APPELLANT: Bnos Sanz
4811 16th Avenue
Brooklyn, NY 11204

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RESPONDENT: New York State Education Department
Child Nutrition Program Administration
99 Washington Avenue, Room 1623
Albany, NY 12234

STATE: New York; County of Sullivan

In the Matter of the Appeal of

BNOS SANZ
LEA CODE: 800000056831

from a decision by the New York State Education Department's Child Nutrition Program to deny appellant's application to become a sponsor For the 2012 Federal Summer Food Service Program and to reclaim $874 from appellant's 2011 Summer Food Service Program

DECISION

I find that respondent acted in accordance with the Federal Child Nutrition Program's regulations, specifically those that pertain to the Summer Food Service Program found at 7 CFR Part 225, when it denied appellant's application to participate in the 2012 Summer Food Service Program and reclaimed $874 from appellant's 2011 Summer Food Service Program.

This Decision is rendered this 17th day of August 2012

Maureen Lavare
Hearing Officer

LIST OF REPRESENTATIVES:

For the Appellant
Jacob Silberman
Bnos Sanz
4811 16th Avenue
Brooklyn, NY 11204

Morton M. Avigdor, Esq.
957 East 10th Street
Brooklyn, NY 11230

For the Respondent
Frances O'Donnell, Coordinator and
Paula Tyner-Doyle School Food Program Specialist III and
Kimberly Vumbaco School Food Program Specialist III
New York State Education Department
Child Nutrition Program Administration
99 Washington Avenue, Room 1623
Albany, NY 12234

DOCUMENTS SUBMITTED AND REVIEWED

Appellant's Submissions (pertaining to the 2012 sponsor renewal application denial)

1) June 22, 2012 [*sic* July] letter to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq., representing Bnos Sanz, appealing the New York State Education Department's Child Nutrition Program's denial of their 2012 SFSP sponsor renewal application and explaining appellant's position with attached July 9, 2012 letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Jacob Silberman of Bnos Sanz, denying Bnos Sanz's 2012 Summer Food Service Program application
2) July 19, 2012 letter to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq., representing Bnos Sanz, appealing the New York State Education Department's Child Nutrition Program's decision to reclaim $874 from appellant's 2011 Summer Food Service Program and explaining appellant's position with attached July 11, 2012 Notice of Action letter from Raemie Swain, School Food Program Specialist II of the New York State Education Department's Child Nutrition Program to Jacob Silberman of Bnos Sanz

3) July 20, 2012 letter to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq., representing Bnos Sanz, enclosing documents for appeal
4) New York State Education Department - Child Nutrition Program Administration – Summer Food Service Program Review Form (desk audit) for review dated February 6, 2012 of Bnos Sanz
5) Emails between Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program and Jacob Silberman of Bnos Sanz
6) New York State Education Department - Child Nutrition Program Administration Summer Food Service Program Site Review Form for Bnos Sanz dated July 20, 2010
7) New York State Education Department - Child Nutrition Program Administration Summer Food Service Program Site Review Form for Bnos Sanz dated July 9, 2007
8) United States Department of Agriculture - Sponsor Review Report - Summer Food Service Program for Bnos Sanz dated January 9, 2008
9) June 26, 2012 email from Jacob Silberman of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program
10) January 25, 2012 letter from Jacob Silberman of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program enclosing information requested on December 28, 2011
11) June 18, 2012 letter from Jacob Silberman of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program responding to June 4, 2012 Notice of Action letter and attaching various documents, including a Non-profit Organization Financial Administrative Form
12) April 15, 2011 letter from Jacob Silberman of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program responding to March 14, 2011 letter requiring corrective action
13) April 21, 2011 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Jacob Silberman of Bnos Sanz accepting proposed corrective action
14) April 7, 2011 letter from Moshe Felberbaum of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program submitting a written acknowledgement of additional corrective action required to be taken per March 14, 2011 letter
15) January 25, 2011 letter from Moshe Felberbaum of Bnos Sanz to the New York State Education Department's Child Nutrition Program adding additional comments to the response letter already sent regarding the November 29, 2010 administrative review
16) January 12, 2011 letter from Moshe Felberbaum of Bnos Sanz to the New York State Education Department's Child Nutrition Program responding to the November 29, 2010 administrative review

<u>Appellant's Submissions (pertaining to the 2011 Summer Food Service Program reclaim)</u>

17) Certificate of Workers' Compensation Insurance Coverage for Bnos Sanz Inc. with a policy effective date beginning July 24, 2011 through July 24, 2012

