

CHAPTER SIX — HEALTH, EDUCATION AND WELFARE

School Lunch and Breakfast Programs During the Seventies

This article reviews the federal, state, and local regulation of school lunch and breakfast programs. It examines their inadequacies and suggests ways to remedy them.

Congress has made a commitment to provide American children with nutritious meals through a series of school feeding programs.¹ Annual state-federal expenditures for these programs are hovering around the \$4 billion mark, with the federal government absorbing slightly over half this cost.²

The school breakfast and lunch programs are educational subsidies. Supporters justify such programs on the theory that children who are adequately fed will have a greater chance of success in school.³ Malnutrition suffered during grammar school, junior

¹ During the academic year, school children have the National School Lunch Program, 42 U.S.C.A. § 1751-1769a (West 1978), as amended by Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, 92 Stat. 3603; the School Breakfast Program, 42 U.S.C.A. § 1773 (West 1978), as amended by Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, § 6, 92 Stat. 3603; the Special Milk Program, 42 U.S.C.A. § 1772 (West 1978), as amended by Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, 92 Stat. 3603; and the Food Service Equipment Assistance Program, 42 U.S.C.A. § 1754, 1774 (West 1978), as amended by Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, § 6(b), 92 Stat. 3603.

² Mullen, *School Lunches: Why Johnny Won't Eat*, Chicago Tribune, Feb. 20, 1977, at 1, col. 2, reprinted in *National School Lunch and Child Nutrition Act: Hearings on H.R. 1139 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 144 (1977)* [hereinafter cited as *1977 House Hearings*]; U.S. NEWS & WORLD REPORT, Jan. 29, 1979, at 76.

³ In *Davis v. Robinson*, 346 F. Supp. 847 (D.R.I. 1972), the court gave a liberal interpretation to the National School Lunch Act. The court, *id.* at 853, quoted the testimony of Dr. Richard Granger, a physician and expert on child nutrition, as follows:

We create a situation where the poor child is hungry and can't learn so that in the next generation he grows up to be an adult who cannot take his productive place in society, and we end up with a child in

high, and high school can lead to a loss of learning time, interference with the learning process, and retardation in the individual's psychological growth.⁴ Hunger can induce learning impairments such as apathy and nonmotivation,⁵ and protein deficiency impairs memory.⁶ Only in severe cases of malnutrition, however, are mental and intellectual functioning permanently retarded. Children in their infancy who experience moderate degrees of malnutrition, even for long periods, recover from the impairment.⁷ Consequently, school lunch and breakfast programs can improve the child's ability to learn.

Moreover, curbing malnutrition is necessary to alleviate the cyclical effect of poverty and provide children with an opportunity for full educational development.⁸ Poor children attending a school without a lunch program are less likely to receive a nutritious lunch than are their more affluent classmates.⁹ And even if a child does receive a lunch from his or her family, it is statistically likely to be less nutritious than a National School Lunch Program (NSLP) lunch.¹⁰

Today the school nutrition programs reach an unprecedented number of children.¹¹ Much of this growth has occurred within the last decade. Between 1969 and 1977, the number of children participating in the lunch program rose from 20.7 to 26 million.¹² The

a revolving door through which poor people come and go and the rest of us just pass them by.

⁴ S. MANOCHA, *MALNUTRITION AND RETARDED HUMAN DEVELOPMENT* 102 (1972).

⁵ *Id.* at 103-04.

⁶ *Id.* at 104.

⁷ *Id.* at 107, 111.

⁸ *See note 3 supra.*

⁹ Dr. Jean Mayer, Professor of Nutrition at Harvard University, quoted in *Davis v. Robinson*, 346 F. Supp. 847, 852 (D.R.I. 1972).

¹⁰ *Id.*

¹¹ There are approximately 50 million elementary and secondary students in American public and private schools. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 128 (1977). While 45 million students, or 90%, attend a school with a NSLP, only 57.3%, or 25.9 million children, participate. *Id.* at 120-21. Approximately 18,000 schools, or 16.8% nationwide, do not have a lunch program. *Id.* at 120-21, 126; *1977 House Hearings, supra note 2*, at 864 (report by American School Food Serv Ass'n). The breakfast program does not reach 8 million needy. *Child Nutrition Amendments of 1978: Hearings on S. 2630, S. 2809, and S. 2824 Before the Subcomm. on Nutrition of the Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2nd Sess.* 550 (1978) (statement of Rev. George A. Chauncey, Chairman, Interreligious Taskforce of U.S. Food Policy) [hereinafter cited as *1978 Senate Hearings*].

¹² U.S. GENERAL ACCOUNTING OFFICE, *PROGRESS AND PROBLEMS IN ACHIEVING OBJECTIVES OF SCHOOL LUNCH PROGRAM* (1973), reprinted in *National School Lunch Act: Hearings on H.R. 4974 Before the General Subcomm. on*

number receiving free or reduced price lunches jumped from 3.1 to 11 million.¹³ During this same period, the number of children participating in the breakfast program grew from virtually nothing to 10 million, with approximately 2.25 million receiving them free or at reduced cost.¹⁴

Many problems, unfortunately, remain with the lunch-breakfast programs. This article analyzes the major shortcomings afflicting these programs, and includes a critique of the remedial legislation Congress has enacted from 1971-78. The organization of this paper follows the flow of federal funds. Once Congress enacts the school nutrition legislation and funds the programs, the U.S. Department of Agriculture (USDA) has the responsibility of administering them and passing the money on to each state's educational agency.¹⁵ The states then send the funds to the local school districts.¹⁶ This discussion begins with Congress and follows the money down to the child, who is the ultimate recipient of the food. First, however, a word needs to be said about the mechanics of how the lunch and breakfast programs operate.

I. OPERATIONS

Although Congress enacted the school lunch and breakfast programs to increase demand for agricultural commodities during the Depression, the programs have evolved into educational aids and are a regular part of the curriculum in many schools.¹⁷ Per-

Education of the House Comm. on Education and Labor, 93rd Cong., 1st Sess. 62 (1973) [hereinafter cited as 1973 House Hearings]; Benzra, Would You Eat Your Child's School Lunch? FAM. HEALTH, Sep. 1977, at 40.

¹³ 1973 House Hearings, *supra* note 12, at 62 (GAO Report to Congress); 1978 Senate Hearings, *supra* note 11, at 475 (statement of Josephine Martin, American School Food Serv. Ass'n).

¹⁴ 1978 Senate Hearings, *supra* note 11, at 550 (statement of Rev. George A. Chauncey, Chairman, Interreligious Taskforce on U.S. Food Policy).

¹⁵ See text accompanying notes 33, 68, and 123 *infra*.

¹⁶ See text accompanying notes 123 and 132 *infra*.

¹⁷ During the Depression, the school lunch program was an informal method of creating demand for agriculture commodities. Agricultural Adjustment Act of 1935, c. 641, § 32, 49 Stat. 750 (current version at 7 U.S.C. § 612(c) (1976)). The Works Progress Administration and the National Youth Administration would buy up surplus food and distribute it to schools. World War II caused supply and transportation problems, so Congress reimbursed schools directly for food purchases. S. REP. N. 553, 79th Cong., 1st Sess. 10-11 (1945).

By 1946 it had become apparent that the lack of physical fitness and other medical problems found in World War II draftees could be traced to malnutrition. 1977 House Hearings, *supra* note 2, at 150 (Mullen, *School Lunches: Prescription for Malnutrition*, Chicago Tribune, Feb. 22, 1977, at 8, col. 1). So Congress passed the National School Lunch Act (NSLA) "to safeguard the

haps the key to understanding how they operate is to look at the funding guidelines and eligibility criteria.

Schools participating in the NSLP receive a base amount for every lunch served at the school, whether the child receives it free, at reduced cost, or pays for it in full.¹⁸ This is called "general assistance" money.¹⁹ Thus, general assistance money reduces the school's cost of every lunch served.²⁰ Congress has also provided for a parallel system of funding called "special assistance" money.²¹ Special assistance funds subsidize only free and reduced price lunches.²² Thus, Congress subsidizes a free lunch in part with general assistance funds and in part with special assistance money.

