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**United States
Department of
Agriculture**

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Food and
Nutrition
Service

SUBJECT: Questions and Answers on the Serious Deficiency
Process in the Child and Adult Care Food Program (CACFP)

TO: Regional Directors
Child Nutrition Programs
All Regions

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State Agency Directors Administering CACFP
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This memorandum transmits Attachment 2, a set of questions and answers on the serious deficiency process for institutions and family day care homes. The attachment provides answers to questions on the determination of serious deficiency, corrective action, responsible principals and individuals, appeals, and the National Disqualified List.

This is the second in a series of questions and answers on various topics presented during the recent training sessions on the second interim management improvement rule. We addressed institution applications in the first set of questions and answers, CACFP Policy #06-2005, issued on September 23, 2005.

Please contact your regional office if your State agency has additional questions concerning these topics. Regional offices should contact Keith Churchill or Ed Morawetz of my staff.

Original Signed

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Attachment

II. QUESTIONS RELATING TO THE SERIOUS DEFICIENCY PROCESS

Determination of Serious Deficiency and Notice of Serious Deficiency to Institutions

- 1. If an institution submits 12 late claims in a row, or even 9 late claims in a 12-month period, is this definitely a serious deficiency, or is it a matter of State agency (SA) judgment? Instead of declaring it seriously deficient, would it be acceptable for the SA to simply move up the institution's next scheduled review?**

Answer: No, making changes to the review schedule would not be adequate. There is a point at which an institution's repeated problems indicate serious mismanagement and, therefore, rise to the level of a serious deficiency. Although a single error might be viewed as minor, the frequency of this error calls into question the institution's ability to submit a valid claim. In order to get the problem resolved, the SA should declare the institution seriously deficient and give it a timeframe for correcting the problem it is having with claims submission.

- 2. When can an SA combine a notice of serious deficiency with a notice of intent to terminate?**

Answer: The SA can combine both of these notices into one step only when it takes action to suspend an institution, in accordance with section 226.6(c)(5)(i)(B).

- 3. If the SA identifies multiple serious deficiencies, can the SA choose to cite only one of them in the notice of serious deficiency?**

Answer: No, the SA must name and fully describe all of the serious deficiencies in the notice. Making sure that the notice is complete, and that it fully documents each serious deficiency, is critical. If there is later an appeal of a proposed termination, the hearing official's decision should be based on whether the institution has fully and permanently corrected all of its serious deficiencies in the time allowed for corrective action.

- 4. One of the training slides suggested that it's up to the SA to determine what constitutes a serious deficiency. Isn't the SA required to declare a participating institution seriously deficient if any of the reasons listed in section 226.6(c)(3)(ii)(A) – (U) are found? Shouldn't the serious deficiency always be identified in terms of a citation from the regulations?**

Answer: Yes, each serious deficiency must be identified in terms of one of the specifically listed serious deficiencies or any other action affecting the institution's ability to administer the Program. Again, however, even using the list of serious deficiencies in the regulations, the SA will have to exercise judgment to differentiate between small occasional errors and serious systemic problems. The slide was

intended to convey this idea: that SAs must distinguish between an error and a serious deficiency by considering when a problem rises to the level of serious deficiency, how frequently it occurs, how severe it is, and how it affects the institution's ability to meet the Program's performance standards.

5. Could State employees who work only with claims initiate the serious deficiency process if they notice claiming problems?

Answer: Yes, potentially, a claims examiner could identify a serious deficiency and start the serious deficiency process. However, every SA should have procedures in place to ensure that the notice of serious deficiency, and all other relevant correspondence, is issued only with the approval, and under the signature, of an SA official authorized to make this decision and commit the SA to this course of action.

6. Is there a maximum amount of time (e.g., 30 or 60 days) that can elapse between the discovery of the serious deficiency and issuance of the notice by the SA?

Answer: In most cases, the notice of serious deficiency should be issued within 30 days of completing an onsite review. Extensive delays in issuing a notice of serious deficiency circumvent the intent of the Agricultural Risk Protection Act of 2000 (ARPA) to shorten the time between identification and resolution of a serious deficiency, and will weaken the SA's position if the institution appeals a later proposal to terminate its participation.

7. If the SA has to terminate an institution for not submitting a budget or some other required document, does the serious deficiency process have to be used?

Can the SA simply issue a notice of intent to terminate? Answer: No, if an institution fails to submit a budget or another required document, the SA cannot simply issue a notice of intent to terminate. Rather, the SA must follow all of the normal steps in the serious deficiency process. However, if the SA determines, in consultation with the institution, that the institution has not submitted the required documents because it intends to stop participating in the Program, the institution's withdrawal from the Program would not involve a serious deficiency.

8. 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 SA should proceed with the serious deficiency process, including disqualification if the applicant does not take acceptable corrective action.

