(Cite as 17 D.o.E. App. Dec. 361)

BEFORE THE DEPARTMENT OF INSPECTIONS AND APPEALS

BEAR BASICS CHILDREN'S CENTER, INC., Appellant, vs. STATE DEPARTMENT OF EDUCATION, Respondent.	DIA # 96DOE001 PROPOSED DECISION AND ORDER

FINDNGS OF FACT:

I. BACKGROUND:

1. The Respondent State Department of Education stated, on brief, that it "accepts the Appellant's Statement of the Case as essentially correct." (Respondent's Brief at 2). Therefore, the Appellant's Statement of the Case is quoted and incorporated as findings of fact numbers 2 through 15 below:

2. A. Nature of the Case. This case involves an appeal by Bear Basics Childrens Center, Inc. of a request for overclaim by the Bureau of Food and Nutrition of the Iowa Department of Education in regard to the Child and Adult Care Food Program (hereinafter CACFP).

3. B. Course of Proceedings. The Appellant, Bear Basics Childrens Center, Inc. (hereinafter Bear Basics) is a child day care institution and participant in the Children and Adult Care Food Program. (Exhibit 1) The CACFP is a federally funded program which is administered in Iowa by the Bureau of Food and Nutrition of the Department of Education. Virginia Huntington conducted an unannounced management evaluation of Bear Basics' participation in the CACFP July 6, 1995. (Transcript, p. 85 ll. 2-8) Ms. Huntington and Rod Bakken conducted a follow up unannounced management evaluation of Bear Basics' participation in the CACFP from August 1 to August 3, 1995. (Transcript, p. 187 ll. 13-25, p. 188 ll. 1-2)

4. Ms. Huntington and Mr. Bakken sent a letter to Curt Bolin, the president and manager of Bear Basics, dated December 11, 1995, summarizing the results of the July 6 and August 1 to August 3, 1995, management evaluations. (Exhibit 5) The letter set forth certain required changes and certain recommended changes. The December 11, 1995, letter referenced that reimbursement for certain items would be disallowed Bear Basics. The December 11, 1995, letter also indicated that the corrected claims regarding the request for refund (i.e. the overclaim) would follow.

5. On January 19, 1996, Bear Basics received a letter postmarked January 18, 1996, and dated December 12, 1996, from Brad Albers, accountant with the Bureau of Food and Nutrition, setting forth the calculation and demand for overclaim in the amount of $7,688.15. (Exhibit 28) On January 23, 1996, Bear Basics mailed by certified mail its *Notice of Appeal* of the overclaim

decision to the Department of Education. The Department does not contest the timeliness of the *Notice of Appeal*.

6. This matter was scheduled for hearing for May 14, 1996, pursuant to an order issued by the Honorable Donald W. Bohlken April 15, 1996. At the request of Bear Basics because of a conflict which its counsel had with other litigation, the hearing was continued by agreement of the parties to May 20, 1996. This matter came on for hearing before the Honorable Donald W. Bohlken on May 20, 1996, and May 21, 1996.

7. C. Facts. Bear Basics is a child day care provider duly licensed by the state of Iowa. (Transcript, p. 20 ll. 10-25, p.21 ll. 1-3, p. 216 ll. 24-25, p. 217 l. 1) In its eighteen (18) years of operation it has never had its license suspended or revoked. (Transcript, p. 217 ll. 2-8) From December 1989 until June 30, 1995, Bear Basics was operated as a proprietorship by Windell Curtis Bolin (hereinafter Curt Bolin) and Elizabeth Bolin, (hereinafter Betty Bolin) husband and wife. On July 1, 1995, Bear Basics was incorporated as Bear Basics Childrens Center, Inc. by Mr. and Mrs. Bolin. (Transcript, p. 219 ll. 2-11) Curt Bolin is the president and chairman of the Board of Directors of Bear Basics. (Transcript, p 219 ll. 12-14) He is also designated as Bear Basics' manager. Betty Bolin is the vice-president and also a member of the Board of Directors at Bear Basics. (Transcript, p. 219 ll. 15-21) She has been a licensed day care provided for approximately eighteen (18) years. (Transcript, p. 215 ll. 10-19) Prior to she and her husband establishing the business known as Bear Basics, she operated a licensed home day care center. (Transcript, p. 215, ll. 20-25, p. 216 l. 1) Betty is designated as the program director at Bear Basics. (Transcript, p. 217 l. 25, p 218 ll. 1-8)

8. The Children and Adult Care Food Program (CACFP) is a federally funded program that provides grant and aid assistance to states to initiate, maintain and expand nonprofit food service programs for children or adults in nonresidential institutions which provide care. 7 C.F. R. Ch. 11 § 226. Bear Basics is a participant in a pilot program of the CACFP for "for profit" day care providers. (Transcript, p.17 ll. 14-22) Bear Basics has been a participant in the program since February of 1993. (Transcript, p. 271 ll. 11-24) Prior to its participation in the CACFP, Bear Basics offered a limited food service program to the children it provided day care for. (Transcript, P. 274 ll.1-12)

9. Curt Bolin became aware of the program through information he had received from the Department. (Transcript, p. 219 ll. 22-25, p. 220 ll. 1-12) He contacted Rod Bakken and applied for participation in the program. (Transcript, p. 220 ll. 18-25, p. 221 ll. 1-21) Bear Basics spent approximately $20,000 00 to $30,000.00 to purchase kitchen equipment to comply with the CACFP

requirements. (Trans p. 221 ll. 22-25, p. 222 ll. 1-8) In addition, Bear Basics hired a full time cook, Jennifer Mohler. (Trans p. 221 ll. 9-12) Bear Basics retained Sheila Lepley and assigned her the responsibilities for overseeing the day to day management and operation of Bear Basics' participation in the CACFP. (Transcript, p. 222 ll. 21-25, p. 223 ll. 5-17) Ms. Lepley attended CACFP training sessions sponsored by the Department. (Transcript, p. 223 ll. 1-4) Among other things, Ms. Lepley's responsibilities included preparation of reports to be filed with the Department and maintenance of CACFP required records. (Transcript, p. 234 ll. 1-5, p. 235 ll. 12-22) Ms. Lepley left her employment at Bear Basics in October of 1995. (Transcript, p. 300 ll. 14-24)

10. Bear Basics' participation in the CACFP is governed by a contract entitled the *Child and Adult Care Food Program Agreement CNP 47* (hereinafter *CNP 47*) which was executed by Bear Basics August 9, 1994, and approved by the Department August 15, 1994. (Exhibit 1) The *CNP 47* recites that it may "not be modified or changed in any other way other than by the consent in writing of the parties." (Exhibit 1 p. 6) The *CNP 47* incorporates by reference the provisions of 7 C.F.R. Chapter 11 § 226 as a part of the contract. (Exhibit 1 p. 6)

11. The *CNP 47* imposes at least fifty (50) specific requirements that Bear Basics must comply with to maintain its (Bear Basics') part of the contract. (Exhibit 1 pp. 2-5) *The CNP 47* imposes three (3) specific requirements on the Department. (Exhibit 1 p. 1 and p.5)

12. Among other things, Bear Basics' participation in the CACFP is subject to an annual audit performed in accordance with generally accepted auditing standards set forth in Chapter 11 of the Code of Iowa and Government Auditing Standards issued by the Comptroller General of the United States. 7 C.F.R. Ch. 11 § 226.8 Bear Basics' participation in the CACFP program has been audited annually by the state of Iowa auditor's office for the federal fiscal years ending 9/30/93, 9/30/94 and 9/30/95. (Exhibits 2,3, and 4).

13. In addition to the audits performed by the auditor of the state of Iowa, Bear Basics has also been the subject of two management evaluations performed by the Department. (Transcript, p. 178 ll. 11-25, p. 179 ll. 1-12) The first management evaluation was performed by Rod Bakken of the Department in April of 1993. (Trans p. 178 ll. 11-19) The second management evaluation was performed on July 6, 1995, and from August 1, through August 3, 1995, by Virginia Huntington and Rod Bakken of the Department. (Trans p. 179 ll. 6-12)

14. As a result of the management evaluations performed July 6 and August 1 to August 3, 1995, the Department determined that Bear Basics was not entitled to reimbursement for any of the meals and snacks served during sixteen (16) days in June of 1995 and on July 3 and July 5, 1995.

(Exhibit 5) The stated basis for the Department's determination was the alleged failure of Bear Basics to have meal menus available for the days in question. (Exhibit 5)

15. In addition, as a result of the management evaluation of July 6 and August 1 to August 3, 1995, the Department also denied Bear Basics' reimbursement for meals served July 6, 1995, on the basis that they provided insufficient quantities of food to meet CACFP requirements. (Exhibit 5) Also, although not specifically referenced in the December 11, 1995 letter (Exhibit 5), Ms. Huntington testified that the Department denied Bear Basics' reimbursement for a morning snack and an afternoon snack served August 1, 1995, based on the Department's determination that there were insufficient quantities of food served for each of these snacks. (Transcript, p. 144 ll. 7-20)

II. The Depositions of Virginia Huntington and Rodney Bakken Are Admitted Solely for Purposes of Impeachment Because They Are Neither Parties in This Case Nor Are They Officers, Partners, Or Managing Agents of The Respondent Department of Education:

16. Both Virginia Huntington and Rodney Bakken were deposed by the Appellant prior to the hearing. (Depositions of Huntington and Bakken). It is a matter of dispute between the Respondent and Appellant as to whether these depositions should be submitted solely for purposes of impeachment or for any purpose to which Appellant wishes to use them. (Tr. at 380-81; Appellant's Brief at 28-29; Respondent's Brief at 12-13).

17. The parties in this case are Bear Basics Children's Center, Inc. and the State Department of Education. By agreement of the parties, Curt Bolin, who was originally named in the notice of hearing, was not properly named as a party. (Tr. at 4).

18. Ms. Huntington has been a consultant with the Respondent for approximately nine years. Her job "is to visit child care centers, daycare homes and sponsors of daycare homes to review their compliance with program regulations and also to give them technical assistance . . . [to make] sure that they comply with program regulations." She also has "responsibilities for training, giving workshops and writing a newsletter." (Tr. at 15-16). Her functions could be summarized as providing review of, advice and assistance, and education to participants in the Child and Adult Care Food Program (CACFP). (Tr. at 16).

19. Mr. Bakken has been a consultant with the Respondent for approximately 18 years. (Tr. at 170). His duties are the same as Ms. Huntington's with the exception that he has been designated as lead worker, a non-supervisory position. (Tr. at 171).

