."<sup>41</sup> By allowing these advertisements to infiltrate school campuses, public school policymakers seriously undermine USDA's nutritional goals, and, at the same time, endorse industries whose products are linked to obesity. But advertising campaigns represent just one of USDA's problems.

##### B. The School Lunch Stigma

According to USDA, popular foods, such as those served by Pizza Hut and Taco Bell, stigmatize participation in the school lunch

36. H.R. Rpt. 106-619, at IV (May 16, 2000).

37. See U.S. Dept. of Agric., *Foods Sold in Competition with USDA School Meal Programs: A Report to Congress* (Jan. 12, 2001) (available at <[http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/report\\_congress.htm](http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/report_congress.htm)>) (accessed Feb. 23, 2004) [hereinafter USDA Report].

38. *Id.*

39. Anne Underwood, *Nutrition: How to Flunk Lunch*, Newsweek 10 (Sept. 16, 2002) (quoting Kelly Brownell, Director of Yale University's Center for Eating and Weight Disorders).

40. Bridget Gutierrez, *A Choice Too Many?*, San Antonio Express-News 1A (Oct. 21, 2002).

41. Becker & Burros, *supra* n. 11, at A1.



programs. "Since only children with money can purchase competitive foods, children may perceive that school meals are primarily for poor children rather than nutrition programs for all children."<sup>42</sup> USDA worries that this perception reduces the willingness of "low-income children to accept free or reduced price meals and non-needy children to purchase school meals."<sup>43</sup> When participation in free lunch or reduced price meals declines, there is "decreased cash and commodity support from USDA for school meals."<sup>44</sup>

### C. *The A La Carte Option*

This reduction in federal fiscal support for school meals leads to another problem—schools become less interested in "maintaining quality school meal programs that meet established nutrition standards. This undermines the substantial Federal investment in the program to provide healthful meals for the Nation's children."<sup>45</sup> For example, a USDA national study concluded that "about 92 percent of all schools offer a la carte items."<sup>46</sup> The a la carte option—provided by schools to compete against the more popular food choices in order to generate more cafeteria revenues—is nutritionally inept. Typical a la carte items include "french fries and hamburgers that don't meet federal fat standards."<sup>47</sup> With a la carte options in the cafeteria and close proximity to fast food and junk food, school lunch meals quickly become, for children, an unattractive alternative.

### D. *Learning Environment Undermined*

USDA also believes that school learning environments are harmed by the low nutritional value offered by competitive foods. When competitive foods are available, school children generally choose to fill-up on the available, unregulated competitive foods, which are "relatively low in nutrient density and are relatively high in fat, added sugars and calories."<sup>48</sup> USDA believes that "[w]hen children replace school meals with these less nutritious foods and beverages, there is the risk that their daily dietary intake will be inadequate in key nutrients *necessary for*

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42. USDA Report, *supra* n. 37.

43. *Id.*

44. *Id.*

45. *Id.*

46. Gutierrez, *supra* n. 40, at 1A.

47. *Id.*; See generally Bird, *supra* n. 8, at 1F (quoting a 1999 USDA study that "found only 20 percent of the lunches served in schools stayed within the required limits on fat set by the USDA, and only 15 percent stayed within saturated-fat limits").

48. USDA Report, *supra* n. 37.

*growth and learning.*<sup>49</sup> In fact, researchers like Bill Potts-Datema of the Partnerships for Children's Health at Harvard School of Public Health, are establishing crucial "links between nutrition and academics."<sup>50</sup>

Furthermore, USDA is concerned that the school policymakers' choice to provide non-nutritional competitive foods confuses children:

When children are taught in the classroom about good nutrition and the value of healthy food choices but are surrounded by vending machines, snack bars, school stores, and a la carte sales offering low nutrient density options, they receive the message that good nutrition is merely an academic exercise that is not supported by the school administration and is therefore not important to their health or education.<sup>51</sup>

Public school officials must act more proactively in providing healthful food choices to school children. Former United States Surgeon General David Satcher suggests that the "school ought to be [an] environment that is conducive to developing lifetime habits of *good nutrition* and exercise."<sup>52</sup> Indeed, public school campuses must be the focus for "creating a culture around academics, fitness, and *good eating*, which . . . starts with [a] health oriented staff."<sup>53</sup>

#### *E. Loopholes in NSLA and CNA*

In its report to Congress, USDA blames Congress for many of the problems school lunch programs face when operating in close proximity to non-nutritional competitive foods.<sup>54</sup> USDA requests that Congress begin remedying these problems by closing various loopholes in NSLA and CNA. Uncorrected, these loopholes are leading school lunch programs down the path toward extinction.

