

Attachment 4

SUBJECT: Implementing Changes to the Child and Adult Care Food Program (CACFP) in Interim Rule entitled, “Child and Adult Care Food Program: Improving Management and Program Integrity”

TO: All Independent Centers in your State

On September 1, 2004, FNS published an interim rule entitled, “Child and Adult Care Food Program: Improving Management and Program Integrity” (69 FR 53501). This rule puts into effect regulatory provisions that FNS had proposed on September 12, 2000 (65 FR 55101), as modified in response to 548 public comments received on that proposal.

Although FNS is soliciting public comment on this interim rule, its provisions will be codified in the Code of Federal Regulations and will have the force of law, effective October 1, 2004. FNS issued this as an interim rule, and allowed a lengthy period for public comments, to permit State agencies and institutions to comment on the rule after they have actually implemented all of its provisions.

This memorandum is intended to provide independent centers with information for their use in implementing the provisions of this interim rule. In addition to discussing each regulatory change in the rule that affects independent centers, this memorandum will also:

- Provide an “index” of the rule (the Federal Register page numbers of the preamble discussion relating to each provision, as well as the specific regulatory citation(s) for each provision) to help you quickly locate discussions of a specific regulatory change;
- Address implementation timeframes; and
- Discuss the areas where this second interim rule interacts with the provisions of the first interim rule published on June 27, 2002 (67 FR 43447), which implemented statutory provisions mandated by the Agricultural Risk Protection Act of 2000 and the Grain Standards and Warehouse Improvement Act of 2000 (Public Laws 106-224 and 106-472, respectively).

Although FNS will provide a more in-depth discussion of most of these regulatory changes in National training to be provided in the spring of 2005, SAs and institutions are expected to implement most of these provisions (the exceptions are clearly noted in the attached guidance) by October 1, 2004.

The contents of this guidance document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Please contact _____ of my staff with any questions concerning this guidance.

[Title]
[Organization]

Attachments

Implementation Guidance for Independent Centers: 2nd Interim CACFP Management Improvement Rule

Introduction

On September 1, 2004, the Food and Nutrition Service (FNS) published an interim rule entitled, “Child and Adult Care Food Program: Improving Management and Program Integrity” (69 FR 53501). This rule put into effect discretionary provisions (i.e., provisions that were not statutorily mandated) that FNS had proposed on September 12, 2000 (65 FR 55101), as modified in response to the 548 public comments we received on that proposal. Although FNS is soliciting public comment on this interim rule, and is allowing a lengthy period for public comment, the rule’s provisions will be codified in the Code of Federal Regulations and will have the force of law, effective October 1, 2004. Thus, although FNS is soliciting public comments, compliance with the interim rule’s provisions is required, in accordance with the implementation dates discussed in this guidance.

This guidance is intended to provide independent centers with information for their use in implementing the provisions of this second interim management improvement rule. In addition to discussing each change in the rule, the guidance will:

- Provide an “index” of the rule, to help you more quickly locate discussions of specific provisions;
- Address implementation timeframes; and
- Discuss interactions between the provisions of the first interim rule, published on June 27, 2002, (67 FR 43447) and this second interim rule.

Please note that provisions that only affect sponsoring organizations are not discussed in this memorandum.

Part I: State Agency Review of Independent Centers’ Program Applications (preamble, pp. 53504-53512; regulatory language: §§ 226.6(b) and 226.6(f) [pp. 53536-53541], 226.15(b) and 226.16(b) [pp. 53544-53545], and 226.23(a) [p. 53547]).

The first interim rule, published on June 27, 2002, implemented a number of new statutorily-mandated eligibility requirements that could most efficiently be captured during the initial and renewal application process. These changes added new requirements to the application process for State agencies (SAs) and applicant institutions.

However, this interim rule offers SAs the opportunity to streamline the institution application process by providing greater flexibility in how SAs manage the application

process. Specifically, this rule incorporates into the regulations the option for SAs to take renewal applications from institutions on an other-than-annual basis, provided that institutions submit some other required information to the SA on a more frequent basis.

What has the State of (Name) decided with regard to taking less-frequent-than-annual reapplications?

Possible responses:

- A. As you know, this State has already implemented [less-than-annual] renewal applications. We will be issuing additional guidance to notify you of any changes to current requirements as part of your next reapplication process.***
- B. We have decided to implement [less-than-annual] renewal applications in Fiscal Year 2006. We will be issuing additional guidance to notify you of how this change will affect you as part of your next reapplication process.***
- C. We are currently studying the interim rule's provisions and, based on the results of our analysis and on future training to be provided by FNS, we will make a final determination regarding the continuation of our current reapplication process. We will notify you of our decision [timeframe].***

[For those using Option A above]: You previously issued guidance on implementation of the [enter period of time in your State, e.g., three-year, two-year] renewal option. What is the status of that guidance?