20. There is no evidence to support the proposition that either Virginia Huntington or Rodney Bakken are either parties in this case or officers, partners or managing agents of the Respondent Department of Education. Therefore, for reasons discussed in the conclusions of law, the depositions of Ms. Huntington and Mr. Bakken are admitted solely for purposes of impeachment and for no other purpose. See Conclusions of Law Nos. 1-3.

III. The Affidavits of Donald Rhodes and Dale Swanson Are to Be Admitted Into the Record:

21. During the hearing, the Appellant indicated its desire to have the record held open for the admission of affidavits from two employees of J.P. Food Service, Donald Rhodes and Dale Swanson. These affidavits are offered to refute the finding made after the review of Bear Basics, undertaken in July and August 1995, that a non 100% juice product was used by Bear Basics and that "the juice machine was set to over dilute juice concentrate." (Ex. 5; Affidavits of Donald Rhodes and Dale Swanson; Tr. at 377-79). Respondent objected to the admission of these affidavits on grounds of relevancy, since none of the overpayments claimed were based on the findings concerning the calibrations of the juice machine. (Tr. at 379).

22. Whether these affidavits are relevant is a close question. The overclaims were not based on the provision of 100% juice or on the calibrations of the juice machine. (EX. 5). The affidavits do, however, arguably have some bearing on the credibility of Virginia Huntington with respect to the reliability of observations made by her. The Appellant's argument is that if Ms. Huntington's observations with respect to the provision of 100% juice and the juice machine are unreliable, than her other observations with respect to Appellant are also unreliable. (EX. 5; Tr. at 379). The affidavits have, therefore, some tendency to make the existence of a fact of consequence to the determination of the case, i.e. Ms. Huntington's credibility, more or less probable than it would be without such evidence. Although the affidavits are admitted, they are entitled to little weight on the question of Ms. Huntington's general credibility because her observations on food service issues are clearly more reliable than her guesswork on juice machine settings. (Tr. at 61, 117-18; Respondent's Brief at 12). See Findings of Fact Nos. 73, 78. See Conclusion of Law No. 4.

IV. Overclaim Based on Missing Menus for June and July of 1995:

A. The Review:

23. On July 6, 1995, Ms. Huntington began her review of the Appellant by making an unannounced visit to the Appellant's day care center. The visit was unannounced because there had been a complaint about sanitation practices at the center which was made by a former employee of Appellant. Normally, when there is no complaint, such visits are announced in advance. (Tr. at 21, 85).

24. While conducting her review, Ms. Huntington noticed that the posted menu was for May 1-4, 1995. (EX. 8; Tr. at 89). When she asked the cook, Jenny Mohler, about the old menus, Mohler indicated that she did not have current menus available. Mohler also stated that Sheila Lepley, Bear Basics office manager, would have any available menus. (Tr. at 89-90). Ms. Huntington then asked Ms. Lepley to supply a number of documents, including menus, for the prior month, June 1995. Ms. Lepley was able to locate menus for a portion of June, but not for 16 days of that month. Ms. Lepley admitted that she did not know where the recipes were. She was also not able to locate menus for July 3 and 5, 1995. (EX. 5; 8; Tr. at 24, 93-95).

25. Ms. Huntington found the fact that Ms. Lepley was able to locate some of the June menus and not others to be puzzling. As she noted, "I really couldn't understand why they'd have some and not have the others because usually, if people are keeping documentation, they'll have it all." (Tr. at 97). Such documentation of menus and food production records are required to be kept under the terms of the contract between Appellant and Respondent. (EX. 1).

B. Did Appellant Bear Basics Provide or Have Available What Were, In Effect, "Menus" to Ms. Huntington During the Review For Periods During Which It Is Claimed Menus Were Missing for June and July 1995?:

26. On brief, Appellant notes that "menu" is not specifically defined in the contract between Appellant and Respondent. Appellant argues that "menu" may be defined as "the range or variety of foods consumed." (Appellant's Brief at 20, citing Webster's Third International New Dictionary 1412 (1981); EX. 1). Based on this definition, Appellant further argues that Ms. Huntington was, in effect, provided with menus when she was given Exhibit 10, a log book maintained by Jenny Mohler, which provides information showing the range and variety of foods served in the Appellant's CACFP. (Appellant's Brief at 21, EX. 10; Tr. at 90-91). Appellant also noted that if Ms. Huntington had questions concerning specific items or quantities, she could have obtained the information from food purchase invoices provided in Exhibit 28. Ms. Huntington did not ask to see such documents during her July 6, 1995 review. (Appellant's Brief at 21; EX. 28; Tr. at 154).

27. There are several problems with these propositions. First, official notice is taken that there are other

definitions of "menu" which would better reflect the public interest in accurate and detailed record keeping of the foods served at each meal. The log book would not indicate which foods were served at particular meals. (EX. 10). One such definition is "[a] detailed list of the dishes to be served at a . . . meal." I Compact Edition of the Oxford English Dictionary 1771 (1971). See Conclusion of Law No. 31. Fairness to the parties does not require that they be given an opportunity to contest this fact.

28. Second, the Mohler log book and the menus were not entirely consistent with respect to the menu information provided. On occasion, the log book would fail to show food items produced that were listed in the menus. More frequently, the logbook would fail to indicate a quantity or indicate a different quantity than that given in the food production records. For example, such discrepancies between the log book and food production records for June 1995 occur for the dates of June 1, 2, 5-9, 12-16, 19-23, 26-30. There are no log book records for the Saturday dates of June 3, 10, 17, or 24. (EX. 10, 16; Tr. at 152).

29. Third, the contract provides that the Appellant must keep the appropriate menu and food production records. It does not provide that the Respondent must compile such records from whatever secondary records may be available. (EX. # 1; Tr. at 326).

30. Fourth, the Appellant understood what was meant by "menu" or "meal menus" were the documents entitled "Menu Planning Worksheet Iowa Child and Adult Food Program" and/or "Food Production Record for Contracted Meals". These combined documents, stapled together, were, for example, offered into evidence by Appellant as the meal menus for April, May, and June of 1995. (EX. 14, 15, 16; Tr. at 239--40, 243, 245-46, 248, 261-62). The same combined forms had been compiled and maintained by Appellant since October 1994. (EX. 28). The Respondent also understood that both of these forms were the ones that were missing. These forms were required to be kept by the contract. (EX.1; Tr. at 105, 120). Therefore, there is no need to speculate on possible alternative meanings of "menu" or of possible reconstruction of what was in the missing menus by examination of Exhibit 10 or other records. There is nothing in the evidence to suggest that the menus requested by Ms. Huntington for June 1995 and reported by Ms. Lepley to be missing were anything other than these forms. Based on this common understanding and the Appellant's practice of recording menu information on these forms since October of 1994, the proposition that the term "menu" in the contract meant something other than the menu planning worksheet or the worksheet and production record in combination must be rejected.

31. For all of the above reasons, the proposition that Ms. Huntington was, in effect, given the menus for June of 1995, during her review of Appellant's compliance with CACFP requirements, must also be rejected.

C. Was the Appellant Given The Opportunity To Provide the Missing June and July 1995 Menus to Respondent at "A Reasonable Time" as Required By 7 C.F.R. S 226.10(d)?:

32. As previously noted, Ms. Huntington's July and August 1995 management evaluation of Appellant's day care center was based on visits to Appellant which were completely unannounced. See Finding of Fact Nos. 3, 23. Although the reasonableness of the place where Appellant requested the 1995 menus, i.e. Appellant's place of business, is not in dispute, the reasonableness of the time is. (Appellant's Brief at 9). For reasons stated in the conclusions of law, a "reasonable time" requirement means the institution must be given notice which will allow it adequate time to prepare for the evaluation. See Conclusion of Law No. 35. Usually evaluations are announced up to two weeks in advance and preceded by a form which identifies records which must be made available at the time of the visit. Due to the surprise nature of this evaluation, however, the Appellant was not given any time to prepare for the evaluation or to place its records in order for inspection. (Tr. at 187-88).

33. The greater weight of the evidence also indicates that Appellant would not have been subjected to an

overclaim if it had provided the missing meal menus within a short period of time after the inspection on July 6, 1995. (Tr. at 69, 181-82, 388). There is no evidence, however, that any representative of the Appellant was ever informed of this option by Respondent. (Tr. at 184, 405-06).

34. Appellant has established that it was not given the opportunity to provide its records for review at a reasonable time.

D. Has the Appellant Been Given Every Reasonable Opportunity, Prior to This Appeal Process, To Correct the Missing Menu Problem Before An Overclaim Was Sought ?:

35. For reasons stated in the conclusions of law, the Respondent must allow an institution under the CACFP program every reasonable opportunity to correct problems before making an overclaim. See Conclusions of Law Nos. 28-29. The legal standard, if followed, would be consistent with the testimony of Louis Smith, Chief of the Respondent's Bureau of Food and Nutrition, to the effect that the Respondent tries to administer the CACFP program "fairly and honestly." (Tr. at 384, 388). On brief, Appellant makes a series of arguments which are phrased so as to aver that it was not treated in accordance with a fair and honest administration of the program and that the overclaim sought was an abuse of discretion. (Appellant's Brief at 8-25). These arguments are addressed below in light of their impact on the issues identified by the pertinent legal standards, i.e. (a) was Appellant given every reasonable opportunity to correct the problem of the missing meal menus before an overclaim was sought by Respondent? (b) did Respondent abuse its discretion, i.e. did it act unreasonably, by seeking an overclaim under the circumstances of this case?

1. Although Neither Curt Nor Betty Bolin Were Contacted About the Missing Menus Until December of 1995, It Was Reasonable and Appropriate For Ms. Huntington to Contact Sheila Lepley, As the Authorized Representative and Agent of Appellant, In Order to Obtain Menu Records:

36. Appellant argues it was neither "fair, honest or reasonable to attempt to assert an overclaim based on allegedly missing meal menus without at a minimum notifying the owners of Bear Basics that a problem existed with the menu record maintenance." (Appellant's Brief at 15). The greater weight of the evidence does not support the proposition that Ms. Huntington made inquiries of Curt Bolin and Betty Bolin about the missing menu records prior to informing them of the overclaim in her letter of December . Ms. Huntington testified at hearing that she raised this issue: (a) during an exit conference on July 6, 1995 with Ms. Bolin and Ms. Lepley, and (b) during an exit conference on August 3, 1995 whose attendees included both Mr. and Mrs. Bolin. (Tr. at 24-25, 42, 125-26; 155,156-57, 258, 270, 320). This testimony was impeached, however, by Ms. Huntington's contradictory testimony at hearing and at deposition.