##### *1. Time and Place Regulation of Non-nutritional Food*

The first loophole, utilized perfectly by the soda pop companies in *National Soft Drink*, is that the "law does not provide specifics about how competitive foods should be regulated, and there is no specific authority enabling USDA to regulate beyond the food service area during meal

49. *Id.* (emphasis added).

50. Pappano, *supra* n. 6, at A30.

51. USDA Report, *supra* n. 37.

52. Pappano, *supra* n. 6, at A30 (emphasis added).

53. *Id.* (quoting Meg Campbell, head of school at the Codman Academy Charter School in Dorchester, Massachusetts) (emphasis added).

54. See USDA Report, *supra* n. 37.

periods.”<sup>55</sup> The result of this loophole is that school cafeterias are “competing with on-campus snack bars, vending machines, and stores that sell candy and soda . . . even *right outside the cafeteria door*.”<sup>56</sup>

The second loophole identified by USDA is that the wording of the statute “inadvertently supports the notion that food sales are an excellent way to increase funds for the schools or student organizations.”<sup>57</sup> USDA is quick to point out that this loophole “puts schools in the position of competing with their own school meal programs for revenue, contributing to decreases in student participation in the school meals programs with the related loss of revenue to support the viability of the programs.”<sup>58</sup> Vending machines “provide money for 98 percent of public high schools, 74 percent of middle schools and 43 percent of elementary schools.”<sup>59</sup> In fact, vending machines help schools generate profit margins of 50 percent or more,<sup>60</sup> which can translate into as much as one hundred thousand dollars per year.<sup>61</sup> These revenues generated from vending contracts support everything, including books, band uniforms, teacher training conferences, floor buffing machines, computer network updates, scholarships, athletic programs, and sometimes even salaries.<sup>62</sup> Reimbursements from school lunch programs do not even come close to generating such revenue, and even if the programs did, it is uncertain whether such spending flexibility could exist. Thus, in essence, “cafeteria managers, principals and athletic coaches undermine the relatively healthful, federally subsidized school lunch because they need to raise money.”<sup>63</sup> Obviously, severing school district dependency on revenues generated by vending machine contracts will not be easily accomplished, especially given “tight budgetary times.”<sup>64</sup> But until something is done,

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55. *Id.*

56. Katherine Gallia, *How Schools are Failing Our Kids*, 32:5 Nat. Health 60 (July, 2002) (emphasis added).

57. USDA Report, *supra* n. 37.

58. *Id.*

59. Becker & Burros, *supra* n. 11, at A1 (citing a study by the Centers for Disease Control and Prevention).

60. See Bird, *supra* n. 8, at 1F.

61. See Associated Press, *Coke Alters Marketing in Schools*, *Deseret News* (Salt Lake City, Utah) A2 (Mar. 14, 2001); Cathy Kightlinger, *Schools Hooked on Junk Food*, *The Indianapolis Star* 1A (Feb. 23, 2003) (reporting that “[p]roceeds from vending contracts can range from \$30,000 to more than \$200,000,” and that one district received \$600,000 up-front after signing a ten-year deal with PepsiCo).

62. See e.g. Associated Press, *supra* n. 61, at A2; Becker & Burros, *supra* n. 11, at A1; Connie Paige, *Raising the Nutrition Grade: Some Officials Troubled by School Cafeteria Fare*, *Boston Globe* 1 (Feb. 16, 2003).

63. Becker & Burros, *supra* n. 11, at A1.

64. Paige, *supra* n. 62 at 1.

poor nutrition in the schools, and obesity resulting there from, will become increasingly problematic.

