

# Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Part 226

RIN 0584-AD66

#### For-Profit Center Participation in the Child and Adult Care Food Program

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Interim rule.

**SUMMARY:** This rule adds a provision to the Child and Adult Care Food Program (CACFP) regulations that authorizes for-profit centers providing child care or outside-school-hours care to participate based on the income eligibility of 25 percent of children in care for free or reduced price meals. This provision, which has been available nationwide on an interim basis through annual appropriation acts since December 2000, was permanently established by the Child Nutrition and WIC Reauthorization Act of 2004. This rule permits the ongoing participation of for-profit centers in the CACFP based on the income eligibility of children in care for free or reduced price meals.

**DATES:** This rule is effective August 26, 2005. To be assured of consideration, comments must be postmarked on or before September 26, 2005.

**ADDRESSES:** The Food and Nutrition Service invites interested persons to submit comments on this interim rule. Comments may be submitted by any of the following methods:

- Mail: Send comments to Robert M. Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Room 640, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302-1594. All submissions will be available for public inspection at this location Monday through Friday, 8:30 a.m.–5 p.m.

- Fax: Submit comments by facsimile transmission to: (703) 305-2879. Please address your comments to Mr. Eadie and identify your comments as “CACFP: For-Profit Centers”.

- E-Mail: Send comments to <http://www.CNDProposal@fns.usda.gov>.

Please identify your comments as “CACFP: For-Profit Centers”.

- Hand Delivery or Courier: Deliver comments to 3101 Park Center Drive, Room 634, Alexandria, Virginia 22301-1594, during normal business hours of 8:30 a.m.–5 p.m.

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

#### FOR FURTHER INFORMATION CONTACT:

Keith Churchill or Linda Jupin, Child Care and Summer Section, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302, phone (703) 305-2590.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 119(a) of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265) amended section 17(a)(2)(B)(i) of the Richard B. Russell National School Lunch Act (NSLA)(42 U.S.C. 1766(a)(2)(B)(i)) to permanently authorize for-profit centers that provide child care or outside-school-hours care to participate in the CACFP if 25 percent of the children in care are eligible for free or reduced price meals under the Program. This criterion provides an additional means by which for-profit centers may qualify for Program participation. For-profit centers in all States have been permitted to participate in the Program since December 2000, when a provision of Public Law 106-554, added Section 17(a)(2)(B)(i) to the NSLA, 42 U.S.C. 1766(a)(2)(B)(i). That time-limited provision was subsequently renewed annually until made permanent by Public Law 108-265 on June 30, 2004. Prior to December 2000, the Food and Nutrition Service (FNS) implemented separate but similar authority in section 17(p) of the NSLA, 42 U.S.C. 1766(p), permitting for-profit centers in three States (Kentucky, Iowa, and Delaware) to participate in the Program. Section 119(a)(2) of Public Law 108-265 struck this provision. As a result of the

permanent statutory provision affecting for-profit centers, these States have been notified that the pilot projects have been eliminated and their affected for-profit centers have been incorporated into regular for-profit Program participation under section 17(a)(2)(B)(i).

This authority differs from that in section 17(a)(2)(B)(ii) (42 U.S.C. 1766(a)(2)(B)(ii)), which permits for-profit centers providing child care or outside-school-hours care to participate in the CACFP. In such cases, for-profit centers are eligible if they receive compensation from the State title XX funds and if at least 25 percent of the enrolled children or the licensed capacity (whichever is less) receive benefits under title XX of the Social Security Act. This criterion was established by Public Law 101-147, which reauthorized child nutrition programs in November 1989, and is located at section 17(a)(2)(B)(ii) of the NSLA.

This interim rule adds a new definition of *For-profit center* to § 226.2 describing the eligibility criteria pertaining to for-profit centers serving children and adults. In doing so, this new definition incorporates the current definitions in § 226.2 for *Proprietary title XIX center* and *Proprietary title XX center*. This rule does not change the eligibility criteria for participation by for-profit adult day care centers. Rather it consolidates several definitions that pertain to for-profit centers into one comprehensive definition in order to standardize the regulatory language on for-profit center participation in the CACFP.

In addition, we have clarified in this new definition of a for-profit center that the eligibility criterion based on children's income eligibility or receipt of title XX benefits extends to centers that provide care to school age children outside of school hours, as mandated by section 17(a)(2)(B) of the NSLA, as well as to traditional child care centers. This includes any for-profit center that meets the definition in § 226.2 of *Child care center* or *Outside-school-hours care center*.

