

# RULE PROPOSALS

## INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of N.J.S.A. 52:14B-3. An extended comment deadline will be noted in the heading of a proposal or appear in subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-6.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

## AGRICULTURE

### (a)

#### DIVISION OF FOOD AND NUTRITION

#### Child Nutrition Programs

#### Proposed Readoption with Amendments: N.J.A.C. 2:36

Authorized By: State Board of Agriculture and Joseph Atchison, III,  
Assistant Secretary, Department of Agriculture.

Authority: N.J.S.A. 18A:33-4 and 5 and 18A:33-9 et seq.

Calendar Reference: See Summary below for explanation of  
exception to calendar requirement.

Proposal Number: PRN 2024-068.

Submit written comments by August 2, 2024, to:

Rose Chamberlain, Director  
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The agency proposal follows:

#### Summary

N.J.A.C. 2:36 was scheduled to expire on May 24, 2024. As the Department of Agriculture (Department) submitted this notice of proposal to the Office of Administrative Law prior to that date, the expiration date was extended 180 days to November 20, 2024, pursuant to N.J.S.A. 52:14B-5.1.c(2). The Department has reviewed the rules and determined that they remain necessary, reasonable, and proper for the purposes for which they were originally promulgated. The Department proposes to readopt this chapter with the amendments set forth below. As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

This chapter describes general program provisions for the Department's Division of Food and Nutrition (Division), which feeds approximately 700,000 school children on a daily basis through the Federal School Breakfast, School Lunch, and After-School Snack programs. These programs provide nutritionally balanced meals to children at low or no cost. The proposed amendments are necessary, reasonable, and proper in order to bring the State rules into alignment with recent additions and revisions to State law and current practices and procedures of the Department. In 2022, N.J.S.A. 18A:33-4 was amended to require that schools offer free lunches to each student enrolled in the district who is Federally ineligible for free or reduced price meals, but who has an annual household income that is not less than 186 percent, and

not more than 199 percent, of the Federal poverty level. This State-level supplement allows schools to provide additional free lunches to students who meet the income requirements and assists in ensuring that children do not go hungry and receive nutritious meals during the school day.

The proposed amendments leave the existing rules at N.J.A.C. 2:36 generally unchanged, except for changes to the definition section and the sections that address eligibility, survey, free and reduced-price meal and/or free milk application, participation requirements, review and evaluation, and meal accountability, as set forth below. Terms have been revised for consistency with Federal terminology and State law. The proposed amendments will ensure that children continue to receive school meals that are nutritiously healthy and offered at free and reduced-price rates.

The current chapter and proposed amendments are summarized as follows:

N.J.A.C. 2:36-1.1 sets forth the definitions of terms used in the rules. The Department is proposing amendments to the definitions in order to achieve consistency with Federal terminology and State law, to bring into alignment with Department terminology, and for greater clarification. The definition of "10 percent threshold" is proposed for addition to make the chapter consistent with N.J.S.A. 18A:33-10.1, which was amended to establish a new threshold requiring a school food authority to participate in a school breakfast program. The definition of "20 percent threshold" is proposed for deletion because it is no longer applicable.

N.J.A.C. 2:36-1.2 explains the Free and Reduced Price Policy and Agreement for School Nutrition Programs requirements for all schools participating in one of the Federal Child Nutrition Programs.

N.J.A.C. 2:36-1.3 explains the Federal Eligibility Guidelines requirements for all sponsors participating in one of the Child Nutrition Programs and by all nonparticipating schools for the purposes of the survey requirements, as defined at N.J.A.C. 2:36-1.4. The heading is proposed for amendment to include the term "Federal" to clarify the type of eligibility discussed in this section. The term "eligibility" is proposed for amendment to be replaced with "Federal eligibility" and the term "standards" is proposed for amendment to be replaced with "Federal standards," both for accuracy.

N.J.A.C. 2:36-1.4 explains the procedure required of every school in completing the free and reduced-price meals and/or free milk survey and the purpose of the survey requirement. N.J.A.C. 2:36-1.4(a) is proposed for amendment to replace the term "eligible" with "Federally eligible" to clarify the type of eligibility being discussed in this section; change the threshold at which a school is required to establish a school breakfast program from a "20 percent threshold" to a "10 percent threshold" to be consistent with N.J.S.A. 18A:33-10.1; and to update the statutory cross-reference for the State breakfast threshold from N.J.S.A. 18A:33-10 to N.J.S.A. 18A:33-10.1 for accuracy.

