

(e.g., records, statements, or other appropriate information) issued by a licensed medical professional (e.g., a physician or other medical professional duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine); a licensed vocational rehabilitation specialist (State or private); or any Federal agency, State agency, or an agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

(4) *Permanent or time-limited employment options.* An agency may make permanent or time-limited appointments under this paragraph (u)(4) where an applicant supplies proof of disability as described in paragraph (u)(3) of this section and the agency determines that the individual is likely to succeed in the performance of the duties of the position for which he or she is applying. In determining whether the individual is likely to succeed in performing the duties of the position, the agency may rely upon the applicant's employment, educational, or other relevant experience, including but not limited to service under another type of appointment in the competitive or excepted services.

(5) *Temporary employment options.* An agency may make a temporary appointment when:

(i) The agency determines that it is necessary to observe the applicant on the job to determine whether the applicant is able or ready to perform the duties of the position. When an agency uses this option to determine an individual's job readiness, the hiring agency may convert the individual to a permanent appointment in the excepted service whenever the agency determines the individual is able to perform the duties of the position; or

(ii) The work is of a temporary nature.

(6) *Noncompetitive conversion to the competitive service.* (i) An agency may noncompetitively convert to the competitive service an employee who has completed 2 years of satisfactory service under this authority in accordance with the provisions of Executive Order 12125, as amended by Executive Order 13124, and § 315.709 of this chapter, except as provided in paragraph (u)(6)(ii) of this section.

(ii) Time spent on a temporary appointment specified in paragraph (u)(5)(ii) of this section does not count towards the 2-year requirement.

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 245 and 272

RIN 0584-AE10

#### National School Lunch Program: Direct Certification Continuous Improvement Plans Required by the Healthy, Hunger-Free Kids Act of 2010

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

**ACTION:** Final rule.

**SUMMARY:** This rule amends the National School Lunch Program (NSLP) regulations to incorporate provisions of the Healthy, Hunger-Free Kids Act of 2010 designed to encourage States to improve direct certification efforts with the Supplemental Nutrition Assistance Program (SNAP). The provisions require State agencies to meet certain direct certification performance benchmarks and to develop and implement continuous improvement plans if they fail to do so. This rule also amends NSLP and SNAP regulations to provide for the collection of data elements needed to compute each State's direct certification performance rate to compare with the new benchmarks. Improved direct certification efforts would help increase program accuracy, reduce paperwork for States and households, and increase eligible children's access to school meals.

**DATES:** This rule is effective March 25, 2013.

**FOR FURTHER INFORMATION CONTACT:** Vivian Lees or Patricia B. von Reyn, State Systems Support Branch, at (703) 305-2590.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

##### A. Legislative History Leading up to This Rulemaking

Section 104 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265) amended section 9(b) of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1758(b)) to require all local educational agencies (LEAs) that participate in the NSLP and/or School Breakfast Program to establish, by school year (SY) 2008-2009, a system to directly certify as eligible for free school meals children who are members of households receiving benefits under SNAP.

Section 4301 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246) (42 U.S.C. 1758a) requires the Secretary of Agriculture, beginning in 2008, to assess the

effectiveness of State and local efforts to directly certify such school-age children for free school meals and to provide annual reports to Congress. (See the *Direct Certification in the National School Lunch Program: State Implementation Progress* (Report to Congress) for 2008, 2009, 2010, and 2011 at <http://www.fns.usda.gov/ora/menu/Published/CNP/cnp.htm>.)

Section 101(b) of Public Law 111-296, the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), amended section 9(b)(4) of the NSLA (42 U.S.C. 1758(b)(4)) to establish and define required percentage benchmarks for directly certifying children who are members of households receiving benefits under SNAP. Section 101(b) further amended the NSLA to require that, beginning with SY 2011-2012, each State that does not meet the benchmark for a particular school year must develop, submit, and implement a continuous improvement plan (CIP) aimed at fully meeting the benchmarks and improving direct certification for the following school year. It also requires that the Secretary provide technical assistance to State agencies in developing and implementing CIPs.

These provisions of section 101(b) of the HHFKA, which were effective October 1, 2010, were implemented through USDA Food and Nutrition Service (FNS) Memorandum SP 32-2011, *Child Nutrition Reauthorization 2010: Direct Certification Benchmarks and Continuous Improvement Plans*, dated April 28, 2011, available at <http://www.fns.usda.gov/cnd/governance/Policy-Memos/2011/SP32-2011.pdf>.

On January 31, 2012, FNS published a proposed rule, *National School Lunch Program: Direct Certification Continuous Improvement Plans Required by the Healthy, Hunger-Free Kids Act of 2010*, in the **Federal Register** (77 FR 4688) to solicit comments on the incorporation of these and other direct certification improvement provisions into regulations governing the determination for eligibility for free and reduced price meals at 7 CFR part 245. The proposed rule also solicited comments on the paperwork burden for the new form FNS-834, *State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report*, which will collect two of the data elements for the formula to compute direct certification performance rates.

##### B. Summary of Mandated Provisions in the Proposed Rule

In summary, the January 2012 proposed rule sought to incorporate the

following mandated provisions from the HHFKA into NSLP regulations:

- **Benchmarks.** The State performance benchmarks for directly certifying for free school meals those children who are members of households receiving benefits under SNAP are 80% for SY 2011–2012, 90% for SY 2012–2013, and 95% for SY 2013–2014 and for each school year thereafter.

- **Identify and notify.** Each school year, FNS will identify and notify State agencies that fail to meet the direct certification performance benchmark.

- **CIPs required.** A State agency that fails to meet the benchmark must develop and submit a CIP to FNS for approval.

- **CIP components.** The CIP must include, at a minimum, specific measures the State will use to identify more children who are eligible for direct certification with SNAP, a timeline for the State to implement these measures, and goals for the State to improve direct certification results for the following school year.

- **CIP implementation.** A State agency that is required to develop and submit a CIP must maintain it and implement it according to the timeline included in the approved plan.