37. At hearing, she also testified that she did not think the meal menu issue was discussed with anyone at the August 1995 exit conference. (Tr. at 157). At deposition, Ms. Huntington testified that she did not ask Curt or Betty Bolin if they could provide the missing menus. (Huntington Dep. at 38, 42). When asked, at deposition, who she had asked for "these June menu information items from" on July 6th, Ms. Huntington replied "I asked Jenny Mohler and Sheila Lepley." (Huntington Dep. at 31, 32). Even at deposition, her testimony was contradictory as she also, at one point, stated that these missing menus were discussed at the exit conference on August 3rd. (Huntington Dep. at 42). At a later point, she testified on deposition that she didn't really remember whether she asked for the June menus in August. (Huntington Dep. at 61).

38. The impression left by Ms. Huntington's self-contradictory testimony at hearing and on deposition is that, while her testimony was not willfully false, her memory was unclear or confused on the missing menu issue. She acknowledged the contradictory nature of her testimony at deposition and at hearing. She acknowledged that her

memory at deposition differed from that at the hearing. (Tr. at 42-43, 79-80). Indeed, Respondent acknowledges this on brief and is bound by such admission. See Conclusion of Law No. 5. (Respondent's Brief at 6). She specifically acknowledged that she did not recall at deposition that she had told Betty Bolin that an overclaim may be made due to the missing menus, but claimed to recall it at hearing. (Tr. at 42-43). She averred that her recollection at hearing was changed from that at deposition because "during the weekend and next week [after deposition] . . . my mind just kind of kept going over and over and over the things that happened." (Tr. at 79-80). For reasons explained in the conclusions of law, such reconstructed memories do not inspire confidence in their accuracy. See Conclusion of Law No. 10.

39. Ms. Huntington's testimony was also effectively contradicted by the testimony of Curt Bolin and Betty Bolin, both of whom testified that they were not asked about the missing menus during either the July or August 1995 visits or at any other time. They did not know there was a problem with such menus until they received the letter from Respondent of December 11, 1995. (EX. 5; Tr. at 229, 237-38, 258, 270, 331, 334-35, 339-41). Mr. Bolin was not even present at Appellant's on July 6, 1995. (Tr. at 229, 275, 292, 331). Betty Bolin was not present at the conclusion of Ms. Huntington's visit on July 6th and, therefore, was not at any exit conference on that date. (Tr. at 334, 335).

40. It is doubtful that the exit conference testified to by Ms. Huntington as occurring on July 6th ever happened. Not only did Betty Bolin refute this testimony, but, when Ms. Huntington was asked, on deposition, to identify the date of the exit conference, she indicated only one date, August 3rd. (Huntington Dep. at 42; Tr. at 335, 338-39). It should be noted that the Appellant's teaching staff is required to attend all exit conferences with Respondent's representatives, as the teachers implement the CACFP program. (Tr. at 337). The daily logs maintained by three teachers were entered into evidence. (EX. 11, 12, 13; Tr. at 337-38, 346). Two of these logs cover a period of time including July 6-August 3, 1995. (EX. 11, 13). The third covers the August 3rd, but not the July 6th date. (EX. 12). These three logs indicate that a meeting was held on August 3rd involving, respectively "Food Program," "Teacher Meeting" and "Food Program People." The content of these logs indicates that many of the same matters were discussed on August 3rd as were recorded in Ms. Huntington's review notes for both July 6th and August 3rd. (EX. 8, 9, 11, 12, 13; Tr. at 38-41). The matters discussed, according to the log books, do not include missing menus. (EX. 11, 12, 13). The two logs whose coverage includes July 6th do not indicate that any meeting or conference was held on that date. (EX. 11, 13).

41. Consultant Rod Bakken also testified that he did not ask Mr. or Mrs. Bolin about the missing menus and that he did not recall the meal menu issue being brought up at the exit conference in August. (Tr. at 182-83

42. Based on the above facts, it appears that neither Mr. nor Mrs. Bolin were contacted about the missing menu problem before the December 11th letter notifying them that the Appellant would not be paid for the days for which menus were missing. (EX. 5). Appellant argues that this failure to contact the owners about the missing menus before asserting an overclaim was unfair and unreasonable. (Appellant's Brief at 15).

43. It is undisputed, however, that Ms. Huntington did contact Sheila Lepley, Office Manager of Appellant, about the missing menus. See Finding of Fact No. 24.

44. The facts concerning Ms. Lepley previously set forth in Finding of Fact No. 9, and admitted by Appellant on brief, are sufficient to demonstrate that Ms. Lepley was the agent of the Appellant with respect to day to day management of the CACFP operation including dealings with the Respondent such as the preparation of reports to be filed with Respondent and maintenance of records. See Conclusion of Law No. 37. This conclusion is buttressed by two additional facts: First, Ms. Lepley signed the contract between the Respondent Iowa Department of Education and the Appellant as the Appellant's "Authorized Representative." The contract was also signed, on behalf of Appellant, by Curt Bolin, as "Institution Board President." (EX. 1; Tr. at 83). It is reasonable to infer that Appellant was aware that

Ms. Lepley was its authorized representative under the contract. Second, Ms. Lepley provided the "signature for the institution" for the monthly claim forms submitted by Appellant to Respondent for the months of June, July and August 1995 wherein she certified that the claims were true and correct in all respects. (EX. 21; Appellant's Brief at 4; Tr. at 122-23).

45. The argument that it was unfair or unreasonable for Ms. Huntington to not contact Mr. or Mrs. Bolin about the missing menus before the December 11th letter must be rejected as Ms. Huntington did contact the authorized representative and agent of Appellant, Sheila Lepley.

2. The Failure of Respondent to Inform Sheila Lepley or Any One Else In the Management of the Appellant That An Overclaim Could Result If the Missing Menus Were Not Provided Is Neither Reasonable Nor Consistent With the Requirement That the Appellant Be Given Every Reasonable Opportunity to Correct the Missing Menu Problem Before An Overclaim Is Made:

46. Appellant argued on brief that it was unreasonable to not tell the Appellant that an overclaim may be asserted if certain records are not located. (Appellant's Brief at 24). Respondent admitted on brief "the fact that the consultants for the Department did not inform the Bolins that an overclaim recovery action might be made on missing menus." (Respondent's Brief on 7-8). The only evidence that anyone at Appellant's was so informed is the testimony of Ms. Huntington that she told both Betty Bolin and Sheila Lepley, at an exit conference on July 6, 1995 that an overclaim could result if the missing menus were not provided. Tr. at 27, 42). Not only is this testimony contradicted by Respondent's admission that the Bolins were not informed, it is not credible for the reasons previously discussed. See Findings of Fact Nos. 36-40.

47. In order for the Appellant to have been given every reasonable opportunity to correct the missing menu problem, the Appellant should have been informed by Respondent of the possible consequences, including a possible overclaim, resulting from the failure to provide the menus. Because the applicable regulations do not expressly provide that an overclaim may be made based on missing records, Appellant cannot be charged with the knowledge that such an event was possible or likely. It is true that Appellant can be charged with the knowledge that it could have been terminated from the program for failure to maintain adequate records. But, it would have no reason to expect either an overclaim or termination since such possibilities were not raised at any point during the evaluation, including the August exit conference. Informing Appellant of the possibility of an overclaim would have given it a strong incentive to locate and report the missing menu records. Failure to do so was neither reasonable nor consistent with the requirement that Respondent give Appellant every reasonable opportunity to correct the problem. See Conclusions of Law Nos. 10, 28-29.

3. The Failure of Respondent to Inform Sheila Lepley or Any One Else In the Management of the Appellant That The Appellant Could Have Additional Time, After the Review, to Provide the Missing Menus Is Neither Reasonable Nor Consistent With the Requirement That the Appellant Be Given Every Reasonable Opportunity to Correct the Missing Menu Problem Before An Overclaim Is Made:

48. Appellant argued on brief that it was unreasonable to not tell the Appellant that they could have additional time, after the review, to provide the missing menus. (Appellant's Brief at 24). Respondent admitted on brief "the fact that the consultants for the Department did not inform the Bolins . . . that they might avoid such a claim by promptly providing the documents after the July 6 review." (Respondent's Brief at 7-8). The evidence in the record indicates that, although the Respondent would have accepted the missing menus without filing an overclaim if Appellant had provided them within approximately one week after the July 6th review, no one in the Appellant's management, including but not limited to Ms. Lepley and the Bolins, was ever informed of this option. (Tr. at 181-82, 388, 405). See Finding of Fact No. 33.

49. In order for Appellant to have been given every reasonable opportunity to correct the missing menu problem, it should have been informed that some leeway would be given in providing the missing documents within a short period of time after the evaluation. Because the applicable regulations do not state that such an option was available, Appellant cannot be charged with the knowledge that it was available. (Tr. at 184, 406-07). See Conclusion of Law No. 6. The failure to Inform the Appellant of this option was unreasonable and did not conform with the requirement that Respondent give Appellant every reasonable opportunity to correct the problem.

E. Appellant Has Corrected the "Missing Menu" Problem by Providing The Missing Menu Records At The Hearing:

50. For reasons stated in the conclusions of law, the period of time for extending to the Appellant every reasonable opportunity to correct the missing menu problem includes the time encompassed by the appeal process. The appeal itself provides a reasonable opportunity to correct the problem. Thus, it cannot be said that provision by the Appellant of the missing menu records during the appeal is necessarily too late to correct the problem. See Conclusion of Law No. 30.

51 The greater weight of the evidence indicates that (a) that the menus in question were misplaced or misfiled at the time of the July 1995 evaluation, and (b) that the authentic missing menu records for the 16 days in June and for July 3 and 5, 1995 are now part of the record of this case. See Findings of Fact of Fact Nos. 52-62.

1. The Missing Menus Were Misplaced:

52. There is substantial evidence to suggest that it had been the routine practice of Appellant to prepare and maintain menu records for the CACFP program. Complete menu records for the period from October of 1994 to April 1996, including the documents entitled "Menu Planning Worksheet Iowa Child and Adult Food Program" and "Food Production Record for Contracted Meals," are in the record. (EX. 14-18, 28). The credible testimony of Jenny Mohler, Curt Bolin, Betty Bolin and Vivian Boals, based on their knowledge and observations of the records and of practices at the Appellant's facility, supports the proposition that these menu records were prepared and maintained in accordance with the standard practices of the Appellant. (Tr. at 235-37, 238-41, 245-50, 277-81, 299-300, 300-01, 307, 309-11, 315-17, 325-26, 335-36, 351, 369-71). Vivian Boals took over Sheila Lepley's position after she left in October of 1995. (Tr. at 366, 367). This evidence supports the inference that the menu records for 16 days in June and on July 3 and 5, 1995 were also prepared in accordance with the routine procedures of Appellant.

