

**To:** Authorized Representatives of School Nutrition Programs

**From:** Child and Adult Nutrition Services

**Date:** September 9, 2019

**Subject:** Procedures for School Food Authority Request for an Appeal for the School Nutrition Programs

**Memo Number:** SD\_SNP 226-1

This memo replaces National School Lunch Program (NSLP) memo 54. The purpose of this memo is to explain the appeal process in the School Nutrition Programs (National School Lunch Program, School Breakfast Program, Afterschool Snack, Special Milk Program, and Fresh Fruit and Vegetable Program) per 7 CFR 210.18(p), 215.11, and 220.13(f)(2). Questions about this memo can be referred to SD Department of Education (SD DOE) Child and Adult Nutrition Services.

The **State agency** (SA) is Child & Adult Nutrition Services which is a part of the SD Department of Education.

The **School Food Authority** (SFA) is an entity which has entered into agreement with the SA through an application process and has a signed agreement on file.

The **Review Official** is the person who receives an appeal and makes a determination based on information and evidence. The Review Official for SD DOE is assigned by the Secretary of the Department of Education and is usually the Administrative Hearings Office, though it can be assigned to others as needed based on workload and the need to meet the timeliness of the appeal.

- 1. Definitions.** USDA Regulations use the terms appeal, review, and in-person hearing. For purposes of this memo and procedures:
  - **Appeal** is the general term whereby an SFA is requesting that a higher authority take a look at the adverse action taken against the SFA. This can be accomplished by a Review of Records or an In-person Hearing.
  - **Review of Records** is one alternative in the appeal process. This involves asking the Review Official (the higher authority) to look at records from the State Agency (SA) and the School Food Authority (SFA) to determine if the action taken against the SFA was correct or if it can be eliminated or reduced.
  - **In-person Hearing** is a second alternative in the appeal process. This involves asking the Review Official (the higher authority) to listen to representatives from the appealing agency in addition to looking at records provided by the SFA. Representatives from the

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State agency would also be at the in-person hearing and allowed to speak and present documents.

## 2. Actions That Can Be Appealed.

- a) **Claims for Reimbursement:** In accordance with 7 CFR 210.18(p), a School Food Authority (SFA) on behalf of a facility under its jurisdiction, may request a review *or* an in-person hearing of the denial of all or a part of a Claim for Reimbursement or withholding payments arising from administrative review activity conducted by the State agency (SA). Additional authority for this action is found in specific School Nutrition Program regulations ([7 CFR 210.24, 215.11, 215.15, 220.13, and 220.18](#)).
- b) **Performance-based Reimbursement:** Per US Department of Agriculture (USDA) Food and Nutrition Service (FNS) [memo SP 26-2014](#), an SFA can request a review *or* an in-person hearing of the SA action to turn off or recover the six cents performance-based reimbursement.
- c) **Serious Noncompliance, Suspension, and Termination:** In accordance with 2 CFR 200.341, an SFA can request a review *or* an in-person hearing of the SA action to any remedy for non-compliance if an SFA fails to comply with Federal statutes, regulations or the terms and conditions of a Federal award and the State agency imposes additional conditions, as described in [2 CFR 200.207](#). Remedies for noncompliance include (per [2 CFR 200.338](#)):
  - (1) Temporarily withholding cash payments pending correction of the deficiency by the State agency.
  - (2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.
  - (3) Wholly or partly suspend or terminate the Federal award.
  - (4) Initiate suspension or debarment proceedings as authorized under 2 CFR part 180 and Federal awarding agency regulations (or in the case of a pass-through entity, recommend such a proceeding be initiated by a Federal awarding agency).
  - (5) Withhold further Federal awards for the project or program.
  - (6) Take other remedies that may be legally available.
- d) **Termination:** In accordance with [2 CFR 200.339-200.342](#), an SFA can request a review *or* an in-person hearing of the SA action to terminate the Federal award. Termination may be in whole or in part by the State agency if the SFA fails to comply with the terms and conditions of the Federal award or for cause.

The actions that can be reviewed or appealed by the SFA as listed in this section is hereinafter referred to as adverse action. Written notification of the SFA's right to review *or* an in-person hearing action will accompany the written communication of adverse action from the State agency.

## 3. Filing a Request for an Appeal Through a Review of Records.

- A. SFAs are afforded the right to appeal adverse action from the SA through a review of the records with the right to file written information. An SFA aggrieved by adverse action from the

SA may request a review of such action by filing a timely request for an appeal-Review of Records, as outlined in this section.

B. The request for a Review of Records must:

- 1) be written (i.e., it cannot be handled through a phone call),
- 2) state the name, address, and contact information of the SFA,
- 3) include the name, title, and signature of the authorized representative of the SFA. It need not be signed under oath.
- 4) It must specify that this is a request for review of records,
- 5) clearly identify the adverse action activity or activities being reviewed, the basis of the SFA's appeal, and the relief or remedy sought. And
- 6) include the date of the letter or other such written communication from the SA notifying the SFA of the proposed adverse action, with the name and title of the SA official who signed such letter or communication.

