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## SCHOOL FOOD: DOES THE FUTURE CALL FOR NEW FOOD POLICY OR CAN THE OLD STILL HOLD TRUE?

*Susan Lynn Roberts*

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### I. INTRODUCTION

National Child Nutrition Programs are considered one of the greatest success stories in the United States governmental domestic food and nutrition assistance. It is a reflection of the United States goals to provide needy children with a more nutritious diet, to improve the eating habits of all our children, and to help the farmer by providing an outlet for commodities.<sup>1</sup> Legislation over the years has provided for five major child nutrition programs.<sup>2</sup>

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1. Victor Oliveira, *Food Assistance Expanded, Then Contracted in the 1990’s*, FOOD REV., Sept.-Dec. 2000, at 31.

2. See National School Lunch Act, 42 U.S.C. §§ 1751-1769 (2000).

- *National School Lunch Program*

The National School Lunch Program provides nutritious lunches in more than 97,700 public and non-profit schools and residential child care institutions.<sup>3</sup> In Fiscal Year 2000, over 27.4 million children were fed lunch each day (with over 14 million free or reduced cost) at a yearly cost of \$5.56 billion.<sup>4</sup>

- *School Breakfast Program*

The School Breakfast Program provides nutritious breakfasts in more than 72,000 schools and institutions.<sup>5</sup> In Fiscal Year 2000, an average of 7.55 million children (6.4 million at free or reduced cost level) were fed breakfast each day.<sup>6</sup>

- *Special Milk Program*

The Special Milk Program offers milk to children who do not have access to other meal programs and also reimburses schools for the milk they serve.<sup>7</sup>

- *Summer Food Service Program*

The Summer Food Service Program serves healthy meals and snacks to low-income children during school summer vacation.<sup>8</sup> Only about two million children participate in the summer lunch program even though the need is estimated at over fourteen million.<sup>9</sup>

- *Child and Adult Care Food Program*

The Child and Adult Care Food Program provides meals and snacks to infants, young children, and adults who receive day care.<sup>10</sup>

The history of these programs is important to understanding how far these school food programs have come and to where they should aspire. The early United States school feeding programs were started because children were

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3. FOOD & NUTRITION SERV., USDA, SCHOOL LUNCH PROGRAM – FACT SHEETS, at <http://www.fns.usda.gov/cnd/lunch/aboutlunch/faqs.htm> (last updated Mar. 17, 2003).

4. *See id.* There are three levels of pricing for school lunch: (1) regular price lunch where the child pays almost the entire cost of the lunch but there is some Government subsidy; (2) reduced price lunch (maximum \$.40) for children from families with incomes between \$22,945-\$32,653 for a family of four (130%-185% of the poverty level); (3) free lunch for children from families with incomes below \$22,945 for a family of four (130% of the poverty level). *Id.*

5. FOOD & NUTRITION SERV., USDA, SCHOOL BREAKFAST PROGRAM - FACT SHEET, at <http://www.fns.usda.gov/cnd/Breakfast/AboutBFast/faqs.htm> (last updated Aug. 29, 2002).

6. *Id.*

7. FOOD & NUTRITION SERV., USDA, SPECIAL MILK PROGRAM - FACT SHEET, at <http://www.fns.usda.gov/cnd/Milk/AboutMilk/faqs.htm> (last updated June 11, 2002).

8. *See* FOOD & NUTRITION SERV., USDA, SUMMER FOOD SERVICE PROGRAM, at <http://www.fns.usda.gov/cnd/Summer/About/index.html> (last visited on Sept. 12, 2002).

9. *Id.*

10. FOOD & NUTRITION SERV., USDA, CHILD NUTRITION HOMEPAGE, at <http://www.fns.usda.gov/cnd/> (last updated Aug. 9, 2002).

hungry and did not have access to food.<sup>11</sup> Philadelphia's William Penn High School started a school feeding program in 1909 because, as Emma Smedley who ran the first William Penn school lunch program, said, "Janitors or other individuals whose chief concern was profits, with little regard for the stomachs of their patrons, reaped large sums by catering to the appetites of children. The food sold was rarely wholesome and often actually unclean."<sup>12</sup>

Almost one hundred years later, school food programs are feeding many children food they would not otherwise have access to because of their family's income.<sup>13</sup> This is the success. However, much of Emma Smedley's quote still applies. The actors are different, but the concerns are the same. Concerns in schools regard vending machines with empty calorie soda and candy sold to children for the profits of large conglomerates who compete with the nutritious breakfasts and lunches offered by the school food programs.<sup>14</sup> There are also concerns over data that show our children are falling substantially short of getting needed vitamins and minerals while at the same time getting too much fat, sugar, and unhealthy additives.<sup>15</sup> These nutrient shortages persist, while at the same time unneeded excesses of fat, sugar, and unhealthy additives will have significant health consequences.<sup>16</sup> We are experiencing an increase in obesity in children which the United States Surgeon General is calling epidemic.<sup>17</sup>

This note will attempt to discuss the issues that have influenced policies over the last one hundred years and guided the laws affecting school feeding programs (and in turn the health of our nation's children). It will discuss what we can learn from our history of school food policy and legislation to guide us today. It will discuss the most significant issues facing our nation today, at the start of a new century, in regards to one of our most important assets – our children and their health. It will explore specifically the exploding issue of competitive foods in our schools and how they affect the school food programs and our children's health.<sup>18</sup> Finally, this note will analyze and argue for new food and nutrition policy to meet the challenges of this new era.

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11. See ANTONIA DEMAS, *HOT LUNCH: A HISTORY OF THE SCHOOL LUNCH PROGRAM* 28 (Food Studies Institute, Inc. 2000).

12. *Id.* at 9 (citing EMMA SMEDLEY, *THE SCHOOL LUNCH* 5 (Innes & Sons 1920)).

13. *See id.* at 28.

14. *See id.* at 26.

15. See FOOD & NUTRITION SERV., USDA, *FOOD SOLD IN COMPETITION WITH USDA SCHOOL MEAL PROGRAMS: A REPORT TO CONGRESS* (2001), available at <http://www.fns.usda.gov/cnd/> (available under "National School Lunch Program" link) (last updated Feb. 1, 2002) [hereinafter A REPORT TO CONGRESS].

16. *See id.*

17. See OFFICE OF THE SURGEON GEN., U.S. DEPT. OF HEALTH & HUMAN SERV., *Forward from the Surgeon General to THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001*, available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/foreward.htm> (last visited Sept. 13, 2002).

18. "USDA defines 'competitive foods' as 'foods offered at school, other than meals served through USDA's school meal programs – school lunch, school breakfast, and after school snack programs.'" A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under "National School Lunch Program" link).

## II. THE HISTORY OF SCHOOL FEEDING PROGRAMS

### A. *The Earliest School Feeding Programs*

The idea of feeding kids lunch at school has been around since the 1700s in Europe.<sup>19</sup> Educators observed children coming to school hungry and having a difficult time concentrating on their studies.<sup>20</sup> Charitable institutions and private individuals were the first to address the issues of childhood malnutrition with school feeding programs.<sup>21</sup> Benjamin Thompson, an American born physicist, inventor, and statesman, started the first program in Munich, Germany in 1790.<sup>22</sup> In his campaign to wipe out vagrancy, he fed thousands of undernourished children in school.<sup>23</sup>

As in Europe, mandatory schooling in the United States brought the image of the starving child who could not learn. In 1904, Robert Hunter brought it to light when he wrote of New York City:

It is utter folly, from the point of view of learning, to have a compulsory school law which compels children, in that weak physical and mental state which results from poverty, to drag themselves to school and to sit at their desks, day in and day out, for several years, learning little or nothing . . . learning is difficult because hungry stomachs and languid bodies and thin blood are not able to feed the brain.<sup>24</sup>

In response to Hunter's claims, socialist educator John Spargo gathered data and found that nearly one out of four children had no breakfast or only tea and maybe a cracker.<sup>25</sup> Children given pennies by their parents to buy food from street vendors were buying pickles and bread, ice cream, or candy, if they weren't gambling it away.<sup>26</sup> Physicians also began documenting cases of malnutrition in the New York schools.<sup>27</sup>

In a couple of years, after urging from the New York Superintendent of Schools, Dr. Maxwell, New York City started two pilot school lunch programs with three cent lunches.<sup>28</sup> Evaluation of the programs after only three months showed not only improved physical status of children (increased weight of children receiving food over controls), but also problems (often still with us today) of equitable access, food waste, and cost (actual cost was four cents).<sup>29</sup>

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19. See DEMAS, *supra* note 11, at 1 (citing LOUISE STEVENS BRYANT, SCHOOL FEEDING, ITS HISTORY AND PRACTICE AT HOME AND ABROAD (J.B. Lippincott Co. 1913)).

20. See *id.* at 4.

21. See *id.* at 1.

22. See *id.*

23. See *id.* at 2 (citing GORDON GUNDERSON, USDA, THE NATIONAL SCHOOL LUNCH PROGRAM, BACKGROUND AND DEVELOPMENT 1 (1971)).

24. *Id.* at 5 (citing ROBERT HUNTER, POVERTY 216-17 (Macmillan Co. 1905)).

25. See *id.*, at 6 (citing JOHN SPARGO, THE BITTER CRY OF THE CHILDREN (Quadrangle Books 1968) (1906)).

26. *Id.* (citing JOHN SPARGO, THE BITTER CRY OF THE CHILDREN (Quadrangle Books 1968) (1906)).

