

DEPARTMENT OF EDUCATION
14 DE Admin. Code 260
Statutory Authority: 14 Delaware Code,
Section 122(e) (14 Del.C. §122(e))

REGULATORY IMPLEMENTING ORDER

FINAL

260 General Appeal Procedures for the Child and Adult Care Food Program of the United States Department of Agriculture CACEP/USDA

I. Summary Of The Evidence And Information Submitted

The Secretary of Education intends to amend 14 **DE Admin Code 260** General Appeal Procedures for the Child and Adult Care Food Program of the United States Department of Agriculture CACEP/USDA. The amendments are necessary in order to bring the state's regulations in line with the requirements of the federal statute.

Notice of the proposed regulation was published in the News Journal and the Delaware State News on July 26, 2004 in the form hereto attached as *Exhibit "A"*. No comments were received.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code 260** in order to bring the state's regulations in line with the requirements of the federal statute.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code 260**. Therefore, pursuant to 14 **Del.C. §122**, 14 **DE Admin. Code 260** attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C. §122(e)**, 14 **DE Admin. Code 260** hereby amended 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 260** amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code 260** 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 September 16, 2004. 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 16th day of September 2004.

DEPARTMENT OF EDUCATION
Valerie A. Woodruff, Secretary of Education

~~**260 General Appeal Procedures for the Child and Adult Care Food Programs of the United States Department of Agriculture CACFP/USDA**~~

~~1.0 When a participating institution or agency seeks to appeal actions taken by the Delaware Department of Education pursuant to findings based on monitoring or administrative reviews the following shall apply:~~

~~1.1 The institution or agency shall be advised in writing of the grounds on which the Delaware Department of Education has based its action. The notice of action, which shall be sent by certified mail, return receipt requested~~

shall also include a statement indicating that the institution has the right to appeal the action.

~~1.2 To initiate an appeal procedure, a written request for review shall be filed by the appellant not later than 15 calendar days from the date the appellant received the notice of action, and the Delaware Department of Education shall acknowledge the receipt of the request for appeal within 10 calendar days. Then, the following procedures shall pertain:~~

~~1.2.1 Within five (5) days of receipt of an appeal for review, the Delaware Secretary of Education, or his/her designee, shall appoint a review official who shall be selected from the approved list of hearing officers. The review official shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section.~~

~~1.2.2 The appellant may refute the charges contained in the notice of action in person and by written documentation to the review official. In order to be considered, written documentation must be filed with the review official not later than 30 calendar days after the appellant received the notice of action. The appellant may retain legal counsel, or may be represented by another person. A hearing shall be held by the review official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review. Failure of the appellant institution's representative to appear at a scheduled hearing shall constitute the appellant institution's waiver of the right to a personal appearance before the review official, unless the review official agrees to reschedule the hearing. A representative of the Delaware Department of Education shall be allowed to attend the hearing to respond to the appellant's testimony and to answer questions posed by the review official.~~

~~1.2.2.1 If the appellant does not specifically request a hearing in the letter of request for review, and the review official determines that a review of documentation is sufficient for resolution, the appellant and the Delaware Department of Education shall be advised of the official's determination.~~

~~1.2.2.2 If the appellant has requested a hearing, the appellant and the Delaware Department of Education shall be provided with at least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time and place of the hearing.~~

~~1.2.3 Any information on which the Delaware Department of Education's action was based shall be available to the appellant for inspection from the date of receipt of the request for review.~~

~~1.2.4 The review official shall make a determination based on information provided by the Delaware Department of Education and the appellant, and on Program regulations.~~

~~1.2.5 Within 60 calendar days of the Delaware Department of Education's receipt of the request for review, the review official shall inform the State agency and the appellant of the determination of the review.~~

~~1.2.6 The Delaware Department of Education's action shall remain in effect during the appeal process. However, participating institutions and facilities may continue to operate under the Program during an appeal of termination, unless the action is based on imminent dangers to the health or welfare of participants.~~

~~1.2.7 The determination by the Delaware Department of Education's review official is the final administrative determination to be afforded to the appellant.~~

~~1.2.8 Appeals shall not be allowed on decisions made by the Food and Consumer Services, U.S. Department of Agriculture, on requests for exceptions to the claims submission deadlines stated in 7CFR Sec. 226.10(e) or requests for upward adjustments to claims.~~

~~1.2.9 In cases where an appeal results in the dismissal of a claim against an institution, which was asserted by the Delaware Department of Education, based upon Federal audit findings of the Food and Consumer Services, U.S. Department of Agriculture, may assert a claim against the Delaware Department of Education in accordance with the procedures outlined in 7CFR Sec. 226.14(c).~~

Authority: 7 CFR Sec. 226.6 State Agency Administrative Responsibilities, (k) Institution appeal procedures.
See 5 DE Reg. 461 (8/1/01)

