NATIONAL CACFP SPONSORS ASSOCIATION

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

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Autumn McCain
Program Monitoring Branch
Program Monitoring and Operational Support Division
Child Nutrition Programs
USDA Food and Nutrition Service
3101 Park Center Drive
Alexandria, Virginia 22302

Dear Autumn,

Thank you for the opportunity to provide insight on the USDA FNS Request for Information: The Serious Deficiency Process in the Child and Adult Care Food Program.
ID: FNS-2019-0035-0001

We applaud USDA Food and Nutrition Service for asking for public comments to gather feedback about the successes, challenges, potential benefits, and negative impacts associated with the application of the Serious Deficiency (SD) process.

The National CACFP Sponsors Association (NCA) is a national platform for the Child and Adult Care Food Program (CACFP) and our community membership includes over 60,000 people nationwide from sponsoring agencies, child care centers, family home providers, schools and afterschool programs, and state agencies. As part of the Association's efforts to provide responses based on membership consensus, we surveyed our members for each of the questions presented in the RFI by the USDA. We have included the data with our response. Of the respondents, 37.5 percent were family home sponsors, 36.36 percent were child care center sponsors, 34.09 percent were independent child care centers, and the remainder were afterschool meal sponsors, family child care providers, and state agencies.

We believe that when non-compliance in the CACFP is severe, the SD process is reasonable and appropriate. However, it needs clarification in critical areas as well as additional and thorough, guidance, training and technical assistance from USDA FNS.

We strongly believe that the SD process should be transparent and consistent across states, and should be used to address severe and pervasive issues of program non-compliance that critically impact program integrity. It should not apply when addressing minor infractions which are often human error and can be corrected with training and technical assistance.

We would like to see the Serious Deficiency designation become appealable and have a statute of limitations. Currently, it is only temporarily deferred and there is no opportunity for minor violations to be erased from an institution's file. Therefore, a future instance of the same minor infraction at any time, ever, could result in termination.

We fear that the SD process limits CACFP participation by providers, centers, afterschool programs, and potential sponsoring organizations who are not willing to risk their professional reputation due to minor, non-systemic, administrative errors.

We have specifically addressed the questions in the RFI.

Are determinations of serious deficiency and resulting corrective actions:

a. Reasonable and commensurate with the severity of the non-compliance issues they are intended to address?

When the non-compliance is severe, the SD process is reasonable and appropriate. A slight majority (50.59%) of our respondents indicated determinations of serious deficiency and corrective actions were commensurate with the severity of the non-compliance, and 56.63% agreed that the SD process achieved positive outcomes of permanent correction of non-compliances.

Most of the caveat comments by survey respondents indicated that, unfortunately, minor infractions receive the same level of consequences. State agencies have a wide variance of execution of the serious deficiency process. For example, one state has a "three-strikes and you are out" rule. If a provider does not have her menus up to date by one day during the sponsor visit, the provider is placed on a corrective action plan (CAP). If the same occurrence happens 3 years later, the sponsor is directed to make the provider seriously deficient. Seven years later, if the provider does not record her menus for one day, the sponsor must propose termination. Because SD's are only temporarily deferred, there is no opportunity for the minor violations to be erased from the providers file. Though the regulation allows for frequency and severity of a compliance issue to be used in determining the severity of the consequences for the provider, there are no standards set for State Agencies (SAs) to use. Therefore, the definition of frequency and severity vary greatly from state to state. A provider can be placed on the National Disqualified List for seven years for not having menus up to date three times in ten years, which is the same penalty for someone who has intentionally defrauded the program for millions of dollars.

b. Effective in achieving positive outcomes, including timely and permanent correction of noncompliance issues?

Our members believe that the CAP corrects non-compliance issues. However, we know independent centers who have chosen to terminate the food program with the SA because of the risk of another occurrence. With the Chairman of the Board of a center at risk of being placed on the NDL for minor infractions, centers may be directed to leave the food program or choose not to participate in the first place. If the SD process is modified to define frequency and severity and allow "recension" (as opposed to a temporary deferment of the SD), the CAP option can resolve most, if not all, minor infractions. In addition, it is important to ensure that permanent correction of a non-compliance issue does not mean that the facility or sponsor may never make another minor mistake again. An example would be if a sponsoring organization were made SD for incorrect classifications of a number of income forms during a review, then, at a future review, there may be one mistake on one form. Most SA's would now say that the problem was not "permanently corrected", where in reality, the system changes did correct the prior problem, yet human error may still come into play.

