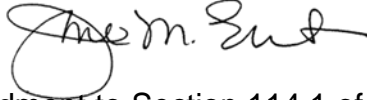






THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

**TO:** The Honorable the Members of the Board of Regents

**FROM:** Jhone M. Ebert 

**SUBJECT:** Proposed Amendment to Section 114.1 of the Regulations of the Commissioner of Education Relating to School Breakfast Programs

**DATE:** January 3, 2018

**AUTHORIZATION(S):**  

## SUMMARY

### Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the amendments to §114.1 of the Commissioner's Regulations to implement the Breakfast after the Bell legislation in accordance with Section 2 of Part B of Chapter 56 of the Laws of 2018 and to make other technical changes to School Breakfast Programs in accordance with federal regulations?

### Reason(s) for Consideration

Required by State statute (Part B of Chapter 56 of the Laws of 2018) and federal regulations (7 CFR Part 220).

### Proposed Handling

The proposed amendment will be presented to the Full Board for adoption as a permanent rule at the January 2019 meeting of the Board of Regents. A copy of the proposed rule and the assessment of public comment are attached.

## **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 Rule Making was published in the State Register on October 3, 2018. The proposed amendment was adopted as a second emergency rule at the December 2018 meeting of the Board of Regents, effective December 11, 2018 to ensure that the rule remained continuously in effect until it could be adopted as a permanent rule at the January 2019 meeting. Following the 60-day public comment period required under the State Administrative Procedure Act, the Department received several comments on the proposed amendment. A complete assessment of the public comment received is included as Attachment B.

## **Background Information**

Technical amendments to the definitions, terms and meal pattern requirements set forth in Section 114.1 are necessary to conform with recent changes to 7 CFR Part 220, the federal regulations governing School Breakfast Programs administered by the State Education Department (Department). Such federal regulations were promulgated pursuant to The Healthy Hunger Free Kids Act (“HHFKA”) of 2010, Public Law 111-296, which amended section 4 of the Child Nutrition Act of 1966 which authorizes payments to States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.

In addition, the Enacted 2018 State Budget (Section 2 of Part B of Chapter 56 of the Laws of 2018), requires all public elementary or secondary schools with at least 70 percent or more of its students eligible for free or reduced-price meals under the National School Lunch Program to offer all students a school breakfast after the instructional day has begun, referred to as Breakfast After the Bell, beginning in the 2018-19 school year, and each school year thereafter. The schools meeting the 70 percent free and reduced-price meals criteria are determined by the Department based upon data submitted by each school through the basic educational data system (BEDS) from the prior school year.

Each public school required to implement the Breakfast After the Bell program shall consult with teachers, parents, students, and members of the community to determine the breakfast service delivery model(s) that best suits its students. Service delivery models may include, but are not limited to, breakfast in the classroom, grab and go breakfast, and second chance breakfast, which would include breakfast served in the cafeteria. Time spent by students consuming breakfast in the classroom may be considered instructional time when instruction is being provided.

Schools subject to this requirement shall provide notice to students' parents and guardians that the school will be offering breakfast to all students after the instructional day has begun.

Any school identified pursuant to this section may annually apply to the Commissioner for a waiver from establishing a school breakfast program after the instructional day has begun. Such waiver may be granted by the Commissioner upon a demonstration of the following by the school:

- a lack of need for a school breakfast program after the instructional day has begun because of a successful existing breakfast program; or
- providing a school breakfast program after the instructional day has begun would cause economic hardship for the school.

The 2018 Enacted State Budget provided the Department with an additional \$5 million to reimburse increased participation in public school breakfast programs for schools required to implement the Breakfast After the Bell program.

In addition, the 2018 Enacted State Budget provided the Department funding in the amount of \$7 million to be distributed to any eligible public school required to implement Breakfast After the Bell through a non-competitive grant. Each eligible public school will receive a one-time incentive of \$5,000 that will allow schools to purchase food service equipment, including equipment used for the storage, preservation or distribution of food, that will assist in the implementation and success of a Breakfast After the Bell program.

