

August 6, 2019

Brandon Lipps
Administrator
Food and Nutrition Service
U.S. Department of Agriculture
3101 Park Center Drive
Alexandria, Virginia 22302

RE: Docket ID FNS-2019-10308

Dear Mr. Lipps:

Thank you for the opportunity to provide comments in response to the U.S. Department of Agriculture's Request for Information: The Serious Deficiency Process in the Child and Adult Care Food Program, 84 Fed. Reg. 96 (May 17, 2019).

The Food Research and Action Center (FRAC) is the leading national nonprofit organization working to eradicate poverty-related hunger and undernutrition in the United States. We provide coordination, training, technical assistance, and support on nutrition and anti-poverty issues to a nationwide network of advocates, service providers, program administrators and participants, and policymakers.

FRAC agrees with USDA, the goal of the serious deficiency process is to address severe and pervasive issues of non-compliance through a clear structured set of steps providing an opportunity for corrective action and due process. Stakeholder experience indicates there are regulatory, policy, and implementation barriers to a consistently fair and effective serious deficiency process. We offer the following answers in response to USDA's request for information questions.

Are determinations of serious deficiency and resulting corrective actions reasonable and commensurate with the severity of the non-compliance issues they are intended to address?

Determinations of serious deficiency are not always reasonable and commensurate with the severity of non-compliance the system was intended to address. Stakeholders have reported instances of sponsoring organizations, child care centers, afterschool programs, and family child care homes being found seriously deficient for relatively minor errors.

Rather than “severe and pervasive issues of program non-compliance” the reasons cited for serious deficiency in these cases include minor clerical errors in record keeping, low error rates for claiming/applications, and failure to comply with new state requirements implemented without advance notice.

Program operators with limited English proficiency, low literacy, or lower levels of education are more likely to make repeated paperwork errors, which may unfairly lead to being declared seriously deficient and terminated. As a consequence, the programs and providers will lose CACFP, and subsequently, other educational or child care program funding when they are placed on the national disqualified list.

Stakeholder experience indicates there are regulatory, policy, and implementation barriers to a fair and effective enforcement system which consistently delivers determinations of serious deficiency that are reasonable and commensurate with the intended severity of non-compliance. The barriers will be addressed throughout these comments. Key regulatory barriers include:

- An overly broad definition of what constitutes a serious deficiency, and
- No mechanism for “fully and permanently” resolving a successfully corrected serious deficiency.

Overly broad definition of what constitutes a serious deficiency: The regulations fail to focus specifically on “severe and pervasive issues of program non-compliance.” There are no standards to measure the severity of problems and distinguish between human error versus serious noncompliance that is severe and substantial. The failure of the current requirements to distinguish between human error and intentional noncompliance has led to the termination of programs and providers from CACFP for reasons unrelated to serious and deliberate violations of program requirements.

No mechanism for “fully and permanently” resolving a successfully corrected serious deficiency: The option to “fully and permanently” resolve a successfully corrected serious deficiency was eliminated. With no option to fully resolve or “close-out” a corrected serious deficiency, it remains a threat to the family child care provider, sponsor, site, center, or afterschool program. Under the current system, if the same mistake is ever made again the organization and/or individuals will be automatically terminated and placed on the National Disqualified List. Eliminating the option to “rescind” a serious deficiency and requiring immediate termination and disqualification for similar deficiencies has not been a successful regulatory change.

Is the serious deficiency process consistently implemented?

The USDA Paperwork Reduction Work Group report, “Report to Congress: Reducing Paperwork in the Child and Adult Care Food Program” identified a problem with a lack of consistency across states and in some cases within states. Stakeholders report that there are wide differences in how State agencies and sponsoring organizations implement the serious deficiency process. These inconsistent policies and actions are informed by a number of factors including:

- Failure to abide by the intended **purpose** of the serious deficiency process,
- Misinterpretation of what constitutes a serious deficiency, and
- Additional state requirements.

Failure to abide by the intended purpose of the serious deficiency process: In some cases, the serious deficiency process is employed as a general way to direct program operators or sponsors to make improvements. It is not reserved for serious non-compliance but rather as an all-purpose process for dealing with non-compliance. It is counterproductive to force programs into the complex and potentially perilous serious deficiency process rather than offering technical assistance, training and monitoring. At each step, those with oversight should choose the least intrusive preventative and corrective strategies aimed at helping organizations or programs achieve and maintain compliance.

Misinterpretation of what constitutes a serious deficiency: There can be significant variation in what is deemed a serious deficiency. Some policies and monitors fail to correctly categorize the results of a review based on the scope and severity of the problem. As a result, sponsoring organizations and program operators have been declared seriously deficient for findings that do not represent serious program violations. The Child Nutrition and WIC Reauthorization Act of 2004 established a \$600 disregard for overpayments by sponsoring organizations and schools in order to relieve USDA and State agencies of the financial and administrative burden associated with collecting small overpayments. Notwithstanding this disregard, there have been sponsors declared seriously deficient for very small errors in overpayments (e.g. \$6.00). A serious deficiency should constitute a severe and pervasive issue of program non-compliance. Employing the serious deficiency process for something less, wastes resources and unnecessarily jeopardizes benefits for children.

Additional state requirements: Additional state requirements can sometimes be the source of inconsistencies and conflict. This is particularly problematic when

noncompliance with the disputed state requirement is cited as a serious deficiency. There is no process to mediate disputes over additional state agency requirements.

Currently, there is limited recourse for sponsoring organizations and program operators found seriously deficient based on these inconsistencies. The serious deficiency determination itself cannot be appealed, nor can the corrective action steps. In addition, there is no mediation process for review findings including additional state requirements.

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

FRAC recommends the following improvements to bring further clarity and consistency to the process:

- Define standards to measure the severity of problems and distinguish between human error versus serious noncompliance that is “severe and substantial.”
- Restore the option to “fully and permanently” resolve a successfully corrected serious deficiency rather than only be allowed to “temporarily defer” it.
- Allow a separate course of action and timeframe for each serious deficiency.
- Expand the list of appealable actions to include a finding of serious deficiency, corrective action steps, and additional state requirements that conflict with USDA regulations or guidance.
- Establish a mediation process to resolve differences in interpretation and implementation of requirements.
- Ensure serious deficiency notifications and explanations reflect the literacy level and primary language of the provider.
- Require State agencies and sponsoring organizations to hire independent fair impartial professional hearing officials for CACFP hearings.
- Allow hearing officials to exercise judgment and fully assess serious deficiency cases.

Summer Food Service Program

FRAC commends USDA's effort to implement the recommendations made by commenters in the proposed rule, Child Nutrition Program Integrity, 81 FR 17563. As USDA points out in this request for information, "Comments on the proposed rule suggested that prior to making the operations of any other Child Nutrition Program subject to the serious deficiency process, FNS should further investigate and attempt to address potential inconsistencies in the implementation of the process across States." As USDA's planning process proceeds it will be important to also focus on the comments in the proposed rule (Child Nutrition Program Integrity, 81 FR 17563) concerning the importance of designing a serious deficiency system adapted to the unique challenges of the Summer Food Service Program: short timeframes, volunteers and short-term employees, the potential for more variability in attendance, and the informal nature of community-based, faith-based program operations intended to attract neighborhood families.

We appreciate USDA's work to guarantee the Child Nutrition programs are operated with integrity, and to preserve the good reputation of the programs with the public and policy makers.

Thank you for your consideration of these comments.

Sincerely,

Geraldine Henchy, MPH, RD
Director of Nutrition Policy and Early Childhood Nutrition Programs
Food Research and Action Center