Appellant's Submission's Made at and after the Hearing

18) Form W-2, wage and tax statement for employees of Bnos Sanz during 2010
19) January 25, 2012 letter from Jacob Silberman, Director of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program enclosing information requested on December 28, 2011 with attachments (same as 10 above which did not include attachments)
20) July 20, 2010 Summer Food Service Program Document Request Form to Bnos Sanz
21) March 14, 2011 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Jacob Silberman of Bnos Sanz requiring Bnos Sanz to implement certain corrective actions and to acknowledge the requirements by April 15, 2011
22) July 14, 2011 Summer Food Service Program Document Request Form to Bnos Sanz
23) February 6, 2012 Summer Food Service Program Administrative Review Form, portions of a desk audit of sponsor Bnos Sanz
24) June 4, 2012 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition to Jacob Silberman of Bnos Sanz, stating that additional findings were made and additional corrective action is required and future failure may result in a seriously deficient finding which will require immediate termination from the Summer Food Service Program.
25) Certificate of Workers' Compensation Insurance Coverage for Mesivta Sanz Inc. with a policy effective date beginning July 24, 2009 through July 24, 2010
26) Certificate of Workers' Compensation Insurance Coverage for Mesivta Sanz Inc. with a policy effective date beginning July 24, 2010 through July 24, 2011

Respondent's Submissions (pertaining to the 2012 sponsor renewal application denial)

1) August 2, 2012 letter from the New York State Education Department's Child Nutrition Program to Hearing Officer Maureen Lavare explaining respondent's position
2) Copy of 7 CFR Part 225
3) New York State Education Department - Child Nutrition Program Administration Summer Food Service Program Site Review Form for Bnos Sanz dated July 20, 2010
4) U.S. Department of Agriculture – Food and Nutrition Service - Sponsor Review Report Summer Food Service Program, review date November 29, 2010
5) December 16, 2010, Notice of Proposed Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Mr. Jacon Silberman of Bnos Sanz requiring corrective action
6) January 12, 2011 letter from Moshe Felberbaum of Bnos Sanz to the New York State Education Department's Child Nutrition Program responding to the December 16, 2010 letter

7) January 25, 2011 letter from Moshe Felberbaum of Bnos Sanz to the New York State Education Department's Child Nutrition Program also responding to the December 16, 2010 letter
8) March 14, 2011 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Mr. Jacon Silberman of Bnos Sanz requiring Bnos Sanz to implement certain corrective actions and to acknowledge the requirements by April 15, 2011
9) April 15, 2011 letter from Moshe Felberbaum of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program submitting written acknowledgment of additional required corrective action
10) New York State Education Department - Child Nutrition Program Administration Summer Food Service Program Site Review Form for Bnos Sanz dated July 14, 2011
11) June 15, 2011 [*sic* July] letter from Jacob Silberman of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program submitting corrective action measures in response to July 14, 2011 site visit
12) New York State Education Department - Child Nutrition Program Administration Summer Food Service Program Site Review Form for Bnos Sanz dated July 29, 2011
13) December 28, 2011 letter to Jacob Silberman of Bnos Sanz from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program regarding a follow-up review
14) New York State Education Department - Child Nutrition Program Administration – Summer Food Service Program Review Form (desk audit) for review dated February 6, 2012 of Bnos Sanz
15) June 4, 2012 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition to Jacob Silberman of Bnos Sanz, stating that additional findings were made and additional corrective action is required and future failure may result in a seriously deficient finding which will require immediate termination from the Summer Food Service Program.
16) June 18, 2012 letter from Jacob Silberman and staff of Bnos Sanz to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program responding to June 4, 2012 Notice of Action letter and attaching various documents, including a Non-profit Organization Financial Administrative Form
17) July 9, 2012 letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Jacob Silberman of Bnos Sanz, denying Bnos Sanz's 2012 Summer Food Service Program sponsor renewal application
18) 2011-2012 Summer Food Service Profile Program for Bnos Sanz
19) 2012-2013 Summer Food Service Program Profile for Bnos Sanz

Respondent's Submissions (pertaining to the 2011 Summer Food Service Program reclaim)

20) August 2, 2012 letter from Paula Tyner-Doyle, School Food Program Specialist III, of the New York State Education Department's Child Nutrition Program to Hearing Officer Maureen Lavare explaining respondent's position
21) Copies of section of 7 CFR Part 225
22) New York State Education Department - Child Nutrition Program Administration Summer Food Service Program Site Review Form for Bnos Sanz dated July 20, 2010
23) July 27, 2010 letter from Bnos Sanz to the New York State Education Department's Child Nutrition Program clarifying three income applications
24) New York State Education Department - Child Nutrition Program Administration Summer Food Service Program Site Review Form for Bnos Sanz dated July 29, 2011
25) New York State Education Department - Child Nutrition Program Administration – Summer Food Service Program Review Form (desk audit) for review dated February 6, 2012 of Bnos Sanz
26) Eligibility Error Worksheet, Income Applications and Camp Roster for Hearth Haplite for 2011
27) June 4, 2012 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Jacob Silberman of Bnos Sanz discussing multiple findings and a reclaim of $874
28) July 11, 2012 Notice of Action letter from Raemie Swain, School Food Program Specialist II of the New York State Education Department's Child Nutrition Program to Jacon Silberman of Bnos Sanz stating that $874 will be reclaimed and notifying Bnos Sanz that it has the right to appeal