#### V. USDA'S RECOMMENDATION FOR REMEDYING THE PROBLEMS

In a long overdue move—considering that *National Soft Drink* was decided in 1983—USDA has proposed ways to close the above loopholes. In particular, USDA has requested that “Congress consider . . . actions recommended by program operators and other partners to strengthen USDA’s ability—and the ability of the States and local schools—to foster a healthier school nutrition environment in communities across America.”<sup>65</sup> Among the recommended actions is for Congress to “[s]trengthen the statutory language to ensure that all foods sold or served anywhere in the school during the school day meet nutrition standards.”<sup>66</sup> This recommendation would effectively overrule *National Soft Drink* and allow the Secretary of Agriculture to promulgate the regulation struck down in that case.

USDA also suggests that Congress “[s]trengthen the statutory language to ensure that revenue from all competitive food sales throughout the school inure *solely* to the school food service account.”<sup>67</sup> Undoubtedly, this recommendation will receive substantial opposition because, as was pointed out above, revenue from competitive food sales is currently used for whatever school districts need and want.

Other USDA recommendations include establishing adequate amounts of time for meal periods, providing financial incentives to states that increase training standards for service directors and managers, purchasing better food service equipment, providing for more spacious and roomier cafeteria and dining spaces, and increasing the overall State funding for local school food services.<sup>68</sup>

USDA’s recommendations have already generated a positive response from some producers of foods of minimal nutritional value. For example, Coca-Cola Co. “will begin loading healthier drinks, [possibly fruit and milk smoothies,] into vending machines alongside sodas, covering up giant logos and advocating nonexclusive deals between bottlers and school districts.”<sup>69</sup> Encouragingly, this move should be simple for Coca-Cola, and for other companies like it, since “middle- and high-school sales represent less than 1 percent” of Coca-Cola’s

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65. USDA Report, *supra* n. 37.

66. *Id.*

67. *Id.* (emphasis added).

68. *See id.*

69. Associated Press, *supra* n. 61, at A2.

sales.<sup>70</sup> The Coca-Cola approach encourages more nutritional consumption among children without undermining vending machine revenues upon which school districts have become so dependent. Indeed, if Coca-Cola follows through on the plan, it will set a template for future success. However, much more needs to be done to fix the school lunch programs' problems.

## VI. HOW USDA HAS CONTRIBUTED TO THE SCHOOL LUNCH PROBLEM

School districts and competitive non-nutritional food service contracts are not the only problems that ail school lunch programs. USDA is also partly responsible. USDA's biggest internal problem stems from the inadequate reimbursements it gives to school districts—" \$2.09 for meals served free to qualifying students, \$1.69 for reduced-price meals and 20 cents for the ones sold at full price."<sup>71</sup> These federal meal subsidies are not enough to provide a whole, nutritional meal.<sup>72</sup> Because "[l]ean meat, low-fat cheese and fresh produce all often cost more than full-fat and processed foods,"<sup>73</sup> typical school lunch menus too often consist of "chili cheese dogs, pepperoni pizza, Salisbury steak and greasy pork chops."<sup>74</sup>

The American School Food Service Association (ASFSA), a professional lobbying group that advocates for more nutritious school lunches, blames USDA's spending habits for the nutritionally paltry school lunch menu. ASFSA complains that USDA "spent \$338 million on surplus beef and cheese for schools in 2002 but only \$159 million on fruits and vegetables, most of them canned and frozen."<sup>75</sup> Not surprisingly, many school children, when asked their opinions about school lunch, use the adjectives "'gross,' 'nasty,' or 'scary'."<sup>76</sup> Among the increasing number of school children who are vegetarians, USDA's selection of food proves even more deficient.<sup>77</sup> Essentially, USDA is

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70. *Id.*

71. Bird, *supra* n. 8, at 1F.

72. *See id.*

73. *Id.*

74. Amy Joy Lanou, *Viewpoints*, *Newsday* A35 (Oct. 15, 2002) (available in 2002 WL 101396438).

75. Felicia Fuller, *Capitol Concepts: Foodservice Lobbyists Head for the Hill Seeking Pro-industry Legislation*, *Restaurants and Institutions* 55 (Feb. 15, 2003) (available at <<http://www.rimag.com/2003/02b/bus.asp>> (accessed Feb. 23, 2004)).

