Child & Adult Care Food Program

Serious Deficiency Process & Provider Appeals

Training for CACFP Hearing Officials
Welcome sponsors and hearing officers... Intro

Today we will:

• Present a summary of the process of declaring providers seriously deficient
• Summarize the most common serious deficiencies
• Describe the elements of the provider appeals process; and
• Discuss the role of the hearing official.
• The Agriculture Risk Protection Act mandated several new provisions pertaining to providers.
  • These required procedures include a serious deficiency process that gives providers the opportunity to take corrective action in response to a sponsor’s finding of serious deficiency.
  • There is also a provision for suspending CACFP participation for homes for serious health or safety violations.
  • Today, we will discuss the requirement that gives providers the opportunity to appeal a sponsor’s proposed termination of their agreement for cause or the suspension of their CACFP participation.
Why did the law introduce this requirement? The statute had never before addressed appeal rights for providers. In fact, it might at first seem counterproductive that a law that was designed to strengthen integrity in the CACFP would add procedural safeguards for providers who are accused of undermining the nutritional or fiscal integrity of the CACFP.

Just the opposite is true. Years ago, sponsors told us that they spent a great deal of time and resources removing a seriously deficient provider, only to have the provider show up on a rival sponsor’s program within a matter of days or weeks. Therefore, there was little incentive to remove a seriously deficient provider. Now there is.

During the audits conducted by the Office of Inspector General in the 90s, OIG noted the same thing and made recommendations to USDA. One of these suggestions was that there should be a means of formally disqualifying noncompliant providers, just as there was for seriously deficient centers.

As a result, ARPA added to the law a requirement that seriously deficient providers who had failed to correct their serious deficiencies must have their agreements terminated and be placed on the National Disqualified List.

Congress also believed that it was imperative to ensure that the right of the providers be protected. An important tool in this effort is the provider’s right to appeal.
When we discuss termination, it is important to note there are two different kinds of termination: cause and convenience.

When a provider violates the agreement with the sponsor, this is termination for cause. This termination is initiated by the Sponsor and is the focus of our discussion today.

Termination for convenience deals with nonperformance issues and may be initiated by either the provider or the Sponsor. An example might be when it is no longer economically feasible for a Sponsor to provide services to a remote geographical area.

Our discussion today will focus on termination for cause.
ARPA requires that providers be provided a fair hearing before any decision to terminate their agreement or suspend participation in the food program. The regulations call this the administrative review process for homes. In everyday terms, we call this an appeal.

An appeal is simply the process by which a provider can make known that they disagree with the action taken by the sponsor.

The regulations say that the appeal is heard by an administrative review official. This person is commonly referred to as the hearing official or hearing officer.

If the action is subject to appeal and the appeal is properly made, the request for an appeal is granted. Not all actions are appealable and appeals must be made according to proper procedures.
What can be appealed?

- Proposed termination for cause and proposed disqualification
- Suspension for health or safety violations

What is appealable?

Providers may appeal only two actions:

- proposed termination for cause and proposed disqualification and
- suspension for health or safety violations
What actions are NOT appealable?

Anything else.

The law does not require an opportunity to appeal other actions such as the denial of claims or the recovery of overpayments.
When is an action appealable?

A provider may request an appeal when:

- Sponsor issues a Notice of Proposed Termination for Cause and Proposed Disqualification.
- Sponsor issues a Suspension Notice.

ARPA requires that a provider have the opportunity to appeal a decision to terminate its agreement for cause BEFORE the termination takes effect. Therefore, the PROPOSED termination action is appealable. The law also requires that suspension of a provider’s participation be appealable, but in this case, the law states that the opportunity for appeal does not occur until after the suspension takes effect.

This means that a provider may request an appeal when:

- The sponsor issues a Notice of Proposed Termination for Cause and Proposed Disqualification; and
- When a sponsor issues a Suspension Notice.
The sponsor has incorporated language in its agreement regarding seriously deficient determination, termination and disqualification.

The Sponsor gives a copy of the appeal procedures to the provider:

- Annually
- When any appealable action is taken
- Upon request.
Sponsors must follow the procedures established in the regulations when providing appeals to homes.

