

**IOWA DEPARTMENT
OF EDUCATION
(Cite as 24 D.o.E. App. Dec. 15)**

<i>In re Termination from CACFP</i>	:	
Judy Kennedy, d/b/a Kennedy Daycare, Appellant,	:	
vs.	:	DECISION
Southern Iowa Economic Development Association, Appellee.	:	[Admin. Doc. #4627]

This matter was heard telephonically on February 2, 2006, before Carol J. Greta, J.D., designated administrative law judge, presiding on behalf of Judy A. Jeffrey, Director of the Iowa Department of Education. The Appellant, Judy Kennedy, personally was present. The Appellee, Southern Iowa Economic Development Association, was represented by employee Alice Beeson. Hearing was held pursuant to this agency’s administrative rules in 281 Iowa Administrative Code 6. The Iowa Department of Education has jurisdiction over the hearing pursuant to the federal regulation found at 7 C.F.R. 226.6(k).

**I.
FINDINGS OF FACT**

Judy Kennedy runs a child daycare home – Kennedy Daycare – in Ottumwa. She has 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, for seven months. The CACFP is a federal program that provides reimbursement for meals and snacks provided to children in daycare homes and centers.

Daycare homes such as Kennedy Daycare must be supervised by a sponsoring organization, in this case the Southern Iowa Economic Development Association [“SIEDA”]. To participate in CACFP in Iowa, the home provider must be licensed by the Iowa Department of Human Services [“DHS”]. Ms. Kennedy’s daycare is licensed as a category C provider. The limit on the number of children who may be in care in a category C home, as imposed by DHS, is discussed under our Conclusions of Law.

A CACFP daycare home provider also must sign an annual agreement that provides for the terms and conditions of program participation. The present agreement between Ms. Kennedy and SIEDA was signed by Ms. Kennedy on September 13, 2005 (Exhibit 8). Some of the applicable provisions in the agreement¹ are as follows:

- The sponsor must conduct at least two unannounced visits to the home per federal fiscal year (October 1 – September 30), and that at least one of the unannounced visits must include a review of an observed meal service. [§A, ¶3d]
- The sponsor shall provide payment to the home provider for meals within registration capacity. [§A, ¶11]
- The sponsor shall follow the required procedures for corrective action, serious deficiency, and suspension if the provider fails to comply with CACFP requirements. [§A, ¶17] The listed requirements include submission of false claims for reimbursement [¶17(ii)] and any “other circumstance related to non-performance under the” agreement. [¶17(ix)]
- The home provider shall record attendance and meal participation information daily, “but not in advance of actual activity” and recording attendance and meal participation records “independently of the other. Menus may be recorded in advance but not less than daily.” [§B, ¶3]
- The home provider shall maintain daily attendance by child’s name, date and arrival-departure time. [§B, ¶5b]
- The home provider shall maintain daily meal participation by date, by meal type, and by child’s name. [§B, ¶5c]

At issue in this appeal are two Notices of Intent to Terminate that SIEDA sent to Ms. Kennedy on or about January 5, 2006 (Exhibits 27 and 32). The reasons provided in the Notices were being over registration capacity (cited as “other circumstance related to non-performance”) and submission of false claims for reimbursement.

Regarding both issues, SIEDA correctly followed the procedures required before a home provider may be terminated from CACFP participation. The sponsor provided written Notices of Seriously Deficient Practice to Ms. Kennedy to make her aware of the alleged seriously deficient practices (Exhibits 14 and 24). The Notices also informed Ms. Kennedy of the Corrective Action Plans required to demonstrate full and permanent compliance with CACFP rules. Notices of Intent to Terminate are not issued until the sponsor is satisfied that a home provider continues to violate CACFP rules after being advised (via the Notice of Seriously Deficient Practice) that the provider needs to change

¹ These paragraph numbers correspond to the numbers in the provider/sponsor agreement between these parties for the current fiscal year, October 1, 2005 – September 30, 2006. Some of the paragraph numbers are different from those in the agreement that covered the prior fiscal year.

how she conducts her daycare. This procedure ensures that no provider is terminated without being given a second chance.²

