

TEXAS POLICY

In Texas, organizations that contract directly with Texas Department of Agriculture's USDA federally funded nutrition programs are called Contracting Entities or CEs. The Summer Food Service Program (SFSP) is identified as a nutrition program and, as such, sponsors are considered CEs.

Serious Deficiency Process

If, during an organization's application for or participation in the SFSP, the Texas Department of Agriculture (TDA) determines that a serious noncompliance occurred, TDA may place the organization, responsible principal(s) and responsible individual(s) in the serious deficiency process.

The steps in the serious deficiency process are as follows:

Step 1. Serious Deficiency Determination.

Step 2. Notice of Serious Deficiency.

Step 3. Opportunity for Corrective Action.

Step 4. Notice of Application Denial and/or Notice of Termination of the Food and Nutrition Division Permanent Agreement (Permanent Agreement) and Exclusion.

Acronyms and Definitions

Administrative Review Official (ARO)—The independent and impartial official who conducts a fair review or an appeal. The ARO shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal. Although the ARO may be an employee of TDA, he/she shall not have been involved in the action that is the subject of the appeal, or have a direct personal or financial interest in the outcome of the appeal.

Advance payments—Financial assistance made available to a CE for its operating costs and/or administrative costs prior to the end of the month in which such costs will be incurred.

Appeal—A fair review or hearing provided upon request to an organization, responsible principal or responsible individual who has been given notice by TDA of any adverse action that will affect their participation in or reimbursement under the Program. A determination of serious deficiency is not an adverse action subject to appeal.

Applicant—An entity that has submitted an application to TDA but has not yet become a Contracting Entity (CE).

CACFP—Child and Adult Care Food Program.

CFR—Code of Federal Regulations.

Contracting Entity (CE)—An organization that has been approved to operate the Program and has executed a Permanent Agreement with TDA to that effect.

Corrective Action Plan (CAP)—A plan submitted by the organization, responsible principal(s) and/or responsible individual(s) documenting the actions taken, or to be taken, to fully and permanently correct serious deficiency(ies) identified by TDA. Also referred to as Corrective Action Documents (CADs).

Excluded—The status of an organization, responsible principal or responsible individual that has been declared seriously deficient and subsequently placed on the Texas Excluded SFSP List (TEXSL).

FNS—The Food and Nutrition Service of the U.S. Department of Agriculture.

Fair Review—See Appeal.

Follow-up review—Examination conducted by TDA or FNS on CEs and sites to determine compliance with a CAP and Program requirements. Results are provided in writing to the CE.

Food Service Management Company (FSMC)—Any commercial enterprise or nonprofit organization with which a CE may contract for preparing unitized meals, with or without milk, for use in the Program, or for managing a CE's food service operations. Food Service Management Companies may be: (a) Public agencies or entities; (b) private, nonprofit organizations; or (c) private, for-profit companies.

National Disqualified List (NDL)—List, maintained by the United States Department of Agriculture (USDA), of organizations, responsible principals and responsible individuals, and day care homes disqualified from participation in the Child and Adult Care Food Program (CACFP).

Notice—A letter sent by certified mail, return receipt requested (or the equivalent private delivery service), that describes an action taken by TDA or FNS with regard to an organization's/individual's Program reimbursement or participation. The notice shall specify the action being taken and the basis for the action, and is considered to be received by the organization/individual when it is delivered. If the notice is undeliverable, it is considered to be received by the organization/individual five (5) calendar days after being sent to the addressee's last known mailing address.

Organization—As used in this Texas Policy, may be an applicant and/or CE, depending on their status in the SFSP.

Principal—Any individual who holds a management position within, or is an officer of, the contracting entity (sponsor), including all members of the contracting entity's board of directors, or otherwise exercises control of, or determines the actions of, the contracting entity.

Program—The Summer Food Service Program.

