



*A National Platform for the Child and Adult Care Food Program Community.*

May 23, 2016

Andrea Farmer, Chief, School Meal Programs Branch  
Policy and Program Development Division,  
Child Nutrition Programs  
Food and Nutrition Service  
Department of Agriculture,  
3101 Park Center Drive,  
Alexandria, Virginia 22302-1594

Re: Comments on Proposed Rule - DEPARTMENT OF AGRICULTURE Food and Nutrition Service 7 CFR Parts 210, 215, 220, 225, 226 and 235 RIN 0584-AE08 Child Nutrition Program Integrity

Dear Ms. Farmer,

The National CACFP Sponsors Association (NCA) would like to commend the USDA on the proposed codification of the Program Integrity Rules authorized by the Healthy, Hunger Free Kids Act of 2010. We agree that strong internal controls, sound program management systems and a complementary system of accountability for state agencies and institutions are needed for all child nutrition programs. NCA and its membership base do, however, express multiple concerns for several sections of the proposed rules.

Foremost, our primary concern is the application of the CACFP Serious Deficiency process in its current state to the SFSP and to unaffiliated centers that report to a sponsoring organization. There are many areas of the process that have been identified as dysfunctional that have not been fully addressed by USDA (*Report to Congress: Reducing Paperwork, in the Child and Adult Care Food Program*, August 2015, pp. 34-36). The current process needs a thorough reevaluation and the Undersecretary indicated in his remarks in Orlando at the 30<sup>th</sup> Annual NCA Conference, April 2016 that their regulation changes were forthcoming. While this statement is hopeful, NCA has concern about expanding this current model which does not support the program nor fully and effectively protect integrity.

NCA and its members beg for clarification and improvement prior to the implementation of the Serious Deficiency process in other federal child nutrition programs. Specifically, under the current rule base, process definitions for “fully and permanently corrected” are absent and hence subjective, without a timeframe, and arbitrary. Additionally, the ability for state agencies to “temporarily defer” the seriously deficient determination is deeply flawed in terms of a fair due process. The lack of federal definition standards creates regulatory uncertainty, disincentives to program participation, and the potential for abuse of powers. Regarding “temporary deferral” if a proposal to terminate is appealed and the hearing official sides with the sponsoring institution or

the site, the determination should be nullified. Under the current system, the designation of serious deficiency is still ""temporarily deferred," even when the institution has been determined not to be seriously deficient in its operation of the program by an independent judicial branch. This deferral leaves institutions in jeopardy for funding from other sources, and places a stigma on the institution and its officers and governing body.

In addition, current guidance removes an independent evaluation for examining the nature or validity of findings during an administrative hearing. CACFP 02-2015, November 21, 2014, clarifies that the role of the administrative review (hearing) official does not include validating the serious deficiency determination or verifying whether corrective actions submitted by the institutions fully and permanently corrects Program violations. In practical terms, current USDA guidance subverts the fair hearings process for determination of validity of findings.

The absence of a process to determine if the serious deficiency itself is valid and the inability to address this alleged finding prior to an appeal or hearing may require the institution to “correct an area of cited non-compliance” that may not actually be a deficiency that rises to the standard of severe or systemic mismanagement of the Program. Under the current process, institutions risk termination from participation for questioning the validity of state program findings.

NCA also shares its concern about the impact on the SFSP of the application of a heavy, problematic process. SFSP differs from CACFP significantly in its operating timeframe, scope, population served, delivery model, procedures, and sophistication. Imposing the CACFP Serious Deficiency process could imperil the SFSP in terms of expansion and access of the SFSP, and the desirability of institutions to operate the Programs. From NCA’s experience, many experienced and qualified CACFP operators, notable and competent multi-program institutions (YMCA, Catholic Charities, Lutheran Social Services, Camp Fire and Boys and Girls Clubs) along with many day care homes exited CACFP when the serious deficiency process was initiated under the program integrity reforms that expanded the serious deficiency process.