Is the serious deficiency process consistently implemented?

Among States?

Only 15% of survey respondents indicated that the process was implemented consistently among states beyond their own. A large majority (68.24%) indicated they had no knowledge of the consistency. An analysis of Survey comments indicated that with each state being able to interpret the current SD regulations, there is very little consistency. For example, one state found a sponsor SD because the sponsor used an old Income Eligibility Form (IEF). This form was still on the SA's website. The sponsor was declared SD, even though the current and correct income guidelines were used in determining whether a child was in the free, reduced or paid category. The sponsor received a substantial fine as all children's meals from the date of the IEF until the time of the review were reclassified as paid. While a sponsor may appeal the financial action, they cannot appeal the SD. Then even if the SD is "deferred" the sponsor could not appeal the appropriateness of the SD itself. Since only proposed terminations can be appealed, the sponsor had no recourse. The RO supported the SA.

Within your State?

Only 31.76% of Survey respondents stated that within their own state, there was consistency on application of the process and 55.29% indicated they had no knowledge of the application of consistency. As there is little to no transparency, sponsors and independent centers are unaware of what occurs with other independent centers or sponsors. Some information can be gleaned through published court cases but generally sponsors do not have a full picture of whether state agencies are implementing the regulations consistently. This information should be examined and evaluated during federal management evaluations. We would like to suggest an internal federal study of consistency of the application of the process.

By sponsoring organizations within your state?

Those states with strong sponsor associations are more cognizant of implementation consistency. However, there are many sponsoring organizations that do not use the SD process and have never found a provider seriously deficient or ever made a referral to the NDL. Only 30.49% of Survey respondents indicated there was consistency. This low rate of confidence may show a lack of consistency in application and little to no SA oversight whether sponsors are using the process to improve the program or to remove bad performers.

Describe your decision-making process as it relates to determinations of serious deficiency.

a. How do you decide that a given non-compliance issue or combination of non-compliance issues rise to the level of a serious deficiency?

Often this is determined by the level of seriousness unless a state agency dictates otherwise. Training and technical assistance are typically offered first. If unsuccessful, the second step is usually the creation and implementation of a CAP. SD would be the third step. Non-compliance issues should rise to the level of serious deficiency if a pattern is established and every effort has been utilized to train the provider to eliminate errors. Many times, disallowing providers for their mistakes not only offers opportunity for additional training but is an incentive to follow through with training and work towards full compliance without having to issue a corrective action or SD. Therefore, it is crucial to determine when there is an SD, including what measures automatically result in a finding of SD and how to differentiate between a reasonable margin of human error and systematic or intentional non-compliance.

b. What factors weigh most heavily?

The gravest factors in determining if a provider should be declared SD are imminent threat to the health and safety of the children, significant fraud, frequency and severity of the issue including if it was systemic, and the length of time between infractions.

c. Who is involved in the decision-making process?

Depending on the size of the organization, the process may include the Executive Director, Compliance Manager, Monitor, and/or the Advisory Board.

What could be done to bring further clarity and consistency to the administrative review (appeal) process?

a. Which definitions or operational provisions related to the serious deficiency process in 7 CFR 226 need additional clarification?

226.16(l)(3)(i)(E) That failure to fully and permanently correct the serious deficiency(ies) within the allotted time will result in the sponsoring organization proposed termination of the day care home's agreement and the proposed disqualification of the day care home and its principals, and

226.16(l)(2)(ix) Any other circumstance related to non-performance under the sponsoring organization-day care home agreement, as specified by the sponsoring organization or the State agency.

Further guidance on the definition of "permanently". It is important to have more clarification on the definition of frequency and severity. This is very subjective and not implemented consistently across all states or sponsorships. Additional guidance in defining frequency and severity as well as systemic are needed.

The verbiage "any other circumstance" leads to a broad interpretation and may permit an SD for minor infractions and human error.

b. What areas of training would be most beneficial?

Consistent training is crucial to the success of any program. Create SD training for the USDARO's, who in turn train the SA's and the sponsors. This would create and maintain consistency and reasonableness between states and sponsors. However, no amount of training will help if the process continues to be used for minor infractions.

c. What types of technical assistance resources would be most useful?

State by state additional requirements should be made available to independent centers and sponsors of homes, and affiliated and unaffiliated centers. This would be most useful as a technical assistance resource. Though there are currently no regulations defining the SD process for sponsors of unaffiliated centers, this has not stopped states from implementing their own regulations.

