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Introduction

The essence of the traditional American food fight has fundamentally changed, escalating beyond the walls of junior high school cafeterias and into the halls of legislatures. Instead of lobbing mashed potatoes and mystery meat, lawmakers and advocates are trading barbs about the food cafeterias serve and where it comes from.[1]

The scope of child-nutrition programs is significant, and many of those programs use schools as nuclei for food distribution.[2] In 2014, at least 33.26 million American schoolchildren depended on food provided by school meal programs for the majority of their daily nutrition.[3] In some low-income school districts, children may receive up to three meals per

1. *See* Helena Bottemiller Evich, *The Carrot War Gets Serious,* POLITCO (Sept. 23, 2015, 5:25 AM), *http://www.politico.com/agenda/story/2015/09/federal-healthy-school-lunch-program-food-lobby-000239; see also* Nicholas Confessore, *How School Lunch Became the Latest Political Battleground,* N.Y. TIMES (Oct. 7, 2014), http://www.nytimes.com/2014/10/12/magazine/how-school-lunch-became-the-latest-political-battleground.html?_r=2.

2. *E.g.*, FOOD & NUTRITION SERV., *School Meals: Child Nutrition Programs*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/school-meals/child-nutrition-programs (explaining that states administer the National School Lunch Program, the School Breakfast Program, the Child and Adult Care Food Program, the Summer Food Service Program, the Fresh Fruit and Vegetable Program, and the Special Milk Program through schools, child care centers, and after-school programs) (last updated Aug. 17, 2016); FOOD & NUTRITION SERV., *Child and Adult Care Food Program (CACFP)*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/cacfp/child-and-adult-care-food-program (last updated Nov. 20, 2015); FOOD AND NUTRITION SERV., *Fresh Fruit and Vegetable Program*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/ffvp/fresh-fruit-and-vegetable-program (last updated Mar. 1, 2016).

3. *Written Testimony to the National Commission on Hunger*, H. Comm. on Agric. 114 Cong. 1-12 (2015) (Submitted by Marian Wright Edelman, President, Children's Defense Fund), http://www.childrensdefense.org/library/data/nch-invited-written-testimony.pdf (stating that 21.7 million children receiving either free or reduced price lunches); ECON. RES. SERV., *National School Lunch Program,* U.S. DEP'T OF AGRIC., http://www.ers.usda.gov/topics/food-nutrition-assistance/child-nutrition-programs/national-school-lunch-program.aspx (last updated April 15, 2015) (reporting that "children from food-insecure . . . households were more likely to eat school meals and received more of their food and nutrient intake from school meals than did other children.").

day, plus a snack, from school.[4] These numbers signify that schools themselves have also fundamentally transformed from conglomerations of desks and classrooms into trusted sources of sustenance, especially for students of color. Free and reduced-price school-meal recipients are primarily black and Latino students from lower socioeconomic classes.[5] Given the vast scope of the school-meal programs that serve so many dependent students, the quality and nutritional value of the food served to them is paramount.

Four key considerations highlight the need for healthy school meals. First, childhood obesity has reached epidemic levels.[6] According to the Centers for Disease Control and Prevention ("CDC"), "[c]hildhood obesity has more than doubled in children and quadrupled in adolescents in the past 30 years."[7] Unhealthy school meals in childhood portend an adulthood riddled with serious health complications. Obesity can lead to an onslaught of health problems later in life, including heart disease, stroke, type 2 diabetes, high blood pressure, and certain types of cancer; each of these preventable health problems cost Americans billions of dollars in healthcare fees annually.[8]

4. *See* Christine Armario, *More Schools Serve Students Dinner As Demand Expands*, WTOP (Jan. 15, 2015, 3:34 PM), http://wtop.com/food/2015/01/la-schools-to-double-number-of-students-served-dinner/; Marisol Bello, *Schools Becoming the 'Last Frontier' for Hungry Kids*, USA TODAY (Apr. 5, 2015, 6:30 PM), http://www.usatoday.com/story/news/2015/04/05/public-school-dinners-pantries/70389176/; Heather Hollingsworth, *More Public Schools Dish Up 3 Meals a Day*, SEATTLE TIMES, http://www.seattletimes.com/nation-world/more-public-schools-dish-up-3-meals-a-day/ (last updated Feb. 21, 2012, 6:08 AM).

5. *Status and Trends in the Education of Racial and Ethnic Minorities*, NAT'L CTR. FOR EDU. STAT. (July 2010), https://nces.ed.gov/pubs2010/2010015/indicator2_7.asp (noting that "The percentages of Black (74 percent), Hispanic (77 percent), and American Indian/Alaska Native (68 percent) 4th-graders who were eligible were higher than the percentages of White 4th-graders and Asian/Pacific Islander (34 percent) 4th-graders who were eligible."); *see* FOOD & NUTRITION SERV., *National School Lunch Program (NSLP): Applying for Free and Reduced Price School Meals*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/school-meals/applying-free-and-reduced-price-school-meals (last updated Oct. 16, 2016); Child Nutrition Programs—Income Eligibility Guidelines, 80 Fed. Reg. 17027 (Mar. 31, 2015), http://www.gpo.gov/fdsys/pkg/FR-2015-03-31/pdf/2015-07358.pdf (indicating that the qualifying four person family income to participate in free and reduced price meal programs is $44,863 and $31,525, respectively).

6. *Childhood Obesity Facts*, CTRS. DISEASE CONTROL & PREVENTION, https://www.cdc.gov/healthyschools/obesity/facts.htm (last updated Aug. 27, 2015).

7. *Obese Youth Over Time*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/healthyschools/obesity/obesity-youth.htm (last updated Sept. 27, 2015).

8. *See Adult Obesity Facts*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/adult.html, (last updated Sept. 1, 2016) (Stating that "[t]he estimated annual medical cost of obesity in the U.S. was

Second, healthier school meals have the power to fight societal health disparities and overarching inequalities.[9] Obesity risks are particularly high for low-income and minority youth nationwide.[10] Many of these youths live in food deserts,[11] "urban neighborhoods and rural towns without ready access to fresh, healthy, and affordable food" where fast food and convenience stores are predominant food sources.[12] By providing access to fresh, unprocessed, and nutritious foods, school districts can act as distribution hubs that help fight the prevalence of food deserts.

$147 billion in 2008 U.S. dollars; the medical costs for people who are obese were $1,429 higher than those of normal weight."); *Why Obesity Is a Health Problem*, NAT'L HEART, LUNG, & BLOOD INST., http://www.nhlbi.nih.gov/health/educational/wecan/healthy-weight-basics/obesity.htm (last updated Feb. 13, 2013).

9. *See Bitter Fruits*, ECONOMIST (Aug. 13, 2016), http://www.economist.com/news/united-states/21704801-incomes-become-more-unequal-so-too-may-rate-healthy-eating-bitter-fruits (discussing income inequality's relationship with healthy eating).

10. *See Childhood Obesity Facts,* CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/childhood.html (last updated June 19, 2015) (stating that in 2012, the CDC found that obesity was more common in Hispanic and black children and adolescents, and that preschool-age children of low income families are also at greater risk of obesity); Jorge Delva et al., *The Epidemiology of Overweight and Related Lifestyle Behaviors: Racial/Ethnic and Socioeconomic Status Differences Among American Youth*, 33 AM. J. PREVENTIVE MED. S178, S182 (2007) (finding that black and Hispanic youth have higher BMIs than white youth).

11. *See* U.S. DEP'T OF AGRIC. AGRIC., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES (2009), http://www.ers.usda.gov/media/242654/ap036_reportsummary_1_.pdf (citing that more than forty percent of the 23.5 million food desert inhabitants are low-income); Angelica I. Ambrose, *A National School Garden Program: A Holistic and Sustainable Approach to Combating Food Deserts*, 21 SAN JOAQUIN AGRIC. L. REV. 51, 54 (2012) ("Those most affected by food deserts are residents of low-income areas and racial minorities. Many food deserts exist in socioeconomically disadvantaged areas, thus exposing disparities in food access based on income and race.").

12. *Hunger Research: Understanding Food Insecurity In You Community: What Is a Food Desert,* UNC SCHOOL OF GOV'T (last visited Oct. 15, 2016), *http://hunger-research.sog.unc.edu/faq/what-food-desert* (explaining that food deserts are combinations of low income and low access communities); MICHAEL CAROLAN, THE SOCIOLOGY OF FOOD AND AGRICULTURE 70 (2nd ed. 2016) ("They qualify as "low-income communities", based on having: a) a poverty rate of 20 percent or greater, OR b) a median family income at or below 80 percent of the area median family income . . . They qualify as "low-access communities", based on the determination that at least 500 persons and/or at least 33% of the census tract's population live more than one mile from a supermarket or large grocery store (10 miles, in the case of non-metropolitan census tracts).").

Third, schools currently contribute to the vast amount of American food waste, an amount that could fill a 90,000-seat football stadium.[13] Not only do healthier school meals promote improved health outcomes for schoolchildren, but they can also decrease food waste. Students who enjoy their lunches eat more of them, particularly when schools offer fresh produce.[14] Consequently, these students are less likely to dump the majority of their meals in the trash.[15]

Finally, the majority of Americans simply want healthy school lunches.[16] Ninety-one percent of parents think that schools should serve fruits or vegetables with each meal and the overwhelming majority support stricter school nutrition standards.[17]

With such high stakes, reforms must happen swiftly and effectively to ensure that high-need students have access to proper nutrition. Accounting for the above considerations, the United States Department of Agriculture ("USDA") promulgated a rule that encourages schools to procure local, unprocessed foods to serve in their meal programs.[18]

13. *See* Jimmy Nguyen, *Creative Solutions to Ending School Food Waste,* U.S. DEP'T OF AGRIC. BLOG, http://blogs.usda.gov/2014/08/26/creative-solutions-to-ending-school-food-waste/ (last updated Aug. 26, 2014 10:00 AM) ("Americans waste enough food every day to fill a 90,000 seat football stadium. Approximately one-third of all food is wasted at the retail and consumer levels. While research has shown that food wasted by children is similar to the rest of the U.S. population, there are many ways schools can reduce food waste and teach students about the impact it has on the environment and in their community . . . . [I]ntroducing a 'healthy options only' convenience line increased consumption of those nutritious items by 35 percent."); Teresa Watanabe, *Solutions Sought to Reduce Food Waste at Schools*, L.A. TIMES (Apr. 1, 2014, 9:45 PM) http://www.latimes.com/local/la-me-lausd-waste-20140402-story.html.

