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Are Food Subsidies Making Our Kids Fat? Tensions Between the Healthy Hunger-Free Kids Act and the Farm Bill

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Are Food Subsidies Making Our Kids Fat? Tensions Between the Healthy Hunger-Free Kids Act and the Farm Bill

Melissa D. Mortazavi*

Abstract

On December 15, 2010, President Obama signed the Healthy Hunger-Free Kids Act of 2010 (HHFKA)¹ into law. It was hailed as a bipartisan success and a significant reform of childhood nutrition policy. Indeed, on its surface the law appears to make a significant shift away from the food paradigm of the past. However, upon closer examination, it fails to unwind the tangled connections between domestic eating habits and longstanding farm subsidies.

This Article breaks new ground in several ways: First, it is one of the first essays in the emerging and underexplored field of food law, a cross-section of health law, law and society, environmental law, and administrative law; second, this is the first Article to look in-depth at the Healthy Hunger-Free Kids Act of 2010, which is in some ways the most radical iteration of the Child Nutrition Act² and National School Lunch Act³ in twenty-five years; third, I offer a unique critique of this legislation by pointing out the tacit juxtaposition between it and longstanding farm subsidies, which are up for renewal and reconsideration next year; and finally, relying on both of these observations, I outline what Congress

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1. See Healthy Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (codified in scattered sections of 42 U.S.C.) (attempting to ensure that low-income children receive the meals they need and are able to participate in child nutrition programs).

2. See Child Nutrition Act of 1966, 42 U.S.C. §§ 1771–85, 1771 (Supp. V 1964) (amended 2010) (supplementing the National School Lunch Act by providing, amongst other things, a milk and school breakfast program).

3. See Richard B. Russell National School Lunch Act, 42 U.S.C. §§ 1751–60, 1751 (1946) (amended 2010) (creating the National School Lunch Program to protect the health of school children and encourage domestic consumption of agricultural commodities).

should do to effectively reform the current regulatory regime and address the critical public health issue of obesity. Specifically, I argue Congress must reallocate or eliminate certain food subsidies through farm bill reform, closely monitor the USDA's exercise of discretion, limit loopholes relating to competitive foods, monitor potential preemption suits, reallocate the designation of dietary guidelines to a medical or health administrative agency, and allocate additional resources to the school meal infrastructure.

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I. Introduction

Food in America is inherently a legal matter. It is the meeting point of a broad set of laws and regulations: those surrounding food pricing, transportation and processing, environmental pollution, water rights, employment, and real and intellectual property rights. Together, these laws in large part predetermine what choices Americans have at the dinner table or grocery store. The choices Americans make there translate into widespread health trends, specifically the growing problem of obesity in the United States. Economically, the cost of obesity is staggering—an estimated \$150 billion is spent annually on obesity related expenses.⁴ Only through engaging with broad cross-statutory reform will the American diet and American health effectively change.

Increasingly, evidence is accumulating that the United States' system of regulating food is fundamentally flawed. Our country is suffering from an obesity epidemic, with youth obesity skyrocketing at alarming rates.⁵ Currently, the federal government estimates that one out of three children is overweight or obese.⁶ These children are at risk for health problems—such

4. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2539 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220).

5. United States Department of Health and Human Services, *Childhood Obesity* (2005), http://aspe.hhs.gov/health/reports/child_obesity/ (last visited Nov. 25, 2011) [hereinafter *Childhood Obesity*] (reporting that in the United States, "[t]he number of adolescents who are overweight has tripled since 1980 and the prevalence among younger children has more than doubled") (on file with the Washington and Lee Law Review).

6. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2495 ("According to Centers for Disease Control and Prevention's 2003-2006 National Health and Nutrition Examination Survey (NHANES) data, almost 32 percent of children 6 to 19 years of age are overweight or obese."); Inst. of Med., *Childhood Obesity in the United States: Facts and Figures* (Sept. 29, 2004), available at <http://iom.edu/~media/Files/Report%20Files/2004/Preventing-Childhood-Obesity-Health-in-the-Balance/FINALfactsandfigures2.pdf> ("At present, approximately nine million children over 6 years of age are considered obese.").

as cardiovascular disease, high cholesterol, and Type 2 diabetes—as youths and as adults.⁷ The annual cost of childhood obesity is \$3 billion in direct medical expenses alone.⁸ Perhaps even more troubling, "obese children and adolescents are more likely to become obese as adults."⁹ Currently, scholars estimate obesity-related medical expenses for adults to be around \$147 billion.¹⁰ This number grows as obese children reach adulthood.¹¹ As such, a focus on child nutrition is perhaps the best allocation of government resources and nutrition regulation because this is where government policies will have the broadest long-term impact.

A key component of the obesity puzzle is the school meal program: how the law itself structures and teaches citizens to eat.¹² As of 2009, the federal child nutrition program feeds over 50 million children a day, 31.6 million of whom receive free lunches.¹³ Although school lunches cannot be held wholly responsible for the health of the nation's children, they present undoubtedly a key opportunity to teach young Americans good nutrition fundamentals. Childhood is a time when norms are set.¹⁴ What does a normal meal look like, how big is it, what does it taste like, and what ingredients does it contain? Although the School Lunch Program allegedly seeks to positively impact child health, school lunches as they currently stand may actually be contributing to the obesity crisis in children.¹⁵

7. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2495.

8. *Id.* at 2539.

9. *Id.*

10. *Id.*

11. See *Childhood Obesity*, *supra* note 5 (noting that overweight adolescents have a 70% chance of becoming overweight adults).

12. See Harvard Univ., *Public Split on Government Role in Addressing Adult Obesity; Childhood Obesity Is a Different Story*, HARVARD FORUMS ON HEALTH (June 11, 2003), ("Two-thirds of Americans believe schools should play a major role in helping to fight the obesity problem.").

13. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2514.

14. See Healthy Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183, 3224 (codified in scattered sections of 42 U.S.C. and 7 U.S.C.) ("Congress finds that—(I) eating habits and other wellness-related behavior habits are established early in life; and (II) good nutrition and wellness are important contributors to the overall health of young children and essential to cognitive development.").

15. See Clint G. Salisbury, *Make an Investment in Our School Children: Increase the Nutritional Value of School Lunch Programs*, 2004 BYU EDUC. & L.J. 331, 352 (2004) ("School lunch programs in public schools have generated concern amongst parents, health specialists, and educators, that school lunch programs are actually promoting obesity.").

This Article examines the strengths and weaknesses of the most recent reform of federal attempts to address childhood obesity and children's nutrition: The Healthy Hunger-Free Kids Act of 2010 (HHFKA). It concludes that the success of this bill is uncertain at best.¹⁶ The new law, essentially a reauthorization of the Child Nutrition Act of 1966 (CNA), makes some promising changes to the National School Lunch Program (NSLP). Most notably, it supersedes longstanding case law limiting the United States Department of Agriculture's (USDA) discretion to regulate competitive foods on school campuses and it increases funding for the School Lunch Program.¹⁷ However, the bill's changes fail to untangle the fundamental historical statutory tension between the marriage of nutrition standards (a health issue) with agricultural growth and surplus (a business issue). Thus, the HHFKA's success is contingent on the substance of the new USDA regulations and whether the same broad bipartisan support that made the HHFKA possible will support necessary corresponding changes in the reauthorization of the Farm Bill in 2012. This Article argues that fundamental changes to corresponding federal legislation, such as the Farm Bill, and the administrative structure of the school meal program must occur for the HHFKA to meaningfully combat the childhood and long-term obesity crisis in the United States.

II. Longstanding Statutes with Longstanding Issues

A. The National School Lunch Program Act

The historical tension in American dietary policy dates back to 1930s Depression-era programs that sought not only to feed people, but also to prop up the floundering agricultural sector by disposing of agricultural surplus purchased through price-support agreements.¹⁸ Since their

16. Although the Healthy Hunger-Free Kids Act (HHFKA) affects many programs that address childhood eating habits, administration and inclusion of additional children under the program, and hunger, this Article will focus exclusively on the provisions affecting the quality and nutritional value of school meal programs.

17. See Office of the Press Sec'y, *Child Nutrition Reauthorization Healthy, Hunger-Free Kids Act of 2010*, THE WHITE HOUSE (Dec. 13, 2010), (noting that the Healthy-Hunger Free Kids Act "[g]ives USDA the authority to set nutritional standards for all foods regularly sold in schools during the school day . . . [and it p]rovides additional funding to schools that meet updated nutritional standards for federally-subsidized lunches").

18. JANET POPPENDIECK, BREADLINES KNEE DEEP IN WHEAT: FOOD ASSISTANCE IN THE DEPRESSION 10, 32-34 (1986).

inception, such school food programs linked the disposal of agricultural surplus to government nutrition programs.

Passed shortly after WWII, the goals of the National School Lunch Act (NSLA) were twofold: "[T]o safeguard the health and well-being of all the nation's school children . . . and to encourage the domestic consumption of the nation's agricultural commodities."¹⁹ Currently, local and independent schools that voluntarily enroll in the federal school-lunch program receive cash subsidies and surplus commodities from the USDA in exchange for their compliance with federal nutritional guidelines and providing low cost and free lunches to needy children.²⁰ The consumption of agricultural surplus was an explicit goal of the NSLA.²¹

Cash subsidies are limited, so surplus allocated to schools provides key support to school lunch viability.²² A direct influx of commodity purchases supports the School Lunch Program by providing food very cheaply either through "bonus" foods or "entitlements."²³ Schools' reliance on entitlement foods (often also called "USDA Foods") is high and accounts for 15–20% of federal school-lunch food expenditures.²⁴ At its discretion, the USDA buys and provides schools with additional "bonus" foods at no or low cost; this food is agricultural surplus stock purchased, usually in emergency situations, by the USDA to support the commodities sector.²⁵ No entitlement foods are allocated for the School Breakfast Program (SBP).²⁶

19. Donald T. Kramer, Annotation, *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, 636–37 (1973).

20. U.S. Dep't of Agric. Food & Nutrition Serv., *National School Lunch Program*, 1 (Sept. 2010) [hereinafter *Lunch Program*].