Section 2 of Part B of Chapter 56 of the Laws of 2018 also required the Department to publish on its website, on or before May 1 of each year, a list of the public schools that meet the requirements for operating such programs and to provide notification to such schools. Pursuant to this requirement, the Department posted such list of eligible schools on its website by May 1, 2018. The law further requires the Department to develop and distribute guidelines and provide appropriate technical assistance for the implementation of the Breakfast After the Bell program which shall be in compliance with all applicable federal and state laws governing the School Breakfast Program. This guidance was also issued to the field by May 1, 2018. In addition, effective December 2019 and each December thereafter, the Department will be required to annually publish on its website information pertaining to all schools participating in the School Breakfast Program (SBP) including but not limited to: school name, service delivery model, enrollment, percentage of children eligible for free or reduced-price meals and the average daily participation for breakfast. The Department's Child Nutrition staff is in the process of enhancing the current data system to collect the required reporting data.

### **Related Regents Items**

[September 2018](http://www.regents.nysed.gov/common/regents/files/918p12a3.pdf). (<http://www.regents.nysed.gov/common/regents/files/918p12a3.pdf>)  
[December 2018](http://www.regents.nysed.gov/common/regents/files/1218brca10.pdf) (<http://www.regents.nysed.gov/common/regents/files/1218brca10.pdf>)

### **Recommendation**

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

VOTED: That §114.1 of the Regulations of the Commissioner of Education be amended, as submitted, effective January 30, 2019.

**Timetable for Implementation**

If adopted at the January 2019 Regents meeting, the proposed amendment will become effective on January 30, 2019.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 208, 305 and Sections 4 and 5 of Chapter 537 of the Laws of 1976, as amended by Chapter 56 of the Laws of 2018.

Section 114.5 of the Regulations of the Commissioner of Education is amended as follows:

Section 114.1. School breakfast program.

(a) Definitions. As used in this section:

(1)...

(2) Severe need school shall mean a school where 40 percent or more of the lunches served to students at the school in the second preceding school year were served free or at a reduced price[, and in which the reimbursement rate per meal established by the United States Secretary of Agriculture is insufficient to cover the costs of a school breakfast program].

(3)...

(4)...

(5)...

(6) Breakfast after the Bell shall mean providing students access to school breakfast after the instructional school day begins.

(b) Nutritional standards. A breakfast shall [contain, as a minimum, each of the following food components in the amounts indicated:

(1) One-half pint of fluid milk served as a beverage or on cereal, or used in part for each purpose.

(2) A one-half cup serving of fruit or full-strength fruit or vegetable juice.

(3) Two servings from one of the following components or one serving from each:

(i) Bread/bread alternate—one slice of whole grain or enriched bread; one serving of a biscuit, roll, muffin, etc., made of whole grain or enriched flour, or a 3/4 cup or one ounce serving of whole grain or enriched or fortified cereal.

(ii) Meat/meat alternate—one ounce of meat/poultry, fish or cheese, 1/2 large egg, two tbsp. of peanut, nut or seed butter, four tbsp. of cooked dry beans, or one ounce or more of the following: peanuts, soynuts, tree nuts, or seeds.

(4) Offer versus serve. Each school shall offer its students all four required food items as set forth under subdivision (b) of this section. Each school may allow students to refuse one food item from any component that the student does not intend to consume. The refused food item may be any of the four items offered to the student. A student's decision to accept all four food items or to decline one of the four food items shall not affect the charge for breakfast.] meet the minimum meal pattern requirements contained in 7 CFR 220.8 and 7 CFR 220.23 (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 12234 and such breakfast shall be served in conformance with the offer versus serve requirements contained in 7 CFR 220.8 (e) (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 12234).

(c) [Eligible participants. Any public school district, private nonprofit school or residential child care institution, as defined in 7 CFR 220.2 (Code of Federal Regulations,

1993 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402: 1993—available at Office for Regional Field Services, Room 775, Education Building Annex, Albany, NY 12234), may apply. In the case of a public school district, approval may be granted for selected schools rather than an entire district.

(d)] Free and/or reduced-price breakfasts. Children to whom free and/or reduced price breakfasts will be served are to be determined by local [sponsoring] agencies in conformity with their existing written policy statements on file in the official records of every sponsoring agency in conformance with [7 CFR 220.7(e) (Code of Federal Regulations, 1993 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402: 1993—available at Office for Regional Field Services, Room 775, Education Building Annex, Albany, NY 12234).] 7 CFR Part 245 (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).

[(e) Application. Application will be made on forms required by the commissioner.

(f) Reporting requirements. Monthly reports shall be filed no later than the 10th day of each month. Severe need schools shall report financial data to support the need for the additional reimbursement on the December claim for the period July through December and the June claim for the period January through June.]

[(g)] (d). . .

[(h)] (e). . .

[(i)] (f). . .

[(j)] (g). . .

