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## RESTRUCTURING LOCAL SCHOOL WELLNESS POLICIES: AMENDING THE KIDS ACT TO FIGHT CHILDHOOD OBESITY

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Rebecca Edwalds\*

*Childhood obesity is a major problem plaguing the United States. Over one-third of children are overweight, and there is little indication that this trend will reverse in the near future. The federal government has attempted to combat childhood obesity through the National School Lunch Act, which regulates the quality of foods federally subsidized schools may serve to children, and provides broad goals for physical activity. These basic goals leave extensive room for states to implement different standards, and they are not sufficient to effectively confront the childhood obesity problem. This Note proposes amendments to the National School Lunch Act that increase the requirements for physical activity for schools participating in the National School Lunch Program. By raising the standards and forcing schools to increase actual physical activity among children, the United States can begin to take strides in the right direction to combat childhood obesity.*

### INTRODUCTION

Childhood obesity is a growing and omnipresent health issue in the United States.<sup>1</sup> As of 2008, over one-third of all U.S. children and adolescents were overweight,<sup>2</sup> and currently, seventeen percent of overweight children and adolescents are obese.<sup>3</sup> These numbers continue to grow. Children are now at risk for health issues that historically only plagued adults—issues so severe that the average life expectancy in the United States is decreasing.<sup>4</sup>

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1. See Lauren Kaplin, *A National Strategy to Combat the Childhood Obesity Epidemic*, 15 U.C. DAVIS J. JUV. L. & POL'Y 347, 353 (2011).

2. *Id.*; see *Childhood Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/healthyyouth/obesity/facts.htm](http://www.cdc.gov/healthyyouth/obesity/facts.htm) (last updated Feb. 27, 2014) [hereinafter *Childhood Obesity Facts*].

3. *Data and Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/data/childhood.html> (last updated Jan. 7, 2014) [hereinafter *Data and Statistics*].

4. See Stacey L. Fabros, Note, *A Cry for Health: State and Federal Measures in the Battle Against Childhood Obesity*, 7 J.L. & FAM. STUD. 447, 447 (2005) (listing type 2 diabetes and high cholesterol among the adult infirmities now afflicting children); Kaplin, *supra* note 1, at 347 (noting that today's children have a shorter life expectancy than their parents); see generally Stephen R. Daniels, *The Consequences of Childhood Overweight and Obesity*, 16 THE FUTURE OF CHILDREN: CHILDHOOD OBESITY 47 (2006), available at [www.futureofchildren.org/futureof](http://www.futureofchildren.org/futureof)

Most state and federal policies attempting to combat childhood obesity focus on which foods are served in lunchrooms. While the type of food served in schools is important in the battle against childhood obesity, statutes enacted to date have been insufficient and may contribute to the obesity problem.<sup>5</sup> Children need to exercise and learn how to make healthy choices while they are young so that they can make better decisions as adults.

The most recent federal law on point, the Healthy, Hunger-Free Kids Act of 2010<sup>6</sup> (Kids Act), is a promising step toward fighting childhood obesity. The Kids Act is a significant improvement over the original 1946 school wellness program, codified in the National School Lunch Program.<sup>7</sup> However, the Kids Act has not gone far enough. This Note proposes an amendment to the Kids Act that combines more stringent physical activity requirements with increased physical and nutritional education, all within the existing Local School Wellness Policy framework<sup>8</sup> established by the Kids Act.

Part I of this Note examines the history and current structure of federal legislation surrounding childhood obesity. Part II discusses how the current statutory framework addresses childhood obesity and considers its shortcomings. This Part also explores the guidelines at the center of the Kids Act and argues why such guidelines are inadequate. Finally, Part III proposes an amendment to the Kids Act that will make the Act more effective in teaching children the importance of exercise and healthy eating. Additionally, Part III combats possible criticisms of the proposed amendment by arguing that such criticisms do not override the need for greater action against childhood obesity.

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children/publications/journals/journal\_details/index.xml?journalid=36 (discussing health issues associated with the increasing prevalence of childhood obesity).

5. Although it is clear that childhood obesity is multi-faceted and cannot simply be fixed by the implementation of more exercise in schools, this Note argues that strengthening physical education and nutritional education programs in schools could go a long way towards fighting obesity. Other reforms are undoubtedly important, but they are beyond the scope of this Note.

6. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (2010) (codified mostly at 42 U.S.C.A. §§ 1751-69j (2012)).

7. National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C.A. §§ 1751-69j (2012)).

8. As will be discussed in more detail below, the Local School Wellness Policy is the portion of the Kids Act that gives guidelines to participating schools for physical activity and education. This Note proposes to build on those guidelines.

## I. EXISTING FEDERAL PROGRAMS

The federal government's first foray into childhood nutrition and health legislation came about not because children in America were obese, but because many were starving.<sup>9</sup> Accordingly, the first federal program to deal with the issue, the National School Lunch Program, focused on feeding children. Although there are still hungry children in the United States, childhood obesity has become an increasingly pressing issue.<sup>10</sup> As a result, attention of some legislative and regulatory bodies, such as the Centers for Disease Control and Prevention, has shifted from feeding hungry children to helping obese children become healthy.<sup>11</sup>

The introduction of physical activity and nutrition education into federal legislation has been a slow and inadequate process, in part because of the historical focus on feeding children, and also partially due to the foods served in schools' contingency on federal funding.<sup>12</sup> This Part summarizes existing federal law regulating child health and nutrition to demonstrate why reform is needed.<sup>13</sup> Although federal regulations have attempted to incorporate physical activity and nutrition education elements, they have failed to effectively combat childhood obesity.

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9. The government first became involved with childhood nutrition in 1946 with the National School Lunch Program. See Donald T. Kramer, *Construction and Application of National School Lunch Act (42 U.S.C.A. § 1751 et seq.) and Child Nutrition Act of 1966 (42 U.S.C.A. § 1771 et seq.)*, 14 A.L.R. FED. 634, § 2 (originally published in 1973).

10. *Compare Child Hunger Facts*, FEEDING AMERICA, <http://feedingamerica.org/hunger-in-america/hunger-facts/child-hunger-facts.aspx> (last visited Mar. 23, 2014) (stating that in 2011 twenty percent or more of the child population in thirty-seven states and D.C. lived in food insecure households), *with Childhood Obesity Facts*, *supra* note 2 (stating that one-third of children in the United States are overweight).

11. See Ctrs. for Disease Control & Prevention, *School Health Guidelines to Promote Healthy Eating and Physical Activity*, 60 MORBIDITY & MORTALITY WEEKLY REP. 1, 1 (2011), available at <http://www.cdc.gov/mmwr/pdf/rr/rr6005.pdf> [hereinafter CDC Guidelines]. *Compare* National School Lunch Act, 60 Stat. 230 (containing only provisions about food and nutrition), *with* Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (2004) (containing the first mention of physical activity).

12. See 150 CONG. REC. H1686-01 (daily ed. Mar. 30, 2004) (statement of Rep. Lynn Woolsey) (discussing the Child Nutrition Act of 2004, when the local wellness policy was first introduced, "[t]he primary goal of all the Federal child nutrition programs is to increase opportunities for low-income infants and children so they will eat nutritious food").

13. All of the statutes discussed are still in full force in schools today.

A. 1946 National School Lunch Program<sup>14</sup>

Established in the aftermath of the Great Depression, the National School Lunch Program (NSLP) was created through the Richard B. Russell National School Lunch Act to address malnutrition and poverty among children.<sup>15</sup> At the time, there was an agricultural surplus, where farmers were unable to find buyers for their crops, and malnutrition problems, particularly amongst children.<sup>16</sup> The NSLP granted cash subsidies from the United States Department of Agriculture (USDA) for every meal served at schools in compliance with federal regulations promulgated under the NSLP.<sup>17</sup> The NSLP thus provided a solution to both problems. Farmers found a buyer for excess crops and children received at least one full meal each school day at an affordable price to the schools.<sup>18</sup> This subsidy arrangement, which still exists today, was not mandatory, but provided a monetary incentive for schools to participate. Though the program received little funding and was poorly administered when it first began, it has much more structure and funding today.<sup>19</sup>

The NSLP's federal regulations, although originally focused on preventing starvation and malnutrition, also include a minimum standard of nutrition and require each meal to be provided to children for free or at a reduced price.<sup>20</sup> The minimum nutritional standards attempt to ensure that each meal served at the free or reduced price is nutritionally balanced.<sup>21</sup> In addition, the regulations prohibit the sale of Foods of Minimum Nutritional Value

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14. National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C.A. § 1751-69i (2012)).

15. Leah Loeb, Comment, *Childhood Obesity: The Law's Response to the Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity*, 12 J. HEALTH CARE L. & POL'Y 295, 318-19 (2009).