N.J.A.C. 2:36-1.5 sets forth the free and reduced-price meal and/or free milk application procedures. N.J.A.C. 2:36-1.5(c) is proposed for

amendment to remove “upon request” after “An application is available in Spanish” because the term “upon request” is not necessary. N.J.A.C. 2:36-1.5(d) is proposed for amendment to replace the term “eligibility” with “Federal eligibility” for accuracy and to replace the term “free or reduced-price meals and/or free milk” with “Federal free or reduced-price meals and/or free milk” for accuracy. New N.J.A.C. 2:36-1.5(f) is proposed to address a school district’s responsibility to determine a student’s eligibility for State-funded meals, in accordance with N.J.S.A. 18A:33-4.a, if the student does not meet Federal free and reduced-price school meal eligibility requirements.

N.J.A.C. 2:36-1.6 concerns the participation requirements for the school lunch and breakfast programs. N.J.A.C. 2:36-1.6(b) is proposed for amendment to change the percentage of school enrollment that qualifies a school for free or reduced-price meals from 20 percent to 10 percent, in order to be consistent with N.J.S.A. 18A:33-10.1 and to clarify the Federal eligibility.

N.J.A.C. 2:36-1.7 explains the basis for the local nutrition policy for both school meals and competitive foods as the Dietary Guidelines for Americans and the Federal regulations governing the School Nutrition Programs and requires each school district and/or sponsor to implement a local school wellness policy.

N.J.A.C. 2:36-1.8 provides for consistency in the nutrition standards between the Department and Federal nutrition standards for all school meals and clarifies the requirement for compliance with the State Competitive Food Policy.

N.J.A.C. 2:36-1.9 provides for the review and evaluation of each sponsor’s implementation of the Free and Reduced Price Policy and the Local School Wellness Policy; the withholding of funds and/or other fiscal actions for noncompliance; and the written approval by the Division before the standards set forth in either policy can be altered or amended. N.J.A.C. 2:36-1.9(b) is proposed for amendment to change the term “Model Local School Wellness Policy” to “Local School Wellness Policy” because the Department does not prepare or provide a model local school wellness policy. Each school is responsible to prepare its local school wellness policy.

N.J.A.C. 2:36-1.10 explains the basis for the maximum meal and milk charges pursuant to Federal regulations.

N.J.A.C. 2:36-1.11 explains the guidelines and medical exemptions for the sale of competitive foods on the school campus during the school day.

N.J.A.C. 2:36-1.12 provides for free, reduced-price, and paid meal accountability. This section is proposed for amendment to change “free, reduced-price, and paid” to “Federal free, Federal reduced price, and Federal paid,” for accuracy and to include a new requirement concerning the responsibility of school districts to count and record daily, at the point of service, the number of free lunches provided in accordance with the State-level school meal eligibility guidelines and N.J.S.A. 18A:33-4.a.

#### **Social Impact**

The rules proposed for re adoption with amendments will have a positive social impact as they will continue to provide guidelines for school districts to offer nutritious meals to children at free and/or reduced prices and will continue to provide a basis for school districts to ensure the proper handling of competitive foods sold on the school campus during the school day. The rules proposed for re adoption with amendments will continue the added benefits of improving the health of school-aged children by creating an environment that reinforces the development of healthy eating habits.

#### **Economic Impact**

It is anticipated that the rules proposed for re adoption with amendments will have a positive economic impact. Schools will continue to receive financial assistance to provide nutritious meals to children during the school day.

Re adoption of the rules with proposed amendments will not increase State and local expenditures for the provision of the school lunch and school breakfast programs. The Department provides school districts with State and Federal cash assistance and donated foods acquired by the United States Department of Agriculture to be used to assist schools in serving nutritious breakfasts and lunches to children each school day and to offset the costs associated with providing these meals. (7 CFR Parts 210 and 220). The State also provides financial assistance to public and

charter schools to provide free lunch to students who meet the requirements of the State-level school meal eligibility guidelines pursuant to N.J.S.A. 18A:33-4.a.