14. *See Healthy School Lunches Improve Kids' Habits: Strong Nutrition Standard Work, Evidence Shows*, PEW CHARITABLE TRUSTS (Dec. 1, 2015), http://www.pewtrusts.org/en/research-and-analysis/analysis/2015/12/01/healthy-school-lunches-improve-kids-habits ("Compared with 2012, children ate nearly 13 percentage points more of their entrees and 18 percentage points more of their vegetables by the last year of the study. Food waste declined as a result. The researchers also found that greater variety led to healthier choices. Each additional fruit option offered was associated with a 9.3 percent increase in the number of students taking a fruit serving.").

15. *See id*.

16. *See Americans' Views on School Food and Child Nutrition*, PEW CHARITABLE TRUSTS (June 11, 2015), http://www.pewtrusts.org/en/research-and-analysis/collections/2015/04/americans-views-on-school-food-and-child-nutrition.

17. *See Parents Support Healthier School Food Standards*, PEW CHARITABLE TRUSTS (Sept. 8, 2014), http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/parents-support-healthier-school-food-standards.

18. Geographic Preference Option for the Procurement of Unprocessed Agricultural Products in Child Nutrition Programs, 76 Fed. Reg. 78, 22603 (Apr. 22, 2011).

Consequently, local and state legislatures have increasingly begun to adopt farm-to-school laws that both help schools access healthy foods and connect small local producers to new markets.[19] However, other regulatory barriers that restrict school procurement practices may still inhibit schools' access to fresh, unprocessed ingredients that comprise healthy meals.[20] Public-bidding requirements complicate easy access to available products. Because schools must accept a vendor's lowest bid, private food-service management companies ("FSMCs"), which consistently price their standardized products below small local producers' wares, often win school meal contracts over local producers.[21] Yet, FSMCs are not always best for schools, especially when local farm-to-school vendors offer a myriad of benefits that FSMCs do not.[22]

This Note contends that by increasing school flexibility and control over vendor awards, farm-to-school procurement legislation can help schools access fresh, healthy foods for school meal programs. Part I briefly overviews the evolution and operations of the National School Lunch Program ("NSLP") and School Breakfast Program ("SBP"). Part II highlights FSMC fraud and irresponsibility that elucidates the need for schools' increased procurement flexibility. Part III explains the merits of farm-to-school legislation as a solution to inflexibility. Part IV demonstrates how enacting farm-to-school laws can increase school flexibility and control over school meals and identifies three key strategies lawmakers can employ to help schools access local, responsible food vendors. First, lawmakers can employ legislative devices to promote small, local vendors in the formal bidding process. Second, state and local governments can raise small- purchase thresholds, allowing schools to purchase more fresh, nutritious food through informal purchasing. Finally, lawmakers should advocate a micro-purchase carve-out for farm- to- school programs, which would allow schools to deliver fresh, local produce to students more frequently.

I. Overview of the National School Lunch Program and School Breakfast Program

A. What are the National School Lunch and School Breakfast Programs?

The passage of the Richard B. Russell National School Lunch Act in 1946 affirmed the United States government's national-security interest in

19. *See State Farm to School Legislative Survey 2002-2014,* NAT'L FARM TO SCH. NETWORK 8 (Mar. 2015), http://www.farmtoschool.org/Resources/F2S-Survey-2014.pdf.

20. *See infra* Part IV.

21. *See infra* Part IV.A; *See infra* Part I.C.

22. *See infra* Part III.B.

feeding the nation's malnourished children.[23] Amended numerous times since its enactment, the National School Lunch Act establishes the NSLP, which provides free or low-cost meals to students who meet eligibility requirements.[24] The government affirmed the NSLP's importance in the Child Nutrition Act of 1966.[25] The Child Nutrition Act sought to expand government assistance in meeting the nutritional, developmental, and educational needs of children as a way to promote children's health and well-being, as well as to increase domestic agricultural-product consumption.[26] Piloted in 1966, the SBP became a national child nutrition program in 1975.[27] Nearly identical to the NSLP, the SBP provides free or low-cost breakfasts to students who meet eligibility requirements "in recognition of the demonstrated relationship between food and good nutrition and the capacity of children to develop and learn."[28] While critical in nutrition delivery to children, these school meal programs are expensive. In 2015, the federal government paid a combined total of almost seventeen billion dollars for the NSLP and SBP.[29]

As a reauthorization of the Child Nutrition Act, the Healthy Hungry Free Kids Act of 2010 ("HHFKA") governs what foods schools can distribute through school meal programs.[30] Due to increased concern about

23. *See* National School Lunch Act of 1946 § 2, 42 U.S.C. § 1751 (2012); Susan Lynn Roberts, *School Food: Does the Future Call for New Food Policy or Can the Old Still Hold True?*, 7 DRAKE J. AGRIC. L. 587, 588 (2002).

24. Gordon W. Gunderson, *National School Lunch Act,* U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/nslp/history_5#natlamended (last updated Aug. 26, 2015).

25. *See* Roberts *supra* note 23, at 588.

26. *See* Child Nutrition Act of 1966, 42 U.S.C. § 1771; *see also id*. at 595 ("Major improvements with several new programs to specifically help schools, and thus children, in economically poor areas were written into the legislation. 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 . . . . Food policy was changing behind the program and genuinely appeared to be focusing on helping low income children.").

27. *See* FOOD & NUTRITION SERV., *The School Breakfast Program Fact Sheet,* U.S. DEP'T OF AGRIC. (July 26, 2013), http://www.fns.usda.gov/sites/default/files/SBPfactsheet.pdf.

28. *See id*.; Child Nutrition Act, *supra* note 26.

29. FOOD & NUTRITION SERV., *Federal Cost of School Meal Programs,* U.S. DEP'T OF AGRIC. (Jan. 8, 2016), http://www.fns.usda.gov/sites/default/files/pd/cncost.pdf; SCHOOL NUTRITION ASS'N, SCHOOL MEAL TRENDS & STATS, https://schoolnutrition.org/AboutSchoolMeals/SchoolMealTrendsStats/ (last visited Apr. 1, 2017).

30. *See* OFFICE OF THE PRESS SEC'Y, *Child Nutrition Reauthorization Healthy, Hunger-Free Kids Act of 2010* (Dec. 13, 2010) (noting that the Healthy-Hunger Free Kids Act "[g]ives USDA the authority to set nutritional standards for all foods regularly

childhood obesity, HHFKA heightened nutritional standards for food served in schools, improved the quality of food served, increased the number of eligible children, and provided for school-wide income eligibility.[31] HHFKA, designed to cater to children's dietary needs, aims to provide high-nutrient, low-calorie meals by requiring school menus to feature fruits, vegetables, whole grains, and low-fat milk, while limiting the availability of foods with high levels of sodium, saturated fat, and trans fat.[32]

B. How Do Schools Use Government Funds to Purchase School Meals?

Schools that choose to participate in the National School Lunch and School Breakfast Programs receive cash subsidies in exchange for serving meals that meet federal nutrition guidelines—bolstered by HHFKA—and offering free or reduced-price lunches and snacks to low-income students.[33] The federal government reimburses states based on the number of meals schools serve at an annually calculated reimbursement rate.[34] For instance, in the 2015–2016 academic year, most schools could receive a maximum reimbursement of $3.24 per meal for serving free and reduced-price lunches.[35] Severe-need schools serving school breakfasts could receive a maximum of $1.99, whereas non-severe-need schools receive $1.66.[36]

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sold in schools during the school day, including vending machines, the "a la carte" lunch lines, and school stores.").

31. *See* FOOD & NUTRITION SERV., *Secretary Vilsack Statement on Passage of the Healthy Hunger-Free Kids Act*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/pressrelease/2010/063210 (last updated Aug. 26, 2015); FOOD & NUTRITION SERV., *School Meals: Healthy Hunger-Free Kids Act*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/school-meals/healthy-hunger-free-kids-act (last updated Mar. 3, 2014); *Healthy, Hunger-Free Kids Act of 2010 Fact Sheet*, WHITE HOUSE OFF. OF THE PRESS SECRETARY (Dec. 13, 2010), https://www.whitehouse.gov/the-press-office/2010/12/13/president-obama-signs-healthy-hunger-free-kids-act-2010-law.

32. Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088 (Jan. 26, 2012) (to be codified at 7 C.F.R. pt. 210, 220).

33. *See* FOOD & NUTRITION SERV., *The National School Lunch Program Fact Sheet*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/sites/default/files/SBPfactsheet.pdf (last visited Apr. 1, 2017); FOOD & NUTRITION SERV., *supra* note 27.

34. *See* FOOD & NUTRITION SERV., USDA FOODS IN THE NATIONAL SCHOOL LUNCH PROGRAM (2010), *available at* http://www.fns.usda.gov/sites/default/files/WhitePaper.pdf (last visited Apr. 1, 2017).

35. National School Lunch, Special Milk, and School Breakfast Programs, National Average Payments/Maximum Reimbursement Rates, 80 Fed. Reg. 42472 (July 17, 2015).

36. *Id.*; U.S. DEP'T OF AGRIC., ELIGIBILITY FOR SEVERE NEED RATES FOR THE SCHOOL BREAKFAST PROGRAM (Sept. 22, 2005), *available at* https://fns-prod.azureedge.net/sites/default/files/SP23-2005.pdf (defining severe need

The Food and Nutrition Service ("FNS"), along with state agencies, coordinates the NSLP.[37] FNS is a USDA agency that administers food and nutrition programs.[38] State agencies are responsible for school-meal administration at the state level. The most common type is a state's department of education.[39] FNS receives entitlement funds, granted by the Richard B. Russell National School Lunch Act, to purchase food for schools.[40] FNS can exercise flexibility with federal funding; it can use this money to buy what it deems best to accommodate nutritional standards and school-district preferences.[41] However, FNS and state agencies delegate procurement practices to school-food authorities—non-profit organizations that have USDA approval to administer school-meal operation at district levels in multiple schools. Commonly, school districts serve as school-food authorities.[42] With these delegated funds, school-food authorities purchase eighty to eighty-five percent of each school meal from commercial markets.[43]

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schools as schools where cafeterias served forty percent of all lunches served in the second preceding year to free and reduced price meal candidates).

