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CHILD AND ADULT CARE FOOD PROGRAM  
OPERATIONAL MEMO #21**

**TO:** Child and Adult Care Food Program (CACFP) Institutions

**FROM:** Mary Ann Chartrand, Director  
Grants Coordination and School Support

**DATE:** May 26, 2006

**SUBJECT: Additional Guidance on the CACFP Serious Deficiency  
Process from the Second Interim Rule**

Food Nutrition Service (FNS) has drafted responses to questions received on various topics presented during recent training sessions on the second interim management improvement rule.

The attached guidance is a set of questions and answers on the serious deficiency process for institutions and family day care homes. The attached guidance provides information to help CACFP staff build a stronger understanding of the rule's requirement on determination of serious deficiency as it relates to the following:

- Corrective action
- Responsible principals and individuals
- Appeals
- National Disqualified List

Along with this guidance, CACFP staff should continue to refer to the second interim rule entitled, *Child and Adult Care Food Program: Improving Management and Program Integrity* issued on September 1, 2004.

If you have any questions, please call the CACFP at (517) 373-7391.

**Please keep this memo on file or in a notebook for quick and easy reference.**

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**Questions and Answers**  
**Child and Adult Care Food Program (CACFP)**  
**Second Interim Rule on Management Improvement**

**Questions Relating to the Serious Deficiency Process**

- 1. If a new applicant is declared seriously deficient, is it prohibited from withdrawing its application and avoiding the consequences of the serious deficiency process?**

Answer: Once any institution has been determined to be seriously deficient, it cannot avoid going through the serious deficiency process, whether by withdrawing an application or by terminating its agreement "for convenience." Although the interim regulations did not specifically state that a new applicant is prohibited from withdrawing its application to avoid the serious deficiency process, the State Agency (SA) should proceed with the serious deficiency process, including disqualification if the applicant does not take acceptable corrective action.

- 2. If a day care home loses its license, must the sponsor declare the home seriously deficient?**

Answer: If a home loses its license, it is ineligible to participate. As long as the home notifies the sponsor that it has lost its license and is not claiming meals, there is no need for the sponsor to declare the home seriously deficient. However, a home that loses its license and continues to submit claims for program reimbursement is seriously deficient.

- 3. During a review, the sponsor issues a finding that is not a serious deficiency, but that requires the home to take corrective action. Can the provider self-terminate at this point, without any action by the sponsor?**

Answer: Yes, the home can terminate its agreement with the sponsor "for convenience" at any time, provided that the sponsor has not discovered a serious deficiency in the provider's program operations, or has not declared the provider seriously deficient.

- 4. If the owner of sponsored centers finds serious problems at one of its centers, must the owner declare that center seriously deficient?**

Answer: No, there is no serious deficiency process for sponsored centers in the National School Lunch Act (NSLA) or in the regulations. MDE would expect the sponsor to take appropriate action to correct the problems, such as replacing the employee who is responsible for the problem, or terminating the sponsored center's participation.

**5. Is there a time limit between the expiration of the time allowed for corrective action and the issuance of a notice of proposed termination?**

Answer: No, there is no set time limit. However, by this point in the process, the institution has already failed to take successful corrective action and its ability to manage the program has been called into question.

**6. An institution was declared seriously deficient for altering the expiration date on a license, so that the license appeared current. What is acceptable corrective action for this institution?**

Answer: By altering the expiration date of the license, the institution has submitted false information. Acceptable corrective action would require the institution to show evidence that the allegation is not true, or that the SA has otherwise made an administrative error. An appeal of a proposed termination resulting from the submission of false information would be abbreviated (i.e., the appellant would not have an opportunity for an in-person hearing), in accordance with section 226.6(k)(9)(i).