Besides general and special assistance funds, schools participating in the NSLP also receive commodities donated free by the USDA.²³ The term "commodities" has traditionally referred to surplus food which farmers could not sell and which the USDA would buy to support prices.²⁴ The USDA would then donate these commodities free of charge to the schools. During a brief period in the early 1970's, however, such surplus food became unavailable, and the USDA had to buy up food at nonsurplus, market prices to donate to the schools.²⁵ Thus, the term

health and well being of the Nation's children and to encourage domestic consumption of nutritious agricultural commodities." Pub. L. No. 79-396, § 2, 60 Stat. 230 (1946) (codified at 42 U.S.C. § 1751 (1976)). Unfortunately, the program was largely ignored and received insignificant funding until 1966, when America became concerned with poverty and welfare. 1966 U.S. CODE CONG. & AD. NEWS 3183-84. Congress saw the Act as a way of providing hungry children with at least one nutritious meal per day. In 1966, Congress passed the Child Nutrition Act, which added an experimental breakfast program. Pub. L. No. 89-642, § 4, 80 Stat. 885 (1966) (codified at 42 U.S.C. § 1773 (1976)).

¹⁸ 42 U.S.C. § 1753 (1976).

¹⁹ See note 27 *infra*.

²⁰ To receive general assistance reimbursements for fully paid lunches, the state must provide matching funds of three dollars for every federal dollar received (a 25% ratio). 42 U.S.C. § 1756 (1976). For free and reduced price lunches, there is no such general assistance matching requirement. *Id.*

²¹ 42 U.S.C. § 1759(a) (1976).

²² Special assistance funds carry no matching requirement. 42 U.S.C. § 1759(a) (1976).

²³ 42 U.S.C. § 1755(e) (1976).

²⁴ *Commodity Distribution and Food Stamp Programs: Hearings on S. 2871 and S. 3235 Before the Subcomm. on Agriculture Research and General Legislation of the Senate Comm. on Agriculture and Forestry, 93rd Cong., 2nd Sess. 22 (1974) (statement of Clayton K. Yeutter, Assistant Secretary of Agriculture) [hereinafter cited as 1974 Senate Hearings].*

²⁵ [1973] U.S. CODE CONG. & AD. NEWS 1238; 42 U.S.C. § 1762(a) (1976).

“commodities” has come to mean food the government gives directly to school districts, be it surplus or nonsurplus.²⁶ Commodities, like general assistance payments, then, reduce the school’s cost of every meal served.²⁷

The breakfast program operates in a manner very similar to the lunch program. The USDA makes basic payments for each free, reduced price, and fully paid breakfast served.²⁸ The USDA provides additional funds for free and reduced price breakfasts.²⁹

Student eligibility criteria for the lunch program are identical to those for the breakfast program.³⁰ Students with family incomes 25% above the federal poverty level may receive free meals, with reduced price meals going to children whose families have incomes no higher than 95% above the poverty level.³¹ The poverty guidelines are increased annually to keep up with inflation.³²

II. CONGRESS

School food programs are initiated in Congress, which has responsibility for drafting the legislation and appropriating funds. In recent years, Congress’s work in this area has largely been concerned with inflation and schools which lack kitchen facilities.

²⁶ The authority for buying such commodities is found at 42 U.S.C. § 1755 (1976); 7 U.S.C. § 612(c), § 1431 (1976).

²⁷ Starting June 30, 1975, the average value of these commodities had to be 10¢ per lunch, to be adjusted annually for inflation. 42 U.S.C. § 1755(e) (1976). Thus, as of June 30, 1978, funding from all sources can be shown as follows:

CATEGORY	FULLY PAID		REDUCED PRICE		FREE	
	BR	LUN	BR	LUN	BR	LUN
Gen. Ass.	\$.115	.1450	.1150	.1450	.1150	.1450
Spec. Ass.	----	----	.2175	.5500	.2875	.6500
Commodities	----	.1175	----	.1175	----	.1175
TOTAL	\$.115	.2625	.3325	.8125	.4025	.9125

Source: U.S. OFFICE OF MANAGEMENT & BUDGET, CATALOG OF FEDERAL DOMESTIC ASSISTANCE 43-46 (1978).

²⁸ 42 U.S.C. § 1773(b)(1) (1976).

²⁹ *Id.* Unlike the lunch program, the breakfast program carries no matching requirements whatsoever. *Id.*

³⁰ 42 U.S.C. § 1773(e) (1976).

³¹ 42 U.S.C. § 1758(b)(1) (1976). For example, the estimated poverty level for a nonfarm family of four in 1977 was \$6160. 1979 WORLD ALMANAC & BOOK OF FACTS 216.

³² 42 U.S.C. § 1758(b)(1) (1976).

Historically, inflation has caused serious funding difficulties.³³ Congress has responded by enacting legislation which automatically adjusts cash payments for inflation.³⁴ The USDA makes the adjustments semiannually.³⁵ The lawmakers have provided annual increases for commodities.³⁶ These cost of living escalator provisions have alleviated, but not cured, inflation as an emergency concern. With today's inflation running at an annualized rate of 15%,³⁷ it would perhaps be appropriate to make the adjustments every three months. Alternatively, the USDA could estimate future rates of inflation, and pay the larger subsidies in advance.

In addition to funding the programs, Congress also writes the legislation. A certain amount of ambiguity, unfortunately, remains in the statutory language. The federal courts cannot agree whether "schools" as used in the Act³⁸ means only individual schools, or every school in a participating district. In other words, if a school district decides to participate, must every school in that district participate? Many school districts do not permit the participation of schools which do not have kitchens and cafeterias. These are often older, disadvantaged, inner-city schools. The litigation usually arises in the context of children suing to compel the establishment of a lunch or breakfast program at such schools.³⁹

³³ During the early 1970's, food prices rose at the rate of 20% to 30% annually. With the dollar buying less and less, many schools had to respond with emergency measures. Local administrators raised the price of school meals and reduced their quantity and quality. Children dropped out of the program at the rate of 1% for every 1¢ increase in cost. *School Lunch and Breakfast Programs: Hearings on S. 1005, S. 1063, and S. 2409 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry, 93rd Cong., 1st Sess.* 45 (statement of Sen. Dick Clark) [hereinafter cited as *1973 Senate Hearings*]; 1973 U.S. CODE CONG. & AD. NEWS 2394.

³⁴ National School Lunch and Child Nutrition Amendments of Nov. 7, 1973, Pub. L. No. 93-150, § 3(a), 87 Stat. 560 (codified at 72 U.S.C. § 1759(a) (1976)).

³⁵ *Id.*

³⁶ National School Lunch and Child Nutrition Amendments of June 30, 1974, Pub. L. No. 93-326, § 3, 88 Stat. 286 (codified at 42 U.S.C. § 1755(e) (1976)). The annual adjustments take place automatically.

³⁷ Time, April 9, 1979, at 57.

³⁸ 42 U.S.C. § 1758(a) (1976) reads in part: "Lunches served by schools participating in the school-lunch program under this Act. . ." [emphasis added].

³⁹ For cases which say that a school district may exclude individual schools which do not have kitchen facilities, see *Richmond Welfare Rights Organization v. Snodgrass*, 525 F.2d 197 (9th Cir. 1975); *Marquez v. Hardin*, 339 F. Supp. 1364 (N.D. Calif. 1969); *Ayala v. District 60 School Bd.*, 327 F. Supp. 980 (D. Colo. 1971); *Torres v. Butz*, 397 F. Supp. 1015 (N.D. Ill. 1975); and *Briggs*

In *Briggs v. Kerrigan*,⁴⁰ a Massachusetts district court held that a school district may participate without including all the schools within its boundaries.⁴¹ The court noted that Congress had expressly considered and rejected an amendment which would have extended the programs to schools without kitchen facilities.⁴² This does not mean that the lunch program is inapplicable to schools without cafeterias, but only that the school district must make the decision. A second rationale for the court's judgment was that lack of economic means was only one reason Congress provided the lunch and breakfast programs. The other justifications transcend class barriers, and include ignorance of the elements of good nutrition, the increasingly long distances from home to school, and the greater incidence of working mothers.⁴³

The district court decided *Briggs* before the 1970 amendments were enacted. These amendments contained the directive to feed every child, and marked a major turning point in the history of the school nutrition programs.⁴⁴ In *Davis v. Robinson*,⁴⁵ the district court held that the 1970 amendments overruled *Briggs* and said that a school district may not have a lunch program in its wealthier schools without also instituting one in its poorer schools.⁴⁶ The thrust of the 1970' amendments, in the court's

v. *Kerrigan*, 307 F. Supp. 295 (D. Mass. 1969), *aff'd* 431 F.2d 967 (1st Cir. 1970). For cases which say a school district must serve lunches in its neediest schools first, lack of kitchen facilities being no excuse, see *Justice v. Bd. of Educ.*, 351 F. Supp. 1252 (S.D.N.Y. 1972); *Jones v. Bd. of Educ.*, 348 F. Supp. 1269 (N.D. Ohio 1972), *rev'd on other grounds*, 474 F.2d 1232 (6th Cir. 1973); and *Davis v. Robinson*, 346 F. Supp. 847 (D.R.I. 1972).