Hearing Officer's submissions

1) July 16, 2012 letter to Mr. Morton M. Avigdor, Esq. from Hearing Officer Maureen Lavare with a copy to Frances O' Donnell, Coordinator of the New York State Education Department's Child Nutrition Program finding the request for appeal of the denial of the sponsor's 2012 SFSP renewal application to be timely and scheduling the hearing for July 31, 2012
2) July 27, 2012 letter to Mr. Morton M. Avigdor, Esq. from Hearing Officer Maureen Lavare, with a copy to Frances O'Donnell, Coordinator of the New York State Education Department's Child Nutrition Program finding the request for appeal of a reclaim from appellant's 2011 Summer Food Service Program to be timely and scheduling the hearing for August 8, 2012
3) July 27, 2012 letter to Mr. Morton M. Avigdor, Esq. from Hearing Officer Maureen Lavare, with a copy to Frances O'Donnell, Coordinator of the New York State Education Department's Child Nutrition Program allowing the two pending appeals by Bnos Sanz to be consolidated; scheduling the hearing for both appeals on August 8, 2012 and requiring that all documents to be considered as part of both appeals be submitted no later than August 2, 2012 with a copy to the other party
4) New York State Education Department – Summer Food Service Program Appeal Procedures

PROCEDURAL BACKGROUND

On July 11, 2012 I received a request for appeal, mistakenly dated June 22, 2012 from Morton Avigdor, Esq. on behalf of Bnos Sanz (hereinafter "appellant" or "sponsor") (appellant #1). Appellant appeals the decision of the New York State Education Department's Child Nutrition Program (hereinafter "respondent" or "State agency"), to deny its 2012 Summer Food Service Program ("SFSP") sponsor application. Appellant was informed of this decision by letter dated July 9, 2012 from respondent (appellant #1, respondent #17). By letter dated July 16, 2012, I found that the appeal was made timely and I scheduled a hearing for July 31, 2012 (hearing officer #1). I also directed both parties to submit all documents they wanted considered as part of the appeal to my office by July 25, 2012, with a copy to each other (hearing officer #1).

On July 19, 2012 I received a request for appeal, dated July 19, 2012 from Morton Avigdor, Esq. on behalf of appellant (appellant #2). Appellant appeals respondent's decision to reclaim $874 from its 2011 SFSP (appellant #2, respondent #9). Appellant was informed of this decision by letter dated July 11, 2012 from respondent (appellant #2, respondent #9). By letter dated July 27, 2012 I found that the appeal was made timely and I scheduled a hearing for August 8, 2012 (hearing officer #2). I also directed both parties to submit all documents they wanted considered as part of the appeal to my office by August 2, 2012, with a copy to each other (hearing officer #2).

At a hearing on a different matter, involving a different appellant, Mr. Avigdor requested that the two appeals for Bnos Sanz be consolidated so that only one hearing need occur. I found this request reasonable and respondent had no objection, therefore, by a second letter dated July 27, 2012, I consolidated the two hearing requests and rescheduled the 2012 SFSP sponsorship denial hearing for August 8, 2012 (hearing officer #3). I also directed both parties to submit all documents they wanted considered as part of either appeal to my office by August 2, 2012 with a copy to each other (hearing officer #3).

A hearing was held on August 8, 2012 at the offices of the New York State Education Department located at 89 Washington Avenue, Albany, New York. Two issues were heard at this hearing; the denial of appellant's 2012 SFSP sponsor application and the reclaim of $874 from appellant's 2011 SFSP.

FACTUAL BACKGROUND

The primary purpose of the SFSP is to provide food service to children from needy areas during periods when area schools are closed for vacation (7 CFR §225.1). For the summer of 2012 appellant applied to be a SFSP "sponsor" meaning that it would provide summer food service similar to that made available to children during the school year under the National School Lunch and School Breakfast programs (7 CFR §225.2). Appellant has been a sponsor at two

SFSP sites for several years[1]. Specifically, appellant is a sponsor at Camp Shearith Hapleta located at 218 Firehouse Road, Woodbourne, New York and Camp Maybrook Sanz located at 14 Budd Road in Woodbourne, New York. Between these two camp sites appellant feeds approximately 1000 children during the summer (respondent #s 18 and 19).

Respondent conducted a site review of appellant's SFSP in 2007 wherein it found several violations but noted: "Applications in nice order. Observed nice meal service. Children fed well" (appellant #7). Respondent also conducted a site review of appellant's SFSP in 2008 (appellant #8). At this site review respondent found that not all operational costs claimed were allowable and that the sponsor filed an inaccurate claim for reimbursement because it claimed the total operational costs accrued to the SFSP rather than only the cost of serving eligible children (appellant #8). However, respondent also noted "sponsors records are well organized and available upon request" (appellant #8).