16. See Comment, *The National School Lunch Act: Statutory Difficulties and the Need for Mandatory Gradual Expansion of State Programs*, 125 U. PA. L. REV 415, 415 (1976); Kramer, *supra* note 9, at § 3.

17. See Jennifer L. Pomeranz & Lawrence O. Gostin, *Improving Laws and Legal Authorities for Obesity Prevention and Control*, 37 J.L. MED. & ETHICS 62, 68 (2009).

18. See Loeb, *supra* note 15, at 318-19.

19. See Kramer, *supra* note 9, at 636-37.

20. See Loeb, *supra* note 15, at 318-19.

21. See Pomeranz & Gostin, *supra* note 17, at 64.

(FMNV).<sup>22</sup> Failure by a school to comply with these regulations can result in a loss of federal funding.<sup>23</sup>

Because schools serve more food than can be covered by cash subsidies, the regulations also created a program whereby the USDA can purchase “entitlement foods”<sup>24</sup> in stock from agricultural surplus and resell those foods to schools.<sup>25</sup> Entitlement foods are not FMNV, although their nutritional value may be questionable. Schools tend to heavily rely on entitlement foods, most of which are “canned, frozen, or dried, and disproportionately favor meats, eggs, and cheese.”<sup>26</sup> These foods tend to be the basis for unhealthy foods often served in schools such as “cooked sausage patties and links, pizza topping, pork bar-b-que, beef parties/crumbles/meat balls, fruit pops, turnovers, chicken nuggets/patties/roasted pieces, breaded chicken . . . and pizza.”<sup>27</sup>

Even vegetables that are available as entitlement foods are not particularly healthy. They typically consist of “various beans, processed tomato products, potatoes, and corn,” most of which are starches.<sup>28</sup> Although starches provide important nutrients, they tend to be higher in calories and carbohydrates—items some nutritionists believe should be eaten in moderation.<sup>29</sup> In addition, school lunch portions typically exceed recommended caloric intake.<sup>30</sup> When the purpose of the Act was to feed malnourished children, larger portion sizes and reliance on entitlement foods were less of a concern. However, obesity is a more prevalent issue today than malnutrition, so the need to reduce unhealthy calories is of great importance.<sup>31</sup> The statute’s dual purpose of reducing agricultural

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22. Victoria L. Brescoll et al., *Assessing the Feasibility and Impact of Federal Childhood Obesity Policies*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 178, 181 (2008). The foods of minimum nutritional value (FMNV) are foods prescribed by the USDA that may not be sold in the food service areas during lunch periods. FMNV include: “soda water, water ices, chewing gum, hard candy, jellies, and gums, marshmallow candy, fondant, licorice, spun candy, and candy coated popcorn.” Pomeranz & Gostin, *supra* note 16, at 68.

23. Kathryn L. Plemmons, *The National School Lunch Program and USDA Dietary Guidelines: Is There Room for Reconciliation?*, 33 J.L. & EDUC. 181, 191 (2004).

24. See Melissa D. Mortazavi, *Are Food Subsidies Making Our Kids Fat? Tensions Between the Healthy Hunger-Free Kids Act and the Farm Bill*, 68 WASH. & LEE L. REV. 1699, 1704 (2011).

25. *See id.*

26. *Id.* at 1704–05.

27. *Id.* at 1705.

28. *Id.*

29. See Melina Jampolis, *Expert Q&A*, CNNHEALTH.COM, (Apr. 17, 2009, 9:44 AM), <http://www.cnn.com/2009/HEALTH/expert.q.a/04/17/potatoes.starch.glycemic.index.jampolis/index.html>.

30. See Plemmons, *supra* note 23, at 192 (“[S]ome have attributed the alarmingly escalating rates of child obesity of student participants to the historical paranoia of childhood malnutrition, which has been overcompensated by over consumption.”).

31. See Mortazavi, *supra* note 24, at 1706.

surplus and feeding malnourished children makes it difficult to provide meals that are truly nutritionally balanced.<sup>32</sup>

The NSLP has an additional problem, however. It only prohibits the sale of FMNV in school cafeterias during lunch hours, so children still have access to these foods from vending machines, snack bars, or the cafeteria before and after lunch.<sup>33</sup> Moreover, the items prohibited as FMNV only include “sodas, non-juice based water ices, chewing gum, and certain kinds of candy and candy coated items,”<sup>34</sup> leaving room for other unhealthy foods such as French fries, ice cream, and potato chips to be served at lunch.<sup>35</sup>

Furthermore, the National School Lunch Program does not fully prevent schools from selling or making available “competitive foods”—foods sold in direct competition with NSLP foods in schools, but not endorsed by NSLP. Competitive foods tend to be higher in fat and calories and lower in nutritional value than NSLP foods.<sup>36</sup> The ease with which children can access these high-fat, low-nutrient foods prevents moderately healthy foods provided by the government from being the sole source of calories for children.<sup>37</sup>

While the NSLP has helped to solve the problems it was originally enacted to face, it has outlived its usefulness. It now provides school lunches to children struggling with obesity that offer insufficient nutritional quality and portion control, while doing nothing to encourage increased physical activity. In short, instead of combatting childhood obesity, the current food regime established in the NSLP significantly contributes to the problem.

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32. *Cf. id.* (“The USDA’s duty to two masters—public health on the one hand and the economic viability of the agricultural sector on the other—has always been an uneasy balancing act.”).

33. Brescoll, *supra* note 22, at 181.

34. Mortazavi, *supra* note 24, at 1720.

35. *See* Brescoll, *supra* note 22, at 181.

36. *See* Pomeranz & Gostin, *supra* note 17, at 68. Competitive foods are statutorily defined as any foods that are in competition with foods provided by the National School Lunch Program. 7 C.F.R. § 210.11(a)(1). More specifically, they are the foods provided to schools through private vendors, which act as another source of income for schools. *See* Plemmons, *supra* note 23, at 193.

37. Plemmons, *supra* note 23, at 193.

*B. Child Nutrition Act of 1966*<sup>38</sup>

Established for purposes similar to the National School Lunch Act,<sup>39</sup> the Child Nutrition Act of 1966 created the National School Breakfast Program to supplement the school lunch program.<sup>40</sup> Although the 1950s and 60s were periods of steady growth and prosperity in the United States, poverty, particularly amongst children, was still a concern. Accordingly, funding for school meal programs greatly increased.<sup>41</sup> Like its counterpart, the NSLP, the Child Nutrition Act does not force schools to participate.<sup>42</sup> Instead, the National School Breakfast Program provides a monetary benefit to schools that adopt its program.<sup>43</sup> This infrastructure was put in place to target schools with students from low-income families.<sup>44</sup> Because schools are typically funded by local property taxes, schools in low-income areas, which often have minimal or no property taxes, are frequently underfunded, and thus more likely to take advantage of the monetary benefits provided by the Child Nutrition Act.<sup>45</sup> To take part in the National School Breakfast Program, individual school districts must apply to their state's educational agency, which then applies to the federal government for food and monetary aid.<sup>46</sup> This structure, enacted in 1966, still exists today.<sup>47</sup>

There are two principal issues with the Child Nutrition Act. First, like the NSLP, the Child Nutrition Act does not prevent schools from selling or making available "competitive foods." In addition—similar to the NSLP—the original Child Nutrition Act did not include health education or physical exercise components.<sup>48</sup> Because schools need the money that comes from the sale of competitive foods, it is difficult for the National School Lunch Program or the Child Nutrition Act to promote the health of children, especially

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38. Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (amended 2004).

39. See Mortazavi, *supra* note 24, at 1707–08 ("The purpose of [the Child Nutrition Act of 1966] was also binary: To feed school children adequate calories and to encourage consumption of surplus agricultural commodities.").

40. See Lesley Lueke, Comment, *Devouring Childhood Obesity by Helping Children Help Themselves*, 32 J. LEGAL MED. 205, 210 (2011).

41. See Kramer, *supra* note 9, at § 3(c).

42. Lueke, *supra* note 40.

43. See *id.*

44. See Plemmons, *supra* note 23 at 186–87.

45. See Interview with Eduardo Sindaco, Principal, Rusk Middle and Elementary School, in Houston, Tex. (Oct. 10, 2012).

46. See Plemmons, *supra* note 23, at 186–87.

47. See Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (2010) (codified mostly at 42 U.S.C.A. §§ 1751–69j (2012)).

48. Child Nutrition Act of 1966 (amended 2004); see Fabros, *supra* note 4, at 450.



since both programs lack physical exercise and health education components.