In summary, while the preamble and program guidance suggest the application of the Serious Deficiency process for severe program mismanagement, and program guidance requires “State agencies must establish procedures to distinguish between administrative errors and “Serious Deficiencies”, definitions of terms are not used in the proposed regulation itself and are inconsistent across states.

NCA urges USDA to address the Serious Deficiency process before application across program lines because many of the proposed rules may exclude or hinder participation in the SFSP and the CACFP. In addition we have a strong sense that school systems will also choose to not sponsor SFSP as well as the CACFP At Risk afterschool programs, due to the potential of harm to the NSLP if a mistake is made that becomes subjectively serious. Therefore, it is imperative that the process be updated to address the real issues of improper use or abuse of the program, and recognize differences in improper use and possible human error prior to implementation.

Our secondary concern is that some of the proposed regulatory methods create additional administrative burden and create levers of control with no effective outcomes. We believe that some of the proposed regulations are not the best approach and could be a waste of public

resources while not addressing substantive issues which are the root of the integrity challenges. Additionally, NCA recommends that USDA conduct more frequent reviews of state agency operations, than the regulatory every five year review period, as needed, to ensure that sound management practices are utilized to protect the integrity of the program.

Specifically, NCA hopes USDA will reconsider portions of the regulations cited below for improvement of federal child nutrition programs:

***In Section 303, Fines for Violating Program Requirements***, fines and penalties are authorized by the Healthy, Hunger Free Kids Act of 2010 for state agencies and school food authorities. We agree that those state institutions and school food authorities that have not performed according to federal regulations established for the programs, or have not met federal compliance plans or not completed corrective action plans established by USDA should have financial incentives for improved management performance. We agree that USDA lacks any authority or financial incentives to administer the program outside of policy guidance and management reviews that have no significant consequences for state agencies. NCA understands Congressional intention for this section of the Act to meet USDA's need for a system of fines to incentivize school food authorities and state agencies for defying the nutrition rules given that nearly all funding is federal. We concur that the Act imposes new requirements on states and schools that implement child nutrition programs. Those requirements are intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) specifically and explicitly for school authorities and state agencies, but not private individuals or organizations. NCA also understands that the Act does not authorize for the imposition of fines and penalties by state or federal agencies for sponsoring organizations, day care homes or unaffiliated centers which are not school food authorities or state agencies as suggested by the proposed rules.

The justification cited for the rationale in the **Background and Discussion of the Proposed Rule**, *Review of management Controls in the CACFP Final Report, November 2011*, and the *Child Care Assessment Project Final Report Final Report 2009*, did not prescribe or recommend fines or penalty assessments as a cure for program wrongdoing. In fact, this OIG report cited "the controls implemented by FNS in response to our prior recommendations were not operating as prescribed." These controls included "a failure to employ the serious deficiency process" by state agencies as stated in the *Child Care Assessment Project Final Report 2009*.

Additionally, no CBO estimate was provided in the Act for the imposition of fines and penalties for entities other than school food authorities and state agencies. Herein is the CBO estimate for the Act that applies to CACFP: "Child and Adult Care Food Program (CACFP). The bill makes several changes to the Child and Adult Care Food Program that would expand participation or alter the way the program is administered. In total, CBO estimates that this legislation would increase direct spending for CACFP by \$737 million over the 2011-2020 period."

It is clearly not the express intent of the HHFKA that the proposed fines are levied on CACFP program operators. USDA legislative and public testimony did not hint at the need for the imposition of fines for CACFP entities at U.S. Senate public hearings on December 8, 2008, March 4, 2009, March 31, 2009, nor November 17, 2009. We believe this proposal is a lapse in transparency by USDA, and NCA will work with Congress to explore other opportunities to help its members understand the legal reasoning behind USDA penalties.

