

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA**

MACLAND CHILD CARE SERVICES, :  
INC. d/b/a LOST MOUNTAIN ACADEMY, : Docket No.: OSAH-DECAL-CAFP-  
II, : 1408966-110-Schroer  
Petitioner, :  
v. :  
GEORGIA DEPARTMENT OF EARLY :  
CARE AND LEARNING, :  
Respondent. :



NOV 1 2013

Kevin Westray, Legal Assistant

**FINAL DECISION**

Petitioner Macland Child Care Services, Inc. (“Macland”) d/b/a Lost Mountain Academy II appealed the decision of Respondent Georgia Department of Early Care and Learning (“DECAL”) to terminate and disqualify Macland from participation in the Child and Adult Care Food Program (“CACFP”).<sup>1</sup> The hearing was conducted on September 30, 2013 and October 7, 2013 by the undersigned Administrative Law Judge from the Office of State Administrative Hearings. Macland was represented by John Jones, Esq. and Melvin Goldstein, Esq. DECAL was represented by Kimberly Alexander, Esq.

For the reasons stated below, DECAL’s decision is **AFFIRMED**.

**FINDINGS OF FACT**

1.

Macland operates Lost Mountain Academy II, a child care center located in Dallas, Georgia. In October 2005, Macland, through its owner, Alverro L. Brown, signed an Agreement for

<sup>1</sup> The CACFP is a food service program established by the United States Department of Agriculture (“USDA”) under the authority of the National School Lunch Act, 42 U.S.C. §§ 1751-1769e, and the Child Nutrition Act of 1966, 42 U.S.C. §§ 1771-1790. CACFP is intended to “safeguard the health and well-being of the Nation’s children” by encouraging the “consumption of nutritious” foods. 42 U.S.C. § 1751. CACFP provides states “grants-in-aids and other means to initiate nonprofit food service programs for children in institutions providing child care.” 42 U.S.C. § 1766(a)(1).

Participation in the Child and Adult Care Food Program ("Macland CACFP Agreement") with DECAL, the state agency that oversees the CACFP in Georgia.<sup>2</sup> In the Macland CACFP Agreement, Macland agreed "to comply with the CACFP regulations under 7 C.F.R. § 226, and any instructions or procedures issued in connection therewith, and the CACFP policies and guidance of [DECAL] ..." (Testimony of Resnick, Brown; Ex. R-2)

2.

Mr. Brown was also associated with Lali's Angels, Inc. ("Lali's Angels"), which operated a child care center located in Doraville, Georgia. In or around October 2005, Lali's Angels executed an Agreement for Participation in the Child and Adult Care Food Program ("Lali's Angels' CACFP Agreement") with DECAL. In the Lali's Angels' CACFP Agreement, Biraj Lali Brown, Mr. Brown's wife, was listed as the owner of Lali's Angels, but both Biraj Brown and Mr. Brown were identified as the institution's "principals." The term "principal" was defined in Part I of both the Macland and Lali's Angels' CACFP Agreements as "any individual who holds a management position within, or is an officer of an institution or a sponsored center, including all members of the institution's board of directors or the sponsored center's board of directors. (7 C.F.R. § 226.2)" (Testimony of Resnick, Brown; Ex. R-1)

3.

In the spring of 2013, the Office of State Administrative Hearings ("OSAH") considered a case involving Lali's Angels. On or about March 22, 2013, OSAH issued a Final Decision in that case, ordering the emergency closure of Lali's Angels for up to twenty-one days as a result of findings of imminent danger to the safety and welfare of children under O.C.G.A. § 20-1A-13(c).

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<sup>2</sup> Alverro Brown is the only person identified as "owner" on the Macland CACFP Agreement. However, at the administrative hearing, Mr. Brown testified that currently he is not the sole owner of Macland and that he is in the process of updating the forms and agreements on file with DECAL. It is unclear from the evidence in the record what share of Macland Mr. Brown now owns. An August 9, 2013 memorandum written by Mr. Brown suggests that his wife is the co-owner of Macland. (Testimony of Brown; Exhibit R-7)

The underlying issues in the March 22 Final Decision related to transportation of children in violation of a past settlement agreement between Lali's Angels and DECAL. (Testimony of Resnick, Brown; Exhibit R-3)

4.