37. *See* U.S. DEP'T OF AGRIC. OFF. OF INSPECTOR GENERAL, NATIONAL SCHOOL LUNCH PROGRAM-FOOD SERVICE MANAGEMENT COMPANY CONTRACTS 1 (Jan. 2013).

38. U.S. DEP'T OF AGRIC., FOOD AND NUTRITION SERVICE (FNS) OVERVIEW, http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=FNS_Agency_Splash.xml (last updated June 11, 2014).

39. Telephone Interview with Samia Hamdan, Senior Nutritionist at U.S. Dep't Agric. Food & Nutrition Serv. (Feb. 1, 2016).

40. *See* U.S. DEP'T OF AGRIC., *supra* note 36; FOOD AND NUTRITION SERV., *supra* note 34, at 5-6; National School Lunch, Special Milk, and School Breakfast Programs, National Average Payments/Maximum Reimbursement Rates, 80 Fed. Reg. 42471 (July 17, 2015) ("Section 6, Section 32 ("Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753) provides general cash for food assistance payments to States to assist schools in purchasing food."); *See also* FOOD & NUTRITION SERV., *Food Distribution: Schools/USDA Foods Programs - FAQs*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/fdd/schoolsusda-foods-programs-faqs (last updated Dec. 30, 2015) (detailing that the government will also provide schools with entitlement and bonus foods, acquired through "USDA's price support and surplus removal programs" to supplement meals).

41. *See* FOOD & NUTRITION SERV., *supra* note 34, at 5 ("Since Section 6 funds are not required to be spent on direct intervention in agricultural markets, USDA has great flexibility in the type of products it can buy with these funds. Purchases are made to provide nutritious foods and accommodate school preferences.").

42. *See* National School Lunch Program 7 C.F.R. § 210.2 (2012); FOOD & NUTRITION SERV., CONTRACTING WITH THE FOOD SERVICE MANAGEMENT COMPANIES: GUIDANCE FOR SCHOOL AUTHORITIES I-1 (Apr. 2009), *available at* http://www.fns.usda.gov/sites/default/files/FSMCguidance-sfa.pdf.

43. *See* FOOD & NUTRITION SERV., *supra* note 34, at 3 ("80 to 85 percent [of the composite of each school meal] is purchased from commercial markets using the cash assistance provided by USDA, funds provided by State and local governments, children's payments for reduced price and paid lunches, proceeds

Within a commercial market, school-food authorities must purchase products from vendors that are both responsive and responsible.[44] Responsive vendors are vendors that meet all of a school's solicitation specifications.[45] For instance, a vendor that responds to a school's solicitation for apples with a bid for peaches is not a responsive vendor. Responsible vendors are those that are "capable of performing successfully under the terms and conditions of the contract."[46] In evaluating a vendor's responsiveness and responsibility, schools can use a vendor's reputation as a deciding factor.[47] A school that discovers that an asparagus vendor routinely delivers half of the requested amount of asparagus, for example, would not have to contract with that vendor, because the vendor, incapable of performing under contract terms, is irresponsible.

C. What Roles do Food-Service Management Companies Play in School-Meal Programs?

Over time, as more children began to participate in school-meal programs and the cost of food increased, schools struggled to maintain affordable school-lunch programs.[48] Searching for ways to stretch dollars and feed more mouths, schools began to enter private contracts with FSMCs.[49] An FSMC is a "commercial enterprise or a nonprofit organization which is or may be contracted with by the school food authority to manage any aspect of the school food service."[50] Convinced that the food service practices efficiently serving other institutions, such as prisons and airlines, would also benefit schools, the Secretary of Agriculture permitted private food-management companies to service, operate, and manage school cafeterias in 1969.[51] Since that time, FSMCs have entrenched

from vending machines, catering activities, and other funds earned by or provided to the school food service.").

44. *See* U.S. DEP'T OF AGRIC., PROCURING LOCAL FOODS FOR CHILD NUTRITION PROGRAMS 37 (Aug. 2015), http://www.fns.usda.gov/sites/default/files/f2s/F2S_Procuring_Local_Foods_Child_Nutrition_Prog_Guide.pdf.

45. *See id*. at 36.

46. *Id*.

47. *Id*.

48. *See* SUSAN LEVINE, SCHOOL LUNCH POLITICS: THE SURPRISING HISTORY OF AMERICA'S FAVORITE WELFARE PROGRAM 151 (2008) ("as the number of free meals *soared*, the number of paying children precipitously declined . . . the search for financial stability eroded both the nutritional integrity and the public nature of the National School Lunch Program.").

49. *See id*. at 158, 163.

50. National School Lunch Program, 7 C.F.R. §210.2 (2012).

51. *See* LEVINE, *supra* note 48, at 158, 161.

themselves in school cafeterias across America. As Tom Callahan, Vice President of an FSMC called Sodexo, once predicted, "as long as federal reimbursements did not keep up with 'food and labor costs' and state contributions continued to be 'embarrassingly low,' schools would either have to drop out of the National School Lunch Program or find 'creative ways' to meet their costs."[52]

Those creative solutions include contracting with FSMCs. School-food authorities often contract with FSMCs to fulfill their NSLP needs, maintaining that "outsourcing food services [is] the only way to maintain a fiscally viable lunch program because many nationwide FSMCs could generate higher sales volume with lower operational costs."[53] Reflecting the trend toward privatizing school meals, FSMCs dominate nearly a quarter of school-nutrition programs.[54] Contracts with FSMCs take two forms: a fixed-price per-meal contract or a cost-reimbursable contract. In fixed-price per-meal contracts, FSMCs charge schools flat rates for each meal they serve and credit the school for any government-donated foods.[55] In cost-reimbursable contracts, FSMCs invoice schools for foods

52. *See* LEVINE, *supra* note 48, at 163; *see also* Carolyn VanderSchee, *The Privatization of Food Services in Schools: Undermining Children's Health, Social Equity, and Democratic Education, in Schools or Markets?*, *in* COMMERCIALISM, PRIVATIZATION, AND SCHOOL-BUSINESS PARTNERSHIPS 5-7 (Deron Boyles ed., 2005).

53. VanderSchee, *supra* note 52, at 5.

54. *See* Lucy Komisar, *How the Food Industry Eats Your Kid's Lunch*, N.Y. Times (Dec. 3, 2011), http://www.nytimes.com/2011/12/04/opinion/sunday/school-lunches-and-the-food-industry.html?_r=1 ("About a quarter of the school nutrition program has been privatized, much of it outsourced to food service management giants like Aramark, based in Philadelphia; Sodexo, based in France; and the Chartwells division of the Compass Group, based in Britain."); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-156R, MEAL COUNTING AND CLAIMING BY FOOD SERVICE MANAGEMENT COMPANIES IN THE SCHOOL MEAL PROGRAMS 2 (2009) (stating that as of 2007, 13 percent of SFAs choose to contract with private FSMCs.); *see, e.g.*, LEVINE, *supra* note 48, at 181-82 ("By the mid-1990s, Marriott Corporation alone managed lunch programs in over 350 school districts (and an estimated 3,500 schools) nationwide, and was expanding at a rate of 20 percent each year. Aramark, Sodexho, and Dakara followed Mariott in the school food -service market. Sodexho, for example, claimed to serve 360 million school lunches in 2002."); VanderSchee, *supra* note 52, at 6 ("Today, approximately 1,000 of the 15,000 school districts in the United States have contracted food services with FSMCs such as Marriott, Canteen, or Aramark."); Betty T. Izumi et al., *Farm to School Programs: Exploring the Role of Regionally-based Food Distributors in Alternative Agrifood Networks*, 27 AGRIC. & HUM. VALUES 335, 336 (2010) ("Systems and Services Company (SYSCO), a $35 billion publicly traded company that is the market leader in wholesale food distribution in North America . . . SYSCO maintains an estimated 15% share of the $225 billion industry and a sales force that is larger than the combined sales forces of the next nine largest competitors.").

55. *See* U.S. DEP'T OF AGRIC. OFF. OF INSPECTOR GENERAL, *supra* note 37.

they purchase and serve to students.[56] Notably, cost-reimbursable contracts require FSMCs to pass on savings to schools; that is, contract prices should reflect the rebates and purchase discounts FSMCs receive for school purchases in the prices.[57]

II. FSMC Fraud Highlights the Need for Schools' Increased Procurement Flexibility

Given schools' tight budgets and procurement requirements, FSMCs are convenient and attractive one-stop-shops for food service needs.[58] Yet, school meal privatization has opened the door to fraud, and today, many school districts remain vulnerable to FSMC abuse.[59] Irresponsible behaviors of leading FSMCs, such as Sodexo, Chartwells, and Aramark, demonstrate how some FSMCs have manipulated both students and schools.[60] Not only have whistleblowers accused FSMCs that provide school meals of stealing thousands of dollars from parents, taxpayers, and the federal government through fund mismanagement and kickbacks, but students also decry the quality of food FSMCs deliver.[61]

For example, in 2010, Sodexo paid twenty million dollars to settle a *qui tam* lawsuit after the New York Attorney General's Office's investigation revealed that the FSMC had pocketed off-invoice rebates.[62] That is, Sodexo cajoled its suppliers into giving it rebates, which it then pocketed without reflecting such discounts in the rates it charged schools.[63] These sweetheart deals—defrauding twenty-one New York

56. *Id*.

57. *Id*.