Furthermore, in addition to lack of congressional intent, OIG recommendations, and legislative testimony, NCA is troubled that USDA has not disclosed penalty guidelines nor the actual breakdown of how penalties for violations are structured and calculated as required by 2015 Unfunded Mandates and Information Transparency Act. In an era of increasing regulatory burdens, it is imperative to understand the methodology behind potential disciplinary actions where fines are a component. The public has a right to know how fines are calculated for potential violations. If USDA desires to impose fines and penalties on sponsoring organizations, day care homes or unaffiliated centers, NCA urges USDA to seek enabling legislation for that specific purpose. However, in the future, we would support additional Congressional legislation that imposes financial fines and penalties for criminal activity for all federal child nutrition programs, including CACFP.

Aside from the deficiencies in the stated rationale for fines and assessments for entities other than school food authorities and state agencies, NCA's rationale for opposition to the proposed extension of fines and penalties is that current procedures already exist to deal with program operators who are found not compliant. This current process provides tools to address nonfeasance, misfeasance and malfeasance by institutions. We also posit that because these institutions and principals are already subject to the Serious Deficiency process, management incentives are already in place for these institutions to build a culture of compliance. NCA also has additional program integrity concerns about the extension of these broad state financial powers for the imposition of fines that may encourage commercial bribery, collusion, misapplication, and abuse.

For school authorities and state agencies, the intended entities for fines and penalties, NCA posits that fines should be limited to a percentage of the program dollars for the specific program found out of compliance. NCA notes a discrepancy in the preamble on whether state agencies can be assessed based on SAE funds or meal reimbursement. The Act makes clear the prescription. We prefer an assessment on the SAE for state agencies, and not the entire program funding stream that includes program reimbursement, and only the portion of SAE that applies to the specific program in violation.

- **In Section 331(b): State Agency Sponsor Review Requirements**, NCA does not agree with the proposed provisions. The proposed rules do not adequately define which institutions are at risk of program mismanagement nor do they provide definitions of severe mismanagement. We believe a better approach is to focus on institutions with significant problems found in previous reviews and/or allow for review averaging by state agencies.

We agree that independent centers that are only reviewed by state agencies every three years are at high and substantial risk of having serious management problems due to lack of annual required training, and lack of state oversight and these facility types should be reviewed more frequently during initial participation and thereafter.

Finally, NCA is concerned that the additional criteria for a proposed indicator for mismanagement by labeling an “increase in the number of homes/centers or claims” is not accurate and not necessarily an indicator of mismanagement. We understand that some states currently use this criteria and it has resulted in good sponsors being targeted for amending claims to recover overpayments, or request additional benefits for children. The additional proposed indicator of program growth is likewise not an accurate indicator. For example, a well-run organization that has an effective recruitment program would be penalized if new sites were added, and significant is not defined. In addition, it is the well-run sponsoring organization that often inherits a “significant” number of homes or centers from another organization that has not performed well. Larger sponsors may file multiple claims in a month so as to process claims based on the receipt date from the facility and pay sites in batches. Sponsors that perform edit checks routinely may also need to file amended claims.

- **In Section 332: State Liability for Payments to Aggrieved Child Care Institutions**, NCA has multiple concerns about the current lack of due process in the “prompt determination” of actions by state agencies. This proposed regulation attempts to address procedures for termination that “must include a provision for a fair hearing and prompt determination for any service institution aggrieved by any action of the State agency that affects the participation of the service institution in the SFSP or the claim of the service institution for reimbursement”. The proposed regulation does not address the timely notification of review findings. In some cases, state agencies have not provided notification of review findings to institutions for up to 24 months after the initial review. These delays unduly prejudice institutions ability to defend state agency findings for proposed adverse action. Delays in notification endanger the program and lessen the integrity of the program.