Responsible Principal or Responsible Individual—

- A principal, whether compensated or uncompensated, who TDA or USDA determines to be responsible for an organization's serious deficiency.
- Any other individual employed by, or under contract with, an organization who TDA or USDA determines to be responsible for the serious deficiency; or
- An uncompensated individual, such as volunteer, who TDA or USDA determines to be responsible for an organization's serious deficiency.

Review—Examination conducted by TDA or FNS on CEs and sites to determine compliance with Program requirements. Results are provided in writing to the CE.

SFSP—Summer Food Service Program.

Temporarily Defer—Action taken by TDA to postpone the serious deficiency process until or unless it is determined that the serious deficiency or serious deficiencies were not fully and permanently corrected.

Texas Excluded SFSP List (TEXSL)—List maintained by TDA that identifies organizations, responsible principals and responsible individuals who are excluded from participating in the SFSP. Organizations, responsible principals and responsible individuals remain on the list for seven years and if debt is involved, until the debt is paid. An organization, responsible principal or responsible individual will go through the serious deficiency process before being placed on the list.

Step 1: Serious Deficiency Determination

The list of serious deficiencies in the SFSP includes, but is not limited to:

1. Submission of false information to TDA, including during the initial and renewal application process to participate in the SFSP;
2. Noncompliance with bid procedures and contract requirements applicable to procurement of federal child nutrition program regulations;
3. Failure to return to TDA any advance payments which exceeded the amount earned for serving eligible meals;
4. Failure to submit all claims for reimbursement in any prior year, except claims that are currently pending appeal;
5. Permitting an individual who is on the National Disqualified List (NDL) or TEXSL to perform SFSP duties for the organization;
6. Organization applying for or participating in the SFSP while on the NDL, TEXSL, or SFSP exclusion list maintained by the responsible State agency in another state;
7. Failure of a private nonprofit organization to maintain tax-exempt status;
8. Failure to perform financial and administrative responsibilities;
9. Imminent threat to the health or safety of participating children; or
10. Any other action affecting the organization's ability to administer the SFSP in accordance with Program requirements.

If program violations are found at the CE's sites, then those sites can contribute to a serious deficiency determination. Program violations include, but are not limited to, the following:

1. Continued use of a food service management company (FSMC) that is in violation of health codes;
2. Noncompliance with the meal service time restrictions;
3. Failure to maintain adequate records;
4. Failure to adjust meal orders to conform to variations in the number of participating children;
5. Simultaneous service of more than one meal to any child;
6. Claiming of Program payments for meals not served to participating children;
7. Serving a significant number of meals which did not contain all meal components in the required amounts;
8. Excessive instance of off-site meal consumption; or
9. Any other actions affecting the site's ability to operate the SFSP in accordance with Program requirements.

NOTE: Imminent threat to the health and safety of participating children at any site will result in immediate termination of that site and placement of the CE, responsible principal(s) and responsible individual(s) in the serious deficiency process.

If the CE is using a FSMC, TDA will notify the FSMC of the site's termination within 48 hours.

The above list of serious deficiencies and site program violations is not all-inclusive. TDA may declare an organization, responsible principal and responsible individual seriously deficient for any serious management or integrity problems. TDA will use discretion in making these serious deficiency determinations by distinguishing between:

- Occasional and systemic errors; and
- Minor and major errors.

When TDA determines that a serious deficiency has occurred, TDA must also:

- Determine who is responsible for the serious deficiency, to the extent possible;
- Include the names of those individuals in the *Notice of Serious Deficiency*; and
- Send the notices in the serious deficiency process to the:
 - Organization;
 - Responsible principal(s) and responsible individual(s); and
 - Organization's Executive Director and Board Chairman, or equivalent positions.

The Executive Director is responsible for the organization's day-to-day operations. The Board Chairman, or equivalent, is responsible for the organization's overall operation. They may not always be directly responsible for a specific serious deficiency; however, by virtue of their positions, they have overall responsibility and accountability for the organization.

Only the organization and those principals and individuals cited as responsible for the serious deficiencies will be named in the notices and potentially excluded.