On July 20, 2010 respondent conducted a site review at appellant's Maybrook Sanz camp site (appellant #6, respondent #s 3 and 22). The day of the attempted review was a day of fast and therefore no meal service was observed by respondent (appellant #6, respondent #s 3 and 22). Respondent did, however, review appellant's income eligibility applications and found several incorrectly approved applications (appellant #6, respondent #s 3 and 22). Appellant was given an opportunity to correct the applications and did so (respondent #23). The notes from this review state that appellant's SFSP is "well run" and it "provides a much needed and beneficial service to the community" (appellant #6, respondent #s 3 and 22).

Respondent then conducted an administrative review on November 20, 2010 (respondent #4). Following this review, by letter dated December 16, 2010, respondent notified appellant that it did not maintain accurate meal count records and did not maintain adequate documentation to support program costs (respondent #5). Respondent required appellant to submit a statement of the costs that it's 2010 SFSP funds were used to pay, as well as a system to ensure that SFSP payments are maintained and utilized solely for the purpose of the costs associated with eligible children (respondent #5). In accordance with the requirements of respondent's December 16, 2010 letter, appellant responded by letter dated January 12, 2011 (appellant #16, respondent #6). This letter was supplemented by another letter dated January 25, 2012 (appellant #15, respondent #7). Respondent found appellants January 12 and 25, 2011 letters to be insufficient and therefore, by letter dated March 14, 2011, required appellant to implement specific corrective action (respondent #8). In addition to the corrective action, respondent required appellant to: 1) prorate SFSP costs to include only costs incurred for eligible children, 2) pay bills in a timely manner, 3) pay vendors the same amount that is due for goods/services provided, 4) maintain all required documents as required by the SFSP's regulations and guidance and 5) comply with 7 CFR Part 3019 (respondent #8). This letter required an acknowledgment signed and dated by an authorized official (respondent #8). Appellant submitted two acknowledgments, one dated April 7, 2011 signed by Moshe Felberbaum as "representative official – Bnos Sanz" and one dated April 15, 2011, signed by Jacob Silberman as "Authorized official – Bnos Sanz" (appellant #s 12 and 14, respondent #9).

[1] At hearing appellant's attorney stated that appellant has been a sponsor for 15 years.

On July 14, 2011 respondent attempted to conduct a site review at appellant's Maybrook Sanz camp site (appellant #22, respondent #10). Similar to the site review it attempted to conduct in 2010, respondent found that it was a day of fast and no meals were being served at the camp[2] (appellant #22, respondent #10). Respondent also found that records were not readily available for its review. As a result, respondent required appellant to submit numerous documents within 24 hours (appellant #22, respondent #10). Appellant responded the next day with a letter mistakenly dated June 15, 2011, and outlining four steps to be taken to address the issues of the July 14, 2011 site visit (respondent #11).

On July 29, 2011 respondent conducted another site review at appellant's Maybrook Sanz camp site (respondent #s 12, 24). Respondent was able to observe a meal service at this review and found that appellant had income applications that were not approved correctly, an inaccurate meal counting system, and served meals that did not meet all meal pattern requirements (respondent #s 12, 24). Appellant was allowed to submit corrected eligibility applications to respondent (respondent #s 12, 24).

By letter dated December 28, 2011 respondent notified appellant that it would be conducting a follow-up review to determine if appellant had implemented the corrective action it was required to take in response to the reviews conducted of its 2010 SFSP (respondent #13). By letter dated January 25, 2012 appellant submitted a report of its 2011 SFSP expenses to respondent (appellant #19). On February 6, 2012 respondent performed a desk audit as appellant's follow-up review (appellant #23, respondent #s 14, 25). As a result of this desk audit, a Notice of Action letter dated June 4, 2012 was sent by respondent stating that appellant made limited progress in implementing its corrective action (appellant #24, respondent #s 15, 27). Specifically, respondent found that appellant's meal count records were not accurate and that appellant did not implement the required corrective action; appellant did not implement an acceptable procurement procedure in accordance with the requirements of 7 CFR Part 3019; appellant did not demonstrate operational control of the SFSP, in that it did not appear to have a workman's compensation policy for its kitchen staff who are paid with SFSP funds; appellant did not correctly approve household income applications[3]; appellant served incomplete meals when observed by respondent on July 29, 2011 and appellant did not have an accurate meal counting system (appellant #24, respondent #s 15, 27). Appellant was made aware that $874 would be reclaimed from its 2011 SFSP (appellant #24, respondent #s 15, 27). Appellant was also required to complete and submit the Non-profit Organization Financial Administrative Form (appellant #24, respondent #s 15, 27). Finally, appellant was put on notice that "any future failure by the sponsor to comply with SED's required corrective action will result in the sponsor being declared seriously deficient in the SFSP and will be immediately terminated from the SFSP" (appellant #24, respondent #s 15, 27).