27. See *id.* at 6-7.

28. See *id.* at 7.

29. See *id.* at 8.

Other urban school feeding programs were started in Boston, Philadelphia, Chicago, Cincinnati, and St. Louis.<sup>30</sup> In rural areas, where the school did not have a kitchen, the heating stove also functioned as the kitchen stove.<sup>31</sup> Children brought food from home for the common pot and all were able to eat, no matter what they brought.<sup>32</sup>

### B. *Early Government School Feeding Programs*

In the early 1900s, malnutrition was rampant in American young people as made apparent when fully one-third of the young men who tried to enlist in the military in World War I were rejected due to diseases of malnutrition.<sup>33</sup> Even with this severe problem, “the government was not ready to take measures that would recognize public health as important to national security.”<sup>34</sup> There were no Government food or nutrition programs on the horizon.

Not until the Great Depression of the 1930s did the Federal Government get involved with school feeding programs.<sup>35</sup> Ironically, while millions of unemployed Americans were undernourished to a point of serious threat to the nation, there were agricultural surpluses because farmers could not find markets for their goods.<sup>36</sup> The situation was drastic. The Government was finally ready to get involved with a school feeding program. It had determined it could help get rid of surplus farm commodities as well as help hungry children in one great program.<sup>37</sup>

The Secretary of Agriculture purchased surplus domestic foods, which he then distributed to schoolchildren.<sup>38</sup> This helped the children and schools while at the same time helping the agricultural community by removing price-depressing surplus foods from the market.<sup>39</sup> During this time, the school lunch programs also provided a place for many unemployed women to work under the Work Projects Administration (“WPA”).<sup>40</sup> With the labor from the WPA, surplus food supplied by the Federal Government, and state administrative assistance, the school lunch program “was able to expand substantially throughout the 30’s.”<sup>41</sup>

“By 1941 the WPA was operating school lunches in every state, the District of Columbia, and Puerto Rico.”<sup>42</sup> By 1942, six million children were fed

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30. *See id.* at 5-11.

31. *Id.* at 10.

32. *See id.*

33. *See id.* at 12.

34. *Id.*

35. *See id.* at 13.

36. *See id.*

37. *See id.*

38. *Id.*

39. *Id.*

40. *Id.* at 14.

41. *Id.*

42. *Id.* (citing GORDON W. GUNDERSON, USDA, THE NATIONAL SCHOOL LUNCH PROGRAM, BACKGROUND AND DEVELOPMENT 13 (1971)).

daily and educators and health professionals were seeing results.<sup>43</sup> The growth was phenomenal and the results were wonderful.

The major Government policies behind the program were to give workers jobs and to support agriculture.<sup>44</sup> Feeding needy children was not the top policy priority at this time. Children were lucky secondary beneficiaries of policy really intended for the workers and farmers.

However, the growth of the school food program in the late 1930s and early 1940s was short lived. Both workers and commodity foods were lost to World War II; workers left WPA to work in defense industries and extra food was sent to the armed forces.<sup>45</sup> By 1944, the number of children served school lunch was only five million.<sup>46</sup> This situation reinforced the notion that the policy and program were not really for the children. Supporting the war effort took priority over continued expansion of the school lunch program and needy children.

Times changed though, and so did support for a school lunch program when a different spin was put on why a school feeding program was needed. As the war ended, an important statement from a military leader helped start the official school lunch program.<sup>47</sup> General Hershey, Director of the Selective Service, told Congress that the nation had sustained 155,000 casualties because of malnutrition in its young men.<sup>48</sup> And these were the healthier men as fully one-third were rejected and could not even enter the armed services because of malnutrition.<sup>49</sup> The nation was ready to address the problem of unhealthy children and youth as a national security measure. In 1946, the National School Lunch Act was signed into law.<sup>50</sup>

In the National School Lunch Act, Congress declared that its policy, as a measure of national security, was to:

1. "safeguard the health and well-being of the Nation's children" and
2. "encourage the domestic consumption of nutritious agricultural commodities and other food."<sup>51</sup>

This same purpose of policy has not changed in over fifty-five years and is still what guides the school food legislation today.<sup>52</sup> The nation had a school food program with one of its major purposes to safeguard the health and well-

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43. See *id.* (citing GORDON W. GUNDERSON, USDA, THE NATIONAL SCHOOL LUNCH PROGRAM, BACKGROUND AND DEVELOPMENT 13 (1971)).

44. See *id.* at 12-16.

45. *Id.* at 15.

46. *Id.* (citing GORDON GUNDERSON, USDA, THE NATIONAL SCHOOL LUNCH PROGRAM, BACKGROUND AND DEVELOPMENT 13 (1971)).

47. Cf. BERNARD BARD, THE SCHOOL LUNCHROOM: TIME OF TRIAL 15 (John Wiley & Sons, Inc. 1968).

48. *Id.*

49. DEMAS, *supra* note 11, at 14.

50. See National School Lunch Act of 1946, Pub. L. No. 79-396, 60 Stat. 230 (codified as amended at 42 U.S.C. §§ 1751-1769h (2000)).

51. *Id.* § 2.

52. See Richard B. Russell National School Lunch Act, 42 U.S.C. §§ 1751-1769h (2000).

being of children. Of course, its other main purpose was still to support agricultural commodities.

Congressional policy related to safeguarding the health of children was based on three factors which Congress felt contributed to poor nutrition of the nation's school children at the time: (1) lack of economic means, (2) lack of knowledge about nutrition, and (3) difficulty of getting proper lunches at school.<sup>53</sup> These three challenging factors still contribute to poor nutrition today.

However, the challenges are much better dealt with today in school feeding programs than they were back in the 1940s, 1950s, and 1960s. For example, school districts were sued for not providing lunches at the needier schools in a district when other schools from more affluent areas in the district had programs.<sup>54</sup> Courts in both Massachusetts and Colorado decided that school districts did not have to select schools in areas of economic need before selecting others.<sup>55</sup> As Judge Garritty explained in his interpretation of the 1946 legislation, "[t]he National School Lunch Act is not primarily a welfare program."<sup>56</sup> It is apparent that needy children were not a top priority and school systems were not helping them. This action was then confirmed as appropriate by the courts when they ruled that it was not the legislative intent to have the food program be a welfare program.

Twenty years later, however, this error in policy was beginning to be recognized with the Child Nutrition Act of 1966.<sup>57</sup> Major improvements with several new programs to specifically help schools, and thus children, in economically poor areas were written into the legislation.<sup>58</sup> A pilot breakfast program was designed for schools in poor economic areas, where children traveled long distances, or where improvement of dietary practices of children was needed because mothers were working.<sup>59</sup> Another program provided non-food assistance for start-up and expansion costs.<sup>60</sup> Food policy was changing behind the program and genuinely appeared to be focusing on helping low income children.

Even with these new efforts, claims of poverty and hunger were still flying when Senators Joseph Clark and Robert Kennedy traveled to Mississippi to investigate in 1967.<sup>61</sup> They were appalled by what they saw.<sup>62</sup> Following them was a team of doctors sponsored by the Field Foundation, who found malnutrition and disease.<sup>63</sup>

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53. *Ayala v. Dist. 60 Sch. Bd.*, 327 F. Supp. 980, 984 (D. Colo. 1971) (citing S. REP. NO. 553, at 9 (1945)).

54. *See Briggs v. Kerrigan*, 307 F. Supp. 295 (D. Mass. 1969); *see generally Ayala*, 327 F. Supp. at 980 (discussing a lawsuit against a school district for not providing lunches at all schools).

55. *See Briggs*, 307 F. Supp. at 301-302; *see also Ayala*, 327 F. Supp. at 985.

56. *Briggs*, 307 F. Supp. at 303.

57. *See* Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (codified as amended at 42 U.S.C. §§ 1771-1790 (2000)).

58. *See id.*

59. *See id.*

60. *See id.*

61. *See* DEMAS, *supra* note 11, at 21.

62. *Id.*

63. *See id.*; *see also* NICK KOTZ, LET THEM EAT PROMISES: THE POLITICS OF HUNGER IN

We saw children being fed communally - that is by neighbors, who give scraps of food to children whose own parents have nothing to give them. Not only are these children receiving no food from the government, they are also getting no medical attention whatsoever. They are out of sight and ignored. They are living under such primitive conditions that we found it hard to believe we were examining American children of the twentieth century!<sup>64</sup>

On the heels of the physician's report was *Hunger, U.S.A.*, published in 1968.<sup>65</sup> It documented hunger and malnutrition that could not be ignored:

We feel fairly confident that most Americans must believe - if they think of it at all - that the federal food programs (including the school lunch program) are designed to serve the interests and needs of beneficiaries. This is not true.... The school lunch program has not been used to combat malnutrition and hunger among the poor.... At most, one-third of poverty stricken children attending public school participate in the school lunch program. Despite express provision in the national school lunch act that they shall "be served without cost or at a reduced cost," a majority of poor children are forced to pay the full price for school lunch or go without.<sup>66</sup>

If that wasn't enough, the reality of poverty and hunger was brought into the living room of every American with a 1968 CBS television documentary, *Hunger in America*.<sup>67</sup> President Richard Nixon responded by establishing the Food and Nutrition Service ("FNS") as part of the United States Department of Agriculture ("USDA") to operate federal food programs, including the school feeding programs.<sup>68</sup> Congress responded with significant increases in appropriations to reach a greater number of needy children.<sup>69</sup> In addition, regulations were added which required the use of federal standards to determine which children were to receive free and reduced price lunches (rather than let each state make its own determination).<sup>70</sup> More than ever before food policy was focusing on the needs of children, especially needy children, who to this day had really not had the opportunity to fully participate in the school feeding programs. Maintaining agricultural support was still important, but it was taking a back seat to children.

The 1970s brought the addition of a summer school lunch program for children in "areas in which poor economic conditions exist."<sup>71</sup> The 1970s also reinforced another of the original factors why the legislation was introduced in

AMERICA 8-9 (Doubleday & Co., Inc. 1969).