76. Paige, *supra* n. 62, at 1.

77. *See e.g.* Associated Press, *Vegetarian Schoolkids Not Being Served Well*, *Deseret News* (Salt Lake City, Utah) A11 (Sept. 2, 2001); Scott Parks, *Vegetarians Dish Out a D to Dallas Schools*, *The Dallas Morning News* 25A (Aug. 29, 2002); Underwood, *supra* n. 39, at 10.

undermining its own goals, because the byproduct of paltry reimbursements and questionable spending practices is a school lunch program that is unattractive to school children and school districts alike. Furthermore, USDA's recommendation that revenues generated by competitive non-nutritional food contracts should be used solely for school food service accounts appears to set a double-standard.

## VII. FEDERAL AND STATE LEGISLATIVE INITIATIVES

Given USDA shortcomings, loopholes in Congressional legislation, and the fact that public school policymakers tend to pursue profits over investing in nutrition, school lunches are proving deficient. Fortunately, as parents and special interest groups have spoken out against these deficiencies, government representatives have begun to take corrective action. This section presents a sampling of current legislation aimed at fixing school lunch problems.

### A. Federal Legislation

#### 1. *Better Nutrition for School Children Act of 2001*

In an effort to reinstate powers of the Secretary of Agriculture which were limited by the decision in *National Soft Drink*, Senator Patrick Leahy proposed the "Better Nutrition for School Children Act of 2001" (BNSCA).<sup>78</sup> If passed, the bill would amend the Child Nutrition Act of 1966 in order "to promote better nutrition among school children participating in the school breakfast and lunch programs."<sup>79</sup> In order to reach that goal, the bill prohibits the "sale, donation, or service without charge of foods of minimal nutritional value on school grounds during the time of service of food under the school breakfast program . . . or the school lunch program . . ."<sup>80</sup> Under the bill, the Secretary of Agriculture is required to "review the Federal, State, and local laws (including regulations), policies, and practices relating to the sale, donation, or service without charge of foods of minimal nutritional value . . . and . . . promulgate final regulations relating to the sale, donation, or service without charge of foods of minimal nutritional value."<sup>81</sup> The Secretary of

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78. Sen. 745, 107th Cong. § 1 (2001). The bill was reintroduced in 2003 and as of this printing has been referred to the Senate Committee on Agriculture, Nutrition and Forestry. See also H.R. Res. 2129, 107th Cong. § 1 (2001).

79. Sen. 745, 107th Cong.

80. *Id.* at § 2(c)(1).

81. *Id.* at § 2(c)(2)(B).

Agriculture would have the power to either unilaterally prohibit the sale of non-nutritional foods or to permit states and local schools to prohibit the sale.<sup>82</sup> In either case, the Secretary would be required to regulate according to "sound nutritional science."<sup>83</sup> In his review, the Secretary would consider the following factors: (1) the nutritional needs of students in different grades; (2) the proximity of areas where foods of minimal nutritional value may be sold or donated; (3) the extent to which foods of minimal nutritional value substitute for other food served in participating schools; and (4) the financial benefits schools receive by allowing the sale or donation of foods of minimal nutritional value.<sup>84</sup>

The problem with the bill is that it has been up for consideration since April 2001, and there appears to be no hurry to get it passed. However, in the meantime, Congress is considering further federal legislation designed to improve school lunch programs.

## 2. *Improved Nutrition and Physical Activity Act of 2003*

On February 12, 2003, California Representative Mary Bono introduced to Congress the Improved Nutrition and Physical Activity Act of 2003 (IMPACT).<sup>85</sup> While the crux of IMPACT is designed to combat an obesity problem among all age groups, parts of the resolution potentially impact states and school districts with respect to school lunch programs.

IMPACT would provide federal grants to states if they

(1) develop and disseminate school-based curricula or programs that focus on a healthy lifestyle that includes *promotion of balanced dietary patterns* and physical activity to prevent becoming overweight or obese and related, serious, and chronic medical conditions that are associated with being overweight or obese;

(2) provide education and training to education professionals, including health education, physical education, and food service professionals;

(3) develop and implement policies that create a *healthy school environment in relation to nutrition* and physical activity.<sup>86</sup>

Furthermore, IMPACT would call for the federal government to

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82. See *id.* at § 2(c)(2)(C).