The economic impact to New Jersey school children and their families is positive, as nutritious breakfasts and lunches are required to be available at regulated prices to all students in schools where specified levels of students qualify for free or reduced-price breakfast and lunch and offered at free and reduced prices to those students eligible.

#### **Federal Standards Analysis**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-23 (P.L. 1995, c. 65) require administrative agencies that adopt, readopt, or amend any State rules that exceed any Federal standards or requirements to include in the rulemaking a comparison between the two sets of standards. If a State standard exceeds a Federal standard, then a cost-benefit analysis must also be included. The proposed re adoption of this chapter is in accordance with the Federal school nutrition regulations and is primarily funded by Federal United States Department of Agriculture Child Nutrition funds pursuant to 7 CFR Parts 210, 220, and 215. The proposed amendments are necessitated by the amendments at N.J.S.A. 18A:33-4.a that requires public and charter schools to offer free lunch to each student enrolled in the district who is Federally ineligible for free or reduced-price meals, but who has an annual household income that is not less than 186 percent, and not more than 199 percent, of the Federal poverty level.

Pursuant to the Federal rules, school participation in Federal school nutrition programs is optional. The rules proposed for re adoption with amendments exceed the Federal rules in that they require all schools with five percent or more of enrolled students eligible for free or reduced-priced meals to provide a school lunch program and/or any school with 10 percent or more of enrolled students eligible for these same benefits to offer the school breakfast program and to offer free and reduced-price meals to all eligible students. This requirement implements State statute (N.J.S.A. 18A:33-4, 18A:33-5, and 18A:33-10.1). The rules proposed for re adoption with amendments also require the State to establish a maximum per meal and milk charge, which are not explicitly required by Federal regulations. The Federal regulations do set a maximum charge for reduced-price meals and suggest that pricing otherwise take into consideration the Federal subsidy; the rules proposed for re adoption with amendments put that suggestion into operation by setting a maximum charge that includes the Federal subsidy as one of the parameters. Additionally, the proposed rule amendments require schools to offer free lunch to students who are ineligible for Federal meals but meet State-level income requirements of having an annual household income that is not less than 186 percent of, and not more than 199 percent of, the Federal poverty level. These changes implement the State statutory requirements set forth at N.J.S.A. 18A:33-4 and could not be limited without statutory change.

#### **Jobs Impact**

It is not anticipated that the rules proposed for re adoption with amendments will result in the generation or loss of jobs.

#### **Agriculture Industry Impact**

It is anticipated that the rules proposed for re adoption with amendments will have a positive impact on New Jersey agriculture. School food authorities will continue to be encouraged to promote the use of locally grown fruits and vegetables.

#### **Regulatory Flexibility Statement**

Pursuant to the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., a “small business” means any business that is resident in New Jersey, independently owned and operated, not dominant in its field, and that employs fewer than 100 full-time employees. Therefore, the rules proposed for re adoption with amendments may apply to some school food authorities meeting the definition of a small business. However, the rulemaking does not require that capital costs be incurred, as schools receive Federal and State funding to participate in the Child Nutrition Programs. Each school is required to maintain records of the program funds received and expended. These records must be made available upon request to the Department. The Department anticipates the burden and cost of maintaining these records will be negligible, because to the extent that the small business operates as a school food authority, that small

business would already be required to keep and maintain records as required by Child Nutrition Program regulations as a standard business practice. There will also be no additional costs incurred for employment of professional services.

**Housing Affordability Impact Analysis**

It is anticipated that the rules proposed for readoption with amendments will have no impact on the affordability of housing and there is an extreme unlikelihood that the rulemaking would evoke a change in the average costs associated with housing. The rules proposed for readoption with amendments pertain to Child Nutrition Programs administered by the Department and not housing development.

**Smart Growth Development Impact Analysis**

The rules proposed for readoption with amendments will have an insignificant impact on smart growth development, and there is an extreme unlikelihood that the rules proposed for readoption with amendments would evoke a change in housing production in Planning Areas 1 or 2, or within designated centers pursuant to the State Development and Redevelopment Plan in New Jersey. The scope of the rules proposed for readoption with amendments is the nutrition standards for the Federal Child Nutrition Programs administered by the Department of Agriculture, Division of Food and Nutrition, and programs that relate to meals, beverages, and snacks and not housing development.

