APPELLANT: Congregation Darkei Tshivo of Dinov
183 Wilson Street
PMB #125
Brooklyn, NY 11211

RESPONDENT: New York State Education Department
Child Nutrition Program Administration
One Commerce Plaza, Room 1623
Albany, NY 12234

STATE: New York; Orange County

In the Matter of the Appeal by

CONGREGATION DARKEI TSHIVO OF DINOV
SPONSOR LEA CODE: 331400226020

from a decision by the New York State Education Department denying site approval to participate in the Federal 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 proposed site approval to operate in the 2013 Summer Food Service Program.

This Decision is rendered this 18th day of September 2013.

Maureen Lavare
Hearing Officer

LIST OF REPRESENTATIVES

For the Appellant:
Shloime Rabinovich
Director
Congregation Darkei Tshivo of Dinov
183 Wilson St. PMB #125
Brooklyn, NY 11211

For the Respondent:
Erin Morigerato, Esq
New York State Education Department
Office of Counsel
89 Washington Avenue, Room 148 EB
Albany, NY 12234

DOCUMENTS SUBMITTED AND REVIEWED

FOR THE APPELLANT:

1. August 5, 2013 letter from Shloime Rabinovich, Director for Congregation Darkei Tshivo of Dinov, enclosing supporting documentation and reason for appeal:

   Appendix 1: USDA Memo dated April 8, 2011, Memo Code SFSP-13-2011 – Subject: For-Profit Locations at Meal Sites in the Summer Food Service Program

   Appendix 2: USDA Memo dated February 13, 1987; FNS Instruction 776-6, Rev.1; Source Citation: Section 225.2 (Private nonprofit), regarding tax-exempt status for summer food service program sites.

   Appendix 3: Spreadsheet on the memos referred to in Appendices 1 and 2

   Appendix 4: New York State Education Department – Summer Food Service Program – New Site Information Sheet-Non-Camp Sites signed 7/8/13

   Appendix 5: Lease Agreement between Fair Oaks Homes LLC and Congregation Darkei Tshivo of Dinov signed by both parties on 3/24/13

   Appendix 6: Temporary Residence permit issued by the Orange County Department of Health certifying that Congregation Darkei Tshivo of Dinov is the operator of Congregation Darkei Tshivo of Dinov at 310 Shawangunk Road, Middletown, NY 10940 – effective date June 27, 2013, expiring on December 31, 2013

Appendix 7: Notarized letter dated August 5, 2013 from Mark Goldenberg of Fair Oaks Homes LLC certifying no involvement with the tenant's Summer Food Service Program

Appendix 8: E-mail correspondence between CNDINTERNET@fns.usda and unknown dated May 4 and May 9, 2011 regarding interpretation of USDA memo #SFSP 13-2011

Appendix 9: December 2, 2003 IRS Tax Exempt letter to Congregation Darkei Tshivo Dinov at 574 E. 9th Street, Brooklyn, New York and Certificate of Incorporation dated June 12, 1991 for Congregation Darkei Tshivo of Dinov

Appendix 10: Page 15 of the USDA Summer Food service Program Administrative Guidance Handbook

FOR THE RESPONDENT:

1. August 16, 2013 letter from Erin C. Morigerato, Esq., Senior Attorney with New York State Education Department, enclosing supporting documentation regarding appeal:

   Exhibit A: Congregation Darkei Tshivo of Dinov's NYS Education Department Summer Food Service Program Non Profit Organization Financial Administration Form, with attachments and 2013 New Sponsor Application/Agreement both dated May 9, 2013

   Exhibit B: Congregation Darkei Tshivo of Dinov's New Site Information Sheet -Camp Sites dated May 9, 2013

   Exhibit C: NYSED's 2013 potential New Sponsor Pre-Approval Visit report dated June 11, 2013

   Exhibit D: NYSED notes regarding discussions with Town of Walkill and Orange County Department of Health

   Exhibit E: June 19, 2013 letter from NYSED to Congregation Darkei Tshivo of Dinov approving them as a sponsor for the 2013 Summer Food Service Program but denying participation of the site and denying the sponsor's request for an advance

   Exhibit F: July 8, 2013 letter from Congregation Darkei Tshivo of Dinov attaching a New Site Information Sheet – Non-Camp Sites and applying to use the same site as a "closed enrolled site"

   Exhibit G: July 11 and 12, 2013 e-mail exchange between NYSED and Congregation Darkei Tshivo of Dinov regarding request for clarification relative to the non-profit status of Fair Oaks Homes, LLC

Exhibit H: July 24, 2013 denial letter from NYSED's Child Nutrition Program office to Congregation Darkei Tshivo of Dinov pertaining to the 310 Shawangunk Road Middletown, New York site

Exhibit I: August 2, 2013 letter from Congregation Darkei Tshivo of Dinov requesting a written appeal of NYSED's July 24, 2013 denial to operate a site

Exhibit J: August 9, 2013 letter from Impartial Hearing Officer Maureen Lavare acknowledging request for appeal and directing that the parties submit documentation by August 16, 2013