83. *Id.* at § 2(c)(2)(D).

84. See *id.* at § 2(c)(2)(E).

85. H.R. 716, 108th Cong. § 1 (2003). The latest action on this resolution occurred on Feb. 25, 2003; it was referred to the Subcommittee on Health.

86. *Id.* at § 399W (emphasis added).

provide grants “to local educational agencies to plan, implement, and evaluate culturally and linguistically appropriate and competent programs to promote a healthy lifestyle, including programs that . . . *improve the nutritional status of the students at elementary and secondary schools.*”<sup>87</sup> In addition, the resolution would require local school districts to spend their grants in at least four nutrition-promoting areas including:

(A) Planning and implementing a healthy lifestyle curriculum or program with an *emphasis on nutrition* and physical activity for each grade level . . .

(C) Planning and implementing healthy lifestyle classes or programs for parents and guardians, with an *emphasis on nutrition* and physical activity . . .

(E) *Creating opportunities for students to choose foods to improve nutritional status.*

(F) Training teachers and staff, including food service workers, on how to teach good nutrition and physical activity practices.

(G) Other activities as deemed appropriate by the Secretary.<sup>88</sup>

In addition to providing grants that could improve nutrition in school lunches, IMPACT calls for an investigation into USDA’s nutritional standards. Under IMPACT, the Institute of Medicine will

(1) investigate whether [USDA’s] nutrition programs and nutrition recommendations are based on the latest scientific evidence;

(2) investigate whether [USDA’s] food assistance programs contribute to either preventing or enhancing obesity and being overweight in children, adolescents, and adults;

(3) investigate whether [its] food assistance programs can be improved or altered to contribute to the prevention of obesity and becoming overweight; and

(4) identify obstacles that prevent or hinder the programs from achieving their objectives.<sup>89</sup>

This investigation could potentially result in a complete overhaul of USDA’s nutritional guidelines.

IMPACT is designed to combat obesity nationwide. An integral element of IMPACT is preventative care, which includes influencing

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87. *Id.* (emphasis added).

88. *Id.* at § 399W(b)(3) (emphasis added).

89. *Id.* at § 401.



children's eating habits in the public school system. For instance, IMPACT supports a Youth Media Campaign<sup>90</sup> that encourages children to eat nutritionally and engage in physical activity. At the very least, this nutrition-oriented media campaign could neutralize the effect of glitzy advertising by companies like Taco Bell, Pizza Hut, Coca-Cola, PepsiCo and Frito Lay. On the other hand, better legislation would also allow schools to eliminate the glitzy advertising so the money that would go into a nutritional campaign could be used to buy the more expensive lean meats, grains, and fresh produce.

### *B. Federal Initiative and State Legislation Implementing the Initiative*

In addition to proposing federal nutrition-related legislation, the federal government encourages states to adopt their own legislation consistent with national goals.

#### *1. USDA's Small Farms/School Meals Initiative*

In an effort to get more fresh produce and grain to school lunch platters, USDA has promulgated the "Small Farms/School Meals Initiative."<sup>91</sup> Shirley Watkins, USDA Under Secretary for Food, Nutrition, and Consumer Services, explains that the initiative's purpose is to make "an important step toward improving both the economic stability of small farmers and the long-term health of children in our school systems."<sup>92</sup> The initiative calls for farmers "to sell fresh produce to local schools for use in their meal programs, and [for] children [to] get the benefit of adding fresh fruits and vegetables to their diets."<sup>93</sup> Ultimately, town hall meetings would be the setting where federal, state, and local agencies, farmers, and local school officials would negotiate the details in order to make the program feasible and efficient.<sup>94</sup>

This initiative serves to mitigate the criticism that school lunches do not serve enough *fresh* fruit and vegetables. One of the main reasons school districts have struggled to provide fresh fruit and vegetables is because those foods are more expensive. The Small Farms/School Meals Initiative enables school districts "to provide fresh produce quickly and *with lower transportation costs* by buying it from small farmers instead of

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90. See *id.* at § 1001.