*C. Child Nutrition & WIC Reauthorization Act of 2004*<sup>49</sup>

In 2004, when Congress reauthorized the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966, it also created the Child Nutrition Act of 2004. Like its predecessors, the Child Nutrition Act of 2004 focused on regulating the types of foods served in school cafeterias.<sup>50</sup> However, the 2004 Act also made several amendments to help reduce childhood obesity.<sup>51</sup> One of its most important additions was a directive to the Secretary of Agriculture to promulgate new standards regarding nutrition and food consumption.<sup>52</sup> Inspired by legislation in Arkansas,<sup>53</sup> the 2004 Act also added health education and physical activity components.<sup>54</sup> For example, the 2004 Act amended the Child and Adult Care Food Program. This program was established with the 1946 National School Lunch Act in order to provide food to qualifying families, and amended in the 2004 Act to offer additional funding to entities that created health education programs for limited English speakers, including children and their families.<sup>55</sup>

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49. Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, 118 Stat. 729 (codified as amended at 42 U.S.C.A. §§ 1771-1791 (2012)).

50. *See id.*

51. *Id.*; *see* Fabros, *supra* note 4, at 450-52.

52. *See* Mortazavi, *supra* note 24, at 1707.

53. In 2003, Arkansas became one of the first states to take aggressive steps to combating childhood obesity by passing Arkansas Act 1220 of 2003. Child Health Advisory Committee, 2003 Arkansas Laws Act 1220 (H.B. 1583) (codified as A.C.A. § 20-7-133-35 (2007)). The Act established a state Child Health Advisory Committee whose job it was to create standards for nutritional and physical education throughout the state. Fabros, *supra* note 4, at 449. The Act also prohibited the sale of unhealthy foods from vending machines for elementary school students. A.C.A. § 20-7-135(c)(1) (2007); *see* Fabros, *supra* note 4, at 449. The most aggressive measure required schools to distribute annual body mass index (BMI) results to parents, given in the context of the child's age group, along with a notification of the possible health effects of a high BMI, nutrition, and physical activity. *See* Fabros, *supra* note 4, at 450. Because of parent outrage at the possible traumatic effects BMI categorization had, the Arkansas General Assembly changed this BMI assessment requirement. *See* James M. Raczynski et al., *Arkansas Act 1220 of 2003 to Reduce Childhood Obesity: Its Implementation and Impact on Child and Adolescent Body Mass Index*, 30 J. PUB. HEALTH POL'Y S124, S129 (2009), available at <http://www.palgrave-journals.com/jphp/journal/v30/nS1/pdf/jphp200854a.pdf>. The BMI assessment is now a requirement for even numbered grades Kindergarten through 10 and is administered every other year, although parents may choose to opt out of the program. *See id.* at S130.

54. *See* 42 U.S.C.A. § 1788 (2012); Child Nutrition and WIC Reauthorization Act of 2004 § 119(j), § 204; Fabros, *supra* note 4, at 450-51.

55. *See* Child Nutrition and WIC Reauthorization Act of 2004 § 119(j).

The 2004 Act, however, consisted of vague standards regarding what physical activity and nutrition education was required and lacked clear enforcement mechanisms. The 2004 Act required each local educational agency to establish wellness policies that, *inter alia*, “[include] goals for nutrition education, [and] physical activity.”<sup>56</sup> Additionally, the 2004 Act authorized such agencies to seek general advice from the Secretary of Agriculture regarding how to meet local school wellness policy standards.<sup>57</sup> One guideline promulgated by the Secretary of Agriculture suggests, but does not mandate, that schools provide all children with at least sixty minutes of exercise per day.<sup>58</sup> However, the 2004 Act contains no enforcement mechanism for these guidelines, meaning that local educational agencies are essentially free to create whatever wellness policies they see fit, even if they do not live up to the guidelines.<sup>59</sup>

In addition to requiring local school wellness policies, the 2004 Act also created the Team Nutrition Network and Team Nutrition.<sup>60</sup> The Team Nutrition Network is a program that allows the Secretary of Agriculture and the Secretary of Education to provide grants to states that create programs promoting healthy eating and physical activity.<sup>61</sup> Team Nutrition is an organization established under the USDA’s Food and Nutrition Service<sup>62</sup> that seeks to “improve children’s lifelong eating and physical activity habits” through comprehensive plans promoting a healthy lifestyle, but these plans are not backed by any enforcement mechanisms.<sup>63</sup> Team Nutrition recruits schools to become “Team Nutrition Schools” that commit to promoting healthy lifestyles in children.<sup>64</sup>

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56. *Id.* at § 204(a)(1).

57. *Id.* at § 204(b).

58. *See, e.g.*, NAT’L ASS’N FOR SPORT & PHYSICAL EDUC., POSITION STATEMENT: COMPREHENSIVE SCHOOL PHYSICAL ACTIVITY PROGRAMS 1 (2008) [hereinafter POSITION STATEMENT], available at <http://www.aahperd.org/naspe/standards/upload/Comprehensive-School-Physical-Activity-Programs2-2008.pdf>; U.S. DEP’T OF HEALTH & HUMAN SERVS., PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS MIDCOURSE REPORT: STRATEGIES TO INCREASE PHYSICAL ACTIVITY AMONG YOUNG 1 (Washington, D.C., 2012), available at <http://www.health.gov/paguidelines/midcourse/pag-mid-course-report-final.pdf>.

59. *See* Loeb, *supra* note 15, at 322; *see also* Pomeranz & Gostin, *supra* note 17, at 68 (stating that the local wellness policy in the 2004 Act needed to be strengthened and have increased monitoring and enforcement).

60. *See* Fabros, *supra* note 4, at 451.

61. 42 U.S.C.A. § 1788(c)(1) (2012).

62. *See generally* Team Nutrition, FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., <http://www.fns.usda.gov/teamnutrition/team-nutrition> (last visited Mar. 23, 2014) (providing information on the implementation of local school wellness policies).

63. FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., TEAM NUTRITION POLICY STATEMENT 1 [hereinafter POLICY STATEMENT], available at <http://www.fns.usda.gov/tn/about-team-nutrition> (last updated Nov. 23, 2013).

64. *See id.* at 7.

Team Nutrition relies heavily on the Food and Nutrition Service, state agencies, school districts, and individual schools to distribute Team Nutrition materials and promote its messages.<sup>65</sup>

The 2004 Act placed the burden of creating policies squarely on individual school districts, in conformity with principles of federalism.<sup>66</sup> Yet, leaving these decisions to individual districts has proved insufficient, and childhood obesity remains a rampant problem.<sup>67</sup>

#### D. *Healthy, Hunger-Free Kids Act of 2010*<sup>68</sup>

The Healthy, Hunger-Free Kids Act of 2010, also called the Child Nutrition Reauthorization Bill, is the most recent federal legislation dealing with childhood health and obesity.<sup>69</sup> Like the previous federal legislation, the Kids Act focuses on the types of foods available in schools. However, the Kids Act imposes tougher restrictions on the types of food products allowed on school grounds and encourages more physical and nutritional education.<sup>70</sup> The Kids Act authorizes the USDA to regulate competitive foods and requires more stringent nutritional standards for meals served in schools.<sup>71</sup> The Kids Act requires the USDA's nutritional guidelines to be scientifically founded and in compliance with the published Dietary Guidelines for Americans.<sup>72</sup> This is an important and necessary step toward combating childhood obesity because it increases the nutritional value of foods available at schools while lowering calorie consumption.<sup>73</sup>

The Kids Act improves the process through which schools receive entitlement foods.<sup>74</sup> Originally, entitlement foods were limited to whatever surplus items American farmers produced. Although the purchase of entitlement foods by the USDA still partially depends on which commodities are in surplus, the USDA may now decide

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65. See *id.* at 6.

66. George C. Guasconi, *Responding to the Wellness-Policy Requirement*, 1 No. 3 Quinlan, School District Budget Report art. 13 (2006).

67. See *Data and Statistics*, *supra* note 3.

68. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (2010) (codified mostly at 42 U.S.C.A. §§ 1751–69j (2012)).

69. See *id.*; Kaplin, *supra* note 1, at 351–52.

70. Kaplin, *supra* note 1, at 373.

71. See Lisa Craig, Comment, *Childhood Obesity, the Unhealthy School Lunch and School Liability Under 42 U.S.C. § 1983*, 21 SAN JOAQUIN AGRIC. L. REV. 73, 79–80 (2012); Mortazavi, *supra* note 24, at 1713. Although the USDA has this new power to regulate competitive foods, it is unclear that they are utilizing this power. See Mortazavi, *supra* note 24, at 1718.

