



Food and
Nutrition
Service

Park Office
Center

3101 Park
Center Drive
Alexandria
VA 22302

DATE: May 24, 2018

MEMO CODE: SP 15-2018, CACFP 12-2018, SFSP 05-2018

SUBJECT: Child Nutrition Program Waiver Request Guidance and Protocol-
Revised

TO: Regional Directors
Special Nutrition Programs
All Regions

State Directors
Child Nutrition Programs
All States

This memorandum revises the current USDA Food and Nutrition Service (FNS) process for State agencies and eligible service providers¹ seeking a waiver of statutory or regulatory Program requirements for the Child Nutrition Programs (CNPs), including the Child and Adult Care Food Program (CACFP), the Summer Food Service Program (SFSP), the National School Lunch Program (NSLP), the Fresh Fruit and Vegetable Program (FFVP), the Special Milk Program (SMP), and the School Breakfast Program (SBP). This memorandum supersedes SP 27-2017, CACFP 12-2017, SFSP 08-2017, *Child Nutrition Program Waiver Request Guidance and Protocol*, dated April 26, 2017.

Background

This memorandum provides an overview of statutory waiver authority, the waiver request and review process, and data reporting requirements. The intent is to enhance integrity in all CNPs by ensuring that FNS, State agencies, and eligible providers adhere to the statutory requirements in Section 12(l) of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1760(l) when requesting a waiver. This memorandum also includes a revised version of the Child Nutrition Program State Waiver Request Template [Attachment A]. State agencies and eligible service providers are encouraged to use this template when submitting waiver requests for the CACFP, SFSP, NSLP, FFVP, SMP, and SBP. Using the template ensures all information required by FNS, as outlined in this memorandum, is included in the waiver request. However, if State agencies and eligible service providers choose not to use the template, they must ensure that all requirements included in Section 12(l) of the NSLA are met, including submission of all required data and information.

¹ Eligible service providers include: a local school food service authority, a service institution or private nonprofit organization; or a family or group day care home sponsoring organization.

Waiver Authority: Section 12(l) of the NSLA, 42 U.S.C. 1760(l)

The NSLA provides USDA authority to waive certain provisions of the CNPs,² as follows:

(l)(1)(A) Except as provided in paragraph (4), the Secretary may waive any requirements under this Act or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.), or any regulation issued under either such Act, for a State or eligible service provider that requests a waiver if—

- (i) the Secretary determines that the waiver of the requirement would facilitate the ability of the State or eligible service provider to carry out the purpose of the program;
- (ii) the State or eligible service provider has provided notice and information to the public regarding the proposed waiver; and
- (iii) the State or eligible service provider demonstrates to the satisfaction of the Secretary that the waiver will not increase the overall cost of the program to the Federal Government, and, if the waiver does increase the overall cost to the Federal Government, the cost will be paid from non-Federal funds.

(B) The notice and information referred to in subparagraph (A)(ii) shall be provided in the same manner in which the State or eligible service provider customarily provides similar notices and information to the public.

(2)(A) To request a waiver under paragraph (1), a State or eligible service provider (through the appropriate administering State agency) shall submit an application to the Secretary that—

- (i) identifies the statutory or regulatory requirements that are requested to be waived;
- (ii) in the case of a State requesting a waiver, describes actions, if any, that the State has undertaken to remove State statutory or regulatory barriers;
- (iii) describes the goal of the waiver to improve services under the program and the expected outcomes if the waiver is granted; and
- (iv) includes a description of the impediments to the efficient operation and administration of the program.

(B) An application described in subparagraph (A) shall be developed by the State or eligible service provider and shall be submitted to the Secretary by the State.

² Under the Robert Stafford Disaster Relief and Emergency Act (42 U.S.C. 5141), the Secretary may use separate waiver authority in response to federally declared disasters and emergencies. Refer to memorandum SP 46-2014, CACFP 12-2014, SFSP 18-2014, *Disaster Response*, May 19, 2014, (<http://www.fns.usda.gov/disaster-response-0>) for more information.