9. The list of serious deficiencies for new applicants includes “any other action” (see section 226.6(c)(1)(ii)(B)). If the SA denies an application because the organization is not VCA, must it declare the applicant seriously deficient?

Answer: Absolutely not. If a new applicant is denied, the SA would offer the organization an appeal, and the organization would be free to re-apply at any time. It is certainly possible that the organization could make changes that would make its re-application approvable, by bringing it into compliance with VCA. The only time that a new applicant should be declared seriously deficient is for the submission of false information, or for other violations of law. If a renewing institution’s application is denied, and if the denial was due to a serious deficiency discovered during the SA’s review of its re-application materials or because false information was submitted, it would be necessary to declare the institution seriously deficient. In other circumstances, it would only be necessary to deny the renewal application, offer an appeal, and permit the institution to continue participating during its appeal.

10. If a multi-State institution is declared seriously deficient in one State, must other SAs also declare it seriously deficient?

Answer: The only time that one State’s action would require another SA to take an action is when a multi-State institution is terminated and disqualified. In that instance, in accordance with section 226.6(c)(6)(ii)(G)(1), other States in which the multi-State institution is participating must also terminate the institution’s agreement within 45 days of the disqualification. The only exception is if the multi-State organization can show that its operations in another State are totally distinct from its operations in the State in which it was terminated and disqualified.

11. What if a multi-State institution is declared seriously deficient in one State, and the SA in a different State also finds a serious deficiency?

Answer: In that case, both SAs should declare the institution seriously deficient, and take all of the steps in the serious deficiency process. However, as soon as the institution was terminated and disqualified in one State, the other SA should determine if additional action is needed. If the second SA’s reasons for declaring the institution seriously deficient were identical to those cited in the first SA’s notice, the second SA would simply terminate the institution’s agreement, as required by section 226.6(c)(6)(ii)(G)(1). If there were different serious deficiencies cited by the second SA, it should complete its action, through termination and disqualification, so that the additional serious deficiencies appear on the National Disqualified List.

12. Must an applicant institution that unintentionally submitted false information, due to its misunderstanding of a question on the application, be declared seriously deficient?

Answer: No, if, in the SA's judgment, the false information was the result of the applicant's misunderstanding, it would not be necessary to declare the applicant seriously deficient.

Determination of Serious Deficiency and Notice of Serious Deficiency to Homes

13. 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.

14. 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.

Determination of Serious Deficiency and Notice of Serious Deficiency: Sponsored Centers

15. 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. Unless the SA has its own process for addressing serious problems in sponsored centers, FNS would only 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.

Corrective Action by Institutions

16. 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. Although the regulations do not specify a deadline, FNS clearly intended that the notice of intent to terminate be issued very shortly after the expiration of the time allowed for corrective action.

17. Can the SA accept an institution’s corrective action and withdraw the serious deficiency after a notice of proposed termination has been issued? Should corrective action be accepted if it is after the deadline in the notice of serious deficiency?

Answer: If the SA has received documented evidence that the institution has fully and permanently corrected the serious deficiency, the SA may accept the institution’s corrective action and withdraw the proposed termination at any point up until the institution’s agreement is terminated. The deadlines specified in the regulations are intended to shorten the time between identification and resolution of a serious deficiency.

18. 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).

19. 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. (Also see Question # 20.)

20. 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. (Also see Question # 19.)

21. 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).

22. 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. The regulations do not specify a maximum time period for completion of corrective action involving a long-term management revision. However, the institution's written plan must include interim milestones and a final deadline for completion of corrective action. The SA's acceptance of the plan is a statement of the SA's expectation that the proposed corrective action, if fully implemented, will result in the changes necessary to address the serious deficiency. The finding of serious deficiency is withdrawn only when the corrective action plan is fully implemented, and the corrective action is determined to be permanent and complete.

23. What are the record retention limits for documents relating to a notice of serious deficiency and subsequent corrective action? Wouldn't the three-year limit on record retention automatically impose a de facto three-year limit on permanent corrective action?

Answer: The regulations at section 226.10(d) state the minimum recordkeeping requirements: Records must be retained for three years after submission of the final claim for the fiscal year to which they pertain, unless there are unresolved audit findings, in which case the records must be retained until the audit is resolved. If an SA conducts a follow-up review and is confident that the institution's corrective action is successful, the SA may want to discard the records after this period has

elapsed. However, if the SA has doubts about the institution's ability to sustain the corrective action, the SA will want to retain those records for a longer period of time.

Responsible Principals and Responsible Individuals

24. 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.

25. Is the possibility of separate appeals for responsible principals and individuals mentioned in the prototype notice?

Answer: No, the prototype notice of proposed termination indicates that an institution may appeal the proposed termination of its agreement, and that the institution, the director, the board chair, and other responsible principals and individuals may appeal the proposed disqualification. Only the hearing official may grant a request to separate an individual's appeal from that of the institution, or from other named individuals. FNS will consider adding language on separate appeals when we review and reissue the prototype notices.

