

# **KENTUCKY DEPARTMENT OF EDUCATION**

## **STAFF NOTE**

### **Action/Discussion Item:**

702 KAR 6:090, Minimum Nutritional Standards for Foods and Beverages Available on Public School Campuses During the Day; Required Nutrition and Physical Activity Reports

### **Commissioner's Recommendation:**

The Commissioner recommends approval of the revisions to 702 KAR 6:090 to align the state requirements for the sale of competitive food on school campuses with the final federal rule.

### **Rationale:**

The regulation had to be updated to align Kentucky's minimum nutritional standards for the sale of competitive food and beverages with the less stringent federal rules set forth in 7 CFR 210.11.

### **Applicable Statute or Regulation:**

KRS 158.854, 156.160, 158.856, 160.345, 7 CFR 210.11

### **Action Question:**

Should the Kentucky Board of Education approve the revisions to 702 KAR 6:090 regarding the nutritional standards for competitive food and beverages?

### **History/Background:**

**Existing Policy:** 702 KAR 6:090 establishes the minimum nutritional standards for the sale of "competitive" food and beverages in schools. The term "competitive" describes food or beverages sold outside of and in competition with the National School Breakfast or National School Lunch programs. For the last two years, the Kentucky Board of Education (KBE) has waived the state regulation's nutritional requirements applicable to competitive food. By granting the waiver, school districts were permitted to comply with the less stringent federal standards.

**Summary:** The necessity for amending this regulation is twofold: (1) the existing nutritional standards set forth in Kentucky regulation make it too difficult for school districts to find compliant resalable food; and (2) there is now a final federal regulation that ensures healthy snacks in schools that is achievable for school districts. Rather than asking for another waiver, the Kentucky Department of Education (KDE) Division of School and Community Nutrition is recommending the alignment of the state and federal requirements.

KRS 158.854(1) requires the KBE to promulgate an administrative regulation specifying the minimum nutritional standards for the sale of competitive food and beverages. Competitive foods are snack type foods and beverages sold in school vending machines, canteens, stores, as well as a la carte items for purchase in the cafeteria. 702 KAR 6:090 is the state regulation that establishes those nutritional standards. Kentucky's standards are more stringent than the federal requirements. States participating in the school breakfast and lunch programs must adhere to the minimum federal requirements but may create even more stringent state requirements. Kentucky's standards are so strict that schools have trouble finding commercially available conforming food. As a result, the KBE granted waivers from the regulation's requirements for the last two years. The waivers permitted schools to purchase food in conformance with the federal Interim Final Rule.

On July 1, 2014, the federal Interim Final Rule for the *National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010*, otherwise known as *Smart Snacks in Schools*, became effective. The Final Rule became effective on September 27, 2016. A copy of that rule (7 CFR 210.11) is attached. The federal regulation (or rule) promulgated by the Department of Agriculture (USDA) set forth the minimum standards for the sale of food outside the National School Breakfast and National School Lunch programs. At the time Kentucky created standards for competitive foods, the federal rule did not exist.

The proposed amendment seeks to align the state regulation with the less stringent federal rule. This is accomplished by removing the current state standards and referencing the federal rule found at 7 CFR 210.11. The amendment requires healthy options for competitive food and beverages, and does so in an achievable manner. Districts have used the interim federal rule to purchase competitive food for the past two years and are familiar with its provisions. The final federal rule is very similar to the interim rule. Aligning the state and federal rules ensures healthy snacks for Kentucky's students that are obtainable for school districts.

***Budget Impact:*** The amendment of this administrative regulation has no fiscal impact on the Kentucky Department of Education.

### **Groups Consulted and Brief Summary of Responses:**

School Nutrition Directors were supportive of the state regulation waivers in previous years. The Division of School and Community Nutrition conducted a survey of School Nutrition Directors to determine support for the amendment. The survey received one hundred twenty-five (125) responses. One hundred twenty-one (121) respondents were in favor of amending the state regulation to align with the less stringent federal requirements, and only four (4) respondents were opposed.

The Local Superintendents Advisory Council (LSAC) reviewed the regulation at its December meeting and supported the amendment. LSAC will review it another time prior to the February meeting and a letter from that body will come to the board providing its viewpoint.

The Legislative Research Commission's Office of Education Accountability (OEA) also reviewed the proposed amendments and provided comments. They raised three concerns. KDE staff, including KDE legal staff, reviewed OEA's comments and determined that no changes to the

amendments were warranted. A summary of OEA's individual concerns and KDE's responses are set out as follows:

1.) OEA CONCERN: KRS 158.854(1) states that an administrative regulation addressing minimum nutritional standards under these circumstances must address serving size. OEA has determined that 7 CFR 210.11 does not provide serving size requirements. 7 CFR 210.10, not 210.11, appears to provide the serving size information required by KRS 158.854(1).

