




Nancy S. Grasmick
State Superintendent of Schools

200 West Baltimore Street • Baltimore, MD 21201 • 410-767-0100 • 410-333-6442 TTY/TDD • MarylandPublicSchools.org

TO: Members of the Maryland State Board of Education
FROM: Nancy S. Grasmick 
DATE: March 22, 2011
SUBJECT: COMAR 13A.06.01-.03 (AMEND)
Child Nutrition Appeal Procedures
PERMISSION TO PUBLISH

PURPOSE:

The purpose of this action is to request that the State Board grant permission to publish amended regulations concerning the child nutrition appeal procedures.

HISTORICAL BACKGROUND:

In April 2009, the Mid Atlantic Regional Office of the United States Department of Agriculture (USDA) conducted a management evaluation of the Child and Adult Care Food Program administered by the Department. As a result of that review, USDA made three recommendations to align the COMAR regulation with the Code of Federal Regulation 7 C.F.R. Part 226. In addition, terminology was updated to conform to changes in federal standards. The regulation was last updated in 2005.

EXECUTIVE SUMMARY:

Members of the Department met with the Attorney General's Office, edited some of the existing language, and included the following changes:

- Added language to provide for an abbreviated hearing procedure;
- Provided for combined administrative hearings for responsible principals and responsible individuals; and
- Provided for a standard review hearing based solely on the information provided by the State agency, the institution, and the responsible principals and individuals, and based the outcome on deferral and State laws, regulations, policies, and procedures governing the Program.

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In addition to the substantive changes, the document has been reorganized to better align subject matter and present a more descriptive and user friendly document.

ACTION:

I request permission to publish amendments to COMAR 13A.06.01.-.03 with the following TENTATIVE timelines:

Maryland Register Issue Date: May 20, 2011
30- day open comment period ends: June 20, 2011
Adoption: July 19-20, 2011

NSG/pba
Attachments

13A.06.01.01 (2/15/10)

.01 Scope.

A. Program Standards. The Department shall administer the following food and nutrition programs according to the following federal laws and the implementing regulations, which are incorporated by reference:

(1) National School Lunch Program, 42 U.S.C. §§1751—1760; 1769a and 1779, and 7 CFR Part 210;

(2) Special Milk Program, 42 U.S.C. §§1772 and 1779, and 7 CFR Part 215;

(3) School Breakfast Program, 42 U.S.C. §§1773 and 1779, and 7 CFR Part 220;

(4) Summer Food Service Program, 42 U.S.C. §§1758, 1761, and 1762a, and 7 CFR Part 225;

(5) Child and Adult Care Food Program, 42 U.S.C. §§1758, 1759a, 1762a, 1765, and 1766, 1766a and 7 [Part] CFR Part 226;

(6) Nutrition Education and Training Program, 42 U.S.C. §1788, and 7 [Part] CFR Part 227;

(7) State Administrative Expense Funds, 42 U.S.C. §§1776 and 1779, and 7 CFR Part 235;

(8) Cash in Lieu of Donated Foods, 42 U.S.C. §§1751, 1755, 1762a, 1765, 1766, and 1779, and 7 CFR Part 240;

(9) Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools, 42 U.S.C. §§1751—1752, 1758, 1759a, 1760, 1772—1773, and 1779, and 7 CFR Part 245; and

(10) Food Distribution Program, 42 U.S.C. §§1751, 1755, 1758, 1760—1762a, and 1766, and 7 CFR Part 250.

B. Program Administration.

(1) This chapter applies to the administration of the National School Lunch Program, the School Breakfast Program, the Special Milk Program, the Summer Food Service Program, the Child and Adult Care Food Program, Nutrition Education and Training Program, State Administrative Expense Funds, Cash in Lieu of Donated Foods, Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools, and the Food Distribution Program pursuant to the federal programs standards set forth in this regulation and pursuant to the terms and conditions set forth in the agreements between the State Department of Education and the local educational agencies, [sponsoring organizations,] and institutions, commercial food processors, and other contractors.

(2) Local educational agencies, [sponsoring organizations,] and institutions participating in the federal programs set forth in this regulation shall maintain a financial management system as authorized by the federal regulations and prescribed by the Department in compliance with the [School Food Service] Financial, Accounting, and Reporting Manual, [May 2005,] which is incorporated by reference in COMAR 13A.02.01.02 C.

