

Food and Nutrition Service, USDA

§ 246.22

(2) Such organization-wide audits shall be used to determine whether—

(i) Financial operations are conducted properly;

(ii) Financial statements are presented fairly;

(iii) State and local agencies are complying with the laws, regulations and administrative requirements that affect the expenditure of Federal funds;

(iv) State and local agencies have established internal procedures to meet the financial management objectives of federally assisted programs; and

(v) State and local agencies are providing accurate and reliable information to the Federal government. If such agencies fail to arrange for the required audits at the appropriate frequency or fail to ensure that an acceptable audit is performed at the appropriate frequency, the respective cognizant audit agencies may arrange for the performance of the required audits. If the cognizant audit agencies arrange for the required audits because of these circumstances, the State agencies shall reimburse the respective cognizant audit agencies for the pro rata cost of their organization-wide audits.

(3) Each State agency shall make all State or local agency sponsored audit reports of Program operations under its jurisdiction available for the Department's review upon request. The cost of these audits shall be considered a part of nutrition services and administration costs and may be funded from the State or local agency nutrition services and administration funds, as appropriate. For purposes of determining the Program's pro rata share of indirect costs associated with organization-wide audits, the cost of food shall not be considered in the total dollar amount of the Program.

§ 246.21 Investigations.

(a) *Authority.* The Department may make an investigation of any allegation of noncompliance with this part and FNS guidelines and instructions. The investigation may include, where appropriate, a review of pertinent practices and policies of any State or local agency, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether

the State or local agency has failed to comply with the requirements of this part.

(b) *Confidentiality.* No State or local agency, participant, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this part because that person has made a complaint or formal allegation, or has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conducting of any investigation, hearing, or judicial proceeding.

Subpart G—Miscellaneous Provisions

§ 246.22 Administrative appeal of FNS decisions.

(a) *Right to appeal.* When FNS asserts a sanction against a State agency under the provisions of § 246.19, the State agency may appeal and must be afforded a hearing or review by an FNS Administrative Review Officer. The right of appeal shall not apply to claims for repayment assessed by FNS against the State agency under § 246.23(a). A State agency shall have the option of requesting a hearing to present its position or a review of pertinent documents and records including any additional written submission prepared by the State agency.

(1) FNS will send a written notice by Certified Mail-Return Receipt Requested to the state agency or otherwise ensure receipt of such notice by the agency when asserting a sanction against a State agency as specified in § 246.19(a).

(2) A State agency aggrieved by a sanction asserted against it may file a written request with the Director, Administrative Review Division, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Va. 22302, for a hearing or a review of the record. Such request shall be sent by Certified Mail-Return Receipt Requested and postmarked within 30 days of the date of receipt of the

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sanction notice. The envelope containing the request shall be prominently marked "REQUEST FOR REVIEW OR HEARING." The request shall clearly identify the specific FNS sanction(s) being appealed and shall include a photocopy of the FNS notice of sanction. If the State agency does not request a review of hearing within 30 days of receipt of the notice, the administrative decision on the sanctions will be considered final.

(b) *Acknowledgment of request.* Within 15 days of receipt by the Director of the Administrative Review Division of a request for review or hearing, the Director will provide the State agency with a written acknowledgment of the request.

(1) The acknowledgment will include the name and address of the FNS Administrative Review Officer to review the sanction;

(2) The acknowledgment will also notify the State agency that within 30 days of the receipt of the acknowledgment, the State agency shall submit three sets of the following information to the Administrative Review Officer—

(i) A clear, concise identification of the issue(s) in dispute;

(ii) The State agency's position with respect to the issue(s) in dispute;

(iii) The pertinent facts and reasons in support of the State agency's position with respect to the issue(s) in dispute and a copy of the specific sanction notice provided by FNS;

(iv) All pertinent documents, correspondence and records which the State agency believes are relevant and helpful toward a more thorough understanding of the issue(s) in dispute;

(v) The relief sought by the State agency;

(vi) The identity of the person(s) presenting the State agency's position when a hearing is involved; and

(vii) A list of prospective State agency witnesses when a hearing is involved.

(c) *FNS action.* (1) When a hearing is requested pursuant to this section, the Administrative Review Officer will, within 60 days after receipt of the State agency's information, schedule and conduct the hearing. The State agency will be advised of the time, date

and location of the hearing at least 10 days in advance.

(2) When a hearing is requested, the FNS Administrative Review Officer will make a final determination within 30 days after the hearing, and the final determination will take effect upon delivery of the written notice of this final decision to the State agency.

(3) When a review is requested, the FNS Administrative Review Officer will review information presented by a State agency and will make a final determination within 30 days after receipt of that information. The final determination will take effect upon delivery of the written notice of this final decision to the State agency.

§ 246.23 Claims and penalties.

(a) *Claims against State agencies.* (1) If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any Program funds provided to a State agency for supplemental foods or nutrition services and administration purposes were, through State or local agency negligence or fraud, misused or otherwise diverted from Program purposes, a formal claim will be assessed by FNS against the State agency. The State agency shall pay promptly to FNS a sum equal to the amount of the nutrition services and administration funds or the value of supplemental foods or food instruments so misused or diverted.

(2) If FNS determines that any part of the Program funds received by a State agency; or supplemental foods, either purchased or donated commodities; or food instruments, were lost as a result of thefts, embezzlements, or unexplained causes, the State agency shall, on demand by FNS, pay to FNS a sum equal to the amount of the money or the value of the supplemental foods or food instruments so lost.

(3) The State agency shall have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

(4) FNS is authorized to establish claims against a State agency for unreconciled food instruments. When a