

**IOWA DEPARTMENT OF EDUCATION**  
**27 D.o.E. App. Dec. 550**

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*In re Termination from CACFP*

Sara Ross,	:	14DOE006
Appellant,	:	
v.	:	DECISION
Polk County Community Family & Youth Services,	:	[Admin. Doc. 5001]
Appellee.	:	

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The Appellant, Sara Ross, filed an appeal from a determination that her child care home is seriously deficient for the reasons specified herein. This matter was heard telephonically on November 18, 2014, before Administrative Law Judge Carol J. Greta, designated hearing officer on behalf of Brad A. Buck, Director of the Department of Education.

The Appellant, Sara Ross, appeared personally and testified on her own behalf. The Appellee, Polk County Community Family & Youth, was represented by CACFP specialist Gracy Kirkman and program administrator Joy Ihle. Only Ms. Kirkman testified for Polk County Community Family & Youth.

The written record consists of the following:

- 1 The transmittal slip from the Department of Education, which included the following:
  - a. Appeal letter from Ms. Ross dated October 23, 2014, which included a letter from her cellular phone provider, Sprint, dated October 17, 2014
  - b. Flow Chart: Serious Deficiency Process for Home Providers
- 2 Exhibits A – L from Polk County Community Family & Youth, as follows:
  - a. Exhibit A: Notice of Serious Deficiency dated June 3, 2010
  - b. Exhibit B: Rescission of Notice of Serious Deficiency
  - c. Exhibits C & D: communications from November 2010 and October 2011 re “same day entry button”
  - d. Exhibit E: Current Corrective Action Plan dated September 2, 2014
  - e. Exhibit F: June 2014 meal information entered by Ms. Ross
  - f. Exhibit G: July 2014 meal information entered by Ms. Ross
  - g. Exhibit H: August 2014 meal information entered by Ms. Ross

- h. Exhibit I: September 2014 meal information entered by Ms. Ross
- i. Exhibit J: October 2014 meal information entered by Ms. Ross
- j. Exhibit K: 2 emails from Minutemenu dated October 24, 2014
- k. Exhibit L: Proposed Termination and Proposed Disqualification dated October 8, 2014

All of the above were admitted into the record without objection.

### ***FINDINGS OF FACT***

Sara Ross runs a child daycare home in Ankeny. She participated in the Child and Adult Care Food Program (CACFP), which is administered by the United States Department of Agriculture through the Iowa Department of Education's Bureau of Nutrition Programs. Under CACFP, Ms. Ross is a "provider."

CACFP is a federal program that provides reimbursement for meals and snacks provided by providers to children in daycare homes and centers. A provider is required to keep contemporaneous detailed, accurate records of the provider's menus, as well as of the attendance and meals/snacks served to each individual child in the care of the provider.

The participation of providers in CACFP is supervised by a sponsor, in this case Polk County Community Family & Youth. To participate in CACFP in Iowa, the provider must possess a certification of registration from the Iowa Department of Human Services, and must sign an agreement that provides for the terms and conditions of program participation. One of the provisions in the agreement specifies that a provider shall keep required records. Required records include, but are not limited to, attendance, meal pattern, meal counts, and menu records. 7 CFR § 226.16(d)(4)(i).

On June 3, 2010, Polk County Community Family & Youth sent a Serious Deficiency Notice to Ms. Ross, citing lack of contemporaneous required meal records for the period May 24 – 28, 2010. (Exhibit A) Ms. Ross was given a chance to correct the deficiency by entering meals and attendance records daily and by attending a course on avoiding serious deficiencies.

The sponsor determined by letter dated August 19, 2010, that Ms. Ross "fully and permanently corrected the serious deficiencies [sic] that were cited in the Serious Deficiency Notice." Ms. Kirkman signed the letter in which she also stated as follows:

We have rescinded our serious deficiency determination. However, if we find in any subsequent review that any of these serious deficiencies have not been fully and permanently corrected, we will immediately propose to terminate your agreement for cause and propose to disqualify you without any further opportunity for

corrective action.

(Exhibit B)

For the next four years, no problems were noted by the sponsor regarding Ms. Ross's recordkeeping. However, on September 2, 2014 Ms. Kirkman called Ms. Ross because she had noted that there were no entries for the month of August, 2014. Prior to August, it was Ms. Ross's habit to use a computer at her sister's house to make her data entries. However, in August, Ms. Ross acquired a new smart phone and downloaded an application that she thought was allowing her to enter the data on her phone. When she filed her appeal, Ms. Ross requested that her carrier, Sprint, review her data usage for her new phone for August. In a letter dated October 17, 2014, addressed to Ms. Ross, a customer service representative from Sprint reported as follows:

We were able to review your data usage for the month of August 2014, per your request. Our records indicate that you used the Minute Menu application approximately 21 days during the month. Usage also indicates the application was used during the work week. Data Usage also indicates each visit lasted on average for five to ten minutes per day.

