

**STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATION**

COMMISSIONER OF EDUCATION

THE JOHN HOPE SETTLEMENT HOUSE, *et al.*
Petitioners

v.

**THE RHODE ISLAND DEPARTMENT OF ELEMENTARY
AND SECONDARY EDUCATION**
Respondent

**DECISION
ON RESPONDENT'S MOTION TO DISMISS AND TO SUMMARILY
TERMINATE AND DISQUALIFY**

The Rhode Island Department of Education for Elementary and Secondary Education (RIDE) challenges the appeal by the John Hope Settlement House (JHSH), its Board Chairperson, Anastasia Williams (Williams) and its Board Treasurer, Walter Morgan (Morgan), which seeks review of RIDE's March 12, 2015 determination that: (1) its agreement to participate in the federal Child and Adult Care Food Program (CACFP) should be terminated as of April 2, 2015; and (2) the JHSH Williams and Morgan should be disqualified from future CACFP participation.

RIDE argues that there exists no genuine issues of material fact and, accordingly, this matter is ripe for dismissal and entry of a summary order. The JHSH has filed a one line objection to RIDE's dispositive motion, but has not otherwise countered with any rebuttal to the legal and factual assertions by RIDE.

Factual Findings and Relevant Law

The United States Department of Agriculture's Food Nutrition Service (USDA and FNS, respectively) oversees the funding of grants and lends support and provides nonprofit food service programs to child care institutions under the CACFP. Pursuant to the

implementation of this program, RIDE, and the USDA and FSN enter into an agreement providing that the CACFP shall be administered by RIDE, consistent with applicable statutory and regulatory provisions. *See Exhibit 1.* Thus, RIDE must ensure that participating entities such as JHSH have the capacity and financial ability to meet program standards. In addition, participating entities must demonstrate adequate accountability by means of internal controls and management systems. *See 42 U.S.C.A.*

Section 1766(d).

RIDE entered into a separate agreement with JHSH on April 7, 2011. *See Exhibit 2.* The agreement provides that:

- (1) The JHSH “agrees to permit authorized RI Department of Education, USDA personnel, and other State or Federal officials during normal working hours to review records, books and accounts as needed to determine Program compliance. These visits will include both announced and unannounced visits to the institution and their facilities . . .”
- (2) If upon review by authorized officials one or more serious deficiencies are uncovered, i.e., that an institution such as JHSH has been “determined to be non-compliant in one or more aspects of the Program” (*See 7 C.F.R. Section 226.6 (k)*), RIDE must provide written notice and an opportunity to the participating institution to take corrective action in accordance with the provisions of 7 C.F.R. Section 226.6(c)(3)(iii)(C).

In the instant matter, a site visit and records review was conducted by a RIDE child nutrition program administrator. This visit and review yielded a serious deficiency determination and issuance of a formal notice dated February 4, 2014¹ finding that:

- (1) JHSH received \$35,343.67 in USDA reimbursements for meals served between January 1 through June 30, 2013, for which no documentation was available for purposes of verifying that these monies were expended exclusively for program operations;
- (2) the absence of any documentation to establish that the CACFP funds were expended in support of the Program but rather evidence that the monies were spent improperly for non-food program items;²

¹ *See Exhibit 3.*

² The conclusion drawn by this serious deficiency established that the JHSH was not a fiscally viable organization as required under 7 C.F.R. Section 22.6(b)(2)(xviii)(A)(Performance Standard 1), a finding that was further supported

and (3) because it was found that critical administrative and operational positions at JHSH were filled by volunteers, it was found that the JHSH failed to demonstrate the administrative capacity required under 7 C.F.R. Section 226.6(b)(2)(xviii)(B)(Performance Standard 2).

As a result of these findings of serious deficiency, RIDE offered, and the JHSH accepted, the following corrective action plan:

- (1) Establish a separate financial account dedicated to reimbursement funds for payments made for allowable food program expenses;
- 2) Identify administrative staff for oversight of this process;
- 3) Express in writing an understanding of the limited purposes for which CACFP funds may be expended, namely, the operation of the federal food program, as well as acknowledgement that any subsequent expenditures for unallowable purposes shall result in the issuance of a proposed termination of JHSH and its responsible officials from the federal program;
- 4) Validate reimbursement by properly depositing \$35,343.67 in federal food program funds into a separate CACFP account.³

These corrective measures were to be instituted no later than April 7, 2014. In addition, a second set of steps comprising corrective action were to be completed by the same date and included:

- 1) The production of independent audits covering the last three (3) years as well as a current JHSH budget that adequately underwrites administrative, operational and programmatic costs (including the CACFP);
- 2) The submission of a projected budget for the next fiscal year (2014-2015);
- 3) Identification of the JHSH official(s) responsible for overseeing the budget and the internal controls for ensuring the proper allocation of funds no later than March 7, 2014.