72. Mortazavi, *supra* note 24, at 1716.

73. *Id.*

74. See Craig, *supra* note 71, at 81.

which foods to buy, allowing for healthier choices than under the NSLP.<sup>75</sup> State distribution agencies can then decide which foods to purchase from the USDA to distribute to local school districts.<sup>76</sup> However, the Kids Act does not require states to buy entitlement foods of any kind or amount.<sup>77</sup> Therefore, although this system allows states to select healthier foods for their school districts, there is no guarantee that states will actually choose to receive healthier foods from the USDA.

The Kids Act also takes the physical and nutritional education components of the Child Nutrition and WIC Reauthorization Act of 2004 further by requiring the Secretary of Agriculture to provide goals and guidelines for local educational agencies, thereby aiding those agencies in creating meaningful local wellness policies.<sup>78</sup> This is an improvement over the Team Nutrition Network, which, as noted above, only facilitates these goals and guidelines, leaving tremendous discretion to individual school districts to promulgate inadequate local wellness policies.<sup>79</sup> By becoming the first piece of legislation to impose a federal nutritional education requirement, the Kids Act is a big step in the right direction.<sup>80</sup>

## II. SHORTCOMINGS OF THE KIDS ACT

The Kids Act is certainly an improvement over previous child wellness laws, particularly in the physical activity and nutritional education realm. However, it is not strong enough to combat the problem of childhood obesity. This Part explores the current policies and practices under the Kids Act. Section II.A describes the requirements of the local wellness policies under the Kids Act. In doing so, it highlights the lack of support systems for local school districts and presents the guidelines created to aid local school districts in forming local wellness policies. This Section concludes that school districts fail to fulfill these guidelines due to budgetary constraints and lack of enforcement. Sections II.B and II.C give

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75. *See id.*

76. *See id.*

77. *See id.*

78. *Local School Wellness Policy*, FOOD & NUTRITION SERVS., U.S. DEP'T OF AGRIC., [http://www.fns.usda.gov/tn/healthy/wellnesspolicy\\_requirements.html](http://www.fns.usda.gov/tn/healthy/wellnesspolicy_requirements.html) (last visited Mar. 23, 2014); Kaplin, *supra* note 1, at 373.

79. *See Policy Statement, supra* note 63, at 1; Section II, *infra*.

80. Kaplin, *supra* note 1, at 371–72. In the 1920s, some government and other community groups pushed for nutritional health through campaigns advocating for personal hygiene and healthy foods. *Id.* at 371.

examples of local wellness policies in Texas and Illinois, respectively. These states represent the two extremes of the local wellness policy spectrum. By looking at both the weakest and strongest implementations of local school wellness policies, it is evident that few states make meaningful contributions towards the fight against childhood obesity via local wellness policies.

#### A. Local School Wellness Policy Requirements

Although the provisions of the Kids Act strengthen the local school wellness policy mandate originally created by the Child Nutrition Act of 2004, they do not go far enough.<sup>81</sup> The new provisions were inspired by the lack of reporting requirements under the 2004 Act regarding compliance and implementation of the local wellness policies.<sup>82</sup> The most significant improvements in the Kids Act include the addition of a nutritional education requirement, inclusion of additional parties in the formulation of local school wellness policies, programs to improve transparency to the community about the wellness policies and their progress, and the designation of an official at each educational agency to enforce local school wellness policies.<sup>83</sup>

Another key change involves the Secretary of Agriculture's increased role in the creation and enforcement of school guidelines. Where the Child Nutrition Act of 2004 only required the Secretary of Agriculture to assist educational agencies upon request, the Kids Act requires the Secretary of Agriculture to proactively create guidelines for local wellness policies.<sup>84</sup> More specifically, the Kids Act requires the Secretary of Agriculture to create guidelines and goals in the following areas: (1) nutrition and physical education; (2) nutrition guidelines for foods that are made available on school campuses; (3) requiring others outside of the local educational agency to participate in the creation, implementation, and review of the policies; (4) requiring that the education agency keep the

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81. See NUTRITION & FOOD SERV., U.S. DEP'T OF AGRIC., CHILD NUTRITION REAUTHORIZATION 2010: LOCAL SCHOOL WELLNESS POLICIES, TEAM NUTRITION 1 (Jul. 8, 2011), [http://www.fns.usda.gov/cnd/Governance/Policy-Memos/2011/SP42-2011\\_os.pdf](http://www.fns.usda.gov/cnd/Governance/Policy-Memos/2011/SP42-2011_os.pdf). The USDA provides a comparison chart of the local school wellness policy requirements under the 2004 Act and under the 2010 Act. NUTRITION & FOOD SERV., U.S. DEP'T OF AGRIC., LOCAL SCHOOL WELLNESS POLICIES (LWP): COMPARISON CHART OF 2004 VS. 2010 REQUIREMENTS 1 (Sep. 20, 2011), <http://www.fns.usda.gov/sites/default/files/lwpccomparisonchart.pdf>.

82. See Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 204, 124 Stat. 3183, 3216-17 (2010) (codified mostly at 42 U.S.C.A. §§ 1751-69j (2012)).

83. *Id.*

84. Compare Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 204(a)-(b) with 42 U.S.C.A. § 1758b(b) (2012).

public updated on changes and implementation status of the policies; and (5) measurement of compliance with the local school wellness policy by the local educational agency.<sup>85</sup>

Additionally, the statute also requires the Secretary of Agriculture to seek input from the U.S. Department of Education and the U.S. Department of Health and Human Services, acting through the Centers for Disease Control and Prevention, when promulgating the guidelines.<sup>86</sup> In response to this mandate, these agencies formed an Interagency Workgroup and created a 5-Year Technical Assistance and Guidance Plan.<sup>87</sup> The Guidance Plan, which was produced after conducting surveys and interviews with school administrators, nutritionists, and staff members, lays out goals and objectives for the years 2010 to 2014 for the types of assistance and guidance available to local educational agencies. For example, one of the Workgroup's conclusions was that there ought to be clearer guidance and more resources "to help school districts assess, implement, and measure the implementation of their LWPs."<sup>88</sup>

The Guidance Plan's goals and objectives, as well as its underlying survey data, highlight the shortcomings of the Kids Act. For example, the Workgroup reported a lack of support for local wellness policies from school administrators, nutritionists, and staff members. A more critical look shows that the policies likely lack support because their creation is essentially an unfunded mandate.<sup>89</sup> Compounding the lack of independent funding is the fact that because schools must achieve certain academic standards under No Child Left Behind, physical education is one of the first programs cut due to budget restraints.<sup>90</sup> In order to comply with the local wellness policy mandate, schools will often count recess as a form of physical activity.<sup>91</sup> Recess, however, is not necessarily equivalent to exercise, as there is no guarantee that children will actually engage in physical activities.<sup>92</sup> The use of recess in lieu of

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85. 42 U.S.C.A. § 1758b(b).

86. See 42 U.S.C.A. § 1758(b)(d)(1); FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., LOCAL SCHOOL WELLNESS POLICIES: OVERVIEW AND ACTION STEPS 1, <http://www.fns.usda.gov/sites/default/files/lwpoverview.pdf> (last updated July 12, 2013).

87. See FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., HEALTHY, HUNGER-FREE KIDS ACT OF 2010, SECTION 204: LOCAL SCHOOL WELLNESS POLICIES; 5-YEAR TECHNICAL ASSISTANCE AND GUIDANCE PLAN 1 (Sep. 20, 2011), <http://www.fns.usda.gov/sites/default/files/lwp5yrplan.pdf> (updated July, 2013) [hereinafter 5-YEAR PLAN].

88. *Id.* at 10.

89. Laura C. Leviton, *Children's Healthy Weight and the School Environment*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 38, 49 (2008).

90. See Fabros, *supra* note 4, at 455.

91. Interview with Eduardo Sindaco, *supra* note 45.

92. See Leviton, *supra* note 89, at 47 ("Children are more active generally at school when there is equipment such as basketball hoops . . . and supervision to organize active games.").

formal physical education undermines the physical activity requirements in the Kids Act.<sup>93</sup> Moreover, even when there are physical activity classes, studies have shown that in some school districts, only nine percent of that class time is spent performing moderate to vigorous physical activity.<sup>94</sup>

Furthermore, even if schools were required under local wellness policies to provide physical education to students, budgetary constraints pit academic programs directly against wellness policies, and academic programs usually win. The strategy of dropping physical education programs when budgets are tight sends the wrong message to children: Physical activity is not as important as academics.<sup>95</sup> This mindset works directly against the Kids Act's goal of encouraging children to form life-long healthy habits.

The Workgroup also found that school nutritionists believed the benefits of physical education were not sufficiently publicized.<sup>96</sup> Research has shown that physical activity is linked with stronger academic performance, better behavior, and improved cognitive skills.<sup>97</sup> Decision-makers' knowledge of these benefits might improve the credibility of local school wellness policies. However, the Kids Act contains little to ameliorate this problem.