⁴⁰ 307 F. Supp. 295 (D. Mass. 1969), *aff'd* 431 F.2d 967 (1st Cir. 1970).

⁴¹ *Id.* at 301.

⁴² *Id.*

⁴³ *Id.* at 300.

⁴⁴ Act of May 14, 1970, Pub. L. No. 91-248, § 6(b), 84 Stat. 207 (current version at 42 U.S.C. § 1758(b)(1) (1976)). The 1970 law said:

[B]ut, by January 1, 1971, any child who is a member of a household which has an annual income not above the applicable family size income level set forth in the income poverty guidelines shall be served meals at free or reduced cost. . . . In providing meals at free or reduced cost to needy children, first priority shall be given to providing free meals to the neediest children.

⁴⁵ 346 F. Supp. 847 (D.R.I. 1972).

⁴⁶ *Id.* at 875. Another way of attacking the school district might be the equal protection clause of the 14th amendment. The equal protection clause is relevant when school districts have nutrition programs in their newer, wealthier schools but not older ones which lack kitchen facilities. To determine whether wealth is a suspect classification, it is necessary to look at such factors as whether the class is saddled with the disability of poverty, whether the class has a history of unequal treatment, or whether it has so little political power as to

opinion, was to feed lower income children.⁴⁷

In *Richmond Welfare Rights Organization v. Snodgrass*,⁴⁸ the Ninth Circuit disagreed with *Davis*. The court said that the 1970 amendments did not intend any far reaching changes in the school nutrition programs,⁴⁹ and followed *Briggs*. The NSLA, said the Ninth Circuit, does not require a school board to operate a lunch program in every school in the district.⁵⁰ Rather, the district must go only so far as to allow the participation of every eligible child attending a school with such a lunch program.⁵¹

It is the responsibility of Congress to clear up this ambiguity. The USDA has attempted to solve this problem by issuing regulations which have the salutary effect noted in *Davis*. The regulations refer to "school food authority" instead of "school."⁵² "School food authority" is defined as the "governing body which

require extraordinary protection from the majoritarian process. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (sustaining property tax method for financing public education). If the class is found to be suspect, two possibilities exist: either the state has the burden of showing that the regulation serves a compelling interest, or no presumption is accorded to either side, in which case the interests are weighed evenly.

For purposes of the school nutrition programs, wealth is not a suspect classification. *Rodriguez* held that in determining the degrees of educational benefits conferred by rich and poor school districts, wealth is not a suspect classification. 411 U.S. at 18. In *Dandridge v. Williams*, 397 U.S. 471 (1970) (sustaining the Maryland maximum grant limitation on Aid to Families with Dependent Children benefits), the court is in accord with *Rodriguez*. *Dandridge* decided that limitations on maximum welfare grants should be judged by the rational relationship test. *Id.* at 485.

Cases which have held wealth to be a suspect classification are weak. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (no residency requirements constitutionally permissible to receive welfare), where wealth was a suspect classification, has been overruled by implication in *Dandridge* and *Rodriguez*. *Shapiro* has also been looked on as a case involving the right to travel. See also J. NOWAK, R. ROTUNDA, & J. YOUNG HANDBOOK ON CONSTITUTIONAL LAW 264 (1978). *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (overruling the property tax method of financing public education), while holding classifications based on wealth to be suspect, expressly distinguished its decision from the school lunch case of *Briggs v. Kerrigan*, 307 F. Supp. 295 (D. Mass. 1969), *aff'd*, 431 F.2d 967 (1st Cir. 1970). *Serrano* said that *Briggs* was irrelevant. 5 Cal. 3d at 598-99 n.13. While wealth may be a suspect classification, it is not as applied to the lunch and breakfast programs.

⁴⁷ *Davis v. Robinson*, 346 F. Supp. 847, 857 (D.R.I. 1972).

⁴⁸ 525 F.2d 197 (9th Cir. 1975).

⁴⁹ *Id.* at 203.

⁵⁰ *Id.* at 207-08.

⁵¹ *Id.*

⁵² 7 C.F.R. § 210.1-295.10 (1978).

is responsible for the administration of one or more schools. . .”⁵³ “School food authority,” then, refers to the school district and implies that the program must reach poorer schools in a district before the wealthier ones. But Congress should not rely on the USDA exclusively, since the USDA has no authority to overrule decisions like *Snodgrass*. Instead, Congress should affirm the USDA by codifying *Davis*. *Davis* is an excellent decision because it follows the spirit of the 1970 amendments by providing that the neediest schools must be reached first.

Although Congress has refused to codify *Davis*, it has attempted to accomplish the same result by providing equipment assistance.⁵⁴ As was noted above, the principle reason many school districts do not allow certain schools to participate is the lack of kitchens and cafeterias. Congress has endeavored to provide funds for kitchen facilities through an equipment assistance program which pays 75% of the cost of buying food service equipment.⁵⁵ But the problem remains. Even with Congress absorbing 75% of the cost, many school boards have been unwilling to invest in such equipment.⁵⁶ They refuse to spend “education dollars” on food.⁵⁷ This attitude has caused Congress to waive the matching requirement and provide 100% financing for “especially needy” schools.⁵⁸

Although the lack of kitchens and cafeterias has prevented many schools from participating in the lunch and breakfast programs, equipment assistance funds may not be used to purchase land or construct buildings.⁵⁹ Schools may use the money only for the purchase of kitchen equipment.⁶⁰ There are, however, two little-known ways of securing federal funds for the acquisition or improvement of real estate for kitchens or cafeterias. The first is a provision which allows the state to set aside federal funds “to carry out special developmental projects.”⁶¹ One difficulty with

⁵³ 7 C.F.R. § 210.2(p) (1978).

⁵⁴ 42 U.S.C.A. § 1774 (West 1978), as amended by Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, § 6(b), 92 Stat. 3603.

⁵⁵ Child Nutrition Act of Oct. 11, 1966, Pub. L. No. 89-642, § 5, 80 Stat. 885 (codified at 42 U.S.C. § 1774(b) (1976)).

⁵⁶ 1977 House Hearings, *supra* note 2, at 144 (Mullen, *School Lunches: Why Johnny Won't Eat*, Chicago Tribune, Feb. 20, 1977, at 14, col. 2, 3).

⁵⁷ *Id.*

⁵⁸ Act of Sept. 26, 1972, Pub. L. No. 92-433, § 6(e), 86 Stat. 724 (codified at 42 U.S.C. § 1774(b) (1976)).

⁵⁹ 42 U.S.C. § 1774(a) (1976).

⁶⁰ *Id.*

⁶¹ 42 U.S.C. § 1779 (1976) provides in part: “. . . the Secretary may provide for the reserve of up to 1 per centum of the funds available for apportionment

using this provision, however, is that legislative history is silent as to the definition of such a project. A more promising method is the Elementary and Secondary Education Act of 1965,⁶² which provides assistance for schools in low-income areas.⁶³ This Act authorizes the acquisition of land and the construction of kitchen facilities and cafeterias.⁶⁴

There are still 18,000 schools that do not have a lunch program,⁶⁵ largely because of a lack of kitchen facilities. Many more schools have overcrowded cafeterias which were converted from basements and storage rooms.⁶⁶ School administrators either are

to any state to carry out special developmental projects."

⁶² Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. § 236-241, 241a-241c, 241e-241h, 241j-241l, 242-244, 331-332b, and 821-900a-5 (1976)).

⁶³ The Elementary and Secondary Education Act of 1965 provides:

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local education agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance. . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children.