Exhibit K: web site address for Code of Federal Regulations, Title 7 Part 225

Exhibit L: February 23, 1987 USDA FNS Instruction 776-6 Rev. 1

Exhibit M: USDA Memo dated April 8, 2011, Memo Code SFSP-13-2011 – Subject: For-Profit Locations at Meal Sites in the Summer Food Service Program

Exhibit N: Excerpt from USDA 2013 Summer Food Service Program Handbook pages 14-17

Exhibit O: August 5, 2013 Congregation Darkei Tshivo of Dinov written appeal and Appendices, stamped "Received August 9, 2013 Summer Food Service Program"

Exhibit P: January 2013 Memo from Frances N. O'Donnell, Coordinator of the Child Nutrition Program regarding Summer Food Service Program Sponsor Training

Exhibit Q: Excerpt from NYSED's Summer Food Service Program's power point

Exhibit R: Excerpt from NYSED's Summer Food Service Program's power point

Exhibit S: July 31, 2013 and August 1, 2013 email exchange between Congregation Darkei Tshivo of Dinov and NYSED regarding site approval

PROCEDURAL BACKGROUND

By letter dated August 5, 2013 Congregation Darkei Tshivo of Dinov (appellant) requested a written appeal of the State Education Department's, Child Nutrition Program's (respondent's) decision to deny the application of Congregation Darkei Tshivo of Dinov's proposed site for participation in the 2013 Summer Food Service Program (SFSP) (appellant # 1 and respondent Exhibit O). Appellant was notified of respondent's decision to deny its site application by letter dated July 24, 2013 (Respondent Exhibit H). By letter dated August 9, 2013 I found the request for appeal to be timely and required both parties to submit all documentation it wanted considered as part of the appeal to my office, with a copy to the opposing party by August 16, 2013 (Respondent Exhibit J). Both parties submitted letters and written documentation for my consideration by that date.

FACTUAL FINDINGS BASED ON SUBMITTED DOCUMENTS

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). In May 2013 appellant submitted an application to become a new SFSP sponsor for a meal service program for July and August 2013 (Appellant's Exhibit A). A sponsor is defined, in part, in the SFSP's federal regulations as a public or private non-profit residential summer camp which provides 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 also submitted a form entitled "New Site Information Sheet-Camp Sites" requesting approval to provide meals at a residential and non-residential camp site located at 310 Shawgunk Road, Middletown, New York in Orange County (Respondent Exhibit B).

In response to the application, respondent conducted a new sponsor pre-approval visit of the 310 Shawgunk Road, Middletown, New York site (site) on June 11, 2013. During this visit respondent observed that "the kitchen facility is not finished and not ready for production. The sponsor needs to finish the kitchen to be up to health codes and have stoves, ovens, coolers, freezers and production sinks and tables" (Respondent Exhibit C). Respondent discussed the site's condition with the building inspector for the Town of Wallkill, where the site is located, and the Orange County Department of Health (Respondent Exhibit D). Based on these discussions and its observations during the June 11, 2013 site visit, by letter dated June 19, 2013 respondent denied the site participation in the 2013 SFSP (Respondent Exhibit E). Appellant did not appeal this determination. Also in the June 19, 2013 letter, respondent approved appellant as a SFSP sponsor for 2013 (Respondent Exhibit E).

By letter dated July 8, 2013, appellant wrote to respondent and stated that "the local authorities refused to approve our site this year as a residential camp." Appellant requested to change its site application to a "closed enrolled site" and submitted a "New Site Information Sheet-Non Camp Sites" application (Appellant Appendix 4; Respondent Exhibit F). This application stated that the physical location of the site is non-profit and that documentation is available to support the site's nonprofit and tax exempt status (Appellant Appendix 4; Respondent Exhibit F). Subsequent emails exchanged between appellant and respondent, however, revealed that the site was owned by Fair Oaks Homes LLC, a for-profit entity (Respondent Exhibit G). Based on this information and in accordance with the United States Department of Agriculture's (USDA) SFSP Memo 13-2011 dated April 8, 2011, by letter dated July 24, 2013 respondent again denied the site participation in the SFSP[1] (Respondent Exhibit H). In response, appellant timely commenced this appeal.

Appellant asserts that respondent has misread USDA Memo 13-2011 and states that "it is quite logical that a non-profit site entity sponsored by an IRS tax exempt non-for-profit organization can rent space from a for-profit property owner in order to feed and care for needy children."

[1] In its August 16, 2013 letter to me with exhibits, respondent states in footnote 6 that on August 15, 2013 it received a "complete, correct and accurate New Site Information Sheet for participation in the 2013 SFSP as a camp" from appellant. Presumably, the site was approved as of that date. This third site approval application submitted by appellant is not at issue in this appeal.