(3) The Secretary shall act promptly on a waiver request contained in an application submitted under paragraph (2) and shall either grant or deny the request. The Secretary shall state in writing the reasons for granting or denying the request.

(4) The Secretary may not grant a waiver under this subsection that increases Federal costs or that relates to—

(A) the nutritional content of meals served;

(B) Federal reimbursement rates;

(C) the provision of free and reduced price meals;

(D) limits on the price charged for a reduced price meal;

(E) maintenance of effort;

(F) equitable participation of children in private schools;

(G) distribution of funds to State and local school food service authorities and service institutions participating in a program under this Act and the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.);

(H) the disclosure of information relating to students receiving free or reduced price meals and other recipients of benefits;

(I) prohibiting the operation of a profit producing program;

(J) the sale of competitive foods;

(K) the commodity distribution program under section 14;

(L) the special supplemental nutrition program authorized under section 17 of the Child Nutrition Act of 1966 (42 U.S.C. 1786); or

(M) enforcement of any constitutional or statutory right of an individual, including any right under—

(i) title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.);

(ii) section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794);

(iii) title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.);

(iv) the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.);

(v) the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.); and

(vi) the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.).

Waiver Request Protocol

Eligible service providers must submit their requests to waive CNP requirements to their respective State agencies. State agencies must submit requests to waive CNP requirements to their FNS Regional Office. FNS Regional Offices will review the waiver request for completeness and verify that the applicant provided the required public notice of their request. Notice and information provided to the public regarding the proposed waiver should be in the same manner in which the State or eligible service provider usually provides similar notices and information to the public. Acceptable methods include, but are not limited to:

- Posting notice on the State agency's or eligible service provider's website;
- Providing public notice through a printed announcement in the local/state newspaper.

Waiver Decisions

Once a complete waiver request is received, FNS Regional Offices will then submit a recommendation to the National Office for review. FNS highly encourages State agencies and eligible service providers to submit requests using the attached template, which includes the elements required by the NSLA as well as other information that will assist FNS in processing the request.

State agencies and eligible service providers should consult with their Regional Offices when developing waiver requests to ensure a well-reasoned, thorough request is submitted from the outset and clearly provides the reason and need for the waiver request. In order to ensure USDA is able to conduct a detailed review of each request, State agencies should submit complete waiver requests at least 60 calendar days prior to the anticipated implementation date. However, FNS recognizes that some requests are made in response to unexpected situations addressing unforeseen circumstances and will make every effort to expedite the response to those requests.

The Secretary carefully considers every waiver request but may only approve those requests that facilitate the ability of the State agency or service provider to carry out the purpose of the CNPs and do not increase the overall cost of the Federal Government program. Moreover, the Secretary does not have the authority to waive the nutritional content of the meals served, Federal reimbursement rates, or the enforcement of any statutory right of any individual. FNS will provide all responses to waiver requests in writing.

FNS provides approval of waivers for a limited time period. After the initial waiver period has expired, if the waiver is still needed, State agencies and eligible service providers may request renewal of a waiver. A renewal waiver request will be processed in the same manner as an initial waiver request. FNS will consider the data reports, discussed in further detail below, with each request for renewal.

Monitoring and Reporting

FNS is committed to ensuring that waivers granted improve Program operations while maintaining Program integrity. The NSLA requires FNS to review the performance of State agencies' and eligible service providers' CNP operations under waiver authority. FNS requires that each request to waive CNP requirements include proposed data reporting that will enable FNS to assess the effect of the waiver on CNP administration and monitor its impact. Reports will include:

- a summary of the use of waivers by the State and eligible service providers;
- a description of whether the waivers resulted in improved services to recipients/participants;
- a description of the impact of the waivers on providing nutritional meals to participants;
- a description of how the waivers reduced the quantity of paperwork necessary to administer the Program; and
- any additional information requested in the waiver approval.

