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**TO:** Members of the State Board of Education

**FROM:** Karen B. Salmon, Ph.D.

**DATE:** March 28, 2017

**SUBJECT:** COMAR 13A.06.01.02.03  
*Programs for Food and Nutrition*  
**AMEND - PERMISSION TO PUBLISH**

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**PURPOSE:**

To request permission to publish amended regulations that govern the nutrition appeal procedures for Local Educational Agencies (LEAs) and other agencies participating in the federal nutrition programs.

**REGULATION PROMULGATION PROCESS:**

Under Maryland law, a state agency, such as the State Board, may propose a new or amended regulation whenever the circumstances arise to do so. After the State Board votes to propose such a regulation, the proposed regulation is sent to the Administrative, Executive & Legislative Review (AELR) Committee for a 15-day review period. If the AELR Committee does not hold up the proposed regulation for further review, it is published in the Maryland Register for a 30-day public comment period. At the end of the comment period, the Maryland State Department of Education (MSDE) staff reviews and summarizes the public comments. Thereafter, MSDE staff will present a recommendation to the State Board of Education to either: (1) adopt the regulation in the form it was proposed; or (2) revise the regulation and adopt it as final because the suggested revision is not a substantive change; or (3) revise the regulation and re-propose it because the suggested revision is a substantive change. At any time during this process, the AELR Committee may stop the promulgation process and hold a hearing. Thereafter, it may recommend to the Governor that the regulation not be adopted as a final regulation or the AELR Committee may release the regulation for final adoption.

**BACKGROUND/HISTORICAL PERSPECTIVE:**

In April 2014, the Mid Atlantic Regional Office of the United States Department of Agriculture (USDA) conducted a management evaluation of the Summer Food Service Program administered by the MSDE. As a result of that review, the USDA made recommendations to align COMAR regulation with the Code of Federal Regulation 7 C.F.R. Part 225. In addition, terminology was updated to conform to changes in federal standards. The last update of the regulation was in 2011.

**EXECUTIVE SUMMARY:**

The purpose of the proposed amendment updates COMAR 13A.06.02.03 to clarify several dates and State Administrative Hearing procedures specific to the Summer Food Service Program. In addition, the section regarding actions subject to Administrative Hearing by Program was reorganized for greater clarity and additional communications were added to include electronic methods.

**ACTION:**

Request permission to publish the proposed amendments to COMAR 13A.06.01.02.03, *Programs for Food and Nutrition*.

# Title 13A STATE BOARD OF EDUCATION

## Subtitle 06 SUPPORTING PROGRAMS

### Chapter 01 Programs for Food and Nutrition

Authority: Education Article, §§5-206, 5-214, 7-501—7-505, 7-601—7-605, and 7-701—7-704, Annotated Code of Maryland Federal Statutory Reference: 42 U.S.C. §§1751—1762a, 1765, 1766, 1766a, 1769a, 1772, 1773, 1776, 1779, 1788 Federal Regulatory Reference: 7 CFR 210, 215, 220, 225—227, 235, 240, 245, 250

#### **.01 Scope.**

A. Program Standards. The Department shall administer the following food and nutrition programs according to the following federal laws and the implementing regulations, which are incorporated by reference:

- (1) National School Lunch Program, 42 U.S.C. §§1751—1760, 1769a, and 1779, and 7 CFR Part 210;
- (2) Special Milk Program, 42 U.S.C. §§1772 and 1779, and 7 CFR Part 215;
- (3) School Breakfast Program, 42 U.S.C. §§1773 and 1779, and 7 CFR Part 220;
- (4) Summer Food Service Program, 42 U.S.C. §§1758, 1761, and 1762a, and 7 CFR Part 225;
- (5) Child and Adult Care Food Program, 42 U.S.C. §§1758, 1759a, 1762a, 1765, 1766, and 1766a, and 7 CFR Part 226;
- (6) Nutrition Education and Training Program, 42 U.S.C. §1788, and 7 CFR Part 227;
- (7) State Administrative Expense Funds, 42 U.S.C. §§1776 and 1779, and 7 CFR Part 235;
- (8) Cash in Lieu of Donated Foods, 42 U.S.C. §§1751, 1755, 1762a, 1765, 1766, and 1779, and 7 CFR Part 240;
- (9) Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools, 42 U.S.C. §§1751—1752, 1758, 1759a, 1760, 1772—1773, and 1779, and 7 CFR Part 245; and
- (10) Food Distribution Program, 42 U.S.C. §§1751, 1755, 1758, 1760—1762a, and 1766, and 7 CFR Part 250.

