

702 KAR 6:100. Appeal procedures for nutrition and health services programs.

RELATES TO: KRS 156.070(5), 156.160(1)(f), 7 C.F.R. 210.18(q), 215.11, 220.13(f)(2), 225.13, 226.6(k), 42 U.S.C. 1761, 1766(e), 1772
 STATUTORY AUTHORITY: KRS 156.070(5), 7 C.F.R. 210.18(q), 225.13

NECESSITY, FUNCTION, AND CONFORMITY: KRS 156.070(5) requires the Kentucky Board of Education to promulgate administrative regulations governing the operation of programs within the Department of Education. 7 C.F.R. 210.18(q) and 225.13 require the board to establish an impartial and fair appeals procedure for the federal nutrition program. This administrative regulation establishes the appeals procedure for a sponsor of a federal nutrition program.

Section 1. Actions that May be Appealed. (1) A school food authority that sponsors the National School Lunch Program, the Special Milk Program or the School Breakfast Program may appeal the denial of all or part of a claim for reimbursement arising from administrative or follow-up review activity.

(2) A sponsor of the Child and Adult Care Food Program, including an independent center or sponsoring organization on behalf of a facility under its jurisdiction, and responsible principals and responsible individuals, may appeal the following adverse actions:

- (a) Denial of a new or renewing institution's application for participation;
- (b) Denial of an application submitted by a sponsoring organization on behalf of a facility or site;
- (c) Notice of proposed termination of participation of an institution or facility or site;
- (d) Suspension of an institution's agreement;
- (e) Denial of an institution's application for start-up payments;
- (f) Denial of an advance payment;
- (g) Denial of all or part of a claim for reimbursement;
- (h) Notice of proposed disqualification of a responsible principal or a responsible individual;
- (i) Recovery of all or part of an advance in excess of the claim for the applicable period;
- (j) Decision by the Department of Education not to forward to Food and Nutrition Service (FNS) an exception request by an institution for payment of a late claim, or a request for an upward adjustment to a claim;
- (k) Demand for the remittance of an overpayment; or
- (l) Any other action of the Department of Education affecting the participation of an institution in the program or the institution's claim for reimbursement.

(3) A program sponsor or a food service management company (FSMC) participating in the Summer Food Service Program for Children may appeal the following adverse actions:

- (a) Denial of an application for participation;
- (b) Denial of a sponsor's request for an advance payment;
- (c) Denial of a sponsor's claim for reimbursement;
- (d) Refusal of a state agency to forward to FNS an exception request for payment of a late claim or a request for an upward adjustment to a claim;
- (e) A claim against a sponsor for remittance of a payment;
- (f) Termination of the sponsor or a site;
- (g) Denial of a sponsor's application for a site; or
- (h) Denial of a food service management company's application for a registration or the revocation of a food service management company's registration.

Section 2. Filing An Appeal. (1) A program sponsor, responsible principal, or responsible individual aggrieved by an adverse action of the Division of Nutrition and Health Services (the "division") may appeal the action by filing a timely request for an appeal. The request shall be filed with the Director, Division of Nutrition and Health Services, Department of Education, 2545 Lawrenceburg Road, Frankfort, Kentucky 40601.

(2) The request shall be in writing and clearly state:

- (a) The name and address of the program sponsor;
- (b) The name and title of the person who signed the request;
- (c) The adverse action being appealed, the basis of the appeal, and the relief or remedy sought;
- (d) The date of the letter or other written communication from the division notifying the program sponsor of the proposed adverse action, and the name and title of the division official who signed the letter or communication; and
- (e) If a hearing before a hearing officer is desired, the desire for a hearing.

(3)(a) An appellant program sponsor may submit written information in support of its position when it files its appeal and request for a hearing. Except as provided in paragraph (b) of this subsection, it may also submit additional written information to the designated hearing officer up to thirty (30) calendar days after receipt of the division notice of adverse action.

(b) If the appellant program sponsor is the Summer Food Service Program, it may submit additional written information in support of its position up to seven (7) calendar days after filing the appeal and request for a hearing.

Section 3. Appeal Timelines. (1) The request for appeal shall be postmarked or received by the division prior to midnight of the fifteenth calendar day (or tenth working day if the Summer Food Service Program) after receipt of the notice of adverse action. If the 15th day (or tenth working day if the Summer Food Service Program) falls on a Saturday, Sunday, or federal legal holiday, the request shall be timely if it is postmarked or received the next day which is not a Saturday, Sunday, or federal legal holiday.

