

**NEW YORK STATE EDUCATION DEPARTMENT
SUMMER FOOD SERVICE PROGRAM
APPEAL PROCEDURES**

I. ACTIONS UNDERTAKEN UNDER THE SUMMER FOOD SERVICE PROGRAM WHICH CAN BE APPEALED TO NEW YORK STATE DEPARTMENT OF EDUCATION

1. In accordance with the federal regulations of the Summer Food Service Program (SFSP) which establishes the minimum criteria for SFSP appeals, the New York State Education Department (SED) observes many of those standards as well as state agency standards and has established these appeal procedures to be followed when a SFSP Sponsor requests an appeal of an administrative action taken by the Child Nutrition Program (CNP). SED reserves the right to adhere its appeal process to any subsequent amendments to federal regulations or state agency procedures at SED's discretion.
2. 7 CFR §225.13 allows for appeals for the following actions:
 - a. **Denial of the application for participation;**
 - b. **Denial of a request for an advance payment;**
 - c. **Denial of a timely claim submittal for reimbursement;**
 - d. **Denial by the state agency to forward to FNS an exception request from the sponsor for payment of a late claim or a request for an upward adjustment of a claim;**
 - e. **Claims against a sponsor for recovery of overpayment;**
 - f. **Termination of the participation of a sponsor or sponsor's site;**
 - g. **Denial of a site application.**

*****Appeals are not allowed on decisions made by the Food and Nutrition Service with respect to late claims or upward adjustments under 7 CFR §225.9(d) (5).**

****** Appeals are not allowed on Seriously Deficient determination in accordance with USDA guidance.**

******* The standard of review is whether the State Agency's Notice of Action is arbitrary and capricious based upon the information and documentation the Sponsor provided prior to the Notice of Action.**

******* The appellant has the burden of proof to show that the determination of the department was incorrect, arbitrary and capricious or in violation of program statutes, regulations and guidance.**

3. The Sponsor's authorized official shall be advised in writing of the grounds upon which the state agency based the administrative action. The state agency notice of action shall be sent by certified mail, return receipt (or the equivalent private delivery service), by facsimile, or by email to the Sponsor's authorized official recognized by SED at the last known mailing address, facsimile number or email address. The notice of action shall also

include a statement indicating that the sponsor has the right to appeal the action of the state agency.

II. PROCEDURE FOR FILING AN APPEAL

1. All appeal requests must be postmarked by the U.S. Postal Service (or the equivalent private delivery service) or delivered to the CNP office **within 10 calendar days of receipt** of the state agency notice of action. **The notice of action is considered to be received when it is first delivered to the sponsor's authorized official at the last known address by certified mail, return receipt (or the equivalent private delivery service), by facsimile, or by email.** If the 10th calendar day falls on a Saturday, Sunday, or federal holiday, request will be timely if it is postmarked or delivered the next business day which is not a Saturday, Sunday or federal legal holiday. If the notice is undeliverable, it is considered to be received five days after being sent to the sponsor's authorized official's last known mailing address, facsimile number, or email address. Nothing contained in this section is intended to extend the deadline for appeal requests beyond 10 calendar days of receipt of the notice of action. **Untimely appeals will not be considered and will be returned to the Sponsor.**

2. The appeal request **must clearly identify the state agency action being appealed and be signed by the Sponsor's authorized official or school administrator recognized by SED.** If the Sponsor has designated another person, consultant or agent to represent its appeal interests, the sponsor must provide written authorization of the same. If the Sponsor has retained legal counsel, a letter of representation must accompany the appeal request. A photocopy of the state agency notice of action must accompany each appeal request.

3. The Sponsor has two appeal options. It can request a review of documentation upon submission of such documentation to the Impartial Hearing Officer (IHO) (**written appeal**) or it can request a **hearing** before the IHO, which is informal and will be held in NYSED's Albany Office. The Sponsor must **clearly state** in its appeal request which type of appeal it is seeking.

4. The Sponsor is required to refute the charges contained in the state agency notice of action by clearly stating its arguments and objections to the charges contained in the notice of action and provide documentation such as statutes, regulations and guidance supporting the sponsor's arguments and objections. This is known as Discovery. **Additional documentation, including but not limited to CNP records, reports and documentation to support CNP operations, not previously provided at the time of a CNP review or as part of a final corrective action plan shall not be considered.** Such discovery shall be submitted with the Sponsor's appeal request, or the Sponsor must indicate in its appeal request that such documentation will be filed **with the IHO within 7 calendar days after submitting the request for review.** **Failure of a sponsor to respond** to the charges contained in the state agency notice of action and provide their arguments, objections and discovery within the specified timeframes shall result in the SFA being precluded from submitting those arguments, objections and discovery at hearing.

