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Michael F. Easley, Governor

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July 5, 2001

CACFP 01-19

MEMORANDUM

TO: Sponsoring Organizations of Day Care Homes

FROM: Arnette Cowan, MS, RD, LDN
Head, Special Nutrition Programs

RE: Effects of the Agricultural Risk Protection Act of 2000, Pub.L. 106-224, on termination of the agreements of the day care home providers in the Child and Adult Care Food Program (CACFP)

Section 243 (c) of the Agricultural Risk Protection Act of 2000, Pub. L. 106-224, (ARPA) amended section 17 (d) of the Richard B. Russell National School Lunch Act (NSLA, 42 U.S.C. 1766(d)) to give family or group day care homes (providers) the opportunity to request an administrative review (appeal) prior to termination of their agreements to participate in the CACFP by their sponsoring organization. Attached is a copy of a portion of the law that requires this action.

This memorandum addresses some of the questions that have been received regarding establishment of such a system and also discusses the procedures leading up to the proposed termination that will be established in accordance with the new law. These procedures must be put into place as quickly as possible and must remain in effect until an interim rule is published to codify the changes from ARPA in the CACFP regulations. These requirements will be discussed at the training session on August 6, 2001.

I. PROCEDURES RELATING TO TERMINATION OF DAY CARE HOME PROVIDER'S PROGRAM AGREEMENTS

What procedures must sponsoring organizations establish for terminating the agreement of a day care home?

The procedures that are being established for the termination of a provider's agreement parallel the procedures used by State agencies for terminating an institution's agreement. These procedures apply only to termination of a provider's agreement "for cause" (see the discussion below on the meaning of "termination for cause"). At minimum, the sponsoring organization must:



- Give written notice to the day care home (with a copy to the State agency) that the sponsoring organization has declared the provider seriously deficient and specify the serious deficiency(ies).

The written notice must also inform the provider:

- * of the actions it must take to correct the serious deficiency(ies);
 - * of the period of time allotted to correct the deficiency (unless the serious deficiency is related to health or safety issues, as discussed below);
 - * that failure to fully and permanently correct the serious deficiency (ies) within the allotted period of time will result in the termination of the provider's agreement and placement of the provider on the National disqualified list (see below for further discussion of the "National disqualified list");
- At the end of the period allotted for corrective action, determine whether corrective action has been taken that fully and permanently corrects the serious deficiency; and
 - If the sponsoring organization determines that the provider has not taken corrective action to fully and permanently correct the serious deficiency within the allotted time, give the provider written notice of intent to terminate the agreement for cause. The written notice must also:
 - * inform the provider that it may request an administrative review of the proposed termination;
 - * give the provider the procedures for seeking an administrative review;
 - * inform the provider that, if termination for cause occurs, the provider will be placed on the National disqualified list, and
 - unless Program participation has been suspended because the serious deficiency is related to health and safety issues, as discussed below, inform the provider that it may continue to participate in the Program and receive Program reimbursement for eligible meals served until its administrative review is completed.

Does that mean that a provider continues to receive Program payments during the period of its appeal?

Yes. With the exceptions discussed in the next paragraph, the sponsoring organizations must continue to pay any claims for reimbursement for eligible meals served until the provider's agreement is terminated, including the period of any administrative review.

May a sponsoring organization suspend a provider's participation, including Program payments, during the appeal process if the intended termination is based on the submission of a false or fraudulent claim?

No. ARPA provides for suspension of a provider's Program participation only when the sponsoring organization determines there is an imminent threat to the health and safety of the children at the day care home, or that the day care home has engaged in activities which threaten the public health or safety. In these cases, the sponsoring organization must declare the provider seriously deficient, provide written notice of intent to terminate the provider's agreement for cause, and suspend Program payments pending the completion of the provider's administrative review. The provider does not have the opportunity to correct the serious

deficiency(ies) in these cases. Unlike false or fraudulent claims submitted by institutions, false or fraudulent claims made by providers were not addressed in the amendment to ARPA made by the Grain Standards and Warehouse Inspection Act of 2000, Pub. L. 106-472.

However, it is always the case that a sponsoring organization may not pay any claim, or any portion of a claim, that it believes to be invalid. This is not a “suspension” of Program participation, but a denial of a claim based on the sponsoring organization’s normal process for reviewing claims. Even if the provider’s claim is denied at the same time that the sponsoring organization issues a notice of intent to terminate the provider’s agreement, payment has not been “suspended” because the sponsor will continue to pay any valid claims received during the appeal process.

II. PROVIDER APPEAL RIGHTS

Does ARPA require administrative reviews for providers when the sponsoring organizations takes actions other than terminating the provider’s agreement for cause?

No. Section 243(c) of ARPA amended section 17(d) by requiring only that care home have the opportunity to request an administrative review prior to the termination of its agreement for cause. The law does not, for example, require an administrative review to be offered when claims for reimbursement are denied or overpayments are recovered.

What if a State agency or a sponsoring organization already has an administrative review system that permits providers to receive a hearing on actions other than termination?

There is no reason for State agencies or sponsoring organizations to modify systems that exceed the minimum requirements of the law.

Does termination of a provider’s agreement by a sponsor “for convenience” require that sponsoring organization to offer an administrative review?