That guidance, which was issued on ***[enter date of State transmission to institutions]***, is rescinded and is replaced by the provisions of the interim rule and our forthcoming guidance to you on this subject.

Does the interim rule permit the use of permanent agreements?

Yes. In response to public comment, the interim rule permits SAs to enter into permanent agreements with any institution participating in CACFP, while continuing to require, in accordance with section 9(i) of the National School Lunch Act (NSLA), the use of permanent agreements between SAs and school food authorities (SFAs) in instances where the SFA administers more than one Child Nutrition Program under the auspices of that SA.

How will this affect independent centers participating in CACFP in the State of (Name)?

- A. As you know, based on prior FNS guidance, we already utilize permanent agreements with independent centers in the State of (Name). We will notify you if, as a result of this rule, any changes are required to our current permanent agreement with your institution.***

- B. We have decided to convert all current agreements to permanent agreements as part of each institution's next reapplication process in Fiscal Year 2006. We will provide you with further information at that time.***
- C. We are currently studying this provision in the interim rule and, based on the results of our analysis and on future training to be provided by FNS, we will make a final determination regarding the use of permanent agreements in the State of (Name). We will notify you of our decision [timeframe].***

What is the purpose of reapplication if centers already have a "permanent agreement"?

The "permanent" agreement does not guarantee an independent center the right to participate in CACFP in perpetuity; it simply relieves the SA and the center from the paperwork burden of including an agreement renewal every time the institution reapplies to participate. Whether or not a SA elects to use the permanent agreement option, all participating independent centers are still required to reapply at intervals not to exceed three years.

The reapplication process provides the SA with an opportunity to reassess the institution's continued financial viability, administrative capability, and internal controls, and the institution's continued adherence to other Program requirements. In a sense, the reapplication process allows the SA to perform a "desk review" of participating institutions' operations, which supplements the required "onsite" reviews that are also performed on a cycle not exceeding three years. If, during either the review of the renewal application or during an onsite Program review, the SA determines that the institution is no longer operating in conformance with Program requirements and is unable to come into compliance with those requirements, the SA would then initiate the serious deficiency process in accordance with § 226.6(c), which could culminate in the termination of the permanent agreement.

If an independent center has a permanent agreement and fails to reapply, what action must the SA take?

If an independent center chose not to reapply and was not seriously deficient, the SA would simply terminate its permanent agreement with the center, and no further action would be necessary. In essence, this would amount to a "termination for convenience" by the center; it would be eligible to reapply as a new institution at any time in the future and there would be no need to offer appeal rights when the agreement was terminated.

However, if the center that fails to reapply has been declared seriously deficient prior to the end of the reapplication period, the serious deficiency process would continue, in accordance with § 226.6(c)(3)(iii)(A)(6) of the regulations. If the center failed to appeal its proposed termination or the SA prevailed on appeal, the SA would terminate its permanent agreement with the institution and place the independent center on the National Disqualified List.

If an independent center has a permanent agreement and reapplies, but is denied approval, what action must the SA take?

If a participating center reapplies but its renewal application is denied, and the application denial is not due to a serious deficiency (e.g., the center has submitted an incomplete application), the SA would simply inform the center of the denial, provide an opportunity to appeal (in accordance with § 226.6(k)(2)(i)) and, if the center failed to appeal or the SA prevailed on appeal, terminate the permanent agreement.

If the denial of the participating center's renewal application was due to one or more serious deficiencies in its application (e.g., the proposed budget demonstrated that the center was not financially viable), the procedures of § 226.6(c)(2) must be followed. If the center failed to appeal or the SA prevailed on appeal, the SA would terminate its agreement and place the center on the National Disqualified List.

Can you summarize the minimum content requirements for initial and renewal applications submitted by independent centers?

Yes. Attachment A includes a chart that summarizes the minimum State and Federal requirements for the content of new and renewal applications submitted by independent centers. It also includes (in the middle columns of each chart) a description of other information that the center is required to submit to the SA, and the frequency of such required submissions, regardless of the length of time between applications.

Part II: SA Review and Oversight Requirements (preamble, pp. 53512-53526)

Household Contacts (preamble, pp. 53512-53513; regulatory language : § 226.6(m)(3)(x) and 226.6(m)(5) [p. 53542], and § 226.16(d)(5) [p.53546]).

The rulemaking published on September 12, 2000, proposed very specific requirements for when and how household contacts (also referred to as “parental contacts” or “parent audits”) were to be conducted. In response to public comment that these proposed requirements were too complex and would prohibit the use of effective household contact systems that were already in place, the interim rule requires only that SAs establish household contact systems for use by the SA in its review of independent centers.

In the interim rule, what are the minimum content requirements for household contacts?