### C. Summary of Additional Provisions in the Proposed Rule

Additionally, in support of the mandated provisions, the proposed rule

sought to improve the accuracy of State direct certification rates and to strengthen the direct certification process so that States could monitor their own performance in a timely manner using the same methodology that FNS will use. As such, the January 2012 rule proposed to set forth the following improvements and requirements:

- **Methodology.** A transparent methodology for computing direct certification rates by defining the data elements and the formula to compute these rates:

$$\begin{array}{ccccccc} \text{Percent of SNAP children} & & \text{SNAP children} & & \text{SNAP children in special} & & \\ \text{directly certified for free} & & \text{directly certified} & + & \text{provision schools operating in} & & \\ \text{school meals} & = & \text{for free school} & & \text{a non-base year} & = & \\ & & \text{meals} & & & & \\ & & & & \text{\#1} & + & \text{\#3} \\ & & & & \text{School-aged children in SNAP households during} & & \\ & & & & \text{the months of July, August, and September} & & \text{\#2} \end{array}$$

- **Data Element #1.** A requirement that Data Element #1 be the count of the number of children who are members of households receiving benefits under SNAP and who were directly certified for free school meals as of the last operating day in October. Also, certifications via the “Letter Method” would not be included in the count of SNAP direct certifications as this is no longer permitted, pursuant to the statutory changes made by the HHFKA.

- **Form FNS–742 timeframes.** A change in the date that the FNS–742 (currently entitled the *Verification Summary Report*, but soon to be revised and renamed for use in SY 2013–2014 as the *School Food Authority (SFA) Verification Collection Report*)—a form that collects verification summary data as well as Data Element #1—is due, requiring that it come in one month earlier than currently in order to provide Data Element #1 to States and to FNS in a more-timely fashion. As such, under the proposed rule, the State agency would collect annual verification data from each LEA no later than February 1st (instead of March 1st) and report this data to FNS no later than March 15th (instead of April 15th) each year. To accommodate this change in submission timeframes, the proposed rule would also remove the requirement for State agencies to report “the aggregate number of students who were terminated as a result of verification but who were reinstated for free or reduced

price meal benefits as of February 15th each year” (Reapplied and Reinstated).

- **Data Element #2.** A new way to estimate the universe of school-aged children in households that receive benefits under SNAP that would require that the SNAP State agency provide FNS and the State agency administering the NSLP with the actual count of children ages 5–17 who at any time during the months of July, August, or September were members of such households.

- **Data Element #3.** A more accurate way to estimate the number of children from households receiving SNAP benefits that attend schools operating in a non-base year under the special assistance provisions of section 11(a)(1) of the NSLA (42 U.S.C. 1759a(a)(1)) and 7 CFR 245.9. As proposed, Data Element #3 would require that a match be run between SNAP records and student enrollment records from such schools and would allow the State agency to count all such matches in addition to the counts of actual SNAP direct certifications from all other schools when determining State direct certification rates.

- **Form FNS–834, new interagency form.** A mechanism for reporting Data Elements #2 and #3 (a new interagency form, the FNS–834, *State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report*) to FNS and NSLP State agencies by December 1st each year.

- **Special Circumstances.** An opportunity for States to inform us of

special circumstances that would affect a State’s direct certification rate in a quantifiable way not captured by the formula or the three data elements.

- **CIP additional component.** An additional component to the CIPs beyond the legislated mandate, which would require State agencies to provide information about their progress toward implementing other direct certification requirements. Also, the mandated CIP timeline would be “multiyear” in acknowledgement that by the time a State agency’s CIP is submitted to FNS and approved, the new school year may already be underway.

- **CIP timeframe.** A requirement that the CIP be submitted to FNS within 60 days of a State’s having been formally notified that it has failed to meet the benchmark.

- **Amend SNAP regulations.** An amendment to SNAP regulations at 7 CFR 272.8 to add the requirement for the SNAP State agency to provide Data Element #2 to FNS and to the State agency administering the NSLP.

- **States affected by this rule.** A notification that, at this time, the NSLP States affected by this rule are the 50 States, the District of Columbia, and Guam.

## II. Public Comments and USDA/FNS Response

FNS received 26 comments on the proposed rule. Of these, 4 were from nutrition, health, or child advocacy organizations at the national, state, or

local level; 12 were from individuals representing 8 State agencies that administer the school meal programs; 6 were from law students; and the remaining 4 were from other interested individuals.

FNS greatly appreciates these public comments as they have been instrumental in developing this final rule. Although FNS considered all comments, the description and analysis in this final rule preamble focuses on the key issues. To view all public comments on the proposed rule, go to [www.regulations.gov](http://www.regulations.gov) and search for public submissions under docket number FNS-2011-0020.

Overall, the comments were supportive of the proposed rule in that it strengthens the direct certification process so that more eligible children will be able to receive free meals at school. Commenters from advocacy organizations were in strong support of the proposed rule, indicating that the rule does a good job implementing statutory requirements and provides a sensible approach to improving the accuracy of computing State direct certification performance rates. Of the State agency employees that responded, most commented on specific issues that could affect their States.

The following discussion provides information on the comments as well as a discussion of the clarifications and changes made to the proposal based on the comments received:

#### *Benchmarks*

##### *Proposed Rule on Benchmarks:*

Sets the benchmarks at the mandated 80% for SY 2011–2012; 90% for SY 2012–2013; and 95% for SY 2013–2014 and each school year thereafter.

##### *Comments on Benchmarks:*

*Changing the Benchmarks*—Several State agencies were concerned that they would not be able to meet the direct certification performance benchmarks in the given timeframes. Most of those who commented would prefer that the benchmark for SY 2013–2014 and beyond be capped at 90% and that the benchmarks be phased in more gradually. One commenter felt that the 95% target fell short and recommended that the goal be set at 100%.

##### *“Letter Method” and the*

*Benchmarks*—One State agency wanted to be able to count “Letter Method” certifications as direct certifications and felt that they could not reach the benchmark without doing so. “Letter Method” refers to the process where a family member brings to the school a letter issued by the SNAP agency confirming that the household receives SNAP benefits, and the student is

certified for free meals through categorical eligibility based on this information.

*Matching Criteria and the Benchmarks*—Another State was concerned that some States, under pressure to meet the benchmarks, may purposely relax their matching criteria in order to increase the number of matches they get, thus increasing their direct certification rates even though some of the matches might not be valid.

##### *USDA/FNS Response on Benchmarks:*

*On Changing the Benchmarks*—The benchmarks and their effective dates are statutorily required under section 9(b)(4)(F) of the NSLA (42 U.S.C. 1758(b)(4)(F)), and may not be altered.

*On “Letter Method” and the Benchmarks*—Section 9(b)(4)(G) of the NSLA (42 U.S.C. 1758(b)(4)(G)) establishes that certifications based on the “Letter Method” with SNAP, as of SY 2012–2013, can no longer be regarded as direct certifications because some action is required by the household. Although States can continue to utilize this method as a form of certification for free meals, they must not count these students as directly certified with SNAP. The intended result is for improved State automated direct certification systems that can match and certify these students independent of household action.