64. KOTZ, *supra* note 63, at 9.

65. See generally CITIZENS' BOARD OF INQUIRY, *HUNGER, U.S.A.* (1968) (addressing issues of hunger and poverty in the United States).

66. *Id.* at 68.

67. See Karen Terhune, Comment, *Reformation of the Food Stamp Act: Abating Domestic Hunger Means Resisting "Legislative Junk Food"*, 41 CATH. U. L. REV. 421, 425 (1992).

68. DEMAS, *supra* note 11, at 22.

69. See Act of June 30, 1971, Pub. L. No. 92-32, 85 Stat. 85 (1971) (amending the National School Lunch Act, 42 U.S.C. §§ 1751-1769h).

70. See Richard B. Russell National School Lunch Act, 42 U.S.C. § 1758(b) (2000); see also 7 C.F.R. §§ 245.1-245.13 (2002).

71. 42 U.S.C. § 1761(a) (2000).

1946 — the realization that “affluence did not ensure good nutritional habits.”<sup>72</sup> A USDA study showed “that over one-third of upper income families surveyed had [deficient] diets.”<sup>73</sup> A House of Representatives Report stated:

[I]t is clear that a great many Americans of all economic levels are not very well informed on the subject of nutrition and its importance. Since the inauguration of the school lunch program more than 30 years ago it was felt that the serving of a type A lunch would serve to instill good nutritional habits in the youngsters who were participating in the program. This obviously has not been the case.<sup>74</sup>

Food and nutrition policy recognized the importance of nutrition education in addition to the provision of food. The policy of just feeding food at school was not enough. It was time for a nutrition information and education program to be in the schools simultaneously with the food program.<sup>75</sup>

### C. School Food Programs at the End of the Century

The 1980s ushered in Reaganomics and for the first time the school lunch program budget was decreased.<sup>76</sup> Even though there was an increase in children qualifying for free and reduced lunches due to high unemployment and a poor economy, participation in the program decreased because prices for lunches had to be increased.<sup>77</sup> Cost saving was “in” with measures such as the infamous designation of catsup as a vegetable by the Reagan administration.<sup>78</sup> But it didn’t end there. Other proposed budget cuts would have terminated the entire program if it had not been for effective lobbying by groups such as the School Board Association and the American School Food Service Association.<sup>79</sup> These groups understood how important the school feeding programs were in the lives of children. The programs were beginning to really meet the needs of children, especially needy children. But the tenuousness of this type of social program was also shown during this time. The programs needed their supporters.

The child nutrition programs fared better in the 1990s with overall increases in funding while the major USDA food and nutrition program, food stamps, saw an overall decrease in funding.<sup>80</sup> The number of free and reduced

72. DEMAS, *supra* note 11, at 22.

73. *Id.* (citing GORDON W. GUNDERSON, USDA, THE NATIONAL SCHOOL LUNCH PROGRAM, BACKGROUND AND DEVELOPMENT 24 (1971)).

74. H.R. REP. NO. 91-81, at 3 (1969), *reprinted in* 1970 U.S.C.C.A.N. 3014, 3016.

75. *See* DOROTHY VANEGMOND-PANNELL, SCHOOL FOODSERVICE 20 (3d ed. 1985).

76. *See* DEMAS, *supra* note 11, at 24.

77. VANEGMOND-PANNELL, *supra* note 75, at 36.

78. *See* DEMAS, *supra* note 11, at 24.

79. *See* VANEGMOND-PANNELL, *supra* note 75, at 37.

80. *See* Oliveira, *supra* note 1, at 31-32. The USDA administers fifteen domestic food and nutrition programs with five programs – Food Stamp, National School Lunch, WIC, Child and Adult Care Food, and School Breakfast Programs – accounting for over 90% of all the federal expenditures. *See id.* In 1999, the Food Stamp program received \$17.65 billion (a decrease of 11.3% from 1990); the National School Lunch program received approximately \$6.0 billion (an increase of 21.4% from 1990); the School Breakfast program received \$1.33 billion (an increase of 73.9% from 1990). *Id.*

price lunches served to children increased from forty-eight percent of the total lunches served in 1990 to fifty-seven percent in the year 2000.<sup>81</sup> In 1990, 707 million breakfasts were served compared with over 1.3 billion in 2000 (of which approximately eighty-four percent are free or offered at a reduced price).<sup>82</sup> The programs are continuing to increase their reach to low income children as this main goal of the legislation is met.

Also very important during the 1980s and 1990s were federal nutrition policies reflecting “increasing awareness of complex relationships between diet choices and health.”<sup>83</sup> Scientific research was continually linking better eating to improved health and the reduction of chronic diseases plaguing Americans.<sup>84</sup> It was estimated in the early 1990s that poor diet and physical inactivity caused approximately 500,000 deaths annually through the chronic diseases of cancer, cardiovascular diseases, and diabetes alone.<sup>85</sup> The conservative economic cost of diet-related diseases was estimated at over \$71 billion annually.<sup>86</sup> The Federal Government’s recommendations for healthy eating, the *Dietary Guidelines for Americans*, first published in 1980 by USDA and the United States Department of Health and Human Services (“HHS”) and revised every five years, reflected this scientific research linking diet to health.<sup>87</sup>

Not until the mid 1990s, however, did the federal school food programs begin to reflect these guidelines.<sup>88</sup> A 1992 study showed that school lunches and breakfasts, while meeting vitamin and mineral requirements, far exceeded the *Dietary Guidelines for Americans* recommendations for fat, saturated fat, and sodium.<sup>89</sup> In addition, the new Clinton administration’s Assistant Secretary of

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81. See FOOD & NUTRITION SERV., USDA, NATIONAL SCHOOL LUNCH PROGRAM: PARTICIPATION AND LUNCHES SERVED, at <http://www.fns.usda.gov/pd/slsummar.htm> (last updated Jan. 29, 2003) [hereinafter PARTICIPATION AND LUNCHES SERVED].

82. See FOOD & NUTRITION SERV., USDA, SCHOOL BREAKFAST PROGRAM PARTICIPATION AND MEALS SERVED, at <http://www.fns.usda.gov/pd/sbsummar.htm> (last visited Jan. 29, 2003) [hereinafter SCHOOL BREAKFAST PROGRAM PARTICIPATION].

83. Stephen R. Crutchfield & Jon Weimer, *Nutrition Policy in the 1990’s*, FOOD REV., Sept.-Dec. 2000, at 38, 43.

84. See *id.* at 41 (discussing increased participation in the improved school lunch program targeted at low-income youth, a group at risk for various nutrition-related diseases).

85. See generally J.M. McGinnis & W.H. Foege, *Actual Causes of Death in the United States*, 270 J. AM. MED. ASS’N. 2207 (1993) (discussing the causes of death in the United States).

86. ECON. RESEARCH SERV., USDA, AGRICULTURAL INFORMATION BULLETIN NO. 750, AMERICA’S EATING HABITS: CHANGES AND CONSEQUENCES 25 (Elizabeth Frazao ed., May 1999), available at <http://www.ers.usda.gov/publications/aib750/> (last visited Sept. 16, 2002). This estimate is considered low because only data for coronary heart disease, cancer, stroke and diabetes is computed. See *id.*

87. See CTR. FOR NUTRITION & POLICY PROMOTION, USDA, DIETARY GUIDELINES FOR AMERICANS 2000 (5th ed. 2000). The 2000 guidelines are: (1) let the Pyramid guide your food choices; (2) aim for a healthy weight; (3) be physically active every day; (4) choose a diet that is low in saturated fat and cholesterol and moderate in total fat; (5) choose a variety of grains daily, especially whole grains; (6) choose a variety of fruits and vegetables daily; (7) choose beverages and foods to moderate your intake of sugars; (8) choose and prepare foods with less salt; (9) if you drink alcoholic beverages, do so in moderation; (10) keep food safe to eat. *Id.*

88. See Crutchfield & Weimer, *supra* note 83, at 38.

89. See JOHN BURGHARDT & BARBARA DEVANEY, USDA, THE SCHOOL NUTRITION DIETARY ASSESSMENT STUDY: SUMMARY OF FINDINGS 8-9, 14-15 (1993), available at

Agriculture over school food programs, Helen Haas, a long time critic of high fat/low nutrient school lunches, began initiating change in 1994.<sup>90</sup>

Congress supported the USDA by passing the Healthy Meals for Americans Act of 1994 requiring that by July 1, 1996, school food programs had to provide meals which were consistent with the *Dietary Guidelines for Americans* in addition to meeting students' daily needs for calories and key nutrients in order to receive reimbursement for meals.<sup>91</sup> In 1994, USDA launched the School Meals Initiative for Healthy Children ("SMI") with a strategic goal of reaching the nutrition guidelines in school feeding programs.<sup>92</sup> This change in policy to reflect the *Dietary Guidelines for Americans* in the school food programs was extremely important. Poor eating habits established during childhood usually carry over to adulthood.<sup>93</sup> These eating habits in turn lead to the chronic diseases, rampant in the United States today, along with their inherent deaths, disabilities, and costs.<sup>94</sup> This was a major change in policy for the school food programs, but an essential one. We should not just serve food to children, but we should serve nutritious food. Food policy in school food programs was finally catching up to what the medical research had been telling us for years.

Unfortunately, a follow-up study during the 1998-1999 school year found only one in five elementary schools and one in seven secondary schools met the SMI standards for calories from fat in lunches actually chosen by and served to children.<sup>95</sup> Of importance, however, is the finding that students in eighty-two percent of elementary and ninety-one percent of secondary schools could have chosen lunches that met the guidelines (i.e. had less fat), but obviously chose to eat a less healthy lunch.<sup>96</sup>

Children's total diets in the 1990s echoed this less than ideal intake seen at the schools.<sup>97</sup> Children were eating too much fat, saturated fat, sodium, and

<http://www.fns.usda.gov/oane/MENU/Published/CNP/FILES/SNDA-sum.pdf>.

