Benjamin Rioja Paris
Policy Analyst, Regulatory Policy
Thomas A. Roe Institute for Economic Policy Studies
The Heritage Foundation

Jamie Bryan Hall
Research Fellow, Quantitative Analysis
Center for Health and Welfare Policy
The Heritage Foundation

214 Massachusetts Ave., NE
Washington, D.C., 20002
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Hon. Thomas J. Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave SW
Washington, DC 20250

Attention: Child Nutrition Programs: Community Eligibility Provision-Increasing Options for Schools
(RIN 0584-AE93, Docket No. FNS-2022-0044)

Dear Secretary Vilsack:

We write to comment on the USDA's NPRM "Child Nutrition Programs: Community Eligibility Provision-Increasing Options for Schools" (RIN 0584-AE93), pursuant to the notice and comment process outlined in and protected by 5 U.S.C. § 553(c). The proposed rule is arbitrary and capricious. The rule completely ignores cost, showing no sign whatsoever that the Department considered the costs or even the downsides of the choice of ISP threshold. In providing no details whatsoever about how the Department chose the ISP threshold or estimated cost of the proposal, the rule fails to meet the basic obligations of administrative law, depriving the public of its right to comment intelligently on proposed rules. The discrepancy between the claims made about the regulation's significance and a reasonable estimate of the cost alone shows that the Department did not weigh the costs and benefits of this regulation at all. Indeed, it is not even clear that the Department respects the statutory definition of ISP, opting instead to invent its own definition of the proportion in a manner foreign to the statute. For these reasons, the Department should not and cannot go forward with this rule. Our full comment follows. Thank you for your consideration of this pressing matter.

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I. The rule unlawfully ignores cost.

A. The rule contains no estimate of cost and does not consider cost in the rulemaking process.

The proposed rule's lack of consideration of cost is an appalling instance of arbitrariness. The Department does not include a regulatory impact analysis, claiming that the regulation is not significant and therefore does not require one. It is no coincidence, however, that a basic maxim of economics is "There is no such thing as a free lunch." The Department seems to think the American people are foolish enough to think otherwise. To not even attempt to estimate the cost of this regulation in any part of this document is not merely a regulatory misstep: it shows a disregard for the demands of administrative procedure, the commenting public of the United States, and the taxpayers whose hard-earned funds would be used to cover the increased costs that this proposal would inevitably cause.

The Department claims that OMB reviewed this proposal and that, finding it "not significant," absolved the Department of the need to address the costs of this regulation in any way. This is a ridiculous view of the law. While OMB may have relieved the agency of the specific obligations of EO 12866, it may not relieve it of its obligation to provide the public with meaningful rationale for the rule. As *Motor Vehicle Manufacturers Association of the United States v. State Farm* states, "an agency rule would be arbitrary and capricious if the agency [had] […] entirely failed to consider an important aspect of the problem."[1] But cost is clearly an important aspect of a problem like the provision of taxpayer-funded meals: something provided to people free-of-charge by the government must, by definition, be funded by the public alone, such that cost is perhaps the most important factor for the agency to consider. Indeed, as *Michigan v. EPA* notes, "Consideration of cost reflects the understanding reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[2] There is no sign, here, that the agency considered either cost or the pros and cons alike of its decision. The proposed rule conspicuously ignores the question of cost and does not provide the public with any evidence that it considered the taxpayers' money at all in its determination of the ISP threshold.

The Department first states that it arrived at the 25 percent ISP threshold after it "considered operational factors, including characteristics of LEAs currently eligible and near eligible to elect CEP, and analyzed the composition of the ISP and the proportion of free and reduced price students at varying ISP levels."[3] First of all, none of this data which the Department considered is made available to the public. It is not clear what "operational factors" entails, and it is notable that the Department declines to specify cost as being among these. But

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[1] Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[2] *Michigan v. Envtl. Prot. Agency*, 576 U.S. 743, 753, 760 (2015).
[3] 88 FR 17410.

even if cost is an "operational factor," the public has no way of knowing this, and it certainly has no way of knowing what the costs actually looked like. The standards of administrative procedure in the United States require that agencies make their reasoning transparent throughout the rulemaking process. Simply claiming that the agency "considered […] factors" does not satisfy the demands of *Motor Vehicle Manufacturers Association v. State Farm* and *Michigan v. EPA* to actually and publicly "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[4]

The Department claims that "[b]ased on these analyses [of operational factors], at a 25 percent ISP, USDA estimates that at least 45 percent of students would be eligible for free or reduced price meals, if household income applications were collected."[5] But this is not analysis. The Department gives no reason for why the 45 percent number is desirable. It simply states that the 25 percent threshold would, according to its calculations (which we cannot see and which, therefore, are not even shown to be derived from a reasonable estimation), correspond to an underlying hypothetical eligibility of 45 percent. The Department does not show how it arrived at this 45 percent number or why it is in itself good or better than any or all alternative numbers, meaning that it once again fails to "articulate […] a rational connection between the facts found and the choice made."[6]