58. VanderSchee, *supra* note 52, at 5 ("Since the 1980s, local food authorities most often turn to FSMCs for financial reasons, citing that outsourcing food services was the only way to maintain a fiscally viable lunch program because many nationwide FSMCs could generate higher sales volume with lower operational costs.").

59. Nirvi Shah, *USDA to Probe Companies Running School Cafeterias*, EDUC. WEEK (June 14, 2011), http://www.edweek.org/ew/articles/2011/06/15/35rebates_ep.h30.html.

60. *See* Joseph Erbentraut, *The Problem Is Gross School Lunch. These High Schoolers Are Fixing It*, Huffington Post (Dec. 10, 2015), http://www.huffingtonpost.com/entry/chicago-public-schools-aramark-lunch-boycott_56686953e4b0f290e5217c3c (Noting that "Aramark currently provides food services for some 380 school districts nationwide."); Shah, *supra* note 59.

61. *See* Shah, *supra* note 59.

62. *Qui Tam Lawsuit*, BLACKS' LAW DICTIONARY (10th ed. 2014) (defining qui tam action as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive."); *see also* Shah, *supra* note 59.

school districts and the State University of New York system—not only violated Sodexo's contracts with schools but also federal and state law.[64]

Similarly, whistleblowers alleged that Chartwells, once the largest FSMC in the D.C. Public School ("DCPS") system, not only cheated DCPS out of precious funds but also delivered subpar products. In the DCPS system, 52,616 students participate in the NSLP and 35,188 students participate in the SBP. In an effort to implement cost-saving measures that would increase school-meal nutrition, DCPS relied on Chartwells to provide its child-nutrition program meals.[65] In another *qui tam* lawsuit, plaintiffs accused Chartwells of purchasing highly processed foods through a corporate affiliate and then charging higher prices for the foods.[66] The suit alleges alleged that Chartwells "knowingly submitted false invoices" to DCPS, resulting in the school district's overpaying the company.[67] Though the settlement neither confirms nor denies Chartwells' culpability, Chartwells settled the case for nineteen million dollars.[68]

Students themselves have accused FSMCs of injustice. Outraged by the quality of their meals, Chicago students began to boycott the Aramark food served to them as part of the FSMC's ninety-seven-million-dollar contract with the Chicago Public School District.[69] Armed with unappetizing photographic evidence, students at Roosevelt High School

63. *See Whistleblower in Sodexo Kickback Case Comments on New York Settlement,* PHILLIPSANDCOHEN.COM (July 21, 2010), http://www.phillipsandcohen.com/2010/Whistleblower-in-Sodexo-kickback-case-comments-on-New-York-settlement.shtml; *Attorney General Cuomo Announces $20 Million Settlement With Food Services Company For Overcharging New York Schools,* N.Y. STATE OFF. ATT'Y GEN. (July 21, 2010), http://www.ag.ny.gov/press-release/attorney-general-cuomo-announces-20-million-settlement-food-services-company; *see also* Shah, *supra* note 59.

64. *See* N.Y. STATE OFF. ATT'Y GEN., *supra* note 63.

65. *See* MASOOMA HUSSAIN & JASHUA STEARNS, CONTRACTING OUT SCHOOL FOOD SERVICES FAILED TO CONTROL COSTS AS PROMISED, OFFICE OF THE DISTRICT OF COLUMBIA AUDITOR (Oct. 7, 2016), *available at* http://www.dcauditor.org/sites/default/files/Food%20Services%20Final%20with%20Appendices%2010_7_16.pdf; *See* FOOD AND NUTRITION SERV., *supra* note 3.

66. Michael Alison Chandler, *D.C. Schools Food Vendor Pays $19 Million to Settle Whistleblower Lawsuit,* WASH. POST (June 5, 2015), https://www.washingtonpost.com/local/education/dc-schools-food-vendor-pays-19-million-to-settle-whistleblower-lawsuit/2015/06/05/bae8dd3c-0b96-11e5-9e39-0db921c47b93_story.html.

67. *See id*.

68. *See* PHILLIPS & COHEN LLP, SETTLEMENT AGREEMENT, *available at* http://www.phillipsandcohen.com/2015/Chartwells-DCPS-Mills-settlement-agreement.pdf.

69. *See* Erbentraut, *supra* note 60.

took to the blogosphere to document and protest Aramark's unpalatable food, which students likened to something worse than "prison food."[70]

In part, poor oversight facilitates FSMCs' irresponsibility and manipulation.[71] In the USDA's audit of school-meal FSMC contracts, the USDA admitted that, out of twelve school-food authorities with cost-reimbursable contracts, nine had no accountability mechanism to ensure that the FSMC with which they each contracted actually forwarded rebates to the school-food authorities.[72] Contrary to both government regulation and the contract terms between school-food authorities and FSMCs, few, if any, school-food authorities oversaw FSMC operations or FSMC adherence to contractual obligations.[73] FNS mandates that school-food authorities monitor and record USDA-donated-food use, but school-food authority officials have generally delegated that duty to FSMCs.[74] Gil Harden, the USDA's Assistant Inspector General for Audit, testified before Congress that eleven out of eighteen school food authorities had insufficient monitoring and controls over food contracts and FSMC operations, exposing $1.7 million in prohibited FSMC charges and unaccounted-for USDA food donations.[75] The aforementioned corporate behaviors and insufficient supervision mar Sodexo's, Chartwells', and Aramark's reputations.

Ultimately, FSMC abuses like these come at a high cost to the health and nutrition of the nation's youngest and most in-need citizens. Even after the Inspector General's Office requested increased FSMC oversight, fraudulent practices can endure.[76] In instances where FSMCs underserve students, shortchange schools, and defraud taxpayers, schools should have a viable remedy. Where the current model fails to effectively meet schools' needs, schools should have the option to seek alternate food sources and take their business elsewhere, perhaps as nearby as the farm down the road. Thus, to help shirk dependence on FSMCs, state and local governments can help reinstate schools' flexibility and control, allowing administrators to independently fulfill their food-service needs and meet nutrition goals within their local communities.

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70. *Id*.

71. *See* Shah, *supra* note 59.

72. *See* U.S. DEP'T OF AGRIC. OFF. OF INSPECTOR GENERAL, NATIONAL SCHOOL LUNCH PROGRAM-FOOD SERVICE MANAGEMENT CONTRACTS 2 (Jan. 2013).

73. *See id*. at 1-2.

74. *Id*. at 2.

75. U.S. DEP'T OF AGRIC., STATEMENT OF GIL HARDEN ASSISTANT INSPECTOR GENERAL FOR AUDIT BEFORE THE SUBCOMMITTEE ON EARLY CHILDHOOD, ELEMENTARY, AND SECONDARY EDUCATION 7-8 (May 19, 2015).

76. Notably, this case settled in 2015, after the USDA audited SFAs in 2013and charged FNS with improved regulation.

III. The Farm to School Solution

A. What is Farm to School?

Gaining traction in the mid-1990s, the farm-to-school concept is "a school-based program that connects schools (K-12) and local farms with the objectives of serving local and healthy foods in school cafeterias or classrooms, improving student nutrition, providing health and nutrition education opportunities, and supporting small and medium-sized local and regional farmers."[77] HHFKA formally established the USDA's farm-to-school program, which aims to facilitate farm-to-school activities and increase local food access by awarding grants and providing technical assistance to schools, state and local agencies, Native Americans and Alaska Natives, agricultural, and non-profit organizations.[78]

However, states have enacted their own unique versions of farm-to-school legislation. According to the National Farm to School Network, thirty-nine states and the District of Columbia have enacted farm-to-school legislation.[79] Farm-to-school laws typically encompass three key aspects to establish important community links: procurement policies, agricultural education, and school gardens.[80] The USDA estimates that 40,328 schools nationwide foster some type of farm-to-school link.[81] Yet,

77. Anupama Joshi et al., *Do Farm-to-School Programs Make a Difference? Findings and Research Needs*, 3 J. HUNGER & ENVTL. NUTRITION 229, 230 (2008); *see also* U.S. DEP'T OF AGRIC. OFF. OF INSPECTOR GENERAL, THE FARM TO SCHOOL PROGRAM FY 2013-15 SUMMARY OF GRANT AWARDS 6, *available at* http://www.fns.usda.gov/sites/default/files/f2s/F2S_Grant_Summary_Report.pdf ("The term farm to school describes efforts that bring local or regionally produced foods into school cafeterias; hands-on learning activities such as school gardening, farm visits, and culinary classes; and the integration of food-related education into the regular, standards based classroom curriculum."); Erin Roche et al., *Increasing Local Procurement in Farm-to-school programs: An Exploratory Investigation*, 5 J. OF AGRIC., FOOD SYS., AND CMTY. DEV. 81, 82 (2015) ("Yet because these programs have evolved independently and organically, there has been no uniform definition of FTS programming. FTS programs are often characterized by activities that link farmers and schools that serve kindergarten through twelfth grade (K–12) with the goals of contributing to nutritious meals and education for youth, along with increasing opportunities for farmers who market locally.").

78. *See* U.S. DEP'T OF AGRIC. OFF. OF INSPECTOR GENERAL, THE FARM TO SCHOOL PROGRAM 2012-2015: FOURS YEARS IN REVIEW 2, *available at* http://www.fns.usda.gov/sites/default/files/f2s/Farm-to-School-at-USDA--4-Years-in-Review.pdf (last visited Apr. 1, 2017).

79. *See* NAT'L FARM TO SCH. NETWORK, *supra* note 19, at 8.