*On Matching Criteria and the Benchmarks*—Regarding the concern about some States making their match criteria less stringent in order to inflate their numbers, the goal should remain that States set criteria to yield high levels of confidence so that eligible children are found in the match and ineligible children are not. States have different data elements available to them for making a match—what works well in one State might not work in another—and as such, this final rule does not establish a single national standard for match criteria. We will continue to develop and provide guidance to assist States in setting reasonable match criteria, including the sharing of best practices from other States that may have comparable characteristics.

##### *Disposition on Benchmarks in Final Rule:*

The provisions setting the mandated benchmarks in the new § 245.12(b) Direct certification performance benchmarks remain unchanged from the proposed rule.

#### *Methodology and Data Collection*

##### *Proposed Rule on Methodology and Data Collection:*

Provides for the collection and reporting of single data elements to

replace, wherever possible, the complex estimates used in the past for the component statistics needed to estimate SNAP State direct certification performance rates. Provides for a new methodology using these new data elements that is straightforward, transparent, timelier, and more accurate. Outlines the reporting mechanisms for these new data elements—Data Element #1 is to be reported on the form FNS-742, and Data Elements #2 and #3 are to be reported on the new form FNS-834. Provides for an earlier submission of the FNS-742 and a December 1st deadline for the submission of the new FNS-834. To provide for the earlier submission of the FNS-742, the proposed rule would remove the requirement for reporting the number of students who reapplied and who were reinstated by February 15th.

##### *Comments on Methodology and Data Collection:*

Most commenters were supportive of the new methodology, lauding our proposal to use reported data (rather than generated estimates) and appreciative of the reporting mechanisms which would allow State agencies to track their own performance in a timely manner. Most also did not find the proposed reporting of these data elements to be burdensome for States and LEAs.

*The Process as a Whole*—One commenter believed the new methodology would impose a complex data collection process and assign potentially misleading rankings.

*Data Element #1 and the Change in Form FNS-742 Timeframes, “Reapplied and Reinstated”*—One commenter was concerned that the requirement to report the number of students who reapplied and were reinstated by February 15th was not actually proposed to be removed.

*Data Element #2, Universe*—Several commenters, who otherwise agreed with the new approach, pointed out that the new Data Element #2—requiring SNAP State agencies to provide a count for the universe of school-aged children in SNAP households—still includes children who may not be students in NSLP schools. Some State agencies reported having what they believe to be significant but unquantifiable numbers of dropouts, homeschoolers, or children in non-public or charter schools which may not participate in the NSLP. These States point out that the count against which they would be measured will be too high and their direct certification rates would appear to be lower because of it.

*Data Element #2, 5–17 Age Range*—Three commenters commented on our

proposal to continue using the 5–17 age range that FNS has used for years as “school-age” for estimating the number of school-aged children living in households receiving SNAP benefits when computing direct certification performance rates. Two suggested using an age range that is aligned with compulsory school attendance ages, either by using a narrower age range or by making the age range State-specific. The third commenter was concerned that using the 5–17 age range for Data Element #2 meant that the State must run their matches only on this same 5–17 age range.

**Data Element #3, State Agency Concerns**—Although most commenters were supportive of collecting Data Element #3—which requires States with special provision schools operating in a non-base year to have a match run between SNAP records and student enrollment records from these schools—some State agencies expressed special concern with this data element. Two of these States foresee problems because although some of their provision schools do have their students listed in the statewide student enrollment database, a few of their other provision schools do not. One State, however, had major concerns with this provision, and this State has a significant number of special provision schools. This State also pointed out that this issue will affect more and more States as they elect the new Community Eligibility Option (CEO) when it becomes available to all States in SY 2014–2015. Another State pointed out that it does not conduct matches at the State level; it uses district-level matching and is under the impression that the match for special provision schools must be done at the State level.

**Data Element #3, Advocacy Organization Concerns**—The advocacy organizations were in favor of this provision, commenting that it will improve the accuracy of the direct certification performance rate calculation and will provide schools with data to make good management decisions, especially with regard to continuing in their current special provision or switching to CEO or another option. One of these advocacy groups went on to urge FNS to allow CEO schools to use the results of the CEO match with SNAP (that must be completed by April 1 if the CEO wants to have their claiming percentages adjusted) in lieu of running a match again for this data element requirement in or near October.

**USDA/FNS Response to Methodology and Data Collection:**

**On the Process as a Whole**—FNS developed the new methodology to provide a more simplified and straightforward approach than has been used in years past. It has been designed to yield more accurate counts with which to measure States against the benchmarks and to give States the power to track their own performance. We expect this process to be an improvement over generating estimates to assess performance, particularly since State performance rates are no longer intended to track general trends but rather to compare States against actual benchmarks.

**On Data Element #1 and the Change in Form FNS–742 Timeframes, “Reapplied and Reinstated”**—In actuality, the requirement to report on the form FNS–742 the number of students who reapplied and were reinstated by February 15th was proposed to be removed and is removed by this final rulemaking. Removing this requirement allows the form FNS–742 to be submitted a month earlier, which will allow earlier computation of direct certification rates.

**On Data Element #2, Universe**—We acknowledge that the best scenario to determine the universe of those children who could potentially be directly certified with SNAP would be to get the count of children who not only live in households receiving benefits under SNAP but also are actually in attendance at schools that participate in the NSLP. This data, however, is not available. This final rule would require the SNAP State agency to provide an actual, unduplicated count of school-aged children ages 5–17 who are living in households receiving benefits under SNAP at any time during the period July 1 through September 30. This is a major improvement, but, as stated in the proposed rule, we acknowledge that the new methodology still does not account for children in this age range who are not attending school or who are attending schools not participating in the NSLP. Our commenters noted this as well.

In States with a high incidence of homeschoolers, dropouts, or children attending non-NSLP schools, the direct certification rate may indeed appear lower than it actually is. To measure the actual impact of a large homeschooling population, for instance, FNS would first need to determine, by State, the number of homeschooled children in the target 5–17 age range. Additionally, FNS would need to determine the number of these children who are also members of households receiving benefits under SNAP at any time during the July through September timeframe.

Only then could FNS determine the size of the SNAP-and-homeschooled population that would need to be removed from the universe of children who could potentially be matched. A similar calculation would be needed in each State in order to determine the number of dropouts and the number of children attending non-NSLP schools. No reliable State-specific data is available which would enable FNS to determine these numbers.

