

IOWA DEPARTMENT OF EDUCATION

[26 D.o.E. App. Dec. 229]

In re Petition for Waiver of Rule

4U2U Brands, LLC,	:	WAIVER
Petitioner,	:	
for a Waiver of	:	
Rule 281—58.11	:	[Adm. Doc. #4753]

On or about June 20, 2012, 4U2U Brands, LLC [“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 specific product that is a carbonated 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 Association of School Boards, School Administrators of Iowa, and the Iowa Nutrition Advisory Panel (collectively, “interested parties”). None of the interested parties objected to the waiver request, noting that this agency has previously ruled that beverages that are 100% fruit or vegetable juice are allowable under rule 58.11, whether carbonated or not.

The beverages in question are four flavors marketed under the name “Epic Sparkling Juices” by the Petitioner. They are 100% fruit juice, contain no added sweeteners, and provide 100% of the RDA [recommended daily allowance] of Vitamin C. The flavors are black cherry, passion fruit/mango, strawberry/melon, and lemon/lime.

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	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)

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

Were it not for the carbonation, Epic juices would be allowed under rule 58.11 as a beverage to be made available to students by schools and school districts. The Petitioner points out that the United States Department of Agriculture [“USDA”] has exempted Epic from its category of “goods of minimal nutritional value,” and thus, the beverages may be offered by schools in Iowa directly through the National School Lunch Program. Rule 58.11, however, prohibits Envy 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.** This is true because this agency earlier granted a similar waiver to other beverages that are carbonated 100% fruit juices with no added sweeteners. Not waiving the rule would also result in a hardship to schools that are allowed to provide Epic 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.** This agency provides a similar waiver at the conclusion of this Decision for any beverage that is allowable under Rule 58.11 but for the carbonation. Manufacturers of new products must continue to request a waiver.
- 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) (2011) 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 Epic beverages are a healthy alternative to soda.

DECISION

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

This agency has previously similarly ruled, and has provided a *partial* list of acceptable beverages in the Appendix herein. We add the four Epic sparkling juices to that list today. 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 is maintained and updated as needed on the Iowa Department of Education's Healthy Kids Act webpage (http://educateiowa.gov/index.php?option=com_content&view=article&id=1769&catid=838&Itemid=2545), under "Other Documents".

7/2/12
Date

/s/
Jason E. Glass, Director

Appendix

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

4U2U Brands

Epic Sparkling Juices consisting of 100% pure juice, juice concentrates, sparkling water, natural flavors, natural color, and vitamins/minerals in following flavors:

Epic Red (strawberry melon)

Epic Purple (black cherry)

Epic Yellow (passionfruit mango)

Epic Green (lemon lime)