20 U.S.C. § 241a (1976).

⁶⁴ 20 U.S.C. § 241e(1) (1976) provides in part: "that payments . . . will be used for the excess costs of programs and projects (including . . . the construction of school facilities . . .) (A) which are designed to meet the special educational needs of educationally deprived children in . . . areas having high concentrations of children from low-income families . . ." [emphasis added]. "Excess costs" means only that Title I funds are not to be used to supplant local and state funds which may already be available for similar activities. But since there usually are no state or local funds for kitchen and cafeteria construction, federal funds should still be available. [1974] U.S. CODE CONG. & AD. NEWS 4108-09, 4212. 20 U.S.C. § 841(a) provides in part: "The Commissioner shall carry out a program for making grants for *supplementary educational centers* and services, to stimulate and assist in the provision of vitally needed educational services not available in sufficient quantity or quality." [emphasis added]. 20 U.S.C. § 887a(b)(2) allows funds to be used to pay the cost of "providing supplemental health, nutritional, mental health, and food services to children from low-income families when the resources for such services available to the applicant from other sources are inadequate to meet the needs of such children." See also B. BARD, *THE SCHOOL LUNCHROOM: TIME OF TRIAL* 90 (1968): "While altogether divorced from the National School Lunch Act, the Elementary and Secondary Education Act of 1965 has been a boon to many schools without food service. . . . Under Title I of the program, numerous school districts have begun outfitting lunchrooms where none existed before."

⁶⁵ See note 11 *supra*.

⁶⁶ Brenton, *It's Twelve O'Clock: Do You Know What Your Child is Eating?*

not aware that funds for improvements to realty are available from HEW, or else such officials would rather spend the money on classrooms instead of cafeterias.⁶⁷ Congress could simultaneously simplify the law and emphasize its intent to feed every child by consolidating real and personal property into one place, the School Lunch Act.

III. THE USDA

Once Congress has allocated funding for the school nutrition programs, the USDA is vested with the authority for administering these funds.⁶⁸ Administrative difficulties are present in the commodities distribution program, the breakfast program, and in determining how much discretion the USDA has to set policy.

Perhaps the worst administrative shortcomings have been in the commodities donation program. The USDA distributes commodities directly to local school districts free of charge as part of its subsidization of the lunch and breakfast programs.⁶⁹ The problem is that the commodities are often inappropriate. Schools receive too much of certain commodities, many lack suitability and are useless, and come packaged in the wrong sizes.⁷⁰

Congress has enacted three major amendments to the commodities distribution program to deal with this problem. The first requires each state to set up an advisory council from the local districts to advise the USDA regarding the schools' need for commodities.⁷¹ The second change allows a school to refuse up to 20%

REDBOOK, May 1978, at 46.

⁶⁷ Bard, *supra* note 64, at 90 says: "Some state education authorities, who have the final word on how ESEA [Elementary and Secondary Education Act] funds are allotted, have refused to allow spending for lunchroom purposes."

⁶⁸ 42 U.S.C. § 1782 (1976).

⁶⁹ 42 U.S.C. § 1753 (1976).

⁷⁰ Congressman Richard A. Gephardt of Missouri testified about his inspection tour of certain school districts in Missouri. One school district which served 4500 lunches per day had a 2 ½ year supply of peanut butter and a 2 year supply of orange juice. A second district had 153 cases of cranberries, a notoriously unpopular item. A third district had 6200 pounds of margarine, which made their 1300 pounds of butter unnecessary, and 1700 pounds of peanut shortening, an item with very limited use. A fourth district had 494 cases of orange juice, or a 10-week supply if they fed a four ounce serving to every child once a day. Elsewhere, schools had massive quantities of ground beef, forcing them to serve it up to five times a week. In addition, packaging was either too large (like a 70 pound block of butter) or too small (like 12 pound turkeys). *1977 House Hearings, supra* note 2, at 44-45.

⁷¹ National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 6, 91 Stat. 1325 (codified at 42 U.S.C.A. § 1762(e) (West 1978)).

of the value of the commodities offered it, without having the rejected food count against the state's allotment.⁷² The purpose of this was to allow a school to refuse, without being penalized, commodities it could not use. As a result of this provision, the USDA will make an effort to donate more appropriate commodities. Third, Congress required the USDA to conduct pilot projects substituting straight cash for commodities.⁷³ The purpose of this experiment was to provide information to help Congress decide whether it should eliminate the commodities program and substitute cash instead.

These measures, though well intentioned, are inadequate. The problem runs deeper than the distribution of commodities. It reflects a serious conflict of interest within the USDA. On one hand, the USDA is obliged to purchase surplus food to help farmers by supporting prices; on the other hand, the USDA has a commitment to donate the best food available to the schools.⁷⁴ The USDA cannot do both adequately, for surplus food is often the least desirable.⁷⁵ The result is that the USDA emphasized the interests of agribusiness, and the schools receive inappropriate commodities.⁷⁶

There are at least two possible solutions to this dilemma. The USDA could issue straight cash to the school districts instead of commodities. Alternatively, Congress could transfer the school nutrition programs to the Department of Health, Education, and Welfare (HEW).

The Nixon Administration proposed the former of these two alternatives.⁷⁷ It suggested donating cash in lieu of commodities.⁷⁸ Congress, however, did not agree with the Administration and chose to retain the commodities program. The lawmakers believed that the USDA is more qualified than the school districts to undertake the tasks of quantity purchasing, quality control,

⁷² National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 7, 91 Stat. 1325 (codified at 42 U.S.C.A. § 1755(a) (West 1978)).

⁷³ National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 10, 91 Stat. 1325 (codified at 42 U.S.C.A. § 1769(b) (West 1978)).

⁷⁴ MAYER, U.S. NUTRITION POLICIES IN THE SEVENTIES 206-07 (1973).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ No formal bills were introduced. Instead the proposal was by way of testimony before Congressional committees. 1974 *Senate Hearings*, *supra* note 24, at 41 (statement of Clayton K. Yeutter, Assistant Secretary of Agriculture).

⁷⁸ *Id.*

and administration.⁷⁹ Many school directors have indicated that the commodities program supplies 30% more food than would the cash equivalent.⁸⁰ Sentiment exists that there is a certain stigma attached to receiving cash—it too closely resembles welfare. Furthermore, it is more acceptable politically “to provide commodities that are seen also as a means of stabilizing our agricultural economy.”⁸¹

Congress should, however, switch to cash in lieu of commodities. An all-cash system would provide a wider variety of food and would be more convenient since school districts already buy 80% of their food with cash.⁸² Replacing commodities with cash would not increase the over-all cost of the program: even though the USDA buys huge quantities of food and thus obtains a favorable price, these expenditures are deceptively low because they do not include overhead,⁸³ or the waste resulting from inappropriate commodities. The USDA subsidizes overhead out of general operating funds and does not charge overhead to the lunch and breakfast programs.⁸⁴ Once overhead is added in, the USDA cannot buy food any more inexpensively than the average size school district.⁸⁵ And since schools would buy commodities better suited to their needs than what the USDA supplies, less food would be wasted.

A second possible solution to eliminate inefficient USDA administration is to transfer responsibility for the school nutrition programs to HEW. A precedent for such an action may be found in 1970, when President Nixon attempted to make the pesticide regulatory program more effective by transferring it from the USDA to the Environmental Protection Agency (EPA).⁸⁶ The President apparently believed that the USDA could not be a champion of the farmers and simultaneously police their use of pesticides. Similarly, the USDA cannot adequately perform the functions of purchasing unwanted, surplus food and supplying schools with high quality commodities.

In addition to the conflict of interest problem with commodities, there is the fundamental question of how much legislative

⁷⁹ 1974 U.S. CODE CONG. & AD. NEWS 3400.

⁸⁰ *Id.*

⁸¹ *Senate Hearings 1974, supra note 24, at 34* (statement of Sen. McGovern).

⁸² *Id.* at 29 (statement of Assistant Agriculture Secretary Yeutter).

⁸³ *Id.* at 27.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Reorg. Plan 3 of 1970, 3 C.F.R. 199 (1970), reprinted in 5 U.S.C. app., at 827 (1976) and in 84 Stat. 2086 (1970).

authority Congress has delegated to the USDA. This question arose when the USDA published regulations lowering the federal reimbursement for free lunches from 60¢ to 35¢.⁸⁷ When the Senate passed a resolution to show its disapproval,⁸⁸ the USDA responded by tightening eligibility standards for free lunches.⁸⁹ Congress, the chief champion of the child nutrition programs, was furious. It passed a joint resolution increasing the free lunch reimbursement 6¢ higher than that of the previous year,⁹⁰ and nullified the USDA's tightened eligibility regulations.⁹¹

Congress should have gone a step further and prohibited the USDA from adjusting reimbursement and eligibility standards in the future. The legislators expressly considered this, and did enact such a prohibition applicable to fiscal year 1972.⁹² Since Congress chose not to extend the prohibition beyond that time, the USDA could argue that it now has the authority to reduce the scale of the lunch and breakfast programs. But if the USDA were to attempt such a move in the future, plaintiffs could attack it on grounds that the USDA acted beyond the scope of its delegated power.