5. A Sponsor shall be afforded the opportunity to review any information obtained by the state agency upon which the notice of action was based by submitting such discovery requests to the IHO. However, information relating to the selection of the sponsor for audit, investigation notes or other material which may reveal investigation techniques, material prepared for submission to the IHO in preparation for an appeal or confidential information need not be revealed. The Sponsor's and State Agency's arguments, information and discovery shall be

provided **simultaneously** to each party in accordance with discovery deadlines established by the IHO. **Neither side is required to provide documentation and discovery prior to the simultaneous discovery deadlines established by the IHO.** Requests for rebuttal may be made at the IHO's discretion. Post hearing briefs are impermissible. Any new allegations, belated assertions or arguments in rebuttal documentation or at hearing that have not been previously advanced shall not be considered unless the IHO determines otherwise. Adjournment of discovery deadlines can be made at the request of either party.

6. All appeal requests must be sent to the following email or physical address:

ATTN: Appeals Coordinator
The New York State Education Department
Child Nutrition Program Administration
89 Washington Avenue, Rm 375 EBA
Albany, NY 12234
CN-Appeals@nysed.gov

III. ASSIGNMENT OF AN IMPARTIAL HEARING OFFICER AND SUBMISSION OF DOCUMENTATION

1. Upon receipt of an appeal request the CNP Appeals Coordinator will assign an IHO to decide the appeal.
2. The IHO will immediately acknowledge the Sponsor's appeal and require the parties to submit documentation pursuant to the timeframes established by the IHO. In the acknowledgment letter, the IHO will seek approval from the parties to use facsimile or email throughout the appeal process. The IHO may schedule the hearing as part of the acknowledgment letter. If the acknowledgment letter scheduled a hearing, the parties may request an adjournment if needed. After receipt of the acknowledgment letter, the parties must immediately bring procedural concerns to the IHO's attention. **The Sponsor and the CNP must copy each other on all submissions.**

IV. HEARING

1. Pursuant to 7 CFR §225.13, if the Sponsor requested a hearing, it should be **held within 14 days** from the date the IHO receives the request for review but not before the Sponsor's written documentation is received by the IHO. The hearing may be held at a later date upon request from either party or in the event of scheduling conflicts.
2. Pursuant to 7 CFR §225.13, the IHO will provide the parties with **at least 5 day advance written notice** of the time, date and location of the hearing, sent by certified mail, return receipt requested, if the parties did not otherwise agree to the use of facsimile or email.
3. The parties may retain legal counsel or be represented by another person at the hearing. If the Sponsor has designated another person, consultant or agent to represent its appeal interests, the sponsor must provide written authorization of the same.
4. Failure of the Sponsor or Sponsor's representative to appear at a scheduled hearing shall constitute its waiver of the right to a personal appearance before the IHO. A representative of the state agency shall be allowed to attend the hearing to respond to the Sponsor's testimony and written information and to answer questions from the IHO.

5. The informal appeal procedures do not include motion practice. Stenographic transcripts are not required. The formal rules of civil procedure may not apply. The IHOs are not bound by the rules of evidence governing courts in New York State. IHOs have the discretion to include hearsay evidence that is relevant and determine witness credibility. Irrelevant and unduly repetitious testimony will be excluded. Post hearing briefs are impermissible.

V. THE HEARING OFFICER'S DECISION

1. The IHO shall make a decision to uphold, reverse, or modify the state agency's action based on a review of the documentation and information provided by the Sponsor and the state agency, and on program regulations. The IHO's determination is the final administrative determination to be afforded the Sponsor and is effective upon receipt by the Sponsor.
2. The IHO's written determination shall be sent to the Sponsor and to the state agency by certified mail, return receipt requested, by facsimile or by email **within 5 days** after the close of the hearing or **within 5 days after receipt** of the Sponsor's supporting documentation if no hearing is conducted unless good cause for delay can be demonstrated.
3. **The state agency's action shall remain in effect during the appeal period.** However, participating Sponsors and sites may operate the program during the appeal period **AT THEIR OWN RISK**. If the appeal results in overturning the state agency's decision, reimbursement shall be paid for meals served during the appeal period provided the sponsor can demonstrate CNP program compliance in accordance with CNP rules, regulations and guidance. The sponsor is required to maintain and produce all records relating to CNP program operations in accordance with CNP requirements. If the appeal does not result in overturning the state agency's decision, no reimbursement shall be made. However, such operation under the program shall **not be allowed** if the state agency's action is based on **imminent danger to health or welfare of children,** including but not limited to health, safety and sanitation determinations made by federal, state or local government agencies. If the sponsor or site has been terminated for this reason, the state agency shall so specify in its notice of action.