By letter dated June 18, 2012 appellant responded to the June 4, 2012 Notice of Action and attached a Training Checklist for Administrative Staff; Training Checklist for Monitors;

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[2] At hearing, respondent stated that appellant failed to inform respondent that it was not serving meals on these days (one site review in 2010 and one site review in 2011) and that appellant is required to notify respondent when it does not serve meals. The SFSP Document Request Form for the July 14, 2011 site visit does request a "site change form: for changes to the approved meal service time" (appellant #22, respondent #10).

[3] Household income applications are also referred to as income eligibility applications throughout this decision.

Training Checklist for Site Staff; Permit to Operate - Renewal Application with the New York State Department of Health for facility Bnos Sanz; Permit to Operate - Renewal Application with the New York State Department of Health for facility Mosdos Klausenburg; Certificate of Liability Insurance; Certificate of Insurance Coverage Under the NYS Disability Benefits Law; Certificate of Incorporation and Amendment of Bnos Sanz; 501(c)(3) letter from the Internal Revenue Service; Organizational Chart: Board of Directors; Duties for Administrative and its completed Non-profit Organization Financial Administrative Form (appellant #11, respondent #16).

Upon review of this information and appellant's 2012 SFSP renewal application, respondent determined that appellant does not have the financial and administrative capability to operate a SFSP and by letter dated July 9, 2012 denied appellant's 2012 SFSP renewal application (appellant #1, respondent #17). By Notice of Action letter dated July 11, 2012, respondent notified appellant that it was reclaiming approximately $874 from its 2011 SFSP (appellant #2, respondent #28). This consolidated appeal ensued.

ARGUMENTS MADE ON APPEAL

Appellant argues that respondent's decisions not to renew appellant's sponsor application and to reclaim $874 were arbitrary and capricious and incorrect. Appellant also states that respondent's finding that appellant does not have the financial and administrative capability to operate a SFSP is not based on corporate, fiscal or programmatic realities and that failure to demonstrate financial and administrative capability is not a valid reason to deny sponsorship approval under 7 CFR §225.11. Appellant also argues that although respondent's June 4, 2012 letter discusses "future violations" possibly resulting in termination, respondent was not given the opportunity to show compliance and adherence to its corrective action plan. Additionally, appellant states that it has operated a successful SFSP for years. Appellant asserts that respondent's decision is a denial of the equal protection clause of the United States Constitution. Finally, appellant asserts that respondent did not follow "its own procedure which requires notification in writing and by Certified mail to the institution within 30 days of the application."

Respondent asserts that appellant has failed to demonstrate that it has the financial and administrative capability to operate the SFSP and it therefore reasonably denied its application to participate as a sponsor in the 2012 SFSP. Respondent also asserts that it properly reclaimed $874 from appellant when it found that appellant incorrectly approved the income application forms for nine children who attended Camp Shearith Hapleta during July 2011.

FINDINGS

$874 Reclaim from Appellant's 2011 SFSP

The regulations for the Summer Food Service Program are found at 7 CFR Part 225.

7 CFR §225.15(f) states that "the application [for SFSP meals] is used to determine the eligibility of children attending camps." 7 CFR §225.15 (f)(2) sets forth application procedures based on household income and states that the application *must* include the social security number of the adult household member who signs the application, or an indication that they do not have a social security number, and the signature of an adult household member (emphasis added). During its February 6, 2012 administrative review of appellant's 2011 SFSP respondent found that nine children enrolled at Camp Shearith Hapleta were inaccurately approved and claimed for free meals during the month of July 2011 (respondent #20). Respondent submitted the eligibility error worksheet which lists the nine children it found ineligible upon review (respondent #26). These children were found ineligible because the social security information and/or an adult signature were missing from their applications (respondent #s1, 26). Based on this finding, by letter dated July 11, 2012 respondent notified appellant that it would begin the process of reclaiming approximately $874 from appellant's 2011 SFSP (appellant #2, respondent #28). Respondent points out that although it could have reclaimed all meals (breakfast, lunch, dinner and NY State 4th meal supplement) for all days that these children attended camp, it only sought a reclaim for the lunch meals served to these nine children in July because those were the dates and meals respondent specifically audited during its review (appellant #20).

