

IOWA DEPARTMENT OF EDUCATION
(Cite as 24 D.o.E. App. Dec. 45)

<i>In re Termination from CACFP</i>	:	
Nicole Klemme,	:	
Appellant,	:	DECISION
vs.	:	
Iowa East Central T.R.A.I.N. Program,	:	[Admin. Doc. 4631]
Appellee.	:	

This matter was heard telephonically on March 28, 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, Nicole Klemme, took part in the hearing on her own behalf. Its CACFP manager, Vicki Liebke, represented the Appellee, Iowa East Central T.R.A.I.N. Program. Hearing was held pursuant to this agency's administrative rules in 281—Iowa Administrative Code chapter 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

Nicole Klemme runs a child daycare home in Davenport. 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, since March 16, 2005. 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 Ms. Klemme's must be supervised by a sponsoring organization, in this case the Iowa East Central T.R.A.I.N. Program ["T.R.A.I.N."]. A further requirement for participation in CACFP in Iowa is that the home provider be licensed by the Iowa Department of Human Services ["DHS"]. Ms. Klemme's daycare is licensed by DHS as a category A home.

A CACFP daycare home provider must sign an annual agreement with the sponsoring organization that provides for the terms and conditions of program participation. A copy of their agreement was not provided to us by either Ms. Klemme or

T.R.A.I.N. However, assuming they utilized the standard agreement, some of the applicable provisions in the agreement are as follows:

- The sponsor shall provide payment to the home provider for meals provided to children within registration capacity.
- The sponsor shall follow the required procedures for corrective action, serious deficiency, and termination from the Program if the provider fails to comply with CACFP requirements, such as submission of false claims for reimbursement.
- The home provider shall record attendance and meal participation information daily, but not in advance of actual activity. The daily attendance records are to be maintained by child's name, date and arrival-departure time. The home provider shall maintain daily meal participation by date, by meal type, and by child's name.

T.R.A.I.N. sent to Ms. Klemme a Notice of Serious Deficient Practice and a Corrective Action Plan on or about December 9, 2005. We were provided with a copy of the Corrective Action Plan, but not the "Serious Deficient Notice Letter" that was sent to Ms. Klemme by T.R.A.I.N. From the Corrective Action Plan, it appears that the reason provided in the Notice was submission of false claims for reimbursement.

At this hearing, Ms. Liebe testified that the Notice of Serious Deficient Practice was sent to Ms. Klemme following a household contact audit for the week of November 6 – 12, 2005. Phone conversations with parents and/or completed audit forms returned by parents whose children were claimed on Ms. Klemme's meal reimbursement forms for that week led T.R.A.I.N. personnel to believe that three children were not present at times and dates so claimed. It does not appear from the written record before us that these children were identified in any documentation provided to Ms. Klemme. Their identities were stated during this hearing as Isabella M., Makenna K., and Mercedes M.¹ For purposes of this appeal, it is not necessary for us to determine whether Ms. Klemme submitted false claims for reimbursement of meals regarding these children. We assume that T.R.A.I.N. had a reasonable cause to issue the December 9th Notice of Seriously Deficient Practice and Corrective Action Plan to Ms. Klemme.

The Corrective Action Plan given to Ms. Klemme included six specific steps. Those relevant to this appeal are set out as follows:

1. Complete meal participation and attendance accurately AT THE POINT OF SERVICE (when a meal or snack is served).
2. Copy enclosed Attendance Sign In/Sign Out Sheets and have parents of children in attendance sign children in and out by recording accurate times and then signing their name each day

¹ We do not use complete surnames for the minor children to protect their privacy; however, both parties are fully aware of the identities of the children.

child is in care. This documentation will be considered part of the required daily CACFP paperwork.

...

4. Adhere to DHS capacity guidelines for Category A home.

...

On or about February 24, 2006, T.R.A.I.N. sent to Ms. Klemme a "Notice of Proposed Termination and Proposed Disqualification." This Notice states in part as follows:

Based on our review of the menus and documentation you have submitted since [December 14, 2005], we have determined that you have not fully and permanently corrected the serious deficiencies that were cited in the Serious Deficiency Notice.

...

The following paragraph detail[s] each serious deficiency and its status based on the review of the corrective action plan documentation.

Menus recorded arrival/departure times completed by you did not match times recorded by parent on sign in/sign out sheet. You did not adhere to DHS capacity regulations for a Category A home. [Emphasis added.]

At this hearing, Ms. Liebe explained that on the claim for February 16, 2006, Ms. Klemme claimed reimbursement for the minor child Taya J. for meals not served to her. The Notice of Termination sent to Ms. Klemme and quoted above does not identify the child or the date.

The above underscored language apparently represents the totality of both the reason for moving to terminate Ms. Klemme's participation and the totality of what was provided to Ms. Klemme by T.R.A.I.N. There is nothing in the record that reflects any communication from T.R.A.I.N. to Ms. Klemme between December 9, 2005 and February 24, 2006. There is nothing in the record to reflect that any technical assistance was provided to Ms. Klemme by T.R.A.I.N. personnel. In a memorandum from Ms. Liebe sent to this agency and to Ms. Klemme a few days prior to this hearing to summarize T.R.A.I.N.'s evidence, the following notation appears:

2-17-06 [Ms. Klemme] Submitted menu recorded arrival/departure times for a child which differed from the arrival/departure times recorded by parent on sign in/sign out sheet [Emphasis added.]

Ms. Liebebe verified at this hearing that the issue of the incorrect notation of the arrival/departure time of the one child on the one date was the only reason, other than the overcapacity issue, for seeking to terminate Ms. Klemme's participation in the CACFP. [The 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.]

Following her receipt of the February 24 Notice of Intent to Terminate, Ms. Klemme filed a timely appeal to this agency.