KDE RESPONSE: The proposed regulation aligns the state regulation with the federal regulation found at 7 CFR 210.11. The federal regulation does, in fact, address serving sizes at 7 CFR 210.11(i) and (j). Those sections limit the amount of calories and sodium for snack and a la carte dishes "per item as packaged or served". Further, 7 CFR 210.10 applies to the meal requirements for lunches and afterschool snacks, not competitive foods. 7 CFR 210.11 applies to "competitive foods". Competitive foods are different from meal foods and the 7 CFR 210.10 portion sizes are inapplicable.

2.) OEA CONCERN: OEA has also determined that 7 CFR 210.11(m)(1)(v) allows 100 percent fruit/vegetable juice, and 100 percent fruit and/or vegetable juice diluted with water (with or without carbonation and with no added sweeteners) (no more than 8 fluid ounces). This is inconsistent with, and more liberal than KRS 158.854(2)(c).

KDE RESPONSE: KRS 158.854(2)(c) reads: " 'School-day-approved beverage' means water, one hundred percent (100%) fruit juice, lowfat milk, and any beverage that contains no more than (10) grams of sugar per serving." The limitations on "School-day-approved beverage" are only applicable (per the statute) to elementary schools. OEA finds the federal rule to be more liberal because it permits the sale of 100% fruit/vegetable juice or fruit/vegetable juice *diluted with water* (with or without carbonation but with no added sweeteners). The existing regulation permits 100% fruit/vegetable up to 17 oz. The proposed regulation reduces the amount to 8 oz. The statute permits water and it permits 100% fruit juice. OEA's interpretation is too strict in finding that the statute would not permit juice diluted with water. The intent of the statute is to control calories and sugar. The proposed regulation does so more than the existing state rule.

3.) OEA CONCERN: There are other ambiguities in 7 CFR 210.11 regarding school-aged children and the definition of an elementary school, so there may be other inconsistencies with Kentucky statutory authority.

KDE RESPONSE: OEA did not fully articulate the ambiguities they found regarding school-aged children, and therefore, KDE cannot respond. However, the regulation will be subservient to the requirements of Kentucky statutes relating to school-aged children. Additionally, the requirement that elementary schools only serve school-day-approved beverages is found in statute (KRS 158.854(4)). The definition of elementary school is not dependent on this regulation but is determined by Kentucky law.

**Contact Person:**

Robin Fields Kinney, Associate Commissioner  
Office of Finance and Operations  
(502) 564-1976  
[Robin.Kinney@education.ky.gov](mailto:Robin.Kinney@education.ky.gov)

Lauren Moore, Director  
Division of School and Community Nutrition  
(502) 564-5625  
[Lauren.Moore2@education.ky.gov](mailto:Lauren.Moore2@education.ky.gov)



---

**Commissioner of Education**

**Date:**

February 2017

Federal Regulatory Language:

**§210.11 Competitive food service and standards.**

(a) *Definitions.* For the purpose of this section:

(1) *Combination foods* means products that contain two or more components representing two or more of the recommended food groups: fruit, vegetable, dairy, protein or grains.

(2) *Competitive food* means all food and beverages other than meals reimbursed under programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 available for sale to students on the *School campus* during the *School day*.

(3) *Entrée item* means an item that is intended as the main dish and is either:

(i) A combination food of meat or meat alternate and whole grain rich food; or

(ii) A combination food of vegetable or fruit and meat or meat alternate; or

(iii) A meat or meat alternate alone with the exception of yogurt, low-fat or reduced fat cheese, nuts, seeds and nut or seed butters, and meat snacks (such as dried beef jerky); or

(iv) A grain only, whole-grain rich entrée that is served as the main dish of the School Breakfast Program reimbursable meal.

(4) *School campus* means, for the purpose of competitive food standards implementation, all areas of the property under the jurisdiction of the school that are accessible to students during the school day.

(5) *School day* means, for the purpose of competitive food standards implementation, the period from the midnight before, to 30 minutes after the end of the official school day.

(6) *Paired exempt foods* mean food items that have been designated as exempt from one or more of the nutrient requirements individually which are packaged together without any additional ingredients. Such “paired exempt foods” retain their individually designated exemption for total fat, saturated fat, and/or sugar when packaged together and sold but are required to meet the designated calorie and sodium standards specified in §§210.11(i) and (j) at all times.

(b) *General requirements for competitive food.* (1) *State and local educational agency policies.* State agencies and/or local educational agencies must establish such policies and procedures as are necessary to ensure compliance with this section. State agencies and/or local educational agencies may impose additional restrictions on competitive foods, provided that they are not inconsistent with the requirements of this part.