91. See U.S. Dept. of Agric., *Small Farms/School Meals Initiative, Town Hall Meetings: A Step-by-Step Guide on How to Bring Small Farms and Local Schools Together* (available at <<http://www.fns.usda.gov/cnd/Lunch/Downloadable/small.pdf>>) (accessed Feb. 24, 2004).

92. *Id.*

93. *Id.*

94. See *id.* at i-ii.

from distant markets.”<sup>95</sup> Lower transportation costs enable the school districts to purchase more fresh produce.

Not only do children benefit from better food, but the initiative also provides that the school children receive an education from the farmers. The farmers “visit [the students’] classrooms [to explain] how the produce is grown and the role it plays in a healthful diet, thereby [the student’s experience] first-hand in both the classroom and the cafeteria the value and appeal of fresh fruits and vegetables.”<sup>96</sup>

The initiative’s most troublesome impediment lies in logistics. Many farmers are unable to meet the initiative’s requirement of “supply[ing] the volume, variety, quality, and selection of produce schools need, and . . . deliver[ing] it when schools want it.”<sup>97</sup> In response to this concern, USDA encourages small farmers “to join together in a cooperative or some larger organization in order to meet the schools’ needs.”<sup>98</sup> These types of small farm cooperatives would be critical in school districts located in winter climates. For example, in Utah, most of the school year occurs during the winter or otherwise non-harvesting months. However, cooperatives are only partially effective as they necessarily include farmers distant from the schools. Since the underlying theory of the initiative is that we can bypass high transportation costs by purchasing from local farmers, transportation costs are only marginally mitigated when cooperatives include distant farmers.

Despite limitations of USDA’s Small Farms/Small Meals Initiative, some states, including Maine, are enacting legislation to encourage school districts to participate.

## 2. *Maine’s State Legislation*

In the 2003 Maine legislative session, the house proposed a bill entitled, “An Act To Promote Maine Farm and Dairy Products in Place of Soft Drinks in Public Schools and To Create a Maine Residency Program for New Dentists.”<sup>99</sup> Although the Act does not specifically reference the Small Farms/Small Meals Initiative, it creates a Health Promotion Fund<sup>100</sup> which is in line with the Initiative’s goals. The Act generates moneys for the Fund by taxing soft drink manufacturers,

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95. *Id.* at i (emphasis added).

96. *Id.*

97. *Id.*

98. *Id.*

99. Maine L.D. 505 (121st Legis. 2003). The current status of the bill is that on Apr. 2, 2003, it was placed in the legislative files, *i.e.*, it is “Dead.”

100. *See id.* at § 1.

namely Coca-Cola, Inc. and Pepsi-Cola Inc., distributors, retailers, and wholesale dealers who sell soda pop in Maine.<sup>101</sup> This tax on carbonated soft drinks, other sugary drinks, and candy is similar to state taxes imposed on cigarettes. The health promotion fund would be used as follows:

Fifty percent of money in the fund must be distributed by the Department of Education each year on a per-student basis to school administrative units that adopt policies that prohibit the advertising and sale of soft drinks and candy on all school property and that make available on a daily basis *Maine dairy products and fresh in-season farm products for sale and consumption as snack foods and as part of regular school meal programs.*

Fifty percent of money in the fund must be used by the Department of Human Services for a dental health residency program for one of more qualifying hospitals in the State based on competitive applications.<sup>102</sup>

The proposed bill seeks to improve food quality by encouraging school districts to team up with local farmers in providing the children with greater quantities of dairy products and fresh produce. The health promotion fund compensates school districts for the extra money spent on fresh produce. In sum, the Maine plan bypasses USDA's notion that the higher cost of fresh products can be compensated for by lower transportation costs. Instead, Maine taxes makers and distributors of what many nutritionists see as the problem—sugary drinks and candy. The state then uses that revenue to compensate school boards for added costs incurred by purchasing more produce for school lunches. The proposed bill does not address the problem that school districts face when their vending machine profits are cut-off. Perhaps rather than allocating the other 50 percent of the health fund to dentistry, the Act should give that money to school districts so they can continue funding other activities that are usually subsidized by profits from the soda and candy distribution.