80. NAT'L FARM TO SCH. NETWORK, *About Farm to School* (2016), http://www.farmtoschool.org/about/what-is-farm-to-school.

81. *But see* THE FARM TO SCHOOL CENSUS: NATIONAL OVERVIEW, FOOD & NUTRITION SERV. 1 (2013) (noting that only 75% of schools participated in this survey) ("Some states were not able to screen out private schools and charter schools from requests to

studies suggest that schools where many pupils receive free or reduced-price lunch participate in fewer farm-to-school activities than their higher-income counterparts.[82]

B. What are the Benefits of Farm to School Programming?

Farm-to-school legislation and programming offer many benefits to students, schools, local farmers, and entire communities. The benefits of nutritious meals are clear; access to fresh fruits and vegetables helps combat childhood obesity and proper nutrition positively impacts academic performance and educational outcomes.[83] Farm-to-school laws facilitate exposure to agricultural education so that both rural and urban children can learn about sustainable, healthy food production, as well as healthy eating habits.[84] Combined with increased access to fresh, local, and healthy foods, schools are able to practice what they preach, complementing their instruction about food production and healthy eating with the physical fruits of those labors.[85] Not only can farm to

complete the Census. For almost all states, responses from private and charter schools are not included in the results reported here as they are not statistically representative. Statistics for Kansas do include charter and private schools as do statistics for the District of Columbia. For all other states, charter schools were included if they were part of a multi-site charter school district.").

82. *See* ELIZABETH ROBISON BOTKINS & BRIAN ROE, UNDERSTANDING PARTICIPATION IN THE USDA'S FARM TO SCHOOL PROGRAM (2015) ("The %*reduced* has a negative relationship with farm to school participation, which possibly suggests a budgetary limitation for these schools . . . . [And] %reduced has a positive relationship with processed.").

83. *See* Taryn W. Morrisey et al., *Local Food Prices and Their Associations With Children's Weight and Food Security*, 133 PEDIATRICS 422 (2014); Peter Hinrichs, *The Effects of the National School Lunch Program on Education and Health*, 29 J. POL'Y ANALYSIS & MGMT. 479 (2010).

84. *See* NAT'L FARM TO SCH. NETWORK, THE BENEFITS OF FARM TO SCHOOL, available at http://www.farmtoschool.org/Resources/BenefitsFactSheet.pdf (last updated Apr. 2017); NATHAN ROSENBERG & EMILY BROAD LEIB, EXPANDING FARM TO SCHOOL IN MISSISSIPPI: ANALYSIS AND RECOMMENDATIONS 10 (May 2011) ("The CDC has identified farm to school as an effective way to enhance nutrition education and ecoliteracy. The USDA also states that farm to school programs may support health and nutrition education and act as a source for agriculture-related lessons and curricula. Studies underpin these claims, showing that farm to school educational activities can increase knowledge on topics such as nutrition and health, local foods and agriculture, and the environment. Studies that have examined programs with a parental education component have also observed positive changes in parental behavior, knowledge, and attitudes with regard to healthy food.").

85. *See* SIMONE JOHNSON ET AL., IMPACT OF FARM TO SCHOOL PROGRAMS ON STUDENTS' CONSUMPTION OF HEALTHFUL FOODS: AN EMPIRICAL ANALYSIS IN GEORGIA 26 (July 2015) ("This negative correlation between the number of convenience stores per capita and positive correlation between supermarkets per capita and implementation of FTSPs [farm to school programs] seems to be in line with literature on food deserts, which shows that areas without access to affordable healthy foods tend to be served by convenience stores . . . . Therefore a greater

school programs actively fight the rise of food deserts, but they can also teach children about making healthy food choices, a lesson that will remain relevant throughout their adult lives.[86] Educators in Eugene, Oregon, for example, tested second and third graders' food preferences and knowledge before and after implementing farm-to-school instruction. Such testing revealed an increase in the students' preference for and consumption of produce, as well as knowledge of food origins.[87] Additionally, farm-to-school programs have also seen a reduction in plate waste.[88]

In addition to promoting health, education, and increased access to healthy foods for students, farm-to-school programs promote significant financial benefits for both schools and local producers. By providing fresh, healthy options to students on a regular basis, schools can entice students paying full price for meals to participate in their school-meal programs, which generates increased revenue.[89] Farm-to-school laws also link responsible local vendors to new markets. Farm-to-school activities promote local commerce and open new markets to small- and medium-sized farms.[90] Vending to schools is "a 'potentially huge' and relatively untapped direct market" for farmers struggling to compete global

number of convenience stores per capita might indicate the district is in a food desert, and the families in the district may not have enough knowledge about the healthful foods they should be eating to push for FTSPs within their district.").

86. *See* NAT'L FARM TO SCH. NETWORK, *supra* note 84; Angelica I. Ambrose, *A National School Garden Program: A Holistic and Sustainable Approach to Combating Food Deserts*, 21 SAN JOAQUIN AGRIC. L. REV. 51, 60-61 (2012) (Stating that "[a] solid legislative effort to equip food deserts with school gardens would simultaneously increase access to healthy, low cost food and guarantee that children and their communities are armed with the right information to be able to make healthy choices." And that "[s]chool gardens can simultaneously improve fresh food access and people's ability to make positive choices.").

87. *See* U.S. DEP'T OF AGRIC., USDA FARM TO SCHOOL TEAM: 2010 SUMMARY REPORT 51 (July 2011).

88. *See* NAT'L FARM TO SCH. NETWORK, *supra* note 80; *New USDA Data Show Growing Farm to School Efforts Help to Reduce Plate Waste, Increase Student Participation in Healthier School Meals Program,* U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?contentid=2015/10/0292.xml (last updated Nov. 30, 2015).

89. *See* NAT'L FARM TO SCH. NETWORK, *supra* note 84.

90. *See* Betty Izumi et al., *Market Diversification and Social Benefits: Motivations of Farmers Participating in Farm to School Programs*, 26 J. RURAL STUDIES 374, 374 (2010) ("Advocates have argued that by forging direct relationships with schools, small- and midsize family farmers can gain access to a stable and reliable market that will return a fair price for their products."); *see also* David Conner et al., *You Can Know your School and Feed It Too: Vermont Farmers' Motivations and Distribution Practices in Direct Sales to School Food Services*, 29 AGRIC. & HUMAN VALUES 321 (2012).

competition.[91] While farmers' current sales to schools may not suffice to sustain an independent livelihood, farmers support farm-to-school programs because they provide additional revenue sources that enable producers to spread their risk across diverse markets.[92] Supplying food to schools opens a new market for farmers to sell their surplus products.[93] Furthermore, schools are additional income sources, especially during producers' periods of income uncertainty.[94]

Community accountability, fostered within farm-to-school relationships, encourages local producers to perform responsibly. Large FSMCs that service hundreds of school districts across the country may not necessarily depend on any one school district for their income.[95] In contrast, small local vendors may depend on their local school.[96] Because small local producers lack the purchase power of FSMCs, they have an incentive to maintain good relationships with schools in order to continue to take advantage of schools' market opportunities.[97] Local producers'

91. *See* Izumi et al., *supra* note 90, at 374.

92. *See id*. at 378-79; NAT'L FARM TO SCH. NETWORK, *supra* note 84 ("Average 5 percent increase in income from farm to school sales for individual farmers.").

93. *See* Izumi et al., *supra* note 90, at 378-79.

94. *Id.* at 379 (noting that sometimes, farmers who sell to wholesalers must wait long periods of time to be compensated for their products).

95. *See, e.g.*, *Company Profile*, ARAMARK, http://phx.corporate-ir.net/phoenix.zhtml?c=130030&p=irol-homeProfile&t=&id=& (last visited Apr. 1, 2017) ("We serve over 500 million meals annually to approximately 5 million students at colleges, universities, and K-12 schools"); U.S. SECURITIES & EXCH. COMM'N, FORM 10-K ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934: ARAMARK (2015) ("The Education sector had a double-digit sales increase for fiscal 2014 due to growth in our base business within our Higher Education food business, net new business in our K-12 food and facilities business."); *see also* Komisar, *supra* note 54.

96. *See Programs & Policy: Good Food Purchasing Policy*, L.A. FOOD POL'Y COUNCIL, http://goodfoodla.org/policymaking/good-food-procurement/ (last visited Apr. 1, 2017) ("LAUSD now spends more money locally: In 2013, LAUSD purchased . . . about $10 million in produce coming from local growers. Increased demand for local businesses means new jobs: manufacturers and processers providing more food for LAUSD created over 150 new well-paying food chain jobs.").

97. *See, e.g.*, Mary Clare Ahearn*, Financial Position of Farm Operator Households*, U.S. DEP'T OF AGRIC. ECON. RES. SERV., at 1-2, 23 (Feb. 23, 2102), http://www.usda.gov/oce/forum/past_speeches/2012_Speeches/Ahearn.pdf ("In 2010, the majority of family farms (60 percent) had gross sales of less than $10,000. These very small farms accounted for only 1 percent of the value of product and had negative average farm incomes, receiving all of their household income from off-farm sources . . . . They received more than $76,252 in income from off-farm sources in 2010."); MATTHEW LEROUX ET AL., CORNELL COOPERATIVE EXTENSION OF TOMPKINS COUNTY, GUIDE TO MARKETING CHANNEL SELECTION: HOW TO SELL THROUGH WHOLESALE AND DIRECT MARKETING CHANNELS 6-7 (2010).

community reputations are at stake, as fraudulent behaviors would jeopardize their brands. Farm-to-school programs incentivize vendors to perform responsibly and to value the relationship between school and producer. Building relationships between local farmers and schools forges important social bonds that can strengthen and unite communities. The embeddedness of these programs fosters strong, symbiotic community ties.[98] Through farm to school, farmers become invested in helping students lead healthier lives, and, likewise, school administrators support local communities and commerce through their cafeterias.[99]

C. Is Farm to School Affordable?

With a little planning, cooperation, and ingenuity, farm-to-school programs are an affordable venture. Higher, healthier standards are not cost-prohibitive; they are a choice.[100] School-meal production costs vary from district to district, depending on a variety of factors, including regional agriculture differences, labor costs, transportation costs, and school infrastructure.[101] Food-labor costs are the largest production costs for producing school lunches.[102]

Where school-food authorities assume that fresh, local produce is strictly cost-prohibitive, they are wrong. In the USDA's recent farm-to-school survey, schools reported that farm-to-school programs actually lower school meal program costs.[103] Anecdotal research reveals that foodservice directors acknowledge that in-season local products cost less than non-local foods.[104] The foodservice directors also acknowledge the superior quality, in terms of taste and appearance, of a more expensive local product over a non-local product and that "student acceptability far

98. *See* Izumi et al., *supra* note 90, at 380.

