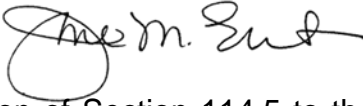






THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: The Honorable the Members of the Board of Regents

FROM: Jhone M. Ebert 

SUBJECT: Proposed Addition of Section 114.5 to the Regulations of the Commissioner Relating to the Prohibition Against Meal Shaming

DATE: November 29, 2018

AUTHORIZATION(S):  

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents add a new §114.5 to the Commissioner's regulations to establish standards to prohibit meal shaming in schools?

Reason(s) for Consideration

Required by State statute (Education Law §908 as enacted by Part B of Chapter 56 of the Laws of 2018).

Proposed Handling

The proposed amendment is presented to the Full Board for adoption as an emergency rule at the December 2018 meeting of the Board of Regents. A copy of the proposed rule and a statement of facts and circumstances justifying the emergency action are included as Attachments A and B, respectively.

Procedural History

The proposed amendment was presented to the P-12 Education Committee for recommendation and to the Full Board for adoption as an emergency rule at the September 2018 meeting of the Board of Regents, effective September 18, 2018. A Notice of Emergency Action and Proposed Rulemaking was published in the State

Register on October 3, 2018. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

In the enacted 2018 State Budget, a new Education Law §908 was added which requires all public school districts, charter schools, and non-public schools that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the Federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees.

Education Law §908 requires that such plans include the following elements:

- A statement that the school or school district shall provide the student with the student's meal of choice for that school day of the available reimbursable meal choices for such school day, if the student requests one, unless the student's parent or guardian has specifically provided written permission to the school to withhold a meal, provided that the school or school district shall only be required to provide access to reimbursable meals, not a la carte items, adult meals, or other similar items;
- an explanation of how staff will be trained to ensure that the school or school district's procedures are carried out correctly and how the affected parents and guardians will be provided with assistance in establishing eligibility for free or reduced-price meals for their children;
- procedures requiring the school or school district to notify the student's parent or guardian that the student's meal card or account balance is exhausted and unpaid meal charges are due. The notification procedures may include a repayment schedule, but the school or school district may not charge any interest or fees in connection with any meals charged;
- a communication procedure designed to support eligible families enrolling in the National Free and Reduced-Price Meal Program. Such communication procedures shall also include a process for determining eligibility when a student owes money for five or more meals, wherein the school or school district shall: (i) make every attempt to determine if a student is directly certified to be eligible for free meals; (ii) make at least two attempts, not including the application or instructions included in a school enrollment packet, to reach the student's parent or guardian and have the parent or guardian fill out a meal application; and (iii) require a school or school district to contact the parent or guardian to offer assistance with a meal application, determine if there are other issues within the household that have caused the child to have insufficient funds to purchase a school meal, and offer any other assistance that is appropriate;
- a clear explanation of procedures designed to decrease student distress or embarrassment, provided that no school or school district shall: (i) publicly

- identify or stigmatize a student who cannot pay for a meal or who owes a meal debt by any means including, but not limited to, requiring that a student wear a wristband or hand stamp; (ii) require a student who cannot pay for a meal or who owes a meal debt to do chores or other work to pay for meals; (iii) require that a student throw away a meal after it has been served because of the student's inability to pay for the meal or because money is owed for earlier meals; (iv) take any action directed at a pupil to collect unpaid school meal fees. A school or school district may attempt to collect unpaid school meal fees from a parent or guardian, but shall not use a debt collector, as defined in Section 803 of the Federal Consumer Credit Protection Act, 15 U.S.C. Sec. 1692a; or (v) discuss any outstanding meal debt in the presence of other students;
- a clear explanation of the procedure to handle unpaid meal charges, provided that nothing in the statute is intended to allow for the unlimited accrual of debt; and
 - procedures to enroll in the Free and Reduced-Price Lunch Program, provided that such procedures shall include that, at the beginning of each school year, a school or school district shall provide a free, printed meal application in every school enrollment packet, or if the school or school district chooses to use an electronic meal application, provide in-school enrollment packets and an explanation of the electronic meal application process and instructions for how parents or guardians may request a paper application at no cost.

The statute requires such schools and school districts to submit their plan to the Commissioner by July 1, 2018, in conformance with the Commissioner's regulations. After submission of such plan, the school or school district shall adopt and post the plan on its website.