In order to address this issue and in recognition of the potential for improving data sources, we are adding a check box to the new form FNS–834. This check box would provide States a mechanism for indicating that they have special circumstances that may affect their direct certification rate calculation in a quantifiable way. For FNS to consider making an adjustment due to a special circumstance, however, a State would need to forward a description of the circumstance, the count of the number of children affected by the circumstance, the methodology for estimating the count, and the source(s) of published State or Federal data used to support that methodology. This ancillary system for determining the effect of special circumstances should help to keep our own methodology dynamic and better able to adapt to improved data sources.

It is important to point out that there is already some built-in variability which could make a State’s direct certification rate appear to be higher than it actually is. For instance, States that have mandatory pre-K programs that serve children younger than age 5, as well as States with children in attendance who are older than 17 during the target months, are able to count these children if they are directly certified, even though they would not be represented in the universe of those who could potentially be matched. This variability could potentially help offset any negative impact caused by the fact that not all children counted in the universe actually attend NSLP schools. Also, it is important to remember that the benchmarks are not set at 100%; and even for SY 2013–2014 and beyond, where the benchmark is at its highest at 95%, there is still a 5% built-in allowance.

**On Data Element #2, 5–17 Age Range**—Section 4301 of the Food, Conservation, and Energy Act of 2008 requires that when we assess State direct certification performance for the Report to Congress we include, for the universe of children who could potentially be matched against student enrollment records, an estimate of the number of school-aged children

receiving SNAP benefits during the months of July, August, or September. We have used the 5–17 age range as a proxy for “school-age” since the first Report to Congress in 2008. Of the two commenters who suggested using compulsory education requirements instead, one recommended using 6–15 as an age range that would more closely represent the average compulsory requirements across States, while the other suggested using State-specific compulsory age ranges as defined by individual State statute. Compulsory education requirements, however, set an age range for when children must be enrolled in and attending school; they do not preclude children younger or older from attending school, so they would not be good indicators for actual school enrollment.

According to the detailed table, “Enrollment Status of the Population of 3 Years Old and Older, by Sex, Age, Race, Hispanic Origin, Foreign Born, and Foreign-Born Parentage: October 2010,” found in the *Current Population Survey* published by the U.S. Census Bureau and the U.S. Bureau of Labor Statistics, 94.5% of 5- and 6-year-olds and 96.1% of 16- and 17-year-olds were enrolled in school. School enrollment drops significantly on either side of this 5–17 age range. The 5–17 age range is therefore an appropriate approximation for the “school-age” snapshot required by Congress, and we intend to continue using it in estimating the number of school-aged children who could potentially be matched.

For the commenter who was concerned that the State would need to set its match criteria to include only the 5–17 year age range, we wish to clarify that States are to count all children directly certified with SNAP, not just those in the 5–17 age range. We use the 5–17 age range to estimate the universe of potential matches for the Report to Congress and to determine State performance, not to dictate the age range the State agency is to utilize for the match. States/LEAs are therefore responsible for matching SNAP data with their school enrollment data over a wider age range than the 5–17 in order to pick up all possible matches of children who are in school in the State, including those under 5 or over 17 years of age. Using the narrower range for the universe actually gives States an advantage for meeting the benchmarks if they were to find matches outside of that age range.

*On Data Element #3, State Agency Concerns*—States must ensure that matches are run between SNAP data and enrollment data of students attending special provision schools

operating in a non-base year, so that the State can get credit for each of the SNAP children in these schools. This final rule does not prescribe a particular methodology for collecting this data element, enabling each State the flexibility to set up its own business practice. For instance, if a State uses district- or local-level matching, it might choose to use this same method for its non-base year special provision schools, or it may choose a different method, perhaps having such schools upload student enrollment files to the State, with the State running the match on their behalf. If a State uses State-level matching, it may have some schools not represented in its statewide student enrollment database, and the State may need to come up with a way to upload from such schools. For other State-level matching States, it may be that they are already running the matches for all the schools in the State, but just not sending the matches down to the local level for LEAs to enter into their point-of-service systems. In this latter scenario, just counting the number of such matches would be very easy for the State. Many States have no, or very few, special provision schools, so not all States are affected at this time.

For those States with special provision schools that are not geared up to run the match in SY 2012–2013, we are providing an alternative phase-in procedure. For SY 2012–2013, the State agency may elect to use base-year SNAP direct certification rates for these schools when completing the form FNS–834. For SY 2013–2014 and beyond, however, States are expected to have a system in place to do this match with their special provision schools operating in a non-base year.

*On Data Element #3, Advocacy Organization Concerns*—With regard to CEO schools—which have the opportunity to run a match by April 1 each year to determine if they would be eligible for an increase in claiming percentages—we agree that certain accommodations for them can be made. Pursuant to this final rule, States that have special provision schools exercising the CEO may establish the count for this data element for these CEO schools each year through data matching efforts in or near October (but not later than the last operating day in October) between SNAP data and student enrollment data from these schools—as for the other special provision schools—or by opting for one of the following two alternatives:

- Using the count of identified students matched with SNAP used in determining the CEO claiming percentage for that school year; or

- Using the count from the SNAP match conducted by April 1 of the same calendar year the FNS–834 is due, whether or not it was used in the claiming percentages.

In any case, it is important the count used represents students in CEO schools matched against SNAP records, without the inclusion of any letter method or non-SNAP matches. In other words, the State must selectively count the SNAP matches from the matching efforts performed for the April CEO opportunity if either of the two alternatives for CEO schools is elected. States also must ensure that students are not double counted.

*Disposition of Methodology and Data Collection in Final Rule:*

The provisions in the new § 245.12(c)(1) Data Element #1 remain unchanged from the proposed rule.

The provisions in the new § 245.12(c)(2) Data Element #2 remain unchanged from the proposed rule.

Likewise, the related provisions that amend SNAP regulations in the new § 272.8(a)(5)—to point the SNAP State agency to the requirements of § 245.12(c)(2) and to require the SNAP State agency to execute a data exchange and privacy agreement with the NSLP State agency—remain unchanged from the proposed rule.

Paragraph 245.12(c)(3) Data Element #3 is changed in the final rule to allow States annually the option of using specific alternatives for the estimation of Data Element #3 for its special provision schools that are exercising the CEO.

The alternative phase-in procedure for SY 2012–2013 for those States with special provision schools that cannot properly compute Data Element #3 for this first school year will be handled in FNS guidance and is not codified in the final rule.