At hearing, appellant argued that 7 CFR §225.6 (b)(3) requires that respondent provide technical assistance and allow appellant to correct the applications before reclaiming any funds. I disagree, 7 CFR §225.6 pertains to the approval of sponsor applications. Further, 7 CFR §225.12 (a) states, in relevant part that, "the State agency shall disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable under this part..." Therefore, in opposition to appellant's assertion, the regulations require that respondent reclaim the amount paid to appellant for the nine children improperly made eligible. Further, appellant was clearly on notice that respondent performed income application eligibility reviews, because several previous reviews found that appellant made children eligible who should not have been made eligible (*see* appellant #s 7, 6, respondent #s 3, 12, 22 and 24). Thus, appellant was on notice that respondent would check its income eligibility applications at its sites.

Respondent also argues that it should have been given an opportunity to correct the nine applications, because in the past it had been given an opportunity to correct income eligibility applications by respondent (*see* appellant #s 7, 6, respondent #s 3, 12, 22 and 24). Respondent explained at hearing that although it may afford sponsors an opportunity to fix income eligibility determinations and submit the revised information at a site review, such an opportunity is not appropriate at a follow-up review when respondent is checking to see that a sponsor has implemented corrective action and taken the necessary steps to become compliant with the federal regulations. The February 6, 2012 administrative review was a follow-up to the July 29, 2011 site review (appellant # 23, respondent #s 14, 25). Appellant was given an opportunity to correct income applications after the July 29, 2011 site review at camp Maybrook Sanz (respondent #s 12, 24). Respondent asserts that after the July 29, 2011 site review, appellant should have reviewed the income applications at both camps to ensure that all applications were correct. It did not do so, and thus, during respondent's February 6, 2012 administrative review, respondent found nine incorrectly approved income applications from Camp Shearith Hapleta.

Respondent also argues that with 1000 children attending its camps, some errors will be made. While this might be true, it is then incumbent upon appellant to either: make such errors a cost of doing business and expect a reclaim after each year's SFSP, potentially leading to termination from the SFSP, or to implement a system requiring a diligent re-review of each income application. Quite simply, the federal regulations do not allow State agency's to disregard violations due to the large size of a sponsor's site. Clearly, after being given several opportunities to fix the same violation in the past, appellant was on notice that income eligibility applications are regularly reviewed by respondent and it therefore should have ensured that all income eligibility applications were correctly approved. I find appellant's reclaim of $874 to be reasonable.

Timeliness of Application Denial

Appellant alleges that respondent did not make a timely determination on its application. The relevant regulation states:

> [W]ithin 30 days of receiving a complete and correct application, the State agency shall notify the applicant of its approval or disapproval. If an incomplete application is received, the State agency shall so notify the applicant within 15 days and shall provide technical assistance for the purpose of completing the application. Any disapproved applicant shall be notified of its right to appeal under §225.13. (7 CFR §225.6[b][3]).

Appellant states that it submitted its application to respondent on May 24, 2012 but the denial letter was dated July 9, 2012 (appellant #1, respondent #17). Other than an assertion made in its June [*sic* July] 22, 2012, letter appealing respondent's determination and requesting a hearing, no additional information was submitted pertaining to this allegation. Neither party submitted a copy of the dated application. Also, I was not provided information as to whether the application was deemed "complete and correct" upon receipt by respondent (7 CFR §225.6[b][3]). Therefore, based on the lack of information and evidence provided to me, I cannot make a factual determination that the denial of the application was untimely.

Additionally, I note that even if respondent's determination was untimely, the language of the regulation is directory rather than mandatory, meaning that "the lime limit within which an administrative agency must act is generally construed as discretionary in the absence of express limits on the authority of the agency to act" (Court Reporting Institute v. State Education Department, 237 AD2d 1, 4 *citing* Matter of Estate of Clifford v. New York State Employees Retirement System, 123 AD2d 1, 4). There is no language in the Child Nutrition Program law or regulations limiting the state agency's ability to act if an application is not approved or disapproved within 30 days (see Meyers v. Maul, 249 A.D2d 796). Further, appellant makes no showing of substantial prejudice based on its claim that respondent denied its application late. For the reasons discussed, petitioner is not entitled to any relief on this basis.

Equal Protection

For reasons similar to those discussed in the Timeliness section above, I decline to find that respondent's actions constituted a violation of the equal protection clause of the United States Constitution. Appellant makes this conclusory allegation in its letter appealing respondent's determination but provides no support for this claim (appellant #1).