Other states as well are proposing legislation that, though not necessarily concerned with implementing the federal small farms initiative, is committed to increasing the nutritional value of school lunch and eliminating sugary, high-fat foods from public school campuses.

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101. See *id.* at § 2, 36 M.R.S.A. 721 §§ 4852–4853.

102. *Id.* at § 2, 36 M.R.S.A. 721 § 4855 (emphasis added).

### C. California's State Legislation

#### 1. California's Proposed Legislation on Vegetarian School Lunch

Existing law in California requires that the "governing board of a school district . . . give diligent care to the health and physical development of pupils."<sup>103</sup> In light of that responsibility, the California legislature proposed a bill on January 27, 2003 that would require schools to serve "plant-centered vegetarian school lunches."<sup>104</sup> The resolution was prompted by the finding that a "growing number of California school children either identify themselves as vegetarian or vegan, come from vegetarian or vegan families, or come from families who avoid meat and dairy foods for religious or health reasons."<sup>105</sup>

The heart of the proposed resolution requires that California state agencies "develop nutritionally sound school lunch menu plans that would provide daily optional plant-centered vegetarian school lunches, prepared without meat or dairy products, in such a way that all pupils are assured nutritionally balanced diets, regardless of their food preferences and avoidances."<sup>106</sup> The resolution cites the American Dietetic Association's position that vegetarian diets result in "risk reduction for several chronic degenerative diseases and conditions, including obesity, coronary artery disease, hypertension, diabetes mellitus, and some types of cancer."<sup>107</sup>

In addition to meeting the needs of a growing number of school-aged vegetarians, this vegetarian school lunch resolution takes a back-door approach in changing the general presentation of school lunches. The resolution refers to a recommendation forwarded by USDA and several other national organizations "that there be greater emphasis in the American diet on fruits, vegetables, whole grains, and legumes with a reduction in consumption of animal foods, which are generally higher in saturated fat and cholesterol."<sup>108</sup> Given "[r]ecent studies indicat[ing] that more than one-quarter of California children are overweight or obese,"<sup>109</sup> the resolution also seeks to curb the diets of regular meat eaters. Thus, the resolution promotes the view that fresh fruit and vegetables, along

103. Cal. Educ. Code Ann. § 49400 (West 1993).

104. *Nutrition: Vegetarian School Lunches*, Cal. Assembly Con. Reg. 16, 2003-04 Reg. Sess. 1 (Feb. 20, 2003). The bill passed, as amended, in June 2003.

105. *Id.* at 2.

106. *Id.* at 1.

107. *Id.* at 2-3.

108. *Id.* at 1-2.

109. *Id.* at 2.

with grains, need to be the focal point of school lunches. California state agencies are given until January 2008 to report to the legislature on the progress of providing alternative school lunch menus.<sup>110</sup>

This proposed legislation contains vital information on why school lunches should contain more variety and provides an idea on how school lunches can be more nutritious. But the resolution lacks direction—it is silent on *how* to actually implement the program; consequently, the resolution comes off as idealistic. For example, the resolution utterly fails to address the financial implications of introducing more fruits and vegetables into the school lunch program. Additionally, the resolution mentions nothing about USDA's "Small Farms/School Meals" Initiative. Until California's legislature enacts legislation that mitigates the costs associated with more nutritious lunches—like what is proposed in the Maine legislation—its resolution is unlikely to succeed.

## 2. California's Childhood Obesity Prevention Act

On February 21, 2003, California Senator Ortiz introduced Senate Bill 677, entitled the California Childhood Obesity Prevention Act (CCOPA).<sup>111</sup> Existing law in California "prohibits the sale of carbonated beverages in middle schools from one-half hour before the start of the schoolday [sic] until after the end of the last lunch period."<sup>112</sup> The proposed Act seeks to amend the existing law by "prohibit[ing] the sale of carbonated beverages to pupils in elementary schools commencing January 1, 2004, to pupils in middle or junior high schools commencing January 1, 2005, and to pupils in high school commencing January 1, 2007."<sup>113</sup>

The legislative findings supporting CCOPA are more detailed than those offered in the vegetarian lunch resolution—and they are more startling. The findings indicate that 30 percent of California children are overweight, and in some school districts, that figure is as high as 40 to 50 percent.<sup>114</sup> CCOPA's justification for targeting carbonated drinks comes in the finding that "[e]ach additional daily serving of sugar-sweetened soda increases a child's risk for obesity by 60 percent. By 1996, both boys and girls consumed twice as many soft drinks as milk. Soft drinks now

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110. See *id.* at 4.