Step 2: Notice of Serious Deficiency

The *Notice of Serious Deficiency*:

- Fully describes the serious deficiency(ies) or refers to and incorporates documents that discuss the serious deficiency(ies), such as review findings;
- Specifies the corrective action required to fully and permanently correct the serious deficiency(ies), and the deadline by which corrective action must be taken;
- Identifies the responsible principals and/or responsible individuals;
- Informs the organization that the serious deficiency determination is **not** subject to appeal;
- States that failure to fully and permanently correct the serious deficiency(ies) by the deadline will result in:
 - Denial of the organization's application, if applicable.
 - Termination of the CE's Permanent Agreement, if applicable.
 - Exclusion of the organization, responsible principal(s) and responsible individual(s) from participation in the SFSP for as long as they remain on the TEXSL.
- Informs the organization whether or not they will be eligible for SFSP reimbursement during the period of corrective action;
- States that if the CE voluntarily terminates its Permanent Agreement after receiving the *Notice of Serious Deficiency*, TDA will still proceed with exclusions and denial of the application, if applicable.
- States that a determination of serious deficiency in one program administered by TDA may be considered in its evaluation of financial viability and administrative capability of an application for any other program administered by TDA.

Step 3: Opportunity for Corrective Action

The *Notice of Serious Deficiency* provides the opportunity for the organization to fully and permanently correct the serious deficiency(ies) by creating and implementing a corrective action plan (CAP).

The organization will be allowed a specific amount of time to fully and permanently correct the serious deficiency(ies) before TDA denies the application, if applicable, terminates their Permanent Agreement, if applicable, and excludes the organization, responsible principals and/or responsible individuals from participating in the Program.

The amount of time allowed to correct a serious deficiency will be determined by TDA and may, in part, be based on the CE's number of operating days left in the program year and the type of serious deficiency. Some deficiencies, such as submission of false information to TDA, require a shorter period of time for correction. **TDA will not grant any requests for extension of the time allotted to an organization, responsible principal and/or responsible individual to submit a CAP.**

Once a Notice of Serious Deficiency is issued, it can result in only two possible outcomes:

1. The serious deficiency(ies) **are** fully and permanently corrected to TDA's satisfaction within the time allotted for corrective action. TDA will determine if the serious deficiency(ies) have been "fully and permanently" corrected by:

- Reviewing the documentation submitted showing the corrective action taken; and/or
- Conducting an onsite review to verify that corrective action was taken.

If TDA determines that the serious deficiency has been fully and permanently corrected within the time allotted, all parties will receive written notification that the serious deficiency has been temporarily deferred. This means that TDA will not proceed with Step 4 in the process. However, if at any time it is discovered that the serious deficiency(ies) have not been fully and permanently corrected TDA may proceed immediately to Step 4 without further opportunity for corrective action. In short, once a CAP has been approved, an organization is responsible for maintaining the operations and procedures contained therein; a lapse in compliance observed by TDA may trigger the serious deficiency process to resume and allow TDA to proceed to Step 4 in this process.

2. The serious deficiency(ies) **are not** fully and permanently corrected to TDA's satisfaction within the time allotted, either because the organization, responsible principal(s) and/or responsible individual(s) do not respond to the *Notice of Serious Deficiency* or the response is inadequate. In this case TDA will proceed with:

- Denial of application, if applicable.
- Termination of the CE's Permanent Agreement, if applicable.
- Placement of the organization, responsible principal(s) and responsible individual(s) on the TEXSL.

NOTE: If the responsible principals and/or responsible individuals have not corrected their contribution to the serious deficiency, TDA will continue its actions to exclude those persons.

Step 4: Notice of Application Denial and/or Notice of Termination of Permanent Agreement and Exclusion

If the serious deficiency(ies) have not been fully and permanently corrected within the time allowed, TDA will issue a written *Notice of Application Denial and/or Notice of Termination of Permanent Agreement and Exclusion* from the SFSP.