In the fall of 2005, SIEDA personnel noticed that Ms. Kennedy had been claiming two children throughout October on the same days and at the same times as was another provider. Ms. Kennedy admitted that she had been marking the children's meals ahead of time. In accordance with 7 C.F.R. § 226.10(f), SIEDA did not pay Ms. Kennedy for the falsely claimed meals. Pursuant to 7 C.F.R. § 226.16(1)(3), SIEDA also sent Ms. Kennedy notice that submitting false claims is a seriously deficient practice to be corrected by "mark[ing] meals served for all children at point of service (when meals are served) on a permanent basis." (Page 2 of Exhibit 24)

On December 14, 2005, Ms. Beeson conducted an unannounced visit to Kennedy Daycare. She was present at the daycare from 11:30 a.m. to 12:42 p.m., a total of 72 minutes. Ms. Kennedy had already served lunch that day. While present, she asked Ms. Kennedy to provide her with a list of the children present at that time. The list provided by Ms. Kennedy did not contain the names of two children who were listed on her December claim as having received lunch from Ms. Kennedy on December 14.

Ms. Kennedy's explanations for the discrepancies are not credible. She first stated that one of the children (Johnny) must have been in the bathroom when she was creating the list for Ms. Beeson on the 14th, and then argued that she thought that Ms. Beeson only wanted the names of those children to whom Ms. Beeson read a story while the latter was at her daycare.³ Regarding the other child (Jacob), Ms. Kennedy stated that she mixed up Jacob with his brother, Conner. The evidence shows that both Jacob and Conner were marked for lunch on December 14, but Ms. Kennedy told Ms. Beeson that only one brother was present at that time. (Even if she had confused the brothers' identities, if both had been present she presumably would have stated so to Ms. Beeson.)

Even viewing Ms. Kennedy's statements in a light most favorable to her, Ms. Kennedy's explanations demonstrate that she continued to disregard the recordkeeping requirements of the CACFP. She had also marked two girls (Leilani and Jaden) as present but not having been fed lunch on December 14. Her explanation was that the girls ate before arriving at her home at 11:00 a.m. and that they were present for just an hour that day. Ms. Beeson testified that no child left while she was present at Kennedy Daycare on the 14th. We find that Ms. Kennedy is not being truthful, and that after

² There is an exception not at issue here. 7 C.F.R. section 226.16(1)(4) states that a provider must be suspended from the program immediately (with appeal rights) for an imminent threat to the health or safety of children in the provider's setting.

³ This explanation is rejected because Ms. Kennedy provided Ms. Beeson with the names of the three children who were napping in another room during story time, and because Ms. Kennedy argues in her next breath that Johnny assisted Ms. Beeson with story time.

receiving written notice that she must mark meal service at the time that meals were served, she continued to pre-mark her monthly reports.

[The over capacity issue is discussed in our Conclusions of Law. For the reasons stated in that section, we need not make any findings of fact related to that issue.]

By document dated January 5, 2006, SIEDA gave Ms. Kennedy Notice of Intent to Terminate her participation in CACFP for her failure to permanently and fully correct the seriously deficient practice of making false claims. Her timely appeal to this agency followed.

II. 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 minimum terms of the participation agreement between the sponsor and the home provider.

The regulations at 7 C.F.R. § 226.16 enumerate reasons why a daycare home may be terminated from CACFP. Being cited as “seriously deficient” and not correcting the deficiency is one cause for termination. A serious deficiency includes submission of false claims for reimbursement and failure to daily record required records. 7 C.F.R. § 226.16(1)(2). The regulations also mandate the procedure to be used if the sponsor determines that a home provider has committed one or more serious deficiencies. Offering an opportunity to take corrective action is mandated in rule 226.16(1)(3). The procedures were followed correctly by the sponsor. The issues are substantive.

Over capacity

The first deficiency cited by the sponsor was that Ms. Kennedy was over her capacity limits as a category C home.

To be eligible for CACFP participation, Ms. Kennedy must operate her daycare home within the limits set by DHS. She is licensed by DHS as a category C home. According to DHS rule 441—Iowa Administrative Code (IAC) 110.10, category C homes must comply with the following limits as to number of children in care:

- a. No more than 12 children not attending kindergarten or a higher grade level shall be present at any one time.
- b. Of these 12 children, not more than 4 children who are 24 months of age or younger shall be present at any one time. Whenever 4 children who are under the age of 18 months are in care, both providers shall be present.
- c. In addition to the 12 children not in school, no more than 2 children who attend school may be present for a period of less than two hours at any one time.