State agencies and eligible service providers are reminded to adhere to existing applicable monitoring and reporting requirements, as well as those outlined in the waiver approval issued by FNS, to ensure continued operation throughout the approved waiver period. Failure of a Program operator to fulfill the monitoring and reporting requirements will impact consideration of subsequent requests to waive the same Child Nutrition Program regulations. For example, if FNS determines that the waiver leads to deficits in Program operation or to an increase in the overall cost of the Program to the Federal Government and the increase has not been paid for with non-Federal funds, FNS may terminate the waiver.

State agencies are reminded to distribute this memorandum to Program operators. Program operators should direct any questions concerning this guidance to their State agency. State agencies with questions should contact the appropriate FNS Regional Office.

Original Signed

Angela Kline

Director

Policy and Program Development Division

Child Nutrition Programs

Attachment



CHILD NUTRITION PROGRAM STATE WAIVER REQUEST TEMPLATE

Child Nutrition Programs are expected to be administered according to all statutory and regulatory requirements; waivers to the requirements are exceptions. However, Section 12(l) of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1760(l), provides authority for USDA to waive requirements for State agencies or eligible service providers under certain circumstances. When requesting the waiver of statutory or regulatory requirements for the Child Nutrition Programs (CNP), including the Child and Adult Care Food Program (CACFP), the Summer Food Service Program (SFSP), the National School Lunch Program (NSLP), the Fresh Fruit and Vegetable Program (FFVP), the Special Milk Program (SMP), and the School Breakfast Program (SBP), State agencies and eligible service providers should use this template. State agencies and eligible service providers should consult with their FNS Regional Offices when developing waiver requests to ensure a well-reasoned, thorough request is submitted. State agencies and eligible service providers are encouraged to submit complete waiver requests at least 60 calendar days prior to the anticipated implementation date. Requests submitted less than 60 calendar days prior to the anticipated implementation should be accompanied by an explanation of extenuating circumstances.

For more information on requests for waiving Program requirements, refer to SP 15-2018, CACFP 12-2018, SFSP 05-2018, *Child Nutrition Program Waiver Request Guidance and Protocol- Revised*, May 24, 2018.

- 1. State agency submitting waiver request and responsible State agency staff contact information:**
- 2. Region:**
- 3. Eligible service providers participating in waiver and affirmation that they are in good standing:**
- 4. Description of the challenge the State agency is seeking to solve, the goal of the waiver to improve services under the Program, and the expected outcomes if the waiver is granted. [Section 12(l)(2)(A)(iii) and 12(l)(2)(A)(iv) of the NSLA]:**
- 5. Specific Program requirements to be waived (include statutory and regulatory citations). [Section 12(l)(2)(A)(i) of the NSLA]:**
- 6. Detailed description of alternative procedures and anticipated impact on Program operations, including technology, State systems, and monitoring:**

7. **Description of any steps the State has taken to address regulatory barriers at the State level. [Section 12(l)(2)(A)(ii) of the NSLA]:**
8. **Anticipated challenges State or eligible service providers may face with the waiver implementation:**
9. **Description of how the waiver will not increase the overall cost of the Program to the Federal Government. If there are anticipated increases, confirm that the costs will be paid from non-Federal funds. [Section 12(l)(1)(A)(iii) of the NSLA]:**
10. **Anticipated waiver implementation date and time period:**
11. **Proposed monitoring and review procedures:**
12. **Proposed reporting requirements (include type of data and due date(s) to FNS):**
13. **Link to or a copy of the public notice informing the public about the proposed waiver [Section 12(l)(1)(A)(ii) of the NSLA]:**
14. **Signature and title of requesting official :**

Title:

Requesting official's email address for transmission of response:

TO BE COMPLETED BY FNS REGIONAL OFFICE:

FNS Regional Offices are requested to ensure the questions have been adequately addressed by the State agency and formulate an opinion and justification for a response to the waiver request based on their knowledge, experience and work with the State.

Date request was received at Regional Office:

- ☐ **Check this box to confirm that the State agency has provided public notice in accordance with Section 12(l)(1)(A)(ii) of the NSLA**

• **Regional Office Analysis and Recommendations:**