90. See DEMAS, *supra* note 11, at 24-25.

91. See Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, § 106, 108 Stat. 4699 (codified as amended at 42 U.S.C. § 1758 (2000)); Child Nutrition Act of 1966, Pub. L. No. 89-642, § 2, 80 Stat. 885, 885 (1966).

92. See DEMAS, *supra* note 11, at 25.

93. See Mark Lino et. al., *Report Card on the Diet Quality of Children*, NUTRITION INSIGHTS (USDA Center for Nutrition Policy and Promotion), Oct. 1998, at 1.

94. See *id.* (referring to the health risk children face as the result of a poor diet).

95. See OFFICE OF ANALYSIS, NUTRITION & EVALUATION, USDA, SCHOOL NUTRITION DIETARY ASSESSMENT STUDY II: SUMMARY OF FINDINGS - EXECUTIVE SUMMARY (2001), available at <http://www.fns.usda.gov/oane/MENU/Published/CNP/FILES/SNDAILfindsum.htm> (last updated Mar. 7, 2002).

96. See *id.*

97. See PHILIP GLEASON & CAROL SUITOR, USDA, REPT. NO. CN-01-CD2, CHANGES IN CHILDREN'S DIETS: 1989-1991 TO 1994-1996, XI-XVI (2001), at <http://www.fns.usda.gov/OANE/MENU/published/CNP/FILES/Changes.pdf> (describing the diets of school age children in the United States as of the mid-1990s); see also PHILIP GLEASON & CAROL SUITOR, FOOD FOR THOUGHT: CHILDREN'S DIETS IN THE 1990'S - POLICY BRIEF 3 (2001), at <http://www.mathematica-mpr.com/PDFs/childdiet.pdf> (last visited Nov. 11, 2002) [hereinafter FOOD FOR THOUGHT].

sugar.<sup>98</sup> A calorie increase from the early 1990s to 1995 was driven by an increase in foods and drinks high in added sugars with the average child eating twenty-five teaspoons of added sugars per day.<sup>99</sup> This increase in sugar generally came from an increased consumption of soda and sugared fruit drinks.<sup>100</sup> For example, males ages fourteen to eighteen increased consumption of soda from 1.7 to 2.6 servings a day between 1990 and 1995 while at the same time their consumption of sugared fruit drinks more than doubled.<sup>101</sup>

Dining out was also on an upward trend in the 1990s for children which meant foods higher in fat and saturated fat and lower in essential nutrients when compared to home cooked foods.<sup>102</sup> However, the most disturbing data, based on an index computed by USDA from a 1994 to 1996 food intake study, showed that as children got older, their overall diet progressively declined.<sup>103</sup> While thirty-five percent of children ages two to three had a good diet, only six percent of males ages fifteen to eighteen had a good diet.<sup>104</sup> It's easy to see that the diets of most children during the 1990s needed "substantial improvement."<sup>105</sup>

### III. FOOD POLICY IN THE NEW MILLENNIUM – THE CHALLENGE OF COMPETITIVE FOODS

#### A. *Successes and Challenges*

The dawn of a new century brings successes and challenges to the United States school food programs. The successes are many as seen in each child receiving food at breakfast and lunch rather than going hungry. In 2001, the USDA provided nearly 4.6 billion lunches per year of which fifty-seven percent were free or offered at a reduced price.<sup>106</sup> The USDA also provided 1.3 billion breakfasts of which eighty-three percent were free or offered at a reduced price.<sup>107</sup> "Faced with limited resources, one out of six Americans will seek the help of

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98. FOOD FOR THOUGHT, *supra* note 97, at 5, at <http://www.mathematica-mpr.com/PDFs/childdiet.pdf>.

99. *Id.*

100. *See id.*

101. *Id.* at 7.

102. *See* BIING-HWAN LIN ET AL., USDA, AGRICULTURAL ECONOMIC REPORT NO. 746, THE DIETS OF AMERICA'S CHILDREN: INFLUENCE OF DINING OUT, HOUSEHOLD CHARACTERISTICS, AND NUTRITION KNOWLEDGE 31 (1996), available at <http://www.ers.usda.gov/publications/aer746> (last visited Oct. 10, 2002).

103. *See* Lino, *supra* note 93, at 2. Diet quality is based on the Healthy Eating Index, computed on a regular basis by USDA based on ten different components. *See id.* at 1. Components 1 thru 5 measure the degree a child's diet conforms to USDA's Food Guide Pyramid serving recommendations for the five major food groups: grains, vegetables, fruits, milk, and meat. *See id.* Other components measure fat consumption, cholesterol, sodium and variety in the child's diet. *See id.*

104. *See id.* at 2.

105. *See id.*

106. *See* PARTICIPATION AND LUNCHES SERVED, *supra* note 81, at <http://www.fns.usda.gov/pd/slsummar.htm>.

107. *See* SCHOOL BREAKFAST PROGRAM PARTICIPATION, *supra* note 82, at <http://www.fns.usda.gov/pd/sbsummar.htm>.

some Government food assistance program.”<sup>108</sup> School breakfast and lunch meet this need for many children and are extremely important food assistance programs for children. The major goal and policy of providing low income children the opportunity to eat food at school has been met with the school food programs. Tremendous improvements have been made in this arena over the life of the program. This food security provided by school food programs is fundamental to children’s human dignity, growth, and survival.

However, significant policy challenges remain at the end of the century and start of the new millennium.<sup>109</sup> As explored above, federal nutrition policies and school food programs evolved in the 1980s and 1990s to reflect an increasing awareness of the relationship between diet and health.<sup>110</sup> Yet children are eating poorer and poorer diets and their declining health statistics are reflecting it.<sup>111</sup> A sampling of data reveals the situation as we enter the new millennium.

#### 1. *Children’s Eating Behaviors:*

- “Only 2 percent [sic] of school-aged children meet the Food Guide Pyramid’s serving recommendations for all five major groups.”<sup>112</sup>
- Children are heavy consumers of soda. Fifty-six percent of eight year olds to eighty-three percent of fourteen year old boys consume soda every day. Over one-third of teenage males consume more than three servings a day.<sup>113</sup>
- Children of all ages are shifting from milk products to soda and fruit drinks.<sup>114</sup> The decrease in milk consumption tended to be larger for females.<sup>115</sup>

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108. INTERAGENCY WORKING GROUP ON FOOD SEC. & FOOD SEC. ADVISORY COMM., U.S. ACTION PLAN ON FOOD SECURITY: SOLUTION TO HUNGER, at ii (1999).

109. See Crutchfield & Weimer, *supra* note 83, at 43.

110. See *id.*

111. See generally A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under “National School Lunch Program” link) (discussing the effect that competitive foods have on the school meal programs).

112. *Id.*

113. *Id.* This consumption data is echoed in United States production data which shows from 1970 to 1997, the production of regular, “sweetened sodas increased from 22.2 to 41.4 gallons per person per year, and the production of diet sodas increased from 2.1 to 11.6 gallons per person per year.” Marion Nestle, *Soft Drink “Pouring Rights”: Marketing Empty Calories to Children*, 115 PUB. HEALTH REP. 308, 310 (2000) (citing J.J. PUTNAM & J.E. ALLSHOUSE, USDA ECONOMIC RESEARCH SERVICE STATISTICAL BULLETIN NO. 939, FOOD CONSUMPTION, PRICES, AND EXPENDITURES 1970-97 (1997) and J.J. PUTNAM & J.E. ALLSHOUSE, USDA ECONOMIC RESEARCH SERVICE STATISTICAL BULLETIN NO. 965, FOOD CONSUMPTION, PRICES, AND EXPENDITURES 1970-97 (1999)). This means that on the average, enough soda is produced for every American of every age to drink 566 -12 ounce soft drinks per year, or just under 200 calories per day. See *id.*

114. A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under “National School Lunch Program” link).

115. See *id.*

## 2. *Children's Diet - Related Health and Cognition Concerns:*

- Obesity has reached epidemic proportions in the United States.<sup>116</sup>
- In 1999, an estimated thirteen percent of children aged six to eleven years and fourteen percent adolescents aged twelve to nineteen years were overweight.<sup>117</sup> Today there are nearly twice as many overweight children and almost three times as many overweight adolescents as there were in 1980.<sup>118</sup>
- Overweight children are more likely to become overweight adults.<sup>119</sup> In addition, diabetes, high blood lipids, high blood pressure, and orthopedic problems are all seen with increased frequency in overweight children.<sup>120</sup>
- Type II diabetes accounted for two to four percent of all childhood diabetes before 1992; by 1994, the rate had quadrupled to sixteen percent.<sup>121</sup>
- The most immediate consequence of being overweight as perceived by the children themselves is social discrimination.<sup>122</sup>
- Nutritional deficiencies (from inadequate diet or poor choices leading to a decrease in nutrients) influence a child's "behavior, ability to concentrate, and [ability] to perform complex tasks."<sup>123</sup>

## 3. *Increase in Soft Drinks in Children's Diets*

It is believed that soft drinks are having a significant impact on the nutrition and health of children today.<sup>124</sup> They pose health risks both because of what they contain – sugar and caffeine – and what they replace in the diet.<sup>125</sup> The following is some data regarding soft drinks in children's diets:

- Soft drinks are the single largest source of sugar in the American diet.<sup>126</sup>

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116. See U.S. DEPT. OF HEALTH & HUMAN SERV., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001 15 (2001), available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf> (last updated Sept. 13, 2002) [hereinafter CALL TO ACTION].