The Guidance Plan produced by the Workgroup provides evidence that the government is at least aware of the types of changes that need to occur to reduce childhood obesity. However, the guidelines, while well intentioned, are too broad to sufficiently prepare local education agencies to adequately address the issue of childhood obesity.

In a separate publication, the Centers for Disease Control (CDC), providing advice per the Kids Act, created its own guidelines that espouse a holistic and comprehensive approach to healthy eating, physical education, and health education.<sup>98</sup> Although compliance with the CDC guidelines "is neither mandatory nor tracked by CDC,"<sup>99</sup> they show that the CDC is aware of the types

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93. Admittedly, even where there is a physical education program, there is no guarantee that children will actually engage in meaningful physical activity during said program. See Karen E. Peterson & Mary Kay Fox, *Addressing the Epidemic of Childhood Obesity Through School-Based Interventions: What Has Been Done and Where Do We Go From Here?*, 35 J.L. MED. & ETHICS 113, 118 (2007).

94. *Id.* (citing P.R. Nader, *Frequency and Intensity of Activity of Third-Grade Children in Physical Education*, 157 PEDIATRIC & ADOLESCENT MED. 2, 185–90 (2003); B.G. Simons-Morton et al., *Observed Levels of Elementary and Middle-School Children's Physical Activity during Physical Education Classes*, 23 PREVENTIVE MED. 437 (1994)).

95. See Lueke, *supra* note 40, at 208.

96. *Cf.* 5-YEAR PLAN, *supra* note 87 at 10.

97. *Id.* at 2.

98. See CDC Guidelines, *supra* note 10, at 1–2.

99. *Id.* at 12.

of programs that must be implemented in order to effectively combat childhood obesity.

The CDC provides nine general guidelines, as follows:

1. Use a coordinated approach to develop, implement, and evaluate healthy eating and physical activity policies and practices.<sup>100</sup>
2. Establish school environments that support healthy eating and physical activity.<sup>101</sup>
3. Provide a quality school meal program and ensure that students have only appealing, healthy food and beverage choices offered outside of the school meal program.<sup>102</sup>
4. Implement a comprehensive physical activity program with quality physical education as the cornerstone.<sup>103</sup>
5. Implement health education that provides students with the knowledge, attitudes, skills, and experiences needed for healthy eating and physical activity.<sup>104</sup>
6. Provide students with health, mental health, and social services to address healthy eating, physical activity, and related chronic disease prevention.<sup>105</sup>
7. Partner with families and community members in the development and implementation of healthy eating and physical activity policies, practices, and programs.<sup>106</sup>
8. Provide a school employee wellness program that includes healthy eating and physical activity services for all school staff members.<sup>107</sup>
9. Employ qualified persons, and provide professional development opportunities for physical education, health education, nutrition services, and health, mental health, and social services with staff members, as well as staff members who supervise recess, cafeteria time, and out-of-school-time programs.<sup>108</sup>

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100. *Id.* at 13.

101. *Id.* at 18.

102. *Id.* at 21.

103. *Id.* at 28.

104. *Id.* at 33.

105. *Id.* at 37.

106. *Id.* at 41.

107. *Id.* at 45.

108. *Id.* at 47.



Although all nine guidelines are important for creating a healthy school environment, this Note suggests that Guidelines Four and Five—increased physical education and nutrition education—are most needed.<sup>109</sup> Guideline Four recommends daily physical education for grades K-12, specified as 150 minutes of exercise per week for elementary school children, and 225 minutes of exercise per week for secondary school children.<sup>110</sup> Guideline Four also suggests having daily recess and opportunities available for extracurricular sports, but does not allow recess or participation in sports to take the place of physical education.<sup>111</sup> Guideline Five urges schools to provide health education from pre-kindergarten through twelfth grade.<sup>112</sup> These recommendations demonstrate the importance of health education in the fight against childhood obesity, yet health education is woefully underemphasized in schools.<sup>113</sup>

Like the Guidance Plan, the CDC's guidelines demonstrate that the government is aware of what is necessary to produce an ideal school environment that encourages physical activity and nutrition education. Unfortunately, these guidelines have not been enough to incentivize the implementation of effective programs. As mentioned in Part I, local school wellness policies were first required by the Child Nutrition Act of 2004.<sup>114</sup> At that time, the Secretary of Agriculture's guidelines recommended local school wellness policies provide children with at least sixty minutes of physical activity per day.<sup>115</sup> Yet, by 2006, only four percent of elementary schools, eight percent of middle schools, and two percent of high schools provided daily physical education.<sup>116</sup> The vagueness of these guidelines and lack of mechanisms to enforce them has resulted in a

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109. See Section III.A, *infra*.

110. CDC Guidelines, *supra* note 10, at 28. The recommended weekly physical activity requirements increase with age because physical activity naturally decreases as children get older. See *Adolescents and Young Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nccdphp/sgr/adoles.htm> (last visited Mar. 23, 2014).

111. CDC Guidelines, *supra* note 11, at 31–32.

112. *Id.* at 33.

113. See *id.* at 33–34 (stating that in 2006, the median number of hours required for nutrition education was 3.4 hours for elementary school, and 5.9 hours for high school).

114. See Part I.C, *supra*.

115. See, e.g., POSITION STATEMENT, *supra* note 56; U.S. DEP'T OF HEALTH & HUMAN SERVS., PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS MIDCOURSE REPORT: STRATEGIES TO INCREASE PHYSICAL ACTIVITY AMONG YOUTH 1 (Washington, D.C., 2012), available at <http://www.health.gov/paguidelines/midcourse/pag-mid-course-report-final.pdf>. See also Part I.C <http://www.health.gov/paguidelines/midcourse/pag-mid-course-report-final.pdf>. See also Part I.C, *supra*.

116. See CDC Guidelines, *supra* note 11, at 28. These statistics are also, unfortunately, the most recent data collected on the issue. See *Michelle Obama Understates Percentage of High Schools with Physical Education*, POLITIFACT.COM (May 30, 2012), <http://www.politifact.com/truth-ometer/statements/2012/may/30/michelle-obama/michelle-obama-understates-percent-high-schools-ph/>.

wide range of physical activity and nutritional education programs. At one end of the spectrum is Texas, with little to no physical and nutritional education. At the other end is Illinois, which provides some of the best programs in the country. Both states are discussed below.

### B. Texas

Texas's state policies facially comply with Kids Act requirements, but nonetheless fail to significantly contribute to the battle against childhood obesity. Currently, the Texas State Education Code requires physical education instruction for grades K-12.<sup>117</sup> Today, the phrase "physical education," which historically did not include physical activity, means at least thirty minutes of moderate to vigorous physical activity each day for grades K-5, or if this is impracticable, 135 minutes of moderate to vigorous physical activity each week.<sup>118</sup> The requirement for physical activity may be fulfilled through recess, which is frequently the case in low-income schools.<sup>119</sup>

As children get older, however, the requirements grow more lenient. For grades 6-8, the Code requires just thirty minutes of moderate to vigorous physical activity each day for at least four of the six semesters.<sup>120</sup> High school students must only take one credit of physical education to graduate.<sup>121</sup> This credit can be completed through online coursework, which does not include actual physical activity.<sup>122</sup> In addition, middle and high school students may be exempted from physical education if they participate in a school sport, or any other activity that has moderate to vigorous activity levels.<sup>123</sup>

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117. See TEX. EDUC. CODE ANN. § 28.002 (2011); NAT'L ASS'N FOR SPORT & PHYSICAL ACTIVITY, STATE PROFILES: TEXAS I (2010) [hereinafter STATE PROFILES: TEXAS], available at <http://www.aahperd.org/naspe/publications/upload/texas-profile.pdf> (stating that prior to 2010 kindergarten was the only grade where physical activity must be included in the physical education curriculum).

118. *Id.* at 1.

119. See Nat'l Ass'n of State Bds. of Educ., *State School Healthy Policy Database: Texas*, [http://www.nasbe.org/healthy\\_schools/hs/state.php?state=Texas](http://www.nasbe.org/healthy_schools/hs/state.php?state=Texas) (last updated Aug. 22, 2013) [hereinafter *State School Healthy Policy Database: Texas*]; Interview with Eduardo Sindaco, *supra* note 45 (describing his school's physical education program as having one physical education class per week, and thirty minutes of recess each day).

120. TEX. EDUC. CODE ANN. § 28.002(1) (2011); *id.*

121. *State School Healthy Policy Database: Texas*, *supra* note 119.

122. STATE PROFILES: TEXAS, *supra* note 117, at 2.

123. *State School Healthy Policy Database: Texas*, *supra* note 119.