The USDA receives its authority from Congress, and cannot exercise legislative powers unless Congress so intended. There have been a number of cases in which the Supreme Court has invalidated agency regulations for exceeding the authority conferred by Congress.⁹³ Some of these opinions, however, have been

⁸⁷ 1971 CONG. Q. 2152. Assistant Secretary Richard Lyng said that the purpose of this was to distribute money more equitably among the states, not save funds. STUDIES OF HUMAN NEED, SENATE SELECT COMM. ON NUTRITION AND HUMAN NEEDS, 92nd Cong., 1st Sess., 98 (Comm. Print 1972) (hereinafter cited as STUDIES OF HUMAN NEED).

⁸⁸ S. J. Res. 157, 92nd Cong., 1st Sess., 117 CONG. REC. 34489 (1971).

⁸⁹ In October, 1971, the USDA announced it was tightening eligibility standards so that no child could receive a free lunch if family income (assuming four members) was above \$3490. 1971 CONG. Q. 2245. This, of course, ran contrary to the intent of the 1970 amendments which had indicated that the national eligibility standards were to be a minimum, below which no child could be turned down—and not a maximum. STUDIES OF HUMAN NEED, *supra* note 87, at 99. The USDA estimated that these new eligibility standards would eliminate 584,000 children from the program, while 1.5 million was the estimate of the Senate Select Committee on Nutrition and Human Needs. 3 CONGRESS AND THE NATION 631 (1971); STUDIES OF HUMAN NEED, *supra* note 87, at 99.

⁹⁰ Act of Nov. 5, 1971, Pub. L. No. 92-153, § 1, 85 Stat. 419, *reprinted in* 42 U.S.C.A. § 1753, Historical Note at 450 (West 1978).

⁹¹ Act of Nov. 5, 1971, Pub. L. No. 92-153, § 6, 85 Stat. 419, *reprinted in* 42 U.S.C.A. § 1758, Historical Note at 464 (West 1978).

⁹² *Id.*

⁹³ *See, e.g., Hampton v. Wong*. 426 U.S. 88 (1976) (Civil Service Commission

accompanied by vigorous dissents saying that Congress had contemplated just such regulations.⁹⁴ There would be no room for such a dissent, though, if the litigation involved the lunch program. By overruling the USDA when it attempted to reduce the scale of the program, Congress showed that it never intended the USDA to have that type of legislative discretion.

In addition to complaining that the USDA acted beyond the scope of its authority, our hypothetical plaintiffs could argue that the USDA did not act pursuant to discernable standards. Although the Supreme Court has upheld delegations where Congress provided no standards at all,⁹⁵ other opinions have indicated that agencies must limit the scope of their actions by adopting their own standards.⁹⁶ The plaintiffs could assert that before the USDA curtails the lunch program, it must first publish a list of ascertainable standards by which to do so. Since the USDA has no such regulations, it may not arbitrarily constrict the program.

If the scope of authority and standards arguments need bolstering, the plaintiffs could add an impoundment theory. Under such a rationale, the USDA may not impound funds which Congress has authorized for the school nutrition programs. In *Train v. City of New York*,⁹⁷ the City challenged President Nixon's impoundment of water pollution control funds which were appropriated over his veto.⁹⁸ The United States Supreme Court noted that the language of the statute said that the level of funding was "not to

could not bar aliens from federal jobs); *Gutknecht v. United States*, 396 U.S. 295 (1970) (Selective Service could not accelerate person's induction because of his anti-war protest activities); *Greene v. McElroy*, 360 U.S. 474 (1959) (no withdrawal of security clearances in the absence of a hearing); and *Kent v. Dulles*, 357 U.S. 116 (1958) (State Department could not decline to issue passports to Communists).

⁹⁴ See, e.g., *Hampton v. Wong*, 426 U.S. 88, 117 (1976) (Blackmun, Burger, Rehnquist, White, JJ., dissenting); *Greene v. McElroy*, 360 U.S. 474, 510 (1959) (Clark, J., dissenting); *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (Burton, Clark, Harlan, Whittaker, JJ., dissenting).

⁹⁵ See, e.g., *Arizona v. California*, 373 U.S. 546 (1963) (Secretary of Interior could apportion Colorado River water in times of shortage, even though the statute was silent as to what standards were to be used).

⁹⁶ See, e.g., *Morton v. Ruiz*, 415 U.S. 199 (1974) (Bureau of Indian Affairs may not deny general assistance benefits to Indians on the basis of a regulation not published in the Fed. Reg. or C.F.R.); *Holmes v. Housing Authority*, 398 F.2d 262 (2d Cir. 1968) (housing authority must use ascertainable standards in selecting tenants for admission to low-rent public housing projects). These cases merely suggest possible arguments for plaintiffs to use, and do not imply that plaintiffs will automatically win using them.

⁹⁷ 420 U.S. 35 (1975).

⁹⁸ *Id.* at 40.

exceed" certain specified amounts and thus did not give the President discretion to withhold the funds.⁹⁹ The Court concluded that the Administration must allot the money if it has the power to do so.¹⁰⁰ The lunch and breakfast statutes similarly authorize "such sums as are necessary" to be spent.¹⁰¹ Following the *Train* decision, then, the children, their parents, or local school officials could prevent the USDA from arbitrarily reducing the scale of the programs.

The breakfast program is the final major area which demonstrates the USDA's recalcitrance in supporting the school nutrition programs. Although Congress intended to open the breakfast program to all schools that wanted it,¹⁰² certain Senators felt that the USDA had discouraged applications by misrepresenting the level of funding available.¹⁰³ To counteract the USDA's active hostility, Congress enacted a series of four amendments which have steadily broadened the breakfast program's reach to needy youngsters.¹⁰⁴

In the first of these, Congress sought to encourage the USDA to spend more liberally by increasing the maximum level of reimbursement for breakfasts to 100%.¹⁰⁵ Previously, Congress had authorized the USDA to pay up to 80% of the cost of operating a breakfast program in cases of severe economic need.¹⁰⁶ But the USDA was slow in making the funds available, and almost never paid the full 80%.¹⁰⁷ By increasing the reimbursement rate to 100%, Congress increased the amount of money available to school districts and thus gave them more incentive to pressure the USDA into funding the program.

Congress made a second attempt to increase the availability of

⁹⁹ *Id.* at 42.

¹⁰⁰ *Id.* at 47. The Court said: "We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation." *Id.* at 45-46.

¹⁰¹ 42 U.S.C. § 1752, 1773(a) (1976).

¹⁰² 42 U.S.C. § 1773(a) (1976).

¹⁰³ 1972 CONG. Q. 900 (statement of Sen. Case).

¹⁰⁴ Act of June 30, 1971, Pub. L. No. 92-32, § 3, 4, 85 Stat. 85 (codified at 42 U.S.C. § 1773(c), (d) (1976)); National School Lunch Act and Child Nutrition Act of 1966 Amendments of Oct. 7, 1975, Pub. L. No. 94-105, § 3, 89 Stat. 511 (codified 42 U.S.C. § 1773(g) (1976); Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, § 6(c), 92 Stat. 3603 (to be codified at 42 U.S.C. § 1773(d)).

¹⁰⁵ Act of June 30, 1971, Pub. L. No. 92-32, § 4, 85 Stat. 85 (1971) (codified at 42 U.S.C. § 1773(d) (1976)).

¹⁰⁶ 42 U.S.C.A. § 1773, Historical Note at 514 (West 1978).

¹⁰⁷ [1971] U.S. CODE CONG. & AD. NEWS 1117, 1124.

the breakfast program by expanding the number of schools that could participate. The existing statutory requirements for selection were schools located in poor economic areas and where children had to travel long distances to school.¹⁰⁸ In an effort to encourage the USDA to reach larger numbers of needy children, Congress added a third group of schools which the USDA could select.¹⁰⁹ Under the new law, schools no longer had to be located in poor economic areas if at least some of their students were from low-income families whose children needed the breakfast program.¹¹⁰ The effect of this change, then, was to broaden the class of schools eligible for the breakfast program.