117. *Id.* at 11.

118. *Id.*

119. *Id.* at 8.

120. *Id.*

121. A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under "National School Lunch Program" link).

122. CALL TO ACTION, *supra* note 116, at 8, available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

123. CENTER ON HUNGER, POVERTY AND NUTRITION POLICY, TUFTS UNIVERSITY, STATEMENT ON THE LINK BETWEEN NUTRITION AND COGNITIVE DEVELOPMENT IN CHILDREN 1998, at <http://nutrition.tufts.edu/publications/hunger/pub/statement.shtml> (last updated Aug. 1, 2002) [hereinafter CENTER ON HUNGER, POVERTY AND NUTRITION POLICY].

124. See generally MICHAEL F. JACOBSON, LIQUID CANDY: HOW SOFT DRINKS ARE HARMING AMERICA'S HEALTH, at [http://www.cspinet.org/sodapop/liquid\\_candy.htm](http://www.cspinet.org/sodapop/liquid_candy.htm) (last visited Sept. 19, 2002) (reviewing the intake and health effects of soft drink consumption).

125. *Id.* at 6.

126. *Id.* at 4.

- Soft drinks provide many calories. For the average thirteen to eighteen year old male who drinks soft drinks, they provide an amazing nine percent of total calories.<sup>127</sup>
- Twenty years ago, boys consumed more than twice as much milk as soft drinks. They now consume twice as much soda as milk.<sup>128</sup> Girls also consume twice as much soda as milk.<sup>129</sup>
- Consumption of sugar-sweetened drinks is associated with obesity in children.<sup>130</sup>
- Consumption of soft drinks may also be associated with osteoporosis, tooth decay, heart disease, and kidney stones.<sup>131</sup>
- Caffeine in soft drinks cannot be detected as a flavor, and is more about addiction.<sup>132</sup> “The marketing parallels between nicotine and caffeine are pretty stunning,” says Roland Griffiths, who conducted a study funded by the National Institute on Drug Abuse.<sup>133</sup> “Both are psychoactive drugs. Until recently, cigarette companies denied that nicotine is addicting and said it was added merely as a flavor enhancer for cigarettes. The same is now said for caffeine [in soft drinks].”<sup>134</sup>

#### 4. *School Food Program’s Contribution to Children’s Diets*

While children’s diets and health are declining,<sup>135</sup> research shows that the school food programs are making an “important contribution to the nutrition of school-aged children.”<sup>136</sup> For example:

- Children who participate in school lunch have higher daily intakes of many nutrients.<sup>137</sup>
- Children who eat school lunch have substantially lower intakes of added sugars.<sup>138</sup>

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127. *Id.*

128. *Id.* at 5.

129. *Id.*

130. See David S. Ludwig et al., *Relation Between Consumption of Sugar-Sweetened Drinks and Childhood Obesity: A Prospective, Observational Analysis*, 357 THE LANCET 505, 505 (2001).

131. See JACOBSON, *supra* note 124, at 6-8, at [http://www.cspinet.org/sodapop/liquid\\_candy.htm](http://www.cspinet.org/sodapop/liquid_candy.htm).

132. See Press Release, John Hopkins Medical Institutions, Caffeine in Colas: “The Real Thing” Isn’t the Taste (Aug. 14, 2000), at <http://www.hopkinsmedicine.org/press/2000/august/000814.htm> (last visited Sept. 19, 2002).

133. *Id.*

134. *Id.*

135. See CALL TO ACTION, *supra* note 116, at 11, available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

136. A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under “National School Lunch Program” link).

137. *See id.*

138. *Id.*

- Children who ate school lunch drank three times as much milk at lunchtime, and only half as much soda compared to those who did not eat school lunch.<sup>139</sup>
- Children who participate in the School Breakfast Program have significantly higher standardized achievement test scores than eligible non-participants.<sup>140</sup> They also have significantly reduced absence and tardiness rates.<sup>141</sup>

### B. *Competitive Foods*

While school food programs are contributing to better nutrition for participants, what's happening in the halls outside the school food cafeteria is just the opposite. It's called "competitive foods."<sup>142</sup> "[C]ompetitive foods undermine the nutrition integrity of the programs and discourage participation."<sup>143</sup> They are one of the greatest culprits to children's poor diets and increasing health concerns.<sup>144</sup>

#### 1. *The Changing School Environment*

Most schools now provide a variety of food options from vending machines to snack bars available to students at younger ages than ever before.<sup>145</sup> The numbers are staggering: "[f]orty-three percent of elementary schools, 73.9% percent of middle schools, and 98.2% of senior high schools have either a vend-

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139. FOOD FOR THOUGHT, *supra* note 97, at 8, at <http://www.fns.usda.gov/OANE/MENU/published/CNP/FILES/Changes.pdf> (briefing policy for the Food and Nutrition Service of the USDA).

140. CENTER ON HUNGER, POVERTY AND NUTRITION POLICY, *supra* note 123, at <http://nutrition.tufts.edu/publications/hunger/pub/statement.shtml>.

141. *Id.*

142. See A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under "National School Lunch Program" link) (defining "competitive foods"). The USDA also defines two categories of competitive foods:

1) *Foods of minimal nutritional value ("FMNV")*. These foods belong to specific categories that are described in Appendix B of the regulations for the National School Lunch Program. Current program regulations prohibit the sale of FMNV in the food service areas during the school meal periods. The regulations do not prohibit their sale outside the food service area at any time during the school day. States and local school food authorities may impose additional restrictions.

2) *All other foods offered for individual sale*. Regulations do not prohibit the sale of these foods at any time during the school day anywhere on the school campus, including the school food service areas. These foods range from second servings of foods that are part of the reimbursable school meal to foods that students purchase in addition to or in place of a school meal, such as ala carte sales and other foods and beverages purchased from vending machines, school stores, and snack bars.

*Id.*

143. *Id.*

144. *See id.*

145. *See id.*

ing machine, school store, canteen, or snack bar.”<sup>146</sup> More than seventy percent of these schools “allow students to purchase these items during school lunch periods.”<sup>147</sup> And of course, they are not selling healthy foods. A study in twenty-four California middle schools found 88.5% of the student store inventory was high in fat and/or sugar.<sup>148</sup>

In addition, soft drink companies circumvent rules (which may not be followed anyway) by donating soft drinks for free distribution during school meals, prompting Senator Leahy to say “Nutrition doesn’t go better with Coke or Pepsi at lunchtime .... [T]his is a loophole ... that hurts our children .... [I]t’s not unlike the old days when the tobacco companies would hand out free cigarettes to kids.”<sup>149</sup>

These sales are occurring because “cash-strapped school administrators accept, sometimes solicit, and increasingly defend commercializing activities, such as selling Coca Cola to students, as means of making up budget shortfalls and financing everything from computers and musical instruments to art supplies and staff training.”<sup>150</sup> These need-based decisions not only affect the health of children, they “alter the schoolhouse environment and influence how students are taught and the ethical priorities they see supported.”<sup>151</sup>

This occurrence is accelerated because “food companies view school-children as an attractive market, and use every possible means to promote their products to this young, impressionable, and captive audience.”<sup>152</sup> The overall strategy is to establish “brand loyalty as early in life as possible.”<sup>153</sup> The dollars spent on marketing are enormous. The National Cancer Institute spends about \$1 million annually on the media component of its 5-A Day campaign to encourage greater consumption of fruits and vegetables.<sup>154</sup> In comparison, the soft drink

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146. Howell Wechsler et al., *Food Service and Foods and Beverages Available at School: Results from the School Health Policies and Programs Study 2000*, 71 J. SCH. HEALTH 313, 321 (2001), available at 2001 WL 16641086.

147. *Id.*

148. See Marianne B. Wildey et al., *Fat and Sugar Levels are High in Snacks Purchased from Student Stores in Middle Schools*, 100 J. AM. DIETETIC ASS’N 319, 321 (2000).

149. Nestle, *supra* note 113, at 315 (citing *Lawmakers are Ready to Enlist in the Cola Wars*, NUTRITION WK., May 14, 1999, at 6.).

150. ALEX MOLNAR & JOSEPH REAVES, ARIZ. STATE UNIV., BUY ME! BUY ME!: THE FOURTH ANNUAL REPORT ON TRENDS IN SCHOOLHOUSE COMMERCIALISM YEAR 2000-2001, at 2 (2001), available at <http://www.asu.edu/educ/eps/CERU/> (available under “CERU\_2001\_Annual\_Repo+” link).

151. *Id.*

152. Nestle, *supra* note 113, at 309. Nestle lists the many marketing strategies of soft drink companies targeted to children as:

- 1) Television advertising; 2) Internet advertising; 3) Internet interactive computer games; 4) Toys, clothing, and other items with logos; 5) Discount card, coupons; 6) Telephone cards; 7) Celebrity endorsements; 8) Magazine advertising; 9) Product placement in movies; 10) Supermarket placements; 11) Fast food chain tie-ins; 12) Prizes.

*Id.* at 311.

153. *Id.* at 310.

154. Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 854 (2000).

industry spends more than six hundred times that on advertising each year.<sup>155</sup> Coke alone spent \$277 million in 1997.<sup>156</sup> With this bombardment, is it any wonder children are choosing less healthy foods?