#### B. Program Administration.

(1) This chapter applies to the administration of the National School Lunch Program, the School Breakfast Program, the Special Milk Program, the Summer Food Service Program, the Child and Adult Care Food Program, Nutrition Education and Training Program, State Administrative Expense Funds, Cash in Lieu of Donated Foods, Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools, and the Food Distribution Program pursuant to the federal programs standards set forth in this regulation and pursuant to the terms and conditions set forth in the agreements between the State Department of Education and the local educational agencies, and institutions, commercial food processors, and other contractors.

(2) Local educational agencies and institutions participating in the federal programs set forth in this regulation shall maintain a financial management system as authorized by the federal regulations and prescribed by the Department in compliance with the Financial Reporting Manual for Maryland Public Schools Revised 2009, which is incorporated by reference at COMAR 13A.02.01.02C.

#### **.02 Definitions.**

A. In this chapter, the following terms have the meanings indicated.

#### B. Terms Defined.

- (1) "Administrative hearing" means the fair hearing provided upon request to:
  - (a) An institution that has been given notice by the Department of any action or proposed action that will affect their participation or reimbursement under any of the programs listed in Regulation .01 of this chapter, in accordance with 7 CFR §226.6(k) and Regulation .03A of this chapter; or
  - (b) A principal or individual responsible for an institution's serious deficiency after the responsible individual has been given a notice of intent to disqualify them from any of the programs listed in Regulation .01 of this Chapter.
- (2) ["Branch Chief"] "*Director*" means the [Chief] *Director* of the *Office* of School and Community Nutrition Programs [Branch] within the State Department of Education.
- (3) "Department" means the State Department of Education, the State agency designated to administer food and nutrition programs.
- (4) "Institution" means an agency that is participating in or applying to participate in a program.
- (5) "Local educational agency" has the meaning stated in 7 CFR §210.2.
- (6) "National Disqualification List" means the list maintained by the U.S. Department of Agriculture of institutions, responsible principals and responsible individuals, and day care homes disqualified from participation in the Child and Adult Care Food Program authorized by Section 17 of the National School Lunch Act, as amended, in accordance with 7 CFR §226.2.
- (7) "Program" means the National School Lunch Program, Special Milk Program, School Breakfast Program, Summer Food Service Program, or Child and Adult Care Food Program.

#### **.03 Program Hearing Procedures.**

A. Actions Subject to an Administrative Hearing Upon Request. An institution or local educational agency may request a hearing to review the following actions by the Department for:

- (1) Denial of an institution's or local educational agency's application for participation in a Program;
- (2) Denial of an application submitted by an institution or local educational agency on behalf of a facility to participate in the Program;
- (3) Proposed termination of the participation of an institution, local educational agency, or facility in a Program;
- (4) Notice of proposed disqualification of a responsible principal or responsible individual;
- (5) Suspension of an institution's or local educational agency's participation;
- (6) Denial of an institution's or local educational agency's application for expansion funds or start-up payments;
- (7) Denial of an advance payment;
- (8) Recovery of advances;
- (9) Denial of all or part of a claim for reimbursement, except for late submission;
- (10) Denial by the Department to forward to the U.S. Department of Agriculture, Food and Nutrition Service, an exception request by an institution or local educational agency for payment of a late claim or request for an upward adjustment to a claim;
- (11) Demand for the remittance of an overpayment;
- (12) Withholding payment, if applicable; and
- (13) Any other action of the Department affecting the participation of an institution or local educational agency in the Program or the institution's claim for reimbursement under the Program.]