To keep the methodology for computing Data Element #2 or Data Element #3 dynamic as State or Federal data sources improve over the years, FNS is adding a check box to the new form FNS–834 to allow NSLP or SNAP State agencies to indicate they have special circumstances to bring to FNS’s attention.

The final rule, as in the proposed rule, would remove the provision regarding “Reapplied and Reinstated,” and this final rule removes the provision by the rewording of § 245.11(i). In addition, the revised timeframes for submitting the FNS–742 that are made possible by removing this “Reapplied and Reinstated” requirement remain unchanged from the proposed rule in §§ 245.6a and 245.11(i). Note that even

though the revised form FNS-742 will not be implemented for SY 2012–2013, the provision requiring the earlier submission of the FNS-742 and the dropping of the “Reapplied and Reinstated” requirement applies as well to the current form FNS-742 that will be utilized for SY 2012–2013.

#### CIPs

##### *Proposed Rule on CIPs:*

Sets the requirement that a State that does not meet the direct certification performance benchmarks would need to develop a CIP that includes, at a minimum, the following components: the specific measures the State will use to identify more children who are eligible for direct certification with SNAP, a multiyear timeline for the State to implement these measures, goals for the State to improve direct certification results for the following school year, and a report on the State’s progress in implementing other direct certification requirements. The proposed rule would also require that the State agency submit its CIP to FNS for approval within 60 days of formal notification.

##### *Comments on CIPs:*

Commenters were generally supportive of the requirements of the CIPs, including making the CIPs “multiyear” plans and adding a fourth component to track State progress in implementing other direct certification requirements.

*What is to be included in the CIP—*One commenter was concerned that States would spell out for themselves in their CIPs longer timelines than necessary for accomplishing tasks because of the “multiyear” timeline.

A State agency requested clarification and guidance on the content of the CIPs. Additionally, an advocacy organization had very specific ideas about what should be included in the CIP and how progress should be monitored, such as requiring State agencies to include: goals that are quantifiable and objective, the rationale for adopting the measures it proposes, and an analysis of why a previous plan may have failed.

*State progress implementing other direct certification requirements in the CIP—*A few commenters incorrectly believed that the first three components of the CIP were already incorporated in regulation and that this rulemaking would be adding just the fourth component.

One State agency was concerned that it would need to report progress toward phasing out the “Letter Method” even though it finds it an effective and successful secondary method of reaching eligible families in that State.

Another commenter wanted the fourth component of the CIP to include the tracking of extended eligibility, whereby other children in the directly-certified child’s household can also be considered directly certified, by extension. (See USDA FNS Policy Memorandum SP 38–2009—*Extending Categorical Eligibility to Additional Children in a Household*, dated August 29, 2009, available at [http://www.fns.usda.gov/cnd/governance/Policy-Memos/2009/SP\\_38-2009\\_os.pdf](http://www.fns.usda.gov/cnd/governance/Policy-Memos/2009/SP_38-2009_os.pdf), and USDA Policy Memorandum SP 25–2010—*Questions and Answers on Extending Categorical Eligibility to Additional Children in a Household*, dated May 3, 2010, available at [http://www.fns.usda.gov/cnd/governance/Policy-Memos/2010/SP\\_25-CACFP\\_11\\_SFSP\\_10-2010\\_os.pdf](http://www.fns.usda.gov/cnd/governance/Policy-Memos/2010/SP_25-CACFP_11_SFSP_10-2010_os.pdf)).

*Other CIP issues—*One commenter expressed concern that 60 days may not be enough time for a State agency to formulate and submit a CIP.

Two other commenters were in favor of applying fiscal sanctions or other negative incentives for repeated failure to meet the benchmarks so that States would not just be submitting CIPs each year with no other repercussions.

Two of the advocacy organizations suggested that States be required to post their CIPs for public access.

##### *USDA/FNS Response to CIPs:*

*On what is to be included in the CIP—*The proposal that the timeline in the CIP be “multiyear” was added in the proposed rule so that a State agency could define what measures it proposes to implement in each of several years. Some goals will take longer than a year to implement, some will take less, and others will logically follow after some other goal is reached. In addition, some States may take longer than others to implement effective changes, due in part to such circumstances as the number of LEAs in the State, the population of the State, the geographical size of the State, the current data structures in the State, the relationship with partner agencies, and the restrictions imposed by State law. The intent was to require States to accomplish tasks in appropriate timeframes. Regarding the specifics of what should go into the plans and how they should be structured, we will provide guidance to those State agencies that are required to develop CIPs. Each CIP will be reviewed individually and approved based on whether the goals and timeframes are reasonable for that particular State. Subsequent CIPs can track progress and reflect realigning goals.

*On State progress implementing other direct certification requirements in the CIP—*This final rulemaking codifies all four components of a CIP, not just the fourth.

For reporting “Letter Method” information, there is a phase-out plan for the “Letter Method” for SNAP as it applies to benchmarks and CIPs included in USDA FNS Memorandum SP 32–2011—*Child Nutrition Reauthorization 2010: Direct Certification Benchmarks and Continuous Improvement Plans*, dated April 28, 2011, available at <http://www.fns.usda.gov/cnd/governance/Policy-Memos/2011/SP32-2011.pdf>. By SY 2012–2013, the “Letter Method” must be fully phased-out as a means of direct certification of children in households receiving SNAP benefits, and the mandatory direct certification with SNAP must be conducted using data-matching techniques only. Letters to SNAP households may continue to be used as an additional means to notify households of children’s categorical eligibility based on receipt of SNAP benefits, and schools may continue to use the letter to certify children in lieu of an application; however, such certifications cannot be counted as direct certifications. These certifications based on SNAP letters would be exempt from verification but would not be included in data reported for direct certifications with SNAP. As time goes on, States must have systems that effectively handle more-frequent direct certification with SNAP without the use of the “Letter Method.” States will need to report in each CIP their progress in making this transition.

As for including in the fourth component of the CIPs information about the State’s progress toward implementing extended eligibility policies, we currently monitor the State’s progress during a management evaluation and the State monitors the SFA’s progress during an administrative review. With the advent of the new benchmarks, there is additional incentive for States to fully implement the policy on extended eligibility since doing so would increase the State’s direct certification performance rate.

*On other CIP issues—*With regard to the proposed 60-day timeframes for submitting a CIP, the timed CIP-development period would not start until after we formally notify the State that a CIP is needed. The new transparent methodology should facilitate a State’s ability to continually monitor its own performance, analyze its systems, and plan for improvement. A State that monitors its own performance will likely begin to

estimate its SNAP direct certification performance rate as early as February 1st when the counts are due in from the LEAs, and a State that finds itself below a benchmark could begin to formulate and test its plans long before the State is even notified of the need to do a CIP. To ensure the development of a thoughtful, workable CIP, however, and to give the State time to get input from its State agency partners and to get the CIP through its own State approval process, this final rule sets the due date for submitting the CIP to FNS at 90 days after notification, instead of the 60 days that was proposed.