The only other attempt at an explanation of the selection of the 25 percent ISP threshold occurs when the Department notes that:

> "A 25 percent CEP eligibility threshold also aligns operationally with the minimum threshold for which severe need payments are provided under the Child Nutrition Act to incentivize schools to participate in the SBP. Severe need payments are provided to help schools that serve high proportions of children from low-income households to start and maintain school breakfast programs. Under CEP, a minimum ISP of 25 percent results in 40 percent of meals reimbursed at the free rate (25 × 1.6 = 40). Schools where at least 40 percent of the lunches served to students in the second preceding school year were are [*sic*] free or reduced price qualify as severe need schools and receive this additional reimbursement (42 U.S.C. 1773(d); 7 CFR 220.9(d)). CEP and severe need payments strive to benefit schools that serve high poverty areas. Under the current ISP threshold of 40 percent, individually eligible CEP schools receive qualify for [*sic*] the additional severe need payments. This would continue under the proposed 25 percent ISP threshold. These schools with an ISP of 25 percent are already likely receiving severe need payments based on USDA's analysis that schools with an ISP of 25 percent are estimated to have a free and reduced price percentage of at least 45 percent. Aligning the CEP threshold with the severe need payments threshold simplifies this determination and further supports the SBP through CEP."[7]

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[4] Motor Vehicle Manufacturers Association v. State Farm, 43.
[5] 88 FR 17410.
[6] Motor Vehicle Manufacturers Association v. State Farm, 43.
[7] 88 FR 17410.

This purported explanation, however, is likewise devoid of substantive reasoning for the decision arrived at by the Department.

Breaking down the statement above, the Department first shows that an ISP of 25 percent "results in 40 percent of meals reimbursed at the free rate ($25 \times 1.6 = 40$)" and then states that "Schools where at least 40 percent of the lunches served to students in the second preceding school year were […] free or reduced price qualify as severe need schools and receive" the severe need repayments. All this means is that, under an ISP threshold of 25 percent, no schools ineligible for CEP would be eligible for the severe need repayments (as those with ISP of $X < 25$ percent would receive reimbursements of $X \times 1.6 < 40$, such that they would not receive severe need repayments). This is not a reason to choose this level of ISP threshold; why is it desirable for all schools that receive the severe need repayments to also receive CEP? The Department claims that this "simplifies this determination," but it is unclear what exactly is simplified. Does the Department claim that, because the threshold ISP of 25 percent yields the free or reduced lunch reimbursement level of 40 percent, the Department will no longer separately calculate the eligibility for the severe need repayment? As the Department notes in recognizing that schools at 25 percent ISP would likely have a free and reduced price percentage of "at least 45 percent," there may very well be a discrepancy between the proportion of meals actually supplied at free or reduced price and the proportion of meals served which are reimbursed at the free or reduced reimbursement rate.

Further, the statute does not permit the Department to substitute one cutoff for another: 42 U.S.C. 1773(d) clearly states that schools may receive the severe need repayments only if "during the most recent second preceding school year for which lunches were served, 40 percent or more of the lunches served to students at the school were served free or at a reduced price."[8] The "price" here clearly does not refer to the reimbursement rate, but rather, the actual price at point-of-sale to students. The statute unambiguously demands that the Department use the proportion of meals served at the free-or-reduced rate, not the proportion of meals reimbursed at that rate, in order to check qualification for the severe need repayments. Thus, the ISP threshold selected in no way "simplifies this determination" as the Department claims. This is at best an aesthetic choice by the Department to align numbers as it sees fit, not a choice based on some kind of reasoning about to whom different benefits should or should not be provided (indeed, the Department declines to say that this ordering makes sense or is a desirable state of affairs for students).

Finally, the reasoning of "support[ing] the SBP through CEP" is likewise thin; the CEP was not intended to be modified for the support of a separate government program, and even if we were to permit this as a lone reason given, there is no evidence that this aim was balanced

[8] 42 U.S.C. 1773(d)(1)(A). Note that the Secretary has discretion to change this qualification only "in the case of a school in which lunches were not served during the most recent second preceding school year," 42 U.S.C. 1773(d)(1)(B).

against or considered in the context of other aims, goals, or goods. Thus, the Department does not just ignore cost in its decision; rather, it does not articulate any publicly discernible reasoning behind the number at which it arrives. The 25 percent ISP threshold is chosen totally arbitrarily.