13A.06.01.02 (1/28/10)

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Administrative hearing" [review" means a comprehensive on-site administrative review conducted by the Department, the U.S. Department of Agriculture staff, or both, for the purpose of evaluating the administration of the food and nutrition program by an institution, sponsoring organization, or local educational agency, consistent with the requirements set forth in the applicable program standards set forth in Regulation .01 of this chapter.] means the fair hearing provided upon request to:

(a) An institution that has been given notice by the Department of any action or proposed action that will affect their participation or reimbursement under any of the programs listed in Regulation .01 of this chapter, in accordance with 7 C.F.R. §226.6(k) and Regulation .03A of this chapter.

(b) A principal or individual responsible for an institution's serious deficiency after the responsible individual has been given a notice of intent to disqualify them from any of the programs listed in Regulation .01 of this chapter.

(2) "Branch Chief" means the Chief of the School and Community Nutrition Program Branch within the State Department of Education.

(3) "Department" means the State Department of Education, the State agency designated to administer food and nutrition programs.

(4) "Institution" means an agency that is participating in or applying to participate in a program.

(5) "Local educational[authority]" means the governing body which is:

(a) Responsible for the administration of one or more schools, colleges, or universities; and

(b) Has the legal authority to operate a program.] agency" has the meaning stated in 7 C.F.R. §210.2.

(6) "Program" means the National School Lunch Program, Special Milk Program, School Breakfast Program, Summer Food Service Program, or Child and Adult Care Food Program.

(7) ["Sponsoring organization" means any agency or organization which is participating in or applying to participate in a program to operate one or more facilities.] "National Disqualification List" means the list, maintained by the U.S. Department of Agriculture, of institutions, responsible principals and responsible individuals, and day care homes disqualified from participation in the Child and Adult Care Food Program authorized by Section 17 of the National School Lunch Act, as amended, in accordance with 7 C.F.R. §226.2.

13A.06.01.03 (1/28/10)

.03 Program Hearing Procedures.

A. Actions Subject to an Administrative Hearing Upon Request [Review]. An [sponsoring organization,] institution[,] or local educational agency may request a hearing to review the following actions by the Department:

- (1) Denial of a [sponsoring organization's,] institution's [,] or local educational agency's application for participation in a [p]Program;
- (2) Denial of an application submitted by an institution or local education agency [sponsoring organization] on behalf of a facility to participate in the Program;
- (3) Proposed termination of the participation of an [sponsoring organization,] institution, local educational agency, or facility in a [p]Program;
- (4) Notice of proposed disqualification of a responsible principal or responsible individual;
- (5) Suspension of an [sponsoring organization's,] institution's, or local educational agency's [agreement] participation;
- (6) Denial of an [sponsoring organization's,] institution's, or local educational agency's application for expansion funds or start-up payments;
- (7) Denial of an advance payment;
- (8) Recovery of advances;

(9) Denial of all or part of a claim for reimbursement, except for late submission;

(10) Denial by the Department to forward to the U.S. Department of Agriculture, Food and Nutrition Service, an exception request by an [the sponsoring organization,] institution[,] or local educational agency for payment of a late claim or request for an upward adjustment to a claim;

(11) Demand for the remittance of an overpayment;

(12) Withholding payment, if applicable; and

(13) Any other action of the Department affecting the participation of an [sponsoring organization,] institution[,] or local educational agency in the Program or the institution's claim for reimbursement under the Program.

B. Actions Not Subject to an Administrative hearing [Review]. The following actions are not subject to an administrative [review] hearing:

(1) U.S. Department of Agriculture decision on claim deadline exceptions and requests for upward adjustments to a claim;

(2) Determination of serious deficiency;

(3) Disqualification and placement on [State agency and] the national disqualified list; and

(4) Termination of participation in a [p]Program.

C. Notice of Department's Action. The [sponsoring organization,] institution[,] or local educational agency shall be advised in writing of the grounds on which the Department based its

action affecting the institution's participation in a program, reimbursement, or other actions noted in §A and §B of this regulation. The notice of action shall be sent by certified mail, return receipt requested, and shall indicate the sponsoring organization's, institution's, or local educational agency's right to request a hearing to review the action.]

D. Appeal of Agency Action and Request for a Hearing.

(1) Except as provided in §B of this regulation, t[The [sponsoring organization,] institution[,] or local educational agency may request [review] an administrative hearing [of the Department action] by filing a written request for a hearing with the Branch Chief of the Department not later than 14 calendar days from the date of the Department's notice of action. The request for a hearing shall clearly identify the action appealed and contain a brief statement of the reasons for requesting [review] a hearing.