(2) The division shall acknowledge receipt of the request for an appeal within ten (10) days of its receipt of the request.

(3) Any information on which the division's action was based shall be available for inspection by the institution and the responsible principal and responsible individual from the date of receipt of the request for an appeal.

Section 4. Appeal Procedures. (1) The division shall forward any request for appeal to the Director, Division of Administrative Hearings, Office of the Attorney General. The request for appeal shall be accompanied by a copy of the notice of adverse action sent by the division.

(2) During the appeal process, a program sponsor, responsible principal, responsible individual or food service management company shall:

- (a) Self-represent;
 - (b) Be represented by legal counsel; or
 - (c) Be represented by another person.
- (3) The fair and impartial administrative hearing procedures of KRS Chapter 13B shall apply.
- (4) If a hearing is requested:

- (a) Except as provided in subsection (7) of this section, the institution, the responsible principal and responsible individual, and the

Department of Education shall be provided with at least ten (10) days advance notice of the time and place of the hearing;

(b) If the institution's representative or the responsible principal and responsible individual or their representative fail to appear at the scheduled hearing, the right to a personal appearance before the designated hearing officer shall be waived unless the designated hearing officer agrees to reschedule the hearing; and

(c) A representative of the state agency shall be allowed to attend the hearing to respond to the testimony of the institution and the responsible principal and responsible individual and to answer questions posed by the designated hearing officer.

(5) The designated hearing officer shall make a determination based solely on the information provided by the state agency, the institution, and the responsible principal and responsible individual and based on federal and state laws, administrative regulations, and policies and procedures governing the program.

(6) Except as provided in subsection (7) of this section, within sixty (60) days of the Department of Education's receipt of the request for an appeal, or ten (10) days if the matter under appeal is a suspension of participation, the designated hearing officer shall inform the Department of Education, the institution's executive director and chairman of the board of directors, and the responsible principal and responsible individual of the outcome of the appeal.

(7) If the appellant is the Summer Food Service Program:

(a) The notice of the time and date of the hearing shall be provided at least five (5) days prior to the hearing, with the notice sent by certified mail, return receipt requested;

(b) The hearing shall be held within fourteen (14) days of the date of receipt of the request for an appeal and hearing, but not before the appellant's written documentation is received;

(c) Within five (5) working days after the appellant's hearing, or within five (5) working days after receipt of written documentation if no hearing is to be held, the designated hearing officer shall make a determination based on a full review of the administrative record, and inform the appellant of the outcome of the appeal by certified mail, return receipt requested; and

(d) The Department of Education's action shall remain in effect during the appeal process except if it is an appeal of termination. If it is an appeal of termination:

1. Participating Summer Food Service Program sponsors and sites may continue to operate the program during the appeal, except as provided by subparagraph 3 of this paragraph;

2. Reimbursement shall be paid for meals served during the appeal process if the appeal results in the overturning of the Department of Education's decision; and

3. Continued program operation shall not be allowed if the Department of Education's action is based on imminent danger to the health or welfare of children. If the Summer Food Service Program sponsor or site has been terminated for this reason, the Department of Education shall specify this in its notice of adverse action.

(8) Pursuant to 7 C.F.R. 210.18(q)(9), 220.13(f)(2), 225.13(b)(12) and 226.6(k)(5)(x), the decision of the hearing officer shall be the final administrative determination.

(9) If an application to participate in the program was denied, the determination of the hearing officer shall either sustain the denial or shall direct that the appellant be approved for limited or full participation.

(10) If all or part of a claim for reimbursement, start-up payment, advance payment, or demand for refund of any overpayment was denied, the determination of the hearing officer shall either sustain the action under appeal or specify the amount of the claim for reimbursement, start-up payment, advance payment, or refund of overpayment to be paid.

(11) If an appellant's participation in the program was terminated, the determination of the hearing officer shall either sustain the termination or shall direct that the appellant be permitted to continue participation in the program. (25 Ky.R. 1768; Am. 2149; eff. 3-1-1999; 31 Ky.R. 1893; 32 Ky.R. 74 eff. 8-5-2005; 33 Ky.R. 896; 1321; eff. 12-1-2006; 36 Ky.R. 1527; 2058-M; eff. 4-2-2010.)