Later, Congress added a third amendment to encourage the USDA to find even more needy youngsters.¹¹¹ In this amendment, Congress declared the policy of the United States to be that a breakfast be available to all children in need. The purpose of this statement was to provide an unambiguous declaration of intent to the USDA so that this agency would have no basis for stymieing the breakfast program with administrative roadblocks.¹¹²

These amendments worked only marginally well. While they added approximately 10,000 schools to the breakfast program,¹¹³ there are still some 67,000 schools which serve lunch but not breakfast.¹¹⁴ Congress has recently responded by enacting a statute which requires schools to have a breakfast program if they serve more than 40% of their lunches free or at reduced cost.¹¹⁵ In other words, Congress requires schools with a high concentration of needy children to have a breakfast program.

This mandate is a bold step in the expansion of the breakfast program. One question which remains unanswered is what hap-

¹⁰⁸ 42 U.S.C.A. § 1773, Historical Note at 514 (West 1978).

¹⁰⁹ Act of June 30, 1971, Pub. L. No. 92-32, § 3, 85 Stat. 85 (codified at 42 U.S.C. § 1773(c) (1976)). The amendment says in part: "those schools in which there is a special need for improving the nutrition and dietary practices of working mothers and children from low-income families."

¹¹⁰ *Id.* Congress did not define the words quoted in note 109 *supra*.

¹¹¹ National School Lunch Act and Child Nutrition Act of 1966 Amendments of Oct. 7, 1975, Pub. L. No. 94-105, § 3, 89 Stat. 511 (1975) (codified at 42 U.S.C. § 1773(g) (1976)). The subsection says in part: "[I]t is the purpose and intent of Congress that the school breakfast program be made available to all schools where it is needed to provide adequate nutrition for children in attendance."

¹¹² [1975] U.S. CODE CONG. & AD. NEWS 1009.

¹¹³ 1978 Senate Hearings, *supra* note 11, at 475 (statement of Josephine Martin, American School Food Serv. Ass'n).

¹¹⁴ [1978] U.S. CODE CONG. & AD. NEWS 9235.

¹¹⁵ Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, § 6(c), 92 Stat. 3603 (to be codified at 42 U.S.C. § 1773(d)).

pens if the school resists serving breakfasts by withdrawing from the lunch and breakfast programs altogether.¹¹⁶ It is uncertain whether the courts would permit such an evasion of the spirit of the law.¹¹⁷ But Congress has attempted to prevent future litigation by making it easier for schools to initiate a breakfast program. As discussed earlier, Congress has endeavored to expand the meals programs through equipment assistance grants.¹¹⁸ Now Congress is using the equipment assistance program aimed specifically at aiding schools in starting a breakfast program.¹¹⁹ Schools not presently serving breakfasts receive priority on equipment assistance funds, and these appropriations were increased from \$40 million to \$75 million annually.¹²⁰ Apart from equipment assistance, Congress granted further financial relief to such low-income schools: they will automatically be eligible for the 100% reimbursement of operating costs previously reserved for especially needy schools.¹²¹

Requiring low-income schools with a lunch program to have a breakfast program also marks the first time that participation in a food program has been explicitly mandatory. It is uncertain, however, whether a school could avoid the breakfast mandate by withdrawing from the food programs altogether. The law is ambiguous as to whether such a total pull-out is possible.¹²² The USDA should publish regulations prohibiting a school's retreat, but has shown no inclination of doing so. Instead of waiting to see whether the USDA will permit schools to withdraw, Congress should enact a precautionary provision. This amendment would prohibit a school from abandoning the food programs once they have undertaken them. Such a statute would enable Congress to complete its task of directing the USDA to expand the breakfast program.

¹¹⁶ This opinion is borrowed from the minority views found at [1978] U.S. CODE CONG. & AD. NEWS 9254.

¹¹⁷ *Id.*

¹¹⁸ See text accompanying note 54 *supra*.

¹¹⁹ Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, § 6(b), 92 Stat. 3603 (to be codified at 42 U.S.C. § 1774(b), (e)).

¹²⁰ Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, § 6(b), 92 Stat. 3603 (to be codified at 42 U.S.C. § 1774(a)).

¹²¹ Child Nutrition Amendments of Nov. 10, 1978, Pub. L. No. 95-627, § 6(c) (to be codified at 42 U.S.C. § 1773(d)). See text accompanying note 58 *supra*.

¹²² In *Justice v. Bd. of Educ.*, 351 F. Supp. 1252, 1264 (S.D.N.Y. 1972), the court said: "It is by no means clear . . . that the cruel alternative of total abandonment is actually available."

IV. THE STATE

After receiving the funds from Congress, the USDA passes them on to each state's educational agency. These agencies serve as a conduit between the USDA and the local school districts. Perhaps the major contribution a state can make to the expansion of the school nutrition programs is to enact state laws requiring schools to have lunch-breakfast programs. One state to do so is California.

The California legislature has recently enacted a law mandating schools to have a meal program for needy students.¹²³ A needy student is defined as one who would not otherwise receive proper nourishment.¹²⁴ Further, California has codified the *Davis* decision¹²⁵ by requiring that the neediest children be reached first.¹²⁶ If a school does not have kitchen facilities, the legislature authorizes it to contract out its food requirements to a private manufacturer.¹²⁷ The legislature has also provided for nutrition education.¹²⁸

California should be applauded for its efforts at complementing the federal legislation. The state should, however, take its laws one step further and provide funds for the construction of kitchens and cafeterias, rather than condoning the use of pre-plated, manufactured food. On-site preparation, as discussed below,¹²⁹

¹²³ 1976 Cal. Stats., c. 1010, § 2 (codified at CAL. EDUC. CODE (Reorganized) § 49550 (West (1978))).

¹²⁴ CAL. EDUC. CODE (Reorganized) § 49500 (West 1978).

¹²⁵ 346 F. Supp. 847 (D.R.I. 1972). See text accompanying note 45 *supra*.

¹²⁶ CAL. EDUC. CODE (Reorganized) § 49512 (West 1978) says in part: "The funds shall be allocated to the school districts in such a manner that priority shall be given to providing free meals to the neediest children." CAL. EDUC. CODE (Reorganized) § 49518 (West 1978) says:

To the extent that available funds are insufficient to provide services under the program established by this article to all pupils defined as eligible, the following priorities for the provision of such services shall be observed by the Department of Education:

(a) First priority for services shall go to pupils within the category of children described in Section 11202 of the Welfare and Institutions Code.

(b) Second priority shall go to pupils eligible for social services only under Chapter 2 (commencing with Section 11200) of Part 3 of Division 9 of the Welfare and Institutions Code, and among such category of pupils the order of priorities shall decline progressively according to the age of the pupils, with the youngest pupils receiving the highest priority.

¹²⁷ CAL. EDUC. CODE (Reorganized) §§ 49513, 49532 (West 1978).

¹²⁸ CAL. EDUC. CODE (Reorganized) §§ 49530(a), 49534 (West 1978).

¹²⁹ See text accompanying note 145 *infra*.

greatly enhances the taste and nutritional value of the food. And attractive cafeterias are a much more pleasant place to eat than the over-crowded basements and storage rooms which many schools now use.¹³⁰ A pleasant environment encourages children to eat better.¹³¹

V. THE SCHOOL DISTRICT

The school district is the next governmental body to receive school nutrition funds. School officials have the problem of administering the inflow of federal funds and accounting for matching funds. Various legislative changes have concerned ways of making it easier for local administrators to supervise the collection and expenditure of money.

When the NSLP was enacted in 1946, the USDA allocated funds among the states on the basis of need.¹³² States where the lunch program grew slowly were more "needy" and received more money per meal served.¹³³ Congress recognized the unfairness of this, and sought to encourage local administrators to bring more schools into the program by offering money as an incentive for doing so. The device Congress chose was performance funding, under which schools are paid in proportion to how many meals they serve.¹³⁴ In other words, the more breakfasts and lunches a school serves, the more federal money it receives. This amendment was a sensible solution to the problem because it gave school districts an incentive to serve more meals.

Congress also recognized that school budgets are tight, and that administrators do not feel at liberty to spend money on school nutrition programs for which they might not be reimbursed.¹³⁵ The solution was to provide for advance payments.¹³⁶ The USDA has not followed the spirit of this law, however, for it continues to treat reimbursements as the rule and advance payments as the exception.¹³⁷ The school district is, nevertheless,

¹³⁰ Brenton, *supra* note 66, at 46.

¹³¹ *Id.*

¹³² Pub. L. No. 79-396, § 4, 60 Stat. 230 (1946) (current version at 42 U.S.C. § 1753 (1976)).

¹³³ 1972 CONG. Q. 1953 (statement of Philip Olsson, Deputy Secretary of Agriculture).

