

DEPARTMENT OF EDUCATION
Statutory Authority: 14 Delaware Code, Section 122(d) (14 **Del.C.** §122(d))
14 **DE Admin. Code** 264

FINAL

REGULATORY IMPLEMENTING ORDER

264 General Administrative Appeal Procedures for the Summer Food Service Programs of the United States Department of Agriculture CACFP/USDA

I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to adopt a new regulation 14 **DE Admin. Code** 264 General Administrative Appeal Procedures for the Summer Food Service Programs of the United States Department of Agriculture CACFP/USDA 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** 264 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** 264. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 264 attached hereto as *Exhibit "B"* is hereby adopted. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 264 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** 264 adopted hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 264 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

264 General Administrative Appeal Procedures for the Summer Food Service Programs of the United States Department of Agriculture CACFP/USDA

- 1.0** Institutions participating in the Delaware SFSP may request an Administrative Appeal of the following actions:
- 1.1** Denial of a new or renewing institution's application for participation;
 - 1.2** Denial of a sponsor's request for an advance payment;
 - 1.3** Denial of all or a part of a sponsor's claim for reimbursement (except for a denial based on a late submission)

under 7 CFR § 225.9(d)(5):

1.4 Refusal to forward to FNS an exception request by the sponsor for payment of a late claim or request for an upward adjustment to a claim;

1.5 A claim against a sponsor for remittance of a payment;

1.6 Termination of the sponsor or site; and,

1.7 Denial of a sponsor's application for a site;

2.0 Notwithstanding the provisions of Section 1.0 above, institutions participating in the Delaware SFSP may not request an Administrative Review of the following action:

2.1 decisions made by FNS with respect to late claims or upward adjustments under S 225.9(d)(5).

3.0 Administrative appeal procedures shall apply as set forth below, and will be conducted as follows:

3.1 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 sponsor or food service management company may request an appeal of the action. Notice shall be given to the institution's executive director or other responsible individuals by certified mail, return receipt requested. As used herein, "Petitioner" means a participating institution or agency, or its responsible individuals, as appropriate under the circumstances.

3.2 A request for administrative appeal shall be submitted to the Department in writing not later than 15 days after the date the notice of action is received and the appeal shall meet the requirements specified in 3.5 below.

3.3 The petitioner shall make an appeal within ten (10) working days from the date on which the notice of action is received.

3.4 Any information on which the Department's action was based shall be available to the petitioner for inspection from the date of receipt by the Department of the request for an administrative appeal.

3.5 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 shall be submitted to the review official not later than seven (7) days after the petitioner submitted the appeal, must clearly identify the Department action being appealed, and must include a photocopy of the notice of action issued by the Department.

3.6 A hearing shall 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.

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

3.8 The hearing shall be held within fourteen (14) days of the date of the receipt of the request for review, but, where applicable, not before the appellant's written documentation is received in accordance with paragraphs 3.4–3.7 above.

3.9 The administrative appeal official shall be independent and impartial. 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.

3.10 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 SFSP.

3.11 The decision of the administrative appeal official shall be issued to the Department and petitioner within five (5) days of the petitioner's hearing, or within five (5) working days after receipt of the written documentation if no hearing is held, the appeal official shall make a determination based upon a full review of the administrative record and inform the petitioner of the determination of the review 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.

3.12 The Department's action shall remain in effect during the appeal process. However, participating sponsors and sites may continue to operate the Program during an appeal of termination, and if the appeal results in overturning the Department's decision, reimbursement shall be paid for meals during the appeal process. However, such continued Program operation shall not be allowed if the Department's action is based on imminent dangers to the health or welfare of children. If the sponsor or site has been terminated for this reason, the Department shall so specify in its notice of action.

3.13 The Department shall send written notification of the complete appeal procedures and of the actions which can be appealed, as specified in sections 1.1–1.7 above, to each potential sponsor applying to participate and to each food service management company applying to register in accordance with 7 CFR 225.6(g).

3.14 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.

8 DE Reg. 1473 (4/1/05)