

# A Critical Fix to the Federal Overreach on School Meals

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## KEY TAKEAWAYS

The Community Eligibility Provision increases dependence on government by allowing students, regardless of family income, to receive free school meals.

The USDA overreached by allowing school districts to group schools together in order to qualify all students in those schools for free meals under the provision.

Congress should eliminate the provision so that free meals only go to students in need; until then, the USDA should interpret the provision properly.

Federal school meals are back in the headlines this year. Two presidential aspirants say their Administrations will make the National School Lunch Program (NSLP) and School Breakfast Program available to all children, regardless of family income.<sup>1</sup> Meanwhile, two U.S. Senators have introduced a proposal to expand federal summer meal programs to more students.<sup>2</sup> Yet over the past decade, Washington already significantly expanded its footprint in local schools through federal meal programs and has departed from the original purpose of this program: helping children in need.

A prime example is the Healthy, Hunger-Free Kids Act of 2010, which made an extreme change to federal school meal policy by turning welfare policy on its head.<sup>3</sup> Instead of means-tested welfare (in this case, free school meals) going to those who need them, Congress, through what is called the Community

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Eligibility Provision, made it possible for middle-class and wealthy families to get on the federal dole. The Community Eligibility Provision is a significant step toward universal free school meals—and another way to increase dependence on the federal government.

This *Issue Brief* provides a brief overview of the Community Eligibility Provision, explains how the U.S. Department of Agriculture (USDA) has overreached through an expansive (and questionable) interpretation of the Community Eligibility Provision, and provides specific policy recommendations for both the USDA and Congress.

## The Community Eligibility Provision

Under the Community Eligibility Provision, as implemented by the USDA, if at least 40 percent of students in a school, group of schools, or school district are identified as eligible for free meals (when they receive benefits from another means-tested welfare program like food stamps), then *all* students in that school, group of schools, or school district can receive free meals.<sup>4</sup>

By applying this 40 percent threshold requirement to a school district or group of schools, there is no requirement that a specific school have a significant population of low-income students.<sup>5</sup> In fact, it is possible that a school could provide free meals to every student without a single student coming from a low-income family.

For example, a school with zero low-income students could be grouped together with schools with high levels of low-income students, making it possible that the required 40 percent threshold requirement could be met for all the schools within the group. This would mean all students in those schools (even the “high-income schools”) could then receive free meals.

## The USDA’s Overreach in Determining Eligibility for the Community Eligibility Provision

The USDA has asserted that schools (even those without low-income students) can be grouped together with other schools to meet the required 40 percent threshold.

However, the plain language of the Healthy, Hunger-Free Kids Act applies the Community Eligibility Provision to a local educational agency (such as a school district) or school that meets the 40 percent threshold requirement, not to a select group of schools that taken together meet the 40 percent threshold requirement.<sup>6</sup>

Specifically, the Healthy, Hunger-Free Kids Act authorizes local educational agencies to elect the Community Eligibility Provision “for all schools in the district or on behalf of certain schools in the district,” if specific criteria are met.<sup>7</sup> One of these criteria is a requirement that in order for the Community Eligibility Provision to apply, “the local educational agency or school” must meet the 40 percent threshold requirement;<sup>8</sup> this language clarifies that the threshold may only be met at the local educational agency or individual school level.<sup>9</sup> It does not say that local educational agencies can group a subset of schools together to meet this 40 percent threshold requirement, or that individual schools within this subset need not meet the 40 percent threshold requirement.

Beyond the statutory language, the legislative history also indicates that eligibility for the Community Eligibility Provision does not include the grouping of schools. The Senate report accompanying the Healthy, Hunger-Free Kids Act explained that the Community Eligibility Provision applies to “schools or local educational agencies with very high proportions of low-income children.”<sup>10</sup> When looking at schools (not at a local educational agency), this report language clarifies that the Community Eligibility Provision does not cover schools with low proportions of low-income children.<sup>11</sup>

Unfortunately, the USDA was not deterred from applying the Community Eligibility Provision<sup>12</sup> to a group of schools that, when combined, meet the 40 percent threshold requirement.<sup>13</sup> The USDA’s 2016 final rule implementing the Community Eligibility Provision states that “a local educational agency, *group of schools*, or school” can meet the 40 percent threshold requirement.<sup>14</sup> (Emphasis added.)

## Recommendations

Both the USDA and Congress should take action to address the Community Eligibility Provision, including:

- **Interpreting the law properly by not grouping schools together to determine eligibility for the Community Eligibility Provision.** The USDA should clarify through a new rulemaking that the Community Eligibility Provision applies only if the local educational agency or the specific school meets the 40 percent threshold requirement. While this alone would not prevent all free school meals from going to non-needy students, it would help to close one major loophole that allows such students (including from high-income families) to receive

free meals. It would also ensure that the USDA is following the plain language and intent of the law.

