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TO: Superintendents
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LOCAL WELLNESS POLICIES – Guidance on food and beverage sales in schools

The Child Nutrition Reauthorization Act of 2004 established a new regulation requiring all LEAs that participate in the National School Lunch Program to develop and implement wellness policies that address nutrition and physical activity. Under the Act, local Boards of Education are required to adopt wellness policies no later than June 30, 2006. The wellness policies must include the following components:

- Goals for nutrition education, physical activity, and other school-based activities that are designed to promote student wellness in a manner the LEA deems appropriate;
- Nutrition guidelines for all foods available on each school campus during the school day with the objectives of promoting student health and reducing childhood obesity;
- Guidelines for reimbursable school meals which are no less restrictive than regulations and guidance issued by the US Department of Agriculture and written assurances that LEAs will comply with all federal regulations, general statutes, and policies of the State Board of Education pertaining to the operation of the child nutrition programs;
- A plan for measuring implementation of the local wellness policy, including designation of one or more persons within the LEA or at each school, as appropriate, charged with operational responsibility for ensuring that each school fulfills the district's wellness policy; and

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- Community involvement, including parents, students, representatives of the school food authority, the school board, school administrators, and the public in the development of the wellness policy.

In developing their local wellness policies, several LEAs have requested clarification on the federal regulations (7 CFR 210 and 220), general statutes (G.S. 115 C – 263 and 264) and state board policies (16 NCAC 6H.0004) that govern the administration and operation of child nutrition programs. The Attorney General's office has prepared the enclosed guidance to assist LEAs in clarifying the statutory and policy language.

Should you have questions about the guidance, please contact the Division of School Support at (919) 807-3500 or the Child Nutrition Services section at (919) 807-3506.

PWP/BM/LH/tm

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Enclosure

FOOD AND BEVERAGE SALES IN SCHOOLS

There are two issues related to the sales of food and beverages in the public schools. The first issue is who is allowed to sell food and beverages to students? the second is, what can be sold?

Who is allowed to sell food and beverages to students?

The answer to the first question is found in G.S. §§ 115C-263 and 264 and State Board of Education regulations.

§ 115C-263, entitled “Required provision of services,” states:

As a part of the function of the public school system, local boards of education shall provide to the extent practicable **school food services** in the schools under their jurisdiction. All school food services made available under this authority shall be provided in accordance with standards and regulations recommended by the Superintendent of Public Instruction and approved by the State Board of Education.

G.S. § 115C-264, entitled “Operation,” states:

In the operation of their **public school food programs**, the public schools **shall** participate in the National School Lunch Program established by the federal government. The program shall be under the jurisdiction of the Division of School Food Services of the Department of Public Instruction and in accordance with federal guidelines as established by the Child Nutrition Division of the United States Department of Agriculture

All school food services shall be operated on a **nonprofit** basis, and any earnings therefrom over and above the cost of operation as defined herein shall be used to reduce the cost of food, to serve better food, or to provide free or reduced-price lunches to indigent children and for no other purpose.

Therefore, under the NC statutes all “school food services” must be operated on a “nonprofit” basis for the benefit of the Child Nutrition Program (CNP).

The State Board of Education in turn has adopted regulations which state that “[s]ponsors must operate all food and beverage services during or before the established lunch period through the school food service department.”¹ 16 N.C.A.C. 6H.0104 (a)(1)(A)(2005). Thus, under State Board of Education regulations, CNP’s statutory control of food service ends after the lunch period, *i.e.*, at the end of the “school food services” program.

¹“Sponsors” means LEAs and other organizations that participate in the CNP, *e.g.*, summer camps.

The purpose of 16 N.C.A.C. 6H.0104 (a)(1)(A)(2005) is to preserve the nutritional, programmatic and financial integrity of the CNP by ensuring the revenues from the sale of all foods and beverages to students until after the last child is served lunch accrue to the non-profit CNP. Therefore, the CNP must retain receipts from the sale of all foods and beverages sold to students during the school day until the last child is served lunch. The income must be deposited into the CNP account and may be used only for the purposes of the CNP. Conversely, profits on food and beverages sold after the last child is served lunch do not need to be retained by the CNP.

What can be sold?