The Department's Child Nutrition Program Administration (CNPA) Office has been reviewing meal shaming policies submitted to the CNPA Office as of July 1, 2018 to ensure that they comply with federal and state requirements. In addition, by July 1, 2018 CNPA established guidance, training, and a template Meal Shaming Policy which is posted on the Department's website at [Meal Shaming Policy](http://www.cn.nysed.gov/content/meal-shaming-policy) (<http://www.cn.nysed.gov/content/revise-prohibition-against-meal-shaming>).

As of November 21, 2018, the Department has received several comments on the proposed amendment (the public comment period expires on December 3, 2018 and a full assessment of public comment will be provided when the proposed rule is presented to the Board of Regents for permanent adoption in January 2019, as is currently anticipated). An Assessment of Public Comment received as of November 21, 2018 is included as Attachment C; however, no change to the proposed rule are recommended at this time.

Related Regents Items

[September 2018](http://www.regents.nysed.gov/common/regents/files/918p12a2.pdf) <http://www.regents.nysed.gov/common/regents/files/918p12a2.pdf>

Recommendation

It is recommended that the Board of Regents take the following actions:

VOTED: That the emergency action taken at the September 2018 Board of Regents meeting to add a new §114.5 of the Regulations of the Commissioner of Education be repealed, effective December 11, 2018; and

VOTED: That a new §114.5 of the Regulations of the Commissioner of Education be added, as submitted, effective December 11, 2018, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare to immediately implement the requirements of Education Law §908 as added by Section 1 of Part B of Chapter 56 of the Laws of 2018 and to ensure that the emergency rule adopted at the September 2018 Regents meeting remains continuously in effect until it can be adopted as a permanent rule.

Timetable for Implementation

If adopted at the December 2018 meeting, the proposed amendment will be effective as an emergency rule on December 11, 2018. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at the January 2019 Regents meeting, after publication of the proposed rule in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the January 2019 meeting, the proposed amendment will become effective as a permanent rule on January 30, 2019.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 209, 305 and 908 (as added by Section 1, Part B of Chapter 56 of the Laws of 2018).

1. That the emergency action taken at the September 2018 Board of Regents meeting to add a new section 114.5 of the Regulations of the Commissioner of Education be repealed, effective December 11, 2018.

2. A new section 114.5 is added to the Regulations of the Commissioner of Education as follows:

§114.5 Prohibition against meal shaming.

(a) All public school districts, charter schools and non-public schools in the state that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., shall develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees. The plan shall be submitted to the Commissioner by July 1, 2018 in conformance with this section. After submission of such plan, the school or school district shall adopt and post the plan on its website.

(b) The plan shall include, but not be limited to, the following elements:

(1) a statement that the school or school district shall provide the student with the student's meal of choice for that school day of the available reimbursable meal choices for such school day, if the student requests one, unless the student's parent or guardian

has specifically provided written permission to the school to withhold a meal, provided that the school or school district shall only be required to provide access to reimbursable meals, not a la carte items, adult meals, or other similar items;

(2) an explanation of how staff will be trained to ensure that the school or school district's procedures are carried out correctly and how the affected parents and guardians will be provided with assistance in establishing eligibility for free or reduced-price meals for their children;

(3) procedures requiring the school or school district to notify the student's parent or guardian that the student's meal card or account balance is exhausted and unpaid meal charges are due. The notification procedures may include a repayment schedule, but the school or school district may not charge any interest or fees in connection with any meals charged;

(4) a communication procedure designed to support eligible families enrolling in the National Free and Reduced Price Meal Program. Such communication procedures shall also include a process for determining eligibility when a student owes money for five or more meals, wherein the school or school district shall:

(i) make every attempt to determine if a student is directly certified to be eligible for free meals;

(ii) make at least two attempts, not including the application or instructions included in a school enrollment packet, to reach the student's parent or guardian and have the parent or guardian fill out a meal application; and

(iii) require a school or school district to contact the parent or guardian to offer assistance with a meal application, determine if there are other issues within the

household that have caused the child to have insufficient funds to purchase a school meal and offer any other assistance that is appropriate;

(5) a clear explanation of procedures designed to decrease student distress or embarrassment, provided that, no school or school district shall:

(i) publicly identify or stigmatize a student who cannot pay for a meal or who owes a meal debt by any means including, but not limited to, requiring that a student wear a wristband or hand stamp;