Finally, another item in the corrective action plan required JHSH to identify on or before

by a determination that the JHSH failed to pay the Providence Public School Department for CACFP meals delivered during a 6 month period (from January to June 2013), constituting an indebtedness in the amount of \$46,780 despite having received \$35,343.67 in USDA reimbursements during the same 6 month period.

³ These components of the corrective action plan were directed towards remedying what RIDE had identified in its Motion to Dismiss and to Summarily Terminate and Disqualify as Serious Deficiency 1.

than April 7, 2014, permanent administrative and operational officials by means of an organizational chart.

The JHSH responded to the corrective action plan on March 8 and April 8, 2015, by submitting documentation to RIDE. Subsequently, in a letter dated July 29, 2014, to the JHSH officials, RIDE concluded that the serious deficiencies had been deemed corrected and its determination of serious deficiency was now “temporarily deferred.” *See* Exhibit 4. However, RIDE also indicated in its letter that “if, in any subsequent review, any of these serious deficiencies [had] not been fully and permanently corrected, RIDE [would] immediately propose to terminate JHSH’s agreement and propose to disqualify JHSH, Williams and Morgan without any further opportunity for corrective action. *Id.* at p. 6.

RIDE reviewed JHSH’s compliance with the corrective action plan on separate site visits in October, November and December 2014, and found that the noted deficiencies were no longer deemed adequately corrected. Accordingly, a “Notice of Termination and Disqualification,” dated March 12, 2015, was issued. *See* Exhibit 5. Specifically, with respect to Serious Deficiency 1 for JHSH’s failure to produce receipts and records for verification of proper expenditure of CACFP funds and to develop and adequately implement internal control policies. Moreover, RIDE found that although a separate CACFP account had been opened, the account records did not show any expenses related to the CACFP for the period July to November 2014.⁴ In sum, it was not possible for RIDE to determine whether funds were properly accounted for, deposited and spent pursuant to the CACFP and the governing corrective action plan. Also noted that key administrative positions were continuously being staffed by other JHSH officials in acting or temporary capacities.⁵

Regarding Serious Deficiency 2, it was found that \$4,605.80 was received from RIDE and deposited in the CACFP account on July 24, 2014. This sum was the exact amount paid by RIDE to JHSH on June 1. Although \$7,091.86 had been paid by RIDE to JHSH during the months of July, August and September 2014, none of that sum had been

⁴ It was determined that the June 2014 reimbursement check in the amount of \$4,605.80 was deposited into the account on July 24, 2014. The reimbursement amounts covering July, August and September 2014 totaling \$7,091.86 had not been deposited into the account. Moreover, it appeared to RIDE that the account was utilized for the deposit of day care tuition payments, and that receipts from November 17 to November 26, 2014, were disorganized and no other receipts were present. No determination could be made as to whether receipts were used for the purchase or serving of menu items. In derogation of the corrective action plan, a CACFP consultant was not engaged for the development and implementation of financial control systems.

⁵ The executive director was serving as chief administrator, COO, CFO and childcare director. The former childcare director had been working as the office manager. Other ad hoc interim and acting placements of personnel for filling the positions of executive director and office manager were noted.

deposited into the CACFP account. Additionally, although budgets were in draft form, none were available for inspection; and no office manager was employed during this visit. As for the implementation of financial controls, specifically the use of QuickBooks as required by the corrective action plan, there was noncompliance. Finally, food stock was depleted on November 9, 2014 and, moreover, it was found that food purchases were made on an ad hoc basis and that menu substitutions were common. From an October 8 visit, it was determined that the lunches served did not adhere to the minimum CACFP meal patterns.