We urge USDA to consider expanding the definition of “prompt” to include a set parameter for the communication of review findings. Institutions need to be notified in a timely manner to take appropriate corrective action. We also urge USDA to set time parameters for state agency responses to corrective actions submitted by institutions. Again, timely notification and resolution of management issues is a crucial component of a system of accountability. Additionally, we urge USDA to provide an intermediate step to appeal state agency review findings as recommended in the Report to Congress, August 2015. An intercession method for review could eliminate timely and costly administrative delays and expensive litigation.

- **Section 362 of the HFFKA: Disqualified Schools, Institutions, and Individuals**, Section 362 makes any school, institution, service institution, facility, or individual that has been terminated from any Child Nutrition Program and who is on the CACFP or SFSP National Disqualified List ineligible for participation in or administration of any Child Nutrition Program. We are concerned that school districts and other sponsoring entities will be disinclined to sponsor the SFSP or CACFP if it jeopardizes their agreements for the National School Lunch Program. We believe fewer children will have access to the Program due to this provision unless the serious deficiency process allows for a review of the finding, and if it is only reserved for severe or egregious mismanagement. This terminology should be reflected in the regulation itself rather than just the preamble.
- **In State Agency administrative responsibilities [(226.6)(k)(11)]**, the 60-day timeframe is intended to provide those seeking administrative review with a prompt determination while protecting the use of Federal funds against noncompliant entities. Thus, the Department is requesting comments on the 60-day timeframe and any modification which would meet State needs without compromising the need for a timely decision for the appellant and maintaining CACFP integrity.

According to the preamble, in 2010 only 25% of sampled State agencies were able to meet the 60 day requirement. By 120 days the remaining states had finished the proceedings and had a decision. There is no indication in the preamble for the reasons for failure to perform, whether by nonfeasance or lack of financial incentives to meet federal requirements according to current regulations. NCA does believe, however, that the current framework is too tight and does not adequately serve state agencies or sponsors. Sponsors have struggled to secure and inform legal counsel in too many instances in a short period of time to prepare for an appeal. This current timeline is prejudicial for sponsors, NCA supports extending the appeals timeline to 90 days from the current 60 days. NCA also supports a timeframe of 120 days before the State agency is responsible for paying valid claims with non-federal funds. By only paying valid claims, the risk to federal funds is minimized. A thorough evaluation of records to support the validity of claims protects the use of Federal funds from noncompliant entities.

- **In Section 335: CACFP Audit Funding** In reference to the changes envisioned by section 335, and the Department proposal to amend § 226.4(j), NCA supports these changes to “technical changes correct the misuse of the phrase ‘Program reimbursement provided to institutions’ in reference to the Program funds used to conduct audits. We urge USDA to ensure that state agencies can still pass through audit funds to institutions if they desire to do so and have audit funds available. NCA supports the use of audit funds for state agency hiring of independent, third-party auditors to conduct institutions’ single independent audits or reimbursing auditors for their services. USDA has proposed that state agencies may request an additional .05% for audit funds to strengthen program integrity. NCA supports the use of these additional audit funds to assist program operators currently not receiving program audit funds for single independent audit. We

believe that federal funds should not be returned to the US Treasury when those audit funds could be used to improve the program.

- ***In Serious Deficiency and Termination Procedures for Sponsored Centers in the CACFP***, NCA's concern with the lack of uniformity in the serious deficiency and termination procedures for child care centers and day care homes compliments NCA's call that a new process should be equal in measure for both day care homes, independent centers, and sponsored unaffiliated entities. Currently, unaffiliated centers are not part of the same legal entity as sponsoring organizations just as day care homes operate their businesses independently of a sponsoring organization and are not legally controlled by sponsoring organizations.

