

**IOWA DEPARTMENT OF EDUCATION**

[26 D.o.E. App. Dec. 67]

***In re Petition for Waiver of Rule***

Switch Beverage Company,	:	WAIVER OF RULE
Petitioner,	:	
for a Waiver of	:	
Rule 281—58.11	:	[Adm. Doc. #4720]

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On or about September 14, 2010, Switch Beverage Company [“Petitioner”] filed a petition with this agency requesting a waiver from administrative rule 281—Iowa Administrative Code 58.11. The rule in question permits 100% fruit juices, but prohibits all carbonated beverages. The waiver petition asks that a product that is both carbonated and 100% fruit juice be available to students in Iowa’s schools.

Authority for filing and ruling on petitions for waiver is found in 281—IAC chapter 4. Because the petition herein was not filed within a contested case proceeding and because a hearing is not required by statute, rule, or order, no hearing was held. *See* 281—IAC 4.9. The agency considered the facts, the criteria for waiver in chapter 4, and the information submitted by interested persons in ruling on the petition.

Notice of the filing of the petition was provided to the Iowa State Education Association, School Administrators of Iowa, Iowa Association of School Boards, and the Iowa Nutrition Advisory Panel. Only the latter provided a formal position statement, noting that “[b]ecause there are no nutritional implications with carbonation, there is no merit to excluding beverages on the basis of carbonation. In this case, the product does meet the Panel’s original recommendation that only beverages contributing to the nutritional value of the overall diet be included, i.e. water, 100% fruit and vegetable juices and milk.”

The beverage in question is a 100% fruit juice. No one disputes the Petitioner’s description of its product, which is as follows:

The Switch is sparkling 100% juice, it’s all natural, and contains 2 fruit servings per can as well as 100% of the RDA [recommended daily allowance] Vitamin C. It has no added sweeteners, no preservatives, no artificial colors or flavors. It’s literally just juice, bubbles and vitamin C.

Were it not for the carbonation, The Switch would be allowed under rule 58.11 as a beverage to be made available to students by schools and school districts. The beverage table from rule 58.11 states as follows:

**281—58.11(256) Nutritional content standards.  
Beverages Table**

Beverage	A la Carte, Vending, and Regulated Fundraising Items
Milk	<p style="text-align: center;">Low fat/nonfat regular Low fat/nonfat flavored with no nonnutritive sweeteners In addition: ≤ 27 gm sugar/8 oz (2014) ≤ 24 gm sugar/8 oz (2017) ≤ 22 gm sugar/8 oz (2020)</p>
100% Fruit/Vegetable Juice	No added sweeteners
Water	No added nonnutritive sweeteners
Sports Drinks, Flavored Water	None are to be made available to elementary students during the school day as vending machine, a la carte, or regulated fundraising items
Caffeinated Beverages	None are to be made available to elementary students during the school day as vending machine, a la carte, or regulated fundraising items, with the exception of beverages that contain trace amounts of naturally occurring caffeine-related substances (e.g., chocolate milk)
Sodas/ Carbonated Beverages	None are to be made available to any students during the school day as vending machine, a la carte, or regulated fundraising items

The Petitioner points out that the United States Department of Agriculture [“USDA”] has exempted The Switch from its category of “goods of minimal nutritional value.” This is verified in a memorandum dated February 20, 2009 from the USDA. The effect of the USDA exemption is that The Switch may be offered by schools in Iowa directly through the National School Lunch Program. Rule 58.11, however, prohibits The Switch from being made available to students via the *a la carte* line, vending machines, or regulated fundraising as those terms are defined in chapter 58.

From our review of the materials provided by the Petitioner, the Iowa Nutrition Advisory Panel, and USDA, we find all of the following criteria from rule 281—4.4 to be true:

- 1. Not waiving the rule would result in an undue hardship to the petitioner.** Not waiving the rule would also result in a hardship to schools that are allowed to provide The Switch under USDA’s National School Lunch Program but not under rule 58.11.

2. **Waiver would not prejudice the substantial legal rights of any person.**  
We provide a similar waiver at the conclusion of this Decision for any beverage that, like The Switch, is allowable under Rule 58.11 but for the carbonation.
3. **The provisions of the rule from which waiver is sought are not mandated by statute or other provision of law.** Iowa Code section 256.7(29) (2009 Supplement) mandates the adoption of rules establishing nutritional content standards but does not set the standards.
4. **Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the rule from which waiver is sought.** Waiver does not compromise the public health, safety, and welfare. This is not an issue.
5. **Waiver would not have a negative impact on the student achievement of any person.** Common sense compels a conclusion that The Switch is a healthy alternative to soda.

### DECISION

For the foregoing reasons, the petition for waiver is GRANTED.

Because we recognize that the beverage in question here may not be the only beverage that is allowable under rule 58.11 but for the carbonation, we extend this waiver to all other beverages that are 100% fruit or vegetable juice, whether carbonated or not. A *partial* list of acceptable beverages is included in Appendix A herein. All beverages listed are 100% fruit or vegetable juices, which are carbonated. These beverages may also be permitted in schools and school districts as an item available to students notwithstanding rule 58.11. This list shall be maintained and updated as needed on the Iowa Department of Education's Healthy Kids Act webpage ([http://www.iowa.gov/educate/index.php?option=com\\_content&view=article&id=1769&catid=838&Itemid=2545](http://www.iowa.gov/educate/index.php?option=com_content&view=article&id=1769&catid=838&Itemid=2545) ) , under "Other Documents".

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Date

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Kevin Fangman, Acting Director

## Appendix A

Not all beverages exempted from the Competitive Food Services Regulation by the USDA are provided waivers from rule 281—58.11. **The following list is those items that are 100% fruit or vegetable juice that would meet the requirements of rule 58.11 but for being carbonated. An item listed below may be offered by a school or school district to students at all grade levels.**

### Switch Beverage Company

The Switch carbonated juice beverages with labels bearing “100% juice” in following flavors:

Orange Tangerine

Apricot Peach

Orange Mango

Watermelon Strawberry

Grape

Fruit Punch

Black Cherry

Kiwi Berry.

### Envy Foods

Envy sparkling 100% fruit juice beverages consisting of filtered sparkling water sufficient to reconstitute juice concentrates, juice concentrates, natural flavors, and vitamins/minerals in following flavors:

Envy Sparkling Acai Berry

Envy Sparkling Strawberry Kiwi

Envy Sparkling Tropical Mango

Envy Sparkling Fruit Punch

Envy Sparkling Green Apple