All other changes that are made by this interim rule stem from this new definition of for-profit center and consist primarily of name changes in which the new term “For-profit center” is substituted for “Proprietary title XIX center” or “Proprietary title XX center”.

## II. Procedural Matters

### *Executive Order 12866*

This rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

### *Regulatory Flexibility Act*

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Roberto Salazar, Administrator for the Food and Nutrition Service, has certified that this rule will not have a significant impact on a substantial number of small entities. This interim rule implements a statutory change that permanently authorizes for-profit centers to participate in the Child and Adult Care Food Program on the basis of income eligibility of 25 percent of children in care for free or reduced price meals. This provision has been available to for-profit centers as an eligibility criterion for participation in the Program since FY 2001. Since the provision is not new, the Food and Nutrition Service estimates that the permanent designation of this eligibility criterion will not substantially increase the number of for-profit centers that may apply to participate in the Program.

### *Public Law 104–4*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This interim rule contains no Federal mandates (under regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of \$100 million or more in any one year. Thus, this interim rule is not subject to the requirements of sections 202 and 205 of the UMRA.

### *Executive Order 12372*

The Child and Adult Care Food Program is listed in the Catalog of Federal Domestic Assistance under No. 10.558. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), this program is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

### *Executive Order 13132*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies

are directed to provide a statement for inclusion in the preamble to the regulation describing the agency's considerations in terms of three categories called for under section (6)(a)(2)(B) of Executive Order 13132. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. This interim rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

### *Executive Order 12988*

The rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with its provisions or that would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the **DATES** paragraph of the rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In the Child and Adult Food Care Program, the administrative procedures are set forth at: (1) 7 CFR 226.6(k), which establishes appeal procedures; and (2) 7 CFR 226.22 and 7 CFR parts 3016 and 3019, which address administrative appeal procedures for disputes involving procurement by State agencies and institutions.

### *Civil Rights Impact Analysis*

FNS has reviewed this rule in accordance with the Department Regulation 4300–4, Civil Rights Impact Analysis, to identify and address any major civil rights impact the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that there is no negative effect on these groups. All data available to FNS indicate that protected individuals have the same opportunity to participate in the CACFP as non-protected individuals. Regulations at § 226.6(f)(1) require that CACFP institutions agree to operate the Program in compliance with applicable Federal civil rights laws, including title VI of the Civil Rights Act of 1964, title IX of the Education amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Department's regulations concerning nondiscrimination (7 CFR Part 15, 15a, and 15b). At § 226.6(m)(1), State

agencies are required to monitor CACFP institution compliance with these laws and regulations.

### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collections of information unless it displays a current valid OMB control number. The interim rule does not contain information collections that are subject to review and approval by OMB.

### *Government Paperwork Elimination Act*

FNS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. This interim rule does not impose any information collections or transactions that require consideration under GPEA.

### *Public Participation*

This action is being finalized without prior notice or public comment under authority of 5 U.S.C. 553(b)(3)(A) and (B). This rule implements through amendments to current program regulations a nondiscretionary provision mandated by the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265). Thus, the Department has determined in accordance with 5 U.S.C. 553(b) that Notice of Proposed Rulemaking and Opportunity for Public Comments is unnecessary and contrary to the public interest and, in accordance with 5 U.S.C. 553(d), finds that good cause exists for making this action effective without prior public comment.

### **List of Subjects in 7 CFR Part 226**

Accounting, Aged, Day care, Food and nutrition service, Food assistance programs, Grant programs, Grant programs—health, American Indians, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

■ Accordingly, 7 CFR part 226 is amended as follows:

### **PART 226—CHILD AND ADULT CARE FOOD PROGRAM**

■ 1. The authority citation for Part 226 continues to read as follows:

**Authority:** Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765, and 1766).

**PART 226—[Nomenclature Change]**

- 2. In part 226, remove the words, “proprietary title XIX or title XX”, wherever they appear and add the words, “for-profit”, in their place.
- 3. In § 226.2:
  - a. Revise the first sentence of the definition “Child care center”;
  - b. Add a new definition “For-profit center” in alphabetical order;
  - c. Revise the first sentence of the definition “Outside-school-hours care center”;
  - d. Remove the definitions “Proprietary title XIX center” and “Proprietary title XX center”; and
  - e. Revise the last sentence of paragraph (d) of the definition “Sponsoring organization”.