Other Considerations

One of the most impactful changes that could be made to the SD process would be to permit SD's to be appealable. A substantial majority (85.37%) of the Survey Respondents indicated that a serious deficiency should be able to be appealed because of the potential misapplications of federal policy regulations by state agencies cited in corrective actions or administrative error in program reviews, and/or misstatements of facts. Current regulations only allow appeals after the proposed termination has occurred. When an SD has been issued using erroneous information, it requires a great deal of time, energy and effort to submit a CAP and have the CAP accepted. A corrective action plan based on erroneous information, misapplication of policy or nonfactual statements must be completed, or the SA, sponsor or provider will be proposed for termination. The current system provides no due process This also leaves an SD on the permanent record.

By defining frequency and severity, fewer providers and sponsors will end up on the NDL list for minor, non-systemic infractions. To not be allowed to participate on the CACFP for 7 years for missing 3 days' worth of menus and attendance over a ten-year period is punitive and counterproductive. This severe administrative action should only be used as extreme measures for serious non-compliance. A reasonable margin of error should be established for all but the most grievous infractions. Permit technical assistance and CAPs prior to an SD determination.

Members surveyed indicated overwhelmingly (84.38%) that hearing officers were fair and impartial. The respondents indicated that there are still challenges, reporting that Hearing Officers are often inadequately trained. Their lack of knowledge of program rules and requirements results in unfair and biased determinations. Part of the bias is inherent in the current program guidance for due process promulgated by USDA. The USDA SD handbook says in Part 8, A – "Basis for decision. The hearing official must make a determination solely on the information provided by the sponsoring organization and the DCH, and on Federal and State laws, regulation, policies, and procedures governing the Program." There are sponsors who have been told that the hearing officer can only determine if the sponsoring organization followed the process correctly. If the sponsor followed the process correctly, the hearing official must support the sponsors decision to terminate the provider instead of allowing information for the DCH to be included.

State agencies need an option to terminate or withdraw an application without using the SD process. While we have previously commented on the Proposed Integrity Rule that SA's should not be able to terminate an institution for "convenience", it would be helpful if they had a step by step process to terminate an open application. An example would be if an institution closed its doors and failed to communicate with the SA. Currently, the SA would move through the SD process in order to remove the site from their books. Later, the center reopens and discovers they are on the NDL, for seven years due to their lack of communication

Guidance and regulations should include clarity on the required measures for noncompliance, including an allowance for a reasonable margin of error. 81% of our Survey respondents indicated that USDA should establish an error rate for administrative errors. Survey respondents indicated that serious deficiency should not be the first step of a corrective action unless it is for health or safety issues for children in care, or potentially fraudulent actions that require immediate action. The predominant response was that serious deficiency should be the last step of the corrective action process after training and technical assistance protocols have been implemented. A distinction between a reasonable margin of error and systematic/intentional non-compliance and state-specific requirements compliance is not an appropriate criterion for SD. A process for elevating and mediating disputes over State-specific requirements through USDA is needed. An SD should not be levied against a provider or institution for non-compliance of SA's additional requirements. Because state actions cannot be appealed at the finding level, the current system does not contain sufficient due process protections for institutions to prevent state administrative errors or incorrect policy applications.

Finally, as referenced in the Report to Congress: Reducing Paperwork in the Child and Adult Care Food Program, we urge USDA to: A) Define standards to measure the severity of problems and distinguish between human error and systemic or serious non-compliance. B) Extend the deadline for home care providers to complete corrective action for 30 days to 90 days. C) Shorten the 7-year timeframe for disqualification from CACFP. D) Establish a standard practice with specific steps for requesting reinstatement. E) Create a process for elevating and mediating disputes through USDA. F) Explore alternative dispute resolution approaches.

In closing, NCA believes that the serious deficiency policies and processes can be improved through policy and process changes in addition to providing more training and technical assistance to state agencies and institutions. Additional work is necessary in defining severity, frequency and permanence. Such changes identified in our comments will provide more transparency, higher standards of due process and more consistency and clarity for operators of the CACFP. NCA is committed to working with USDA to identify specific training areas that would be most beneficial to improving the process. Thank you for the opportunity to submit our comments on such an important topic.

Sincerely, on behalf of the entire board of the National CACFP Sponsors Association Board of Directors,

Senta Hester
President