¹³⁴ Act of Sept. 26, 1972, Pub. L. No. 92-433, § 3(b), 4(c), 86 Stat. 724 (codified at 42 U.S.C. § 1753, 1773(b) (1976)).

¹³⁵ 1972 CONG. Q. 2234 (statement of Sen. Humphrey).

¹³⁶ Act of Sept. 26, 1972, Pub. L. No. 92-433, § 3(c), 8, 86 Stat. 724 (1972) (codified at 42 U.S.C. § 1757, 1773(c) (1976)). Disbursements may be either by way of reimbursement or advances.

¹³⁷ 7 C.F.R. § 210.13 (1978) says in part:

entitled to advance payment on request.¹³⁸ Whether payments are advanced or reimbursed, a school which qualifies for the lunch and breakfast programs has a statutory right to the funds, and may sue the USDA for nonpayment.¹³⁹ Since Congress appropriates the money for school nutrition programs one year in advance,¹⁴⁰ local officials should be aware of where they stand, and should know if the USDA is withholding funds.

Finally, school funding of lunch programs has suffered from a shortage of matching funds. Most schools obtain approximately 90% of their matching funds from children who pay the full cost of their lunch.¹⁴¹ But with the increasingly large numbers of students eligible for free or reduced price meals, there developed a shortage of such money.¹⁴² To remedy this situation, Congress waived the general assistance matching requirement for free and reduced price lunches.¹⁴³ The next step would be to put the lunch program on equal footing with the breakfast program by eliminating the general assistance matching requirement for fully paid lunches.¹⁴⁴ This would have the salutary effect of making local officials more enthusiastic about the program, since they would have to spend fewer "education dollars" on food.

VI. THE CHILDREN

Finally, children are the ultimate recipients of the funds channelled to them by the various agencies of government. Waste is the major problem confronting the food programs at this level. Children throw away approximately \$600 million worth of food

Notwithstanding any other provision of this section, the State agency, or FNSRO where applicable, may advance funds available for the program to a school food authority in an amount equal to the amount of reimbursement estimated to be needed for 1 month to make payments for the total number of lunches, including free and reduced price lunches, to be served to children in participating schools under the jurisdiction of the school food authority.

¹³⁸ *Id.*

¹³⁹ See notes 93-101 and accompanying text *supra*.

¹⁴⁰ 42 U.S.C. § 1752 (1976).

¹⁴¹ 42 U.S.C. § 1756 (1976). The remaining 10% comes from the general revenues of the state or school district. *Id.*

¹⁴² [1975] U.S. CODE CONG. & AD. NEWS 1009.

¹⁴³ National School Lunch Act and Child Nutrition Act of 1966 Amendments of Oct. 7, 1975, Pub. L. No. 94-105, § 5, 89 Stat. 511 (codified at 42 U.S.C. § 1756 (1976)).

¹⁴⁴ Treating the lunch and breakfast programs differently seems to be an historical accident. The differences between them are increasingly diminishing.

annually.¹⁴⁵ The cause of this waste is, in large part, unappetizing, pre-plated food.¹⁴⁶ The manufacturer prepares food on the assembly line, cooks it, freezes it, and transports it to the school, which reheats it. This process results in food which is unappetizing and which has roughly half the nutritional value the manufacturer claims for it.¹⁴⁷

Congress has attempted to solve the problem of waste by encouraging schools to prepare hot meals right in their own cafeterias. As discussed earlier, Congress has attempted to expand the lunch and breakfast programs through the use of equipment assistance.¹⁴⁸ Now Congress is using the equipment assistance funds to encourage schools to cook hot meals by providing priority for hot meal facilities.¹⁴⁹ There is little doubt that "on-site" preparation produces more edible and nutritious meals.¹⁵⁰ Moreover, once the equipment is paid for, it costs no more to prepare an appetizing meal from scratch in the school's own kitchen than to buy low-quality, pre-packaged food from a manufacturer.¹⁵¹ One flaw in this statute, however, is that it funds equipment which will enable the school to prepare *or* receive hot meals.¹⁵² The lawmakers should amend the statute to emphasize on-site preparation by striking out "or receive."

A second way Congress has sought to reduce waste is through the regulation of "junk" food.¹⁵³ The problem here is that vending

¹⁴⁵ 1977 House Hearings, *supra* note 2, at 144 (Mullen, *School Lunches: Why Johnny Won't Eat*, Chicago Tribune, Feb. 20, 1977, at 1, col. 5).

¹⁴⁶ 1977 House Hearings, *supra* note 2, at 145 (Mullen, *School Lunches: Why Johnny Won't Eat*, Chicago Tribune, Feb. 20, 1977, at 14, col. 4).

¹⁴⁷ 1977 House Hearings, *supra* note 2, at 145, 149-50 (Mullen, *School Lunches: Why Johnny Won't Eat*, Chicago Tribune, Feb. 20, 1977, at 14, col. 4, 5; *School Lunches: Prescription for Malnutrition*, Feb. 22, 1977, at 1, col. 3; at 8, cols. 2-4).

¹⁴⁸ See note 54 and accompanying text *supra*.

¹⁴⁹ National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 4(1), (3), 91 Stat. 1325 (codified at 42 U.S.C.A. § 1774(b), (f)(1) (West 1978)).

¹⁵⁰ 1977 House Hearings, *supra* note 2, at 146 (Gaines, *Planning Pays Off—Good Meals Get Eaten*, Chicago Tribune, Feb. 21, 1977, at 6, col. 1, 2).

¹⁵¹ 1977 House Hearings, *supra* note 2, at 145 (Mullen, *School Lunches: Why Johnny Won't Eat*, Chicago Tribune, Feb. 20, 1977, at 14, col. 5). If some school districts have gone from on-site preparation to centralized preparation, it is for the convenience of administrators and not for the benefit of the children. 1977 House Hearings, *supra* note 2, at 144 (Mullen, *School Lunches: Why Johnny Won't Eat*, Chicago Tribune, Feb. 20, 1977, at 14, col. 3).

¹⁵² National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 4(3), 91 Stat. 1325 (codified at 42 U.S.C.A. § 1774(f)(1) (West 1978)).

¹⁵³ See note 155 and accompanying text *infra*.

machines selling low-nutrient foods are used by many schools to finance band and football uniforms.¹⁵⁴ It is irrational, however, to spend \$4 billion on school meals and then allow vending machines to compete with more nutritious food since this defeats the purpose of the programs.

Bowing to pressure from school district authorities, Congress has refused to ban the sale of junk food.¹⁵⁵ But it has provided that the USDA must approve such food.¹⁵⁶ To date, the USDA has not exercised the full weight of its authority. Instead, it has published a regulation which continues to allow vending machines to flourish.¹⁵⁷ Any meaningful regulation is left to local school officials,¹⁵⁸ and too few have taken steps to eliminate this problem. One solution, short of banning the machines altogether, would be to lock them during the school day, but allow their use for after-hour school events, such as football games and PTA meetings.

A third way Congress has attempted to eliminate waste is by providing for nutrition education.¹⁵⁹ Schools which have experimented with this concept on their own have reported it has helped to reduce waste by as much as 50%.¹⁶⁰ Once children understand why they should eat a balanced meal, they are more likely to do so.¹⁶¹ The USDA has published general regulations providing for the nutrition and management training of person-

¹⁵⁴ Aburdene, *Junk Foods in School*, EDUC. DIG., March 1978, at 33.

¹⁵⁵ Act of Sept. 26, 1972, Pub. L. No. 92-433, § 7, 86 Stat. 724 (codified at 42 U.S.C. § 1779 (1976)) provided that USDA regulations shall not prohibit the sale of "competitive" foods.

¹⁵⁶ National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 17, 91 Stat. 1325 (codified at 42 U.S.C.A. § 1779 (West 1978)) says in part: "Such regulations shall not prohibit the sale of competitive foods *approved by the Secretary . . .*" [emphasis added].

¹⁵⁷ 7 C.F.R. § 210.15(b) (1978) says:

State agencies and school food authorities shall establish such regulations or instructions as are necessary to control the sale of food in competition with a school's nonprofit food service under the program: *Provided, however*, that they shall not authorize food service facilities and lunchroom areas during the lunch period unless the proceeds inure to the benefit of the school's nonprofit food service under the program, *or to the school, or to school-approved student organizations.*

[last two lines of emphasis added].

¹⁵⁸ *Id.*

¹⁵⁹ National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 15, 91 Stat. 1325 (codified at 42 U.S.C.A. § 1788 (West 1978)).