This notice is customized, based on whether the organization has a pending application and/or Permanent Agreement, and:

- States that TDA is denying the organization's application (if applicable);
- States that TDA is terminating the CE's Permanent Agreement (if applicable);
- States that TDA is excluding the organization, responsible principal(s) and/or responsible individual(s) by placing them on the TEXSL;
- Specifies the basis for the actions;
- Specifies the effective date for the actions;
- Outlines the procedures for appealing the actions;
- Informs the organization as to whether they will be eligible for SFSP payments during the period of appeal; and
- States that the CE must notify feeding sites that TDA has terminated the CE's Permanent Agreement and the effective date of that termination.

The organization, responsible principal(s) and responsible individual(s) may appeal the *Notice of Application Denial and/or Notice of Termination of Permanent Agreement and Exclusion*. Each person wishing to appeal their placement on the TEXSL must submit a request either collectively, naming each person, or separately. Only a principal may appeal the application denial, termination and placement of the organization on the TEXSL. One hearing will be conducted combining all requests received, absent a showing of good cause to the ARO that separate proceedings are required.

To be considered timely, any written appeal request must be received by the TDA Docket Clerk, Legal Division within ten (10) calendar days of receipt of the notice of adverse action.

If the CE is using a FSMC, TDA will also notify the FSMC of the CE's termination within 48 hours.

Removal from the Texas Excluded SFSP List (TEXSL)

Once included on the TEXSL, an organization, responsible principal(s) and responsible individual(s) will remain on the list until TDA determines that the serious deficiency(ies) that led to their placement on the list is/are corrected, or until seven years have elapsed since exclusion from participation, whichever comes first. However, if the organization, responsible principal(s) and/or responsible individual(s) fail to repay debts under the SFSP, they will remain on the list until the debt has been repaid.

To be considered for removal from the TEXSL, an organization, responsible principal or responsible individual must submit the following to their regional Community Operations office:

- A letter requesting the organization, responsible principal(s) or responsible individual(s) be removed from the TEXSL.
- Corrective action that includes:
 - **An acceptable Corrective Action Plan (CAP):** The organization, responsible principal(s) or responsible individual(s) must submit an acceptable CAP outlining the actions that will be taken, or have been taken, to correct the serious deficiency(ies) that caused the placement on the TEXSL. This must contain new information that has not been previously submitted to TDA and rejected. If TDA rejects the CAP, this action cannot be appealed.
 - **Any outstanding audits:** If the serious deficiency includes failure to submit an acceptable audit, the organization must submit an audit that complies with the Single Audit requirements that were in effect at the time the audit was originally due. Corrective action must also include a plan to address any deficiencies identified in the audit.
 - **All outstanding funds owed:** If the organization has an outstanding debt due to a previous SFSP claim, adjusted claim, advance overpayment, audit finding, or any other action resulting in a debt, the debt must be repaid.
 - **One of the following:**
 - An explanation of why the principal(s) or individual(s) identified as being responsible for the serious deficiency(ies) should now be eligible to participate in the SFSP, if the person or persons are requesting removal from the TEXSL.

- A statement that the principal(s) or individual(s) identified as being responsible for the serious deficiency(ies) will not be involved in the operation or administrative of the SFSP, if the person or persons are still part of the organization, and they are not requesting removal from the TEXSL.
- A statement that the principal(s) or individual(s) identified as being responsible for the serious deficiency(ies) are no longer employed by the organization, if they are not included in the request for removal from the TEXSL.

If TDA determines that the organization, responsible principal(s) or responsible individual(s) have taken acceptable corrective action, TDA will remove the organization, responsible principal(s) or responsible individual(s) from the TEXSL. TDA will notify the organization, principal(s) or individual(s) of the decision.

If TDA decides to retain the organization, responsible principal(s) or responsible individual(s) on the TEXSL, TDA will notify the organization, principal(s) or individual(s) of the decision. The decision may not be appealed.