There are no specific minimum requirements. The specific events that would trigger the required conduct of a household contact is left to each SA to determine, as are the specific procedures that the SA would use in conducting a household contact. We believe that the household contact might be an especially effective tool when investigating instances of systematic irregularities in an independent center's income eligibility forms (IEFs), or similar problems.

When and how will the *State of (Name)* implement its household contact systems?

Possible responses:

- A. **[For States that already have household contact systems] The interim rule requires that these systems be implemented by April 1, 2005. In the coming months, we will analyze our existing household contact system requirements to ensure that they are capable of effectively verifying children’s attendance. If any changes result from this review, we will inform independent centers of the changes no later than February 1, 2005, to enable them to plan accordingly for FY 2006.**
- B. **[For States in which no household contact systems exist] We will develop a household contact system for our use in conducting reviews of independent centers and, no later than February 1, 2005, we will notify centers in (State Name) of the systems that we will have in place by April 1, 2005.**

Enrollment forms (preamble, pp.53513-53515; regulatory language: §§ 226.2, “Outside-school-hours care center” [p. 53535], 226.15(e)(2) and (e)(3) [p. 53544], 226.16(b)(1) [pp. 53544-53545], and 226.19(b) [p.53546)].

Does the interim rule modify the requirements for enrollment forms proposed on September 12, 2000?

No, with the single exception noted in the following Q and A. As proposed, the interim rule requires that enrollment forms be updated annually and signed by a parent or guardian, and that the forms indicate the “normal” days in care and meals to be received by each enrolled child.

Were there changes in the proposed requirements for enrollment forms collected by independent outside-school hours care centers?

The only significant change was the elimination of the requirement for enrollment forms in outside-school-hours care centers. When the at-risk snack program was added to the CACFP, Congress recognized that many outside-school-hours centers operated on a drop-in basis, just like at-risk programs, and conformed the licensing requirements in section 17(a)(5)(C) of the NSLA for at-risk programs and after outside-school-hours centers. The guidance implementing the CACFP at-risk program eliminated enrollment requirements for at-risk snack programs; given the similarity in the drop-in nature of many outside-school-hours programs, it is appropriate to further conform the at-risk and outside-school-hours requirements by eliminating enrollment requirements for outside-school-hours programs.

In this State, licensing regulations [require/do not require] licensing for outside-school-hours care centers. Therefore, this change will [describe impact in your State].

Does the interim rule require annual enrollment updates for children in both sponsored and independent centers, as well as homes?

Yes.

Due to liability and other concerns, State licensing staff or the center's attorneys may have dictated the content of the enrollment forms used by a child care center. How can independent centers comply with this requirement?

We are aware of this potential issue. The intent of the regulations is to ensure that the child's presence in the center, and the child's normal schedule, is annually verified by a parent or guardian, and is available to reviewers during an onsite visit.

A. [If the State chooses not to use the "modified IEF" approach described in the next paragraph]: For centers in the State of (Name), we believe that the easiest way to capture this information is on a separate enrollment form.

B. [If the State chooses to allow centers the option of having a separate enrollment form or to collect the info on the IEF]: Therefore, we have elected to modify the current IEF so that centers may choose to capture the required information on a separate enrollment form or as part of the annual IEF process. It must be stressed, however, that this approach to implementation will require all centers using the IEF to ensure that they will capture the required information from parents who elect not to submit income information on the IEF, and whose children are therefore considered to be in "paid" category by default. In these instances, centers must ensure that the household annually updates that portion of the IEF that lists the children in care and their schedules, even if the household does not provide income eligibility information. If this approach is not practical in a particular center, the center must have both an enrollment form and an IEF on file for each child in care.

When must these provisions be implemented?

The interim rule requires that new procedures for annual updates to the enrollment form (or to the IEF, as discussed above), signed by a parent or guardian and indicating the child's normal schedule, must be implemented by April 1, 2005. This means that any new IEF or enrollment form, collected on or after that date, will need to comply with the new requirements. For enrollment forms that are already collected annually, the changes must be in place the next time, on or after April 1, 2005, that the forms are collected. For all other enrollment forms, the changes must be in place by September 30, 2005.

Review Elements for SA reviews of independent centers (preamble, p. 53521; regulatory language: § 226.6(m) [p. 53542]).

The interim rule requires that, as part of each review of an independent center, the SA must assess the institution's compliance with the regulatory requirements pertaining to:

- Recordkeeping;
- Meal counts;
- Meal requirements, as determined from observation of a meal service;
- Administrative costs;
- Facility licensing or approval;
- The new requirements pertaining to annually updated enrollment forms; and
- Any applicable instructions and handbooks issued by FNS, the Department of Agriculture, or the SA, and all other Program requirements.

[If applicable in your State]: These, of course, are minimum requirements. In this State, the following additional review elements are also included: [list].

Change to Audit Requirements (preamble, p. 53524; regulatory language: § 226.8 [p. 53543]).