## 2. *The “Pouring Rights” Contract*

Of gravest concern is one of the most common situations in the schools – the exclusive agreement.<sup>157</sup> Often called “pouring rights” contracts, schools contract with soft drink companies.<sup>158</sup> The soft drink producer’s goal is creating brand loyalty “among young people who have a lifetime of soft drink purchases ahead of them.”<sup>159</sup> Thirty-eight percent of elementary schools, 50.4 percent of middle schools, and 71.9 percent of senior high schools have a contract that gives a company rights to sell soft drinks at the school.<sup>160</sup> About two hundred have exclusive “pouring contracts” with either Coca-Cola or PepsiCo.<sup>161</sup> Money is generally collected by the schools at the beginning of the contract in addition to a percentage of sales.<sup>162</sup> This can “give educators a strong incentive to encourage students to increase their purchases of soft drinks.”<sup>163</sup>

In one of the most notorious “pouring rights” deals, a Colorado district “relinquished its Pepsi vending machines when it signed an \$8 million, 10-year agreement with Coca-Cola.”<sup>164</sup> The Colorado Springs school district urged principals to increase sales of Coke products “to keep the profits flowing from vending machine contracts.”<sup>165</sup>

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155. *Id.*

156. *Soft Drink Ad Spending Rises Slightly in 1997: Coke Down, Pepsi and Cadbury Up*, BEVERAGE DIG., Apr. 24, 1998, available at <http://www.beverage-digest.com/editorial/980424.html> (last visited Sept. 19, 2002).

157. See MOLNAR & REAVES, *supra* note 150, at 7, available at <http://www.asu.edu/educ/eps/CERU/> (available under “CERU\_2001\_Annual\_Repo+” link) (stating that exclusive agreements are agreements between schools and corporations that give corporations the exclusive right to sell and promote their goods and/or services in the school or school district; in return for exclusive agreements, the district or school receives a percentage of the profits derived from the arrangement; exclusive agreements may also entail granting a corporation the right to be the sole supplier of a product or service and thus associate its products with activities such as high school basketball programs).

158. Nestle, *supra* note 113, at 310.

159. *Id.* at 310-11.

160. Wechsler, *supra* note 146, at 321, available at 2001 WL 16641086.

161. Paul King, *New Coca-Cola Marketing Pours It on for Education*, NATION’S RESTAURANT NEWS, Mar. 26, 2001, at 20, available at 2001 WL 9155360.

162. See NORTH CAROLINA SCH. NUTRITION ACTION COMM., SOFT DRINKS AND SCHOOL-AGE CHILDREN: TRENDS, EFFECTS, SOLUTIONS 4 (Sept. 2001), available at <http://www.nutritionnc.com/SoftDrinkFinal.pdf>.

163. *Id.*

164. Nestle, *supra* note 113, at 311 (citing C.L. Hays, *Be True to Your Cola: Rah! Rah! Battle for Soft-Drink Loyalties Moves to Public Schools*, N.Y. TIMES, Mar. 10, 1998, at D1).

165. Marc Kaufman, *Fighting the Cola Wars in Schools*, WASHINGTON POST, Mar. 23, 1999, at Z12.

Given the dollars to be made (estimated at \$750 million nationwide),<sup>166</sup> it can be understood why many school administrators find it convenient to avoid the health and ethical implications.<sup>167</sup> As expressed by one Ohio administrator:

We have worried about whether we're forcing students to pay for their education through the purchase of soft drinks. In the end, though, we have decided that is not the case, because each student has the option to buy or not to buy...Americans drink 13.15 billion gallons of carbonated drinks every year – which means somebody is making a lot of money. Why shouldn't schools get their share? In the end, everyone wins: the students, the schools, the community. And for once, even taxpayers get a break.<sup>168</sup>

Many disagree with such a view however. They are

[d]eeply troubled by a broad range of issues related to the length, exclusivity, and financial terms of the contracts, to the lack of adequate federal oversight of foods sold in competition with school meals, and to the widespread failure of schools to enforce even the weak rules that do exist. They also viewed the contracts as threatening the economic viability of school food service operations, the integrity of the schools' educational mission, and--not least--the children's health.<sup>169</sup>

The loudest protests, however, often come from the competing food and soft drink companies objecting that the contracts prevent “freedom of choice” in the marketplace.<sup>170</sup> As one panelist discussing school food stated during a New York state conference, “publicly supported schools should not dictate what students eat when parents and children want something else . . . no other system outside of prison does this.”<sup>171</sup>

These agreements have received increasing media attention over the past years amid growing criticism over the inroads made into schools by Coca-Cola and other soda companies.<sup>172</sup> As a result, Coca-Cola recently announced a change of corporate strategy away from the exclusive “pouring rights” contracts it had pursued to allowing competing drinks such as juice, water, and vitamin-rich products into school vending machines where Coca-Cola is the supplier.<sup>173</sup> In addition, they urged “local bottlers to let schools limit sales of soft drinks during lunch....”<sup>174</sup> This announcement followed on the tails of the USDA criticiz-

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166. See Kim Severson, *Oakland Schools Ban Vending Machine Junk Food*, S.F. CHRON., Jan. 16, 2002, at A1, A18, available at <http://sfgate.com/search> (available by searching under Archives).

167. See Nestle, *supra* note 113, at 38.

168. *Id.* at 312-13 (citing R.L. Zorn, *The Great Cola Wars: How one District Profits from the Competition for Vending Machines*, AM. SCH. BOARD J., Feb. 1999, at 31).

169. *Id.* at 313.

170. *Id.* at 309.

171. Nestle, *supra* note 113, at 313.

172. See MOLNAR & REAVES, *supra* note 150, at 2 fig. 1, 8, available at <http://www.asu.edu/educ/eps1/CERU/> (available under “CERU\_2001\_Annual\_Repo+” link) (noting that media coverage of soda companies contracting with schools increased from 1990 to 2000, but declined in 2000 to 2001).

173. *Id.* at 7-8.

174. *Id.* at 7.

ing schools for raising money by selling sodas and snacks which sends mixed messages about nutrition.<sup>175</sup>

### 3. *History of Competitive Foods Policy*

Competitive foods were first addressed in 1970 when Congress passed an amendment to The Child Nutrition Act to regulate foods sold in competition to the school lunch program.<sup>176</sup> Basically, competitive foods were not allowed. But, vending machines and snack shops gradually inched their way into the schools as the schools recognized the profitability of competitive foods.<sup>177</sup> By 1972, Congress had amended the Act eliminating any regulation of competitive foods.<sup>178</sup> “Profit had triumphed over nutrition.”<sup>179</sup>

Amid public concern over the nature of the food sold in the vending machines, Congress again amended the Act to direct the USDA to regulate the service of food in competition with the school food programs.<sup>180</sup> The legislative debates conveyed an unmistakable concern that “junk foods,” notably various types of candy bars, chewing gum, and soft drinks, not be allowed to compete in participating schools.<sup>181</sup> However, in its final form, the statute permitted proceeds from the sale of competitive foods in food service areas during meal periods to “inure to the benefit of the schools or of organizations of students.”<sup>182</sup>

Following this last congressional amendment, final regulations were issued in 1980 (after two years of a contentious comment period), which prohibited the sale of Foods with Minimal Nutritional Value (“FMNV”) anywhere in the school from the beginning of the school day until after the last meal period.<sup>183</sup> These regulations were soon overturned in *National Soft Drink Association v. Block*, which stated that the Secretary of Agriculture had “exceeded his rule making authority when he promulgated the time and place regulations barring the sale of competitive foods throughout the school and until after the end of the last service of the day.”<sup>184</sup> The court believed that Congress intended to prohibit competitive foods only in the food service area during meal times.<sup>185</sup>

The USDA’s regulations once again changed and are still used today.<sup>186</sup> The regulations require state agencies and local school food authorities to estab-

175. See REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under “National School Lunch Program” link).

176. Act of May 14, 1970, Pub. L. No. 91-248, § 8, 84 Stat. 207, 212-13 (1970).

177. Nat’l Soft Drink Ass’n v. Block, 721 F.2d 1348, 1350 (D.C. Cir. 1983).

178. Act of Sept. 26, 1972, Pub. L. No. 92-433, § 7, 86 Stat. 724, 729 (1972).

179. *Block*, 721 F.2d at 1350.

180. See National School Lunch Act and Child Nutrition Amendments of 1977, Pub. L. No. 95-166, § 17, 91 Stat. 1325 (1977) (codified as amended at 42 U.S.C. § 1779(b) (2000)).

181. See H.R. REP. NO. 91-81, at 3 (1969) reprinted in 1970 U.S.C.C.A.N. 3014, 3016; see also S. REP. NO. 95-277, at 17 (1977) reprinted in 1977 U.S.C.C.A.N. 3555, 3573.

182. National School Lunch Act and Child Nutrition Act of 1977 § 17, 42 U.S.C. § 1779(b).

183. See National School Lunch Program and School Breakfast Program, 45 Fed. Reg. 6758 (Jan. 29, 1980) (to be codified at 7 C.F.R. §§ 210.11, 220.12).

184. *Block*, 721 F.2d at 1353.

185. *Id.* at 1352.