260 General Administrative Review Procedures for the Child and Adult Care Food Programs of the United States Department of Agriculture CACFP/USDA

1.0 Institutions participating in the Delaware CACFP may request an Administrative Review of the following actions:

1.1 Denial of a new or renewing institution's application for participation;

1.2 Denial of an application submitted by a sponsoring organization on behalf of a facility;

- 1.3 Proposed termination of an institution's agreement;
- 1.4 Proposed disqualification of a responsible principal or responsible individual;
- 1.5 Suspension of an institution's participation;
- 1.6 Denial of an institution's application for start-up or expansion payments;
- 1.7 Denial of all or a part of an institution's claim for reimbursement except for a denial based on a late submission under 7 CFR §226.10(e);
- 1.8 Demand for the remittance of an overpayment; and
- 1.9 Any other action of the State agency affecting an institution's participation or its claim for reimbursement.

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

- 2.1 A determination that an institution is seriously deficient;
- 2.2 Disqualification of an institution or a responsible principal or responsible individual, and the subsequent placement on the State agency list and the National disqualified list; or
- 2.3 Termination of a participating institution's agreement, including termination of a participating institution's agreement based on the disqualification of the institution by any publically funded program.

3.0 Except where the abbreviated administrative review procedures apply as set forth below, administrative reviews will be conducted as follows:

3.1 The Department of Education ("Department") must give notice of the action being taken or proposed, the basis for the action, and the procedures under which the institution and the responsible principals or responsible individuals may request an administrative review of the action. Notice shall be given to the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals by U. S. Mail postage prepaid. As used herein, "Petitioner" means a participating institution or agency, or its responsible principals or responsible individuals, as appropriate under the circumstances.

3.2 A request for administrative review must be submitted to the Department in writing not later than 15 days after the date the notice of action is received.

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

3.4 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 review.

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 must be submitted to and received by the review official not later than 30 days after the petitioner received the notice of action.

3.6 A hearing must be held by the administrative review 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 review. If the petitioner fails to appear at a scheduled hearing, the petitioner waives the right to a personal appearance before the administrative review official, unless the administrative review 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 to answer questions posed by the administrative review official. If a hearing is requested, the petitioner and the Department must be provided with at least 10 days notice of the time and place of the hearing.

3.7 The administrative review official shall be independent and impartial. The administrative review official may be an employee of the Department, but must 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 review official directly, but all such contacts must include the participation of a representative of the Department if the Department chooses to participate.

3.8 The administrative review official shall make a determination based solely on the information provided by the Department, the petitioner, and based upon federal and Delaware laws, regulations, policies and procedures governing the CACFP/USDA.

3.9 The decision of the administrative review official shall be issued to the Department and petitioner within 60 days of the Department's receipt of the written request for an administrative review. 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, solely in itself, constitute grounds for reversing the Department's action. The decision of the administrative review official is the final administrative determination to be afforded to the petitioner.

3.10 The Department shall maintain a searchable record of all administrative reviews and the dispositions of the

same.

3.11 The Department shall conduct the administrative review of the proposed disqualification of the responsible principals and responsible individuals as part of the administrative review of the application denial, proposed termination and/or proposed disqualification of the institution with which the responsible principals or responsible individuals are associated. However, at the discretion of the administrative review official, separate administrative reviews may be held if the institution does not request an administrative review or if either the institution or the responsible principal or responsible individual demonstrates that their interests conflict.

4.0 Notwithstanding any of the foregoing to the contrary, administrative review will be limited to a review of written submissions concerning the accuracy of the Department's determination if the application was denied or the Department proposes to terminate the institution's agreement because:

4.1 The information submitted on the application was false; or

4.2 The institution, one of its sponsored facilities, or one of the principals of the institution or its facilities is

4.2.1 On the National Disqualified List; or

4.2.2 Ineligible to participate in any other publicly funded program by reason of violation of the requirements of the program; or

4.2.3 Has been convicted for any activity that indicates a lack of business integrity.

5.0 The Department's administrative responsibilities to a participating institution shall remain in effect during the administrative review as follows:

5.1 Overpayment demand. During the period of the administrative review, the Department is prohibited from taking action to collect or offset the overpayment. However, the Department must assess interest beginning with the initial demand for remittance of the overpayment and continuing through the period of administrative review unless the administrative review official overturns the Department's action.

5.2 Program payments. The availability of Program payments during an administrative review of the denial of a new institution's application, denial of a renewing institution's application, proposed termination of a participating institution's agreement, and suspension of an institution shall be treated in accordance with the provisions of 7 CFR §226.6 (c)(1)(iii)(D), (c)(2)(iii)(D), (c)(3)(iii)(D), (c)(5)(i)(D), and (c)(5)(ii)(E), respectively.

8 DE Reg. 537 (10/01/04)