**Uniformity:** The same procedures must apply to all homes.

**Representation:** Providers may:

1. represent themselves
2. retain legal counsel, or
3. be represented by any other person of their choosing.

**Review of the record and opposition:**

- The provider must have the opportunity to review the record on which the sponsor’s action was based and refute the action in writing.
- A sponsor may establish a requirement that the sponsor taking the action has the opportunity to review any documentation or evidence the provider intends to offer to dispute the sponsor’s action.
- It is especially important that both parties to the appeal have the chance to review all of the documentation when a decision is going to be made solely on the written record.

**In-person hearing**

Sponsors may offer in-person hearings, but there is no requirement to do so. A review of the written record provides sufficient opportunity for providers to contest an appealable action by their sponsor. It also allows for a fairly rapid resolution of whether the sponsor’s proposed termination action will be finalized and whether the provider will be disqualified and placed on the National Disqualified List.
Basis for decision: The hearing official must make a determination based only on the information provided by the sponsor and provider, and on Federal and State laws, regulations, policies and procedures governing the Program.

Given the requirement that the hearing official be independent and impartial, it may be that he or she has little knowledge of the CACFP. This is yet another reason that the sponsor’s documentation needs to fully support the action taken.

Timelines: The hearing official must inform the sponsor and the provider of the appeal’s outcome within the period of time specified in the sponsor’s administrative review procedures. This time frame is an administrative requirement for sponsors and may not be used as a basis for overturning the termination if a decision is not made within the specified time frame.

It is important not to confuse this with the time that the provider has to submit an appeal. If a deadline is established for the submission of an appeal and the provider does not meet that deadline, the agreement is terminated and the provider is placed on the National Disqualified List.

Final decision: The determination made by the hearing official is the final administrative determination to be afforded the provider.

It should be noted that the determination of the hearing official does not preclude a provider from pursuing the matter through a court of law. In fact, a court may refuse to hear a case until such time as all administrative remedies have been exhausted.
Sponsors may establish additional appeal procedures as long as they are consistent with the minimum procedures set out in regulations.

One example is setting **timeframes** for the various steps in the appeal process. The interim rule did not set time frames for provider appeals. This decision is left to the sponsor provided that the process is uniform for all homes.

Sponsors must establish a time frame in which the appeal decision must be rendered.

Other deadlines that must be established by Sponsors are for:

1. Requesting an appeal
2. For submitting written documentation opposing the action under appeal.

The process must allow the provider and the sponsor adequate time to submit documentation of their case to the review official.
Other examples of supplemental procedures are:

1. Providing an in-person hearing for the provider to make her/his arguments in addition to the written submission, and
2. Establishing additional appealable actions.

If a sponsor establishes supplemental procedures, these must be approved by the state agency.
The state agency remains responsible for ensuring the process complies with minimum procedural standards in the regulations.

When state agencies review sponsoring organizations, it is the SA’s responsibility to evaluate the sponsor’s implementation of the provider appeal procedures.

Failure of the sponsor to properly implement and administer the provider appeal provisions is a basis for declaring a sponsor seriously deficient.
Let’s take a look at what constitutes a serious deficiency. What could lead to a provider’s termination for cause?

- Submission of false information on the application;
- Submission of false claims for reimbursement;
- Simultaneous participation under more than one sponsor; and
- Noncompliance with the Program meal pattern.
More serious deficiencies are:

• Failure to keep required records;
• An imminent threat to the health or safety of children in care or to the public;
• A determination that the provider has been convicted of any activity that occurred during the last 7 years and that indicated a lack of business integrity; and
• Any other circumstance related to nonperformance under the sponsor-provider agreement.

What is the purpose of this “catch-all” language?

That is because the list of serious deficiencies for providers is NOT meant to be all inclusive. Any problem that results in a provider’s failure to perform her/his administrative or financial responsibilities under the regulations requires the sponsor to declare the home seriously deficient. In this way, the sponsor has a basis for declaring a home seriously deficient for any serious management or integrity problem, even if it is not specifically listed in the regulations.