However, there is one major difference here to consider in terms of service delivery and monitoring. The day care home must report to a sponsoring organization in order to receive CACFP funding and the day care home sponsor is paid an administrative fee to provide the oversight. The unaffiliated child care center is actually choosing to pay the sponsoring organization an administrative fee to provide service to the center. There are instances of mismanagement that the sponsoring organization will deem egregious and move toward serious deficiency; however, the current implementation of the process as it has been applied to homes and institutions could result in a child care center being processed as seriously deficient for instances of human error, when compliance monitoring is part and parcel of the service the facility is indeed paying the sponsor to do. The sponsor's role is to find errors and disallow if necessary and offer continued technical assistance. In the proposed rule, the State may choose to find the sponsor seriously deficient for not implementing the serious deficiency process when the role of the sponsoring organization is technical assistance versus finding the site seriously deficient. NCA asserts that the sponsoring of unaffiliated child care centers increases the oversight of facilities and therefore the overall integrity of the program. This process, if not implemented cautiously has the potential to move the sponsored sites away from the sponsoring organization back to the state agency, where the site will then be predictably reviewed only every three years. We recommend that the serious deficiency process for homes and centers be reserved for very serious issues such as severe noncompliance issues, repeated and intentional failure to meet meal patterns, fraud, falsification of records and overpayments. The wording of "severe and substantial" should be added to the proposed rule definition and applied to all entities including day care home. Again, NCA implores USDA to fix the serious deficiency process and not apply it until corrected.

In regards to the SFSP, we have the following comments:

- ***In Section 225.6(c) Content of sponsor application***, NCA expresses the need for access to the SFSP National Disqualified List (NDL). If the proposed regulation creates a standard by which termination from one child nutrition program results in being banned from applying for any child nutrition programs in the future, we need access to the SFSP NDL to maintain program integrity on the same technology platform as CACFP and any other NDL.

- **In Section 225.11(c) Expansion of serious deficiencies**, while NCA understands the rationale of the proposed 10 day rule for completion of corrective action, we call into question the short span of time and the aforementioned timely notification of review findings as a nearly impossible timeframe for notification, corrective action, and review of corrective action. The duration of the program is short, and while we support a shorter corrective action timeframe, 10 days may not be appropriate depending on the nature of the deficiency. Additionally, each serious deficiency should have its own timeline for corrective action. For example, institutions may be able to readily correct a food service contract requirement on food quantities in a quick and satisfactory manner but a weak financial management system cannot likely be corrected in ten days.
- **In Administrative actions for program violations in the Summer Food Service Program (SFSP) [225.11(f)]**, the proposed rule requires the State agency to issue an immediate proposal to terminate a sponsor if a serious deficiency recurs. NCA opposes this wording. However we support FNS’ suggested revision which would provide the State agency with discretion in determining the appropriate action. NCA supports the following wording; “if the State agency initially determines that the sponsor’s corrective action is complete, but later determines that the serious deficiency has recurred, the State agency may move immediately to issue a notice of termination and proposed disqualification, or when appropriate, restart the serious deficiency process”. NCA recommends that this discretion extend to the current 226.6(c)(1)(iii)(B) and 226.6(c)(2)(iii)(B) for CACFP.
- **In Section 225.11(f) Successful corrective action**, NCA believes it would be more effective to restart the serious deficiency process with State Agencies each time rather than immediately disqualify. Each potential serious deficiency requires a separate course of action and corrective action plan and timeframe for the specific finding.
- **In Section 362: Disqualified Schools, Institutions, and Individuals**, NCA requests clarification on the protocol to distinguish between a potentially seriously deficient sponsor and a potentially seriously deficient site. Sponsoring organizations may have a limited number of problematic or deficient sites in comparison to the overall number of sponsored program sites. Institutions should not be declared seriously deficient unless the indication of mismanagement is systemic and severe for the organization as a whole.
- **In 226.25 Other Provisions**, there is no indication in the regulatory language that the issues must be severe or show an integrity problem. With no appeal available for a review of findings for institutions, the result could be a fatal improper state action for an institution based on a single misunderstanding of the rules. Without an appeal or mediation mechanism, this decision could never be reversed.
- **In Financial Reviews of Sponsors in the CACFP in the CACFP [226.7(b)(1)]**