As for Serious Deficiency 3, a continuous turnover of JHSH staff by retirement or resignation was noted, as well as the fact that since April 2014, the position of executive director was filled by four individuals in acting capacities. In addition, a fourth serious deficiency was noted in the March 12, 2015 Notice of Termination and Disqualification resulting from RIDE's November 19, 2014 visit, namely, that in October 2014, eight out of the 23 lunches served failed to adhere to the minimum meal pattern requirements of the CACFP. See *id.*

Position of the Parties

JHSH

In response to RIDE's Notice of Termination and Disqualification, JHSH, through counsel, advised RIDE by letter dated March 23, 2015, that it was in disagreement with RIDE's intent to terminate JHSH's contract relating to the CACFP and to disqualify it and its named officials from further participation in the CACFP. However, JHSH expressed in its response a desire "to resolv[e] this matter cooperatively or in the alternative, through a formal hearing process." See Exhibit 6. JHSH has not at any time tendered an objection to RIDE's notice of serious deficiency, nor at any time has JHSH disputed the content of RIDE's findings of serious deficiencies either informally or by a timely request for administrative review.

RIDE

RIDE argues that JHSH had failed to exercise its administrative remedies by means of contesting the findings in support of RIDE's determination of serious deficiencies. Moreover,

RIDE argues that JHSH's March 23 letter seeking resolution "cooperatively and collaboratively or in the alternative through a formal hearing process," did not constitute a clear and unambiguous request for administrative review under the governing federal regulations. In any case, the March 23 letter was submitted well beyond the statutory period of "not later than 15 days after the date the notice of action [was] received." See 7 CFR Section 226.6(k)(5)(ii).

DECISION

Although the JHSH and its responsible principals and officers may have at one time been entitled to seek remedies through an administrative review of RIDE's findings of serious deficiencies; that time had passed when JHSH acceded to the requirements of the corrective action plan. Such accession amounted to a concession or, in evidentiary terms, an admission or declaration against interest. It is JHSH's acceptance of the corrective action plan that a logical antecedent gives support to the dictate of 7 C.F.R. Section 226.6(k)(3)(iii) that prohibit state agencies from providing administrative review of a "determination that [a] corrective action is inadequate."⁶

Here, the undisputed facts establish that in March 2015, RIDE served a Notice of Termination and Disqualification upon the JHSH that was based on a series of visits and CACFP compliance reviews in October, November and December 2014, resulting in a determination that full and permanent correction of cited serious deficiencies had not been made. This conclusion followed a qualified suspension of a prior determination of serious deficiencies in July 2014 which, although deemed by RIDE to have been corrected, would result in what amounted to an automatic termination of the JHSH's agreement and disqualification of the JHSH and its board chairperson and treasurer "without any further opportunity for corrective action" in the event of a subsequent finding of recurring serious deficiency. See Exhibit 4.

The situation that has arisen since the earlier determination of serious deficiencies was "temporarily suspended" in July 2014, allows no discretion but for RIDE to perform its duties under the federal-state agreement and seek the termination and disqualification of the JHSH and its responsible principals and officers. Because the JHSH had not requested administrative review of RIDE's findings and notice of serious deficiency,

⁶ This section of the federal regulation more specifically prohibits the administrative review of "A determination by a State agency that the corrective action taken by an institution or by a responsible principal or individual does not completely and permanently correct a serious deficiency." 7 C.F.R. Section 226.6(k)(3)(iii).

it now lacks standing to seek review of RIDE's determination that the corrective action is inadequate. *See* 7 C.F.R. Section 226.6(k)(3). The unavailability of administrative review of the Notice of Termination and Disqualification is dependent upon federal regulation, *id.*, and in essence results from the limits placed upon the factual and legal issues for which this administrative body might otherwise exercise its authority. Because the JHSH and its responsible principals have now attempted to prosecute an appeal challenging the findings of inadequacy of a corrective action plan that has been entered consensually, in sum, they are now aggrieved by circumstances that are without a justiciable basis and, therefore, outside the scope of administrative review. And even if the JHSH had standing, it has presented absolutely no credible evidence to rebut RIDE's findings and conclusions.

Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED

- 1) That the decision by RIDE to terminate the JHSH's agreement of participation in the CACFP and to disqualify the JHSH, Board Chairperson Anastasia Williams and Board Treasurer Walter Morgan from further participation in the CACFP) is affirmed;
- 2) That the joint petition of the JHSH, Board Chairperson Anastasia Williams and Board Treasurer Walter Morgan appealing RIDE's decision to terminate their agreement of participation and their disqualification in the CACFP is denied and dismissed.

For the Commissioner

George M. Muksian, Esq.
Hearing Officer

Ken Wagner, Commissioner

September 29th, 2015
Date