- d.* In addition to these 14 children, no more than 2 children who are receiving care on a part-time basis may be present.
- e.* No more than 16 children shall be present at any one time when an emergency school closing is in effect. If more than 8 children are present at any one time due to an emergency school closing exception, the provider shall be assisted by a department-approved assistant who is at least 18 years of age.
- f.* If more than eight children are present, both providers shall be present. Each provider shall meet the provider qualifications for child development home category C.

Non-compliance with the above limits is not listed in 7 C.F.R. part 226 or the CACFP agreement between sponsor and provider as a serious deficiency. Exercising the authority granted in 281—IAC 6.12(2)“o”(5)⁴, the hearing officer consulted Rod Bakken, Lead Consultant, who helps administer CACFP for the State of Iowa.

Mr. Bakken stated that his Bureau has not instructed sponsors to treat capacity issues as serious deficiencies. He believes that the appropriate guidance is that the sponsor shall not reimburse the provider for meals served beyond capacity. But any *chronic* issues of capacity should be reported by the sponsor to DHS as the licensing authority for appropriate action.⁵ A sponsor may caution a provider that capacity issues exist, as SIEDA did with Ms. Kennedy. We applaud the fact that SIEDA asked representatives of the local DHS office to work with them to explain to Ms. Kennedy why category C homes have the capacity limits quoted above and how DHS deals with capacity noncompliance. However, we do not believe that being over capacity is a serious deficiency for purposes of termination from CACFP.

The record shows that Ms. Kennedy greatly reduced the number of meals she served in excess of capacity after being warned of the issue and after SIEDA and DHS personnel worked with her on the issue. Because she was still over capacity on her December claim, the sponsor again could have advised DHS of the noncompliance with rule 441—110.10, even though Ms. Kennedy made improvements in the area of capacity. It would then be left to the discretion of DHS whether to take action adverse to Ms. Kennedy’s daycare license. If DHS were to revoke Ms. Kennedy’s license, she would no longer qualify for participation in CACFP. 7 C.F.R. § 226.18(a). But until such time, if ever, that the federal Department of Agriculture decides to clearly make capacity a CACFP issue, there appears to be no other means by which a sponsor may act to terminate a home provider who exceeds his or her license capacity.

⁴ “Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the hearing panel.”

⁵ Sponsors may also contact Mr. Bakken and others at the Bureau of Nutrition Programs for guidance about this or other CACFP issues.

False claims

The second deficiency cited by the sponsor is submission of false claims. A false claim allegation does not have to equate to claiming payment for meals not served. It also can be founded in a case of a provider claiming fewer, rather than more, actual meals served (as in the case of Jaden and Leilani). The gist of the allegation is that Ms. Kennedy continued in her failure to keep attendance and meal service records in the manner required by federal law. The Corrective Action Plan offered to Ms. Kennedy, that she mark meals served at the time of service, was appropriate.

The regulations state “[e]ach sponsoring organization shall accept final administration and financial responsibility for food service operations in all child ... day care facilities under its jurisdiction.” 7 C.F.R. § 226.16(c). A home provider is required to be fiscally accountable to the public for the funds she receives through the program. The sponsor is to hold the home provider accountable on behalf of the public.

While this result may seem harsh to Ms. Kennedy, the rationale for the strictness of the regulations is simple. CACFP is funded by public monies; that is, by taxpayers. A home provider is required to be fiscally accountable to the public for the funds s/he receives through the program. When such accountability is lacking, the public trust is gone, and the sponsor must act accordingly. Repeating the same lack of care in recordkeeping that she was warned of in November bespeaks gross carelessness on the part of Ms. Kennedy at best and a callous disregard on her part for the public’s money at worst.

III. DECISION

For the sole reason that Ms. Kennedy failed to fully and permanently correct the serious deficiency of submitting false claims, her proposed termination from the Child and Adult Care Food Program is hereby **affirmed**.

Date

Carol J. Greta, J.D.
Administrative Law Judge

It is so ordered.

Date

Judy A. Jeffrey, Director
Iowa Department of Education