On or about April 3, 2013, while Lali's Angels was closed pursuant to the March 22 Final Decision, DECAL sent two notices to Lali's Angels relating to its participation in the CACFP. The first notice notified Mr. Brown and Biraj Brown that Lali's Angels would be suspended as a participant in the CACFP as a result of serious deficiencies arising out of the violations set forth in the March 22 Final Decision.<sup>3</sup> In addition, DECAL proposed to terminate Lali's Angels from the CACFP and to disqualify Lali's Angels, as well as its principals, Biraj Brown and Mr. Brown, from future CACFP participation. The first April 3 notice gave Lali's Angels and the Browns fifteen days to submit an appeal to the proposed actions. The first notice also specified that failure to appeal would result in the Browns being placed on the National Disqualified List and prevent them from serving as a principal in any institution participating in the CACFP. (Testimony of Resnick; Ex. R-3)

5.

DECAL also sent a second notice to Lali's Angels on April 3, 2013, which was addressed to Biraj Brown, Al Brown, and Donna McKenzie. This notice addressed DECAL's determination that Lali's Angel's operation of the CACFP was seriously deficient on the basis of certain other, non-transportation-related violations. In particular, DECAL cited Lali's Angels' failure to provide all CACFP records during a recent three-year review and its failure to implement the CACFP management plan it submitted to DECAL. The second notice required that Lali's Angels submit a

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<sup>3</sup> In the first notice, DECAL cited 7 C.F.R. § 226.6 (c)(3)(ii)(U) as the basis for its serious deficiency finding. Section 226.6(c)(3)(ii)(U) provides that serious deficiencies for participating institutions include "any ... action affecting the institution's ability to administer the Program in accordance with Program requirements."

corrective action plan to address these deficiencies by April 15, 2013. DECAL specified that the corrective action plan must address how Lali's Angels would ensure, among other things, that all documents relating to its CACFP claims were complete, accurate and available for review at all times for up to three years. The second notice also notified Lali's Angels and Mr. Brown of the consequences of failing to submit such a corrective action plan.

Failure to fully and permanently correct these serious deficiencies within the allotted time will result in [DECAL] issuing a Notice of Intent to Terminate and disqualify the institution, Lali's Angels, Inc. and its principals and/or responsible individuals, Biraj L. Brown, Al Brown, and Donna McKenzie. If terminated and disqualified, Lali's Angels, Inc., will be ineligible to participate in the CACFP as an institution or facility. If disqualified Lali's Angel's, Inc. and its above-named responsible principals and /or responsible individuals, will be placed on the National Disqualified List. **While on the list, the above-named responsible principals and/or responsible individuals, will be ineligible to participate in the CACFP as a principal in any institution or facility, or as a family day care home provider.**

(Testimony of Resnick, Brown; Exhibit R-4) (Emphasis added)

6.

Lali's Angels did not appeal the first notice relating to its proposed termination and disqualification from CACFP participation because of the transportation-related violations. Likewise, neither Lali's Angels nor the Browns submitted a corrective action plan to address the non-transportation-related deficiencies identified in the second notice.<sup>4</sup> Consequently, on May 17, 2013, DECAL sent notice to Biraj Brown and Mr. Brown that Lali's Angels was terminated from the CACFP, and that Lali's Angels, Biraj Brown, and Mr. Brown were disqualified from future CACFP participation. In addition, Lali's Angels, Biraj Brown, and Mr. Brown would be placed on

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<sup>4</sup> During the administrative hearing in this case, Mr. Brown testified that he did not submit an appeal or a corrective action plan because Lali's Angels' license was "revoked" on March 22, 2013, and the center was closed. Whether or not Lali's Angels' license was actually revoked at that time, which does not appear to be the case, Mr. Brown credibly testified that he did not believe that a corrective action plan was necessary or appropriate given that Lali's Angels was no longer in operation. Mr. Brown also testified that he did not appeal or take any other action to contest his disqualification from the CACFP because he believed at that time, notwithstanding the language in the notice to the contrary, that his disqualification would relate only to Lali's Angels. (Testimony of Brown)

the National Disqualified List and were prohibited from serving in a principal capacity at any child care institution participating in the CACFP. (Testimony of Resnick, Brown; Exhibit R-5)

7.

On July 2, 2013, DECAL sent a Notice of Serious Deficiency to Macland ("July 2 Notice"). According to the July 2 Notice, because Mr. Brown was on the National Disqualified List, he could not serve as a principal of Macland. DECAL set a deadline of July 20, 2013 for Macland to submit a corrective action plan, providing documentation that Mr. Brown was no longer a principal of Macland. (Testimony of Resnick, Brown; Exhibit R-6)

8.