**Racial and Ethnic Community Criminal Justice and Public Safety Impact**

The Department has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

**Full text** of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 2:36.

**Full text** of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 1. GENERAL PROVISIONS

2:36-1.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

... ["20 percent threshold" means the point at which 20 percent or more of the total school enrollment of each school is eligible for free or reduced priced meals and/or free milk.]

**"Ten percent threshold" means the point at which 10 percent or more of the total school enrollment of each school is Federally eligible for free or reduced-price meals and/or free milk.**

...

2:36-1.3 [Eligibility] **Federal eligibility**

The Division shall administer **Federal** eligibility standards pursuant to the Federal Income Eligibility Guidelines set forth [in] **at** 7 CFR Part 245 for Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools. These **Federal** standards shall be used by all sponsors participating in the child nutrition programs and by all nonparticipating schools for the purpose of completing the survey as required [by] **at** N.J.A.C. 2:36-1.4.

2:36-1.4 Survey

(a) By the last school day prior to October 16 of each school year, each school, under the supervision of its sponsor, shall survey the parent or guardian of each student enrolled to determine which students are **Federally** eligible to receive free or reduced-price meals and/or free milk. The purpose of the survey is to determine whether the school meets or exceeds the five percent threshold established [by] **at** N.J.S.A. 18A:33-5 for school lunch programs and the [20] **10** percent threshold established for school breakfast programs [in] **at** N.J.S.A. 18A:33-[10]**10.1**.

(b)-(c) (No change.)

2:36-1.5 Free and [reduced price] **reduced-price** meal and/or free milk application

(a)-(b) (No change.)

(c) Applications in languages other than English must be provided by the school food authority where non-English speaking parents are possible applicants. (An application in Spanish is available [upon request] from the Division of Food and Nutrition.) Other language translations are available on the USDA Food and Nutrition Service website.

(d) Upon receipt of the completed application, the district must determine each student's **Federal** eligibility for a free or reduced-price meal and/or free milk from the information submitted. Each student shall be offered free or reduced-price meals and/or free milk as soon as **Federal** eligibility has been determined. Students are eligible for school meal benefits or free milk for the school year and up to 30 operating days in the subsequent school year. If the school has reason to question the information provided, the student affected must continue to receive the **Federal** free or reduced-price meals and/or free milk until completion of the appeal procedures set forth in the sponsor's policy pursuant to Federal regulations (7 CFR [§] 245.7 Hearing Procedure for Families and School Food Authorities).

(e) (No change.)

**(f) If the student is found to be Federally ineligible for free or reduced-price school meals, the district must then determine the student's eligibility for a State-funded free lunch, pursuant to N.J.S.A. 18A:33-4.a, in accordance with the State-specified income eligibility guidelines described therein.**

2:36-1.6 Participation requirements

(a) (No change.)

(b) Any school in which [20] **10** percent or more of the school enrollment is found to be **Federally** eligible for free or [reduced price] **reduced-price** meals as of October 1 of the preceding school year, shall offer the School Breakfast Program to all students enrolled in that school, with free and reduced price breakfasts offered to all qualifying children. Such breakfasts shall meet minimum nutritional standards established by the U.S. Department of Agriculture, 7 CFR 220.8. Any school may participate in the School Breakfast Program without participating in any other Federal programs.

1. Any school meeting the [20] **10** percent threshold that requires the implementation of the School Breakfast Program must comply with the following requirements:

i.-ii. (No change.)

(c)-(d) (No change.)

2:36-1.9 Review and evaluation

(a) (No change.)

(b) Federal and State Child Nutrition Program funds may be withheld and/or fiscal action may be taken against sponsors (see 7 CFR 210.19(c), 215.12(a), 220.14(a), and 245.10) found not to be in compliance with applicable Federal regulations (7 CFR Parts 210, 215, 220 and 245)[, and the Model Local School Wellness Policy].

(c) (No change.)

2:36-1.12 Meal accountability

Sponsors shall count and record daily, at the point of service, the number of meals/snacks or milk[s] served by category (**Federal** free, **Federal** reduced price, and **Federal** paid). **In addition, those sponsors that have determined students eligible for State-funded free lunch pursuant to N.J.S.A. 18:33-4.a and the income eligibility guidelines described therein shall count and record daily, at the point of service, the number of free lunches served pursuant to the State program.**