B. The Department deprives the public of the ability to comment intelligently on the proposed rule.

It is not just that it was arbitrary of the Department to ignore cost, however. By keeping private the data that may or may not have been used in coming to the 25 percent ISP threshold, including data related to cost and other factors considered, the Department failed to supply sufficient information for the public to comment intelligently on the proposed rule.

The Department does not reveal to the public the "operational factors, including characteristics of LEAs currently eligible and near eligible to elect CEP" that it considered; nor the data used when it "analyzed the composition of the ISP and the proportion of free and reduced price students at varying ISP levels"; nor the "USDA[] analysis" which showed "that schools with an ISP of 25 percent are estimated to have a free and reduced price percentage of at least 45 percent."[9] This information is vital, since it is the only substantive information the Department even claims to act upon; while we showed their explanation to be totally unreasonable above, even if it *were* logically reasonable, the Department could still not be said to have engaged in a reasonable rulemaking because the information it acted upon was totally hidden. The public does not know what factors the Department considered "operational," what calculations were made toward the selection of the 25 percent threshold, or even whether said calculations were arithmetically correct.

In the clear language of *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, a proposed rule which "contain[s] no substantive information on" a centrally important component of the rule (in this case, *the* centrally important component of the rule) does not "give the public a clear understanding of the nature and magnitude of the activity to generate meaningful comment," and thus "deprive[s] [the public] of an existing procedural right — the right to comment intelligently."[10] The Department, in failing to disclose, even in a general way, the factors, data, analyses, and calculations that it claims to have used in arriving at a 25 percent ISP threshold, deprived the public of this fundamental right of administrative law in the United States. It doubly failed, then, in failing to publish any information whatsoever relating to the cost of the proposed rule, if it indeed possesses or used any such information at all. Since we have not seen any such information, and since the Department did not even gesture toward its existence or use (such a gesture, we emphasize, would still fail to give the public the ability to

[9] 88 FR 17410.
[10] *Ohio Val. Envir. Coalition v. U.S. Army Corps of E*, 674 F. Supp. 2d 783, 804 (E.D. Va. 2009) (internal quotations and brackets omitted).

comment intelligently), the Department's proposed rule is arbitrary and capricious, contrary to the demands of administrative law.

C. The Department claims, without any evidence and contrary to a reasonable estimate, that the rule would not be economically significant.

The Department asserts that the proposed rule would not be economically significant but provides no justification for this determination.[11] Yet rough calculations based on publicly available data suggest that the proposed rule is likely to be economically significant. For the 2022-2023 school year, free lunches and breakfasts are reimbursed at a rate of at least $4.33 and $2.26, respectively, per meal.[12] If a student is served both meals 168 days per year, this implies an annual cost to taxpayers of at least $1,107.12 per student.

As of 2019, roughly 40 million public-school students attended schools in which 25 percent or more of students qualified for free or reduced-price lunch.[13] As of 2020, about 70 percent of schools eligible to participate in CEP elected to do so, and about 15 million students received meals through CEP.[14] If this take-up rate were to hold after the lowering of the eligibility threshold, then at least 28 million students would receive school meals free at the point of delivery through the CEP, at a cost to taxpayers of at least $30 billion per year, at least $14 billion of which would be attributable to schools that adopted the CEP due to the proposed rule. Of course, if the CEP threshold were left unchanged, some students in these schools would have instead received free meals through other provisions, but given that lowering the threshold would expand CEP to schools in which only 25 to 40 percent of students currently qualify for free school meals, roughly 60 to 75 percent of the spending under CEP at these schools would be new spending on school meals. It is therefore reasonable to expect that the proposed rule would result in at least $8 billion to $11 billion in additional federal, state, and local government spending per year. This is clearly an economically significant sum. Likewise, it should also have been analyzed according to the processes outlined in Executive Order 12866, because this estimated increase is a permanent increase in spending on entitlements.

Given that a reasonable estimate based on publicly available data suggests that the proposed rule would be economically significant, the Department should disclose the information upon which it has reached its contrary conclusion and follow proper procedures for notice-and-comment prior to moving forward with a final rule.

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[11] "Child Nutrition Programs: Community Eligibility Provision-Increasing Options for Schools: A Proposed Rule by the Food and Nutrition Service on 03/23/2023," 88 FR 17413.
[12] "National School Lunch, Special Milk, and School Breakfast Programs, National Average Payments/Maximum Reimbursement Rates: A Notice by the Food and Nutrition Service on 07/26/2022," 87 FR 44333.
[13] "Number and percentage distribution of public school students, by percentage of students in school who are eligible for free or reduced-price lunch, school level, locale, and student race/ethnicity: Fall 2019," National Center for Education Statistics, Digest of Educational Statistics, Table 216.60, https://nces.ed.gov/programs/digest/d21/tables/dt21_216.60.asp.
[14] "Community Eligibility Report 2020," Food Research and Action Center, https://frac.org/cep-report-2020.