26. The principals of an institution have changed since the declaration of serious deficiency, completion of corrective action, and bad review findings, two years later. Which principals should be disqualified?

Answer: Disqualification prevents individuals who were responsible for an institution's failure to perform its administrative or financial responsibilities from returning to the Program as principals in another institution. Each case must be evaluated on its merits. In the case you cite, the time at which the new principals arrived, relative to the completion of the initial corrective action, would impact whether the old, or new, or both sets of principals should be named in the second notice of serious deficiency.

27. If an independent for-profit center is sold during the serious deficiency process, how should the SA proceed in terms of naming responsible principals and placing them on the National Disqualified List?

Answer: The SA should continue through the steps of the serious deficiency process. The former owners would have been named in the serious deficiency notice, and the new owners would not be liable to placement on the National Disqualified List. However, unless the new owners corrected the serious deficiencies cited by the SA, the center they own would be placed on the list.

28. 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.

Appeals--Institutions

29. 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.

30. Since many SAs are having trouble meeting the appeal timeframes, will FNS consider lengthening the 60-day deadline for issuing a decision, as set forth in section 226.6(k)(5)(ix)?

Answer: No, ARPA permits institutions to continue participating during their appeal of a proposed termination. Because of this, it is imperative that SAs move expeditiously to bring their appeal timeframes into conformance with the 60-day deadline.

31. 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.

32. 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.

33. 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.

34. What is the difference between "stop payment" and "paying only the valid portion of the claim?"

Answer: Stop payment refers to procedures which were previously used to completely cut off Program payments to an institution until it came into compliance with the regulations. However, those procedures conflict with ARPA's limits on the SA's suspension of payments to an institution, and must no longer be used. Instead, the SA must disallow any portion of the claim that it knows to be invalid.

35. The SA must pay only the valid part of an institution's claim during the serious deficiency process. Can FNS give an example of how the valid and invalid portions of the claim can be determined?

Answer: The SA must never pay the invalid portion of a claim, regardless of whether an institution has been declared seriously deficient. If, for example, a sponsor operated the Program in 200 homes approved by the SA, but based its claim for administrative reimbursement on having 220 homes, the invalid portion of the claim would be the amount of the claim resulting from claiming reimbursement for 20 unapproved homes.

36. 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.

37. 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.

Appeals—Day Care Homes

38. 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.”

Suspension of Institutions

39. If the 120-day suspension period for false claims ends before the institution’s appeal is resolved, must the SA begin to pay valid claims again on Day 121?

Answer: Yes, the institution would be eligible to receive payments for the eligible meals served and the allowable expenses incurred, beginning on the day after the 120-day period ends.

40. What is the rationale for a 120-day limit on suspension of payments for false or fraudulent claims? Since many SAs are having trouble meeting the appeal timeframes, can some consideration be given to extending the 120-day timeframe?

Answer: No, since the 120-day limit is mandated by section 17(d)(5)(D)(ii)(III)(dd) of the NSLA, any change would require legislative action.

41. 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.

42. 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.

43. 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. The action would not affect participation of the sponsor's facilities in other States. However, we strongly encourage SAs to share information concerning the suspension of multi-State institutions, so that other SAs can conduct a review to determine whether the same problems exist in the institution's operation in other States. (Note: If the multi-State institution is terminated, see Question # 10, above.)

National Disqualified List (NDL)

44. How many years must the SA retain records related to a disqualified institution?

Answer: Records must be kept for as long as the institution, principal, or individual remains on the NDL. If the entity remains on the list for more than seven years because a debt is owed to the Program, the SA must retain the records longer.

45. If an institution on the NDL submits a request for removal from the list, how quickly does the SA need to respond?

Answer: The SA must act on a request for removal within a reasonable period of time, but may make the review a lower priority than other Program management activities.

46. What happened to institutions, responsible principals, and responsible individuals who did not receive appeal rights before being placed on the NDL prior to July 29, 2002?

Answer: Institutions, principals, and individuals placed on the NDL prior to that date should have received appeal rights before being placed on the list. If an SA is aware of an instance where the institution or individual was not given the opportunity to appeal, the SA should ask FNS to remove that institution or individual from the list.

47. 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.

48. When, if at all, will the SA be notified that an institution was placed on the NDL?

Answer: The SA should assume that the disqualified institution is placed on the list at the time the SA transmits the information to the FNS regional office.

49. 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.

50. Should the SA collect all outstanding advances to the institution at the time that an institution loses its appeal and has its agreement terminated?

Answer: Once the appeal is concluded, the SA has the option to demand immediate repayment of the excess advances, or to establish a repayment schedule.

51. Will sponsors have access to the NDL?

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

52. Is there a requirement to report whether disqualified providers owe debts to the Program? The training presentation implied there is.

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.