**7. If the institution's submission of timely and complete corrective action leads to the SA's withdrawal of the notice of serious deficiency, how can failure to maintain the corrective action result in a notice of proposed termination?**

Answer: The "withdrawal" of the original serious deficiency notice is contingent on the institution's corrective action being "permanent." If the same serious deficiency is discovered again, the corrective action clearly was not permanent. The SA may then move immediately to issue a notice of proposed termination, without going back through the entire process, because the institution has already had one opportunity to take corrective action to resolve this serious deficiency. However, depending on the circumstances, the SA may also choose to start the serious deficiency process from the beginning.

**8. What is "permanent" corrective action?**

Answer: Defining permanent corrective action depends on a number of factors, including the nature of the original problem, the amount of time that has elapsed between the accepted corrective action and the next review, changes in the institution's personnel, and the availability of records documenting the original non-compliance. It is reasonable for an SA to decide that too much time has elapsed to simply reinstate the proposed termination, in which case it would, instead, restart the process by issuing a new notice of serious deficiency.

**9. Should a family day care home sponsor that has been declared seriously deficient be allowed to continue to add homes?**

Answer: It depends on the nature of the serious deficiency. In most cases, adding more homes would only exacerbate the sponsor's serious deficiency, and the potential misuse or loss of program funds. However, in other cases, the nature of the serious deficiency might be such that adding homes would not exacerbate existing problems (e.g., the sponsor's serious deficiency involved a long-term adjustment to its automated systems).

**10. Do the regulatory deadlines for corrective action refer to the deadline for completing corrective action or for completing a corrective action plan.**

Answer: The corrective action deadlines at sections 226.6(c)(4)(i) and (c)(4)(ii) are for the completion of corrective action. The only exception is when there is a serious deficiency which requires the long-term revision of a management system or process (see section 226.6(c)(4)(iii)). In that case, a corrective action plan must be submitted by the institution and approved by the SA within 90 days.

**11. How far down the institution's organizational hierarchy should an SA go in naming responsible principals and individuals? The Executive Director and the CACFP Coordinator are "no-brainers," but what about cooks and other non-supervisory employees?**

Answer: The SA should name as "responsible principals" those organization officials who, by virtue of their position, bear overall responsibility for the institution's serious deficiency. These management officials also bear responsibility for poor performance by non-supervisory employees, which may have led to the serious deficiency determination. Non-management workers, including contractors and unpaid staff, should be named "responsible individuals" only when they have been directly involved in egregious acts, such as blackmailing providers, filing false reports, or participating in an institution's scheme to defraud the program.

**12. Can a disqualified principal or individual still hold a position in an institution that is otherwise eligible to participate in the program?**

Answer: Yes, as long as the person is not in a principal position, and has no responsibilities that are directly related to the program.

- 13. If a sponsor's homes are "capped" in the notice of serious deficiency, is the cap appealable? If the cap is appealable, how does that conform to section 226.6(k)(3)(ii), which states that the notice of serious deficiency is not appealable?**

Answer: Yes, the SA's action to set a limit on the maximum number of homes that can be sponsored may be appealed by the institution. The action to set a cap is separate from the SA's determination of serious deficiency. The cap is appealable because it involves an action that has an impact on a participating institution's reimbursement. The same principle would apply if a demand for repayment was included in the serious deficiency notice: the demand for repayment would be appealable, while the serious deficiency determination would not.

- 14. Is an abbreviated appeal one in which the hearing official reviews records submitted by the SA and the institution, as opposed to holding an in-person hearing?**

Answer: Yes, there is no right to appear in person in an abbreviated appeal. Hearing officials base their decisions only on the written record. The appeal is still conducted by an impartial hearing official, under the same timeframes as a regular appeal.

- 15. What if an institution does not want an in-person hearing? Can the SA offer the institution the choice of an abbreviated appeal or an in-person hearing?**

Answer: Yes, an institution may request that its appeal be based on the written record, as opposed to an in-person hearing.

- 16. In light of the need for program integrity, and the need for the SA to sometimes require a day care home sponsor to reallocate its funds among various program functions, why does FNS require the SA to give sponsors the right to appeal the denial of a budget item?**

Answer: Section 17(e) of the NSLA requires the SA to provide a fair hearing when it takes any action that adversely affects an institution's participation or claim for reimbursement.