Reasonableness of Denial of 2012 Sponsor Renewal Application

The federal laws governing the school lunch programs state that "[E]ligible service institutions entitled to participate in the program shall be limited to those that demonstrate adequate administrative and financial responsibility to manage an effective food service" (42 USC §1761 [a][3]). 7 CFR §225.14(c)(1) states that "[N]o applicant sponsor shall be eligible to participate in the Program unless it demonstrates financial and administrative capability for Program operations and accepts final financial and administrative responsibility for total Program operations at all sites at which it proposes to conduct a food service." Appellant argues that failure to demonstrate financial and administrative capability is not an allowed reason to deny a sponsor's application in accordance with 7 CFR §225.11(c) which describes when an application may be denied or a sponsor terminated. I disagree. 7 CFR §225.11 (c) lists four serious deficiencies that are grounds for the disapproval of an application. The regulation, however, which uses the language "include, but are not limited to," does not limit the State agency to those four grounds only (CFR §225.11 [c]). Further, both the federal law and its implementing regulations state that an institution is simply not entitled to participate in the SFSP unless and until it can demonstrate "adequate administrative and financial responsibility to manage an effective food service" (42 USC §1761 [a][3]). In other words, before deciding whether or not serious deficiencies occurred which may cause a State agency to disapprove an application, the State agency must first determine whether a potential sponsor is financially and administratively responsible to carry out the mandates of the SFSP. In this instance, I find that respondent correctly determined that appellant is not financially and administratively capable to operate a SFSP.

As described in the Factual Background section above, after attempting to conduct a site review in the summer of 2010 but finding that it was a day of fast, respondent conducted an administrative review on November 29, 2010 (appellant #6, respondent #s 3, 4, 22). Several violations were found during this review and respondent required appellant to submit a written corrective action plan (respondent #5). After receiving two letters from appellant, respondent found many of its proposed corrective actions to be unacceptable and therefore by letter dated March 14, 2011, required appellant to perform certain additional corrective action (appellant #s15, 16, respondent #s 6, 7, 8). Respondent required that appellant submit a written acknowledgment signed and dated by an authorized official (respondent #8). In response to this requirement, appellant submitted two letters, one dated April 7, 2011 and signed by Moshe Felberbaum and one dated April 15, 2011 and signed by Jacob Silberman (appellant #s 12, 14, respondent #9).

On July 14, 2011 respondent attempted to perform a site review at appellant's Maybrook Sanz camp and again found that it was a day of fast and it therefore could not observe a meal

service (appellant #2, respondent #28). Respondent returned to the camp on July 29, 2011 (respondent #s 12, 24). Respondent found that some income eligibility applications were not correctly approved, there was not an accurate meal count system and meals did not meet meal pattern requirements (respondent #s 12, 24). A follow-up administrative review, which was a desk audit, was conducted on February 6, 2012 to ensure that appellant had implemented its corrective actions (appellant #23, respondent #s14, 25). As a result of this desk audit, a Notice of Action letter dated June 4, 2012 was sent to respondent stating that appellant made limited progress in implementing its corrective action (appellant #24, respondent #s 15, 27). Specifically, respondent found that appellant's meal count records were not accurate and that appellant did not implement the required corrective action; appellant did not implement an acceptable procurement procedure in accordance with the requirements of 7 CFR Part 3019; appellant did not demonstrate operational control of the SFSP, in that it did not appear to have a workman's compensation policy for its kitchen staff who are paid with SFSP funds; appellant did not correctly approve household income applications; appellant served incomplete meals when observed by respondent on July 29, 2011 and appellant did not have an accurate meal counting system (appellant #24, respondent #s 15, 27).

The June 4, 2012 letter also put appellant on notice that "any future failure by the sponsor to comply with SED's required corrective action will result in the sponsor being declared seriously deficient in the SFSP and will be immediately terminated" (appellant #24, respondent #s 15, 27). Appellant argues that this language implies that appellant was to be given approval to operate a 2012 SFSP and an opportunity to implement a new corrective action plan. This assertion is incorrect. The language of the June 4, 2012 letter does not imply that appellant's 2012 SFSP application was to be approved by respondent. Rather, it was meant as a warning to appellant that if it is approved to operate future SFSPs it may be terminated upon additional findings of violations. Further, the letter required appellant to comply with certain requirements, such as the submission of a Non-profit Organization Financial Administrative Form to respondent by June 15, 2012. This section of the letter specifically states, "[T]he sponsor's participation in the future is contingent on documentation of financial and administrative capability" (appellant #24, respondent #s 15, 27). Respondent submitted the Non-profit Organization Financial Administrative form (the "form") and multiple other documents by letter dated June 18, 2012, however, respondent found appellant's form and other documentation inadequate to prove that it has financial and administrative capability (appellant #1, respondent #17).