(2) *Recordkeeping.* The local educational agency is responsible for the maintenance of records that document compliance with the nutrition standards for all competitive food available

for sale to students in areas under its jurisdiction that are outside of the control of the school food authority responsible for the service of reimbursable school meals. In addition, the local educational agency is responsible for ensuring that organizations designated as responsible for food service at the various venues in the schools maintain records in order to ensure and document compliance with the nutrition requirements for the foods and beverages sold to students at these venues during the school day as required by this section. The school food authority is responsible for maintaining records documenting compliance with these for foods sold under the auspices of the nonprofit school food service. At a minimum, records must include receipts, nutrition labels and/or product specifications for the competitive food available for sale to students.

(3) *Applicability.* The nutrition standards for the sale of competitive food outlined in this section apply to competitive food for all programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 operating on the school campus during the school day.

(4) *Fundraiser restrictions.* Competitive food and beverage items sold during the school day must meet the nutrition standards for competitive food as required in this section. A special exemption is allowed for the sale of food and/or beverages that do not meet the competitive food standards as required in this section for the purpose of conducting an infrequent school-sponsored fundraiser. Such specially exempted fundraisers must not take place more than the frequency specified by the State agency during such periods that schools are in session. No specially exempted fundraiser foods or beverages may be sold in competition with school meals in the food service area during the meal service.

(c) *General nutrition standards for competitive food.* (1) *General requirement.* At a minimum, all competitive food sold to students on the school campus during the school day must meet the nutrition standards specified in this section. These standards apply to items as packaged and served to students.

(2) *General nutrition standards.* To be allowable, a competitive food item must:

(i) Meet all of the competitive food nutrient standards as outlined in this section; and

(ii) Be a grain product that contains 50 percent or more whole grains by weight or have as the first ingredient a whole grain; or

(iii) Have as the first ingredient one of the non-grain major food groups: fruits, vegetables, dairy or protein foods (meat, beans, poultry, seafood, eggs, nuts, seeds, etc.); or

(iv) Be a combination food that contains  $\frac{1}{4}$  cup of fruit and/or vegetable; or

(v) If water is the first ingredient, the second ingredient must be one of the food items in paragraphs (c)(2)(ii), (iii) or (iv) of this section.

(3) *Exemptions.* (i) *Entrée items offered as part of the lunch or breakfast program.* Any entrée item offered as part of the lunch program or the breakfast program under 7 CFR Part 220 is

exempt from all competitive food standards if it is offered as a competitive food on the day of, or the school day after, it is offered in the lunch or breakfast program. Exempt entrée items offered as a competitive food must be offered in the same or smaller portion sizes as in the lunch or breakfast program. Side dishes offered as part of the lunch or breakfast program and served à la carte must meet the nutrition standards in this section.

(ii) *Sugar-free chewing gum.* Sugar-free chewing gum is exempt from all of the competitive food standards in this section and may be sold to students on the school campus during the school day, at the discretion of the local educational agency.

(d) *Fruits and vegetables.* (1) Fresh, frozen and canned fruits with no added ingredients except water or packed in 100 percent fruit juice or light syrup or extra light syrup are exempt from the nutrient standards included in this section.

(2) Fresh and frozen vegetables with no added ingredients except water and canned vegetables that are low sodium or no salt added that contain no added fat are exempt from the nutrient standards included in this section.

(e) *Grain products.* Grain products acceptable as a competitive food must include 50 percent or more whole grains by weight or have whole grain as the first ingredient. Grain products must meet all of the other nutrient standards included in this section.

(f) *Total fat and saturated fat.* (1) *General requirements.* (i) The total fat content of a competitive food must be not more than 35 percent of total calories from fat per item as packaged or served, except as specified in paragraphs (f)(2) and (3) of this section.

(ii) The saturated fat content of a competitive food must be less than 10 percent of total calories per item as packaged or served, except as specified in paragraph (f)(3) of this section.

(2) *Exemptions to the total fat requirement.* Seafood with no added fat is exempt from the total fat requirement, but subject to the saturated fat, trans fat, sugar, calorie and sodium standards.

(3) *Exemptions to the total fat and saturated fat requirements.* (i) Reduced fat cheese and part skim mozzarella cheese are exempt from the total fat and saturated fat standards, but subject to the trans fat, sugar, calorie and sodium standards. This exemption does not apply to combination foods.

(ii) Nuts and Seeds and Nut/Seed Butters are exempt from the total fat and saturated fat standards, but subject to the trans fat, sugar, calorie and sodium standards. This exemption does not apply to combination products that contain nuts, nut butters or seeds or seed butters with other ingredients such as peanut butter and crackers, trail mix, chocolate covered peanuts, etc.

(iii) Products that consist of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fat are exempt from the total fat, saturated fat and sugar standards, but subject to the trans fat, calorie and sodium standards.

(iv) Whole eggs with no added fat are exempt from the total fat and saturated fat standards but are subject to the trans fat, calorie and sodium standards.