99. *See Id.* at 381 ("The 'give and take' articulated by the farmers suggests a high degree of cooperation and mutual regard between farmers and school food service professionals. The farmers' efforts to deliver small volumes of product to multiple schools and school food service professionals' willingness to make menu adjustments to accommodate farmers' produce surpluses reflect their shared commitment to the long-term viability of farm to school programs and the importance of social relations in local school food procurement."); *see also* Betty Izumi et al., *Farm-to-school Programs: perspectives of School Food Service Professionals*, 42 J. NUTRITION EDUC. & BEHAV. 83, 84 (2010).

100. *See* Izumi et al., *supra* note 99, at 83-84; CTRS. DISEASE CONTROL & PREVENTION, IMPLEMENTING STRONG NUTRITION STANDARDS FOR SCHOOLS: FINANCIAL IMPLICATIONS 2, *available at* https://www.cdc.gov/healthyschools/nutrition/pdf/financial_implications.pdf (last visited Apr. 1, 2017).

101. *See also* SCHOOL NUTRITION ASS'N, *supra* note 29.

102. *Id*.

103. *See* U.S. DEP'T OF AGRIC., *supra* note 88.

104. *See* U.S. DEP'T OF AGRIC., *supra* note 87, at 28.

outweighed the cost difference of the product."[105] Confirming the affordability of farm to school, administrators in one Ohio school district's farm-to-school program's inaugural year reported "no increase in food cost when utilizing a local grower as opposed to ordering through main vendor" and "no increase in food costs per meal or total labor hours."[106]

Dedicated administrators across the country have devised creative solutions to stretch their budgets in order to incorporate nutritious local products.[107] Simple menu modifications have significant impacts on meal costs.[108] When fresh, local food costs proved more expensive than traditional purchase options, school-food directors coordinated their menus with harvest seasons, which allowed the schools to purchase local products at lower prices.[109] School-food directors have also capitalized on USDA bonus commodities, centering their menus around these products in order to decrease preparation costs. For instance, Harrisonburg City Schools in Harrisonburg, Virginia, features USDA foods as main entrees, pairing them with simple side dishes to decrease processing costs and offset the cost of purchasing local products.[110]

Schools have also aimed to lower labor costs in order to purchase fresh, local items.[111] Menu modification can decrease labor costs. Some examples of these practices include purchasing local products, like spinach and broccoli, that do not require much preparation time.[112] Schools remove labor-intensive dishes from menus when fresh, unprocessed produce is in season and rotate those labor-intensive dishes back onto the menu when the produce is out of season, which also decreases labor costs.[113] Other schools recruit community volunteers to assist in meal preparation.[114] Utilizing its community talent and generosity, Boston

105. *Id.* at 28; *See also Id.* at i ("During 2010, the Team visited 15 school districts across the country that were involved in farm to school related activities in varying capacities, reviewed resource materials, participated in national and regional conferences, and consulted with other organizations that worked with the farm to school community. This report summarizes the observations of these activities.").

106. *See* S. EUCLID LYNDHURST SCH. DIST., From Farm to School: Changing Eating Habits One Plate at a Time 6 (Dec 2011).

107. *See* U.S. DEP'T OF AGRIC., *supra* note 87, at 31.

108. *Id.*

109. *Id.*

110. *See id*. at 32.

111. *See id*. at 9.

112. *Id*.

113. *Id*.

114. *Id*. at 8-9.

Public Schools' Chefs Move to Schools program creatively brings local chefs into schools to train staff on food preparation and menu planning.[115]

The prevalence of grant funding for farm to school programs is growing, which will make farm-to-school activities more affordable for schools. From 2013 to 2015, the USDA awarded $15.1 million in farm-to-school grants.[116] In 2015 alone, the USDA awarded $4.8 million dollars to schools in thirty-nine states. Awards, ranging from $20,000 to $100,000, assisted farm to school planning, implementation, support service, and training efforts.[117] Schools with fifty percent of their student populations participating in free and reduced-price lunches received seventy-eight percent of the USDA's total grant awards.[118] States themselves have also allocated funding for farm-to-school programs. Twenty-four states and the District of Columbia have created established or sustainable funding for the programs via grants or state funds.[119] Clearly, with ample planning and commitment, farm-to-school programs are financially feasible, even for schools operating on limited budgets.

D. How does Farm to School Address Health and Safety?

In the nascent arena of farm to school, the law has yet to catch up to progressive food policy. As more farm-to-school programs begin to bloom across the country, sparse federal regulations transfer the onus of ensuring school-food safety to state and local authorities.[120] At the federal level, the National School Lunch Act mandates that schools obtain biannual health inspections for their kitchens.[121] In schools participating in the NSLP and SBP, school-food authorities are required to enact a food-

115. *Id*.

116. *See* U.S. DEP'T OF AGRIC. OFF. OF INSPECTOR GENERAL, *supra* note 77, at 7.

117. *USDA Helps Schools Connect with Local Farmers and Ranchers,* U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?contentid=2015/11/0315.xml&contentidonly=true (last updated Nov. 17, 2015).

118. *See* U.S. DEP'T OF AGRIC. OFF. OF INSPECTOR GENERAL, *supra* note 77, at 7; *see, e.g.*, *USDA Grants and Loans that Support Farm to School Activities,* U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/sites/default/files/f2s/FactSheet_USDA_Grants_and_Loans.pdf (highlighting alternate farm to school funding sources).

119. *See* NAT'L FARM TO SCH. NETWORK, *supra* note 19, at 8, 20.

120. *See* SPARK POL'Y INST. & COLO. FARM TO SCH. TASK FORCE, FARM TO SCHOOL FOOD SAFETY: A REVIEW OF AGRICULTURAL POLICIES & PRACTICES 28, *available at* http://coloradofarmtoschool.org/wp-content/uploads/downloads/2013/02/HFHP-FTS-Food-Safety-Legal-Regulatory-Analysis-FINAL.pdf.

121. *See* Facilities Management, 7 C.F.R. § 210.13 (2016); Requirements for Participation, 7 C.F.R. § 220.7 (2016).

safety program at food-preparation and -service sites.[122] To promote the safest possible foodservice to children, the USDA recommends school-food administrators visit farm-to-school suppliers and offers a plethora of educational resources and guides proffered by state agencies and other field experts.[123] Primarily, the federal government defers to states, advising that producers must comply with local and state regulations before vending to child nutrition programs.[124]

Like the federal government, states provide resources on farm-to-school safety.[125] States have strict health and safety standards when it comes to school foods.[126] However, these standards often fail to account for farm-to-school activities, much to farm-to-school advocates' frustration.[127] Such strictures include Good Agricultural Practices ("GAP") certification and liability insurance. GAP certification is a voluntary credential certifying that a producer processes and stores fruits and vegetables in accordance with FDA and industry food-safety practices in order to minimize the risk of foodborne illnesses.[128] Some states strongly encourage but do not require schools to purchase local products only from GAP-certified suppliers.[129] However, because of cost and access, GAP certification is not readily attainable, thus limiting the number of qualified

122. *See* SPARK POL'Y INST. & COLO. FARM TO SCH. TASK FORCE, *supra* note 120.

123. *See* FOOD & NUTRITION SERV., *Food Safety Practices to Expect from Your Fresh Produce Distributor,* U.S. DEP'T OF AGRIC., at 1, *available at* http://www.fns.usda.gov/sites/default/files/Distributor.pdf; *see generally* FOOD & NUTRITION SERV., *Community Food Systems- Implementing Farm to School Activities: Food Safety*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/farmtoschool/implementing-farm-school-activities-food-safety (last updated March 24, 2014).

124. *See* FOOD & NUTRITION SERV., *Community Food Systems - FAQs- Food Safety*, U.S. DEP'T OF AGRIC., http://www.fns.usda.gov/farmtoschool/faqs-food-safety#2 (last updated June 20, 2014).

125. *See, e.g.*, *Food Safety and Procurement*, WIS. DEP'T PUB. INSTRUCTION, http://dpi.wi.gov/school-nutrition/f2s/food-safety (last visited Apr. 1, 2017).

126. *See* FOOD & NUTRITION SERV., *supra* note 124.

127. *See* U.S. DEP'T OF AGRIC., *supra* note 87, at 45 ("Community partners expressed frustration that many local or State Health Departments have strict food safety requirements for incorporating a school garden's harvest into the school meals.").

128. *See Good Agricultural Practices (GAP) & Good Handling Practices (GHP),* U.S. DEP'T OF AGRIC., *available at* https://www.ams.usda.gov/services/auditing/gap-ghp.

129. *See* U.S. DEP'T OF AGRIC., *supra* note 87, at 47 ("The largest food safety barriers with regard to farm to school have been assessing whether non-GAP-certified farms practice safe handling practices and the expense of GAP certification for small and mid-scale farms. Self-assessments, or the use of an agricultural handling checklist, can help guide the school foodservice directors in their discussion with local farmers.").

local vendors.[130] Other states advise schools to ensure that prospective local vendors carry product-liability insurance.[131] However, not all small local producers carry such a policy or, if they do, such policy may not meet the requested amount of coverage.[132]

Legislatures do attempt to address this gap between law and practice. Model farm-to-school legislation includes provisions for staff training on proper food preparation, handling, safety, and nutrition knowledge.[133] Exemplary farm-to-school bills effectively provide for training and safety.[134] California, for example, establishes online professional-development seminars "for school site staff on serving, including safe handling guidelines."[135] California allocates funds for "independent evaluator to conduct a comprehensive evaluation, including a determination of the need for . . . staff professional development programs on the safe handling, serving, and marketing of nutritious fruits and vegetables as part of the California Fresh Start Pilot Program."[136] Wisconsin farm-to-school legislation provides for "conduct training and . . . technical assistance for school food service personnel and managers, farmers, and food distributors and processors concerning farm to school programs and food safety and procurement."[137] While formal laws have not yet been enacted, schools can still use resources provided by the government to create farm-to-school programs. Schools can successfully use provided resources to ensure the safest food conditions for school-meal programs.

130. *See id.* at 45-46.

131. *See id.* at 44.