Regarding the suggestions for applying fiscal sanctions or other negative disincentives for repeated failures to meet the benchmarks, we want to reiterate that the CIP process is designed for steady progress to be made in improving direct certification rates. We anticipate that States will continue to make a good faith effort to improve their direct certification rates and that the CIPs will be a useful tool in guiding their efforts. FNS will address on a case-by-case basis any instance of willful noncompliance in implementing the improvements required under a CIP. In addition, FNS is in the process of developing a proposed rule to implement section 303 of the HHFKA, *Fines for Violating Program Requirements*, which will provide an additional method to address any instances of severe mismanagement and willful noncompliance with program requirements.

Finally, with regard to general access to the CIPs, we agree that States may wish to share their CIPs with one another to encourage the formulation of successful plans, and we will continue to work to accommodate the sharing of best practices through channels such as PartnerWeb or State-to-State publications. However, mandatory public release of CIPs is unnecessary for this type of technical document and would be an additional burden on States. As such, USDA intends to leave the decision to the individual State as to whether or not it chooses to make its plan available to the public at large.

#### *Disposition of CIPs in Final Rule:*

The provisions regarding CIPs in the new § 245.12, paragraphs (a) *Direct certification requirements*, (d) *State notification*, (f) *Continuous improvement plan required components*, and (g) *Continuous improvement plan implementation*, remain unchanged from the proposed rule. The provision that sets the timeframes for submitting the CIPs is changed in the new paragraph § 245.12(e) *Continuous improvement*

*plan required*, from 60 days in the proposed rule to 90 days in this final rule.

### III. Further Clarification

- *Data Element #1*—On June 8, 2012, FNS published a notice in the **Federal Register** (77 FR 34005) to solicit comments on the proposed changes to the form FNS-742, *Verification Summary Report* (OMB #0584-0026), including the name change to *School Food Authority (SFA) Verification Collection Report*. Data Element #1 would be collected on line 3-2B of the revised form. This revised form will not be required until SY 2013-2014 in order to allow time for changes to be made to State automated systems. Since the revised form will not be implemented for SY 2012-2013, State agencies will not be required to report SNAP-only data for SY 2012-2013. Instead, for SY 2012-2013, the SNAP direct certifications will continue to be included as part of line 4-1A of the current version of the FNS-742. In the interim, States are expected to prepare and modify systems to meet the requirement to report SNAP-only data on the revised FNS-742 beginning with SY 2013-2014.

- *States Affected by This Rule*—To further clarify the criteria by which FNS determines whether or not a State is affected by this final rule, we offer the following: All NSLP States that also operate a food assistance program under SNAP would be affected by this final rule. The only exceptions are the Virgin Islands and Puerto Rico, each of which provides free meals to all children in those States regardless of the economic need of the child's family. Three NSLP States—the Commonwealth of the Northern Marianas, American Samoa, and the Commonwealth of Puerto Rico—are not affected by this rule because they do not operate SNAP, although each does operate a food assistance program under a Nutrition Assistance Block Grant. At this time, therefore, the NSLP States affected by this rule are the 50 States, the District of Columbia, and Guam.

### Procedural Matters

#### *Executive Order 12866 and Executive Order 13563*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and

equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This rule has been designated non-significant under section 3(f) of 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). Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities.

#### *Unfunded Mandates Reform Act*

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. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the 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, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### *Executive Order 12372*

This final rule affects the NSLP and SNAP.

The NSLP is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.555. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials. Since the NSLP is a State-administered, Federally-funded program, FNS headquarters staff and FNS Regional Office staff have formal and informal discussions with State and local officials on an ongoing



basis regarding program requirements and operation. This structure allows FNS to receive regular input which contributes to the development of meaningful and feasible Program requirements.

SNAP is listed in the Catalog of Federal Domestic Assistance under 10.551. For the reasons set forth in the final rule at 7 CFR part 3015, subpart V and related Notice (48 FR 29115, June 24, 1983), SNAP is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

#### *Federalism Summary Impact Statement*

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 regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13121. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

#### *Executive Order 12988*

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

#### *Civil Rights Impact Analysis*

FNS has reviewed this final rule in accordance with the Department Regulation 4300-4, Civil Rights Impact Analysis, to identify any major civil rights impacts the rule might have on children on the basis of race, color, national origin, sex, age or disability.

This rule requires State agencies to develop and implement CIPs if they do not meet certain percentage performance benchmarks for directly certifying for free school meals children in households receiving SNAP benefits. LEAs have for years been required to

directly certify for free school meals those children in households receiving assistance under SNAP, and FNS has been required to assess State and local efforts to directly certify these children. This rule codifies the benchmarks and CIP requirements set by the HHFKA. After a careful review of the rule's intent and provisions, FNS has determined that this rule is technical in nature and affects State agencies only. This rule will not affect children in the NSLP, except to continue to encourage States to increase efforts to have more eligible children directly certified for free meals.

#### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. USDA is unaware of any current Tribal laws that could be in conflict with the requirements of this rule. However, we have made special efforts to reach out to Tribal communities. Beginning in the spring of 2011, FNS has offered opportunities for consultation with Tribal officials or their designees to discuss the impact of the Healthy, Hunger-Free Kids Act of 2010 on tribes or Indian Tribal governments. The consultation sessions were coordinated by FNS and held on the following dates and locations:

1. HHFKA Webinar & Conference Call—April 12, 2011
2. Mountain Plains—HHFKA Consultation, Rapid City, SD—March 23, 2011
3. HHFKA Webinar & Conference Call—June, 22, 2011
4. Tribal Self-Governance Annual Conference in Palm Springs, CA—May 2, 2011
5. National Congress of American Indians Mid-Year Conference, Milwaukee, WI—June 14, 2011
6. Quarterly Consultation Meeting Conference Call—May 2, 2012

There were no comments about this regulation during any of the aforementioned Tribal Consultation sessions.

Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration.

FNS will respond in a timely and meaningful manner to Tribal government requests for consultation concerning this rule. Currently, FNS provides regularly scheduled quarterly consultation sessions through the end of FY2012 as a venue for collaborative conversations with Tribal officials or their designees.