The second interim rule conforms the CACFP regulations to OMB circular and Departmental audit requirements by:

- Increasing the audit threshold for organization-wide audits from \$25,000 to the dollar amount mandated by Department-wide financial management regulations;
- Prohibiting the use of Federal funds for audits not required by Federal regulations; and
- Clarifying that SAs may use audit funds to conduct agreed-upon procedures engagements (limited-scope reviews conducted by auditors), as described in 7 CFR 3052.230(b)(2).

Part III: Operational Requirements (preamble, pp. 53526-53530):

Times of meal service (preamble, pp. 53528-53529; regulatory language: § 226.20(k) [p. 53547]).

The interim rule provides SAs with regulatory authority to specify the length of meal services and the time that elapses between meal services. This authority was added to help SAs discourage a form of abuse, in which multiple meals are claimed for children who are only in care for a short period of time. The rule also removed the specified times of meal service for independent outside-school-hours care centers as well, meaning that the SA must establish all policies relating to times of meal service.

- A. In the State of (Name), we have decided not to implement any restrictions on time of meal service at present. We will notify affected institutions if we decide to implement such policies in the future.*

B. In the State of (Name), we have decided to implement the following limitations to times of meal service for [all centers/outside-school-hours-care centers]:

C. In the State of [Name], we are modifying our existing policy as follows:

Reimbursement to new centers (preamble, p. 53529; regulatory language: § 226.11(a) [p. 53543]).

The interim rule clarifies that SAs have two options for reimbursing meals to new independent centers: they may reimburse a new center for documented meals served in the month prior to month of the SA's agreement with the center, or they may choose to reimburse a new center only for meals served on or after the date of the agreement. The interim rule clarifies that, regardless of the option chosen, the SA must have a uniform Statewide policy on this subject.

A. In the State of (Name), we have always had the policy of reimbursing new independent centers (fill in policy).

B. In the State of (Name), we have decided to implement the following policy with respect to the reimbursement of all new independent centers:

Regulations and guidance (preamble, pp. 53529-53530; regulatory language: §§ 226.6(m)(3)(iv) [p. 53542] and 226.15(m) [p. 53544]).

The interim rule clarifies that guidance issued by FNS is binding, and must be implemented by SAs and institutions. The Administrative Procedures Act recognizes Federal agencies' authority to issue interpretive guidance on implementation of regulations.

Part IV: Miscellaneous non-discretionary changes from earlier laws (preamble, pp. 53530-53533):

This is a miscellaneous group of statutorily-mandated provisions that are addressed in this interim rule.

Advances (preamble, pp. 53530-53531; regulatory language: § 226.10(a) [p. 53543]).

The interim rule includes the provision that SAs may choose to issue advances to institutions at their discretion. This implements § 17(f)(4) of the National School Lunch Act (NSLA), as amended by Section 708(f)(2) of Public Law 104-193, the Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA). This non-discretionary provision was previously implemented in guidance issued on **[enter date of SA issuance of guidance]**. **The State of (Name) [has not/has] elected to use this authority [as follows/as stated in guidance issued to institutions on [date]].**

Elimination of AFDC, replacement with references to TANF (preamble, p. 53531; regulatory language: §§ 226.2 [p. 53535] and 226.23 [p. 53547]).

This change incorporates into the CACFP regulations PRWORA's elimination of the Aid for Families with Dependent Children (AFDC) Program and its replacement of AFDC with the Temporary Assistance for Needy Families (TANF) Program.

Pre-approval visits to private (child care) institutions (preamble, pp. 53532-53533; regulatory language: § 226.6(b)(1), introductory paragraph) [p. 53536].

The interim rule implements section 17(d)(1)(B) of the NSLA, as amended by section 107(c) of Public Law 105-336, which requires SAs to visit new private child care institutions (including for-profit and non-profit institutions, but not including public institutions or any type of adult day care institution). This requirement was implemented in guidance issued on [enter dates of SA issuance of guidance].

Provision of WIC information to independent centers (preamble, p. 53533; regulatory language: §§ 226.6(r) [p. 53542] and 226.15(n) [p. 53544]).

The interim rule implements section 17(s) of the NSLA, which requires SAs to make available information on the WIC Program to all participating institutions (except independent outside-school-hours centers), and for centers to ensure that participating households receive the information. The required information on the WIC Program was provided by FNS to SAs on [enter date of SA issuance of guidance].

Elimination of fourth meal in centers (preamble, p. 53533; regulatory language: §§ 226.15(e)(5) [p. 53544], 226.17(b)(3) [p. 53546], and 226.19(b)(5) [p. 53546]).

Section 708(d) of PRWORA amended section 17(f)(2)(B) of the NSLA by eliminating child care centers' ability to claim reimbursement for four meals per child per day. The change was implemented in guidance issued on [enter date of SA issuance of guidance].