(Appellant #1; Respondent Exhibit I). Appellant further asserts in this letter that respondent is confusing "Property Ownership" with "Site Entity Owned" (Appellant #1; Respondent Exhibit I). Appellant states that it "has clearly established non-profit status as both sponsor and site" (Appellant #1; Respondent Exhibit I).

Alternatively, respondent argues that appellant has admitted that the site is owned by a for-profit entity (Respondent #1). Respondent also states that the purpose of USDA's Memo 13-2011 is to "eliminate the nonprofit status requirement of sites in certain situations such as open sites or open restricted sites but NYSED's SFSP site eligibility policy does not allow eligible sponsors to operate a closed enrolled SFSP at a site if the site location is identified as for-profit"(Respondent #1).

The SFSP regulations at 7 CFR §225.2 defines "site" as a "physical location at which a sponsor provides a food service for children and at which children consume meals in a supervised setting." In each of its three applications for site approval, appellant proposed to use 310 Shawgunk Road, Middletown, New York as the site that it would serve meals to children during the summer of 2013. In its July 8, 2013 "New Site Information Sheet- Non-Camp Sites" form appellant applied to use the same site as a "closed enrolled non-needy area" (Respondent Exhibit F). There is no dispute by the parties that 310 Shawgunk Road, Middletown, New York is owned by Fair Oaks Homes LLC which is a for-profit entity (Appellant Appendix 7; Respondent Exhibit G).

Relying on USDA's Memo13-2011 respondent denied approval of the site because that memo only authorizes sites that are operating as "open or restricted open" to use locations which are not identified as non-profit (Appellant Appendix 1; Respondent's Exhibits H and M). While appellant's general interpretation that USDA's Memo13-2011 was intended to broaden the scope of sites that may use for-profit locations to provide food service for children is correct, the memo's reach was limited. Specifically, the memo states, in part:

> As a result, State agencies may approve meal service sites which are not identified as non-profit locations if the sites meet all of the following criteria:
>
> - The sites must be operated under the sponsorship of an eligible public or private non-profit service institution;
> - *The sites must operate as open sites or restricted open sites*:
> - The sites must be located in an area in which at least 50 percent of the children are from households that are eligible for free or reduced price meals;
> - The sites must make meals available to all children in the area and must serve meals to children on a first come, first serve basis; and
> - The sites must serve all meals at no charge (emphasis added) (Appellant Appendix 1; Respondent Exhibit H).

Further, appellant received confirmation of this memo's interpretation from USDA in an email dated May 9, 2011 which states "The purpose of the memo was to eliminate the nonprofit status requirement for sites that meet the requirements outlined in the memorandum. One of these requirements is that the site must be and [sic] open site" (Appellant Appendix 8). Appellant never

applied to operate an "open site" which is described in the USDA 2013 SFSP Handbook, in part, as a site located in a needy area where meals are made available to all children in the area on a first-come, first serve basis. Sponsors of open sites must take the necessary steps to allow meal service access to all children requesting a meal at the site. Information regarding the meal service at open sites must be publicized in the community served (Respondent Exhibit N). Rather, appellant applied to operate a "closed enrolled site" which is usually established where: an identified group of children live in a pocket of poverty; identified low income children are transported to a congregate meal site located in an area with less than 50% eligible children; or a program provides recreational, cultural, religious, or other types of organized activities for a specific group of children. These types of sites are open only to enrolled children or to an identified group of children, as opposed to the community at large (Respondent Exhibit N).

USDA's Memo13-2011 clearly does not authorize the use of for-profit locations for "closed enrolled sites" (Appellant Appendix 1; Respondent Exhibit H). This is verified by the email correspondence submitted by appellant which stated that the site must be an "open site" (Appellant Appendix 8). Further, respondent has maintained its position that it does not allow eligible sponsors to operate a closed enrolled site at a for-profit location in its training program, which appellant, as a "potential new sponsor" was required to attend (Respondent's Exhibits P and Q). Appellant's argument that respondent confuses "property ownership" and "site entity owned" is misplaced. As discussed above "site" is defined in the SFSP regulations as the location of the food service. There is no dispute that 310 Shawgunk Road, Middletown, New York is the location of the food service appellant proposed to offer for the 2013 SFSP and that it is owned by Fair Oaks Homes LLC, a for-profit entity. The regulations and USDA's Memo13-2011 specifically contemplate that a site does not have to be owned or operated by the SFSP sponsor, however, other than the exceptions enumerated in USDA's Memo13-2011, the site must be non-profit. The fact that the sponsor is exercising complete control over the food service does not negate this requirement for closed enrolled sites. Further, USDA's Memo13-2011 specifically states that "State agencies continue to have the authority to deny the participation of a for–profit site location." Thus, I find that respondent's denial of the site was reasonable and appropriate.

CONCLUSION

I find that respondent acted in accordance with the Federal Child Nutrition Program's regulations and guidance, specifically those that pertain to the Summer Food Service Program found at 7 CFR Part 225 and USDA Memo 13-2011 when, by letter dated July 24, 2013, it denied appellant's proposed site approval to operate in the 2013 SFSP.