132. *Id.* at 44-45 ("Although the school districts visited by the Team did not require their farmers to be GAP certified, they did require farmers and/or the wholesale distributor to maintain product liability insurance before they would consider purchasing food items from them. The amount of product liability insurance varied widely from district to district, ranging from $100,000 to $3 million.").

133. *See, e.g.*, NAT'L FARM TO SCH. NETWORK, *supra* note 19, at 27, 54, 56.

134. *Id*. at 16, 28, 40, 60.

135. CAL EDUC. CODE § 49565.7 (2005).

136. *Id.*

137. WIS. STAT. § 93.49(2)(b)(4) (2009); *see also* ALASKA STAT. ANN. § 14.07.020 (West 2015) ("(7) Prescribe by regulation, after consultation with the state fire marshal and the state sanitarian, standards that will assure healthful and safe conditions in the public and private schools of the state."); D.C. CODE § 38-825.03 (2015) ("(d) As permitted by federal law, when tests show that the soil is safe and when produce is handled safely, produce grown in school gardens may be identified and served to students at the school, including in the cafeteria. Produce grown in school gardens may be sold and the proceeds from such sales shall be expended for the benefit of the public school where the produce was grown."); WASH. REV. CODE ANN. § 28A.320.185 (2009) ("All such foods used in the district's meal and snack programs shall meet appropriate safety standards.").

E. Farm to School in Action: Examples of what Farm to School can Uniquely Achieve

Program success in tribal communities demonstrates the many benefits of farm to school. In Native American communities, where one in four people live in poverty, farm-to-school programs can help Native American and Alaska Native communities incorporate traditional foods into their child-nutrition programs in ways the FSMCs can only dream of rivaling.[138] In North Dakota, the Circle of Nations Boarding School procures bison meat from the Intertribal Buffalo Council Sisseton-Wahpeton Oyate herd for use in their recipes. [139] North Carolina is home to the Cherokee Central Schools district, where the produce grown in school gardens is the heirloom offspring of seeds that Cherokee peoples traditionally used.[140] The school district complements its cultivation with lessons from community members, who teach students about the traditional Cherokee ceremonial and medicinal uses of the plants grown in their gardens.[141] In Mississippi, the Mississippi Band of Choctaw Indians reservation school system procures food from local cultivators to incorporate items such as grapes, sweet potatoes, squash, catfish, peas, tomatoes, melons, and blueberries into their school meals.[142] FNS maintains, and the above cases illustrate, that "operating a farm to school program in a tribal setting or in a school with a high Native American population can help connect students to this history and expand markets for local and Native American farmers."[143]

IV. Legislating for Procurement Flexibility Can Help Bring the Farm to Students' Forks

Though responsive and responsible farm to school vendors are just miles away from school districts that can utilize local products, these vendors are often out of reach because schools, as federally funded public entities, must adhere to the competitive bidding process.[144] To make

138. Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives Are Living in Poverty*, PEW RESEARCH CTR., (June 13, 2014), http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/; *see also* Michelle Sarche & Paul Spicer, *Poverty and Health Disparities for American Indian and Alaska Native Children*, 1136 ANNALS N.Y. ACAD. SCI. 126, 126-27 (2008).

139. *See* U.S. DEP'T OF AGRIC., BRINGING TRIBAL FOODS AND TRADITIONS INTO CAFETERIAS, CLASSROOMS, AND GARDENS (Nov. 2015).

140. *See id*.

141. *Id*.

142. *Id*.

143. *Id*.

144. *See* 2 C.F.R. § 200.100 (2016); 2 C.F.R. § 200.101. (2016).

school meals affordable, schools often feel compelled to enter into contracts with the FSMCs that bid lowest in the formal bidding process.[145] As illustrated above, however, FSMCs are not always responsible vendors; their behaviors indicate that schools may have misplaced their trust.[146] Through farm-to-school legislation, state and local governments can offer school districts viable alternatives to FSMCs in such a way that removes barriers to accessing local, fresh products, as well as vendors' barriers to entry.

With more local vendors entering and competing in the market for school-district foodservice contracts, schools will have increased access to an array of quality vendors. Instead of delegating foodservice and cafeteria management to FSMCs, schools that work closely with local vendors can better control what food appears on students' plates, foster direct managerial accountability, and bring farm-to-school benefits to students. Lawmakers can employ three key strategies to help schools access responsible vendors of fresh, nutritious foods. First, they can pass legislation that makes farm-to-school suppliers more competitive in the formal bidding process. Second, state and local governments can facilitate informal bidding by increasing state and local small-purchase thresholds. Finally, legislators can suggest a micro-purchase carve-out for schools participating in farm-to-school programming.

A. How Does a Public School District Select a Vendor and Purchase Products?

To understand how regulations can infringe upon a school's procurement of fresh, nutritious foods, lawmakers should first analyze the technicalities of the school-food procurement process. A school can procure food products through three main avenues: a formal bidding process, an informal bidding process, or a micro-purchase option. Formal bidding entails either competitive sealed bidding through an invitation for bids, also known as IFBs or competitive requests for proposals ("RFPs").[147] Both avenues entail public advertisement of written specifications. When a school solicits a bid through public announcement, it notifies all potential vendors, who then compete with one another on a level playing field for the award.[148] Formal procurement methods can account for geographic preferences, allowing schools to state a preference for locally produced foodstuffs in their bid specifications.[149] For example, RFPs contain two levels of specification: a cost proposal and a technical proposal. In technical proposals, schools can specify and prioritize

145. *See supra,* Part I.C; VanderSchee, *supra* note 52, at 5.

146. *See supra,* Part II.

147. *See* U.S. DEP'T OF AGRIC., PROCURING LOCAL FOODS FOR CHILD NUTRITION PROGRAMS 46 (Aug. 2015).

148. *Id.* at 41, 48.

149. *Id*. at 48.

additional bid requirements, such as vendor experience, staff quality, farm visits, or the maximum distance a harvest is located from the school.[150] Though schools may streamline their specifications in formal bidding proposals, ultimately, price determines the winner in this bidding method.[151]

Under federal law, schools may use informal or small-purchase bidding when the contract amount totals $150,000 or less. In this process, schools can request price quotes from three local bidders without public advertisements.[152] This $150,000 threshold amount is a ceiling, not a floor; state and local governments have the authority to establish lower small-purchase thresholds and schools must adhere to the lowest established threshold amount.[153] For example, if a local government limits small purchases to a maximum of $7000, then schools must engage in formal procurement measures for any purchase exceeding $7000, even though the federal limit remains at $150,000.[154] Informal purchases must be one-time purchases because, by law, schools cannot infringe upon full and open competition; schools, as federal entities, must award contracts objectively, not create unfair competitive advantages.[155] In order to comply with full and open competition laws that aim to level the playing field while stimulating competition for high-quality products, schools may not solicit separate bids for the same product solely to comply with the established threshold.[156]

Micro-purchases circumvent the competitive bidding process. Schools may purchase products in the amount of $3000 or less without issuing any type of competitive bid solicitation.[157] Similar to informal purchasing, schools may not arbitrarily split micro-purchases and must ensure that micro-purchases are equitably awarded to qualified suppliers; schools cannot play favorites with potential vendors.[158] Critically, in all forms of procurement, vendors must be responsive and responsible.[159]

150. *Id*. at 46-47.

151. *See id.* at 47; Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. § 200.320.

152. *See* U.S. DEP'T OF AGRIC., *supra* note 147, at 44.

153. *See id.* at 39.

154. *See id.* ("For example, Delaware's threshold is $20,000, while California adjusts its threshold every year; in 2015, California's threshold was $86,000.").

155. *See id.* at 34, 42-44; 2 C.F.R. § 200.319 (2016).

156. *See* U.S. DEP'T OF AGRIC., *supra* note 147, at 34, 42-44; 2 C.F.R. § 200.319 (2016).

157. *See* U.S. DEP'T OF AGRIC., *supra* note 147, at 40; Micro-purchase, 2 C.F.R. § 200.67; Methods of Procurement to be Followed, 2 C.F.R. § 200.320 (2016).

158. *See* U.S. DEP'T OF AGRIC., *supra* note 147, at 40.

159. *See id.* at 37; *supra,* Part I(B).

B. Strategy 1: Make Farm to School Suppliers More Competitive in the Formal Bidding Process

To combat FSMCs' shortcomings while increasing students' access to fresh, healthy food, states can help make farm-to-school suppliers more competitive in the formal bidding process. Recognizing this window of legislative opportunity, some progressive states have attempted to assist local, small vendors in the award of schools' competitive bids through various legislative devices.[160] Some states have endeavored to help make local producers more competitive by employing percentage price preference policies.[161] These policies allow school districts to accept higher bids from vendors who provide locally grown foods, even if non-locally sourced vendors provide lower bids.[162] For instance, Maryland, to the extent compatible with federal law, permits schools to use a five-percent price preference to purchase locally grown food that meets bid specifications.[163] This means that even if local producers do not bid the lowest price in a solicitation, they could still win the bids as long as the bid price for locally grown or produced items is no more than five percent higher than the lowest bid. Massachusetts and Alaska, both states with robust farm-to-school programming, also endeavored to adopt percentage price preference laws for local foods, though attempts to pass these provisions into law have failed.[164] In Massachusetts, legislators excluded price-preference language from the final bill that passed into law.[165] While Alaska's bill passed in the House, it sits indefinitely in Senate committees.[166] When a united legislature decides to rally around robust child-nutrition policies that press public-health imperatives, price preference policies can effectively promote access to the fresh, nutritious school-meal ingredients.

Other states offer tax credits to local producers who service schools.[167] Increased tax credits may allow farmers to lower their overall costs and thus to lower their bid prices, which would enable them to better compete with FSMCs. Iowa aims "to encourage and promote the production and purchase of locally and regionally produced vegetables or

160. *See infra*, Part IV.B.

161. *See, e.g.*, H.B. 883, 2006 Gen Assemb., Reg. Sess. (Md. 2006) (citing Article 14-407 (A)(B)); H. 4919, 186th Gen. Court, (Mass. 2010) (citing Section 2 (b)); H.B. 225, 26th Leg., (Alaska 2009).