21. See *Ayala v. Dist. 60 Sch. Bd.*, 327 F. Supp. 980, 983 (D. Colo. 1971) (citing legislative history of the NSLA).

22. Nat'l Alliance for Nutrition & Activity, *USDA Foods: Commodities in the National School Lunch Program*, 3 [hereinafter *Commodities*], available at http://cspinet.org/new/pdf/commodities_fact_sheet.pdf (citing U.S. Dep't of Agric. Food and Nutrition Serv., *USDA Foods: Healthy Choices. American Grown.* (2008)).

23. *Id.*

24. *Id.*

25. *Lunch Program*, *supra* note 20, at 2; GEOFFREY S. BECKER, CONG. RESEARCH SERV., RS20235, FARM AND FOOD SUPPORT UNDER USDA'S SECTION 32 PROGRAM 2 (2006), available at <http://www.cnice.org/NLE/CRSreports/06Dec/RS20235.pdf>.

26. U.S. Dep't of Agric. Food & Nutrition Serv., *Schools/Child Nutrition Commodity Programs*, 1 (Sept. 2009), available at <http://www.fns.usda.gov/fdd/programs/schcnp/pfs-schcnp.pdf>.

The USDA "entitlement" foods are sold to schools at a value of 20.25 cents per lunch.²⁷ Entitlement foods are purchased with funds from Section 32 of the Act of August 24, 1935,²⁸ which allows for the direct purchases of non-price-supported commodities, such as fruits and vegetables.²⁹ Schools select entitlement foods from lists of food purchased at the discretion of the USDA.³⁰ In making such discretionary purchases, the USDA considers, amongst other things, "prior year purchases, likely school needs, expectations of available funds, and any anticipated surplus or other market conditions in the coming year"³¹

Typically, entitlement foods are canned, frozen, or dried, and disproportionately favor meats, eggs, and cheese.³² In 2006–2007, USDA Foods purchased by states were: 35% meat, 15% poultry and eggs, 22% cheese, 25% fruits and vegetables (35% of which were potatoes), and 3% grains, peanuts, and oils.³³ The vegetable offerings are limited to various beans, processed tomato products, potatoes, and corn.³⁴ Potatoes are the only fresh vegetable offered, and fresh fruits include only apples, oranges and pears.³⁵ In practice, entitlement foods often provide the basis of unhealthy meals—the top-end products being: cooked sausage patties and links, pizza topping, pork bar-b-que, beef patties/crumbles/meat balls, fruit pops, turnovers, chicken nuggets/patties/roasted pieces, breaded chicken, turkey ham, bologna, and breast deli slices, and pizza.³⁶

27. *Lunch Program*, *supra* note 20, at 2.

28. Agricultural Adjustment Act of 1935 §32, 7 U.S.C. § 612(c).

29. BECKER, *supra* note 25, at 1. Since 1935, Section 32 has earmarked the equivalent of 30% of annual customs receipts as appropriations to support the farm sector. Today, the bulk of Section 32 funds are used in conjunction with child nutrition programs. However, they are also used for disaster relief, direct payments to farmers, and other farm related emergencies. *Id.* at 1–2.

30. *Id.* at 3 (explaining that the Secretary of Agriculture has broad discretion as to what commodities and what quantities of any commodity he or she may purchase). The money for purchasing entitlement foods and "bonus" agricultural surplus commodities is provided by funds under Section 32. *Id.* at 2.

31. *Id.* at 3.

32. See U.S. Dep't of Agric. Food & Nutrition Serv., *USDA Foods Available for School Year 2010—Schools and Institutions*, 2 (Jan. 2009) [hereinafter *USDA Foods*] (providing a table of USDA foods available to schools and institutions).

33. *Commodities*, *supra* note 22, at 1.

34. *USDA Foods*, *supra* note 32, at 2.

35. *Id.*

36. See U.S. Dep't of Agric. Food & Nutrition Serv., *Commodity Processing*, 4 (Jun. 2007), available at <http://www.fns.usda.gov/fdd/processing/pfs-processing.pdf>.

The USDA's duty to two masters—public health on the one hand and the economic viability of the agricultural sector on the other—has always been an uneasy balancing act. Initially, the dual goals of using agriculture surplus and feeding poor children may not have been in immediate tension; the most pressing issue facing most poor Americans in the post-war years was a simple calorie deficit.³⁷ Indeed, part of the motivation behind the NSLA was to combat weakness and malnutrition found in military recruits.³⁸ But since then, the problems associated with nutrition in our country have come full circle. Ironically, one in four young people are now disqualified from military service because of excessive weight.³⁹ The nation no longer suffers from a calorie deficit but a surplus.⁴⁰ Indeed, "[t]oday, childhood overweight and obesity are major public health concerns."⁴¹

37. See Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2494 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220) ("At that time [1946], nutritional concerns in the United States (U.S.) centered on nutrient deficiencies and issues of under consumption.").

38. See Elizabeth Becker & Marian Burros, *Eat Your Vegetables? Only at a Few Schools*, N.Y. TIMES, Jan. 13, 2013, at A1 (quoting Representative Marcy Kaptur, the ranking minority member of the Agricultural Appropriations Subcommittee, as stating that "the school food program began because many young recruits in World War II were malnourished and physically incapable of meeting the demands of military life"); see also Ellen Fried & Michele Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 DUKE L.J. 1491, 1502 (2007) (referencing a Selective Service report showing that "one-third of men rejected for military service during World War II suffered from significant nutritional deficiencies").

39. Michelle Obama, First Lady of the United States, Remarks by the President and First Lady at the Signing of the Healthy, Hunger-Free Kids Act (Dec. 13, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/2010/12/13/remarks-president-and-first-lady-signing-healthy-hunger-free-kids-act>); see also The Associated Press, *Obesity Takes Its Toll on the Military: Officials Increasingly Worried About Troops Being Too Fat to Fight*, MSNBC.com (July 5, 2005), <http://www.msnbc.msn.com/id/8423112> (last visited Nov. 25, 2011) (noting that of those in prime recruiting age, 18% of men and 43% of women exceed the military's screening weights) (on file with the Washington and Lee Law Review).

40. See Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2495. The initial section of the proposed rule states:

New dietary concerns have emerged since the establishment of the NSLP. The overt nutritional deficiencies in children's diets that led to the NSLP's inception have largely been eliminated. In turn, overweight and obesity are now major health concerns affecting children and adolescents. Studies indicate excess food consumption, poor food choices, and decreased physical activity are contributing to childhood . . . obesity and related chronic health conditions.

Id.

41. *Id.* at 2499.

Congressional attempts to reform the National School Lunch Act to reflect current needs have been frequent in recent years. In 1994, Section 106(b) of the Healthy Meals for Healthy Americans Act⁴² required that school meals conform to the most recent USDA Dietary Guidelines.⁴³ This mandate was strengthened by Section 103 of The Child Nutrition and WIC Reauthorization Act of 2004,⁴⁴ which further amended the NSLA and required the USDA secretary to promulgate rules revising nutrition standards with specific recommendations regarding consumption and food ingredients.⁴⁵ Using its discretion, the USDA recently partnered with the Department of Defense (DoD) to add more fresh produce to school menus.⁴⁶ Through this program, the DoD uses its considerable purchase power to buy bulk produce cheaply that is then distributed to schools.⁴⁷

B. Child Nutrition Act of 1966

The Child Nutrition Act of 1966 (CNA) supplemented the underfunded NSLA by establishing 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.⁴⁸ The CNA requires that many of the programs within the overall Child Nutrition Program be reauthorized every five years.⁴⁹ The most recent reauthorization was originally scheduled for September 2009, but

42. See *id.* Healthy Meals for Healthy Americans Act, Pub. L. No. 103-448, § 106(b), 108 Stat. 4699, 4702-03 (1994) (amending 42 U.S.C. § 1758(a)(1)(A)).

43. See Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 103, 118 Stat. 729, 732 (amending 42 U.S.C. § 1758(a)(4)(B)).

44. Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 103, 118 Stat. 729, 732.

45. U.S. Dep't of Agric., *Department of Defense Fresh Fruit and Vegetable Program* (2011) [hereinafter Dep't of Agric.]. Under the 2002 Farm Bill, at least \$200 million of Section 32 funds must be spent annually on "fruits, vegetables, and other specialty crops, \$50 million of it for fruits and vegetables for schools through the Defense Department Fresh Program." BECKER, *supra* note 25, at 5.

46. See Dep't of Agric., *supra* note 45.

47. *Id.*

48. 42 U.S.C. §§ 1771-89 (amended 2010).

49. Though the CNA does not explicitly require reauthorization of individual programs every five years, the statute only provides for appropriations for those programs for the proceeding five years. The statute must thus be amended every five years to reauthorize funding. See, e.g., *id.* §§ 1786(g)(1)(A), 1793(j) (reflecting the most recent five-year reauthorization of appropriations for the special supplemental nutrition program for woman and infants and the school breakfast program respectively).

due to health care reform, the economic crisis, and other pressing issues, Congress passed a temporary extension of the program for one year.⁵⁰ The HHFKA, passed in 2010, is thus the most recent reauthorization of the Child Nutrition Program.

The purpose of this Act was also binary: To feed school children adequate calories⁵¹ and to encourage consumption of surplus agricultural commodities.⁵² Together, the NSLA and CNA vest the United States Department of Agriculture with the responsibility to set nutritional guidelines for the School Lunch Program.⁵³ Thus, dietary guidelines came under the discretion of the United States Department of Agriculture rather than that of the Surgeon General or another health-related administrative agency.

C. National Soft Drink Association v. Block: *Non-Regulation of Competitive Foods*⁵⁴

In one landmark case, *National Soft Drink Association v. Block*,⁵⁵ the USDA's best efforts to positively change the diet of American school children were deemed outside the purview of its congressional mandate.⁵⁶

50. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-80, 123 Stat 2090, 2113–16 (2009).

51. Child Nutrition Act, 42 U.S.C. § 1771 (2003).

52. See 42 U.S.C. § 1773(b)(2)(C)(4) (2003) (allowing the Secretary of Agriculture to make available to institutions that serve breakfast under the newly created program stocks of agricultural commodities unlikely to be sold by the Secretary of Agriculture or the Commodity Credit Corporation or used in other commodity programs).