On July 19, 2013, Mr. Brown sent a Corrective Action Plan ("First Macland CAP") to Maria Resnick, DECAL's Nutrition Services Policy Administrator. In the First Macland CAP, Brown notified DECAL that Biraj Brown and Mr. Brown had been removed from Macland's Board of Directors and from the administration of the CACFP. Instead, Cynthia Knight, the Director of Lost Mountain Academy II, would take over the administrative functions of the CACFP after her training at the end of July 2013. Two other individuals, Aradhana Patnaik and Kavita Brown, replaced the Browns on Macland's Board of Directors. Also, on July 19, 2013, Mr. Brown sent a request to DECAL to be removed from the National Disqualified List. He included a second corrective action plan to address both the transportation and non-transportation issues raised in connection with Lali's Angels. (Testimony of Resnick, Brown; Exhibits R-7, P-1)

9.

On July 24, 2013, Resnick notified Mr. Brown by email that she had reviewed the First Macland CAP, and that DECAL "has found the CAP sufficient and will be issuing a Notice of Successful Corrective Action and Temporary Deferment today." She did not issue such notice, however. Rather, on July 30, 2013, Resnick notified Mr. Brown that USDA disagreed with

DECAL's assessment of the sufficiency of the First Macland CAP due to Mr. Brown's continued ownership interest in Macland.<sup>5</sup> Mr. Brown requested a meeting with DECAL following his receipt of Resnick's email, and sent a memorandum to DECAL on August 9, 2013. Mr. Brown included a revised corrective action plan ("Revised Macland CAP"), which indicated that the Browns would not be board members or involved in the day-to-day operation of Macland.<sup>6</sup> (Testimony of Resnick, Brown; Exhibit R-7, P-6)

10.

On August 15, 2013, DECAL sent an Amended Notice of Serious Deficiency to Macland. In the Amended Notice, DECAL stated that the First Macland CAP and the Revised Macland CAP were not sufficient to address the serious deficiency because they allowed Mr. Brown to remain a principal of Macland while he was on the National Disqualified List. DECAL gave Macland until August 22, 2013 to submit another revised corrective action plan. (Testimony of Resnick, Brown, Adams; Exhibit R-9)

11.

On August 20, 2013, Mr. Brown sent a letter to DECAL in response to the Amended Notice. He asked that DECAL "apply" the August 9<sup>th</sup> Revised Macland CAP. On August 23, 2013, DECAL sent Mr. Brown and Macland a Notice of Intent to Terminate and Disqualify Macland from the CACFP. Mr. Brown filed a timely appeal. (Testimony of Brown, Resnick; Exhibit R-10)

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<sup>5</sup> DECAL failed to tender a copy of written guidance from USDA on this issue. Accordingly, regardless of whether such guidance, if admissible and admitted, would have an effect on the outcome of this matter, the Court has not taken into account USDA's alleged position.

<sup>6</sup> Nevertheless, the Revised Macland CAP stated that "Alverro Brown, **Owner** will review all documents prior to submission of [CACFP] claims." It also states that the "Director and **Owner** will undergo annual training," and that the **Owner** will participate in a monthly meeting with Macland's cook and director "to review all CACFP documentations and discuss issues as it concern[s] the CACFP. The **owner** will confer with assigned CACFP consultant when needed." (Exhibit R-7) (Emphasis added)

12.

At the time of the administrative hearing, Mr. Brown remained an owner of Macland, but he testified that he no longer manages, supervises or participates in the day-to-day operation of Macland and does not serve on its Board of Directors. However, he maintained that while he was actively involved in Macland's operations, the CACFP program ran smoothly and Macland was never in violation of CACFP rules. In addition, Mr. Brown's request to be removed from the National Disqualified List ("NDL") has been approved by DECAL and is pending before USDA. Until USDA approves the request, however, Mr. Brown remains on the NDL and may not serve as a principal at Macland. (Testimony of Brown, Adams)

**CONCLUSIONS OF LAW**

1.

DECAL bears the burden of proof in this matter. Ga. Comp. R. & Regs. r. 616-1-2-.07. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21.

2.

States receiving federal CACFP grants must agree to comply with all applicable federal laws and regulations, and must enter into participation agreements with each child care institution. 7 C.F.R. 226.3, 226.6(b)(4). In accordance with this requirement, Macland and DECAL have entered into such an agreement, which requires Macland to comply with the federal regulations governing the CACFP.

3.

As part of its responsibilities in administering the CACFP, USDA must maintain a National Disqualified List ("NDL"), which includes all the responsible principals and responsible individuals who are disqualified from participating in CACFP. 7 C.F.R. 226.2. If an individual is on the NDL, they may not serve in a "principal capacity" with any institution participating in the CACFP. 7

C.F.R. 226.6(c)(3)(ii)(B).<sup>7</sup>

4.