(ii) require a student who cannot pay for a meal or who owes a meal debt to do chores or other work to pay for meals;

(iii) require that a student throw away a meal after it has been served because of the student's inability to pay for the meal or because money is owed for earlier meals;

(iv) take any action directed at a pupil to collect unpaid school meal fees. A school or school district may attempt to collect unpaid school meal fees from a parent or guardian, but shall not use a debt collector, as defined in Section 803 of the Federal Consumer Credit Protection Act, 15 U.S.C. Sec. 1692a; or

(v) discuss any outstanding meal debt in the presence of other students;

(6) a clear explanation of the procedure to handle unpaid meal charges, provided that nothing in this section is intended to allow for the unlimited accrual of debt;

(7) procedures to enroll in the free and reduced price lunch program, provided that such procedures shall include that, at the beginning of each school year, a school or school district shall provide a free, printed meal application in every school enrollment packet, or if the school or school district chooses to use an electronic meal application, provide in school enrollment packets an explanation of the electronic meal application

process and instructions for how parents or guardians may request a paper application at no cost;

(c) if a school or school district becomes aware that a student who has not submitted a meal application is eligible for free or reduced-fee meals, the school or school district shall complete and file an application for the student pursuant to title 7 CFR 245.6(d) (Code of Federal Regulations, 2018 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001: 2018—available at Office for Counsel, New York State Education Building, Room 148, 89 Washington Avenue, Albany, NY 12231); and

(d) school liaisons required for homeless, foster, and migrant students shall coordinate with the nutrition department to make sure such students receive free school meals, in accordance with federal law.

8 NYCRR §114.5

STATEMENT OF FACTS AND CIRCUMSTANCES
WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment to add section 114.5 to the Commissioner's regulations is necessary to timely implement Section 1 of Part B of Chapter 56 of the Laws of 2018 which requires all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees by July 1, 2018.

The proposed amendment was presented at the September 2018 Regents meeting, as an emergency adoption effective September 18, 2018, for the preservation of the general welfare in order to immediately conform the Commissioner's regulations to the requirements of Section 1 of Part B of Chapter 56 of the Laws of 2018, which requires all public, charter and non-public schools that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not

have unpaid school meal fees by July 1, 2018. A Notice of Emergency Action and Proposed Rule Making was published in the State Register on October 3, 2018 for a 60 day public comment period

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for adoption, after expiration of the required 60-day comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the January 2019 Regents meeting. Therefore, emergency action is necessary to ensure that the emergency rule adopted at the September 2018 Regents meeting remains continuously in effect until it can be adopted as a permanent rule.

Attachment C

ASSESSMENT OF PUBLIC COMMENT

As of November 21, 2018, the Department has received the following comments:

1. COMMENT:

Several commenters expressed the position that the regulation restricts food service staff from communicating with students or informing them of their school food balances. According to a few commenters “until this law we were able to talk to students about their accounts by reminding them they are getting low on funds or that would you please tell your parent you need to bring in money. It was handled in a delicate and meaningful way. You should be able to take into consideration the age of the child and gauge your discussion with the student accordingly. Now that we cannot say anything to the student they think there is money on their account because we are not asking them for money when they purchase a meal.” Many commenters expressed concern that they are expressly prohibited from having any communication with a child relative to school meals.

DEPARTMENT RESPONSE:

It appears that these commenters misunderstood the intent of Education Law §908, as added by Section 1 of Part B of Chapter 56 of the Laws of 2018, and this rulemaking. The statute and rulemaking do not expressly prohibit school food staff from communicating with the child regarding school meals; however, the statute and regulation require the school to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees. The language in the statute and

regulation specifically states that such plans must include a clear explanation of procedures designed to decrease student distress or embarrassment, provided that, no school or school district shall: publicly identify or stigmatize a student who cannot pay for a meal or who owes a meal debt by any means including, but not limited to, requiring that a student wear a wristband or hand stamp; require a student who cannot pay for a meal or who owes a meal debt to do chores or other work to pay for meals; require that a student throw away a meal after it has been served because of the student's inability to pay for the meal or because money is owed for earlier meals; take any action directed at a pupil to collect unpaid school meal fees; or discuss any outstanding meal debt in the presence of other students. This is not an all-inclusive ban on communication with the student; however, school staff must be mindful of their language and manner, understanding of the child and the presence of other pupils when discussing food service account balances. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking is consistent with the statute and necessary to conform the regulations to Education Law § 908. Thus, no revisions are necessary at this time.