- **Eliminating the Community Eligibility Provision.** Congress has been working on reauthorizing child nutrition programs.<sup>15</sup> Any reauthorizing legislation should eliminate the Community Eligibility Provision and properly consider whether recipients are in need. There would inevitably be misleading claims that this would take free meals away from poor children. Yet all students who are otherwise eligible for free or reduced-priced meals would *remain* eligible for those meals.<sup>16</sup>
- **Reducing waste and misspending.** The USDA and Congress should certainly not make waste worse through the Community Eligibility Provision. For years, the Office of Management and Budget has labeled the NSLP and School Breakfast Program “high priority” programs due to the amount of cash lost annually.<sup>17</sup> The NSLP alone loses nearly \$1 billion each year due to services provided to ineligible children. The Community Eligibility Provision, then, is simultaneously adding students to a deeply flawed program and hiding the waste by changing school meals from a set of services for children in need to an entitlement for all students.

Furthermore, the Government Accountability Office (GAO) released a report<sup>18</sup> this year stating that the USDA’s accounting changes have made fiscal year 2018 data on improper payments incomparable to data from previous years. The USDA should update its risk-management practices, following the GAO’s recommendations, and regularly review its spending patterns. Without such improvements, inaccurate spending could result in fraudulent activity, draining even more taxpayer resources away from children in need.

## Conclusion

The Healthy, Hunger-Free Kids Act took federal school meals down the wrong path. This includes giving free meals to many students regardless of family income (due to the Community Eligibility Provision). Congress should eliminate the Community Eligibility Provision, but, until then, the USDA should clarify that the application of the provision must be based on the number of eligible students at the local educational agency or individual

school (not at a subset of schools). Lawmakers should return to the original purpose of federal school meals: helping children in need.