53. There are several facts supporting the proposition that the missing menu records were misplaced at the time of the surprise visit by Ms. Huntington in July 1995. First, it is clear that the files were in some disarray at that time, making it likely that Ms. Lepley had misplaced the records, which she had not been allowed any time to review due to the unannounced evaluation. Ms. Huntington noted that, in her search for the missing records, she initially went through two file areas and could not find them. She then looked in the "monthly files" without success. Ms. Lepley then searched for them by spreading out papers on the floor and laying on the desk the papers she could find that were related to the month Ms. Huntington wanted. (Tr. at 94-95).

54. Second, this disarray continued until Ms. Lepley left. When Ms. Boals took over Ms. Lepley's position in October of 1995, she credibly testified that, while the records for 1994 were in good shape, the records for three to four months of 1995 were "a mess." (Tr. at 369-70, 374, 376). "Everything was just thrown in there. [i]t was all messed up." (Tr. at 376).

55. Third, once Ms. Boals completed placing these files in order during November of 1995, she noted that "[t]here was nothing missing. It was just that everything was filed in different places." (Tr. at 370, 371). After Curt

Bolin received the letter of December 11, 1995, he asked Ms. Boals about the missing menu records. She walked over to the records tub and pulled them out. Locating the records at that time did not require a search, because the records were now in order. (Tr. at 279, 371). When Mr. Bolin looked at the files, he found they were all there. (Tr. at 239, 277, 279). He then telephoned Mr. Louis Smith, Chief of the Bureau of Food and Nutrition, and informed him that the menus for the entire month of June were available. (Tr. at 250-51, 293, 384).

56. Fourth, the missing menus were largely in Sheila Lepley's handwriting. (Tr. at 242, 247, 301, 316-17). Ms. Lepley left the Appellant's employment two months before the Appellant was informed it would not be reimbursed for the days for which menus were missing. There is no credible evidence to support the propositions that representatives of the Respondent ever discussed the missing menus with Ms. Lepley after the July 1995 visit or that Ms. Lepley was ever aware that an overclaim could result from the missing menu situation. See Findings of Fact Nos. 4, 9, 46. Therefore, there seems to be no incentive for Ms. Lepley to have "faked" or reconstructed the documents before she left in October of 1995. It is obvious that she did not do so after she left Appellant's employment because she had no further access to the records. (Tr. at 245, 300-01). For this reason, it appears that Mr. Bolin's testimony that he told Mr. Louis Smith that he had the actual menu records for June is a more accurate recollection than Mr. Smith's recollection that Bolin offered to reconstruct the records. (Tr. at 293, 395). For all of the above reasons, it is more likely than not the missing menu records for June and July 1995 were temporarily misplaced.

2. The Records Provided at Hearing Are the Authentic Missing Menus for June and July 1995:

57. The menu records provided encompass all of June 1995 as well as July 3 and 5, 1995. (EX. 16, 18). The evidence supports the proposition that these records came directly from the Appellant's files as they existed after they were placed in order by Ms. Boals in November 1995. (Tr. at 239-40, 249-50). See Findings of Fact Nos. 54-55.

58. On brief, Respondent has made several arguments in support of the proposition that the missing menu records submitted by Appellant should not be accepted as authentic. First, Respondent suggests that the menus may have been prepared after the July visit, as neither Mr. Bolin nor Ms. Boals could testify as to exactly when the documents were prepared. (Respondent's Brief at 9-10 citing Tr. at 241, 279-80, 373, 377). As previously noted, it is more likely than not that Ms. Lepley had temporarily misplaced the documents, not created them after the July 1995 visit of Ms. Huntington. See Finding of Fact No. 56.

59. Furthermore, Jenny Mohler credibly testified that the meal menus for June of 1995 were timely prepared and were, to her knowledge, available for inspection. (Tr. at 310, 318). It was her practice to prepare a menu for the whole week and post it. She would then send it with the food production sheets, which were prepared either by her or Ms. Lepley, at the end of the week to Ms. Lepley. From her testimony, it is evident that the documents referred to are the "Menu Planning Worksheet Iowa Child and Adult Food Program" and "Food Production Record for Contracted Meals". (EX. 16; Tr. at 307, 309, 315-17). Ms. Lepley would often recopy the menus and food production sheets before placing them on file because of handwritten corrections made by Ms. Mohler. (Tr. at 309, 317).

60. Respondent also noted that Ms. Lepley was "not performing well during this time frame." (Respondent's Brief at 10). The evidence of "poor performance," focuses not on July of 1995, but on the period immediately before the end of Ms. Lepley's employment in October of 1995, when "she was acting a little strange" and "not performing the way she should have been." (Tr. at 298, 300). Also, such evidence is just as likely to support the proposition that she misfiled or misplaced documents as the proposition that she did not prepare them in a timely fashion. When viewed in light of the preponderance of the evidence, it is more likely that such evidence supports the proposition that the documents were misfiled. See Finding of Fact No. 53.

61. The Respondent further noted "the State Auditor's negative findings regarding filing of the eligibility

applications during this same time period [where] Bear Basics acknowledged that Ms. Lepley had failed to keep this documentation properly filed." (Respondent's Brief at 10; EX. 2 at 11). A finding of a failure to keep "documentation properly filed" is not inconsistent with the finding here that Ms. Lepley misplaced or misfiled the missing menus. It should be noted that the contract between Appellant and Respondent requires the institution to maintain 23 different types of records. (EX. 1). This problem with the eligibility application is the only problem of any kind whatsoever noted by the Auditor's report. (EX. 2).

62. It is more likely than not that the records entered into evidence by the Appellant are the authentic missing menu records for 16 days in June of 1995 and July 3 and 5, 1995. (EX. 16, 18). Thus, Appellant has corrected the problem which led to the overclaim for those dates. The overclaim for those dates, therefore, should be denied.

V. Overclaim Based on Failure to Provide Sufficient Quantities of Food On July 6 and August 1, 1995:

1. Background on Overclaims Based on Failure to Provide Sufficient Quantities of Food:

63. As previously noted, the Respondent denied reimbursement to the Appellant based on Appellant's failure to provide sufficient quantities of food for all meals served on July 6, 1995 and for the morning and afternoon snacks served on August 1, 1995. See Finding of Fact No. 15.

64. This matter was addressed more fully in the letter of December 11, 1995 from Ms. Huntington and Mr. Bakken to Mr. Bolin:

> 4. Meals must provide the correct foods and the required quantities of foods in order to be claimed for CACFP reimbursement. On July 6, all meals were observed to provide insufficient quantities of food to meet CACFP requirements. At breakfast and lunch, fruit and vegetables were not served to each child and at snack, school-agers were given only 1 piece of celery each and only 10 ounces of peanut butter were used when 60 ounces were needed. Meals on the day of the review will not be reimbursed.
>
> In the future, all foods must be served to each child in the correct quantities at the beginning of the meal. If any food is served family style, the full quantity for each person at the table must be on the table in child-sized bowls, etc. at the beginning of the meal.

(EX. 5).

65. Appellant argues that this overclaim is an abuse of discretion, arbitrary and capricious because Ms. Huntington, who made the determination that the quantities of food served were insufficient, "did not do anything to objectively measure or weigh the quantities of the food served the children." (Appellant's Brief at 26).

66. It is clear that Ms. Huntington did not objectively measure or weigh the quantities of food served children on either July 6 or August 1, 1995. (Tr. at 61-62, 107-08, 140). Respondent admits that "Ms. Huntington did not measure the quantity of the snacks." (Respondent's Brief at 12).

67. The greater weight of the evidence, set forth below, demonstrates, however, that, for some meals, Appellant did not fulfill its contractual obligation to meet minimum meal pattern requirements. (EX. 1). These requirements set forth methods to be used for serving foods and the minimum quantity requirements. (EX. 26, 27). It is especially important to note that food improperly served would not meet the minimum quantity requirements as such food would not be counted toward such requirements. (EX. 5; Tr. at 112-14). Thus the finding that there was a failure

to meet minimum quantity requirements is not based solely on measurements of the amount of food, but on failure to properly serve that food. Where the evidence shows that Appellant did not fulfill the contract for certain meals, the Respondent's overclaims are not an abuse of discretion, arbitrary, capricious or unreasonable. The opposite would be true for those overclaims where the evidence does not show Appellant failed to meet minimum meal requirements.

2. Overclaims for Meals Served On July 6, 1995:

68. The meal pattern requirements are set forth in a manual provided to and used by Appellant and other child care centers. (EX. 26, 27). These requirements reflect those in the federal regulations. (EX.27; Tr. at 108-09). See Conclusion of Law No. 38. The manual indicates that "At least the required serving size must be offered." It further states, "In the child care setting, foods are considered to be served if the minimum required amount of each food, for the number of children and adults at the table, is on the table at the beginning of the meal and the child is seated at the table." [This describes the requirement for family style service]. "Individual meal service is allowed if family style meal service is not possible. Pre served plates or trays may be used. With this method, the full serving of each food component must be served at the beginning of the meal, including milk." "Eating should never be used as a reward, punishment or a condition for other activities." (EX. 26). Family style service was not used by Appellant. (EX. 8, 9; Tr. at 114).

69. These standards were not complied with by Appellant with respect to the breakfast for July 6, 1995. "The fruit was not served to the children. It was kept in a bowl kind of on a shelf or a cabinet to the back - - to the side of the room. And if children finished their waffle, they were asked if they wanted fruit. . . . [M]aybe five to ten kids possibly at the most had fruit served to them." (Tr. at 112). This was out of a total of approximately 60 school age children. (Tr. at 112-13). Ms. Huntington's evaluation form, completed after the July 6th visit, noted that five children were observed with fruit at breakfast. (EX. 8; Tr. at 41). At another point the evaluation indicated that "fruit was not . . . served to ch[ildren]. [O]nly a few were served fruit after ate waffle." (EX. 8) The form noted that breakfast did not meet requirements. (EX. 8). As Ms. Huntington noted in her testimony, "[F]ood should not be made conditional on any other type of behavior such as finishing . . . another thing in order to get something else. The rule is that if the adult serves, the full amount must be served to the child at the beginning of the meal." (Tr. at 113).