186. See 7 C.F.R. §§ 210.1-210.31 (2001).

lish rules for the sale of competitive foods “as are necessary,” but at a minimum they must prohibit the sale of foods of minimal nutritional value in the food service area during lunch or breakfast periods.<sup>187</sup> The regulations do not specify when it is “necessary” to establish rules, nor do they require sanctions.<sup>188</sup>

The battle did not end, and in 1994, Senator Leahy in Senate hearings for The Healthy Meals for Healthy Americans Act of 1994 expressed “[c]oncern that some local officials were misled by Coca-Cola or other bottlers into believing that they had to allow soda machines in their schools.”<sup>189</sup> He added that “good eating habits learned as a child translate into a longer and healthier life. Children who buy soda from vending machines are less hungry at lunchtime . . . [C]ongress should put the health of children above corporate profits.”<sup>190</sup>

Nevertheless, the opposition to a stronger, more restrictive competitive foods statute won, and the Healthy Meals for Healthy Americans Act of 1994 meagerly asked USDA to provide model language for states to provide to schools regarding competitive foods.<sup>191</sup> Most states follow the USDA regulations<sup>192</sup> which only forbid FMNV in the cafeteria during breakfast or lunch periods and do not address competitive foods anywhere else on the school campus or any other time.<sup>193</sup> Only a few states have adopted significant competitive foods rules that are more restrictive.<sup>194</sup> The end result of “[t]he statute and regulations currently in effect allow schools to offer competitive foods in ways that can undermine the effectiveness of the school meal programs.”<sup>195</sup>

Realizing this, Congress requested a report from USDA on competitive foods stating, “The [USDA] invests a significant amount of money in the school nutrition programs. The Committee is concerned about the effect foods sold in competition with the school meal programs may be having on the integrity of the program[s].”<sup>196</sup> The USDA released its report to Senator Harkin, Chairman of the Committee on Agriculture, Nutrition and Forestry on January 12, 2001.<sup>197</sup>

In its report to congress, USDA outlined the following impact of competitive foods on school food programs:

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187. National School Lunch Program, 7 C.F.R. § 210.11(b) (2002); School Breakfast Program, 7 C.F.R. § 220.12(a) (2002).

188. See 7 C.F.R. § 210.11 (2002); 7 C.F.R. § 220.12 (2002).

189. S. REP. NO. 103-300, at 8 (1994).

190. *Id.* at 9.

191. See Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, § 203, 108 Stat. 4699 (1994).

192. See FOOD & NUTRITION SERV., USDA, STATE COMPETITIVE FOOD POLICIES, at [http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/state\\_policies\\_2002.pdf](http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/state_policies_2002.pdf) (last updated Jan. 31, 2002) [hereinafter COMPETITIVE FOOD POLICIES].

193. See 7 C.F.R. § 220.11(b) (2002).

194. See COMPETITIVE FOOD POLICIES, *supra* note 192, at [http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/state\\_policies\\_2002.pdf](http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/state_policies_2002.pdf).

195. A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under “National School Lunch Program” link).

196. H.R. REP. NO. 106-619, at 102 (2000), available at 2000 WL 639493.

197. See generally A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under “National School Lunch Program” link) (discussing the effect that competitive foods have on the school meal programs).

- *Competitive foods have diet-related health risk.* With no regulated nutrition standards, competitive foods are relatively low in nutrient density and are relatively high in fat, added sugars and calories.<sup>198</sup>
- *Competitive foods may stigmatize participation in school meal programs....* Since only children with money can purchase competitive foods, children may perceive that school meals are primarily for poor children rather than nutrition programs for all children. Because of this perception, the willingness of low-income children to accept free or reduced price meals and non-needy children to purchase school meals may be reduced.<sup>199</sup>
- *Competitive foods may affect the viability of school meal programs...* Declining participation results in decreased cash and commodity support from USDA for school meals.<sup>200</sup>
- *Competitive foods convey a mixed message.* When children are taught in the classroom about good nutrition and the value of healthy food choices but are surrounded by vending machines, snack bars, school stores, and a la carte sales offering low nutrient density options, they receive the message that good nutrition is merely an academic exercise that is not supported by the school administration and is therefore not important to their health or education.<sup>201</sup>

#### 4. *Professional and Governmental Organizations on Competitive Foods*

In recent years, many professional and governmental organizations have joined USDA in their position on competitive foods, and have drafted formal positions themselves on the issue. The Center for Science in the Public Interest submitted a white paper urging tighter regulations regarding the sale of foods of low nutrient value in schools.<sup>202</sup> The American School Food Service Association's position on competitive foods urged tighter controls.<sup>203</sup> In addition, they conceptualized the term "Nutrition Integrity" as "a guaranteed level of performance that assures that all foods available in school for children are consistent with Recommended Dietary Allowances and the Dietary Guidelines for Americans and, when consumed, contribute to the development of lifelong, healthy eating habits."<sup>204</sup>

The American Dietetic Association in its 2000 position paper supported a nutrition integrity policy and school policy which "create an overall school environment with learning experiences that enable students to develop lifelong

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198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. CITIZEN COMM. ON SCH. NUTRITION, CTR. FOR SCI. IN THE PUB. INTEREST, WHITE PAPER ON SCHOOL LUNCH NUTRITION (1990) (promoting regulations regarding competitive foods).

203. WIS. DEP'T OF PUB. INSTRUCTION, COMPETITIVE FOODS AND FOODS OF MINIMAL NUTRITIONAL VALUE 3 (Oct. 2001), *available at* <http://www.dpi.state.wi.us/dpi/dfm/fns/pdf/competve.pdf>.

204. *Id.* at 1.

healthful eating habits.”<sup>205</sup> The National Association of State Boards of Education recommends that elementary school students not have access to food or beverages in vending machines.<sup>206</sup> The recommendation for middle and high schools is either: 1) no access during school hours or 2) no access until thirty minutes after the end of the last lunch period.<sup>207</sup>

According to the Ohio American Academy of Pediatrics Statement on Soft Drink Contracts in Schools:

Current childhood diet and exercise patterns will make the next generation the most overweight and least fit in this country’s history . . . Soft drink contracts are not ‘free’ money. Every year, American healthcare costs us \$1 trillion dollars. Of this staggering amount, \$100 billion can be directly tied to obesity.<sup>208</sup>

The FDA and National Institute of Health (“NIH”) objectives for improving health, *Healthy People 2010*, calls for an increase in “the proportion of children and adolescents aged 6 to 19 years whose intake of meals and snacks at school contributes to good overall dietary quality.”<sup>209</sup> The main purpose of this particular objective is to “establish an environment in schools that will encourage a good overall diet and, therefore, contribute to learning readiness as well as to short- and long-term disease prevention and health promotion.”<sup>210</sup>

The Centers for Disease Control and Prevention (“CDC”) published guidelines with seven recommendations for ensuring a quality nutrition program in schools of which the overarching recommendation is to “adopt a coordinated school nutrition policy that promotes healthy eating through classroom lessons and a supportive school environment.”<sup>211</sup>

The Surgeon General in his *Call to Action to Prevent and Decrease Overweight and Obesity* recommends eleven actions, two of which include:

ensure that healthy snacks and foods are provided in vending machines, school stores, and other venues within the school’s control; prohibit student access to vending machines, school stores and other venues that compete with healthy school

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205. *Local Support for Nutrition Integrity in Schools – Position of ADA*, J. AM. DIETETIC ASS’N 108, 110 (2000).

206. See NATIONAL ASS’N OF STATE BDS. OF EDUC., FIT, HEALTHY AND READY TO LEARN: A SCHOOL HEALTH POLICY GUIDE, at <http://www.nasbe.org/healthyschools/fithealthy.mgi> (last visited Sept. 23, 2002).

207. See *id.*

208. Statement, American Academy of Pediatrics, Ohio Chapter, Ohio AAP Statement on Soft Drink Contracts in Schools, available at <http://www.ohioaap.org/softdrinks.htm> (last updated Feb. 21, 2001).

209. FDA & NIH, HEALTHY PEOPLE 2010: NUTRITION AND OVERWEIGHT 19-40, available at <http://www.health.gov/healthypeople/document/pdf/volume2/19Nutrition.pdf> (last visited Oct. 12, 2002).

210. Nestle, *supra* note 113, at 308.

211. CDC, GUIDELINES FOR SCHOOL HEALTH PROGRAMS TO PROMOTE LIFELONG HEALTHY EATING, MORBIDITY AND MORTALITY WEEKLY REPORT (June 14, 1996), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/0042446.htm>.

meals in elementary schools and restrict access in middle, junior, and high schools.<sup>212</sup>

### 5. *What Can Be Done?*

In January of 2001, the USDA asked Congress to work with them “to forge a national nutrition policy” while stating that “an effective competitive foods policy had been constrained by current legislation.”<sup>213</sup> The USDA asked Congress to consider seven actions, of which the first is to “strengthen the statutory language to ensure that all foods sold or served anywhere in the school during the school day meet nutrition standards.”<sup>214</sup>

Senator Leahy introduced legislation on April 6, 2001 to give the USDA greater authority over the sale of competitive foods in schools.<sup>215</sup> In introducing the legislation, he stated:

I am tired of major soft drink companies trying to take school lunch money away from children.... For schools participating in the national school lunch program I want the vending machines turned off during lunch on all school grounds – it is that simple.... Children don't vote, children don't hand out large sums of PAC money, children don't hire expensive lobbyists. But I have always put the welfare of children ahead of corporate profits, and I always will.<sup>216</sup>

In the House of Representatives, Maurice Hinchey of New York introduced legislation on June 12, 2001 giving authority to the USDA to regulate all foods and beverages sold “throughout the entire school, including the school grounds, until the end of the school day” in all schools that participate in school food programs.<sup>217</sup> Both pieces of legislation are still in committee and both are expected to meet strong resistance from groups such as the National PTA, the National School Boards Association and soft-drink companies.<sup>218</sup> Supporting the legislation will be groups such as the American School Food Service Association.<sup>219</sup> An association representative, Barry Sackin, stated, “Certainly these [overweight] kids ... are going to pose a burden on our health care system in 20, 30, or 40 years ... [and] [t]herefore it’s an important public policy debate.”<sup>220</sup>

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212. CALL TO ACTION, *supra* note 116, at 20, available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

213. A REPORT TO CONGRESS, *supra* note 15, available at <http://www.fns.usda.gov/cnd/> (available under “National School Lunch Program” link).

214. *Id.*

215. See Better Nutrition for School Children Act of 2001, S. 745, 107th Cong. (2001).

216. 147 CONG. REC. S3711, S3756 (daily ed. Apr. 6, 2001) (statement of Sen. Leahy).