Texas provides significant leeway for school districts to create their own physical education curricula.<sup>124</sup> The base requirement is that the curriculum be sequential and developmentally appropriate for the age range, while advancing several other statutory goals, such as “promot[ing] student participation in physical activity outside of school.”<sup>125</sup> Additionally, at least fifty percent of the physical education must involve physical activity.<sup>126</sup> Under the Code, however, recess meets this fifty percent requirement, despite the fact that many students do not actually engage in moderate to vigorous physical activity during recess.<sup>127</sup>

Texas additionally demonstrates its inadequate approach to childhood obesity by its apparent lack of concern for children’s health. As a form of data collection, the Texas Education Agency requires a fitness assessment of all students from third to twelfth grade.<sup>128</sup> The results are confidential and are not provided to parents as a way of informing them or their child about the child’s current fitness level.<sup>129</sup> Providing this information to parents could at least put parents on notice of their children’s health and give parents the opportunity to effectuate change in their children’s lives that might otherwise go unnoticed.

Like Texas’s physical education requirements, the health education requirements are more stringent for grades below the high school level.<sup>130</sup> Health education must be available for grades K-12, though there are no specific hourly requirements.<sup>131</sup> Grades K-8 must spend “sufficient time” on health education each year, while high school students must earn a half credit in health education over four years to graduate.<sup>132</sup> The state leaves the decision of minimum hourly requirements to each district’s local school health advisory council.<sup>133</sup>

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124. See TEX. EDUC. CODE ANN. § 28.002(d) (2011).

125. *Id.* at § 28.002(d)(10).

126. *Id.* at § 28.002(d)(3).

127. See Peterson & Fox, *supra* note 93, at 118.

128. See *School Health-Physical Fitness Assessment Initiative*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/PFAI.html> (last updated Feb. 6, 2013); *State School Healthy Policy Database: Texas*, *supra* note 119.

129. See *State School Healthy Policy Database: Texas*, *supra* note 119.

130. See *id.*

131. See TEX. EDUC. CODE ANN. § 28.002(a)(2)(B) (2011); see *State School Healthy Policy Database: Texas*, *supra* note 119.

132. *State School Health Policy Database: Texas*, *supra* note 119.

133. TEX. EDUC. CODE ANN. § 28.004(c)(1) (2011).

As a result of these vague guidelines, Texas technically complies with the Kids Act's local school wellness policies. The implementation of local school wellness policies, however, fails to significantly contribute to the battle against childhood obesity.

### C. Illinois

At the opposite end of the spectrum, Illinois is one of the few states to require daily physical education from kindergarten through twelfth grade in public schools.<sup>134</sup> Neither recess nor extra-curricular sports are required.<sup>135</sup> However, schools may count recess toward their daily physical education requirement, as long as a certified teacher is supervising.<sup>136</sup> In addition, schools may exempt students in eleventh or twelfth grade who participate in interscholastic sports, are members of ROTC, who must take other classes to graduate, or take classes required to apply to an institution of higher learning.<sup>137</sup> Illinois allows school districts to apply to the state legislature for a waiver from the physical education requirement for a two-year period, which may be renewed, but only for a total of six years.<sup>138</sup>

Illinois also requires health education, though to a much lesser extent than physical education. Middle and high school students must complete health education, though it is also encouraged in elementary school. Middle and high school students must complete the equivalent of one semester of health education before each graduation, but the weeks may be split up over several years.<sup>139</sup>

Although the legal requirements in Illinois do not meet CDC Guidelines, Illinois has its own model wellness policies that much

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134. See NAT'L ASS'N FOR SPORT & PHYSICAL EDUC. & AM. HEART ASS'N, 2010 SHAPE OF THE NATION REPORT: STATUS OF PHYSICAL EDUCATION IN THE USA 7 (2010) [hereinafter SHAPE OF THE NATION REPORT]; 105 ILL. COMP. STAT. 5/27-6 (2007). Only six states require daily physical education from grades K-12: Illinois, Iowa, Massachusetts, New Mexico, New York, and Vermont. New Jersey and Rhode Island require daily physical education for grades 1-12. See SHAPE OF THE NATION REPORT, *supra*.

135. See Nat'l Ass'n of State Bds. of Educ., *State School Healthy Policy Database: Illinois*, [http://www.nasbe.org/healthy\\_schools/hs/state.php?state=Illinois#](http://www.nasbe.org/healthy_schools/hs/state.php?state=Illinois#) (last updated July. 31, 2013) [hereinafter *State School Healthy Policy Database: Illinois*].

136. *Id.*

137. 105 ILL. COMP. STAT. 5/27-6(b) (2007).

138. See NAT'L ASS'N FOR SPORT & PHYSICAL ACTIVITY, STATE PROFILES: ILLINOIS 1 (2010) [hereinafter STATE PROFILES: ILLINOIS], available at <http://www.aahperd.org/naspe/publications/upload/illinois-profile.pdf>.

139. See *State School Healthy Policy Database: Illinois*, *supra* note 135.

more closely follow the CDC Guidelines.<sup>140</sup> The model policies call for daily physical education, daily recess, daily health education, availability of sports or other physical activity in programs before and after school, and a prohibition against using physical activity as a punishment.<sup>141</sup> However, like many of the federal level guidelines, these model policies are only recommendations and Illinois state law does not contain any mechanisms to ensure their adoption in schools.

Despite the lack of enforcement mechanisms, the Illinois Department of Public Health, in conjunction with the Illinois State Board of Education and the Illinois Public Health Institute, is actively working to raise Illinois' standards.<sup>142</sup> They recently produced a three-year plan calling for all Illinois K-12 students to participate in daily, high-quality physical education.<sup>143</sup> The plan eliminates the physical education waiver program, and mandates that children engage in moderate to vigorous activity for at least fifty percent of physical education time.<sup>144</sup> In addition, the group successfully lobbied the Illinois Legislature to revise the Illinois physical education curriculum. In 2012, Illinois Public Act 97-1102 created the Enhanced P.E. Task Force to make recommendations to the Governor on what curriculum changes need to be made.<sup>145</sup>

This strong state mandate is surely a step in the right direction, but it still lacks effective means of implementation.<sup>146</sup> Schools do not always fulfill the state mandate for daily physical education.<sup>147</sup> Furthermore, childhood obesity is a nation-wide problem, and a state-by-state approach is not an adequate solution. As Texas's state

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140. See generally ILL. NUTRITION EDUC. & TRAINING PROGRAM, SCHOOL DISTRICT MODEL WELLNESS POLICY LANGUAGE (2006) [hereinafter SCHOOL DISTRICT MODEL], available at <http://www.kidseatwell.org/flyers/School%20District%20Model%20Local%20Wellness%20Policy%202006.pdf> (giving model language for local school wellness policies as guidelines for Illinois school districts); NAT'L ALLIANCE FOR NUTRITION & ACTIVITY, MODEL LOCAL SCHOOL WELLNESS POLICIES (2005) [hereinafter MODEL SCHOOL WELLNESS], available at <http://schoolwellnesspolicies.org/resources/NANAWellnessPolicies.pdf>.

141. SCHOOL DISTRICT MODEL, *supra* note 140, at 2; MODEL SCHOOL WELLNESS, *supra* note 140, at 7.

142. See generally LaMar Hasbrouck et al., ILLINOIS ENHANCED PHYSICAL EDUCATION STRATEGIC PLAN (June, 2012), available at [http://www.idph.state.il.us/pdf/EnhancedPE\\_StrategicPlan\\_Final2.pdf](http://www.idph.state.il.us/pdf/EnhancedPE_StrategicPlan_Final2.pdf) (laying out a comprehensive plan for moving forward with physical education).

143. *Id.* at 5.

144. See *id.* at 3.

145. See *Enhance Physical Education Task Force*, ILL. STATE BD. OF EDUC., <http://www.isbe.net/EPE/html/EPETF.htm> (last visited Mar. 23, 2014).

146. See Hasbrouck et al., *supra* note 142, at 9.

147. See Hasbrouck et al., *supra* note 142, at 7-9 (evaluating the efficacy of school physical education programs in Illinois, one of the only states in the country with a K-12 P.E. requirement).

requirements show, it is quite easy for a school district to comply with the local wellness policy without seriously impacting a child's physical activity or health education. This approach is insufficient to address the issue of childhood obesity. The nation as a whole should mimic Illinois' bold efforts to combat childhood obesity by requiring higher standards for physical activity and health education. Because it is unlikely that the states will follow Illinois' example on their own initiative given the current state of affairs, this would require stronger federal intervention.

### III. A STRONGER FEDERAL GOVERNMENT ROLE IS NEEDED

With just four changes, the existing Kids Act could be turned into a significantly more effective statute that might actually stand a chance at combating childhood obesity in the United States. This Part details each of these four changes and explains why greater federal intervention is desirable in this area. It then addresses potential criticisms of the reform and, finally, proposes mechanisms for implementing these changes.