It should also be noted that when the state agency is conducting reviews of homes as part of a sponsor review, the SA could instruct the sponsor to declare any of those homes seriously deficient.
Let’s talk about the serious deficiency about a conviction for an activity indicating a lack of business integrity.

This involves:

• Only convictions during the previous 7 years, and
• It involves criminal convictions only, not civil judgments, audit or review findings, “common knowledge” or supposition.
These are the reason that a sponsor must use to declare a home seriously deficient. So – how is the sponsor expected to apply these rules?

Some of the reasons for declaring a home seriously deficient are broad, such as “noncompliance with the meal pattern.” Does that mean that any provider who makes a single error in menu planning must be declared seriously deficient?

Does the sponsor have any discretion in how they apply the serious deficiency criteria for providers?

The answer is that we expect sponsors to use discretion in making these determinations. It should also be noted that “sponsor discretion” should not be used as a façade for keeping providers in the Program at all cost, or as a way of competing with other sponsors by giving providers the message that a particular sponsor is lax in enforcing the rules.
The sponsor must be able to distinguish between:

• Occasional errors and systemic errors, and
• Minor errors and major errors.
It is important for a hearing officer to be familiar with the process that a Sponsor must go through when declaring a provider Seriously Deficient and proposing termination and disqualification.

One of the roles of the hearing officer is to determine if the Sponsor followed all of the proper procedures.
There are several steps taken by the Sponsor when it becomes clear that a provider is not complying with program regulations or the agreement with the Sponsor:

- After reviewing the facts of the situation, the Sponsor determines that the provider is seriously deficient.

- The sponsor then issues a serious deficiency notice to the provider in writing.

- The sponsor gives the provider an opportunity for corrective action.

- If the provider does not comply with the corrective action, the Sponsor proposes termination and disqualification from the Child and Adult Care Food Program.
The sponsor must send the provider written notice of the adverse action that is subject to appeal.

This notice must

• Fully describe the serious deficiency
• Specify the corrective action required to resolve the serious deficiency and specify the deadline date by which corrective action must be made; and
• State that the serious deficiency determination is not subject to appeal.
Must state that failure to fully and permanently correct the serious deficiency by the deadline will result in:

- proposed termination of the provider’s agreement for cause, and
- proposed disqualification of the provider.
• Must inform provider if she/he will receive CACFP payments during the period of corrective action

• Must state that if the provider voluntarily terminates her/his agreement after receiving the notice, the sponsor will still proceed with the proposed disqualification.
Unless a provider’s participation has been suspended for serious health or safety violations, the Sponsor must continue to pay valid claims for reimbursement for eligible meals served until the provider’s agreement is terminated, including the period of any appeal.
The serious deficiency must be corrected within 30 days.

There is no provision that allows additional time for corrective action.
However – no corrective action is allowed BEFORE suspension for imminent threat to health or safety.
The law makes no provision for the suspension of participation for a provider whom the sponsor believes has submitted a false or fraudulent claim.

It's important to note that a home's promise not to submit false information again does NOT constitute adequate corrective action.

The opportunity for corrective action gives the provider time to demonstrate:

• That the sponsor has made an administrative error;
• That the sponsor has confused two providers with similar or identical names; or
• That the information submitted by the home was not, in fact, false.
Now – what must the sponsor do if a provider has submitted a false or fraudulent claim?

**ANSWER:** deny the claim. If the claim in question has already been paid, the sponsor must recover the payment.

The sponsor must never reimburse providers for invalid claims.

**Q:** Must the entire claim be false in order for the sponsor to call this a “false claim”?

**A:** No. If the sponsor knows that a portion of the claim is false, that portion of the claim must be disallowed.
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An Example of False or Fraudulent Claims

- Four enrollment forms, three children in care.
- Claiming 5-7 children for 3 months
- No explanation
- Provider is declared Seriously Deficient
- While corrective action and appeal occur, the invalid portion of the provider's claims must not be paid.
Unannounced follow-up review recommended

Refer to Nebraska Management Standards: Provider Serious Deficiencies & Corresponding Corrective Action Plan
If serious deficiency is corrected