53. See Child Nutrition Act of 1966, 42 U.S.C. §§ 1771–89 (amended 2010); Richard B. Russell National School Lunch Act, 42 U.S.C. §§ 1751–69 (2006).

54. These nutritionally void foods, are commonly referred to as "competitive foods" because they compete with the foods offered under the School Lunch Program. See Katherine Unger Davis, *Racial Disparities in Childhood Obesity: Causes, Consequences, and Solutions*, 14 U. PA. J.L. & SOC. CHANGE 313, 324 (2011) (explaining that "[t]he term 'competitive foods' is used to denote food and beverage sources in schools other than school-served lunch or breakfast" and that these foods are frequently sugar-rich and high in fat). Today, in addition to soda, candy, and snacks, many schools also allow outside fast food vendors to sell their food on campus. Fried & Simon, *supra* note 38, at 1498.

55. See *Nat'l Soft Drink Ass'n v. Block*, 721 F.2d 1348, 1351 (D.C. Cir. 1983) (holding that, though the rules were not promulgated in an arbitrary or capricious fashion, the Secretary of Agriculture nevertheless exceeded his authority by barring the sale of competitive foods on school premises until after the last lunch period).

56. See *id.* at 1353 (concluding that the Secretary of Agriculture exceeded his authority because Congress intended to grant the Secretary the power to control competitive foods only in food service facilities and at certain designated food service times).

In the 1970s, the Secretary of Agriculture attempted to regulate access to soda and candy at schools.⁵⁷ Schools resisted because they viewed these sales as economically valuable. In response, Congress revoked the Secretary's power to regulate such foods two years later, only to reinstate the power within a few years due to countervailing pressures.⁵⁸ In this revision, Congress granted the USDA the power to regulate competitive foods "in food service facilities or areas during the time of food service."⁵⁹ After reviewing an extensive record, the Secretary then created a regulation "eliminate[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."⁶⁰

This regulation was short lived, as it was challenged and defeated in *National Soft Drink*, the only federal case directly addressing the nutritional guidelines set for school lunches. In *National Soft Drink*, Plaintiffs claimed that the USDA's regulations were arbitrary and capricious, and an abuse of discretion.⁶¹ More specifically, Plaintiffs argued that the Secretary of Agriculture exceeded his authority in regulating competitive foods after the school lunch period.⁶² They argued that the statute only authorized regulations in a narrow time and place, citing statutory language indicating that regulations were valid "in food service facilities or areas during the time of food service."⁶³ The court agreed with this interpretation and held that the time and place restrictions invalidated the challenged regulation.⁶⁴ The USDA subsequently stopped attempting to regulate soda as well as candy and other non-nutritious foods.⁶⁵

Discussion and debate over the issue of competitive foods is ongoing, as the consumption of junk food in schools in recent years has exploded.⁶⁶

57. *See id.* at 1350 (noting that the Secretary of Agriculture promulgated a regulation that restricted "the sale of extra food items at the same time and place as the non-profit program in the schools" (internal quotation marks omitted)).

58. *Id.*

59. Child Nutrition Act of 1966, 42 U.S.C. §§ 1771, 1779 (amended 2010).

60. *Nat'l Soft Drink Ass'n*, 721 F.2d at 1351.

61. *Id.*

62. *Id.* at 1352.

63. *Id.*

64. *Id.* at 1353.

65. *Softer Rules for Junk Food*, THE WASHINGTON POST, Mar. 14, 1984, at A25.

66. *See* MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 198-99 (2002) ("From 1985 to 1997, school districts decreased the amounts of milk they bought by nearly 30% and increased their purchases of carbonated soda by an impressive 1,100%." (citing LYNN DAFT ET AL., PROMAR INTERNATIONAL,

Children in schools provide an "unparalleled marketing opportunity" to food vendors, because most school age children do attend school, even if they do not have access to television or computers at home.⁶⁷ Aggressive tactics taken by soda companies, including negotiating exclusive "pouring rights" contracts⁶⁸ in various school districts, have made soda an established part of school lunches and school budgets.⁶⁹ As of 2000, approximately 200 school districts were participating in such "pouring rights" agreements.⁷⁰

In the wake of this extreme marketing, some argue for a complete ban on competitive foods on public school campuses at all times.⁷¹ Others have noted that junk food marketing to children in schools takes numerous forms and induces children to request and consume these products.⁷² In 2000, Congress requested that the USDA compile a report on the impact competitive foods were having on nutrition in public schools.⁷³ The USDA issued its report a year later, strongly condemning the sale of competitive foods on campuses and detailing many health and social issues associated with their sale to minors at school.⁷⁴

SCHOOL FOOD PURCHASE STUDY: FINAL REPORT (1998)).

67. *Id.* at 188.

68. A "pouring rights" contract is one in which a soda company makes large payments to a school district for the right to sell its products exclusively in every one of the district's schools. *Id.* at 197. These contracts usually involve a lump-sum payment and subsequent maintenance payments every five to ten years. *Id.* at 202.

69. *See id.* at 202–06 (discussing the effects of pouring rights agreements on school districts).

70. *See id.* at 202; *see also* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-00-156, PUBLIC EDUCATION: COMMERCIAL ACTIVITIES IN SCHOOLS 15–16 (2000), available at <http://www.gao.gov/new.items/he00156.pdf> (discussing the prevalence and variety of pouring rights contracts in schools).

71. *See* Fried & Simon, *supra* note 38, at 1497 ("Given the obstacles, inconsistencies, and limitations of current policies and proposals, only a complete ban would accomplish meaningful public health reform and truly protect children's well-being.").

72. *See* NESTLE, *supra* note 66, at 187 ("Channel One"; "[s]oft drink 'pouring rights' agreements"; "[l]ogos on vending machines, supplies, and sport facilities"; "[h]allway advertising"; "[a]dvertisements on free book covers"; "[a]dvertisements on school buses"; "[s]port uniforms [and] scoreboards"; "[c]ontests"; "[f]ree samples"; "[c]oupons for fast food"; "[c]lub and activity sponsorship"; and "[p]roduct placements in teaching materials").

73. H.R. REP. NO. 106-619, at 120 (2000).

74. *See* U.S. DEP'T OF AGRIC., FOODS SOLD IN COMPETITION WITH USDA SCHOOL MEAL PROGRAMS: A REPORT TO CONGRESS 2–4 (2001) [hereinafter USDA Report], available at http://fns.usda.gov/cnd/lunch/_private/competitivefoods/report_congress.htm (reporting that the goals of the School Lunch Program are undermined by the sale of competitive foods in schools).

D. The Farm Bill

Perhaps counterintuitively, the most influential legislation regarding nutrition, diet, and food consumption in the United States contains no mention of diet, nutrition, or public health in its title: It is the Farm Bill.⁷⁵ The influence of the Farm Bill over dietary issues and policy in this country is pervasive and inescapable.

The Farm Bill was originally promulgated in 1949 as an overarching agricultural reform.⁷⁶ It shapes how Americans eat because it dictates which foods are cheap and plentiful.⁷⁷ The Farm Bill creates incentives for farmers to grow more of certain products, and currently prioritizes products that can either be used as animal feed or processed and stored such as corn, soy, and wheat.⁷⁸ This policy renders subsidized products inexpensive and abundant, and other foods, such as fresh fruits and vegetables, costly in comparison.

Under this legislation, the USDA is required by law to subsidize approximately two dozen specified agricultural commodities.⁷⁹ Many would argue that these subsidies are unnecessary, not only because they create additional surpluses of already abundant crops,⁸⁰ but also because they benefit large agribusinesses over local family owned farms.⁸¹ The most recent reauthorization of the Farm Bill in 2008 extended existing

75. Food, Conservation, and Energy Act (Farm Bill) of 2008, Pub. L. No. 110-246, 112 Stat. 1651 (codified in scattered sections of 7, 12, 15, 16, 19, 20, 21, 25, 26, 40, and 42 U.S.C.).

76. GEOFFREY S. BECKER, CONG. RESEARCH SERV., No. 96-900, FARM COMMODITY LEGISLATION: CHRONOLOGY, 1933-2002, at 3 (updated May 31, 2002), available at <http://www.nationalaglawcenter.org/assets/crs/96-900.pdf>.

77. The Farm Bill encourages "even more unneeded output from the most efficient producers at the same time they discouraged utilization, consequently pushing surpluses higher and prices lower." U.S. DEP'T OF AGRIC., FOOD AND AGRICULTURAL POLICY: TAKING STOCK FOR THE NEW CENTURY 47 (2001), available at <http://www.usda.gov/news/pubs/farmpolicy01/fullreport.pdf>.

78. GEOFFREY S. BECKER, CONG. RESEARCH SERV., RS20848, FARM COMMODITY PROGRAMS: A SHORT PRIMER 2 (updated Feb. 7, 2005), available at <http://www.nationalaglawcenter.org/assets/crs/RS20848.pdf>.

79. *Id.* ("The law requires USDA to offer income and/or price support for wheat, feed grains, . . . cotton, . . . rice, soybeans, other oilseeds, . . . milk, peanuts, beet and cane sugar, wool, mohair, honey, dry peas, lentils, and small chickpeas.").

80. *See* U.S. DEP'T OF AGRIC., *supra* note 77, at 47 (discussing effects of the Farm Bill).

81. *See* BECKER, *supra* note 78, at 5 ("In 1997 about 157,000 large farms, with annual agricultural sales averaging about \$900,000, accounted for 8% of all U.S. farms but 72% of all farm sales.").

federal food subsidies—predominately allocated to ten major commodity crops—with no significant explicit allocation for fresh fruits and vegetables.⁸² Indeed, the Farm Bill provides no direct subsidies or aid for fruits, nuts, vegetables, and nursery/greenhouse products.⁸³ Moreover, it prohibits planting fruits, vegetables, and nuts (known as specialty crops) on subsidized farmland.⁸⁴ The mere fact that statutory law defines fruits and vegetables as "specialty crops" indicates a skewed understanding of the centrality of these foods in a healthy diet.⁸⁵ This is true even in a healthy diet as defined by the same federal authorities (USDA) making this policy.⁸⁶

The Farm Bill has a large effect on the content of school lunches because pragmatic cost concerns ultimately drive schools' abilities to conform to nutrition standards. At minimum, the Farm Bill encourages schools to overprivilege commodity crops relative to "specialty crops" as a matter of economics. Under the HHFKA, schools are reimbursed \$2.74 per lunch per student for students who qualify for a free lunch.⁸⁷ With that amount, they must attempt to meet federal dietary guidelines and feed their students. Quite simply, they can only afford to do that with heavy reliance on (1) agricultural surplus purchased and given as bonuses to the program by the USDA and (2) cheap, mass produced commodity products. As such, the Farm Bill dictates which foods are feasible options for schools with limited budgets.