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## Endnotes

1. Nicole Gaudiano, "Two 2020 Contenders Argue School Meals Should be Free for All Students," *Politico*, May 30, 2019, <https://www.politico.com/newsletters/morning-education/2019/05/30/two-2020-contenders-argue-school-meals-should-be-free-for-all-students-441900> (accessed June 27, 2019).
2. Helena Bottemiller Evich, "Gillibrand, Murkowski Unveil Bill to Expand Summer Meals," *Politico*, June 21, 2019, <https://subscriber.politicopro.com/education/whiteboard/2019/06/gillibrand-murkowski-unveil-bill-to-expand-summer-meals-3468450> (accessed June 27, 2019).
3. Healthy, Hunger-Free Kids Act of 2010, Public Law No. 111-296, <https://www.govinfo.gov/content/pkg/PLAW-111publ296/pdf/PLAW-111publ296.pdf> (accessed June 27, 2019).
4. To learn more about the Community Eligibility Provision, see Rachel Sheffield and Daren Bakst, "Child Nutrition Reauthorization: Time for Serious Reform, Not Tinkering," Heritage Foundation *Issue Brief* No. 4570, May 26, 2016, <http://www.heritage.org/research/reports/2016/05/child-nutrition-reauthorization-time-for-serious-reform-not-tinkering>; Jonathan Butcher and Vijay Menon, "Returning to the Intent of Government School Meals: Helping Students in Need," Heritage Foundation *Background* No. 3399, March 22, 2019, <https://www.heritage.org/education/report/returning-the-intent-government-school-meals-helping-students-need>; and Rachel Sheffield and Daren Bakst, "Welfare for the Wealthy? Congress Should Immediately Stop Pushing Universal Free School Meals," Heritage Foundation *Issue Brief* No. 4658, February 24, 2017, <https://www.heritage.org/welfare/report/welfare-the-wealthy-congress-should-immediately-stop-pushing-universal-free-school>.
5. See, for example, U.S. Department of Agriculture, "Community Eligibility Provision (CEP) Planning and Implementation Guidance," September, 2016, p. 15, [https://fns-prod.azureedge.net/sites/default/files/cn/SP61-2016-CEP\\_Guidance.pdf](https://fns-prod.azureedge.net/sites/default/files/cn/SP61-2016-CEP_Guidance.pdf) (accessed July 2, 2019).
6. Healthy, Hunger-Free Kids Act of 2010, § 104 adding Section 11(a)(1)(F)(ii)(I) to the Richard B. Russell National School Lunch Act, <https://www.govinfo.gov/content/pkg/PLAW-111publ296/pdf/PLAW-111publ296.pdf> (accessed June 27, 2019).
7. *Ibid.*
8. *Ibid.* The Community Eligibility Provision can be elected for "certain schools," but this language does not mean that the USDA can create a new threshold requirement based on the grouping of schools. The statutory threshold requirement is still limited to "the local educational agency or school." A local educational agency could certainly identify multiple schools that each meet the 40 percent threshold requirement, allowing the local educational agency to elect the Community Eligibility Provision for those "certain schools in the district."
9. The law expressly uses "school" (singular) not "schools," which is a very clear indication that, if meeting the threshold through this "school language," *each* school must meet the 40 percent threshold requirement. Further, the language is referring to the specific school meeting the threshold (if "the" school meets the threshold requirement).
10. Senate Report 111-178, 6, 2010 U.S. Code 1233, 1238, <https://www.congress.gov/111/crpt/srpt178/CRPT-111srpt178.pdf> (accessed July 10, 2019).
11. It may be possible that if a local educational agency meets the 40 percent threshold requirement, the Community Eligibility Provision could apply to schools that do not meet this threshold.
12. After reviewing the USDA's proposed rule implementing the Community Eligibility Provision, the final rule, the numerous memoranda referenced in the proposed rule regarding the Community Eligibility Provision, and documents contained in the USDA's Community Eligibility Provision Resource Center, among other material, it does not appear that there is any clear legal justification asserted for allowing the grouping of schools to determine eligibility for the community eligibility provision. See U.S. Department of Agriculture, "Community Eligibility Provision Resource Center," <https://www.fns.usda.gov/nsip/community-eligibility-provision-resource-center> (accessed July 1, 2019).
13. In its proposed rule implementing the community eligibility provision, the USDA proposed that a local educational agency "would be able to elect the community eligibility provision on behalf of a single school, a select group of schools, or all schools under its jurisdiction." (Emphasis added.) However, the proposed rule's threshold requirement stated that the Community Eligibility Provision could only apply if "a local educational agency or school" (not a group of schools taken together) met the 40 percent threshold. In its final rule, the agency changed the threshold requirement language to allow "a local educational agency, group of schools, or school" to meet the 40 percent threshold requirement. (Emphasis added.) This new language added "group of schools" to the proposed rule's threshold language, which did not reference grouping schools, and is inconsistent with the Healthy, Hunger-Free Kids Act threshold language. See U.S. Department of Agriculture, "National School Lunch Program and School Breakfast Program: Eliminating Applications Through Community Eligibility as Required by the Healthy, Hunger-Free Kids Act of 2010; Proposed Rule," *Federal Register*, Vol. 78, No. 213 (November 4, 2013), p. 65900, <https://www.federalregister.gov/d/2013-25922/p-174> (accessed July 1, 2019), and U.S. Department of Agriculture, "National School Lunch Program and School Breakfast Program: Eliminating Applications Through Community Eligibility as Required by the Healthy, Hunger-Free Kids Act of 2010; Final Rule," *Federal Register*, Vol. 81, No. 146 (July 29, 2016), p. 50198, <https://www.federalregister.gov/d/2016-17232/p-59> (accessed July 1, 2019).
14. U.S. Department of Agriculture, "National School Lunch Program and School Breakfast Program: Eliminating Applications Through Community Eligibility as Required by the Healthy, Hunger-Free Kids Act of 2010; Final Rule," *Federal Register*, Vol. 81, No. 146 (July 29, 2016), p. 50207, <https://www.federalregister.gov/d/2016-17232/p-183> (accessed July 1, 2019).
15. See, for example, Marshall Matz and Roger Szemraj, "Opinion: Child Nutrition Reauthorization Moves Forward," *Agri-Pulse*, March 21, 2019, <https://www.agri-pulse.com/articles/12026-child-nutrition-reauthorization-moves-forward> (accessed July 1, 2019).

16. If the Community Eligibility Provision were eliminated, students eligible for reduced-priced meals would no longer receive free meals, but they would still receive reduced-priced meals. This is how the program has worked for many years, distinguishing between income levels. The Community Eligibility Provision inappropriately expanded free meals to those who otherwise would not be eligible for them.
17. Office of Management and Budget, "High-Priority Programs and Programs Over \$100M in Monetary Loss," <https://paymentaccuracy.gov/high-priority-programs/> (accessed June 27, 2019).
18. U.S. Government Accountability Office, "School Meals Programs: USDA Has Reported Taking Some Steps to Reduce Improper Payments But Should Comprehensively Assess Fraud Risks," GAO-19-389, May 2019, <https://www.gao.gov/assets/700/699248.pdf> (accessed June 27, 2019).