

DEPARTMENT OF EDUCATION

Statutory Authority: 14 Delaware Code, Section 122(d) (14 **Del.C.** §122(d))
14 **DE Admin. Code** 262

FINAL

REGULATORY IMPLEMENTING ORDER

262 General Administrative Appeal Procedures for National School Lunch Programs (NSLP), the School Breakfast Program (SBP) and the After School Snack Program (ASSP) of the United States Department of Agriculture (USDA) - Fiscal Action

I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to adopt a new regulation **14 DE Admin. Code** 262 General Administrative Appeal Procedures for the National School Lunch Programs (NSLP), the School Breakfast Program (SBP) and the After School Snack Program (ASSP) of the United States Department of Agriculture (USDA)-Fiscal Action in order to comply with the requirements in the federal statute for an appeal procedure.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on January 20, 2005, in the form hereto attached as *Exhibit "A"*. No comments were received.

II. Findings of Fact

The Secretary finds that it is appropriate to adopt **14 DE Admin. Code** 262 in order to comply with the requirements in the federal statute for an appeal procedure.

III. Decision to Adopt the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to adopt **14 DE Admin. Code** 262. Therefore, pursuant to **14 Del.C.** §122, **14 DE Admin. Code** 262 attached hereto as *Exhibit "B"* is hereby adopted. Pursuant to the provision of **14 Del.C.** §122(e), **14 DE Admin. Code** 262 hereby adopted shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of **14 DE Admin. Code** 262 adopted hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as **14 DE Admin. Code** 262 in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to **14 Del.C.** §122 on March 10, 2005. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

IT IS SO ORDERED the 10th day of March 2005.

DEPARTMENT OF EDUCATION

Valerie A. Woodruff, Secretary of Education

262 General Administrative Appeal Procedures for National School Lunch Programs (NSLP), the School Breakfast Program (SBP) and the After School Snack Program (ASSP) of the United States Department of Agriculture (USDA)-Fiscal Action

1.0 Institutions participating in the Delaware NSLP, SBP and ASSP may request an Administrative Appeal of the following fiscal actions:

1.1 Denial of all or a part of an institution's claim for reimbursement or withholding payment arising from a Coordinated Review Effort (CRE) or follow-up review activity conducted by the Delaware State Agency under Volume 7 of the Code of Federal Regulations (7 CFR) 210.18; and,

1.2 Withholding of program payments resulting from a CRE.

2.0 Administrative Appeal shall apply as set forth below, and will be conducted as follows:

2.1 The Department of Education ("Department") shall give written notice of the action being taken or proposed, the grounds upon which the action is based, and the procedures under which the school food authority (SFA) may request an appeal of the action. Notice shall be given to the SFA individuals by certified mail, return receipt requested. As used herein, "Petitioner" means an SFA or its responsible individuals, as appropriate under the circumstances.

2.2 A request for administrative appeal shall be submitted to the Department in writing, postmarked within 10 calendar days after the date the notice of action is received. The Department shall acknowledge receipt of the request for appeal within 10 calendar days.

2.3 Any information on which the Department's action was based will be available to the petitioner for inspection from the date of receipt by the Department of the request for an administrative appeal; if alterations or adjustments can be developed that are agreeable to both the petitioner and the Department, such procedure shall be followed.

2.4 The petitioner may refute the findings contained in the notice of action in person or by submitting written documentation to the Department's review official. In order to be considered, written documentation must be submitted to the review official not later than 30 days after the petitioner submitted the appeal, shall clearly identify the State agency (SA) action being appealed, and shall include a photocopy of the notice of action issued by the SA.

2.5 A hearing must be held by the administrative appeal official in addition to, or in lieu of, a review of written information only if the petitioner requests a hearing in the written request for an administrative appeal. If the petitioner fails to appear at a scheduled hearing, the petitioner waives the right to a personal appearance before the administrative appeal official, unless the administrative appeal official agrees to reschedule the hearing. A representative of the Department may, but is not required, to attend the hearing to respond to the petitioner's testimony and written information and to answer questions posed by the administrative appeal official. If a hearing is requested, the petitioner and the Department must be provided with at least 10 days written notice, sent by certified mail, return receipt requested, of the time and place of the hearing.

2.6 The petitioner may retain legal counsel or may be represented by another person if permitted by law.

2.7 The administrative appeal official shall be independent and impartial, other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section. The administrative appeal official may be an employee of the Department, but shall not have been involved in the action that is the subject of the administrative review, or have a direct personal or financial interest in the outcome of the administrative review. The petitioner may contact the administrative appeal official directly, but all such contacts shall include the participation of a representative of the Department, if the Department chooses to participate.

2.8 The administrative appeal official shall make a determination based solely on the information provided by the Department, the petitioner, and based upon Program regulations, policies and procedures governing the NSBP and NSLP.

2.9 The decision of the administrative appeal official shall be issued to the Department and petitioner within 60 days of the Department's receipt of the request for review, by written notice, sent by certified mail, return receipt requested. If the last day on which the decision is to be issued shall fall on a Saturday, Sunday, legal state holiday, or day when the Department is closed due to adverse weather conditions, the decision shall be issued on the next regular work day of the Department. The failure to issue a timely decision shall not, constitute grounds for reversing the Department's action. The decision of the administrative appeal official is the final administrative determination to be afforded to the petitioner, unless the CRE or review included USDA officials. When USDA officials participate in the CRE or review leading to the fiscal actions taken, then an appeal may be made to the USDA as specified under 4.0 below.

2.10 The Department's action shall remain in effect during the appeal process.

2.11 The Department shall maintain a searchable record of all administrative reviews and the dispositions of the same. The record shall document the Department's compliance with these regulations and shall include the basis

for its decision.

3.0 When the CRE or follow-up activity is conducted by the State agency only, the appeal shall be made to the: Secretary of Education, Delaware Department of Education, P.O. Box 1402, Dover, DE 19903

4.0 When the CRE is performed as a State-Assisted CRE with participation of USDA officials, at the discretion of the petitioner, the appeal may also be made to the: Chief, Administrative Review Branch, USDA-FNS, 3101 Park Center Drive, Alexandria, VA 22302

4.1 Any appeal correspondence should be marked "Request for Review". The USDA Administrative Review Branch conducting an appeal will make a determination based on information provided by the Food and Nutrition Service, the appellant and the Program regulations.

8 DE Reg. 1471 (4/1/05)