82. See Food, Conservation, and Energy Act (Farm Bill) of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (providing for, among other things, the continuation of agricultural programs through fiscal year 2012).

83. BECKER, *supra* note 78, at 2. Section 32 funds, however, are often used to purchase non-supported commodities. See GEOFFREY S. BECKER, CONG. RESEARCH SERV., RS20235, FARM AND FOOD SUPPORT UNDER USDA'S SECTION 32 PROGRAM 1-2 (updated Nov. 28, 2006), available at <http://www.cnie.org/NLE/CRSreports/06Dec/RS20235.pdf> (describing the purposes and uses of Section 32 funding).

84. *Id.* at 3.

85. See Specialty Crops Competitiveness Act of 2004, Pub. L. No. 108-465, § 3(1), 118 Stat. 3882, 3883 (codified at 7 U.S.C. § 1621 note) (defining specialty crops as "fruits and vegetables, tree nuts, dried fruits, and nursery crops (including floriculture)").

86. See U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., DIETARY GUIDELINES FOR AMERICANS 2010, at 35 (7th ed. 2010) (recommending Americans eat more vegetables and fruits).

87. See Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2515 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220) (listing reimbursement rates for the 2010-2011 school year). Schools serving fewer than 60% free and reduced lunches were reimbursed \$2.72. *Id.*

III. The Newest Iteration: The HHFKA

The HHFKA passed with broad bipartisan support and was signed into law on December 15, 2010.⁸⁸ Overall, the HHFKA makes positive changes to existing legislation. Notably, it increases funding for the School Lunch Program,⁸⁹ allows the USDA to regulate competitive foods,⁹⁰ requires the USDA's nutritional guidelines be grounded in science and comport with the most recently published Dietary Guidelines for Americans,⁹¹ requires the use of higher quality commodity-crop products in the form of whole grains and lower fat milk,⁹² offers water at lunch,⁹³ and pilots a small (\$5 million) farm-to-school program to connect local farmers to schools.⁹⁴ What it does not do, however, is alter the Farm Bill in any way. This section examines critically the most fundamental of these changes and the new USDA proposed guidelines. It concludes that the success of the bill remains entirely contingent on its implementation, ongoing congressional action and support, and successful enforcement in the years ahead.

A. Increased Funding

Underfunding has always been a serious issue for the School Lunch Program. In order to incentivize schools to offer more nutritious lunches,

88. See 156 CONG. REC. H7888–89 (daily ed. Dec. 2, 2010) (recording passage of the bill by a strong majority in the House with 264 yeas, 157 nays, and 13 not voting). The bill was passed by unanimous consent in the Senate. 156 CONG. REC. S6832 (daily ed. Aug. 5, 2010).

89. See Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 201, 124 Stat. 3183, 3215 (to be codified as amended at 42 U.S.C. § 1753(b)) (providing a six cent increase in reimbursement).

90. See *id.* § 208, 124 Stat. at 3221 (to be codified as amended at 42 U.S.C. § 1779) (making nutrition standards applicable to all foods sold on the school campus).

91. See U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 86, at viii.

92. See Healthy, Hunger-Free Kids Act, § 202, 124 Stat. at 3216 (to be codified as amended at 42 U.S.C. § 9(a)(2)(A)) (requiring schools to offer a variety of milk consistent with the most recent Dietary Guidelines for Americans).

93. See *id.* § 203, § 9(a)(5), 124 Stat. at 3216 (to be codified as amended at 42 U.S.C. § 1758(a)) (requiring participating programs to provide water free of charge). Water at lunch is important because it encourages children to drink non-caloric and unsweetened beverages. Serving water at lunch provides an alternative to milk, juice, and other beverages offered to children.

94. See *id.* § 243, § 18(g), 124 Stat. at 3237–38 (to be codified as amended at 42 U.S.C. § 1769(g)) (authorizing a farm-to-school program to improve access to local foods).

the HHFKA increases the federal reimbursement rate for free lunches at schools by 6 cents per meal⁹⁵ to \$2.74.⁹⁶ Although the increase of a few cents may seem insignificant, it is the first direct increase in funding the program has seen in more than thirty years.⁹⁷ The HHFKA provides schools with this increase in reimbursement if they meet the new nutrition standards promulgated by the Secretary of Agriculture in accordance with the bill.⁹⁸ Critics point out that the funding for this increase came from cutting another vital nutrition program for the poor: Food stamps.⁹⁹

Substantively, there are two main arguments that this funding increase is not effective at creating more nutritious school meals. First, many argue six cents is not enough money to meet the goals of the dietary guidelines.¹⁰⁰ Second, even if the funding were enough to procure the necessary foods, few schools would receive the increase because they cannot meet the guidelines within their budget unless cheaper fruits and vegetables are available.

The second issue is more problematic: How can schools, with a limited budget, purchase fruits and vegetables in a cost effective manner? Some have suggested that the federal government should facilitate schools consolidating and leveraging their purchasing power to obtain advantageous contracts for healthy food items such as fresh vegetables and fruits.¹⁰¹ I

95. *Id.* § 201, 124 Stat. at 3215 (to be codified as amended at 42 U.S.C. § 1753(b)).

96. *See* Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2515 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220) (listing reimbursement rates for the 2010–2011 school year).

97. THE WHITE HOUSE, FACT SHEET: CHILD NUTRITION REAUTHORIZATION HEALTHY, HUNGER-FREE KIDS ACT OF 2010, at 1 (2010).

98. Healthy, Hunger-Free Kids Act, § 201, 124 Stat. at 3215 (to be codified as amended at 42 U.S.C. § 1753(b)).

99. *See* April Fulton, *Child Nutrition Act Pits School Lunch Money Against Food Stamps*, SHOTS: NPR'S HEALTH BLOG (Nov. 9, 2010 2:17 PM), <http://www.npr.org/blogs/health/2010/11/09/131188233/child-nutrition-act-pits-school-lunch-money-against-food-stamps> (last visited Nov. 25, 2011) (reporting that groups oppose the bill because it "would take future increases slated for the food stamps program") (on file with the Washington and Lee Law Review); Raj Patel, *Why We Shouldn't Cut Food Stamps to Pay for School Lunch*, THE ATLANTIC (Nov. 23, 2010 9:03 AM), <http://www.theatlantic.com/life/archive/2010/11/why-we-shouldnt-cut-food-stamps-to-pay-for-school-lunch/66913/> (last visited Nov. 25, 2011) (reporting that the bill will be paid for by cutting funding for food stamps in 2013 by \$2 billion) (on file with the Washington and Lee Law Review).

100. *See, e.g., Nutrition in Schools: Fighting the Flab*, THE ECONOMIST, June 5, 2010, at 86 (reporting that Senator Gillibrand of New York believed six cents was not enough and instead sought a seventy cent increase).

101. *See* Sheila Fleischhack & Joel Gittelsohn, *Carrots or Candy in Corner Stores?: Federal Facilitators and Barriers to Stocking Healthier Options*, 7 IND. HEALTH L. REV. 23,

argue that Congress should also reallocate subsidies in the Farm Bill to increase production of fresh fruit and vegetables, thereby lowering their cost.¹⁰²

B. Positive Change in the Area of Competitive Foods

The largest and most fundamental change of this bill is that it supersedes the *National Soft Drink* case and explicitly gives discretion to the USDA to regulate all foods, including competitive foods, at all times of the day on school campuses.¹⁰³ As such, the HHFKA makes clear that nutrition standards will apply to all foods sold at schools.¹⁰⁴ This is a significant victory and one that has been heavily debated and politically opposed for decades.¹⁰⁵ Over twenty-five years have passed since *National Soft Drink* became law, and the lack of political will against overriding the court's findings was a point of longstanding inertia.

What remains to be seen, of course, is how the USDA will wield its newfound discretion. Currently, the new regulations as promulgated have no explicit discussion of competitive foods from the new regulations.¹⁰⁶ That said, the new regulations also do not explicitly exempt those foods from the new regulations.¹⁰⁷ Calorie targets for students are set on a meal by meal basis,¹⁰⁸ and it is unclear how, if at all, additional snack

49 (2010) ("Efforts should also be made to evaluate if and how the Federal government can help schools consolidate their purchasing and contract power to leverage their collective purchasing power to more effectively purchase a variety of healthy items." (citing Corinna Hawkes, Freelance Consultant, Presentation at the Robert Wood Johnson Foundation Health Eating Research Food Systems & Public Health Conference: Leveraging the Food Supply Chain to Promote Healthy Diets and Prevent Obesity (Apr. 2, 2009))).

102. See *infra* Part IV.A.

103. See Healthy, Hunger-Free Kids Act, § 208, 124 Stat. at 3221 (amending the Child Nutrition Act of 1966 to permit regulation of competitive foods) (to be codified as amended at 42 U.S.C. § 1779(b)) ("The nutrition standards shall apply to all foods sold—"(i) outside the school meal programs; (ii) on the school campus; and (iii) at any time during the school day.").

104. *Id.*

105. See Fried & Simon, *supra* note 38, at 1503–10 (recounting the history of debate and legislative or judicial action regarding the regulation of competitive foods between 1970 and 2004).

106. See Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494 (proposed Jan. 13, 2011) (to be codified at 8 C.F.R. pts. 210, 220).