II. The rule employs a method of calculating ISP totally foreign to the demands of the statute.

The proposed rule also retains current regulatory language that unlawfully allows local educational agencies to calculate ISP in a way that violates the plain language of the statute and, in so doing, confers CEP eligibility upon schools that do not lawfully qualify. Specifically, 7 CFR 245.9(f)(1)(iii) asserts,

> "The identified student percentage may be determined by an individual participating school, a group of participating schools in the local educational agency, or in the aggregate for the entire local educational agency if all schools participate, following procedures established in FNS guidance."[15]

However, 42 U.S.C. 1759a(a)(1)(F)(ii)(I) clearly states,

> "(I) In general.—A local educational agency may, for all schools in the district or on behalf of certain schools in the district, elect to receive special assistance payments under this subparagraph in lieu of special assistance payments otherwise made available under this paragraph based on applications for free and reduced price lunches if […] (dd) during the school year prior to the first year of the period for which the local educational agency elects to receive special assistance payments under this subparagraph, the local educational agency or school had a percentage of enrolled students who were identified students that meets or exceeds the threshold described in clause (viii)."[16]

By law, the percentage of enrolled students who are identified students must be calculated at the level of either the "local educational agency or school" then compared to the relevant threshold to ascertain potential eligibility for CEP for the entire district or a single school, respectively. If the ISP for the entire district meets or exceeds the threshold and other statutory conditions are met, then the LEA may elect to receive payments under the CEP for the entire district. If the ISP for a single school meets or exceeds the threshold and other statutory conditions are met, then the LEA may elect to receive payments under the CEP *on behalf of* that school. By referring to "certain schools in the district" (rather than, for example, "eligible schools in the district") in subclause (I), the statute merely clarifies that the LEA may elect to receive payments under the CEP for one or more eligible schools in the district, regardless of whether it elects to receive such payments on behalf of any other eligible school(s) in the district.

The clear meaning of reception "on behalf of certain schools in the district" is that the LEA merely stands in for an eligible school or schools. The LEA is not given the authority to accept payment on behalf of any *other* school or schools in the district on account of the existence of these schools. The mention of "certain schools in the district" in subclause (I) does not create a legal path for any given "group of participating schools in the local educational agency" to fulfill the requirement that is clearly applicable to either the "local educational agency

[15] 7 CFR 245.9(f)(1)(iii)
[16] 42 U.S.C. 1759a(a)(1)(F)(ii)(I).

or *school*" (emphasis added) in item (dd). This is an unlawful misinterpretation of an unambiguous statute.

The Department has not merely allowed such grouping in violation of the statute; it has also by its own admission provided "extensive technical assistance" to facilitate this practice:

> "FNS appreciates that grouping is a flexible characteristic of CEP that may be used to maximize Federal reimbursements and administrative efficiencies. As such, school grouping under CEP represents a strategic decision for some LEAs. Because Federal reimbursements are made at the LEA level, rather than at the individual school level, the final rule provides LEAs flexibility to group schools to maximize benefits, based on the unique characteristics of each LEA.
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> To facilitate the use of grouping, and in response to requests from several commenters, FNS has provided extensive technical assistance on grouping through multiple guidance documents. These include the CEP Planning and Implementation Guidance and SP 19-2016, Community Eligibility Provision: Guidance and Updated Q&As (both available at: http://www.fns.usda.gov/school-meals/community-eligibility-provision-resource-center). These resources respond to several real and hypothetical grouping scenarios posed by State agencies and LEAs."[17]

To ensure that special assistance payments are provided to LEAs only on behalf of schools that lawfully qualify for such assistance, the Department should withdraw these guidance documents and promulgate a new rule that complies with the statute.

Considering all of the reasons detailed above, we urge the U.S. Department of Agriculture not to go forward with the proposed rule.

Respectfully submitted,

Benjamin Rioja Paris
Policy Analyst, Regulatory Policy
Thomas A. Roe Institute for Economic Policy Studies
The Heritage Foundation

Jamie Bryan Hall
Research Fellow, Quantitative Analysis
Center for Health and Welfare Policy
The Heritage Foundation.[18]

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[17] "National School Lunch Program and School Breakfast Program: Eliminating Applications Through Community Eligibility as Required by the Healthy, Hunger-Free Kids Act of 2010: A Rule by the Food and Nutrition Service on 07/29/2016," 81 FR 50197-50198.

[18] Affiliation and titles provided for identification purposes only. We submit this comment in our personal capacities only and not as employees of The Heritage Foundation.