Specifically, respondent states that in accordance with section B2 of the form, appellant failed to submit returns and proof of payment of State and federal unemployment insurance and employment taxes (respondent #1). Respondent states that appellant also did not submit any organizational brochures, pamphlets or articles detailing its services, as requested in section B7 of the form (respondent #1). Respondent states that appellant also failed to respond to its request for a recent independent audit or audited financial statement as per section C1 of the form and failed to adequately indicate its revenue sources in accordance with section C2 of the form (respondent #1). Respondent also states that appellant's response to its request for an outreach plan, section D7 of the form, wherein appellant stated that it would "advertise in the local papers" was inadequate (respondent #1). Respondent also found appellant's response to section E1 of the form which asks what internal controls appellant has in place, to be inadequate

(respondent #1). Appellant stated that its internal controls consist of having the director "double check" the bills paid by the bookkeeper (appellant #11, respondent #16). Respondent asserts that in accordance with section E2 of the form, which requests minutes from the last three board meetings and projected meeting dates for future meetings, nothing was submitted (respondent #1). Respondent also asserts that appellant has been inconsistent in that it stated that it does not provide "year round services" as required under 7 CFR §225.14(c)(5), yet its certificate of incorporation states that it is a religious corporation formed to conduct and maintain a house of worship and to "conduct all communal affairs necessary for a viable community" (appellant #11, respondent #16).

Further, respondent attempted to find out if appellant had workers compensation coverage, since appellant states that it spent $18,700 in SFSP operation labor costs during the summer of 2011(respondent #s1, 18). Using the New York State Worker's Compensation Board website, respondent was unable to find any evidence of workers compensation coverage for Bnos Sanz (respondent #1). At hearing, however, appellant provided copies of coverage in the name of Mesivta Sanz, Inc.[4] (appellant #s 25, 26). The address and federal employee identification number of Mesivta Sanz, Inc. appears to be the same as Bnos Sanz (except, see footnote 4 below), yet the relationship between the two entities was not explained. Further, it was not explained why this documentation was not previously provided to respondent or if the coverage includes the SFSP employees, as per respondent's concern.

Also at issue is whether appellant's primary address is located in Brooklyn or Sullivan county. Respondent asked appellant this question in an April 18, 2012 email and appellant responded that the site address, which is not typical, is the organization's actual address and the address that should be used by respondent. However, in its June 18, 2012 corrective action plan response, respondent states that its year-round address is the Brooklyn address (appellant #s 5, 11, respondent #16). Finally, I note that a second Brooklyn address is provided in appellant's 2012-2013 Certificate of Insurance under the NYS Disability Benefits Law (appellant #11, respondent #16). This address is also listed in the New York State Department of Health Permit to Operate, Renewal Application form but is crossed out, with 4811, 16th Avenue written over it (appellant #11, respondent #16). Thus, it is unclear exactly what appellant's primary and actual address is.

Additionally, I note that the evidence suggests that there is some confusion as to who is in charge at Bnos Sanz. Specifically, when respondent required appellant to submit an acknowledgement that it would undertake certain required corrective action, an acknowledgement letter was first submitted by Moshe Felberbaum on April 7, 2011 and a subsequent acknowledgement letter, with the exact same language, was then submitted by Jacob Silberman on April 15, 2011(appellant #s12, 14, respondent #9). Appellant provided no explanation as to why two letters were submitted. These duplicate letters signed by two different authorized representatives give the appearance that appellant is not clear as to who is in charge of

[4] Interestingly, the Certificate of Insurance Coverage under the NYS Disability Benefits Law for April 1, 2012 through April 1, 2013 is in the name "Bnos Sanz", although with a different Brooklyn address (appellant # 11, respondent #16). The address used on this certificate is also used on the New York State Department of Health Permit to Operate, Renewal Application form but crossed out and 4811, 16th Avenue written over it (appellant # 11, respondent #16).

its facility and/or its SFSP. Along the same lines, the organizational chart submitted by appellant with its June 18, 2012 letter does not reference any SFSP staff or management, yet, according to respondent, appellant received approximately $400,000 for its 2011 SFSP (respondent #s 1, 18). It appears that certain employees should be charged with overseeing the operation of such a large SFSP, yet appellant has not provided respondent with documents as to whether this is the case.

At hearing, appellant pointed out that its status as a 501(c)(3) organization does not require it to be audited. While this may be true, there is no reason it cannot undertake an audit or other examination to assure respondent of its fiscal soundness and capability to properly implement the SFSP *(see* discussion of section C1 of the form, above). Further, the submission of W2s and reference to appellant's 15 year history of running a SFSP is not adequate to disprove respondent's determination that appellant does not have financial and administrative capability to operate a SFSP. Quite the contrary, whether appellant successfully ran a SFSP in the past, its inability to come into compliance since violations were uncovered in 2010 demonstrates the reasonableness of respondent's requirement that appellant complete the form. Appellant's subsequent failure to answer all of the questions provided in the form and piecemeal submission of documentation that often led to further unanswered questions, such as its multiple addresses, as one example, amply support respondent's determination that appellant has failed to demonstrate that it has the financial and administrative capability to operate a SFSP.

CONCLUSION

I find that respondent acted in accordance with the Federal Child Nutrition Program's regulations, specifically those that pertain to the Summer Food Service Program found at 7 CFR Part 225, when it denied appellant's application to participate in the 2012 Summer Food Service Program and reclaimed $874 from appellant's 2011 Summer Food Service Program.