107. *Id.*

108. See *id.* at 2498 (setting out proposed minimum and maximum calories levels for

consumption outside of the meal period is factored in. No matter what, a complete prohibition of competitive foods is highly unlikely. The HHFKA itself specifically allows the USDA to permit special exemptions for competitive foods sold during school-sponsored fundraisers.¹⁰⁹

C. New Guidance for USDA Nutritional Regulations

Under the HHFKA, the USDA continues to take the lead and exercise discretion on setting guidelines for school nutrition.¹¹⁰ However, in this bill, Congress provides considerable guidance to the USDA in promulgating the new rules. The HHFKA amends Section 10 of the Child Nutrition Act of 1966 to require that the USDA's nutritional guidelines be grounded in science and comport with the most recently published Dietary Guidelines for Americans.¹¹¹ The statute requires that the USDA consider "authoritative scientific recommendations for nutrition standards; [] existing school nutrition standards, including voluntary standards for beverages and snack foods and State and local standards; [] the practical application of the nutrition standards; and [] special exemptions for school-sponsored fundraisers."¹¹² The statute also encourages schools to serve whole grains,¹¹³ and requires them to serve non-fat milk, low-fat milk,¹¹⁴ and water¹¹⁵ at lunch. Thus, these changes require that surplus used in schools provide more nutritional value with fewer calories.

breakfast and lunch by age group).

109. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 208, 124 Stat. 3183, 3222 (to be codified as amended at 42 U.S.C. § 1779(b)).

110. *See id.* § 208, 124 Stat. at 3221 (to be codified as amended at 42 U.S.C. § 1779(b)) (directing the Secretary of Agriculture to "establish science-based nutrition standards for foods sold in schools").

111. *Id.* § 208, 124 Stat. at 3221 (to be codified as amended at 42 U.S.C. § 1779(b)).

112. *Id.* § 208, 124 Stat. at 3222–23 (to be codified as amended at 42 U.S.C. § 1779(b)).

113. *See id.* § 221(3), 124 Stat. at 3227 (to be codified as amended at 42 U.S.C. § 1776) (instructing the Secretary to issue guidelines to encourage child care centers and day care homes to serve meals and snacks incorporating foods recommended by the most recent Dietary Guidelines, including whole grains).

114. *See id.* § 202, 124 Stat. at 3216 (to be codified as amended at 42 U.S.C. § 9(a)(2)(A)) (requiring schools to offer a variety of types of milk consistent with the most recent Dietary Guidelines for Americans).

115. *Id.* § 203, 124 Stat. at 3216 (to be codified as amended at 42 U.S.C. § 9(a)).

D. Regulations as Proposed

Under the Administrative Procedures Act (APA),¹¹⁶ all administrative agencies are required to give notice in the Federal Register and post their regulations for public comment before they officially take effect.¹¹⁷ After considering input from interested parties, the agency is required to incorporate into the subsequently adopted rules a "concise general statement of [the] basis and purpose" of the rule.¹¹⁸ The new USDA standards regulating school lunches were in their public comment period until April 13, 2011, with final adoption projected for November of 2011.¹¹⁹ The following section reviews in detail the new regulations as proposed.

E. Basis of the Proposed Standards

The proposed changes to the Nutrition Standards in the NSLP/SBP were based on the National Academy of Science's Institute of Medicine's (IOM) 2009 report, "School Meals: Building Blocks for Healthy Children."¹²⁰ The USDA's consultation with the IOM in formulating these new standards places the standards on more solid and legitimate footing. As an institution devoted to science and medicine specifically, the IOM is better suited to evaluate and analyze nutrition and diet than the USDA.¹²¹ Notably, however, the USDA is not required to consult with the IOM or any specific agency in the promulgation of the standards. Rather, the USDA is only required by law to "consider . . . authoritative scientific recommendations for nutrition standards."¹²² Therefore, the USDA has broad discretion to reject such recommendations and may procure

116. See Administrative Procedure Act, 5 U.S.C. §§ 551–706, 3105, 3344, 7521 (2006) (establishing procedures by which federal administrative agencies propose and establish regulations).

117. *Id.* § 553.

118. *Id.*

119. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2494 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220).

120. *Id.* at 2494, 2496. For the full report, see http://www.nap.edu/catalog.php?record_id=12512.

121. *Id.* at 2496 (explaining IOM's expertise, methodology for compiling the report, and previous contributions to USDA efforts to update food package standards in other programs).

122. The Healthy, Hunger-Free Kids Act of 2010 authorizes funding and sets policy for USDA's core childhood nutrition programs. See 42 U.S.C.A. § 1779 (West 2011) (amending § 10(C)(ii)(I) of the Child Nutrition Act of 1966).

recommendations from any authoritative scientific source. In the case of these standards, the departures that the USDA made from IOM recommendations are positive, setting more ambitious and stringent goals than those outlined by the IOM.¹²³

1. Unclear Treatment of Competitive Foods

The main flaw of these standards is that they fail to take clear advantage of new discretion the USDA now has over competitive foods. Although the proposed rules outline in detail nutrition standards for school lunches, breakfasts, and afterschool snack programs,¹²⁴ it is unclear how these standards apply to competitive foods. Under the statute as written, all nutrition requirements should apply to competitive foods, such as sodium, fat, and calorie restrictions. The discussion and charts in the proposed regulations, however, make no explicit recommendations on these items.¹²⁵ There is no discussion of vending machines, candy stores, or snack bars. That said, in one respect the USDA's silence on this issue is positive; it did not explicitly exempt competitive foods sold in school fundraisers from the new guidelines.

2. Food Standards for School Meals

With a clearer Congressional mandate and fresh guidelines, the new regulations make some notable changes to the nutritional requirements of NSLP and the SBP. These standards are a significant departure from existing school-lunch patterns. Specifically, the new standards would amend 7 C.F.R. 210 for the NSLP and 7 C.F.R. 220 for the SBP¹²⁶ to implement the 2005 Dietary Guidelines for Americans (henceforth "Dietary Guidelines")¹²⁷ by requiring schools to reduce sodium content, offer more fruits, vegetables, and whole grains, and provide only fat-free or low-fat fluid milk. The increase in fruits, vegetables, and whole grains is projected

123. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2540.

124. *Id.* at 2498, 2551, 2556–57.

125. *See, e.g., id.* at 2498–2502, 2516, 2518, 2553, 2555, 2565–67.

126. *Id.* at 2496.

127. Because the new 2010 Dietary Guidelines were not available to IOM for consideration, the USDA elected to issue these proposed rules based on the 2005 Guidelines in the hope they would lessen delays. *Id.* at 2494.

to increase costs.¹²⁸ As such, the USDA acknowledges that, "[t]o meet the proposed program in a cost-effective manner, program operators would need to optimize the use of USDA foods¹²⁹ and adopt other cost-saving strategies"¹³⁰

3. Calorie Reform

For the first time in their history, the current draft USDA nutrition standards for schools as promulgated set calorie maximums for various age groups.¹³¹ The USDA's stated intention is "not to reduce children's intake of food but to avoid excessive calories."¹³² The program allows discretionary calories in the form of fat and sugars but only if within calorie, fat, and sodium restrictions.¹³³ It also bars the use of fluid milk with fat content greater than 1% and any "Food of Minimal Nutritional Value" as part of school meals.¹³⁴ Using low-fat and skim fluid milk has the added benefit of costing less than the full-fat versions being served in schools today.¹³⁵

In order "to avoid excessive calories and provide age-appropriate meals," the USDA also proposed new age/grade group categorizations.¹³⁶ As designated, these age groups are kindergarten through fifth grade, sixth through eighth grade, and ninth through twelfth grade.¹³⁷ In theory, age/grade group categorizations make sense—people of different ages have different weights, different developmental needs, and therefore should not be provided with the same type and amount of food. As such, portion sizes

128. *Id.* at 2519.

129. *Id.* at 2530 (explaining that USDA foods were formerly referred to as USDA commodities).

130. *Id.* at 2508.

131. *Id.* at 2494, 2539.

132. *Id.* at 2501.

133. *Id.* at 2498 n.(i).

134. *See* 7 C.F.R. pt. 210 app. B § (a) (defining "Food of Minimal Nutritional Value" as soda water, non-juice based water ices, chewing gum, and certain candies).

135. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2529.

136. *Id.* at 2499 (proposing to adopt age/grade groups recommended by IOM).

137. *Id.* These mirror the age/grade categories designated in the Dietary Reference Intake reports also produced by the IOM. *See id.* (finding that the IOM's approach is "consistent with the Dietary Guideline's emphasis on food groups").

would differ amongst the grades.¹³⁸ However the age categories as specified currently are too broad. Specifically, the K–5 designation should be broken down into smaller more accurate subgroups, because a large amount of growth happens between ages five to ten years old. The calorie needs of a kindergartener and a fifth grader are very different.

In addition, the proposed standards could and should go farther to alter current patterns of eating sweetened foods. Specifically, flavored fat-free milk,¹³⁹ flavored yogurts,¹⁴⁰ and fruits canned in light syrup¹⁴¹ are still accommodated under these standards and unnecessarily provide children with a high calorie version of otherwise healthy offerings. Ultimately, allowing such foods with added sweeteners undermines the calorie reform by teaching children that milk, yogurt, and fruit need sweeteners to be enjoyed. In addition, the list of FMNV remains short, including only sodas, non-juice based water ices, chewing gum, and certain kinds of candy and candy coated items.¹⁴² This allows chocolate, as a flavor of milk, to continue to be offered as part of the school meal program even though one could argue easily that the nutritional value of chocolate is minimal. It is difficult to pinpoint the scientific basis for including certain foods on the FMNV list and not others.

4. Improved Produce Targets and Guidelines

Not only do the USDA nutrition standards more than double the fruit and vegetable targets for school lunches,¹⁴³ they also begin to effectively differentiate between the nutritional value of different fruits and vegetables. Schools will not be allowed to substitute between fruits and vegetables, because each has its own requirement.¹⁴⁴ As currently structured, students

138. *See id.* at 2536 ("[N]ew age/grade groupings would require school districts to offer different portion sizes instead of the same portions to all ages/grades.").

139. *See id.* at 2501 (permitting flavored or unflavored fat-free milk or unflavored low-fat milk).

140. *See id.* at 2554 (permitting flavored or sweetened yogurt to be substituted for meat or meat alternatives).

141. *See id.* (permitting fruit components "canned in light syrup" to be credited as fruit servings).