111. Cal. Sen. 677, 2003–04 Reg. Sess. § 1 (Feb. 21, 2003). This bill chaptered, as amended, in Sept. 2003.

112. *Id.*

113. *Id.* The bill, as chaptered, "would prohibit the sale of certain beverages to pupils in elementary, middle or junior high schools commencing July 1, 2004." Cal. Sen. 677, 2003–04 Reg. Sess. (Sept. 17, 2003).

114. See *id.*

comprise the leading source of added sugar in a child's diet."<sup>115</sup> Furthermore, unlike the vegetarian lunch resolution, the CCOPA ingeniously shows how increased costs of nutritional school lunches will be swallowed up in the savings that will follow as the nutrition effort is realized:

[Obesity] and physical inactivity costs California an estimated 24.6 billion dollars annually, approximately seven hundred fifty dollars . . . per person—a cost that is expected to rise by another 32 percent by the year 2005. Poor nutrition and physical inactivity account for more preventable deaths (28 percent) than anything other than tobacco—more than AIDS, violence, car crashes, alcohol, and drugs combined. The long-term impact of childhood obesity on California's economy, and on our children's increased risk of death from heart disease, cancer, stroke, and diabetes will be staggering. . . . Obesity is linked to a larger increase of chronic health conditions and accounts for a significantly higher amount of health expenditures than those associated with smoking, heavy drinking, or poverty.<sup>116</sup>

The proposed Act's purpose is to remedy the problems outlined in its legislative findings. It plans to accomplish this by outlawing the sale of carbonated, sweetened beverages on California elementary, junior, and high school campuses by 2007. CCOPA also limits the *food* that may be sold to elementary school children.<sup>117</sup> Furthermore, the Act outlines that "the only food that may be sold to a pupil during breakfast and lunch periods is food that is sold as a full meal."<sup>118</sup> The exception to that rule is that fruit, non-fried vegetables, legumes, water, milk, 100 percent fruit juices, fruit-based drinks, or grain products, may be sold individually to elementary children.<sup>119</sup>

Like the vegetarian lunch proposal, CCOPA, indirectly, attempts to implement fresh produce into school lunches. The central purpose of the vegetarian lunch resolution is self-evident: to provide for the needs of vegetarians, especially those who rely on school lunch programs. The main purpose of CCOPA is to eliminate the sale of carbonated beverages on public school campuses. In both cases, there is no direct legislation requiring schools to provide fresh produce and grains in California school lunches. Nevertheless, the message is sent loud and clear that nutritious foods will be expected in school settings.

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115. *Id.* at 2.

116. *Id.*

117. *See id.* at § 3.

118. *Id.*

119. *See id.*

## VIII. CONCLUSION

Human nature is biased toward rich diets that are high in fat and sugar. Today's school children are the building blocks for shifting human nature towards the nutritious. Accordingly, school lunch plays a significant leadership role in this effort. School lunch programs in public schools have generated concern amongst parents, health specialists, and educators, that school lunch programs are actually promoting obesity. School lunch policymakers can no longer ignore the nutritional deficiencies in their school lunches, nor can they justify the deficiencies by relying on substantial profit margins that result in new scoreboards. *National Soft Drink* illustrates loopholes in current federal legislation that enables competitive foods to undermine the nutrition in school lunches. The loopholes further create school district reliance on revenue from competitive food sales. Showy ad campaigns and competitive food offerings of minimal nutritional value create a school lunch stigma. USDA needs to reevaluate how it allocates funds; it needs to start spending a much higher portion of its money on leaner meats, grains, and fresh produce. Recent federal and state legislative proposals could ensure that school lunch programs are no longer compromised by foods of minimal nutritional value. But more must be done. Policymakers at federal, state, and school district levels must invest first in the nutritional needs of children and then in a need for profit, instead of the other way around.