¹⁶⁰ RICH, *How MUNCH CHANGED LUNCH AT OAKHAM 24-29* (HEW Pub., Oct. 1978).

¹⁶¹ *Id.*

nel, as well as educational activities in nutrition for the children themselves.¹⁶² Congress and the USDA should be praised for this progress, which could have a large-scale impact on the eating habits of American youngsters.

A fourth way the lawmakers have reduced waste is to provide students with the opportunity to turn down food they have no intention of eating, without the school losing its federal reimbursement. This option was at first given to senior high students;¹⁶³ it was later extended to the junior high level.¹⁶⁴ This has had considerable success in reducing waste, and perhaps grammar school children should also have this option. One elementary school in Oakham, Massachusetts, has adopted a family style method where food is passed around a table and the children take what they want.¹⁶⁵ This has proven highly successful in reducing waste.¹⁶⁶

Finally, Congress has endeavored to alleviate the waste problem by requiring the USDA to issue regulations to diminish waste,¹⁶⁷ and to conduct a pilot project to find more "efficient" ways of operating the programs.¹⁶⁸

While all these statutory changes represent a certain amount of advancement, there remain numerous gaps which contribute to the waste problem. For example, a lingering problem is a USDA regulation which prescribes the content of school lunches.¹⁶⁹ The rule is written in terms of types and quantities of

¹⁶² 43 Fed. Reg. 12,296 (1978) (to be codified at 7 C.F.R. § 227.1). Nutrition education is funded (for the first time) at \$26 million for fiscal year 1980. 43 Fed. Reg. 25,132 (1978).

¹⁶³ National School Lunch Act and Child Nutrition Act of 1966 Amendments of Oct. 7, 1975, Pub. L. No. 94-105, § 6(a), 89 Stat. 511 (codified at 42 U.S.C. § 1758(a) (1976)).

¹⁶⁴ National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 8, 91 Stat. 1325 (codified at 42 U.S.C.A. § 1758(a) (West 1978)).

¹⁶⁵ RICH, *supra* note 160, at 24-29.

¹⁶⁶ *Id.*

¹⁶⁷ National School Lunch Act and Child Nutrition Act of 1966 Amendments of Oct. 7, 1975, Pub. L. No. 94-105, § 6(a), 89 Stat. 511 (codified at 42 U.S.C. § 1758(a) (1976)).

¹⁶⁸ National School Lunch Act and Child Nutrition Amendments of Nov. 10, 1977, Pub. L. No. 95-166, § 10(2), 91 Stat. 1325 (codified at 42 U.S.C.A. § 1769(a) (West 1978)).

¹⁶⁹ 7 C.F.R. § 210.10 (1978) prescribes the "Type A" lunch:

- (1) One-half pint milk (skim or whole).
- (2) Two ounces of lean meat, poultry or fish; or two ounces of cheese; or one-half cup of cooked, dry beans or peas; or four tablespoons of peanut butter; or one egg; or any combination of these

food, rather than in terms of nutritional value. Thus, "vegetable" can mean the lettuce and pickle accompanying the hamburger.¹⁷⁰ Improving the nutritional value of the food would tend to increase its quality, and children would be less likely to throw it away.¹⁷¹ A USDA regulation provides for more variety in the food,¹⁷² but it does not go far enough.

The USDA has the authority to improve the lunch and breakfast programs to eliminate waste.¹⁷³ There are at least two model systems the USDA could adopt if it chose to do so. One is a traditional format, found in Milwaukee, Wisconsin, and the other is a McDonald's format, found in Las Vegas, Nevada.

Milwaukee has won awards for having the best school lunch program in the nation.¹⁷⁴ The food is prepared from scratch in each school's own kitchen, which saves 50% over the cost of pre-packaged, manufactured food.¹⁷⁵ Vending machines have been eliminated.¹⁷⁶ Although the children are offered no choices, the menu changes everyday.¹⁷⁷ By standardizing the menu, the city can add on many extras.¹⁷⁸ For example, only high quality ingredients are used,¹⁷⁹ and thus the food looks, smells, and tastes good.¹⁸⁰ The students help plan the menus and have a chance to

foods which provides an equivalent amount of protein.

(3) A three-quarter cup serving of two or more vegetables or fruit, or both.

(4) One slice of bread, corn bread, biscuit or the like, made of wholegrain or enriched flour.

A Type A lunch is for children aged 10 to 12. Quantities are adjusted for other age groups.

¹⁷⁰ Benezra, *supra* note 12, at 54.

¹⁷¹ 1977 House Hearings, *supra* note 2, at 148 (Mullen, *School Lunch Nutrients Based on Outdated U.S. Handbook*, Chicago Tribune, Feb. 23, 1977, at 5, col. 2).

¹⁷² 7 C.F.R. § 210.10(h) (1978) provides: "The FNS may approve variations in the food components of the lunch on an experimental or a continuing basis in any school where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, economic or physical needs."

¹⁷³ 42 U.S.C. § 1779 (1976).

¹⁷⁴ Brenton, *supra* note 66, at 48.

¹⁷⁵ Farmer, *A School Lunch Program to Be Proud Of*, ORGANIC FARMING AND GARDENING, March 1976, at 133.

¹⁷⁶ *Id.* at 134.

¹⁷⁷ *Id.* at 132.

¹⁷⁸ *Id.* at 132-33.

¹⁷⁹ Meat at USDA grades; beef chuck patties with only 18-21% fat; vegetables limited to whole kernel corn, peas, green beans, and carrots, to appeal to a broader segment. Brenton, *supra* note 66, at 48; Benezra, *supra* note 12, at 42.

¹⁸⁰ Brenton, *supra* note 66, at 48.

air complaints,¹⁸¹ and top-flight dietitians actually run the food service.¹⁸² The result of this program is that the schools serve the children good food, and waste is minimal.¹⁸³

The fast-food method of providing school lunches has also proven successful. Las Vegas has succeeded in tripling the number of lunches served since switching to a fast-food, "McDonald's" style of operation.¹⁸⁴ Lunches have included "Big Macs," pizzas, "Colonel Sander's Kentucky Fried Chicken" corn dogs, tacos, french fries, lettuce and tomato salads, milk, and milkshakes.¹⁸⁵ Breakfast is a cinnamon roll, a scrambled egg with ham on a roll, and a choice of fruit or juice, and milk.¹⁸⁶ All meals are high in nutritional content.¹⁸⁷ The city-wide food service manager won an award from the Nevada Heart Association for lowering the cholesterol count in school lunches.¹⁸⁸ When criticized for not serving the children "proper" food, this manager responds by pointing to the empty garbage cans, the full cafeterias, and his rising budget balance.¹⁸⁹

VII. CONCLUSION

There are numerous problems remaining with the lunch-breakfast programs. Among the most serious are the lack of funds for modern kitchens and attractive cafeterias, pre-plated foods, USDA bureaucratic inertia, and a lack of concern on the part of local school administrators. While the lunch program has succeeded in reaching most of the needy student population, the breakfast program has not.¹⁹⁰ As a result, millions of children go through the morning hungry and do not learn as much as they could.

There are a variety of answers to the problems associated with the educational feeding programs. Potential solutions would include increased funding, better food, more variety, wider employment of professional dietitians, eliminating junk food, more nutrition education, meals cooked from scratch right in the schools'

¹⁸¹ *Id.*

¹⁸² Farmer, *supra* note 175, at 134.

¹⁸³ *Id.*

¹⁸⁴ Robinson, *Move Over, Ronald McDonald*, EDUC. DIG., March 1978, at 36.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 36-37.

¹⁸⁸ *Id.* at 37.

¹⁸⁹ *Id.*

¹⁹⁰ See note 11 *supra*.

own kitchens, and ending the conflict of interest problem within the USDA.

While the school breakfast and lunch programs have enjoyed great progress during the 1970's, the goal of feeding every child will not be met until the nation adopts a universal free lunch program. Meals would be handed out the way textbooks are today; food would be considered an integral part of the educational process. The cost would be no more than the national expenditure for dog and cat food, and less than half that for horse racing.¹⁹¹ A universal free lunch program would not be a step toward socialism. It would be a recognition that an advanced society can afford higher standards today than in the past, and thereby enjoy a more educated, informed citizenry.

Donald J. Dechant

¹⁹¹ J. PERRYMAN, U.S. NUTRITION POLICIES IN THE SEVENTIES 221 (Mayer ed. 1973).