142. 7 C.F.R. pt. 210 app. B § (a) (2011).

143. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2499 tbl.2 (increasing the combined fruit and vegetable requirements from one-half to one cup under the current requirements to one and one-fourth to two cups under the proposed rule).

144. *See id.* at 2517 (refusing to permit schools to substitute fruits and vegetables to

may decline one item at breakfast and two at lunch, but must always select one fruit or vegetable per meal.¹⁴⁵

The proposed rules also acknowledge that "a basic premise of the Dietary Guidelines is that nutrients should come primarily from the consumption of whole foods that are not highly processed or heavily fortified."¹⁴⁶ Under these regulations, school breakfasts receive the strongest reform because their fresh fruit requirement is doubled.¹⁴⁷

5. Whole Foods, Whole Fruit

The new standards on fruit encourage use of whole fruit "whenever possible" and take important steps to prevent the overuse of processed foods.¹⁴⁸ Under these regulations, schools may serve "fruit that is fresh, frozen without sugar, dried, or canned in juice, water or light syrup."¹⁴⁹ Schools may also meet up to one-half of their fruit requirements through 100% fruit juice, but no juice products with under 100% juice would be allowed.¹⁵⁰ The standards would not allow any credit for snack-type fruit or vegetable products (such as fruit strips or drops), regardless of their nutritional content.¹⁵¹ The rule also eliminates the use of formulated grain-fruit products, which undermine an emphasis on naturally nutrient-dense foods.¹⁵²

6. Diversifying Vegetable Offerings

On the whole, the American diet does not conform to the USDA Dietary Guidelines for vegetables. The USDA recommends that Americans consume three to five servings of vegetables daily.¹⁵³ In reality, Americans

ensure that "students are offered both fruits and vegetables every day").

145. *Id.* at 2519.

146. *Id.* at 2506.

147. *See id.* at 2517 (noting that the number of fruits offered to students at breakfast over the week will double).

148. *See id.* at 2526 (encouraging schools to serve whole fruit rather than fruit juice "whenever possible").

149. *Id.* at 2500.

150. *Id.*

151. *Id.* at 2506.

152. *Id.* (amending 7 C.F.R. pt. 220 app. A to remove formulated grain-fruit products).

153. Ctr. for Nutritional Policy and Promotion, U.S. Dep't Agric., Food Guide Pyramid

consume only two vegetables a day—and if from that total you subtract iceberg lettuce, canned tomato products, and potatoes, the number drops to a single vegetable serving per day.¹⁵⁴

In the new school meal standards, the USDA attempts to steer children's vegetable consumption away from these pitfalls and towards a more diverse diet. Specifically, these standards discourage school reliance on potatoes and processed tomato products in order to meet vegetable targets.¹⁵⁵ They change the current practice of crediting tomato paste and purees as a calculated volume of their whole food equivalent, to crediting them based only on the volume served (aligning the treatment of tomatoes with that of other fruit and vegetable purees).¹⁵⁶ In addition, the regulations require that specific vegetable subgroups be offered over the course of the school week.¹⁵⁷ These subgroups include half-cup servings of dark green vegetables, orange vegetables, and dried beans.¹⁵⁸ This will expose children to a broader variety of nutrients and teach them more about the proper roles of vegetables in their diet.¹⁵⁹

The new standards also facilitate adding vegetables to students' diets by allowing schools "to offer non-starchy vegetables in place of fruits" at breakfast.¹⁶⁰ The USDA suggests that schools may find it more cost effective to add tomatoes and peppers to a breakfast egg dish than offering fruit.¹⁶¹ This type of flexibility is a positive step towards encouraging a shift from a sweet breakfast model to one that is more vegetable and protein based.

Finally, the regulations are structured to intelligently target the best way to increase school compliance. Although compliance with federal

Booklet (1992).

154. NESTLE, *supra* note 66, at 10.

155. *See* Nutritional Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2500, 2506 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220) (limiting the use of potatoes and tomato pastes and purees and substituting other fruits and vegetables).

156. *See id.* at 2506 (eliminating credit for tomato paste or puree that is larger than the volume served).

157. *Id.* at 2500.

158. *Id.*

159. It is unclear at this time that these regulations as proposed will stand. In particular, limitations on the use of processed tomato products and potatoes in meeting the vegetable requirement are currently facing strong political and industrial opposition. Ron Nixon, *School Lunch Proposals Set Off a Dispute*, N.Y. TIMES, Nov. 1, 2011, at A1.

160. 76 Fed. Reg. at 2500.

161. *See id.* ("[V]egetables may be more affordable than whole fruit. For example, schools may add tomatoes and green peppers to a breakfast omelet or a breakfast burrito.")

standards in schools is generally poor, one area where it is very good is in relation to offering all the different required food groups or meal components.¹⁶² Therefore, by creating more required subgroups and eliminating the ability of schools to skip vegetables in favor of fruit, the USDA effectively modified standards in a way that is more likely to increase consumption of fresh produce—particularly vegetables.

7. Phasing Out Refined Grains

The USDA requires that schools switch their grain consumption to entirely "whole grain-rich foods" over the course of two years.¹⁶³ The USDA defines "whole grain-rich foods" as grains that "may contain less than 100[%] whole grains but, generally, contain at least 51[%] whole grains."¹⁶⁴ Initially, schools will only be required to offer such "whole grain-rich foods" half of the time.¹⁶⁵ The rule allows schools to meet part of their grains requirement by offering one serving of a grain-based dessert per day.¹⁶⁶ Such desserts are still subject to the overall calories restrictions set by the USDA.¹⁶⁷

Recognizing the importance of commodity purchases to the NSLP, the USDA pledges to expand the whole grains offered as part of the commodity foods program.¹⁶⁸ Some positive changes to the list of USDA foods offered to schools are the inclusion of whole wheat pasta and the exclusion of shortening and butter.¹⁶⁹ That said, the USDA also acknowledges that "school demand for particular products" is only part of the calculus into

162. *See id.* at 2532 ("[M]ost schools do not fully comply with the current nutrition requirements for meals . . . [but] it is relatively uncommon for schools to serve meals for [f]ederal reimbursement that lack required food group or meal components.").

163. *See id.* at 2500 (explaining that "[t]wo years post-implementation of the final rule, all grains offered during the school week must be whole grain-rich").

164. *Id.* at 2500 n.5.

165. *See id.* at 2500 ("Upon implementation of the final rule, half of the grains offered during the school week must be whole grain-rich.").

166. *Id.*

167. *Id.* ("Schools would need to refer to the Grains/Breads Instruction to identify creditable grain-based desserts.").

168. *See id.* ("IOM expects that the availability of whole grain-rich products will increase over time nationwide. . . . USDA commodity foods (now known as USDA Foods) will continue to expand the list of whole grain products available to schools."). The current USDA whole grain foods include "brown rice, and whole grain tortillas, pancakes, and pasta." *Id.*

169. *Id.* at 2523.

what it buys; other driving forces behind what the USDA purchases annually through the commodity purchase plan are "current prices, available funds, and the variable nature of agricultural surplus."¹⁷⁰

8. Sodium and Providing Meat/Meat Alternatives

As part of a school meal, meat and meat alternatives¹⁷¹ must be offered to kids as part of their main dish and up to one other non-dessert item.¹⁷² The USDA believes that in order to meet fat targets, schools will offer lean meat and meat alternatives.¹⁷³ Additionally, given the sodium restrictions proposed, the new standards would discourage the use of processed meats, which are usually high in sodium.¹⁷⁴ The USDA acknowledges that "[i]ndustry can reduce sodium in school food products by approximately 20[%] to 30[%] using current technology."¹⁷⁵

F. Preemption of Local Regulations

In the post-*National Soft Drink* years when the federal government was not regulating competitive food in schools, many state, local, and municipal governments stepped in to propose, draft, and issue such regulations.¹⁷⁶ One concern over additional reform at the national level is

170. *Id.*

171. *See id.* at 2501 (explaining that recognized meat alternatives include "beans, cheese, whole eggs, nuts, seeds, peanut butter, other nut or seed butters, and yogurt"). Tofu is not currently allowed as a meat alternative because tofu lacks an FDA "standard of identity" so the "USDA cannot assure nutritional consistency across brands and types of tofu." *Id.*

172. *See id.* ("This proposed rule would also retain the current requirement that all creditable meats/meat alternates be offered in the main dish or as part of the main dish and up to one other food item other than a dessert.")

173. *Id.* at 2501 ("To meet . . . the dietary specifications for saturated fats and *trans* fat, schools would have to offer lean meats/meat alternates." (emphasis in original)).

174. *Id.*

175. *Id.* at 2503.

176. *See* Fried & Simon, *supra* note 38, at 1516–17 (stating that "between 2003 and 2005, forty-five state legislatures considered bills intended to limit the availability of soft drinks and junk food in public schools"); *id.* at 1527 (noting that Los Angeles, Seattle, Chicago, Boston, Philadelphia, and New York City have banned soda sales in schools); *cf.* Michele Simon & Ellen J. Fried, *State Laws on School Vending: The Need for a Public Health Approach*, 62 FOOD & DRUG L.J. 139, 140–41 (2007) (noting that although more state laws are being proposed that regulate competitive foods, few were ratified into law because of political pressures from industry).

that overlapping federal guidelines would preempt local, municipal, and state guidelines. This section concludes that while possible, preemption of such existing local guidelines is unlikely.

The Supremacy Clause of the Constitution¹⁷⁷ requires that in the event that there is a conflict between state and federal law, the state law is invalidated in favor of controlling federal law.¹⁷⁸ This preemption may be expressly stated in federal law, or implied by a clear congressional intent to preempt state law.¹⁷⁹ Implied preemption falls into two broad categories: (1) field preemption "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it'"¹⁸⁰ and (2) conflict preemption where "'compliance with both federal and state regulations is a physical impossibility.'"¹⁸¹ Earlier case law took a slightly broader tack, including another category in which state acts were preempted if they "present[ed] a serious danger of conflict with the administration of [a] federal program."¹⁸² Federal regulations adopted pursuant to a federal statute may also preempt conflicting state law.¹⁸³

In the case of the HHFKA, there is no express language preempting state law. Therefore, any preemption claims seeking to invalidate local regulations would have to be based on implied preemption principles.¹⁸⁴ As such, a preemption inquiry would focus on whether the federal regulation

177. See U.S. CONST. art. VI, § 6, cl. 2 ("This Constitution, and the Laws of the United States which be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land . . .").

178. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988))).

179. See *id.* at 98 ("Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))).

180. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

181. *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

182. *Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956).

183. See *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("[S]tate laws can be pre-empted by federal regulations as well as by federal statutes.").

184. See *id.* ("In the absence of express pre-emptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." (citing *Rice*, 331 U.S. at 230)).

scheme was so pervasive that a state regulation system could not coexist or, in the alternative, that state law was in direct conflict with federal law.¹⁸⁵ A less common argument under older case law is that too much additional regulation within the schools would interfere with "the administration of [a] federal program."¹⁸⁶

The argument that the federal regulation scheme is so pervasive that coterminous state regulation is impossible is invalid in the case of regulating food in schools. First, as a matter of historical practice, local and federal governments have been regulating the content of school meals concurrently for the last forty years without implicating preemption.¹⁸⁷ Second, the statute explicitly comprehends working with local regulations when it states that in creating federal regulations the USDA will "consider existing school nutrition standards, including voluntary standards for beverages and snack foods and State and local standards."¹⁸⁸ Likewise, given Congressional intent for the USDA to promulgate regulations with conscious regard towards local laws, it is unlikely that a court would find a direct conflict with state law.¹⁸⁹

The only area where this argument may be made with potential credibility is with respect to competitive foods, where candy and soda manufacturers may challenge local laws banning their foods outright. In this scenario, a manufacturer may argue that while states were allowed to ban such foods outright before the federal government regulated them at all (pre-HHFKA), now that the USDA has discretion over competitive foods, an outright ban is in direct conflict with federal law.¹⁹⁰ Specifically, the HHFKA explicitly allows the USDA to exempt from regulation competitive

185. *See id.* (stating that preemption of an entire area of law will be inferred when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" or when "compliance with both federal and state regulations is a physical impossibility" (citations omitted)).

186. *Nelson*, 350 U.S. at 505; *see also* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (finding that state law may be preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

187. A comprehensive search of case law revealed no decisions invalidating local laws or regulations regarding food in schools on the basis of preemption.

188. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 208(2), 124 Stat. 3183, 3221–22 (to be codified as amended at 42 U.S.C. § 1779).

189. *See id.* (stating that, when promulgating school nutrition standards, the Secretary must consider current local and state standards).

190. *See id.* at 3222 (allowing "special exemptions for school-sponsored fundraisers (other than fundraising through vending machines, school stores, snack bars, a la carte sales, and any other exclusions determined by the Secretary), if the fundraisers are approved by the school and are infrequent within the school").

foods being sold on campus at fundraisers if they are infrequent and done with the consent of the schools.¹⁹¹ Competitive food advocates may argue that this indicates congressional intent to allow such foods in schools under certain circumstances and that states should not interfere with that intent.¹⁹² Because the USDA's proposed rules are silent on the competitive foods issue, the courts are forced to interpret the statute without significant administrative guidance.¹⁹³

However, even this argument is unlikely to gain traction with the courts. First, the Congressional inclusion of the language allowing "special exemptions for school-sponsored fundraisers . . . if the fundraisers are approved by the school"¹⁹⁴ indicates that Congress consciously sought to accommodate rather than override local input. Second, there is no indication in the Congressional Record or elsewhere that Congress had any intention of preempting the stricter regulations of local government. Third, since their inception, school meal programs were designed to work in tandem with local, municipal, and state governments.¹⁹⁵ States are not required to participate, and therefore, if states choose not to comply with federal regulations, they are simply dropped from the program.¹⁹⁶ This makes it highly unlikely that states or municipalities would promulgate

191. *Id.*

192. *See Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

193. *See Nutrition Standards in the National School Lunch and School Breakfast Programs*, 76 Fed. Reg. 2494, 2494 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220) ("This proposed rule would increase the availability of fruits, vegetables, whole grains, and fat-free and low-fat fluid milk in school meals; reduce the levels of sodium and saturated fat in meals; and help meet the nutrition needs of school children within their calorie requirements."). The proposed rule does not address nutrition standards for competitive foods.

194. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 208(2), § 10(b)(1)(C)(ii)(IV), 124 Stat. 3183, 3222 (to be codified as amended at 42 U.S.C. § 1779).

195. *See Gordon Gunderson, The National School Lunch Program Background and Development*, (May 27, 2009) http://www.fns.usda.gov/cnd/Lunch/AboutLunch/ProgramHistory_5.htm (last visited Nov. 25, 2011) (stating that the House Committee on Agriculture Report indicated that "the encouragement of State contribution and participation in the school lunch program will be of great advantage in expanding the program") (on file with the Washington and Lee Law Review).

196. *See U.S. Dep't of Agric., National School Lunch Program*, (stating that schools that choose to participate in the School Lunch Program will be given cash subsidies and donated commodities from the U.S. Department of Agriculture and in return the schools must comply with federal requirements).

rules in direct conflict with the federal regulations. What is far more likely, and what has happened in the past,¹⁹⁷ is that they will add additional requirements to the federal guidelines. Fourth, the current standards as promulgated directly state that, "the rule would permit State or local agencies operating the [NSLP] and [NSBP] to establish more rigorous nutrition requirements or additional requirements for school meals that are not inconsistent with the nutritional provisions of the rule."¹⁹⁸ Although this does not show Congressional intent directly, it certainly holds weight as a valid agency interpretation of that law.

Finally, as a general matter of law, preemption claims are notoriously difficult to win. It is established precedent that due to federalism concerns, courts are reticent to preempt state laws and grant them a presumption of validity.¹⁹⁹ As such, federal courts will be cautious in applying preemption tests to these particular laws and regulations.²⁰⁰ Given the history of these regulations and the express language in the statute indicating that Congress did not mean to preempt more stringent local rules, it is highly unlikely that a federal court would invalidate more strict local, municipal, or state regulation of school food programs.

IV. What Congress Should Do to Effectively Reform Nutrition in Schools

A. Reallocate Food Subsidies Through Farm Bill Reform

Ultimately, the HHFKA will only be as effective as corresponding changes to the Farm Bill. The Farm Bill is up for renewal in 2012 and must

197. See Fried & Simon, *supra* note 38, at 1516–17 (describing recent state regulation in the area of school nutrition aimed at filling the voids left by federal law).

198. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2509 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220).

199. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating that due to federalism concerns there is a "presumption against the pre-emption of state . . . regulations" (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 545–46 (1992))); *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) ("It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." (quoting *Schwartz v. Texas*, 344 U.S. 199, 202–03 (1952))).

200. It is worthwhile to note that shifting pleading standards in federal court may provide additional procedural hurdles to bringing such actions. Roger Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109 (2010).

be modified accordingly to make more vegetables and fruits affordable to schools and the general public.²⁰¹ Alternatively, at a minimum, the Bill must be modified to render current commodity crops less inexpensive in comparison to fresh produce alternatives. The USDA is keenly aware of the connection between the agricultural sector and school meals noting that "[c]hanges in school demand also impact food producers."²⁰² The inverse also holds true.

Congress may modify the Farm Bill effectively by providing financial incentives to grow vegetables and fruit for human consumption and by limiting subsidies to traditional surplus crops. Currently, a majority of these subsidies go to growers who gross over \$200,000 a year.²⁰³ Congress could easily set \$200,000 as the cut-off for receiving subsidies for the traditional commodity crops, thereby continuing to support smaller farms while encouraging large farms to diversify what they grow. The money saved from subsidizing current commodities could potentially be used to restore the food stamp program or subsidize other more nutritionally valuable food. Congress could also modify the Bill to allow vegetables to be grown on government-subsidized land.

However, such changes will likely face considerable opposition. The key to making such a proposal viable politically is not to present this bill as an end to the Farm Bill, but as a rebirth, a reimagining of the Farm Bill. The message to the agricultural sector is not to stop growing—it is to start growing something different, something that will help Americans become healthier.

Lawmakers can also provide an interim solution by building on the groundwork of positive reform for children's nutrition in the 2008 Farm Bill.²⁰⁴ Specifically, in 2008, lawmakers took steps to expand the USDA

201. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, 923 (stating the Act was created "[t]o provide for the continuation of agricultural programs through fiscal year 2012, and for other purposes") (codified at 7 U.S.C. § 8701 (Supp. II 2008)).

202. See Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2528 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220).

203. See Brian Riedl, *How Farm Subsidies Harm Taxpayers, Consumers, and Farmers, Too*, THE HERITAGE FOUNDATION, (June 20, 2007), <http://www.heritage.org/Research/Reports/2007/06/How-Farm-Subsidies-Harm-Taxpayers-Consumers-and-Farmers-Too> (last visited Nov. 25, 2011) (reporting that "the majority of subsidies go to commercial farms with average incomes of \$200,000 and net worths of nearly \$ 2 million") (on file with the Washington and Lee Law Review).

204. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 4304, 122 Stat. 1651, 1888-92 (authorizing the Fresh Fruit and Vegetable Program) (codified at 42

Fresh Fruit and Vegetable Snack Program in Schools to all fifty states and make it a permanent, rather than a pilot program.²⁰⁵ This program provides fresh fruits and vegetables to elementary school children for free throughout the school day.²⁰⁶ Although this is a very good program, it does not address the systemic issues regarding access to fresh produce, because the program is very limited in its scope and only available to a small number of students.²⁰⁷ Currently, the program also does not cover any high schools or middle schools.²⁰⁸

B. Monitor the USDA's Use of Discretion and Make Sure It Is Child Focused

If Congress is serious about combating childhood and future obesity, it must monitor the USDA's use of discretion and issue more stringent guidelines if necessary. Specifically, the USDA must place the focus of the school nutrition program exclusively on the nutrition of students and issue strict guidelines. For the reasons discussed in Parts III.D and E, the current guidelines as issued are weak because they fail to eliminate added sugar or make any strong regulations or recommendation regarding the sale of soda, snack items, and other vending machine style foodstuffs on school campuses.

