

Senator Aaron Osmond proposes the following substitute bill:

STATE CONTROL OF SCHOOL NUTRITION STANDARDS

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Aaron Osmond

House Sponsor: _____

LONG TITLE

General Description:

This bill provides for state control of nutrition standards in Utah schools.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ requires the State Board of Education (the board) to make rules describing nutrition standards for food sold by a school food authority;
- ▶ after the board has finalized rules describing nutrition standards, prohibits the board from requiring a school food authority to comply with federal nutrition standards;
- ▶ requires a school food authority to comply with board rules related to school nutrition standards; and
- ▶ provides for the board to comply with the Code of Federal Regulations, Title 7, Chapter II, Subchapter A, Child Nutrition Programs.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



26 ENACTS:

27 **53A-1-909**, Utah Code Annotated 1953



29 *Be it enacted by the Legislature of the state of Utah:*

30 Section 1. Section **53A-1-909** is enacted to read:

31 **53A-1-909. State control of nutrition standards.**

32 (1) As used in this section:

33 (a) "Board" means the State Board of Education.

34 (b) "Federal nutrition standards" means the nutritional requirements for all food sold in
35 schools as defined in:

36 (i) Section 10 of the National School Lunch Program, 7 C.F.R. Sec. 210.10;

37 (ii) Section 11 of the National School Lunch Program, 7 C.F.R. Sec. 210.11;

38 (iii) Section 8 of the School Breakfast Program, 7 C.F.R. Sec. 220.8; and

39 (iv) Section 23 of the School Breakfast Program, 7 C.F.R. Sec. 220.23.

40 (c) "Federal school nutrition programs" means:

41 (i) the national school lunch program, authorized by the Richard B. Russell National
42 School Lunch Act, 42 U.S.C. Sec. 1751 et seq., as amended; and

43 (ii) the school breakfast program, authorized by the Child Nutrition Act of 1966, 42
44 U.S.C. Sec. 1771, as amended.

45 (d) "School food authority" means a governing body that:

46 (i) is responsible for the administration of one or more schools; and

47 (ii) has legal authority to operate school breakfast and lunch programs.

48 (2) Utah desires to receive the state's portion of federal funds for federal school
49 nutrition programs, but is unwilling to sacrifice the state's rightful sovereignty over the state's
50 education system to obtain these funds.

51 (3) By October 1, 2015, the board shall make rules, in accordance with Title 63G,
52 Chapter 3, Utah Administrative Rulemaking Act, that provide nutrition standard requirements
53 for food served by a Utah school food authority that:

54 (a) are based on the best available nutritional science; and

55 (b) reflect unique nutritional needs in Utah's schools.

56 (4) After finalizing the rules described in Subsection (3), the board may not:

57 (a) in the board's agreement with a school food authority under 7 C.F.R. Sec. 210.9,
58 require the school food authority to meet federal nutrition standards for lunch or after school
59 snacks;

60 (b) in the board's agreement with a school food authority under 7 C.F.R. Sec. 220.7,
61 require the school food authority to meet federal nutrition standards for breakfast; or

62 (c) withhold payment from a school food authority for failure to meet federal nutrition
63 standards if the school food authority meets the nutrition standards developed by the board
64 under Subsection (3).

65 (5) A school food authority shall comply with the board rules made under Subsection
66 (3).

67 (6) Except as otherwise provided in this section, the board and school food authorities
68 shall comply with 7 C.F.R. Chapter II, Subchapter A, Child Nutrition Programs.

Legislative Review Note

as of 3-2-15 1:37 PM

The Utah Legislature's Joint Rule 4-2-402 requires legislative general counsel to place a legislative review note on legislation. The Legislative Management Committee has further directed legislative general counsel to include legal analysis in the legislative review note only if legislative general counsel determines there is a high probability that a court would declare the legislation to be unconstitutional under the Utah Constitution, the United States Constitution, or both. As explained in the legal analysis below, legislative general counsel has determined, based on applicable state and federal constitutional language and current interpretations of that language in state and federal court case law, that this legislation has a high probability of being declared unconstitutional by a court.

The Healthy Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183, amended portions of the National School Lunch Act, 42 U.S.C. 1751 et seq., to require the United States Department of Agriculture (“USDA”) to issue regulations to update the meal patterns and minimum nutrition standards for the National School Lunch and School Breakfast Programs (“federal school nutrition programs”) as well as for all food sold in schools, such as food sold as part of a school-sponsored fundraiser. The federal regulations require a participating school district or charter school (“school food authority”) to serve food that meets minimum nutrition requirements established by the USDA and agree to that requirement by signing an agreement with the State Board of Education (“Board”) before the school food authority may participate in the federal school nutrition programs. 7 C.F.R. §§ 210.9(b)(5), 220.7(e)(2). The Board or a school food authority may establish more rigorous or additional nutrition requirements, if the requirements are consistent with the minimum nutrition requirements established by the USDA. 77 Fed. Reg. 4088, 4105 (Jan. 26, 2012). If the USDA finds that Utah fails to comply

with the conditions of the federal school nutrition programs, the USDA could: 1) require the Board to stop payments to school food authorities; 2) impose a fine on the state; 3) suspend or terminate Utah's federal school nutrition program entirely; or 4) "take any other action as may be available or appropriate." 7 C.F.R. § 210.24; 42 U.S.C. 1769c(e)(1)(A); 7 C.F.R. § 210.25.

This bill: 1) requires the Board to make rules to provide Utah specific "nutrition standard requirements for food served by a Utah school food authority" ("Utah specific nutrition requirements"); 2) requires a school food authority to comply with the Utah specific nutrition requirements; 3) prohibits the Board from requiring a school food authority to comply with federal minimum nutrition requirements established by the USDA for the federal school nutrition programs; and 4) prohibits the Board from withholding payments to a school food authority for failure to meet the federal minimum nutrition requirements, if the school food authority complies with the Utah specific nutrition requirements.

Under the Supremacy Clause, Article VI, cl.2 of the United States Constitution, the United States Supreme Court has "long recognized that state laws that conflict with federal law are without effect." *Altira Group v. Good*, 555 U.S. 70, 76 (2008) (citation omitted). When the USDA updated the federal regulations for the school nutrition programs, the USDA explicitly stated that the final rule "is intended to have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full and timely implementation." 77 Fed. Reg. at 4105.

The federal regulations require a school food authority to serve food that meets minimum nutrition requirements established by the USDA. 7 C.F.R. §§ 210.9(b)(5), 220.7(e)(2). This bill specifically prohibits the Board from requiring a school food authority to comply with the federal minimum nutrition requirements, which directly conflicts with 7 C.F.R. Sections 210.9(b)(5) and 220.7(e)(2). The federal regulations also require the Board to withhold federal school nutrition program money in whole, or in part, from a school food authority that fails to comply with the federal regulations. 7 C.F.R. § 210.24. This bill specifically prohibits the Board from withholding money from a school food authority that fails to comply with the federal minimum nutrition requirements, which directly conflicts with 7 C.F.R. Section 210.24.

Because this bill prohibits the Board from requiring a school food authority to comply with federal minimum nutrition requirements and prohibits the Board from withholding payments to a school food authority if the school food authority fails to meet the federal minimum nutrition requirements, as long as the school food authority complies with the Utah specific nutrition requirements, there is a high probability that a court will find those portions of this bill unconstitutional.

Office of Legislative Research and General Counsel