(h) Breakfast after the Bell program.

(1) All participating public elementary or secondary schools in this state, not including a charter school authorized by article 56 of the education law, with at least seventy percent or more of its students eligible for free or reduced-price meals under the federal National School Lunch Program as determined by the Commissioner based upon data submitted by schools through the basic educational data system (BEDS) for the prior school year, shall be required to offer all students a school breakfast after the instructional day has begun.

(2) Each public school may determine the breakfast service delivery model that best suits its students. Service delivery models may include, but are not limited to, breakfast in the classroom, grab and go breakfast, and breakfast served in the cafeteria. Time spent by students consuming breakfast may be considered instructional time when students consume breakfast in the students' classrooms and instruction is being provided while students are consuming breakfast. In determining a service delivery model, schools shall consult with teachers, parents, students and members of the community.

(3) Schools subject to this requirement shall provide annual notice to students' parents and guardians that the school will be offering breakfast to all students after the instructional day has begun.

(4) Any school identified pursuant to this section may apply to the Commissioner for a waiver from establishing a school breakfast program after the instructional day has begun. Such waivers shall be annually submitted to the Commissioner in a format and manner prescribed by the Commissioner prior to July 1<sup>st</sup> of each school year. Such waiver may be granted by the Commissioner upon the school demonstrating:



(i) a lack of need for a School Breakfast Program after the instructional day has begun because of a successful existing breakfast program; or

(ii) that providing a school breakfast program after the instructional day has begun would cause economic hardship for the school.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Action and Proposed Rule Making in the State Register on October 3, 2018, the State Education Department received the following comments:

1. COMMENT:

Most commenters applauded the Department's overall efforts to require all public elementary or secondary schools with at least 70 percent or more of its students eligible for free or reduced-price meals under the National School Lunch Program to offer all students a school breakfast after the instructional day has begun, referred to as Breakfast After the Bell, beginning in the 2018-19 school year, and each school year thereafter.

DEPARTMENT RESPONSE:

No response is necessary, as the comments are supportive.

2. COMMENT:

Some commenters advocated that this rulemaking should apply to charter schools.

DEPARTMENT RESPONSE:

The rulemaking implements the statutory requirements and expressly applies to all public elementary or secondary schools, not including charter schools authorized by Article 56 of the Education Law, with at least 70 percent or more of its students eligible for free or reduced-price meals under the National School Lunch Program. The rulemaking implements the requirements of the statute and is necessary to conform the

Regulations of the Commissioner to Section 2 of Part B of Chapter 56 of the Laws of 2018. Thus, no revisions are necessary.

### 3. COMMENT:

Some commenters advocated for stronger language in the rulemaking to allow schools that are required to implement a Breakfast after the Bell program to have the ability to implement a Breakfast after the Bell program that best “removes barriers to breakfast participation” and “increases access to school breakfast.” One commenter suggested the rulemaking specifically define breakfast service delivery models including “Breakfast in the classroom,” “Grab and Go” and “Second Chance Breakfast.”

### DEPARTMENT RESPONSE:

The rulemaking implements the requirements of the statute, which provides that schools which are required to implement a Breakfast After the Bell program must consult with teachers, parents, students, and members of the community to determine the breakfast service delivery model(s) that best suits its students. The language in the statute also provides that service delivery models may include, but are not limited to, breakfast in the classroom, grab and go breakfast, and second chance breakfast, which would include breakfast served in the cafeteria. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. Therefore, no revisions are necessary.

### 4. COMMENT:

Some commenters requested additional language be provided in this rulemaking to clarify and strengthen the requirements for schools seeking waivers from the requirements for establishing a Breakfast after the Bell program.

DEPARTMENT RESPONSE:

The rulemaking is consistent with the statute and necessary to conform the regulations to Section 2 of Part B of Chapter 56 of the Laws of 2018 which provides that affected schools may annually apply to the Commissioner for a waiver from establishing a school breakfast program, which may be granted upon a demonstration of: (1) a lack of need for a Breakfast after the Bell program because of a successful existing breakfast program; or (2) providing a Breakfast after the Bell program would cause economic hardship for the school. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. Thus, no revisions are necessary at this time.

5. COMMENT:

One commenter suggested that schools required to implement a Breakfast after the Bell program be required to “establish and adopt a school board policy to ensure student access to school breakfast.”

DEPARTMENT RESPONSE:

This comment is outside the scope of the statutory requirements. Accordingly, no change to the regulation is needed.