2. COMMENT:

Some commenters expressed concern that the rulemaking will place additional responsibilities on school food staff to collect outstanding unpaid meal charges. A few commenters requested additional funding to compensate for school food service employees' time, effort, materials and postage relative to collecting outstanding meal charges.

DEPARTMENT RESPONSE:

While the Department is sympathetic to the commenters' concerns, the rulemaking implements the requirements of the statute. Therefore, no revisions are necessary.

3. COMMENT:

Commenter requested additional funding in the event that the school initiates litigation in small claims court to collect unpaid meal charges.

DEPARTMENT RESPONSE:

The rulemaking implements the requirements of the statute. This comment is also outside the scope of the rulemaking and as such, no revisions are necessary.

4. COMMENT:

Several commenters expressed frustration and concerns that the regulation will result in unlimited meal charges and an increase in unpaid meal account balances. Many commenters stated that unpaid meal charges have significantly increased since the statute and regulation became effective.

DEPARTMENT RESPONSE:

While the Department is sympathetic to the commenters' concerns, the rulemaking implements the statutory requirements and expressly requires a school to develop a plan that includes a clear explanation of the procedure to handle unpaid meal charges and specifically states that nothing is intended to allow for the unlimited accrual of debt. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking implements the requirements of the statute and is necessary to conform the Regulations

of the Commissioner to Education Law § 908. Thus, no revisions are necessary at this time.

5. COMMENT:

One commenter inquired whether the school may withhold transcripts and diplomas until unpaid meal account balances have been collected.

DEPARTMENT RESPONSE:

This comment is outside the scope of the regulation. Accordingly, no change to the regulation is warranted.

6. COMMENT:

Several commenters expressed frustration and concern that this rulemaking allows a child to charge all school meals including a la carte items and second meals which may result in an escalation of unpaid meal account balances. Some commenters also expressed frustration and concern that school food staff must provide a student access to a second meal or a la carte items when the student has money to pay for such items but has outstanding unpaid meal charges.

DEPARTMENT RESPONSE:

While the rulemaking specifically requires the school or school district to provide access to a reimbursable meal, it does not require that a la carte items, adult meals, or other similar items, which would include second meals, be provided. It is in within the school's discretion as to how to address a la carte food items and second meals.

Nevertheless, the rulemaking specifically states that a school must not take any action directed at a pupil to collect unpaid school meal fees. Schools may not use a child's

money to repay previously unpaid charges if the child intended to use the money to purchase a second meal or a la carte item.

The Department has issued guidance and best practices on this initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking is consistent with the statute and necessary to conform the Regulations of the Commissioner to Education Law § 908. Therefore, the Department does not believe any change to the rulemaking is warranted.

7. COMMENT:

One commenter requested clarification on whether a school may utilize an “administrative prerogative application” in the event that a parent or guardian cannot be successfully contacted regarding a student’s unpaid meal balance.

DEPARTMENT RESPONSE:

This comment is outside the scope of the proposed rulemaking. However, 7 CFR 245.6(d) provides local school officials the discretion to complete an application for a child known to be eligible for meal benefits if, after household applications have been disseminated, the household has not applied. This option is intended for limited use upon individual situations and must not be used to make eligibility determinations for categories or groups of children. This option must be used judiciously and may not be used when family income is above the eligibility guidelines, even though the children are coming to school without a meal or money. Family economic status must remain the criterion for administratively making the decision to provide the student access to free or reduced price meals. Schools are encouraged to review Department guidance on this issue.

8. COMMENT:

A few commenters expressed concern that this rulemaking requires a school to provide a reimbursable meal when the child's parent expressly requested that the child not be allowed to charge a reimbursable meal.

DEPARTMENT RESPONSE:

The rulemaking specifically states that the school's plan must include a statement that the school or school district shall provide the student with the student's meal of choice for that school day of the available reimbursable meal choices for such school day, if the student requests one, unless the student's parent or guardian has specifically provided written permission to the school to withhold a meal. If a school has documentation from a parent requesting that their child not receive a reimbursable meal, a reimbursable meal is not required to be provided. The implementation of this provision is at the discretion of a local school food authority. The Department has issued guidance and best practices on the initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking is consistent with the statute and necessary to conform the Regulations of the Commissioner to Education Law § 908, Thus, no revisions are necessary at this time.