70. The only evidence concerning the nature of the violation for the lunch on July 6th are conclusory statements. In the December 11th letter from Ms. Huntington and Mr. Bakken to Mr. Bolin, they state that "all meals were observed to provide insufficient quantities of food to meet CACFP requirements. . . . fruit and vegetables were not served to each child" at breakfast and lunch on July 6th. (EX. 5). The evaluation form completed after the July 6th visit also concluded that lunch did not meet requirements. (EX. 8). There is absolutely no detail on exactly what the failure or violation of Appellant was with respect to the lunch on July 6th. Was it a failure to serve both "vegetables and fruit" at lunch to each child or just vegetables or fruit? Of far greater importance, was the failure or violation due to the method in which the food was made available, as at breakfast where fruit was set aside and its availability was conditioned on the child finishing the waffle, or was the food properly served, but served in insufficient quantity, or both? It should be noted that Ms. Huntington testified that it would be inappropriate for Appellant to hold back the fruits and vegetables when food was adult served. (Tr. at 114). But there is no evidence in the record that the Appellant did hold back the fruits and vegetables at lunch on July 6th or exactly what it did or did not do with respect to that lunch which failed to meet requirements. The record on these issues with respect to the lunch is either silent or so unclear that Appellant could not address them. Therefore, it cannot be said that the Respondent has proven a violation with respect to the lunch on July 6th.

71. The Respondent avers that Insufficient quantities of food were provided to children at snacks on July 6, 1995. (EX. 5). These snacks consisted of servings of celery and peanut butter for the first (morning) snack and juice and pretzels for the second (afternoon) snack. (EX. 5; Tr. at 143, 144).

72. While Ms. Huntington did not measure the quantities of food served on that day, she did rely on statements from the cook about amounts of food that were served as well as her own observations. (Tr. at 62, 107-08, 140). It was reasonable for her to rely on this information.

73. Ms. Huntington observed that, for the first snack, the children were served one stick of celery apiece with peanut butter on the celery. The peanut butter was served from two styrofoam coffee cups. This would be a total of 10 ounces of peanut butter. (EX. 5; Tr. at 114-15). The requirement for school age children for a snack is three quarters of a cup of juice, fruit or vegetable per child. (EX. 26, 27; Tr. at 115). From measurements she made at the office, she knew it would take four to six celery sticks of the size given the children to equal three quarters of a cup. (Tr. at 115). Based apparently on the number of children present, it would have required a total of 60 ounces of peanut butter to meet the proper requirements. (EX. 5). The evaluation form also indicated that the first snack ("AMS"-- A.M. or morning supplement or snack) did not meet requirements. (EX. 8). Mr. Bolin also admitted that "there was a controversy over celery and peanut butter, but it was my error." (Tr. at 313). This is sufficient evidence to prove that the first snack on July 6th did not meet program requirements for the correct quantities of food to be served to the children.

74. Mr. Bolin also averred that he somehow "fixed" the error with the celery and peanut butter, but there is no evidence that it was "fixed" on July 6th by the provision of adequate food for the snack. (Tr. at 313). It is self-evident that, while the Appellant could take action to guard against inadequate quantities of food being provided in the future, the only way, from a nutritional standpoint, to correct inadequate quantities served on a given day would be to increase them to the correct quantities on that day.

75. The only evidence available concerning how or whether the Appellant failed to meet requirements for the second (afternoon) snack on July 6th is provided by conclusory statements in one document and in Ms. Huntington's testimony. The December 11th letter from Ms. Huntington and Mr. Bakken to Mr. Bolin indicates "On July 6, all meals were observed to provide insufficient quantities of food to meet CACFP requirements." (EX. 5). Her testimony also indicates that the amount of juice initially served for the afternoon snack was inadequate. (Tr. at 117-18). There is no indication concerning what quantity of juice was served or whether the actual problem was improper service of the juice, so that whatever quantity was provided was not counted toward the requirement. These conclusory statements are not sufficient to prove that the afternoon snack on July 6, 1995 did not meet CACFP requirements.

3. Overclaims for Meals Served on August 1, 1995:

76. Respondent has also made an overclaim for the morning and afternoon snacks on August 1, 1995. See Findings of Fact Nos. 15, 63. The morning snack for school age children consisted of one-half cup of juice and two Saltine crackers with peanut butter. The afternoon snack for school age children consisted of one-half glass of apple juice and one cookie. (EX. 9; Tr. at 115-16, 144, 146). As previously noted, although Ms. Huntington did not personally measure the quantities, she did rely on statements by the cook as to quantities of food served. (Tr. at 61-62).

77. The specific problems identified with the morning snack on August 1, 1995 were that (a) only a half cup of juice was provided when three quarters of a cup was required under the fruit or vegetable requirement, and (b) only two saltine crackers were provided when five to seven crackers were required under the bread and cereal requirement of an equivalent of one slice of bread. (EX. 9, 26, 27; Tr. at 115-16). This evidence is sufficient to show that the morning snack did not meet the CACFP requirements.

78. The specific problem with the afternoon snack is that it was not served in accordance with USDA requirements. (Tr. at 148). Instead of the children being given the juice and cookie while seated, "they went through a line and either took stuff or did not take it and sat down." (Tr. at 148). Some children "stood and drank j[uice] - walked

away eating cookies." "Not all ha[d] juice." (EX. 9). This did not comply with the manual meal pattern requirements for serving food which have previously been quoted. See Finding of Fact No. 68. As noted in the evaluation form completed after the August 1995 visits, required changes included: "Must give all ch[ildren] correct am[oun]ts of f[oo]d - - if indiv[idual] service all must be given when served." (EX. 9). The evidence here is sufficient to show that there was improper service of the afternoon snack on August 1, 1995.

79. It is more likely than not that the breakfast and morning snack served on July 6, 1995, and the morning and afternoon snacks served on August 1, 1995, did not meet CACFP requirements for the reasons stated. The overclaims for these meals should be upheld.

80. The Respondent has not proven that the lunch and afternoon snack for July 6, 1995 failed to meet CACFP requirements. Therefore, the overclaims for these meals should be denied.

CONCLUSIONS OF LAW:

I. Evidentiary Rulings:

A. The Depositions of Virginia Huntington and Rodney Bakken Are Admitted Solely for Purposes of Impeachment:

1. "Discovery procedures applicable to civil actions are available to all parties in contested cases before an agency." Iowa Code *S* 17A.13(1). Therefore, in determining whether the discovery depositions of Virginia Huntington and Rodney Bakken are admissible for purposes other than impeachment, it is necessary to refer to the rules of civil procedure concerning discovery.

2. The Appellant argues that these depositions are admissible under Iowa Rule of Civil Procedure 144 which provides, in relevant part, that:

> 144. Use of depositions. Any part of a deposition . . . may be used upon the trial . . . against any party who appeared when it was taken, or stipulated therefor, or had due notice thereof, either:
> a. To impeach or contradict deponent's testimony as a witness; or
> b. For any purpose if, when it was taken, deponent was a party adverse to the offeror, or was an officer, partner, or managing agent of any adverse party which is not a natural person.

Iowa Rule of Civil Procedure 144 (a), (b). See Appellant's Brief at 28-29.

3. Under the above rule, since neither Ms. Huntington nor Mr. Bakken were parties in the case nor officers, partners, or managing agents of the Respondent, their depositions shall be used only for purposes of impeachment. *See* id.

B. The Affidavits of Donald Rhodes and Dale Swanson Are to Be Admitted Into the Record As Relevant Evidence:

4. Iowa Rule of Evidence provides that evidence is "relevant" when it tends to "make the existence of [a] fact of consequence to the determination of the [contested case] more or less probable than it would be without such evidence." Iowa R. Evid. 401 (definition of relevant evidence). Here it is contended by Respondent that the affidavits of Donald Rhodes and Dale Swanson should not be entered into evidence as they are irrelevant. Although this

objection is overruled for reasons stated in the findings of fact, it should be noted that this evidence, although relevant, has been found to be entitled to little weight. See Finding of Fact No. 22.

II. Rulings On Matters Pertinent To Both The Overclaim For Missing Menus and The Overclaims Relating To Service of Inadequate Quantities of Food:

A. Binding Nature of Admissions or Stipulations Made By the Parties on Brief:

5. The binding nature of admissions made by the parties on brief has been noted in the findings of fact. See Findings of Fact Nos. 38, 44, 46. When an allegation, *which militates against the party making it*, is made on pleadings or in a brief, and such allegation has not been withdrawn or superseded, **it binds the party making it and must be taken as true by a court, administrative agency, or other finder of fact.** *See* Grantham v. Potthoff-Rosene Company, 257 Iowa 224, 230-31, 131 N.W.2d 256 (1965)(cited in Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)). *See also* Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991).

5A. . A "stipulation" is a "voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate [the] need for proof." BLACK'S LAW DICTIONARY 1269 (5th ed. 1979). **Stipulations as to fact are binding on a court, commission or other adjudicative body** when, as in this case, there is an absence of proof that the stipulation was the result of fraud, wrongdoing, misrepresentation or was not in accord with the intent of the parties. In Re Clark's Estate, 131 N.W.2d 138, 142 (Iowa 1970); Burnett v. Poage, 239 Iowa 31, 38, 29 N.W.2d 431 (1948). The acknowledgement by counsel for Respondent that Appellant's Statement of the Case is "essentially correct" constitutes such a stipulation. See Finding of Fact No. 1.

B. Knowledge of the CACFP Regulations By the Parties is Presumed:

6. The parties, like all persons, are presumed to know the law to the extent such law has been published whether it is in the form of published statutes, Millwright v. Romer, 322 N.W.2d 30, 33 (Iowa 1982) or court decisions, McCulloch's Estate v. Conrad, 52 N.W.2d 67, 77 (Iowa 1952). By analogy, the parties should also be presumed to know published rules, such as the CACFP regulations. *See* Millwright v. Romer, 322 N.W.2d at 33 (citing Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232, 242 (Iowa 1975)). See Findings of Fact Nos. 47, 49.

C. Credibility and Testimony:

7. The Administrative Law Judge and the State Department of Education, in its adjudicative capacity, must be guided by the legal principles in making his credibility assessments. First, the ultimate determination of the finder of fact "is not dependent on the number of witnesses. The weight of the testimony is the important factor." Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957).

8. Second, self-contradictory testimony must be taken into account. The damaging effect of such testimony was noted in the findings of fact concerning Ms. Huntington's credibility. See Findings of Fact Nos. 36-39.

> The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.
>
> . . .
>
> The rule that it is for the [factfinder] to reconcile the conflicting testimony of

> a witness does not apply where the only evidence in support of a controlling fact is that of a witness who so contradicts himself as to render finding of facts thereon a mere guess. We may concede that, ordinarily, contradictory statements of a witness do not make an issue of fact; and that such situation may deprive the testimony of all probative force.