The addition and revisions read as follows:

**§ 226.2 Definitions.**

\* \* \* \* \*

*Child care center* means any public or private nonprofit institution or facility (except day care homes), or any for-profit center, as defined in this section, that is licensed or approved to provide nonresidential child care services to enrolled children, primarily of preschool age, including but not limited to day care centers, settlement houses, neighborhood centers, Head Start centers and organizations providing day care services for children with disabilities. \* \* \*

\* \* \* \* \*

*For-profit center* means a Child care center, Outside-school-hours care center, or Adult day care center providing nonresidential care to adults or children that does not qualify for tax-exempt status under the Internal Revenue Code of 1986. For-profit centers serving adults must meet the criteria described in paragraph (a) of this definition; for-profit centers serving children must meet the criteria described in paragraphs (b)(1) or (b)(2) of this definition.

(a) A for-profit center serving adults must meet the definition of *Adult day care center* as defined in this section and, during the calendar month preceding initial application or reapplication, the center receives compensation from amounts granted to the States under title XIX or title XX and twenty-five percent of the adults enrolled in care are beneficiaries of title XIX, title XX, or a combination of titles XIX and XX of the Social Security Act.

(b) A for-profit center serving children must meet the definition of *Child care center* or *Outside-school-hours care center* as defined in this section and one of the following conditions during the calendar month preceding initial application or reapplication:

(1) Twenty-five percent of the children in care (enrolled or licensed capacity, whichever is less) are eligible for free or reduced-price meals; or

(2) Twenty-five percent of the children in care (enrolled or licensed capacity, whichever is less) receive benefits from title XX of the Social Security Act and the center receives compensation from amounts granted to the States under title XX.

\* \* \* \* \*

*Outside-school-hours care center* means a public or private nonprofit institution or facility (except day care homes), or a *For-profit center* as defined in this section, that is licensed or approved to provide organized nonresidential child care services to children during hours outside of school.

\* \* \*

\* \* \* \* \*

*Sponsoring organization* \* \* \*

(d) \* \* \* The term “sponsoring organization” also includes a *For-profit center*, as defined in this section, that is entirely responsible for administration of the Program in any combination of two or more child care centers, at-risk afterschool care centers, adult day care centers, or outside-school-hours care centers, provided that the centers are part of the same legal entity as the sponsoring organization.

\* \* \* \* \*

- 4. In § 226.6:
  - a. Revise paragraph (b)(1)(viii);
  - b. Revise paragraph (c)(3)(ii)(L); and
  - c. Revise paragraph (f)(3)(iv).

The revisions read as follows:

**§ 226.6 State agency administrative responsibilities.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(viii) *Documentation of for-profit center eligibility.* Institutions must document that each for-profit center for which application is made meets the definition of a *For-profit center*, as set forth at § 226.2;

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(ii) \* \* \*

(L) Claiming reimbursement for meals served by a for-profit child care center or a for-profit outside-school-hours care center during a calendar month in which less than 25 percent of the

children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced-price meals or were title XX beneficiaries;

\* \* \* \* \*

(f) \* \* \*

(3) \* \* \*

(iv) Require for-profit child care centers and for-profit outside-school-hours care centers to submit documentation of:

(A) Eligibility of at least 25 percent of children in care (enrolled or licensed capacity, whichever is less) for free or reduced price meals; or

(B) Compensation received under title XX of the Social Security Act for nonresidential day care services and certification that at least 25 percent of children in care (enrolled or licensed capacity, whichever is less) were title XX beneficiaries during the most recent calendar month.

\* \* \* \* \*

- 5. In § 226.8, revise the second sentence of paragraph (a) to read as follows:

**§ 226.8 Audits.**

(a) \* \* \* State agencies must establish audit policy for for-profit institutions. \* \* \*

\* \* \* \* \*

- 6. In § 226.10, revise the third, fourth, and fifth sentences of paragraph (c) introductory text to read as follows:

**226.10 Program payment procedures.**

\* \* \* \* \*

(c) \* \* \* For each month in which independent for-profit child care centers and independent for-profit outside-school-hours care centers claim reimbursement, they must submit the number and percentage of children in care (enrolled or licensed capacity, whichever is less) that documents at least 25 percent are eligible for free or reduced-price meals or are title XX beneficiaries. Sponsoring organizations of for-profit child care centers or for-profit outside-school-hours care centers must submit the number and percentage of children in care (enrolled or licensed capacity, whichever is less) that documents that at least 25 percent are eligible for free or reduced-price meals or are title XX beneficiaries. Sponsoring organizations of such centers must not submit a claim for any for-profit center in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) during the claim month were eligible for free or reduced-price meals or were title XX beneficiaries. \* \* \*

\* \* \* \* \*

- 7. In § 226.11:

- a. Revise the first sentence of paragraph (b); and
- b. Revise the introductory text of paragraph (c).