#### *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 collection of information unless it displays a current, valid OMB control number. This rule does contain information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

One of the new provisions in this rule—the requirement for the development and submission of continuous improvement plans by any State that fails to meet certain mandated direct certification performance benchmarks—annually increases State agency reporting burden by 54 hours and the recordkeeping burden by 9 hours, for a total of 63 additional burden hours. FNS intends to merge these 63 hours into the Determining Eligibility for Free and Reduced Price Meals, OMB Control #0584-0026, expiration date March 31, 2013. The current collection burden inventory for the Determining Eligibility for Free and Reduced Price Meals (7 CFR part 245) is 1,073,432.

Another provision, requiring the collection of data elements on a new, interagency form (FNS-834, *State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report*), involves changes in both NSLP and SNAP regulations and would increase burden hours on State agencies by an additional 53 hours annually. These 53 burden hours would remain with the newly established OMB Control Number until such time as the FNS-834 is incorporated into the Food Programs Reporting System (FPRS) and the system is approved by OMB.

A 60-day notice was imbedded into the proposed rule, *National School Lunch Program: Direct Certification Continuous Improvement Plans Required by the Healthy, Hunger-Free Kids Act of 2010*, published in the **Federal Register** at 77 FR 4688 on January 31, 2012, which provided the public an opportunity to submit comments on the information collection burden resulting from this rule. This



information collection burden has not yet been approved by OMB. FNS will publish a document in the **Federal Register** once these requirements have been approved.

The average burden per response and the annual burden hours are explained below and summarized in the charts which follow.

Estimated Annual Reporting and Recordkeeping Burden for 0584—NEW, Direct Certification Requirements, 7 CFR Part 245

*Respondents for This Final Rule:* State Agencies.

*Estimated Number of Respondents for This Final Rule:* 18.

*Estimated Number of Responses per Respondent for This Final Rule:* 2.

*Estimated Total Annual Responses:* 36.

*Average Hours per Response:* 1.75.

*Estimated Total Annual Burden on Respondents for This Final Rule:* 63.

#### ESTIMATED ANNUAL REPORTING BURDEN FOR 0584—NEW, DIRECT CERTIFICATION REQUIREMENTS, 7 CFR PART 245

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
<b>Reporting (State Agencies)</b>						
State agencies that fail to meet the direct certification benchmark must develop and submit a <i>Continuous Improvement Plan</i> within 60 days of notification.	7 CFR 245.12 (e) and (g).	18	1	18	3	54
Total Reporting for Final Rule ....	.....	18	1	18	3	54
Total Existing Reporting Burden for Part 245.	.....	.....	.....	.....	.....	1,067,387
Total Reporting Burden for Part 245 with Final Rule.	.....	.....	.....	.....	.....	1,067,441

#### ESTIMATED ANNUAL RECORDKEEPING BURDEN FOR 0584—NEW, DIRECT CERTIFICATION REQUIREMENTS, 7 CFR PART 245

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
<b>Recordkeeping (State Agencies)</b>						
State agencies that fail to meet the direct certification benchmark must maintain a <i>Continuous Improvement Plan</i> .	7 CFR 245.12 (e) and (g).	18	1	18	0.5	9
Total Recordkeeping for Final Rule.	.....	18	1	18	0.5	9
Total Existing Recordkeeping Burden for Part 245.	.....	.....	.....	.....	.....	6,045
Total Recordkeeping Burden for Part 245 with Final Rule.	.....	.....	.....	.....	.....	6,054

#### SUMMARY OF REPORTING AND RECORDKEEPING BURDEN (OMB #0584—NEW) 7 CFR PART 245

TOTAL NO. RESPONDENTS .....	18
AVERAGE NO. RESPONSES PER RESPONDENT .....	2
TOTAL ANNUAL RESPONSES .....	36
AVERAGE HOURS PER RESPONSE .....	1.75
TOTAL BURDEN HOURS FOR PART 245 WITH FINAL RULE .....	1,073,495
CURRENT OMB INVENTORY FOR PART 245 .....	1,073,432
DIFFERENCE (NEW BURDEN REQUESTED WITH FINAL RULE) .....	63

\* These 63 hours will be merged with OMB #0584—0026

Estimated Annual Burden for 0584—NEW, Direct Certification Requirements, 7 CFR Parts 245 and 272

*Respondents for This Final Rule:* State Agencies.

*Estimated Number of Respondents for This Final Rule:* 106.

*Estimated Number of Responses per Respondent for This Final Rule:* 1.

*Estimated Total Annual Responses:* 106.

*Average Hours per Response:* .5.

*Estimated Total Annual Burden on Respondents for This Final Rule:* 53.

## ESTIMATED ANNUAL BURDEN FOR 0584—NEW, DIRECT CERTIFICATION REQUIREMENTS 7 CFR PARTS 245 AND 272

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
<b>Reporting (State Agencies)</b>						
NSLP State agency must annually report to FNS data for calculating direct certification rates.	7 CFR 245.12(c) ..	54	1	54	0.5	27
SNAP State agency must annually report to FNS and to the NSLP State agency data for calculating direct certification rates.	7 CFR 272.8(a)(5)	52	1	52	0.5	26
Total Reporting for Final Rule ....	.....	106	1	106	0.5	53
Total Existing Reporting Burden .....	.....	.....	.....	.....	.....	0
Total Reporting Burden for Parts 245 and 272 with Final Rule.	.....	.....	.....	.....	.....	53

## SUMMARY OF BURDEN (OMB #0584—NEW) 7 CFR PARTS 245 AND 272

TOTAL NO. RESPONDENTS .....	106
AVERAGE NO. RESPONSES PER RESPONDENT .....	1
TOTAL ANNUAL RESPONSES .....	106
AVERAGE HOURS PER RESPONSE .....	.5
TOTAL BURDEN HOURS FOR PARTS 245 and 272 WITH FINAL RULE* .....	53
CURRENT OMB INVENTORY FOR PARTS 245 and 272 .....	0
DIFFERENCE (NEW BURDEN REQUESTED WITH FINAL RULE) .....	53

\* Represents increase of 53 hours from existing reporting burden; no additional recordkeeping burden. These 53 hours will remain with the newly established OMB Control Number.

*E-Government Act Compliance*

The Food and Nutrition Service is committed to complying with the E-Government Act to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

**List of Subjects***7 CFR Part 245*

Civil rights, Food assistance programs, Grant programs-education, Grant programs-health, Infants and children, Milk, Reporting and recordkeeping requirements, School breakfast and lunch programs.