*(1) All Programs.*

- a) Denial of an institution's or local educational agency's application for participation in a Program;*
- b) Denial of an application submitted by an institution or local educational agency on behalf of a facility to participate in the Program;*
- c) Denial of an advance payment;*
- d) Denial of all or part of a claim for reimbursement, except for late submission;*
- e) Denial by the Department to forward to the U.S. Department of Agriculture, Food and Nutrition Service, an exception request by an institution or local educational agency for payment of a late claim or request for an upward adjustment to a claim;*
- f) Demand for the remittance of an overpayment;*
- g) Withholding payment, if applicable;*
- h) Any other action of the Department affecting the participation of an institution or local educational agency in the Program or the institution's claim for reimbursement under the Program and;*
- i) A demand for recovery of funds determined to have been illicitly or inappropriately obtained as determined by a federal audit conducted by the USDA office of Inspector General (OIG) or other authorized audit/oversight agency;*

*(2) All Programs except Summer Food Service Program.*

- a) Proposed termination of the participation of an institution, local educational agency, or facility in a Program;*
- b) Notice of proposed disqualification of a responsible principal or responsible individual;*
- c) Suspension of an institution's or local educational agency's participation;*
- d) Denial of an institution's or local educational agency's application for expansion funds or start-up payments and;*
- e) Recovery of advances.*

*(3) All Programs except Child and Adult Care Food Program: Program participation termination for an Institution or site.*

B. Actions Not Subject to an Administrative Hearing. The following actions are not subject to an administrative hearing:

- (1) U.S. Department of Agriculture decision on claim deadline exceptions and requests for upward adjustments to a claim;
- (2) Determination of serious deficiency;
- (3) Disqualification and placement on the national disqualified list; and
- (4) Termination of participation in the Child and Adult Care Food Program.

C. Notice of Department's Action. The institution or local educational agency shall be advised in writing of the grounds on which the Department based its action affecting the institution's participation in a program, reimbursement, or other actions noted in §§A [and B] of this regulation. The notice of action shall be sent by certified mail[, ] with return receipt requested[.], email and standard mail.

*a) A notice is considered received by the institution or responsible principal or responsible individual when it is delivered, sent by facsimile, or sent by email.*

*b) If the notice is undeliverable, it is considered to be received by the institution, responsible principal or responsible individual five days after being sent to the addressee's last known mailing address, facsimile number, or email address.*

D. Appeal of Agency Action and Request for a Hearing.

(1) Except [as provided in §B of this regulation,] for the Summer Food Service Program, the institution or local educational agency may request an administrative hearing by filing a written request for a hearing with the [Branch Chief] Director of the Department not later than [14] 15 calendar days [from the date of the Department's notice of action.] after the date the notice of action is received. The request for a hearing shall clearly identify the action appealed and contain a brief statement of the reasons for requesting a hearing.

(2) The Department's action shall remain in effect during the hearing process.

(3) Participating institutions or local educational agencies may continue to operate under the Program during the hearing process of a proposed termination unless the action is based on imminent dangers to the health or welfare of participants or for submission of a false or fraudulent claim.

(4) If the institution or local educational agency [I] *has* been terminated based on imminent dangers to the health or welfare of participants, the Department shall so specify in its notice of action.

(5) Institutions or local educational agencies electing to continue operating while the proposed termination is under review shall be reimbursed for valid claims submitted during the period of review in accordance with 7 CFR Parts 210—299.

E. Acknowledgment. The [Branch Chief] *Director* shall mail written acknowledgment of receipt of the request for a hearing to the institution or local educational agency within 10 calendar days, and shall transmit the request to the Office of Administrative Hearings within 5 working days of receipt of the request for a hearing.

F. Delegation to the Office of Administrative Hearings.

(1) The [Branch Chief]*Director* shall delegate a request for a review hearing to the Office of Administrative Hearings in accordance with State Government Article, §10-205, Annotated Code of Maryland.