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. 7 C.F.R. § 226.16(1). 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).

In this case, the February 24 Notice of Intent to Terminate lists two reasons, over-capacity and inaccurately recorded arrival/departure times for "a child." As stated earlier, we were not provided with a copy of the Notice of Seriously Deficient Practice. We do not know if it listed both of the foregoing reasons. The Corrective Action Plan listed only "submission of false claims," but it does include adherence to DHS capacity guidelines as a corrective step. For purposes of this appeal, we do not need to address whether Ms. Klemme was given notice that over-capacity was an issue. Rather, we discuss for instructional purposes for all parties to the CACFP whether that issue may be used by a sponsoring organization as a serious deficient practice.

Over-capacity

To be eligible for CACFP participation, Ms. Klemme must operate her daycare home within the limits set by DHS. She is licensed by DHS as a category A home. According to DHS rule 441—Iowa Administrative Code (IAC) 110.8, category A homes must comply with the following limits as to number of children in care:

- 110.8(1) Limits on number of children in care.
- a. No more than six children not attending kindergarten or a higher grade level shall be present at any one time.
 - b. Of these six children, not more than four children who are 24 months of age or younger shall be present at any one time. Of

these four children, no more than three may be 18 months of age or younger.

- c. In addition to the six children not in school, no more than two children who attend school may be present for a period of less than two hours at a time.
- d. No than eight children shall be present at any one time when an emergency school closing is in effect.

Non-compliance with the above limits is not listed in the CACFP federal regulations, 7 C.F.R. part 226. Nor is being over-capacity listed in the standard CACFP agreement between sponsor and provider as a serious deficiency. We explained in a CACFP appeal earlier this year that capacity issues are not to be treated as serious deficiencies. *Kennedy Daycare v. Southern Iowa Economic Development Association*, 24 D.o.E. App. Dec. 15 (2006).²

A sponsor shall not reimburse the provider for meals served beyond capacity. Any *chronic* issues related to capacity should be reported by the sponsor to DHS as the licensing authority for appropriate action. It would then be left to the discretion of DHS whether to take action adverse to Ms. Klemme's daycare license. If DHS were to revoke Ms. Klemme'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.

False claim

The other reason for termination cited by T.R.A.I.N. is submission of a false claim.

As stated earlier, we need not determine whether Ms. Klemme submitted false claims for reimbursement of meals regarding three named children during the week of November 6, 2005. We assume that T.R.A.I.N. had a reasonable cause to issue the December 9th Notice of Seriously Deficient Practice and Corrective Action Plan to Ms. Klemme.

The Corrective Action Plan offered to Ms. Klemme with regard to the false claims allegation was appropriate. The pertinent requirements in the Plan were that Ms. Klemme complete meal participation and attendance accurately at the point of serving the meal or snack and that she have parents sign their children in and out by recording accurate times and then signing their name each day. We find no fault with the Plan itself. However, we have insufficient information on which to determine whether Ms. Klemme should be terminated from CACFP.

² This case and all appeal decisions decided during and after November 1994 are available on this agency's web site at <https://www.edinfo.state.ia.us/web/appeals.asp>.

The purpose of offering a Corrective Action Plan is to ensure that no provider is terminated from the CACFP unless there is a systemic problem that the provider is not willing to “fully and permanently” fix. Isolated issues that occur from time-to-time are not necessarily evidence of a systemic problem.

The issue here is whether one single instance of misreporting on the heels of the Corrective Action Plan is a failure to “fully and permanently” correct an issue of false claims. 7 C.F.R. section 226.16(l). Our decision here is simply that nothing in the record in this case supports a finding that Ms. Klemme failed to fully and permanently correct a systemic issue of filing false claims.

This is not to preclude the possibility that one error following a Corrective Action Plan for false claims may be enough of a callous disregard of the public’s money that it is part of a systemic failing and, this, may be grounds for successful termination of a provider from CACFP.

A home provider is required to be fiscally accountable to the public for the funds s/he receives through the program. The sponsor is to hold the home provider accountable on behalf of the public. The rationale for the strictness of the regulations is simple. CACFP is funded by public monies; that is, by taxpayers. When such accountability is lacking, the public trust is gone, and the sponsor must act accordingly. But in taking any action, the sponsor cannot act in disregard of the process due to the provider.

For future reference, sponsors are advised that to demonstrate a systemic issue of submission of false claims, the evidence from the sponsor should include – at a minimum – the following:

- Copies of all communications from the sponsor to the provider relevant to the allegation of false claims.
- A showing of all technical assistance given to the provider explaining in detail to the provider where s/he was noncompliant, including all instances (names of children , times, and dates) in which the provider was out of compliance.
- A showing of all technical assistance given to the provider explaining in detail how to remain in compliance.
- A showing that the technical assistance directly addressed the requirements in the Corrective Action Plan.

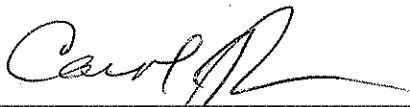
The bullet points above do not impose an additional burden on sponsors. Our assumption is that sponsors now provide sufficient communications and technical assistance to the providers for whom they are responsible. The reminder in this case is that this agency, as the reviewing body, needs to see the evidence.

Finally, our decision here does not mean that we have concluded either that Ms. Klemme does not deserve to be terminated from the CACFP or that T.R.A.I.N. did not provide all process due to Ms. Klemme in the termination process. Our dismissal here signals only that we do not have sufficient evidence before us to render any judgment on the merits.

**III.
DECISION**

For the foregoing reasons, the proposed termination of Nicole Klemme from the Child and Adult Care Food Program is hereby **dismissed**.


4-4-06
Date



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

It is so ordered.

4-8-06
Date



Judy A. Jeffrey, Director
Iowa Department of Education