State v. Smith, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993)(quoting Graham v. Chicago & Northwestern Ry Co., 143 Iowa 604, 615, 119 N.W. 708, 711 (1909) and State ex rel Moehnick v. Andiroli, 216 Iowa 451, 249 N.W. 379 (1933)).

9. Other sources have noted the importance of ascertaining inconsistencies:

a. Within the testimony;
b. Between the present account, and past accounts given by the witness; and
c. Between the testimony, and facts clearly established by other witnesses or documentary evidence.

Lareau & Sacks, Assessing Credibility in Labor Arbitration, 5 The Labor Lawyer 151, 176. (1989).

10. Third, it will be expected that memories, and therefore testimony, which are closer in time to the events testified about will be fresher and more accurate than later memories. *See* id. at 167-68. In addition, contradictions between testimony closer in time to the event and later testimony may be explained by the fact that "memory is susceptible to alteration based on "after-acquired" or "post-event" information. In short, nonexistent "facts" can be introduced into our memory--and without any conscious awareness on the part of the observer [i.e. the witness]." Id. at 169. In summary, "memory is easily distorted by the lapse of time and by after-acquired information." Id. at 176. These are part of the reasons why Ms. Huntington's testimony at hearing is not credited when it contradicts her earlier deposition testimony. See Finding of Fact No. 38.

11. Fourth, witness demeanor can be used in evaluating witness testimony and did play a role in evaluating Ms. Huntington's testimony. In Re Moffatt, 279 N.W.2d 15, 17-18 (Iowa 1979); Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957). *See* Anderson v. City of Bessemer City, 470 U.S. 564, 575, 37 Fair Empl. Prac. Cas. 396 (1985); Libe v. Board of Education, 350 N.W.2d 748, 750 (Iowa Ct. App. 1984). Caution must be exercised, however, when using demeanor clues with respect to determining witness credibility as many traditional demeanor clues and notions are false. *See*, Lareau & Sacks, Assessing Credibility in Labor Arbitration, 5 The Labor Lawyer 151, 154-55. (1989). See Finding of Fact No. 38.

12.. Fifth,.

> Evidence on an issue of fact is not necessarily in equilibrium because the witnesses who testify to the existence of the fact are directly contradicted by the same number of witnesses, even though there is but a single witness on each side and their testimony is in direct conflict.
>
> . . .
>
> Numerical preponderance of the witnesses does not necessarily constitute a preponderance of the evidence so as to require a contested question of fact to be decided in accordance therewith. . . . [T]he intelligence, fairness, and means of observation of the witnesses, and various other recognized factors in determining the weight of the evidence . . . should be taken into consideration. . . . It is, of course, well recognized

> that the preponderance of the evidence does not depend upon the number of witnesses.

Wiese v. Hoffman,, 249 Iowa at 425, 86 N.W.2d 861. Among the factors which may be taken into account is "the plausibility of the evidence. The [factfinder] may use its good judgment as to the details of the occurrence . . . and all proper and reasonable deductions to be drawn from the evidence." Wiese v. Hoffman, 249 Iowa 416, 424-25, 86 N.W.2d 861 (1957). In this case, while Mr. Bolin and Mr. Smith gave differing accounts of their telephone conversation, Mr. Bolin's recollection was found to be more credible because it was more consistent with the other facts in the record indicating that the menu records were not reconstructed by the Appellant. See Finding of Fact No. 56.

13. Sixth, "[d]eference is due to hearing officer [now administrative law judge] decisions concerning issues of credibility of witnesses." Peoples Memorial Hospital v. Iowa Civil Rights Commission, 322 N.W.2d 87, 92 (Iowa 1982)(citing Bangor and Aroostook Railroad Co. v. ICC, 574 F.2d 1096, 1110 (1st Cir.), *cert. denied*, 439 U.S. 837, 99 S.Ct. 121, 58 L.Ed2d 133 (1978)(deference is due by reviewing court to ALJ findings on credibility even when commission has reached a contrary decision)). Such deference is given because the administrative adjudicator who views the witnesses and observes their demeanor at the hearing is "in a far superior position to determine the question of credibility than is this court." Libe v. Board of Education, 350 N.W.2d 748, 750 (Iowa Ct. App. 1984). "Factual disputes depending heavily on the credibility of witnesses are best resolved by the trial court which has a better opportunity to evaluate credibility . . ." Capital Savings & Loan Assn. v. First Financial Savings & Loan Assn., 364 N.W.2d 267, 271 (Iowa Ct. App. 1984)(quoted in Board v. Justman, 476 N.W.2d 335, 338 (Iowa 1991)).

D. The Burden of Persuasion In This Case Is On the Respondent Department of Education to Prove Its Overclaims:

14. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of persuasion must be distinguished from what is known as "the burden of production" or the "burden of going forward." The burden of production refers to the obligation of a party to introduce evidence sufficient to avoid a ruling against him or her on an issue. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The standard of proof for the burden of persuasion in administrative proceedings is proof by a preponderance of the evidence. 2 Am. Jur. 2d, *Administrative Law* S 363 (1994). *See* Iowa R. App. Pro. 14(f)(6).

15. There is no legal authority which directly establishes which party has the burden of persuasion in this proceeding. As noted in a leading treatise:

> [T]here is no key principle governing the apportionment of the burdens of proof. Their allocation, either initially or ultimately, will depend upon the weight that is given to any one or more of several factors, including: (1) the natural tendency to place the burdens on the party desiring change, (2) special policy considerations such as those disfavoring certain defenses, (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities.

Cleary, McCormick on Evidence S 337 (1972).

16. The burden of persuasion often falls upon the party desiring "to change the present state of affairs," Id. *see* 29 Am. Jur. 2d, *Evidence* S 158 (1994), or "upon the party that asserts the claim," 29 Am.

Jur. 2d, *Evidence* S 158. Under this rule it is the Respondent, who seeks to recover overclaims for monies already paid, who should bear the burden of persuasion on these claims.

17. One special policy consideration arises because the overclaims are based on alleged failures to comply with CACFP procedures. The overclaims therefore either are or are similar to sanctions for failure to comply with such procedures. Placing the burden on Respondent would be consistent with the principle that the burden of persuasion is placed on the government when it is "the proponent of an order seeking sanctions against a private party." 2 Am. Jur. 2d, *Administrative Law* S 360 (1994).

18. Placing the burden of persuasion, with respect to the overclaims, on the Respondent is also consistent with the rule that "[g]enerally, the burden of proof is on the party asserting the affirmative of an issue in an administrative proceeding." Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). An example of such an assertion would be where an agency alleges a claimant is disqualified for benefits due to fraud. Gipson v. Iowa Department of Job Service, 315 N.W.2d 834, 836 (Iowa App. 1981)). That example is comparable to the Respondent's assertion here that the Appellant should be required to repay monies already provided due to its alleged failures to comply with CACFP procedures.

19. While Appellant requested this hearing, "the fact that a party requests an administrative hearing does not, ipso facto, make it the proponent of the issue." 2 Am. Jur. 2d, *Administrative Law* S 360 & n.16 (1994)(citing Newport News Shipbuilding & Dry Dock Co. v. Loxley, 934 F.2d 511 (4th Cir. 1991)). While this proceeding is characterized as an "appeal," it is not an appeal from any type of adjudication after hearing, but is a "contested case" where "the legal rights, duties or privileges of a party . . . [are] determined by an agency after an opportunity for evidentiary hearing." Iowa Code S 17A.2(5). The issues of whether Appellant complied with CACFP procedures with respect to maintenance of menu records and the proper provision of adequate quantities of food were raised by the Respondent after its inspections in July and August of 1995, not by the Appellant. The inspections were initiated by the Respondent, not the Appellant. Thus, it is appropriate that the burden of persuasion should be on Respondent because, as previously noted, it is "the one who seeks to establish the affirmative of an issue." See Newport News Shipbuilding & Dry Dock Co. v. Loxley, 934 F.2d 511, 516-17 (4th Cir. 1991)(burden placed on party who initiated administrative investigation of claims).

20. Finally, what has been characterized as "the judicial estimate of the probabilities of the situation" indicates the burden of persuasion on the overclaims should be placed on Respondent. Cleary, McCormick on Evidence S 337 (1972). "The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred." Id. It would be more unusual for a CACFP institution to fail to maintain menu records, particularly if it had a past record of doing so, than for that institution to maintain such records. It would also be more unusual for a CACFP institution to follow incorrect procedures for feeding children, or to feed them inadequate quantities of food, than it would for such an institution to follow correct procedures. The Respondent here claims that the more unusual events occurred. Therefore, for this and the other reasons discussed above, it should bear the burden of persuasion on the overclaims.

III. Rulings On Matters Pertinent To The Overclaim For Missing Menus:

A. The Respondent Has the Legal Authority To Seek An Overclaim Based on Inadequate Recordkeeping If It First Provides the Affected Institution With Every Reasonable Opportunity to Correct Recordkeeping Problems:

21. On brief, Appellant makes a series of arguments to support the conclusion that the Respondent

has no legal authority to seek an overclaim based on the allegedly missing menus for June and July 1995. (Appellant's Brief at 6-7). The pertinent parts of Appellant's arguments are set forth below:

> The CNP 47 [the contract between Appellant and Respondent] . . ..does not . . . state that the Department is entitled to seek an overclaim if meal menus are not provided at the time of a management evaluation.
>
> The CNP 47 executed by Bear Basics incorporates the provisions of 7.C.F.R. ch 11 *S* 226 as a part of the agreement. No other regulations, manuals, or documents are considered part of the CNP 47. Indeed the CNP 47 expressly provides that, except as regards 7 C.F.R. Ch. 11 *S* 226, the terms of this agreement "shall not be modified or changed in any way other than by the consent in writing of both parties hereto."
>
> Neither the CNP 47 nor 7 C.F.R. Ch 11 *S* 226 state that the failure to maintain records such as menus shall be grounds for denial of reimbursement and request for overclaim. Indeed, requests for overclaims asserted in Arkansas and California have been expressly denied in unreported judicial decisions on the grounds that the CACFP regulations do not specifically authorize overclaims based on inadequate or missing records. See Federal Register Proposed Rules, Vol. 60, No. 233, pp. 62227 and 6228, December 5, 1995. Although regulations have now been promulgated which expressly allow overclaims and/or requests for reimbursement based upon inadequate or missing records, at no time material to these proceedings were such regulations in effect.
>
> It is axiomatic that an administrative agency cannot assert any jurisdiction or authority nor exercise any action beyond that expressly reserved to it by statutory grant or administrative regulation. The Department has no authority to take action beyond the scope that expressly provided for in CNP 47 or the applicable administrative regulations embodied in 7 C.F.R. Ch. 11 *S* 226. Absent such express authority, the Department may not seek reimbursement from Bear Basics based on the allegedly missing meal menus for the sixteen (16) days in June and two (2) days in July of 1995.