As stated in the Macland CACFP Agreement, a “principal” is defined in the federal regulations as “any individual who holds a management position within, or is an officer of, an institution or a sponsored center, including all members of the institution’s board of directors....” 7

C.F.R. 226.2. A “responsible principal” or “responsible individual” is defined as:

- (a) A principal, whether compensated or uncompensated, who the State agency or FNS<sup>8</sup> determines to be responsible for an institution’s serious deficiency;
- (b) Any other individual employe by, or under contract with, an institution..., who the State agency or FNS determines to be responsible for an institution’s serious deficiency; or
- (c) An uncompensated individual who the State agency or FNS determines to be responsible for an institution’s serious deficiency.

7 C.F.R. 226.2.

5.

DECAL argues that because Mr. Brown is an owner of Macland, he is necessarily a “principal” of Macland. However, after consideration of the language of the federal regulations, the Court concludes that owners do not automatically fall within the definition of “principals” in Section 226.2. The first consideration is that the word “owner” does not appear in the definition of “principal,” notwithstanding that it is used elsewhere in the CACFP regulations. See 7 C.F.R.

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<sup>7</sup> The federal regulations consider “permitting an individual who is on the [NDL] to serve in a principal capacity with the institution” to be a “serious deficiency.” Id. Although the federal regulations allow participating institutions to correct a serious deficiency through the submission of a corrective action plan, failure to fully and permanently correct a serious deficiency in a timely manner is grounds for termination and disqualification from the CACFP. 7 C.F.R. 226.6(c)(3)(iii)(A)(5), 226.6(c)(3)(iii)(C).

<sup>8</sup> “FNS means the Food and Nutrition Services of the [USDA.]” 7 C.F.R. 226.2.



226.6(b)(1)(xv), (b)(2)(v).<sup>9</sup> Rather, a principal is one who hold a management position, is an officer or director, or is responsible for a serious deficiency. Whether an owner fits this definition is a question of fact to be determined on a case-by-case basis. For example, some owners, particularly minority owners, may have little to no involvement or authority over a child care institution in general or the institution's participation in the CACFP specifically. These individuals, if not officers, directors or otherwise in management positions, cannot reasonably be considered to fall within the definition of principal. On the other hand, an owner may exercise significant influence and control over the management and operations of a child care institution. In that case, an owner, even one who is not nominally an officer or director of the corporation, may be considered to be in a management position, whether he is given a title in the company or not.

6.

Under the facts in the record of this case, notwithstanding Mr. Brown's good faith efforts to distance himself from the day-to-day operations of Macland and his removal as an officer and director of the corporation, he continues to have a management role in the CACFP for Macland under the Revised Macland CAP. Specifically, although Ms. Knight and Macland's cook have taken over the administrative functions and day-to-day operations of food service for Macland, the Revised Macland CAP provides for Mr. Brown's continued significant involvement in the oversight and management of the CACFP. The Revised Macland CAP calls for Mr. Brown to continue to review all CACFP claims, meet with Ms. Knight and the cook monthly to review all CACFP documents and issues, and be Macland's liason with DECAL with regard to CACFP.

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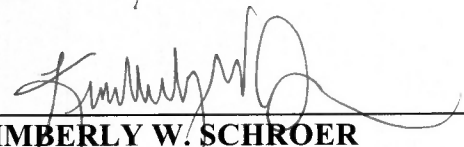
<sup>9</sup> When submitting an application to participate in the CACFP, an institution must include a certification of truth, along with the name, mailing address, and date of birth of the institution's executive director and chairman of the board of directors. *Id.* However, "in the case of a for-profit center that does not have an executive director or is not required to have a board of directors, the **owner** of the for-profit center." *Id.* (emphasis added).

Thus, although an owner who is not an officer or director may remove himself from a management position with an institution such that he is no longer a principal within the applicable definition, Mr. Brown has not done so in this case. By virtue of his de facto management position in Macland's administration of the CACFP, he remains a principal of Macland. As such, Macland's Revised CAP does not fully and permanently correct the serious deficiency, and the termination and disqualification of Macland from CACFP participation was proper. 7 C.F.R. 226.6(c)(3)(iii)(A)(5), 226.6(c)(3)(iii)(C).

**DECISION**

For the foregoing reasons, DECAL's decision to terminate and disqualify Macland from participation in CACFP is hereby **AFFIRMED**.

**SO ORDERED this 1<sup>st</sup> day of November, 2013.**

  
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**KIMBERLY W. SCHROER**  
Administrative Law Judge