#### A. Proposed Amendment to the Kids Act<sup>148</sup>

One reason why the Kids Act has failed to substantially decrease childhood obesity is due to overly vague guidelines. Studies have shown that policies targeting direct behaviors are more likely to be effective than ones setting broad goals.<sup>149</sup> Accordingly, this Note proposes an amendment that articulates four overarching goals centered around concrete standards for physical activity and nutrition education. The overarching goals include the following: (1) to increase moderate and vigorous physical activity; (2) to reduce sedentary activity (i.e. watching TV and playing video games); (3) to decrease consumption of high-fat foods; and (4) to increase consumption of fruits and vegetables. This Note proposes adding the following amendment to Section (b) of the Kids Act to provide more concrete guidelines that target these goals:

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148. Adapted from Planet Health program, Kaplin, *supra* note 1, at 358; *see also* Peterson & Fox, *supra* note 93, at 117 (describing Planet Health's design to target four modifiable health behaviors), and the Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3181 (codified as amended at 42 U.S.C. §§ 1751-69j (2012)). These would replace 42 U.S.C. § 1758b(b)(1) (2012).

149. *See* Peterson & Fox, *supra* note 93, at 117.

(b) The Secretary of Agriculture shall promulgate regulations that provide the framework and guidelines for local education agencies to establish local school wellness policies. Using this provision and the Secretary's guidelines, each local educational agency shall establish local school wellness policies for grades K through twelve including, at a minimum:

- (1) thirty minutes of daily physical exercise, with a physical education class held three days each week, in which students spend seventy-five percent of the class maintaining moderate to vigorous physical activity;
- (2) opportunities for students to participate in physical activity in before or after school programs;
- (3) fifty hours of interdisciplinary nutrition education per year, showing how food choices and physical activity are tied to personal behavior, individual health, and the environment;<sup>150</sup>
- (4) Failure to comply with these requirements will result in a loss of federal funding [remainder of existing statute omitted].<sup>151</sup>

### B. Concrete Guidelines are Essential

The Secretary of Agriculture and the CDC intentionally promulgated broad guidelines under the Kids Act. These guidelines are intentionally broad because "every guideline might not be appropriate or feasible for every school to implement, [so] individual schools should determine which guidelines have the highest priority based on the needs of the school and available resources."<sup>152</sup> However, the vagueness of the guidelines is one reason why the Kids Act has been so ineffective. With such open-ended guidelines, schools feel no obligation to set high standards for physical activity and nutrition education, because they can write it off as infeasible, economically or otherwise.<sup>153</sup>

The proposed amendment seeks to strike a balance between the need for more concrete guidelines and the nuances of different

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150. Proposed originally by the School Nutrition Policy Initiative. See Kaplin, *supra* note 1, at 359. Note that this program was funded by a private grant for research, *id.* at 375, whereas this Note proposes a government mandate.

151. Remainder of the existing statute omitted. See 42 U.S.C. § 1758b (2012).

152. CDC Guidelines, *supra* note 11.

153. See Interview with Eduardo Sindaco, *supra* note 45 (stating that the primary reason for lack of more physical and nutrition education is funding).

school districts. However, this proposal does not strip school districts of all discretion. Instead, the proposed amendment sets a realistic minimum requirement of thirty minutes of daily physical exercise with three physical education classes per week.<sup>154</sup> This requirement is far below the 150 minutes of physical activity each week for elementary students, the 225 minutes each week for high school students recommended by the CDC guidelines,<sup>155</sup> or the sixty minutes per day recommended for all children by the Secretary of Agriculture.<sup>156</sup> However, the proposed amendment will provide a higher minimum physical activity level than currently exists in many states, while leaving school districts discretion to meet the CDC recommendations.

### C. Stronger Federal Intervention is Necessary

Opponents of any government intervention in the obesity battle have two principal objections. The first is that the federal government is too invasive of the personal choices of individuals. The second is that federal regulation will hurt corporate profits by driving people away from entities associated with the restaurant industry.<sup>157</sup> Opponents argue that “paternalism is not properly the province of government, especially when it results in the expenditure of taxpayer dollars.”<sup>158</sup> However, under the doctrine of *parens patriae*, greater intervention by the government is justified in the battle against childhood obesity. “*Parens patriae* . . . refers to the government’s role as guardian for persons legally unable to act for themselves, such as juveniles.”<sup>159</sup> Over one-third of all children and adolescents in the United States are overweight or obese.<sup>160</sup> The government has a responsibility to help these children become healthy.<sup>161</sup>

More specifically, opponents of federal intervention argue that education and health care are typically the province of states, and

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154. *Id.*

155. CDC Guidelines, *supra* note 11, at 28.

156. See POSITION STATEMENT *supra* note 58, at 1.

157. See Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh in on Wellness*, 5 IND. HEALTH L. REV. 185, 189 (2008).

158. *Id.*

159. Kaplin, *supra* note 1, at 377.

160. *Id.* at 353.

161. See *infra* Part III.D.



the federal government has no business interfering.<sup>162</sup> However, “the federal government . . . has more resources and expertise in many areas and can address issues that cross state lines.”<sup>163</sup> Moreover, under the Constitution, the government must provide for the general welfare,<sup>164</sup> which unequivocally includes public health.<sup>165</sup> Because childhood obesity is a national epidemic, the federal government should step in to guide the states more effectively than the Kids Act has done.<sup>166</sup> Childhood obesity is also a national problem, because the burden of health complications that arise from childhood obesity fall on the wallets of all American taxpayers. Childhood obesity rates are much higher in poorer populations—populations that tend to rely on Medicaid and other public assistance programs. The high rate of obesity amongst those receiving social assistance increases the cost of these programs for all Americans.<sup>167</sup>

#### D. Constitutional Criticisms

A favored argument amongst opponents to this Note’s proposed federal intervention is that such intervention violates the Constitution because it reaches beyond Congress’s enumerated powers.<sup>168</sup> Their argument, however, is without merit. The proposed amendment does not require participation, but merely offers subsidies in exchange for participation—a clear constitutional use of the Spending Clause.<sup>169</sup> In *United States v. Butler*, the Supreme Court held that Congress has broad power to spend for the general welfare, as long as the general welfare is one of national concern, and the program does not violate other constitutional provisions.<sup>170</sup> As previously stated, with almost one-third of the nation’s children

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162. See *United States v. Onslow Cnty. Bd. of Educ.*, 728 F.2d 628, 638 (4th Cir. 1984) (“Education is certainly an important state function, and apparently is a ‘traditional’ one for purposes of Tenth Amendment analysis.”).

163. Loeb, *supra* note 15, at 303.

164. U.S. CONST. art I, § 8, cl. 1.

165. See LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 6 (2008).

166. See Loeb, *supra* note 15, at 318 (“Federal legislation setting nationwide standards would ensure that schools work to address the obesity epidemic.”).

167. See John Cawley, *Markets and Childhood Obesity Policy*, 16 *THE FUTURE OF CHILDREN: CHILDHOOD OBESITY* 69, 77 (2006) available at [www.futureofchildren.org/futureofchildren/publications/journals/journal\\_details/index.xml?journalid=36](http://www.futureofchildren.org/futureofchildren/publications/journals/journal_details/index.xml?journalid=36).

168. See generally U.S. CONST. art. I, § 8.

169. See GOSTIN, *supra* note 161, at 46; Loeb, *supra* note 14, at 303, 318.

170. *United States v. Butler*, 297 U.S. 1, 65, 67 (1936) (interpreting U.S. CONST. art. I, § 8).

dealing with weight issues, childhood obesity has clearly risen to a level of national concern.<sup>171</sup>

The National School Lunch Program is a conditional grant to state governments. The Supreme Court has repeatedly held that conditions may be placed on grants, as long as the conditions are expressly stated and have some relationship to the purpose of the spending program.<sup>172</sup> For example, the Supreme Court upheld a law requiring states to adopt a twenty-one-year-old drinking age or lose federal highway funding because the Court found that the purpose of federal highway funding created a sufficient nexus between the drinking age and safe interstate travel.<sup>173</sup> The conditions in the amendment proposed by this Note are clearly stated and align with the program's purpose: creating healthy children. It is unlikely a court would find this nexus lacking.

The Supreme Court has stated that Congress cannot compel states to adopt laws or regulations through monetary incentives in which states have no discretion in their decisions to comply with the federal regulation.<sup>174</sup> However, Congress may create standards with which state and local governments must comply in order to receive funding, but participation is fully voluntary.<sup>175</sup> The vague and broad goals in the Kids Act are likely an attempt to easily maintain compliance with this holding, since it makes it easy for states to comply without placing a heavy burden on each state. The amendment proposed here, however, does not change the fact that the federal government is setting standards. The standards are higher and more clearly defined, but the states and school districts still have discretion in determining the full extent of their local school wellness policies.