(Appellant's Brief at 7-8).

22. There are several flaws in Appellant's argument. First, although the contract only makes specific reference to the regulations under 7 C.F.R. Part 226, this does not negate the rule that the law existing at the time and place of making a contract is as much a part thereof as though it was expressed therein. 17A Am. Jur. 2d, *Contracts S* 381 (1991). Thus the applicable law which may be referred to in resolving these questions is not limited to the specific federal regulations incorporated in the contract. *See* Madera v. Jones, 1 Morris (Case No.) 204 at page 272 (Iowa 1843).

23. Second, Appellant argues, without citation to legal authority other than unreported court decisions, that Respondent must have express authority to make an overclaim for failure to provide missing records. (Appellant's Brief at 7-8). The regulations provide that:

> (a) State agencies shall disallow any portion of a claim for reimbursement and recover any payment to an institution not properly payable under this part.

7 C.F.R. S 226.14 (a) ("Claims against institutions."). The regulations do not provide an express list of specific instances wherein "payment to an institution" is "not properly payable under this part." Id. The regulations do not expressly state that the failure to provide missing records or to maintain records is grounds for an overclaim. *See* id.

24. Nonetheless, administrative rules are construed and interpreted under the same rules as statutes. Motor Club of Iowa v. Dept. of Transportation, 251 N.W.2d 510, 518 (Iowa 1977). One of these rules provides that when an agency is empowered to perform a certain task, "everything necessary to carry out the power and make it effectual and complete will be implied." Koelling v. Board of Trustees, 259 Iowa 1185, 1194, 146 N.W.2d 284 (1967). Thus, express authority to make an overclaim for failure to maintain records is not required.

25. Third, the proposed rules cited by Appellant do not, under these circumstances, indicate a change in the law from a status where overclaims for recordkeeping infractions are not allowed to a status where such overclaims will be allowed in the future. This construction may appear to be contrary to the usual rule that "an amendment changes the law." Loughlin v. Cherokee County, 364 N.W.2d 234, 236 (Iowa 1985). "But an exception is recognized 'when the law is amended as to minor details and some disputed question is made clear by the amendment. In such a case the amendment can be said to cast light on the legislature's earlier intent.'" Id. (quoting Slockett v. Iowa Valley Community School District, 359 N.W.2d 446, 448 (Iowa 1984)); *See also* Barnett v. Durant Community School District, 249 N.W.2d 626, 629 (Iowa 1977)("it is just as probable that the legislature intended to clear up uncertainties, as it did to change existing law where the former law is changed in only minor details"). In this instance, the proposed rule is designed to "affirm the Department's authority to assess overclaims for recordkeeping infractions and to clarify any regulatory ambiguities or inconsistencies regarding overclaims authority." Proposed Rules: Child and Adult Care Food Program: Overclaim Authority, 60 Fed. Reg. 62227 (December 5, 1995)(Summary)(emphasis added).

26. The rationale for implying that overclaims are permitted for recordkeeping violations is set forth in the "Background" for the proposed rules:

> Section 17(n) of . . . [the National School Lunch] Act stipulates that ". . . institutions participating in the program shall keep . . . records as may be necessary to enable the Secretary to determine whether there has been compliance with . . . this section." Furthermore, the CACFP regulations include a number of requirements relating to recordkeeping: Section 226.7(m) requires State agencies to establish standards for institutional recordkeeping; Section 226.15(e) prescribes the minimum recordkeeping requirements for institutions [including 'Copies of menus, and any other food service records required by the State agency] . . . ; Section 226.10(c) requires institutions to certify that records are available to support reimbursement claims; and Section 226.10(d) establishes a timeframe for record retention. Moreover Section 226.6(f)(1) requires that the Program agreement between the State agency and each institution stipulate that each participating institution must agree to comply with all regulatory requirements including these recordkeeping requirements. Finally, the importance with which the Department views an institution's recordkeeping responsibilities is found in Section 226.6(c)(4), where failure to maintain adequate records is specifically listed as a serious deficiency for which termination of an institution's participation may be appropriate.

Proposed Rules: Child and Adult Care Food Program: Overclaim Authority, 60 Fed. Reg. 62227 (December

5, 1995)(Background).

27. The Respondent specifically relies on the above cited program termination provisions, where "failure to maintain adequate records" is listed as a serious deficiency, as authority from which it may be implied that an overclaim may be made for "failure to maintain adequate records." (Respondent's Brief at 5, citing 7 C.F.R. *S* 226.6(c)(4)).

28. The termination provisions also provide, however, that "the State agency shall afford an institution every reasonable opportunity to correct problems before terminating the institution for being seriously deficient." 7 C.F.R. *S* 226.6(c) (emphasis added). This safeguard is clearly provided in the rules so that institutions may avoid the consequences of termination from the program. *See* id. Given that the consequences of an overclaim for an institution, including the financial impact of such an overclaim, may be as profound as termination from the program, any implication in the rules that recordkeeping or other serious deficiencies are grounds for an overclaim must also include this safeguard. Requiring the state agency to give the institution "every reasonable opportunity to correct [recordkeeping or other] problems" would be consistent with the rule that "everything necessary to carry out the power," Koelling v. Board of Trustees, 259 Iowa 1185, 1194, 146 N.W.2d 284 (1967)(emphasis added), to enforce the rules through the overclaim process "will be implied." Id. Thus, under the legal authorities cited above, overclaims for failure to comply with recordkeeping may be made provided that the institution is first given every reasonable opportunity to correct such problems.

29. In reaching this determination, it must be borne in mind that the law presumes the Appellant faithfully fulfilled its legal duty to feed the children in accordance with program requirements. *See* City of Cherokee v. Illinois Central Railroad Co., 137 N.W. 1053, 1054 (Iowa 1912). "[I]t is a well known fact that records are sometimes mislaid or lost even in well-regulated offices." United States v. Haynes School District No. 6, 102 F.Supp. 845, 852 (E.D. Ark. 1951)(where CACFP institution was unable to produce records of the program, the court rejected government's claim asking for rescission of contract and restitution of payments). The principal objects of the contract, the statute and the rules:

> were to feed the . . . children, and to stimulate the consumption of certain foods, thus improving the public health and bolstering the agricultural economy. If the program was in fact properly carried out by the [CACFP institution], these objectives were presumably achieved, irrespective of . . . whether or not the [institution] was able to keep such records when the auditor called for them. Hence, the mere inability of the [institution] to produce records would not necessarily mean that the program had not been carried out . . . or that the Government had not obtained every benefit which it expected to derive from the program.

See id. at 850-51. To fail to provide the institution with every reasonable opportunity to correct recordkeeping problems before enforcing an overclaim may well result in an "inequitable and oppressive," id. at 853, situation which would:

> leave the Government with all of the benefits flowing from [the institution's] operation of the program [for the dates for which overclaims are made] and would cast upon the latter the entire burden thereof, including not only expenditures for food but also sums paid for labor and the expenses incidental to providing facilities for the serving of meals and the storing of food.

Id. at 853.

B. Appellant Is Permitted To and Did Use the Appeal Process As A Reasonable Opportunity To Correct the Missing Menu Problem Under the Authority Providing That CACFP Institutions Be Afforded "Every Reasonable Opportunity To Correct Problems" Before An Overclaim Is Made:

30. The appeal process itself has been viewed as giving "a reasonable opportunity to correct [an institution's] . . . problems" under 7 C.F.R. S 226.6(c). Arkansas Department of Human Services v. Arkansas Child Care Consultants, Inc., 889 S.W.2d 24, 25 (Ark. 1994). **Thus, an institution has the chance to correct information or other problems through the appeal process.** Id. **The opportunity for CACFP institutions to correct such problems does not end prior to the appeal process.** *See* Id. The greater weight of the evidence showed that, although Appellant was not given a reasonable opportunity to correct its recordkeeping problems prior to the appeal, it did provide the correct information during the appeal hearing. Such evidence included, but was not limited to, "[e]vidence of . . . the routine practice of an organization . . . [which is] relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice." Iowa Rule Evid. 406. See Findings of Fact Nos. 25, 52, 55-59. Thus, the overclaim based on recordkeeping problems should be denied.

C. Legal Authority Supports the Rejection of Appellant's Argument That Certain Documents Provided or Available to Ms. Huntington Were, In Effect, "Menus" For The Periods During Which Menus Were Missing In June and July of 1995:

31. There are several legal authorities that support the rejection of Appellant's argument that certain documents provided or available to Ms. Huntington, such as Ms. Mohler's log, constituted what were, in effect, "menus" for the periods in June and July of 1995 for which menus were missing. Appellant based its argument on the fact that "menu" was not defined in the contract and relied on a particular dictionary definition of "menu" to support the argument that "menus" were provided. See Findings of Fact Nos. 26-31. It was proper to take official notice of a different definition of "menu" found in the Oxford English Dictionary for three reasons: First, the definition was a fact of which judicial notice may be taken. Iowa Code *S* 17A.14(4). Judicial notice may be taken of a dictionary definition as it is a fact which is "capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980). Second, "contracts with the government affording a basis for construction by the court are to receive a liberal construction in favor of the government. Thus, the rule in construing contracts in which the government is a party is to resolve all ambiguities, presumptions, and implications in its favor." 17A Am. Jur. 2d, *Contracts S* 406 (1991). Under this rule, it was appropriate to utilize a construction of "menu" which would better reflect the public interest in accurate record keeping of the foods served at each meal. Third, it has been found that fairness to the parties does not require that they be given the opportunity to contest the fact of which judicial notice was taken. Iowa Code *S* 17A.14(4).

32. It was also appropriate to rely on the past practice of the Appellant of reporting menu information on the Menu Planning Worksheet and Food Production Record forms in determining what the word "menu" meant in the contract. See Finding of Fact No. 30. "A document will be read in light of surrounding circumstances and given such practical construction as [the parties] themselves have placed upon it." Kroblin v. RDR Motels, Inc., 347 N.W.2d 430, 433 (Iowa 1984).

D. The Appellant Was Not Given The Opportunity To Provide the Missing June and July 1995 Menu Records to Respondent at "A Reasonable Time" as Required By 7 C.F.R. S 226.10(d):

33. The program payment procedures for the CACFP program provide, in relevant part, that:

> All accounts and records pertaining to the Program shall be made available, upon request, to representatives of the State agency . . . for audit or review, at a reasonable time and place.