C. The request for Review of Records must be mailed to, or filed with, the Secretary of Department of Education, 800 Governors Drive, Pierre, SD 57501-2235.

D. The written request for a Review of Records must be postmarked or received by the Secretary of Education within 15 calendar days, by midnight Central Time (CT) zone of the 15<sup>th</sup> day after receipt of the notice of adverse action. If the 15<sup>th</sup> day falls on Saturday, Sunday, or federal legal holiday, the request will be considered timely if it is postmarked or received the next day which is not a Saturday, Sunday, or federal legal holiday.

#### **4. Content of Request for an Appeal Through an In-Person Hearing.**

A. SFAs are afforded the right to appeal adverse action from the SA through an In-person Hearing before the Review Official and submit written documentation in support of its position by filing a timely request for a review, as outlined in this section. An SFA aggrieved by adverse action from the SA may request a review of such action by filing a timely request for an appeal-In-person Hearing, as outlined in this section.

B. The request for an In-person Hearing must:

- 1) be in writing (i.e., it cannot be handled through a phone call),
- 2) state the name, address, and contact information of the SFA,
- 3) include the name, title, and signature of the authorized representative of the SFA. It need not be signed under oath.
- 4) It must specify that this is a request for an In-person Hearing,

- 5) clearly identify the adverse action activity or activities being appealed, the basis of the SFA's appeal, and the relief or remedy sought, and
  - 6) include the date of the letter or other such written communication from the SA notifying the SFA of the proposed adverse action, and the name and title of the SA official who signed such letter or communication.
- C. The request must be mailed to, or filed with, the Secretary of Department of Education, 800 Governors Drive, Pierre, SD 57501-2235.
  - D. The written request for an In-person Hearing must be postmarked or received by the Secretary of Education within 15 calendar days, by midnight Central Time (CT) zone of the 15<sup>th</sup> day, after receipt of the notice of adverse action. If the 15<sup>th</sup> day falls on Saturday, Sunday, or federal legal holiday, the request will be considered timely if it is postmarked or received the next day which is not a Saturday, Sunday, or federal legal holiday.

#### **5. State Agency (SA) Procedures for Handling an Appeal.**

- A. The SA will receive and log each appeal. If the request is timely, the Secretary of the Department of Education will assign the review to a designated Review Official.
- B. The SA will acknowledge all requests for appeals in writing within 10 calendar days of receipt. The SA will notify successful appellants, which Review Official has been assigned to review their case and where they may send additional written information. If it is an In-person Hearing, the Review Official will supply a Notice to Appear with information regarding date, time, and location. Additional documentation may be provided at that time.
- C. In order to be considered for an appeal, written documentation must be filed with the Review Official not later than 30 calendar days after the appellant received the notice of adverse action.
- D. In an In-person Hearing, the SFA may represent itself, may retain legal counsel at its own expense, or may be represented by another person. A hearing shall be held by the Review Official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for an appeal.
- E. In an In-person Hearing, failure of the appellant SFA's representative to appear at a scheduled hearing shall constitute the appellant SFA's waiver of the right to a personal appearance before the Review Official, unless the Review Official agrees to reschedule the hearing. A representative of the SA shall be allowed to attend the hearing to respond to the appellant's testimony and to answer questions posed by the Review Official.
- F. If the SFA has requested an In-person Hearing, the SFA and the SA shall be provided with at least 10 calendar days advance written notice, sent by certified mail, or its equivalent, or sent electronically by email or facsimile, of the time, date and place of the hearing.
- G. In a Records Review or In-person Hearing, any information on which the SA's action was based shall be available to the appellant SFA for inspection from the date of receipt of the request for review.

H. The Review Official in either a review or appeal shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section.

**6. Determination of the Review Official.**

A. The Review Officer shall make a written determination base upon

- 1) Written information submitted by the SA;
- 2) Written information submitted by the SFA in support of its position;
- 3) Such additional written information as may be obtained by the Review Official from any other person or persons having relevant and pertinent information;
- 4) Information presented orally under oath at a hearing; and
- 5) Program regulations, Guidance, and Policies.

B. Within 60 calendar days of the SA's receipt of the request for an appeal by written notice, sent by certified mail, or its equivalent, or electronically by email or facsimile, the Review Official shall inform the SA and the appellant SFA of the determination of the Review Official. The final determination shall take effect upon receipt of the written notice of the final decision by the SFA.

C. The State agency's action shall remain in effect during the review or appeal process.

D. The determination by the State Review Official is the final administrative determination to be afforded to the appellant. It is not subject to further appeal or reconsideration.

**1. Legal Advice.**

If an appeal and request for administrative review involves any doubtful questions of law, the Review Officer will obtain the advice of the Office of the Attorney General, State of South Dakota.