

§ 210.10(d) and (k)(2) and at § 220.08(c) and (g)(2).

Monitoring Compliance With Nutrition Standards

In both proposals, the Department proposed modifications to the review requirements so that compliance with the updated nutrition standards would be monitored properly. Currently, State agencies monitor compliance with meal pattern components and quantities on a per-meal basis through observation of the meal service. If there is reason to believe that a school is consistently offering meals which are deficient, State agencies may examine menus and production records to ensure that all components were available, and that sufficient quantities were offered.

Under both the June 10, 1994, and the January 27, 1995, proposals, reimbursable meals offered over a school week must collectively meet the updated nutrition standards, including the Dietary Guidelines, as well as provide the minimum number of food items required for a reimbursable meal. Therefore, both proposals would have continued to require reviewers to determine that, on the day of review, the minimum number of menu items (NuMenus or Assisted NuMenus) or components (the food-based alternative) are offered and accepted. Meals lacking the required items or components would be disallowed. To determine compliance with the overall nutrition standards, the Department proposed to implement a review mechanism outside of the administrative review procedure set forth in § 210.18(g).

In the June 10, 1994, proposal, the Department sought to establish a separate nutrition analysis review requirement to supplement the administrative review requirements. Under this requirement (proposed at § 210.19(a)(1)), the State agency would review the school's nutrient analysis to determine that NuMenus or Assisted NuMenus are being properly conducted and that the meals provided do, in fact, comply with the program's nutrition standards. Under food-based systems, however, there generally would be no local nutrition analysis records to review. Therefore, the January 27, 1995, proposal would have required the State agency to conduct a nutrient analysis of one week's meals using the school's production records. That proposal (again § 210.19(a)(1)) also permitted State agencies to develop an alternate review methodology to nutrient analysis, subject to Departmental approval, or to examine local records of nutrient analysis should there be any. Nutrient analysis is needed because,

even with a food-based system that incorporates enhanced meal pattern requirements, there is no guarantee that meals will comply with the Dietary Guidelines. Food selection, preparation techniques and student choices will have a significant effect. Periodic nutrient analysis, even if only at five-year intervals, will be the only way of gauging the school's compliance with the nutrition standards or of identifying ways to improve performance.

Both proposals stressed the Department's commitment to technical assistance and corrective action in non-compliance situations as an alternative to taking fiscal action. In both proposals, State agencies would require corrective action when meals collectively fail to meet the nutrition standards. However, reimbursement for those meals would not be disallowed. School food authorities would be required to develop an acceptable corrective action plan in collaboration with the State agency. For school food authorities making good faith efforts to comply with the terms of the corrective action plan, the State agency would provide technical assistance and training to help them meet the nutrition standards. However, if the school food authority had not been acting in good faith to meet the terms of the corrective action plan and refused to renegotiate the plan, the State agency would be required to determine if a disallowance of reimbursement was warranted.

Over 800 commenters addressed the monitoring requirements in the June 10, 1994, proposal. Most of these were parents/students (350), school food service personnel (316) and teachers and other school officials (101). In general, commenters agreed with the proposed compliance procedure; 140 commenters expressed overall approval, while only 36 completely disapproved. Commenters were concerned, however, about the provision requiring school food authorities to develop corrective action plans with the concurrence of the State agency and the provision requiring disallowance of funds if the school food authority does not act in good faith to achieve corrective action. For the most part, these concerns were technical in nature and involved such issues as defining "intentional" failure to take corrective action or requesting a methodology for calculating a fiscal penalty. Some commenters believed there should be no fiscal penalties, while others believed the State agency should have greater authority to take fiscal action for non-compliance.

The Department received 148 comments on the proposed monitoring requirement for school food authorities

electing to use food-based menu planning systems. The principal concern was with the proposed requirement that State agencies conduct a nutrient analysis of one week's food service using the school's menus and supporting production records. Thirty commenters opposed the provision, while most of the others raised technical concerns or suggested alternate methodologies such as analyzing only menus.

The Department proposed to monitor compliance with the nutrition standards outside of the normal CRE process because of the belief that State agencies should have maximum flexibility to provide training and technical assistance to their schools. Therefore, both proposals stressed corrective action over automatic disallowances (except when the State agency observes that meals are not complete) because the Department does not wish to penalize school food authorities which are making good faith efforts to move toward compliance.

The Department believes that State agencies are in the best position to determine what corrective actions must be taken, what the time frames for completion will be and whether or not the school food authority is making a good faith effort to comply. Because circumstances will vary from one situation to another, the Department does not believe rigid criteria can adequately determine a "good faith" effort, although progress toward compliance with the nutrition standards would certainly be one major indicator. Moreover, the Department does not envision that disallowances would occur routinely. The timing and amount of any disallowances are entirely at the State agency's discretion, but the Department intends that they would be imposed only when the school is not taking the agreed upon corrective action and is not making progress toward compliance.

Finally, the Department proposed to have State agencies conduct a nutrient analysis as part of the review of schools using food-based menu systems because there is no other way to demonstrate that these school food authorities are actually meeting the nutrition standards, including the Dietary Guidelines. As noted elsewhere in this preamble, section 9(f) of the NSLA now requires that all schools comply with the Dietary Guidelines, and the Department's proposed meal patterns will allow schools using a food-based menu planning system to achieve these goals. However, there is a wide variation in the foods schools select to meet the component requirements. Consequently,