Minute Menu is one of the software systems approved by Polk County Community Family & Youth for providers to use when entering their records. However, while Sprint could verify that Ms. Ross used the Minute Menu application, the Minute Menu system informed Ms. Kirkman that it had no records for August from Ms. Ross in its system. (Exhibit K)

Once a month is over, a provider has five days to make sure that all the records for that month are indeed uploaded to an approved system. (Ross Testimony) Accordingly, on September 2, when Ms. Kirkman noticed that no August records had been entered, Ms. Ross was unaware of the problem because she had not yet verified her work. (*Id.*)

Starting again in September 2014, Ms. Ross has her technology issues resolved and has made daily entries in accordance with CACFP requirements. (Kirkman Testimony; Exhibits I & J)

Although Ms. Kirkman and Ms. Ihle characterized Ms. Ross as one of their best providers, the Iowa Department of Education's Bureau of Nutrition Programs advised Polk County Community Family & Youth that it had no choice but to immediately terminate Ms. Ross from the CACFP based on the serious deficiency from 2010 and the problem with the records for August 2014. Accordingly, the sponsor sent a proposed termination and proposed disqualification to Ms. Ross dated October 8, 2014, stating that she had not "fully and permanently corrected the serious deficiencies that were cited in the Serious Deficiency Notice" of June 3, 2010. (Exhibit L)

## **CONCLUSIONS OF LAW**

CACFP is a program created by the Agricultural Risk Protection Act, 42 U.S.C. § 1766. That Act and its regulations dictate the terms of the participation agreement between the sponsor and the provider.

The regulations at 7 CFR § 226.16 enumerate reasons why a daycare home provider may be terminated from CACFP. Being cited as “seriously deficient” and not correcting the deficiency is one cause for termination. A serious deficiency includes the provider’s failure to maintain records. 7 CFR § 226.16(e).

Ms. Ross successfully corrected her first serious deficiency, allowing the sponsor to rescind its determination of serious deficiency under 7 CFR § 226.16(l)(3)(ii) (2009). In July 2011, that federal regulation was amended. Because this language is important to the outcome of this appeal, the pre-2011 and post-2011 verbiage of section 226.16(l)(3)(ii) is provided as follows:

<b>Pre-2011</b>	<b>Post-2011</b>
<p><i>(ii) Successful corrective action.</i> If the day care home corrects the serious deficiency(ies) within the allotted time and to the sponsoring organization’s satisfaction, the sponsoring organization must notify the day care home that it has <b>rescinded</b> its determination of serious deficiency. The sponsoring organization must also provide a copy of the notice to the State agency. (Emphasis added.)</p>	<p><i>(ii) Successful corrective action.</i> If the day care home corrects the serious deficiency(ies) within the allotted time and to the sponsoring organization’s satisfaction, the sponsoring organization must notify the day care home that it has <b>temporarily deferred</b> its determination of serious deficiency. The sponsoring organization must also provide a copy of the notice to the State agency. <b>However, if the sponsoring organization accepts the provider’s corrective action, but later determines that the corrective action was not permanent or complete, the sponsoring organization must then propose to terminate the provider’s Program agreement and disqualify the provider... .</b> (Emphasis added.)</p>

The undersigned has thoroughly reviewed the statute and regulations that were in effect at the time that the provider sent to Ms. Ross the letter of August 19, 2010, in which the provider advised Ms. Ross that “if we find in any subsequent review” that the same serious deficiency has “not been fully and permanently corrected, we will immediately propose to terminate your agreement for cause...without any further opportunity for corrective action.” (Exhibit B) It

appears that the statement quoted immediately above had no legal basis in August 2010. The undersigned understands that the sponsor was acting on the guidance from the Iowa Department of Education, but there is no showing of authority for the quoted statement.

Only in July 2011 was the pertinent federal regulation amended to give a sponsor authority to move directly to termination without giving a provider another opportunity for corrective action.

“[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.’ ” *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 947, 117 S. Ct. 1871, 1876, 138 L. Ed. 2d 135 (1997) (internal cites omitted.).

The amendment to 7 CFR § 226.16(l)(3)(ii) in July 2011 clearly attaches a new disability to a CACFP provider who had cured a serious deficiency prior to the amendment.

There is a longstanding presumption against statutory retroactivity, “founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation.” *Landgraf v. USI Film Products*, 511 U.S. 244, 286, 114 S. Ct. 1483, 1508, 128 L. Ed. 2d 229 (1994). “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. *Id.*, 511 U.S. at 265, 114 S. Ct. at 1497.

Not only does precedent in caselaw protect Ms. Ross, the “Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause ‘may not suffice’ to warrant its retroactive application.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976).

Polk County Community Family & Youth was ill-advised by the State Agency to immediately move to terminate Ms. Ross’s agreement and disqualify her from the CACFP program, basing such action on a retroactive law.

Furthermore, even assuming that Polk County Community Family & Youth had legal justification to rely on the retroactive law, it has not been shown that Ms. Ross was again seriously deficient. There is no dispute that the data for August 2014 did not ultimately end up where it was to be. However, this was not for lack of effort by Ms. Ross. She proved that she thought in good faith that she had taken the necessary steps to provide the information. In addition, she was not given the five “grace days” to discover the glitch and enter the information before her sponsor acted.

CACFP uses public resources to reimburse providers, and the regulations for participation are quite strict. However, they are not so strict as to permit disregard of a provider's good faith efforts, as demonstrated by her letter from Sprint and by her compliance once the glitch was discovered.

***DECISION***

For the foregoing reasons, the proposed termination and proposed disqualification of Sara Ross from the Child and Adult Care Food Program is hereby **dismissed**. Ms. Ross may continue with full participation in the CACFP.

Entered this 20<sup>th</sup> day of November, 2014.



Carol J. Greta  
Administrative Law Judge

It is so ordered.

11-25-14

\_\_\_\_\_  
Date



\_\_\_\_\_  
Brad A. Buck, Director  
Iowa Department of Education

cc: Appellant  
Appellee  
Ann Feilmann, Suzanne Secor Parker, Robin Holz – Department of  
Education