The answer to this question is found in federal law and State law.

Federal law requires CNPs to place time and place limitations on the sale certain foods. Federal law requires CNPs to limit sale of “competitive foods” which it defines as “any foods sold in competition with the Program to children in food service areas during the lunch periods.” 7 CFR § 210.11(a)(1) Federal law also requires CNPs to limit the sale of food of “minimal nutritional value.” 7 CFR § 210.11(b).

State agencies and school food authorities **shall** establish such rules or regulations as are necessary to control the sale of foods in competition with lunches served under the Program. Such rules or regulations **shall prohibit** the sale of foods of **minimal nutritional value**, as listed in Appendix B of this part, in the food service areas during the lunch periods. The sale of **other competitive** foods may, at the discretion of the State agency and school food authority, be allowed in the food service area during the lunch period only if all **income from the sale of such foods accrues to the benefit of the nonprofit school food service or the school or student organizations approved by the school**. State agencies and school food authorities may impose additional restrictions on the sale of and income from all foods sold at any time throughout schools participating in the Program.

Pursuant to that federal directive, the State Board of Education has enacted policies that prohibit CNPs from selling food of minimal nutritional value (16 N.C.A.C. 6H .0104(a)(1)(D)) and require profits from all “competitive food sales” to be used for the school’s non-profit lunch and breakfast programs. 16 N.C.A.C. 6H .0104(a)(2)

Sale of “soft drinks”

G.S. § 115C-264.2 regulates “Vending Machine Sales” in the public schools. Among other things, that statute provides that “soft drinks” cannot be sold: (I) during the breakfast and lunch periods, (ii) at elementary schools, or (iii) contrary to the requirements of the National

School Lunch Program.²

This section of G.S. § 115C-264.2 permits the sale of “soft drinks” in middle and high schools between the breakfast and lunch periods or after the lunch period as long as those sales are not contrary to the National School Lunch Program.³

As noted above, the National School Lunch Program requires participating States to prohibit the sale of foods of minimal nutritional value, including carbonated drinks (see 7 C.F.R. § 210.11, App. B(a)(1), **in the food service areas during the lunch periods**. In addition, as noted above, State Board of Education regulations (16 N.C.A.C. 6H .0104(a)(1)(D)) prohibit CNPs from selling “food of minimum nutritional value” at any time. Insofar as, G.S. § 115C-264(c) and 16 N.C.A.C. 6H .0104(a)(1)(A) require CNPs to operate all food and beverage services offered in the schools before the end of the lunch period, these regulations prohibit North Carolina public schools from selling soft drinks or any other “food of minimum nutritional value” anywhere in the schools before the end of the lunch period.

Water

Water is not a “soft drink” because it is not sweetened. Nevertheless, it is a beverage subject to G.S. § 115C-264(c) and 16 N.C.A.C. 6H .0104(a)(1)(A) which state that the CNPs must operate all food and beverage services offered before the end of the lunch period. Therefore, schools may sell water anywhere and anytime but the profits from the sale of water sold prior to the end of the lunch period must be retained by the CNP and used only for the benefit of the CNP.

Adult non-students

All the laws and regulations in this area are intended for the benefit the CNP and the students. The laws are not intended to regulate the sales of food or beverages to adults, unless the adults are purchasing food or beverages from the school lunch program. See, 16 N.C.A.C. 6H .0104(a)(1)(E). Consequently, authority of the CNP to operate all food and beverage sales in the school prior to the end of the lunch period and the restrictions on sales of competitive foods,

² For purposes of defining “soft drinks,” DPI follows N.C.G.S. § 105-164.3 which defines “soft drink” as

“A nonalcoholic beverage that contains natural or artificial sweeteners. The term does not include beverages that contain one or more of the following:

- a. Milk or milk products.
- b. Soy, rice, or similar milk substitutes.
- c. More than fifty percent (50%) vegetable or fruit juice.”

³ G.S. § 115C-264.2(a)(2), (3) and (4) impose further restrictions on the sale of “sugared carbonated soft drinks.”

foods of minimal nutritional value or soft drinks do not apply to sales in those areas of the school which are generally restricted to faculty and staff, *e.g.*, teachers' lounges, maintenance garages.