162. H.B. 883, 2006 Gen Assemb., Reg. Sess. (Md. 2006).

163. *See id.*

164. H. 4919, 186th Gen. Court, (Mass. 2010); H.B. 225, 26th Leg., (Alaska 2009).

165. *See* H. 4459, 186th Gen. Court, (Mass. 2010).

166. *See Bill History/Action for 26th Legislature- Bill: HB 225*, ALA. ST. LEGISLATURE, http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20225&session=26.

167. *See, e.g.*, H. File 2426, 85th Gen. Assemb., (Iowa 2014).

fruits, to improve nutrition for the citizens of Iowa, and to strengthen local and regional farm economies" by providing a tax credit of up to fifty percent of an in-state schools' purchase price or $10,000, whichever is less.[168] Though this particular piece of legislation sits ripening in Iowa's economic-growth subcommittee, more bills like this across the country would help farmers' bids become more attractive to school districts that ask lawmakers to support farm to school.

Still other states simply mandate that schools purchase locally whenever possible. In Michigan, schools purchasing food for national school lunch and breakfast programs "shall" prefer "food that is grown or produced by Michigan businesses if it is competitively priced and of comparable quality."[169] New York seeks to "require" schools to purchase foodstuffs that are "grown, produced or harvested in New York state or that any processing of such food product take place in facilities located within New York state."[170] The state has suggested in this legislation a waiver for purchases that are not competitive or inadequate.[171] These laws target schools' bid specifications in efforts to help producers win bids based on the character and quality of their products.

As with any legislative device, these options face political challenges. Advocates must secure a unified legislature that will pass measures like these; otherwise, proposed laws that affect school procurement practices may die before legislators have the opportunity to debate them. Not only can bills containing price-preference provisions or tax rebates die in committee, but lawmakers can also vote down or veto the bills.[172] The challenge to this option, while not insurmountable, is obtaining strong committee advocates and bipartisan support for bills containing these provisions. With no decrease in the obesity epidemic or in societal inequality in sight, legislators should turn to these legislative devices to secure access to fresh, nutritious food for students.

C. Strategy 2: Increase State and Local Small-Purchase Thresholds for Informal Bidding

Raising small-purchase thresholds would allow schools to purchase from vendors who cannot otherwise match FSMC prices in formal bidding. Schools face significant restrictions when making small purchases. Importantly, federal regulations prohibit schools from splitting purchases for the purpose of bringing their contract prices below the informal

168. *See id.*

169. *See* H.B 5314, 97th Leg., Reg. Sess., (Mich. 2014).

170. *See* S. 1427, 2013 State Assemb., Reg. Sess., (N.Y. 2013).

171. *Id*.

172. *See How a Bill Becomes a Law*, IND. ST. HOUSE TOUR OFF. (2001), http://www.in.gov/gov/files/BillintoLaw.pdf (last visited Apr. 1, 2017).

purchase threshold amount.[173] For example, School A's district threshold for small bids is $100,000. School A's kitchen needs $200,000 worth of kale for the year's menu. To maintain full and open competition, School A may not contract for $100,000 worth of kale in August and $100,000 worth of kale in January.[174] Moreover, schools may not purchase the same item from two different vendors unless the school discloses the split to the original vendor.[175] In other words, a school can split bids by purchasing an item from two vendors, as long as the school informs the primary vendor that it plans to do so.[176] There exist legitimate reasons to promulgate separate bid solicitations. Schools can choose to split their purchases if there are inherent differences in foods, including shelf life, delivery methods, and seasonality.[177]

Instead of utilizing regulatory loopholes to give schools flexibility in school-food procurement, advocates should simply call upon local and state governments to raise small-purchase thresholds, just as Louisiana lawmakers endeavored to raise their state's limit. In S.B. 458, Louisiana sought to raise the state's small-purchase threshold to the allowable federal maximum "in order to support procurement of local agricultural products and the 14 USDA Farm to School initiatives."[178] If Louisiana schools are no longer limited by lower, state-imposed informal purchase thresholds, schools would have more opportunities to use greater portions of their budgets to procure local, fresh food. Informal purchases can increase schools' autonomy by giving the school more control over which vendors answer small purchase solicitations; that is, schools can directly solicit local vendors for small purchases.[179] For example, with increased purchase power, schools can support more "small and minority businesses, and women's business enterprises," which the Code of Federal Regulations encourages.[180] With higher small-purchase thresholds, schools will have more flexibility to procure healthy products and more control over where they come from.

Threshold-raising is an attractive option because local lawmakers can accomplish a significant change with relative expedience. Moreover, local attention will enable lawmakers to examine and address the unique needs of their local schools, streamlining ordinances that work best for their

173. *See* U.S. DEP'T OF AGRIC., *supra* note 147, at 77.

174. *Id*.

175. *Id.*

176. *See id*.

177. *See id.* at 78.

178. *See* S.B. 458, 39th Leg., Reg. Sess., (La. 2014).

179. *See* U.S. DEP'T OF AGRIC., *supra* note 147, at 44.

180. *See id.* at 78; Contracting with Small and Minority Businesses, Women's' Business Enterprises, and Labor Surplus Area Farms, 2 C.F.R. § 200.321(3).

communities.[181] Successful local models may then inspire similar ordinances in neighboring communities and beyond, cementing farm to school flexibility from the ground up.[182] Gaining grassroots support for local programs with local impacts is likely to increase the efficacy of this option and expediently allow more flexible school purchases. Given the public health imperative, state and local lawmakers can turn to this option to address students' nutritional needs.

D. Strategy 3: Encourage the USDA Promulgate a Micro-purchase Carve-Out for Schools Participating in Farm to School Programs

Particularly in districts that fail to increase their small-purchase thresholds, a carve-out for micro-purchases—purchases of $3000 or less without a bid solicitation—at schools participating in farm-to-school programs would also help school districts procure fresh and nutritious foods for school meals. Under current micro-purchase policies, a school cannot make several purchases throughout the year when the aggregate amount of the purchase is greater than $3000.[183] To illustrate, a school may not purchase $3000 worth of okra monthly, for such a purchase would violate full and open competition regulations.[184]

These restrictions complicate fresh food management. Not only does limiting micro-purchases hinder seasonal eating, but it also makes finding alternative foods on short notice extremely difficult (e.g. cafeterias may be left scrambling when a crop disease depletes produce supply).[185] In times when local vendors have bumper crops, this carve-out would enable schools to take advantage of surplus foods.[186] By carving out a provision that allows schools to make multiple micro-purchase throughout the year for fresh, nutritious local foods, legislators will give schools increased control and flexibility in food management. Alternatively, lawmakers may consider advocating for an increase in the $3000 micro-purchase threshold for fresh, healthy food purchases.

Regulators can structure and manage this carve-out. For instance, regulators may consider instituting an application process for schools that wish to make multiple micro-purchases throughout the school year.

181. *See* Mia Shirley, Note, *Food Ordinances: Encouraging Eating Local*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 511, 525-26 (2013).

182. *Id*. at 526 ("Agricultural and food policy are aptly suited for local level regulations. Regulating food policy at a local level relates closely to land use development and community planning, which are regulated by municipal governments. 'Most policy issues facing farmers' markets develop at the local level because farmers' markets are a local activity.'").

183. *See* U.S. DEP'T OF AGRIC., *supra* note 147, at 40-41.

184. *See id*. at 34; 2 C.F.R

185. *See* U.S. DEP'T OF AGRIC., *supra* note 147, at 41.

186. *Id.*

Regulators could require schools to justify to local food authorities their need and reasoning for making multiple micro-purchases. Critically, all of these suggested carve-outs would apply only to schools' purchases of local, fresh, and nutritious food products dedicated to school meal programs.

However, the federal rulemaking process can prove lengthy. For an agency to propose such a carve-out, law requires a public notice and comment period.[187] A carve-out will likely face potentially fatal opposition during public comment, particularly from powerful lobbies with interests in processed and frozen foods.[188] Opponents might suggest that liberalizing informal bidding channels compromises the integrity of full and open competition. However, this strategy's goal is to achieve important social and health policy changes and to support schools and community producers, not to undermine fair competition. Schools will realize the significant benefits of increased purchase power. Not only will they enjoy increased control and flexibility, but schools will also help fight food waste while increasing the nutritional value to school lunches. Like the first two suggested strategies, a micro-purchase carve-out provides a path for schools to decrease reliance on FSMCs while increasing dependence on responsive and more responsible local vendors.

Conclusion

The health of the nation's children is a pressing public-health imperative. Schools' integral roles in food delivery and community-building make them uniquely situated to respond to that exigency. FSMC disappointments highlight the need for school flexibility in and localized control over accessing fresh, healthy school meals. Granted, not all FSMCs underserve students. However, in the fight against childhood obesity and inequity, schools deserve choice instead of constraint in order to best serve the nutritional needs of all students, particularly those who depend on school meal programs.

These recommendations remove regulatory impediments to schools' flexibility and control over nutritious school-meal ingredients. Schools should have the freedom and flexibility to choose the suppliers who can improve the quality and nutritional value of the meals they serve, especially when such suppliers and resources are located in students' home communities. State and local governments can help responsive and responsible local vendors win school bids. To accomplish this goal, state and local governments have three options: increase small, local vendors' competitiveness in the formal bidding process, increase state and local

187. *See, e.g.*, MAEVE P. CAREY, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 3 (2013).

188. *See* Evich, *supra* note 1.

small purchase thresholds for informal bidding, or suggest a micro-purchase carve-out for schools participating in farm to school programs.

Farm to school laws facilitate the opportunity for schools and suppliers to build relationships that center around community accountability, incentivizing responsibility. In evaluating a vendor, schools should take into account the myriad benefits local farm-to-school producers offer. When neighbors can easily provide the quality materials schools seek, they deserve a fair opportunity to compete. Farm-to-school laws aim to ensure the nutrition and health of all citizens and to protect America's youth from the repercussions of bureaucratic food fights. After all, all students deserve healthy food for thought.