- Notify provider & state agency

If serious deficiency is **not** corrected

- Notice of Proposed Termination/placement on National Disqualified List is sent to provider & state agency

Notice of Proposed Termination/placement on National Disqualified List is sent to provider & state agency
Propose to terminate agreement for cause
Propose to disqualify provider
Basis for actions = inadequate corrective action
Notice of Proposed Termination/Disqualification

- Procedures for appeal
- Status of program payments
- Voluntary termination = disqualification

Procedures for appeal
Status of program payments
Voluntary termination = disqualification
Status of Program Payments

- General rule: Program participation, including Program payments, continues during the serious deficient process
- One exception
  - Suspended providers
- Sponsors must always deny invalid claims
Provider decides to appeal

- Provider must submit request for administrative review/hearing within time frame specified by sponsor
- Provider & sponsor submit documentation to hearing official
- Hearing official reviews the record or sets date for in-person hearing
The person hearing the appeal must be

**Independent**

**Impartial**

This means that the person must NOT have been involved in the action that is the subject of the appeal. Also, they must NOT have a direct personal or financial interest in the outcome.

The hearing official may be

- An employee or board member of the sponsor,
- A contractor, such as a member of a statewide sponsor association.

Sponsors must make every reasonable attempt to ensure that the hearing official does not have a real or apparent conflict of interest that would affect their ability to render an impartial decision.

There would be at least a potential conflict where the person hearing the appeal is supervised by the person making the original decision. It isn’t too difficult to avoid such conflicts in large multipurpose organizations where the CACFP is one of many of the sponsor’s activities.

However, it is more difficult to show impartiality where the sole purpose of the organization is to sponsor homes on the CACFP.

Appeals may be heard by an individual or by a group of individuals.

In Nebraska, the state agency and its employees do NOT serve as hearing officials for sponsors. Some sponsors have decided to use an employee of another sponsoring organization to serve as its hearing officer.
Role of the hearing officer:

1. Review the evidence, documentation and testimony
2. Remain objective
3. Determine if the sponsor complied with regulatory procedures
4. Issue a decision based on the facts, not opinion or feelings
Review of record or hearing

- Review all evidence and testimony
- Issue decision in writing
  - Decision sent to provider and sponsor at same time
The hearing official is being asked:

Has the program requirement been properly applied?

NOT

Do you agree with the requirement?
In-person hearings

- Allow both sides to present their case, introduce evidence, call witnesses
- Keep proceedings on track
- Maintain decorum
In-person hearings

- Remain objective
- Tape record proceedings, if desired
- Don’t issue your decision at the hearing
Resources for hearing officers

- Federal Regulations 7 CFR 226
- Copy of sponsor/provider agreement
- Copy of sponsor's appeal procedures
Resources for hearing officers

- Copy of sponsor’s manual or handbook for providers
- Copies of sponsor’s administrative memos or other communication to providers
Provider fails to appeal

Hearing official rules in favor of sponsor
Removal from the National Disqualified List
- Generally removed after 7 years
- Two exceptions:
  - If SD is permanently corrected, removal before 7 years
  - If provider still owes a debt after 7 years, will remain on list until repaid
Applying after Disqualification

- What if a provider is on National Disqualified List?
- Sponsor is **not** required to:
  - Offer provider an appeal
  - Assist provider with removal from National Disqualified List
How Long?

- Provider is placed on the National Disqualified List or on a state agency list prior to July 29, 2002, will remain for 7 years.

- Must remain on the list until July 29, 2009: longer if a debt is still owed.
Question?

What if the provider wins the appeal?
Answer

- Notify provider/state agency
- Remove the seriously deficient determination
Question?

Wouldn’t it be simpler to allow the home to terminate for convenience after serious deficiency is declared?
Answer

Easier, but the provider could participate with another sponsor
Question?

Who is the action taken against when the provider is incorporated—the provider or the corporation?
Answer
Both
Question?
Can a sponsor permit more than 30 days for corrective action?
Answer

NO
Questions

- Will homes be notified they are off the National Disqualified List after 7 years?
  - No. This is not required.
And justice for all . . .

Thank you for your contributions to maintaining integrity in the Child and Adult Care Food Program.