Critics may also argue that requiring states to provide more physical education and nutrition education violates the Tenth Amendment.<sup>176</sup> Again, this argument fails. There are three concepts of federalism that are most often cited for Tenth Amendment concerns: avoiding federal tyranny, promoting democratic rule by providing government that is closer to the people, and allowing

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171. See Kaplin, *supra* note 1, at 353.

172. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 212 (1987); *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947).

173. See *Dole*, 483 U.S. at 208.

174. *New York v. United States*, 505 U.S. 144, 188 (1992). In *New York v. United States*, the Supreme Court held that a federal law giving monetary incentives to states to dispose of radioactive waste in a specific manner, or otherwise have to take ownership of the waste violated the Tenth Amendment and was therefore unconstitutional. *Id.* at 173.

175. *Id.* at 166–67.

176. See *Onslow*, 728 F.2d at 638.

states to be laboratories for new ideas.<sup>177</sup> The idea that the proposed amendment to the Kids Act promotes federal tyranny cannot be maintained, as the amendment leaves considerable discretion to local and state governments. Moreover, in a world of expansive federal regulation, this fear is even less convincing.<sup>178</sup> The same can be said for the second concern, because the proposed statute leaves room for a government closer to the people to design specific programs.

The desire to maintain states as laboratories for new ideas is a compelling, but not dispositive argument against the proposed amendment. While it is true that the proposed amendment limits state experimentation, it does not completely confine that experimentation.<sup>179</sup> State and local educational agencies still have discretion to define the exact terms of the local wellness policy. Accordingly, states and local education agencies have room to experiment with different policies to combat childhood obesity beyond the amendment's minimum standards. Moreover, state and local educational agencies have been creating local wellness policies largely unguided since 2004 when the first local wellness policies requirements were introduced.<sup>180</sup> They have had ample time to experiment, yet the locally-designed programs have proven ineffective. It is now time for the federal government to step in for the sake of the general welfare. While the debates about the meaning of the Tenth Amendment within the context of the Spending Power will continue, neither affects the proposed amendment.<sup>181</sup>

### *E. Implementing the Amendment*

The success of the proposed amendment depends significantly on its implementation. The amendment focuses on increasing physical activity and nutritional education in schools because schools are the natural environment for a project of this nature. Many children do not live close to parks or other facilities where they can easily exercise.<sup>182</sup> Most children spend the majority of their day at

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177. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 320 (4th ed. 2011).

178. *Id.* at 321.

179. *Id.* at 322.

180. *See supra* Part I.C.

181. *Id.* at 323.

182. *See* James F. Sallis & Karen Glanz, *The Role of the Built Environments in Physical Activity, Eating, and Obesity in Childhood*, 16 THE FUTURE OF CHILDREN: CHILDHOOD OBESITY 89, 91 (2006), available at [www.futureofchildren.org/futureofchildren/publications/journals/journal\\_details/index.xml?journalid=36](http://www.futureofchildren.org/futureofchildren/publications/journals/journal_details/index.xml?journalid=36).

school<sup>183</sup> and form many habits there that carryover into adulthood.<sup>184</sup> Moreover, most schools already have various sports equipment and field space, making it easier for children to become physically active.<sup>185</sup> Access to exercise facilities in school is especially important in low-income neighborhoods, whose residents are most plagued by obesity.<sup>186</sup>

However, the amendment places a heavier burden on schools to provide students with more physical activity and health education. Educators focused on ensuring that kids reach certain academic benchmarks to comply with No Child Left Behind might see this as problematic.<sup>187</sup> Accordingly, educators often view academics as in competition with, or rather more important than, teaching children the importance of healthy choices and exercise.<sup>188</sup> Policymakers and educators alike should see these realms of education in harmony with one another, especially because being overweight can damage school performance, either through medical related school absences or social stigmas that cause anxiety or depression.<sup>189</sup> Moreover, evidence has shown that increased physical activity during the school day may improve academic performance.<sup>190</sup>

To reduce the friction between academics and physical and nutritional education, schools should incorporate lessons on nutrition and physical activity within existing classrooms and curriculums. Physical and nutritional education courses do not necessarily require separate teachers, as current teachers can teach both classes. In fact, a model local school wellness policy for Illinois already encourages this idea as a legitimate way to achieve the fifty-hour

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183. See Kaplin, *supra* note 1, at 356.

184. Loeb, *supra* note 15, at 296.

185. Kaplin, *supra* note 1, at 356.

186. See *id.* at 355.

187. See Mary Story, et al., *The Role of Schools in Obesity Prevention*, 16 THE FUTURE OF CHILDREN: CHILDHOOD OBESITY 109, 119 (2006), available at [www.futureofchildren.org/futureofchildren/publications/journals/journal\\_details/index.xml?journalid=36](http://www.futureofchildren.org/futureofchildren/publications/journals/journal_details/index.xml?journalid=36).

188. See Peterson & Fox, *supra* note 93, at 116.

189. See Fabros, *supra* note 4, at 447; Story et al., *supra* note 187, at 110. I recognize the possibility that the best solution to the child obesity epidemic is to reform No Child Left Behind. That solution, however, would require a complete societal change on which values in schools are important. There are advocates that believe the current school atmospheres stifle creativity and the development of children to learn certain skills that are not the skills everyone needs in life. See Sir Ken Robinson, *Ken Robinson Says Schools Kill Creativity*, TED TALK (2006), [http://www.ted.com/talks/ken\\_robinson\\_says\\_schools\\_kill\\_creativity.html](http://www.ted.com/talks/ken_robinson_says_schools_kill_creativity.html).

190. Story et al., *supra* note 187, at 111.

nutrition education requirement.<sup>191</sup> A pilot program in Massachusetts provides a similar model for both physical and nutrition education.<sup>192</sup> This integration is important because it enables children to truly buy into health and physical education information when the entire environment around them supports those ideas.<sup>193</sup>

The success of the proposed amendment also depends on funding. One significant reason why the Kids Act has been ineffective is that in practice, it requires districts to create and implement local wellness policies without any significant funding from the federal government.<sup>194</sup> The more stringent requirements included in the proposed amendment will merely exacerbate the problem. Additional funding is needed. One way to provide this funding is to create a new targeted tax.<sup>195</sup> This new tax could be placed on certain foods to discourage their consumption, hopefully having a similar effect to increased taxes on cigarettes.<sup>196</sup> Not only would this tax hopefully discourage unhealthy eating, but it could also create revenue specifically for obesity prevention efforts, such as local school wellness policies.

#### CONCLUSION

Although the federal government and local educational agencies have been working towards preventing childhood obesity, the efforts to date have not been enough. The government has amended the standards for food served in schools under the National School Lunch Program in an attempt to promote school health. Yet under these same regulations, kids still have access to unhealthy competitive foods. In addition, there is a lack of institutional support for programs geared towards health and exercise throughout the

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191. See SCHOOL DISTRICT MODEL, *supra* note 137, at 3 (“To maximize classroom time . . . nutrition education shall be integrated into the standards-based lesson plans of other school subjects.”).

192. One example is Planet Health, which was a two-year program implemented in ten Massachusetts schools where nutrition and physical activity messages were incorporated into the existing school curriculum. See Peterson & Fox, *supra* note 91, at 116; Kaplin, *supra* note 1, at 358.

193. See Peterson & Fox, *supra* note 93, at 117.

194. Currently the federal government only grants \$3 million for the implementation of local wellness policies. See 42 U.S.C.A. § 1758b(d)(3)(D) (2012). See also Interview with Eduardo Sindaco, *supra* note 45.

195. Other policymakers have called for more tax dollars to be used to pay for the implementation of local wellness policies, or for new taxes to be created. See Cawley, *supra* note 167, at 79.

196. See Marcie Ashe, et al., *Local Venues for Change: Legal Strategies for Healthy Environments*, 35 J.L. MED. & ETHICS 138, 138, 144 (2007).

school administration. This makes it more difficult to build an environment emphasizing exercise and healthy living. Finally, even though the Kids Act requires the Secretary of Agriculture to provide guidelines to support local wellness policies, as evidenced by the current policies in Texas and Illinois, the guidelines are insufficient to create solid local wellness policies.

Children must receive education about the importance of healthy choices and exercise, just as they are educated about other core academic subjects. The best solution to this problem is amending the Kids Act to require increased activity and physical education classes, more opportunities before and after school for exercise, and health education requirements. In placing importance on health education and physical activity, children may grow up to make independent healthy choices, and prevent themselves from becoming part of the obesity epidemic that plagues the nation.