USDA has identified deficiencies in the state administrative review process and has proposed standardization of institution reviews. We support this standardization and

move for consistency across all states. In this proposed section posturing prevails over intellect in addressing the substantive issues which are the root of the problem. We believe that standardization will enhance accountability for state performance in administration of the program where weak or fraudulent operators continue to flourish. USDA needs to refocus its management evaluations on an in depth analysis of state administration of the program by examining appeals made for program reviews, disposition of appeals, settlements, and court records which can indicate nonperformance or substandard performance, or nonfeasance by state administrative officials. NCA also believes USDA should review state agency action and referrals for criminal prosecution for program wrongdoers where fraud and program abuses have occurred. While the current administrative process for removal of fraudulent program operators is in many cases effective in removing those institutions from participation, nonfeasance for criminal referral for prosecution undermines program integrity.

NCA opposes the requirement of an annual review of the bank account activity for one month for all sponsoring organizations because this methodology is not an effective use of existing resources. An annual state review of a month of bank statements is not a sound financial audit practice. This proposed methodology is an undue administrative burden that increases paperwork for the state agency and the institution and is unlikely to result in the desired effect. Additionally, this item is uncharacteristically overly prescriptive in explicitly requesting bank statements. Modern finances include credit cards, cash, sweep accounts, lines of credit, and other financial transactions that would not be meaningfully represented in a bank statement.

As a counterproposal, NCA recommends that state agencies change review priorities to tie invoices to bank statements in a targeted edit check during the state agency review process for the tested program months, including bank statements, invoices and accounting records. Our counterproposal for this proposed methodology does not require a forensic accounting specialist. In the 2011 OIG Review of the Management Controls in the CACFP 2011, page 1 of the Executive Summary, OIG stated: "By asking the sponsors to provide documents that supported bank transactions for a specified period, we identified significant unallowable expenditures by sponsors". This statement in context applies to the review of invoices and receipts during an administrative review, not the submission of one month of an annual bank statement with no other documentation. The OIG report also cited "In this follow-up audit, nothing came to our attention to indicate that, except in two cases, the controls implemented by FNS in response to our prior recommendations were not operating as prescribed". The recommendation by OIG, which NCA supports, stated: "Require State agencies, during reviews, to verify a selected month (or more as warranted) of a sponsor's CACFP bank account activity against documents adequate to support that the transactions meet program requirements." USDA concurred with this recommendation by OIG but the proposed rule does not reflect the full methodology of the recommendation by OIG in the 2011 Report.

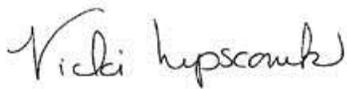
The current proposal discusses the "appearance" of financial impropriety for referral to investigative authorities. Here again, we have a concern with abuse of the process where no wrongdoing is present, only unsubstantiated allegations or perceptions. This type of

process and thinking can and likely will wreak havoc on program operators when non-financial trained reviewers make assessments. This proposed methodology has the potential to grind the CACFP infrastructure to a halt based on concerns that are ancillary to the core mission of the program. There are better alternatives to the methodologies for application on the front end by fixing the state agency review process which was identified as the source of failure in the proposed rules.

Program integrity is of the utmost importance to NCA and we consider our member organizations as partners in assuring that federal child nutrition programs are well managed, accountable and accessible to children. NCA appreciates the opportunity to comment on USDA's continuing efforts to improve program integrity throughout all child nutrition programs. NCA implores that USDA will closely follow legislative intent and the recommendation by its own Office of Inspector General, and thoughtfully consider the Association's comments. NCA hopes that the final rules will provide increased program participation for children in food insecure environments while still maintain the high level of program integrity we deserve.

Respectfully submitted on behalf of the NCA Board of Directors and NCA membership.

Sincerely yours,

A handwritten signature in cursive script that reads "Vicki Lipscomb".

Vicki Lipscomb  
President,  
National CACFP Sponsors Association (NCA)