7 C.F.R. *S* 226.10(d). The burden of persuasion with respect to whether Appellant was allowed to make the records available at a reasonable time rests with the Appellant as it is averring it was not given such reasonable time. *See* Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987).

34. Appellant argues that the "reasonable time" limitation in the rule requiring provision of records upon request relies upon "basic notions of due process and fundamental fairness." (Appellant's Brief at 18). The United States Supreme Court has, however, "held that no procedural due process rights attach to actions of an agency involved in a purely investigative and fact-finding mode." Citizen's Aide v. Rolfes, 454 N.W.2d 815, 818 (Iowa 1980)(citing Hannah v. Larche, 363 U.S. 420, 442 (1960)). Nonetheless, although constitutional due process may not require that the institution's records be made available only at a reasonable time and place, the USDA's rules do place such a limitation on a request for such records by a state agency. 7 C.F.R. *S* 225.10(d). Thus, the USDA enacted a "reasonable time and place" limitation, apparently in the interests of fairness to institutions participating in the CACFP program, even though such a limitation may not have been constitutionally required. *See* id.

35. There is no legal authority directly interpreting the meaning or construing the legal effect of the "reasonable time and place" restriction in this rule. Therefore, it is appropriate to refer to other analogous legal authority, including authorities discussing "reasonable time" limitations in the due process context, in determining whether Respondent complied with the "reasonable time" limitation set forth in the rule. One well known "reasonable time" requirement in administrative law is that notice of an administrative hearing "give sufficient time to enable the individual to prepare the case for hearing. There is no mechanical rule governing adequacy of time; the standard is one of reasonableness, and its application depends upon the facts of the particular case. The question of whether notice is reasonable is one of law for the courts. The extreme cases are easy. Notice given a few hours before the hearing is plainly insufficient. The same is true of a three day notice in a welfare termination case or one of four days in a public housing tenancy termination case." Schwartz, Administrative Law *S* 6.4, p. 303 (1991). Under this authority, it is clear that neither an unannounced inspection wherein records are required within a few hours nor the subsequent failure to notify an institution that additional time is allowed, after the surprise inspection, to provide those records, complies with the "reasonable time" standard set forth in the rule. *See* id., 7 C.F.R. *S* 225.10(d). Appellant was not provided with a reasonable time in which to make its records available.

E. The Overclaim for the Missing Meal Menus Was An Abuse of Discretion:

36. A proper or legal discretion is a "discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained." BLACK'S LAW DICTIONARY 419 (5th ed. 1979). An 'abuse of discretion occurs when "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Rowen v. LeMars Mutual Insurance Co., 357 N.W.2d 579, 583 (Iowa 1964). In this case, the overclaim for the missing meal menus constitutes an abuse of discretion because it was exercised on "grounds which were untenable," id, because those grounds disregarded the rules and principles of law governing overclaims and requiring that Appellant be given every reasonable opportunity to correct problems and sufficient notice so that it may provide its records at "a reasonable time." See Conclusions of Law Nos. 28-29, 32-34. When the agency action complained of "is without regard to established rules or standards," Churchill Truck Lines v. Transportation Regulation Board, 274 N.W.2d 295, 299 (Iowa 1979), it constitutes "arbitrary" and "capricious" action, id., which cannot be the exercise of a proper and legal discretion. BLACK'S LAW DICTIONARY 419 (5th ed. 1979).

37. It does not follow, however, that every argument of Appellant with respect to this issue was valid. It was found, for instance that for Ms. Huntington to contact Ms. Leply about the missing menus, while failing to contact the owners about this issue, was reasonable, and thus not an abuse of discretion, *see* Frank v. Iowa Department of Transportation, 386 N.W.2d 86, 87-88 (Iowa 1986), because Ms. Leply was the agent of the Appellant. See Finding of Fact No. 44. The conclusion that Ms. Leply was the agent of appellant is justified because an employee "who is hired to render service to the employer and is subject to the employer's control or right to control" is an "employee-agent." 27 Am. Jur. 2d., *Employment Relationship* S 3 (1996). From all the surrounding circumstances, including Ms. Leply's role as preparer and custodian of the records and overall manager of the program, it was appropriate for Ms. Huntington to conclude that Ms. Leply had the authority to deal with her with respect to such records. *See* Grismore v. Consolidated Products, 5.N.W.2d 646, 652, 232 Iowa 328 (1942)(extent of agent's authority may be implied from the relations of parties, nature of business of agency, service to be rendered, purpose to be consummated, and the surrounding circumstances).

IV. Rulings On Matters Pertinent To The Overclaim For Service of Insufficient Quantities of Food:

A. The Respondent Has the Legal Authority To Seek An Overclaim Based on Failure to Provide Sufficient Quantities of Food on July 6 and August 1, 1995

38. Appellant argues that Respondent does not have legal authority to seek an overclaim based on failure to provide sufficient quantities of food, because neither the statute nor the rules expressly provide such authority. (Appellant's Brief at 26). This argument must be rejected because the overclaim rules specifically refer to overclaims for "failing to meet the meal requirements of S226.20," 7 C.F.R. *S* 226.14(b). As noted in the findings of fact, "the finding that there was a failure to meet minimum quantity requirements is not based solely on measurement of the amount of food, but on failure to properly serve that food." See Finding of Fact No. 67. Those meal pattern requirements are outlined in section 226.20 which provides the basis for the manual provided to child care centers. The rules indicate the required foods and quantities that are to be "served." 7 C.F.R. *S* 226.20. The manual describes in greater detail how service is to be done to ensure that foods are, in fact, "served" to the children.

39. The overclaim rules permit, but do not require, a state agency to refrain from collecting an overpayment when it finds "that an institution which prepares its own meals is failing to meet the meal requirements of *S* 226.20," 7.C.F.R. *S* 226.14(b), "if the institution takes such other action as, in the opinion of the State agency, will have a corrective effect." id. This rule gives greater discretion to state agencies to file an overclaim for specific instances of failure to meet the meal requirements of *S* 226.20 than in those instances where the authority to file an overclaim is mplied from the termination provisions. In the latter case, the agency is required to provide the institution with every reasonable opportunity to correct its problems. See Conclusions of Law Nos. 27-29.

B. The Respondent's Decision to Seek an Overclaim Based on Failure to Provide Sufficient Quantities of Food With Respect to Certain Meals on July 6, 1995 and August 1, 1995 Is Supported By a Preponderance of the Evidence and Therefore Is Not Arbitrary, Capricious or an Abuse of Discretion:

40. Appellant argues that the overclaims based on failure to serve sufficient quantities of food are all arbitrary and capricious and an abuse of discretion. (Appellant's Brief at 26). "Arbitrary" and "capricious" are practically synonmous. Both refer to an agency decision taken without regard to the law or the facts. Office of Consumer Advocate v. Iowa State Commerce Comm'n, 432 N.W.2d 148, 158 (Iowa 1988).

Unreasonableness was defined in Churchill Truck Lines, Inc. v. Transportation Regulation Board, 274 N.W2d 295, 300 (Iowa 1979), to mean **"action in the face of evidence as to which there is no room for difference of opinion among reasonable minds or not based on substantial evidence."** *See* 2 Am.Jur.2d Administrative Law *S* 651, at 107-12 (1962).. **An abuse of discretion is synonymous with unreasonableness.** *See* Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act, 63 Iowa L.Rev. 285, 317 n.97 (1977). It is premised on **lack of rationality,** and focuses on whether the agency has made **a decision clearly against reason and evidence.** *See e.g.*, Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 730 (2nd Cir. 1978)(under federal administrative procedure act); *see also* American Petroleum Institute v. Environmental Protection Agency, 661 F.2d 340, 349 (5th Cir. 1981)(agency must give at least "minimal consideration to the relevant facts as contained in the record" under federal administrative procedure act); 2 Am.Jur.2d, supra, *S* 651, at 507-12. This standard is no different than the one we employ in reviewing the exercise of a district court's discretion: "We reverse . . . only when such **discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable."** Rowen v. LeMars Mutual Insurance Co., 357 N.W.2d 579, 583 (Iowa 1964).

Frank v. Iowa Dept. of Transportation, 386 N.W.2d 86, 87-88 (Iowa 1986)(emphasis added).

41. Since the overclaims for the July 6th and August 1st meals described in Finding of Fact number 79 are supported by a preponderance of the evidence, it follows that those overclaims do not constitute unreasonable, arbitrary, or capricious action or an abuse of discretion. See Finding of Fact No. 79.

C. The Respondent's Decision to Seek an Overclaim Based on Failure to Provide Sufficient Quantities of Food With Respect to Certain Meals on July 6, 1995 Is Not Supported By Substantial Evidence and Therefore Is Not Arbitrary, Capricious or an Abuse of Discretion:

42. The Respondent's overclaims for the lunch and afternoon snack for July 6, 1995 are not supported by a preponderance of the evidence. The evidence suporting these claims does not meet the standard for a burden of production, let alone the burden of persuasion. "The evidence must be such that a reasonable [person] could draw from it the inference of the existence of the particular fact to be proved. Cleary, McCormick on Evidence *S* 338 (1972).

43. The Respondent must produce evidence sufficient to raise "a genuine issue of material fact as to [the fact in question]." Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). Statements describing conclusions and beliefs are not sufficient to establish the existence of a genuine issue of material fact. *See* Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971). The nondiscriminatory reason proffered "must be specific and clear enough for the [Appellant] to address and legally sufficient to justify judgment for the [Respondent]." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988).

44. This overclaim is not based on substantial evidence, i.e. "what a reaonable mind would accept as adequate to reach a given conclusion." Hamer v. Iowa Civil Rights Commission, 472 N.W.2d 259, 261

(Iowa 1991). In light of the standards set forth above, this overclaim is unreasonable, arbitrary and capricious and constitutes an abuse of discretion. See Conclusion of Law No. 40.

DECISION AND ORDER:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

A. All of the overclaims based on the Appellant's failure to have meal menu records available for inspection by Respondent for dates in June and July of 1995 are hereby overruled.

B. The overclaims based on the Apellant's failure to provide sufficient quantities of food for the lunch and afternoon snack served on July 6, 1995 are hereby overruled.

C. The overclaims based on the Appellant's failure to provide sufficient quantities of food for the breakfast and morning snack served on July 6, 1995, and for the morning and afternoon snacks served on August 1, 1995 are hereby affirmed.

Signed this the 17th day of January, 1997.

Donald W. Bohlken

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