Since CACFP regulations establish a formula for administrative reimbursement to home sponsors that depend, in part, on the amount of the approved budget, a denial of funding, for part or all of a home sponsor's budget request, amounts to a potential reduction in the sponsor's reimbursement.

**17. If the SA's agreement with an institution expires during an appeal, how long can the agreement be extended?**

Answer: The SA would allow a short-term extension of the existing agreement, pending the outcome of the appeal. If the institution loses its appeal, the SA would then terminate the existing agreement and disqualify the institution and its responsible principals and responsible individuals.

**18. If the program year ends during the sponsor's appeal, at what point should the SA require the sponsor to submit a new budget and an updated management plan?**

Answer: While the renewing sponsor's appeal is pending, the SA would extend the existing agreement and continue to pay the valid portion of claims under that agreement. If the sponsor prevails, the SA would then require the submission of a new budget and an updated management plan.

**19. Can sponsors include SA staff as appeals committee members?**

Answer: Yes, the regulations at section 226.6(l)(5)(iv) specifically state that an SA employee, or the employee or board member of the sponsor, may hear provider appeals, as long as the employee or board member was not "involved in the action that is the subject of the administrative review [and does not] have a direct personal or financial interest in the outcome of the administrative review."

**20. What is the difference between a "suspension review" and an "abbreviated appeal?"**

Answer: A suspension review is a limited appeal that is available to institutions before a suspension for submission of false or fraudulent claims takes effect. It consists of a review of written documents, instead of an in-person hearing, to determine whether program payments will continue. It does not resolve any appeal of the SA's proposed termination and disqualification of the institution. An abbreviated appeal also involves a review of documentation. However, unlike a suspension review, the purpose of an abbreviated review is to resolve an appeal of an SA's proposed termination and disqualification of an institution, and any responsible principals and individuals.

**21. Why does section 226.6(c)(5)(ii)(D)(3) permit the institution to appeal the suspension review official's decision, as well as the SA's proposed termination and disqualification of the institution? How many chances to appeal does an institution get?**

Answer: Suspension and termination are distinct actions that entitle the institution to separate appeals.

The purpose of the suspension review is to allow the SA and the institution the opportunity to present written documentation relating to the SA's suspension of program payments, prior to the resolution of the institution's appeal of its proposed termination and disqualification. The suspension review official does not determine whether the institution filed a false or fraudulent claim. Rather, the review official determines whether "the preponderance of the evidence" supports the SA's decision to suspend payments until the institution's appeal of a notice of proposed termination and disqualification is resolved. The administrative review official could later decide to deny the proposed termination and overturn the earlier suspension of payments. This process is mandated by section 17(d)(5)(D)(ii) of the NSLA.

**22. Should a multi-State institution, which has been suspended for false or fraudulent claims in one State, be suspended in all other States in which it participates?**

Answer: No, since the institution has not been terminated, and the claims would be directly attributable to the State in which the sponsor's facilities were located, the suspension action would be the responsibility of the appropriate SA administering the program.

**23. Does the seven-year limit on disqualification apply even if the institution refuses to take corrective action?**

Answer: Yes, the institution is removed from the NDL after seven years, unless it owes a debt to the program.

**24. Since uncollectible debts are written off, how, if at all, does this affect an institution or a principal or an individual remaining on the list for more than seven years?**

Answer: Although the SA may not be required to pursue collection, the debt is still the entity's legal responsibility. The disqualified entity would remain on the list until the debt is repaid.

**25. Will sponsors have access to the NDL?**

Answer: Yes, all institutions (both sponsoring organizations and independent centers) will have access to the list.

**26. Is there a requirement to report whether disqualified providers owe debts to the program?**

Answer: Yes, section 226.6(c)(7)(vi) states that homes, like institutions, will stay on the NDL until they have repaid all debts to the program.