(2) The review hearing shall be conducted by an administrative law judge who is independent of the original decision-making process in accordance with COMAR 28.02.01.

(3) The institution or local educational agency shall be provided with at least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time and place of the hearing.

(4) *An institution may retain counsel or may be represented by an individual designated through a properly executed power of attorney form. Individuals may represent themselves or retain counsel.*

(5) *Except as provided in F(6) for the Summer Food Service Program, [T]the administrative law judge's findings of fact, conclusions of law, and final decision affirming, reversing, or modifying the Department's action shall be based solely on the information provided by the Department, the local educational agency, the institution, and the responsible principals and responsible individuals, and based on federal and State laws, regulations, policies and procedures governing the Program and shall be submitted to the [Branch Chief] Director and to the institution or local educational agency within 60 days of the Department's receipt of the request for a hearing, unless:*

(a) The parties jointly agree to a delay of the hearing;

(b) The administrative law judge, based on the request of one party and for good cause shown, grants a request for a delay of the hearing; or

[I](c) The administrative law judge delays the hearing for good cause.

(6) Exception — Summer Food Service Program — Appeal of Department Action.

(a) If a hearing is requested:

(i) The hearing shall be held within 14 calendar days of the Department's receipt of the request for hearing and conducted by an administrative law judge in accordance with COMAR 28,02.01; and

(ii) The administrative law judge's findings of fact, conclusions of law, and final decision affirming, reversing, or modifying the Department's action shall be based solely on the information provided by the Department, the local educational agency, the institution, and the responsible principals and responsible individuals, and based on federal and State laws, regulations, policies, and procedures governing the Program and shall be submitted to the [Branch Chief] *Director* and to the institution or local educational agency within 5 working days of the conclusion of the hearing.

(iii) *The appellant must be allowed to refute the charges contained in the notice of action either in person or by filing a written documentation with the administrative law judge. To be considered, written documentation must be submitted by the appellant within seven days of submitting the appeal, must clearly identify the Department's action being appealed, and must include a photocopy of the notice of action being issued by the Department.*

(iv) *A hearing must be held by the administrative law judge 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 appealing the action.*

(v) *Failure of the appellant or appellant's representative to appear at a scheduled hearing shall constitute the appellant's waiver of the right to a personal appearance before the administrative law judge, unless the administrative law judge agrees to reschedule the hearing.*

(vi) *A representative of the Department shall be allowed to attend the hearing to respond to the appellant's testimony and written information and to answer questions from the review official.*

(b) If the institution or local educational agency appeals the Department action but does not request a hearing, the administrative law judge shall, within 5 working days after receipt of the appeal:

(i) Make a written determination based on a review of the administrative record; and

(ii) Inform the appellant and the Department of the final decision by certified mail, return receipt requested.

(7) Exception — Child and Adult Care Food Program — Abbreviated Administrative Review. If the institution or local educational agency appeals the Department's action as described [below] *above* and a hearing is requested, the Department must limit the administrative hearing to a review of written submissions concerning the accuracy of the Department's determination if the application was denied or the Department proposes to terminate the institution's agreement because:

(a) The information submitted on the application was false;

(b) The institution, one of its sponsored [facilities] *sites*, or one of the principals of the institution or its [facilities] *sites* is on the national disqualified list;

[I] (c) The institution, one of its sponsored [facilities,] *sites*, or one of the principals of the institution or its [facilities] *sites* is ineligible to participate in any other publicly funded program by reason of violation of the requirements of the program; or

(d) The institution, one of its sponsored [facilities,] *sites*, or one of the principals of the institution or its [facilities] *sites* [I] *has* been convicted for any activity that indicates a lack of business integrity.

G. Discovery. Information on which the Department's action was based shall be available to the institution or local educational agency for inspection from the date of the Department's receipt of the request for a hearing. *No further discovery shall be available.*

H. Burden of Proof. The institution or local educational agency has the burden of proof by a preponderance of the evidence.

I. Final Decision. The decision of the administrative law judge is the final agency determination of the State Department of Education in accordance with the federal regulations governing the program and shall be implemented promptly.

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