217. Better Nutrition for School Children Act of 2001, H.R. 2129, 107th Cong., § 2(a)(1) (2001).

218. Paul King, *USDA Enlists Congress in Fighting Competition from “Junk Food” in Schools*, NATION’S RESTAURANT NEWS, Feb. 19, 2001, at 24.

219. See *California Lightens Up on Competitive Foods in Schools*, NUTRITION WK., Sept. 3, 2001, at 3.

220. *Id.*

In the meantime, states are getting into the act with California passing and the governor signing legislation on competitive foods in schools in October, 2001.<sup>221</sup> The California bill originally targeted the sale of high-fat and high-sugar food items in elementary and middle schools throughout the entire school day and in high schools after lunch.<sup>222</sup> After lobbying from school administrators, the food industry, and the California School Food Service Association,<sup>223</sup> the bill was amended to:

- Prohibit the sale of individual food items with more than thirty-five percent of calories from fat, more than ten percent of calories from saturated fat, and more than thirty-five percent of total weight composed of sugar at elementary schools.<sup>224</sup>
- In middle schools, carbonated beverages can not be sold from one-half hour before school until the end of the last lunch period.<sup>225</sup>
- High schools are exempt from the restrictions, but the bill does establish a three-year pilot program to test the concept in ten high schools or combination of other schools voluntarily.<sup>226</sup>

Comments express the concern this issue is generating. California Senator Martha Escutiam stated, “We have a crisis on our hands,” noting that in some California school districts as many as fifty percent of school children are overweight.<sup>227</sup> “It can’t help when a child is eating chips and soda at 8 in the morning.”<sup>228</sup> In Texas, Jaime L. Capelo Jr., who introduced competitive foods legislation, stated “I can understand why school districts go in search of extra resources . . . but it’s shameful when they obtain additional resources through contracts with soda companies with little or no regard to the health of their students.”<sup>229</sup>

At the state and local levels, policy leaders started taking action. The San Francisco Unified School District was one of the first large school districts to pass a resolution banning certain soft drink and snack food contracts.<sup>230</sup> In 2002,

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221. See CAL. EDUC. CODE § 49430 (West Supp. 2002).

222. See *School Budgets Too Addicted to Vending Machines*, MODESTO BEE, Aug. 29, 2001, at B6 (stating that “[t]he original bill called for a total ban on soda and junk food at elementary and middle schools and a partial ban at high schools.”).

223. See *id.* (stating that “retailers, along with organizations that represent school administrators and food service works, [had] all but killed [the California school food nutrition bill].”).

224. CAL. EDUC. CODE § 49431(b)(2)(A)-(C) (West Supp. 2002).

225. *Id.* § 49431(c).

226. *Id.* § 49433.7.

227. *States Look to Reduce Childhood Obesity by Cutting Down on Snacks*, THE FOOD INST. REP., Sept. 17, 2001, at 9.

228. Greg Winter, *States Try to Limit Sales of Junk Food in School Buildings*, N.Y. TIMES, Sept. 9, 2001, at 1.

229. *Id.*

230. San Francisco Unified Sch. Dist., *The Commercial-Free Schools Act*, Amendment to Resolution No. 95-25A6 (1999), available at <http://www.newrules.org/info/sanfran.html> (last visited Nov. 18, 2002). The Act states: “[T]he San Francisco Unified School District will enter no agreements with vendors to purchase exclusive district-wide access to student customers for soft drinks or snack foods purchased by students in school as such arrangements may imply that the school endorses those products.” *Id.*

the Oakland School District adopted a new food policy which “includes an all-out ban on the sale of sugary drinks and candy in vending machines.”<sup>231</sup> Considered “groundbreaking,” the next step for the district will be “making the new nutrition policy work.”<sup>232</sup>

But by far the largest success to date at the local level is the ban on the sale of sodas in all 677 schools of the Los Angeles Unified School District, which occurred with the passage of a resolution in August 2002.<sup>233</sup> These actions in large school districts of California pave the way for school districts across the country to eliminate competitive foods in the school environment.

Standing with 870 cans of soda (the amount consumed yearly by the average teenage male), the director of the Maine Bureau of Health launched a media campaign urging Maine families to cut back on their soda consumption.<sup>234</sup> Citing 5,780 teaspoons of sugar consumed per year by soda drinking teenagers as a major contributor to the obesity epidemic, the director declared, “enough is enough.”<sup>235</sup>

All of these efforts are essential and more must be forthcoming. A stand must be taken on unhealthy foods and especially competitive foods which undermine the health of this nation’s children and the purpose of the National School Foods Programs, which is “to safeguard the health and well-being of the

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231. See Severson, *supra* note 166, available at <http://sfgate.com/search> (available by searching under Archives). The nutrition policy states:

All food served on school district property, including food sold by the Food Services Department, through vending machines, and by outside and student sales, shall meet nutritional standards established by the Food Services Department . . .

Vending accessible to students shall not dispense sodas, drinks that contain caffeine or a high concentration of sugar, candy, or similar products during school hours . . .

The District shall exercise control over all vending machines on its property and their locations, contents, and hours of operation. No District contracts with vending companies shall permit advertising of food or drink.

Oakland Unified Sch. Dist., Proposed Nutrition Policy, available at <http://www.cfpa.net/obesity/OUSDproposednutritionpolicy.htm> (last visited Nov. 19, 2002).

232. Severson, *supra* note 166, available at <http://sfgate.com/search> (available by searching under Archives).

233. Erika Hayasaki, *Schools to End Soda Sales*, L.A. TIMES, Aug. 28, 2002, at B1. The resolution states:

Resolved, that effective January 2004, during, and until one half hour after the end of the school day at all sites accessible to students shall be: fruit based drinks that are composed of no less than 50 percent fruit juices and have no added sweeteners; drinking water; milk, including, but not limited to, chocolate milk, soy milk, rice milk, and other similar dairy or nondairy milk, and electrolyte replacement beverages that do not contain more than 42 grams of added sweeteners per 20 ounce serving.

Los Angeles Unified Sch. Dist., Motion to Promote Healthy Beverage Sales in LAUSD, available at [http://departments.oxy.edu/uepi/cfj/motion\\_to\\_promote\\_healthy\\_bevera.htm](http://departments.oxy.edu/uepi/cfj/motion_to_promote_healthy_bevera.htm) (last visited Nov. 18, 2002).

234. Press Release, Maine Department of Human Services., State Calls on Maine Families to Cut Back on Soda (Oct. 22, 2002) (on file with author).

235. *Id.*

Nation's children."<sup>236</sup> This purpose is still the most important agenda the National School Food Program can accomplish. It is also one of the most important agendas for this nation.

The history of the school food programs shows policy has been successful in the past in dealing with the issues of the time. Each policy usually followed a few years after the physical and social science introduced the need. For example, in the early years, this meant getting food into the mouths of hungry children, especially low income children. It took almost twenty-five years for the programs to really meet the needs of the needy, but today millions of children depend on and receive nutritious meals at school which are likely the best, and maybe only meals they receive.

At the end of the last century, the policy and actions of the school food programs expanded and recognized the interrelationship of diet to health, especially chronic diseases, by serving healthy diets to children which are high in essential nutrients (e.g., vitamins and minerals) while low in nutrients such as fat, cholesterol, and sodium. In addition, the USDA recently attempted to increase the fresh fruits and vegetables available to schools with the assistance of the Department of Defense and local farmers.<sup>237</sup> Again, these policies lagged about twenty-five years behind the first data that began highlighting these issues as important and needing action. But, the policies did eventually evolve. In the end, all of these policies have worked to safeguard the health and well-being of our nation's children.

It's time now to address the issue of competitive foods with policy that has the health and well-being of children at the forefront, not profits. The issue has been brewing for over thirty years and has come to a head with the overwhelming data on children's poorer eating habits, children's declining health statistics, the interconnection with diet and children's health and cognition, the correlation of sugary drinks and food on children's health, and finally the known success of the school food programs towards improving health and cognition if given a chance. We as a nation must act to add new policy to the repertoire of those now in existence. The policies in existence are critical, but this new arena of competitive foods must be addressed. Numerous professional and governmental organizations have taken a stand on the issue encouraging policy to control competitive foods. Several school districts in California and the state itself are setting an example the nation should follow. Action is needed.

#### IV. CONCLUSION

Research shows there is a direct link between good nutrition and children's lives – their ability to learn, play, grow and develop.<sup>238</sup> Unfortunately, the

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236. 42 U.S.C. § 1751 (2001).

237. See Kristin Franco, *Optimizing Nutritional Health for Children Through School-Based Initiatives*, 101 J. AM. DIETETIC ASS'N. 873 (2001), available at 2001 WL 14317152.

238. See generally CENTER ON HUNGER, POVERTY AND NUTRITION POLICY, *supra* note 123, at <http://nutrition.tufts.edu/publications/hunger/pub/statement.shtml> (reviewing research on child cognitive development as it relates to nutritional intake).

effect that poor nutrition has on learning and educability are often not incorporated into efforts to improve the educational system. In fact, the opposite is true when school systems encourage the intake of foods which compete with healthy foods leading to the decreased nutritional and health status of the children.

The data is convincing. It is time to do something. Children's health can no longer be sacrificed for extra dollars. New policy is essential to control competitive foods so to give the healthy foods of the school food programs a chance. Once available, without competition, children will choose healthier foods. This environment that provides an opportunity and reinforcement for healthful eating can improve the nation's children's health significantly. The challenge for the school food programs at the turn of the new millennium is set. Policy makers can make a real difference, with legislation at the local, state, and especially the national level.