(2) The Department's action shall remain in effect during the [review] hearing process.

(3) Participating [sponsoring organizations,] institutions[,] or local educational agencies may continue to operate under the Program during [review] the hearing process of a proposed termination unless the action is based on imminent dangers to the health or welfare of participants or for submission of a false or fraudulent claim.

(4) If the [sponsoring organization,] institution[,] or local educational agency has been terminated based on imminent dangers to the health or welfare of participants, the Department shall so specify in its notice of action.

(5) [Sponsoring organizations,] [i]nstitutions[,] or local educational agencies electing to continue operating while the proposed termination is under review shall be reimbursed for valid [meals served] claims submitted during the period of review in accordance with 7 CFR Parts 210—299.

E. Acknowledgment. The Branch Chief shall mail written acknowledgment of receipt of the request for a hearing to the [sponsoring organization,] institution[,] or local educational agency within 10 calendar days, and shall transmit the request to the Office of Administrative Hearings within 5 working days of receipt of the request for a hearing.

F. Delegation to the Office of Administrative Hearings.

(1) The Branch Chief shall delegate a request for a review hearing to the Office of Administrative Hearings in accordance with State Government Article, §10-205, Annotated Code of Maryland.

(2) The review hearing shall be conducted by an administrative law judge in accordance with COMAR 28.02.01.

(3) The [sponsoring organization,] institution[,] or local educational agency 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.

(4) [Except as provided in §F(5) of this regulation,] [t]he administrative law judge's findings of fact, conclusions of law, and final decision affirming, reversing, or modifying the Department's action shall be based solely on the information provided by the Department, the local education

agency, the institution, and the responsible principals and responsible individuals, and based on Federal and State laws, regulations, policies and procedures governing the Program and shall be submitted to the Branch Chief and to the [sponsoring organization,] institution[,] or local educational agency within 60 days of the Department's receipt of the request for a hearing, unless:

(a) The parties jointly agree to a delay of the hearing;

(b) The administrative law judge, based on the request of one party and for good cause shown, grants a request for a delay of the hearing; or

(c) The administrative law judge delays the hearing for good cause.

(5) Exception. [For the] Summer Food Service Program: Appeal of Department Action

(a) If a hearing is requested:

(i) The hearing shall be held within 14 calendar days of the Department's receipt of the request for hearing and conducted by an administrative law judge in accordance with COMAR 28.02.01;
and

(ii) The administrative law judge's findings of fact, conclusions of law, and final decision affirming, reversing, or modifying the Department's action shall be based solely on the information provided by the Department, the local education agency, the institution, and the responsible principals and responsible individuals, and based on Federal and State laws, regulations, policies and procedures governing the Program and shall be submitted to the Branch

Chief and to the [sponsoring organization,] institution[,] or local educational agency within 5 working days of the conclusion of the hearing; or

(b) If the institution or local education agency appeals the Department action but does not request a [no] hearing [is requested], the administrative law judge shall,[:] within 5 working days after receipt of the appeal [request for review, the administrative law judge shall]:

(i) Make a written determination based on a review of the administrative record; and

(ii) Inform the appellant and the Department of the final decision by certified mail, return receipt requested.

(6) Exception. Child and Adult Care Food Program: Abbreviated Administrative Review

(a) If the institution or local education agency appeals the Department action as described below and a hearing is requested, the Department must limit the administrative hearing to a review of written submissions concerning the accuracy of the Department's determination if the application was denied or the Department's proposes to terminate the institution's agreement because:

(i)The information submitted on the application was false;

(ii)The institution, one of its sponsored facilities, or one of the principals of the institution or its facilities is on the national disqualified list;

(iii) The institution, one of its sponsored facilities, or one of the principals of the institution or its facilities is ineligible to participate in any other publicly funded program by reason of violation of the requirements of the program; or

(iv) The institution, one of its sponsored facilities, or one of the principals of the institution or its facilities has been convicted for any activity that indicates a lack of business integrity

G. Discovery. Information on which the Department's action was based shall be available to the [sponsoring organization,] institution[,] or local educational agency for inspection from the date of the Department's receipt of the request for a hearing.

H. Burden of Proof. The [sponsoring organization,] institution[,] or local educational agency has the burden of proof by a preponderance of the evidence.

I. Final Decision. The decision of the administrative law judge is the final agency determination of the State Department of Education in accordance with the federal regulations governing the program and shall be implemented promptly.