*7 CFR Part 272*

Alaska, Civil rights, Claims, Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements, Unemployment compensation, wages.

Accordingly, 7 CFR Parts 245 and 272 are amended as follows:

**PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS**

■ 1. The authority citation for 7 CFR Part 245 continues to read as follows:

**Authority:** 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

**§ 245.6a [Amended]**

■ 2. Section 245.6a is amended in paragraph (h) by removing the word “March” and adding in its place the word “February”.

■ 3. Paragraph 245.11(i) is revised to read as follows:

**§ 245.11 Action by State agencies and FNSROs.**

\* \* \* \* \*

(i) No later than February 1, 2013, and by February 1st each year thereafter, each State agency must collect annual verification data from each local educational agency as described in § 245.6a(h) and in accordance with guidelines provided by FNS. Each State agency must analyze these data, determine if there are potential problems, and formulate corrective actions and technical assistance activities that will support the objective of certifying only those children eligible for free or reduced price meals. No later

than March 15, 2013, and by March 15th each year thereafter, each State agency must report to FNS, in a consolidated electronic file by local educational agency, the verification information that has been reported to it as required under § 245.6a(h), as well as any ameliorative actions the State agency has taken or intends to take in local educational agencies with high levels of applications changed due to verification. State agencies are encouraged to collect and report any or all verification data elements before the required dates.

\* \* \* \* \*

**§§ 245.12 and 245.13 [Redesignated as §§ 245.13 and 245.14]**

■ 4. Redesignate §§ 245.12 and 245.13 as §§ 245.13 and 245.14, respectively.

■ 5. New § 245.12 is added to read as follows:

**§ 245.12 State agencies and direct certification requirements.**

(a) *Direct certification requirements.* State agencies are required to meet the direct certification performance benchmarks set forth in paragraph (b) of this section for directly certifying children who are members of households receiving assistance under SNAP. A State agency that fails to meet the benchmark must develop and submit to FNS a continuous

improvement plan (CIP) to fully meet the requirements of this paragraph and to improve direct certification for the following school year in accordance with the provisions in paragraphs (e), (f), and (g) of this section.

(b) *Direct certification performance benchmarks.* State agencies must meet performance benchmarks for directly certifying for free school meals children who are members of households receiving assistance under SNAP. The performance benchmarks are as follows:

(1) 80% for the school year beginning July 1, 2011;

(2) 90% for the school year beginning July 1, 2012; and

(3) 95% for the school year beginning July 1, 2013, and for each school year thereafter.

(c) *Data elements required for direct certification rate calculation.* Each State agency must provide FNS with specific data elements each year, as follows:

(1) *Data Element #1*—The number of children who are members of households receiving assistance under SNAP that are directly certified for free school meals as of the last operating day in October, collected and reported in the same manner and timeframes as specified in § 245.11(i).

(2) *Data Element #2*—The unduplicated count of children ages 5 to 17 years old who are members of households receiving assistance under SNAP at any time during the period July 1 through September 30. This data element must be provided by the SNAP State agency, as required under 7 CFR 272.8(a)(5), and reported to FNS and to the State agency administering the NSLP in the State by December 1st each year, in accordance with guidelines provided by FNS.

(3) *Data Element #3*—The count of the number of children who are members of households receiving assistance under SNAP who attend a school operating under the provisions of 7 CFR 245.9 in a year other than the base year or that is exercising the community eligibility option (CEO). The proxy for this data element must be established each school year through the State's data matching efforts between SNAP records and student enrollment records for these special provision schools that are operating in a non-base year or that are exercising the CEO. Such matching efforts must occur in or close to October each year, but no later than the last operating day in October. However, States that have special provision schools exercising the CEO may alternatively choose to include, for these schools, the count of the number of identified students directly matched with SNAP used in determining the

CEO claiming percentage for that school year, or they may choose to use the count from the SNAP match conducted by April 1 of the same calendar year, whether or not it was used in the CEO claiming percentages. State agencies must report this aggregated data element to FNS by December 1st each year, in accordance with guidelines provided by FNS.

(d) *State notification.* For each school year, FNS will notify State agencies that fail to meet the direct certification performance benchmark.

(e) *Continuous improvement plan required.* A State agency having a direct certification rate with SNAP that is less than the direct certification performance benchmarks set forth in paragraph (b) of this section must submit to FNS for approval, within 90 days of notification, a CIP in accordance with paragraph (f) of this section.

(f) *Continuous improvement plan required components.* CIPs must include, at a minimum:

(1) The specific measures that the State will use to identify more children who are eligible for direct certification, including improvements or modifications to technology, information systems, or databases;

(2) A multiyear timeline for the State to implement these measures;

(3) Goals for the State to improve direct certification results for the following school year; and

(4) Information about the State's progress toward implementing other direct certification requirements, as provided in FNS guidance.

(g) *Continuous improvement plan implementation.* A State must maintain its CIP and implement it according to the timeframes in the approved plan.

## PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

■ 5. The authority citation for 7 CFR part 272 continues to read as follows:

**Authority:** 7 U.S.C. 2011–2036.

■ 6. Section 272.8 is amended by adding a new paragraph (a)(5) to read as follows:

### § 272.8 State income and eligibility verification system.

(a) \* \* \*

(5) State agencies must provide information to FNS and to the State agencies administering the National School Lunch Program for the purpose of direct certification of children for school meals as described in § 245.12(c)(2) of this chapter. In addition, State agencies must execute a data exchange and privacy agreement in

accordance with paragraph (a)(4) of this section and § 272.1(c).

\* \* \* \* \*

Dated: February 4, 2013.

**Audrey Rowe,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2013–04118 Filed 2–21–13; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2013–0091; Directorate Identifier 2013–NM–016–AD; Amendment 39–17366; AD 2013–02–51]

**RIN 2120–AA64**

### Airworthiness Directives; The Boeing Company Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for all The Boeing Company Model 787–8 airplanes. This emergency AD was sent previously to all known U.S. owners and operators of these airplanes. This AD requires modification of the battery system, or other actions. This AD was prompted by recent incidents involving lithium ion battery failures that resulted in release of flammable electrolytes, heat damage, and smoke. We are issuing this AD to correct damage to critical systems and structures, and the potential for fire in the electrical compartment.

**DATES:** This AD is effective February 22, 2013 to all persons except those persons to whom it was made immediately effective by Emergency AD 2013–02–51, issued on January 16, 2013, which contained the requirements of this amendment.

We must receive comments on this AD by April 8, 2013.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

• *Fax:* 202–493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5