(g) *Trans fat.* The trans fat content of a competitive food must be zero grams trans fat per portion as packaged or served (not more than 0.5 grams per portion).

(h) *Total sugars.* (1) *General requirement.* The total sugar content of a competitive food must be not more than 35 percent of *weight* per item as packaged or served, except as specified in paragraph (h)(2) of this section.

(2) *Exemptions to the total sugar requirement.* (i) Dried whole fruits or vegetables; dried whole fruit or vegetable pieces; and dehydrated fruits or vegetables with no added nutritive sweeteners are exempt from the sugar standard, but subject to the total fat, saturated fat, trans fat, calorie and sodium standards. There is also an exemption from the sugar standard for dried fruits with nutritive sweeteners that are required for processing and/or palatability purposes;

(ii) Products that consist of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fat are exempt from the total fat, saturated fat, and sugar standards, but subject to the calorie, trans fat, and sodium standards; and

(i) *Calorie and sodium content for snack items and side dishes sold as competitive foods.* Snack items and side dishes sold as competitive foods must have not more than 200 calories and 200 mg of sodium per item as packaged or served, including the calories and sodium contained in any added accompaniments such as butter, cream cheese, salad dressing, etc., and must meet all of the other nutrient standards in this section. Effective July 1, 2016, these snack items and side dishes must have not more than 200 calories and 200 mg of sodium per item as packaged or served.

(j) *Calorie and sodium content for entrée items sold as competitive foods.* Entrée items sold as competitive foods, other than those exempt from the competitive food nutrition standards in paragraph (c)(3)(i) of this section, must have not more than 350 calories and 480 mg of sodium per item as packaged or served, including the calories and sodium contained in any added accompaniments such as butter, cream cheese, salad dressing, etc., and must meet all of the other nutrient standards in this section.

(k) *Caffeine.* Foods and beverages available to elementary and middle school-aged students must be caffeine-free, with the exception of trace amounts of naturally occurring caffeine substances. Foods and beverages available to high school-aged students may contain caffeine.

(l) *Accompaniments.* The use of accompaniments is limited when competitive food is sold to students in school. The accompaniments to a competitive food item must be included in the nutrient profile as a part of the food item served in determining if an item meets all of the nutrition standards for competitive food as required in this section. The contribution of the accompaniments may be based on the average amount of the accompaniment used per item at the site.

(m) *Beverages.* (1) *Elementary schools.* Allowable beverages for elementary school-aged students are limited to:

- (i) Plain water or plain carbonated water (no size limit);
- (ii) Low fat milk, unflavored (no more than 8 fluid ounces);
- (iii) Non fat milk, flavored or unflavored (no more than 8 fluid ounces);

(iv) Nutritionally equivalent milk alternatives as permitted in §210.10 and §220.8 of this chapter (no more than 8 fluid ounces); and

(v) 100 percent fruit/vegetable juice, and 100 percent fruit and/or vegetable juice diluted with water (with or without carbonation and with no added sweeteners) (no more than 8 fluid ounces).

(2) *Middle schools.* Allowable beverages for middle school-aged students are limited to:

- (i) Plain water or plain carbonated water (no size limit);
- (ii) Low fat milk, unflavored (no more than 12 fluid ounces);
- (iii) Non fat milk, flavored or unflavored (no more than 12 fluid ounces);

(iv) Nutritionally equivalent milk alternatives as permitted in §210.10 and §220.8 of this chapter (no more than 12 fluid ounces); and

(v) 100 percent fruit/vegetable juice, and 100 percent fruit and/or vegetable juice diluted with water (with or without carbonation and with no added sweeteners) (no more than 12 fluid ounces).

(3) *High schools.* Allowable beverages for high school-aged students are limited to:

- (i) Plain water or plain carbonated water (no size limit);
- (ii) Low fat milk, unflavored (no more than 12 fluid ounces);
- (iii) Non fat milk, flavored or unflavored (no more than 12 fluid ounces);

(iv) Nutritionally equivalent milk alternatives as permitted in §210.10 and §220.8 of this chapter (no more than 12 fluid ounces);

(v) 100 percent fruit/vegetable juice, and 100 percent fruit and/or vegetable juice diluted with water (with or without carbonation and with no added sweeteners) (no more than 12 fluid ounces);

(vi) Calorie-free, flavored water, with or without carbonation (no more than 20 fluid ounces);

(vii) Other beverages that are labeled to contain less than 5 calories per 8 fluid ounces, or less than or equal to 10 calories per 20 fluid ounces (no more than 20 fluid ounces); and

(viii) Other beverages that are labeled to contain no more than 40 calories per 8 fluid ounces or 60 calories per 12 fluid ounces (no more than 12 fluid ounces).

(n) *Implementation date.* This section is to be implemented beginning on July 1, 2014.

[78 FR 39091, June 28, 2013, as amended at 81 FR 50151, July 29, 2016]