No. Termination for convenience by the sponsor means that the sponsor has terminated the agreement for reasons unrelated to the provider’s performance under the contract. Because termination for convenience is not based on the “fault” of the other party, providers who have had their Program agreement terminated for convenience are not placed on the National disqualified list. In addition, if a provider’s agreement is terminated for convenience by its sponsor, the provider may participate in the Program under another sponsor, and their participation would not be subject to the provider transfer limits established by State agencies pursuant to ARPA.

However, although a sponsoring organization may terminate a provider’s agreement “for convenience” without giving the provider the opportunity for an administrative review, termination for convenience may not be used by sponsoring organizations in instances where the termination is actually for cause (i.e., is based on the provider’s failure to comply with the terms of its agreement with the sponsoring organization). Improper use of termination for convenience by the sponsoring organization constitutes an attempt to circumvent the law’s intent in requiring the placement of providers terminated for cause on the National disqualified list.

If a sponsoring organization could abuse this process (by terminating a provider for convenience instead of for cause), why is it not reasonable to infer that the law intended to grant the provider appeal rights for any termination action?

There are a number of circumstances under which a sponsoring organization could legitimately determine that it had to terminate a provider’s agreement for convenience. For example, if a sponsoring organization operated the Program in 200 homes in 4 counties, but 2 of the homes were located in the most remote county and were farthest from the sponsoring organization offices, the sponsoring organization might conclude that it was no longer cost-effective to sponsor these providers. Therefore, in order to maintain the sponsoring organization’s

financial viability, as required under section 17(d)(1)(A)(i) of the NSLA, as amended, the sponsoring organization could legitimately terminate the provider's agreement "for convenience". To offer a provider an administrative review in this instance would substitute a review officer's judgment for that of the sponsoring organization regarding the decisions necessary to manage the CACFP consistent with ARPA's requirement that the sponsoring organization be financially viable.

What is the "National disqualified list"?

Section 243(c) of ARPA amended section 17 (d) (5) of the NSLA to expand what is currently called "the List of Seriously Deficient Institutions" to include family and group day care homes and individuals as well as institutions. The new list will be referred to as the "National disqualified list".

How, if at all, has a provider's ability to terminate its agreement with the sponsoring organization "for convenience" been affected by the law?

A provider will continue to have the right to terminate its agreement with the sponsoring organization for convenience, subject to any stipulations by the State agency, as set forth at Section 226.18(b)(8) of the regulations.

However, Section 243(f) of ARPA amended section 17 (f)(3) of the NSLA to prohibit providers from transferring to a new sponsoring organization more than once a year. Thus, if a provider who has transferred within the past year terminates its agreement for convenience (i. e., the provider, not the sponsor, initiates the termination of the agreement for convenience), it would be ineligible to participate under another sponsor until a full year had passed since the transfer. Similarly, if a State agency had implemented an annual "open season" for transfers, and the provider chose to terminate its agreement for convenience outside of the "open season," it would be ineligible to participate until the next open season.

When is a provider's termination appealable?

The written notice of serious deficiency is not subject to administrative review. The provider may request an administrative review only when the sponsoring organization issues the notice of intent to terminate the provider's agreement "for cause".

When must a provider be terminated "for cause"?

A provider's agreement must be terminated for cause when the provider has been declared seriously deficient and has not taken action to fully and permanently correct the serious deficiency within the allotted time. However, in cases in which the serious deficiency is related to health or safety issues, the sponsoring organization must initiate action to terminate the provider's agreement without first providing an opportunity for corrective action.

Can you provide examples of serious deficiencies which, if not corrected, would result in the provider's termination of cause?

Yes. Examples include:

- misrepresentation of information submitted on the application;
- submission of false claims for reimbursement;
- simultaneous participation under more than one sponsoring organization;
- non-compliance with program meal pattern;
- failure to keep required records; or
- any other circumstances related to non-performance under the sponsor-provider agreement, as specified by the sponsoring organization or the State agency.

Please note that, in any serious deficiency involving imminent threat to the health or safety of a child or an activity of a provider that poses a threat to public health or safety (such as falsification of health or licensing certifications and conduct which threatens the safety of children), the sponsoring organization would issue a written notice of serious deficiency that does not allow for corrective action and would simultaneously issue a written notice of intent to terminate that would also include an immediate suspension of Program participation (including Program payments) to the provider, based on the “threat to health or safety” provisions in ARPA. Providers may seek an administrative review of the proposed termination and the suspension and, if the provider prevails in the administrative review, may claim retroactive reimbursement for eligible meals served during the suspension period.

May an employee or board member of the sponsoring organization be considered “independent and impartial” for the purpose of conducting and administrative review?

The only requirement is that the review official be independent and impartial and not involved in the decision to propose to terminate the provider’s agreement. The review official must be “independent and impartial” in the sense that he or she was not involved in the proposed termination and does not have a direct personal or financial stake in the outcome of the administrative review.

This means that a sponsoring organization employee could conduct the administrative review, provided he or she was not involved in the decision to terminate the provider’s agreement. This is the same approach currently used by State agencies in choosing review officers to hear administrative reviews requested by institutions. Sponsoring organizations must make every reasonable attempt to ensure that no review official has a real or apparent conflict of interest that would affect their ability to render and impartial decision.

If you have any questions, please contact me at 919-715-1926 and/or Paula Hissett at 919-715-0575.

Attachment

cc: SNP Staff
Auditors
Denise Rogers-Murray