The revisions read as follows:

**§ 226.11 Program payments for centers.**

\* \* \* \* \*

(b) Each child care institution or outside-school-hours care institution must report each month to the State agency the total number of meals, by type (breakfast, lunch, supper, and snack), served to children, except that such reports must be made for a for-profit center only for calendar months during which not less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries.

(c) Each State agency must base reimbursement to each child care institution or outside-school-hours institution on the number of meals, by type (breakfast, lunch, supper, and snack), served to children multiplied by the assigned rates of reimbursement, except that reimbursement must be payable to for-profit child care centers or for-profit outside-school-hours care centers only for calendar month during which at least 25 percent of children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries. Each State agency must base reimbursement to each adult day care institution on the number of meals, by type, served to adult participants multiplied by the assigned rates of reimbursement, except that reimbursement must be payable to for-profit adult day care centers only for calendar months during which at least 25 percent of the enrolled adult participants were beneficiaries of title XIX, title XX, or a combination of titles XIX and XX. In computing reimbursement, the State agency must either:

\* \* \* \* \*

- 8. In § 226.15, revise paragraph (a) to read as follows:

**§ 226.15 Institution provisions.**

(a) *Tax exempt status.* Except for for-profit centers and sponsoring organizations of such centers, institutions must be public, or have tax exempt status under the Internal Revenue Code of 1986.

\* \* \* \* \*

- 9. In § 226.17:
  - a. Remove the words “proprietary title XX” in paragraph (b)(2) and add in their place the words “for-profit”; and

- b. Revise the second sentence of paragraph (b)(4).

The revision reads as follows:

**§ 226.17 Child care center provisions.**

\* \* \* \* \*

(b) \* \* \*  
 (4) \* \* \* For-profit child care centers may not claim reimbursement for meals served to children in any month in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries. \* \* \*

■ 10. In § 226.19:

- a. In paragraph (b)(2), remove the words “proprietary title XX” and add in their place the words “for-profit”; and
- b. Revise the second and third sentences in paragraph (b)(5).

The revision reads as follows:

**§ 226.19 Outside-school-hours care center provisions.**

\* \* \* \* \*

(b) \* \* \*  
 (5) \* \* \* Reimbursement may not be claimed for more than two meals and one snack provided daily to each child or for meals served to children at any one time in excess of authorized capacity. For-profit centers may not claim reimbursement for meals served to children in any month in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced price meals or were title XX beneficiaries.

\* \* \* \* \*

Dated: July 20, 2005.

**Roberto Salazar,**  
*Administrator, Food and Nutrition Service.*  
 [FR Doc. 05-14811 Filed 7-26-05; 8:45 am]  
**BILLING CODE 3410-30-P**

**DEPARTMENT OF AGRICULTURE**

**Farm Service Agency**

**7 CFR Part 780**

**RIN 0560-AG88**

**Appeal Procedures**

**AGENCY:** Farm Service Agency, USDA.  
**ACTION:** Interim final rule.

**SUMMARY:** The Farm Service Agency (FSA) is amending the regulations for informal agency appeals to make conforming and clarifying changes regarding FSA procedures.

**DATES:** *Effective Date:* This rule is effective August 26, 2005. Written

comments via letter, facsimile, or Internet are invited from interested individuals and organizations and must be received on or before September 26, 2005, in order to be assured of consideration.

**ADDRESSES:** FSA invites interested persons to submit comments on this interim final rule. Comments may be submitted by any of the following methods:

- E-Mail: Send comments to *Tal\_Day@wdc.usda.gov*. Include “Part 780” in the subject line of the message.
- Fax: Submit comments by facsimile transmission to: 202/690-3003.
- Mail: Send comments to: H. Talmage Day, Appeals and Litigation Staff, Farm Service Agency, United States Department of Agriculture, 1400 Independence Avenue, SW., AG STOP 0570, Washington, DC 20250-0570.
- Hand Delivery or Courier: Deliver comments to: H. Talmage Day, Appeals and Litigation Staff, Farm Service Agency, United States Department of Agriculture, 1400 Independence Avenue, SW., Room 6722-S, Washington, DC 20250-0570.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** H. Talmage Day at the above address or 202/690-3297.

**SUPPLEMENTARY INFORMATION:**

**Executive Order 12866**

The Office of Management and Budget (OMB) has determined this rule is not significant for the purposes of Executive Order 12866; therefore, this rule has not been reviewed by OMB.

**Paperwork Reduction Act of 1995**

This rule does not constitute a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

**Unfunded Mandates Reform Act of 1995**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.