C. Limit or Close the Loophole for Competitive Foods

As currently drafted, competitive foods with no nutritional value, like soda and candy, remain largely unmonitored and unregulated.²⁰⁹ Even if

U.S.C. § 1769(a) (Supp. II 2008)).

205. *See id.* (amending the Richard B. Russell National School Lunch Act by permanently authorizing the Fresh Fruit and Vegetable Program nationwide, consolidating all prior operations under Section 19, and increasing program funding (citing 42 U.S.C. § 1769 (2006))).

206. *See id.* § 19(a)–(b) (stating that the Secretary shall give schools grants to make fresh fruits and vegetables available to elementary students throughout the day).

207. *See* U.S. Dep't of Agric., *Fresh Fruit and Vegetable Program*, http://www.fns.usda.gov/cga/FactSheets/FFVP_Quick_Facts.htm (last visited Nov. 25, 2011) (stating that in 2007, the Fresh Fruit and Vegetable Program had 183,299 participants) (on file with the Washington and Lee Law Review).

208. *See id.* (stating that the Fresh Fruit and Vegetable Program is available to elementary schools).

209. *See* Nutrition Standards in the National School Lunch and School Breakfast

the USDA were to exercise its discretion to limit the sale of such foods on school campuses, it would be unlikely to ban their sale outright. As a matter of law, competitive foods may still be sold at schools as part of school fundraisers in certain circumstances.²¹⁰ Specifically, the statute provides "special exemptions for school-sponsored fundraisers (other than fundraising through vending machines, school stores, snack bars, a la carte sales, and any other exclusions determined by the Secretary), if the fundraisers are approved by the school and are infrequent within the school."²¹¹ Therefore, vending machines, school stores, snack bars, and à la carte menus remain subject to health guidelines, and any additional sales would need to be "infrequent."²¹² The statute does not define frequency, therefore providing an inherent ambiguity subject to interpretation, and litigation.²¹³

There are two ways to ensure that competitive foods do not undermine the new health regulations. The first, and perhaps easiest, way (though less permanent), is for the Secretary of Agriculture to broadly determine "any other exclusions" to the exceptions beyond those enumerated. Unfortunately, the current regulations reveal no desire to engage with competitive food limitations even within the context of their clear statutory mandate; an additional limitation is highly unlikely.²¹⁴ Because this is an area where lobbying, political motivations, and economic pressures may compromise the success of the school meal program, Congress must keep a close eye on how discretion is or is not exercised.

The second way to secure strong implementation of the nutrition standards is for Congress to clarify and strengthen the statute. Specifically, Congress should define what it considers infrequent, perhaps in terms of

Programs, 76 Fed. Reg. 2494, 2494 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220) (stating that the proposed rule aims to "increase the availability of fruits, vegetables, whole grains, and fat-free and low-fat fluid milk in school meals; reduce the levels of sodium and saturated fat in meals; and help meet the nutrition needs of school children within their calorie requirements"). The proposed rule does not provide nutrition guidelines for competitive foods such as soda and candy. *See generally id.*

210. *See* Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 208(2), 124 Stat. 3183, 3222 (to be codified as amended at 42 U.S.C. § 1779) (stating that exceptions are permitted for school fundraisers that are infrequent and approved by the school).

211. *Id.*

212. *Id.*

213. *See generally id.*

214. *See* Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2539 (providing only a recommendation that competitive foods be improved, not setting limitations).

number of times per school year. Additionally, if Congress is dedicated to its goal of significantly reducing childhood obesity, then it should not provide an incentive for selling unhealthy food on campus at all; eliminating this exemption would be more consistent with Congress's aim. Congress could choose to eliminate this exemption entirely.

D. Strengthen Compliance and Enforcement

Even by its own standards, the USDA has had difficulty implementing dietary standards effectively in schools.²¹⁵ For example, in 2001, a USDA study revealed that only 15% of elementary schools and 13% of secondary schools meet the NSLP program requirements for saturated fat.²¹⁶ Another study showed that only 7% of participating schools complied with all standards under the program.²¹⁷

Although the new rules seek to strengthen monitoring and compliance by establishing a three-year review cycle, a two-week review period, and a system to monitor the SBP, the USDA currently has very few options at its disposal to compel compliance with its guidelines where infractions are found.²¹⁸ Although the USDA may revoke funding for the program at a given school,²¹⁹ it is reticent to do so, perhaps because this would disproportionately punish needy children rather than irresponsible administrators.

215. See JOHN A. BURGHARDT & BARBARA L. DEVANEY, THE SCHOOL NUTRITION DIETARY ASSESSMENT STUDY: SUMMARY OF FINDINGS 8–9 (Mathematica Policy Research, Inc., 1993), available at <http://www.fns.usda.gov/oane/menu/Published/CNP/FILES/SNDA-Sum.pdf> (summarizing a 1993 assessment in which the USDA found that meals served under the NSLP and the SBP were effective in delivering micronutrients but did not meet the NRC recommendations for average intakes of total fat, saturated fat, carbohydrate, and sodium).

216. MARY KAY FOX ET AL., U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV., SCHOOL NUTRITION DIETARY ASSESSMENT STUDY-II: FINAL REPORT 81 (2001).

217. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2532 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220).

218. See *id.* at 2505 (discussing the USDA's monitoring procedures but providing no other means to compel compliance).

219. See Richard B. Russell National School Lunch Act § 4(b), 42 U.S.C. § 1753(b) (2006) (stating that the USDA Secretary *may* make payments to schools for lunches that meet the requirements).

E. Monitor Potential Preemption Suits

In the months and years ahead, Congress should pay close attention to any lawsuits challenging or invalidating more stringent local regulations of school foods on the basis of preemption. Should any be successful, Congress must modify the federal law to clarify its intention that federal regulations provide a floor, rather than a ceiling, in terms of nutritional aspirations in school and that USDA regulations do not preempt stricter state or local laws.

F. Reallocate Designation of Dietary Guidelines

Finally, the Department of Agriculture is not the ideal administrative agency to issue dietary guidelines because it has an inherent loyalty to the agricultural sector. Instead, the entire federal nutrition program would gain legitimacy and integrity by reallocating the issuance of dietary guidelines fully to an agency principally concerned with health or science, such as the Surgeon General's Office, the Department of Health and Human Services, or the IOM. This would be perhaps the most difficult reform because it would require altering longstanding legislation, administrative norms, and the fundamental structure of at least two administrative agencies.

G. Allocate More Money

Of course, the most direct way to facilitate schools' meeting new nutritional targets is to allocate more money per meal to the School Lunch Program. Unfortunately, this may also be the most politically impracticable option. The USDA estimates the cost of compliance with these standards to be almost 7 cents per lunch and 37 cents per breakfast, with prices increasing as whole-grain requirements increase.²²⁰ Therefore, the costs of the current proposed regulations already exceed the increase in additional federal funds.²²¹

In addition, to be effective, Congress not only needs to put more money towards the food itself in the school food program, but also towards

220. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2537.

221. See Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 201, 124 Stat. 3183, 3214–15 (to be codified as amended at 42 U.S.C. § 1753(b)(3)(C)) (providing an additional six cents per lunch for schools complying with the new requirements).

training and infrastructure. The current bill appropriates a modest amount of funds for training; this is designated predominately for management training rather than actual food preparation training.²²² Preparation is key to children actually eating healthy food at school and beyond. As the USDA notes, pilot programs have indicated that "changes in meal patterns that enhance nutrition can be well received by students."²²³ However this food must be presented well. In order to get children to eat healthy food, it needs to taste good.

In recent years, rather than cooking food, school kitchens have mostly reheated prepared foods.²²⁴ As such, school food-service employees do not necessarily know how to cook food, and the kitchens themselves do not always have the capacity to clean, chop, and prepare foods from scratch. Congress acknowledged this need recently in the American Recovery and Reinvestment Act of 2009 (ARRA).²²⁵ The ARRA allocated \$100 million in grants to schools to update food service equipment.²²⁶ The following year, an additional \$25 million was set aside for this purpose through the Appropriations Act.²²⁷ However, over \$600 million in grants requests were received, which indicates a significant demand and need for investment in food service infrastructure.²²⁸ In order to make it politically practicable to

222. *See id.* § 306, 124 Stat. at 3243–45 (to be codified as amended at 42 U.S.C. § 1776) (amending the Child Nutrition Act of 1966 and appropriating funds for training). There is the option to apply funds to establish "voluntary training and certification programs for other school food service workers," which could include cooks, food preparation, and handling. *Id.*

223. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2538 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210, 220).

224. *See id.* at 2519 (stating that "healthier school meals that are acceptable to students may require more on-site preparation, and less reliance on prepared foods," and are likely to increase labor costs); *id.* at 2527 ("[M]any food production kitchens are designed to heat and hold food items rather than to prepare them." (quoting Institute of Medicine, *School Meals: Building Blocks for Healthy Children*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV. 110 (2010)), <http://www.fns.usda.gov/ora/MENU/Published/CNP/FILES/SchoolMealsIOM.pdf>).

225. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. I, 123 Stat. 115, 119 (to be codified at 42 U.S.C. §§ 1751–57, 1771–74) (providing funds for equipment to carry out the NSLP).

226. *Id.*

227. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-80, § 749(j)(5)(A), 123 Stat. 2090, 2135; *see also* Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2550 (stating that the Food and Nutrition Service awarded "an additional \$25 million in one-time funds included in the FY 2010 Appropriations Act" for the purpose of buying equipment).

228. Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. at 2550, 2536–37.

obtain more funds, additional investment in food service should be viewed as a job creation program—if food service in schools required more skill and labor, more people would be employed there.

V. Conclusion

The HHFKA is a modest step in the right direction; it begins to teach kids the components and sizes of healthy meals. HHFKA does not, however, address the fundamental issues at the heart of the U.S. obesity crisis—foods that are bad for Americans to eat are cheap and abundant, and the agency charged with issuing guidelines for health in schools has a vested interest in the public eating unhealthy products. But hope remains; the new law is a good start. It is now up to Congress to follow through on its avowed bipartisan commitment to end childhood hunger and obesity and make the corresponding changes to other legislation necessary to truly alter the landscape of how schools and Americans acquire and consume their food.

