APPELLANT: Community Center of the Rockaway Peninsula
257 Beach 17th Street
Far Rockaway, NY 11891

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

STATE: New York; County of Queens

In the Matter of the Appeal of

COMMUNITY CENTER OF THE ROCKAWAY PENINSULA

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

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.

This Decision is rendered this 8th day of August 2012

Maureen Lavare

Maureen Lavare
Hearing Officer

LIST OF REPRESENTATIVES:

For the Appellant
Yehuda Harbater
Community Center of the Rockaway Peninsula
257 Beach 17th Street
Far Rockaway, NY 11891

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

1) June 22, 2012 letter to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq., representing Community Center of the Rockaway Peninsula, appealing the New York State Education Department - Child Nutrition Program's denial of their 2012 SFSP sponsor application and explaining appellant's position with attached email dated June 11, 2012 from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Pinkus Mayer, New Project Coordinator of the Community Center of the Rockaway Peninsula
2) July 2, 2012 email to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq. forwarding a copy of the June 21, 2012 denial letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Yehuda Harbater denying Community Center of the Rockaway Peninsula's 2012 summer food service program sponsor application
3) June 21, 2012 denial letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Yehuda Harbater denying Community Center of the Rockaway Peninsula's 2012 summer food service program sponsor application

4) July 9, 2012 letter to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program from Morton M. Avigdor, Esq., representing Community Center of the Rockaway Peninsula, responding to the June 21, 2012 letter
5) One page advertisement for adult vocational courses at the Community Center of the Rockaway Peninsula
6) The Summer Food Service Program 2012 Administrative Guidance for Sponsors
7) July 11, 2012 email to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq. attaching documents to be considered at the hearing as per Hearing Officer Maureen Lavare's July 3, 2012 letter
8) April 4, 2012 letter from Pinkus Mayer, New Project Coordinator of the Community Center of the Rockaway Peninsula to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program describing the proposed open enrollment site
9) Summer Food Service Program Letter of Intent & Request for Application
10) Queens school district data on student eligibility for free or reduced price meals
11) Copy of emails between Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program and Pinkus Mayer, New Project Coordinator of the Community Center of the Rockaway Peninsula (one dated April 6, 2012)
12) April 17, 2012 letter from Pinkus Mayer, New Project Coordinator of the Community Center of the Rockaway Peninsula to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program describing site and meals to be provided by the proposed open enrollment site
13) April 18, 2012 letter from Assemblyman Philip Goldfeder to New York State Education Commissioner John King supporting Community Center of the Rockaway Peninsula's request for an open enrollment site
14) Summer Food Service Program Letter of Intent & Training Registration Form, page 4
15) Emails between Pinkus Mayer, New Project Coordinator of the Community Center of the Rockaway Peninsula to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program dated April 18 and 19, 2012; June 5, 2012 and May 25, 2012
16) New York State Education Department – Summer Food Service Program – New Site Information Sheet – Non-Camp Sites form submitted by Community Center of the Rockaway Peninsula and dated April 25, 2012
17) New York State Education Department – Summer Food Service Program Non-profit Organization Financial Administrative Form dated April 24, 2012
18) New York State Education Department - NYSED Substitute Form W9: Request For Taxpayer Identification Number & Certification dated April 25, 2012
19) Child Nutrition Management System SFA/SFSP Sponsor Administrator Password Application dated April 25, 2012
20) Payee Information form dated April 25, 2012
21) Potential Reimbursement – Self-Prep-Rural form
22) New York State Education Department – Summer Food Service Program – 2012 Sponsor Application/Agreement, signed and dated May 15, 2012

23) Child Nutrition Management System SFA/SFSP Sponsor Administrator Password Application signed and dated May 15, 2012
24) Checklist of documents to be returned with application
25) Agenda for meeting on May 23, 2012 at 2:00
26) Agenda for meeting on Wednesday, May 30, 2012, 10:00 in dining room
27) Planning outreach to families and children
28) Job descriptions and responsibilities
29) Board member listing for Community Center of the Rockaway Peninsula
30) Mission Statement of the Community Center of the Rockaway Peninsula
31) Community Center of the Rockaway Peninsula Governing Board Policies and Procedures
32) Letter from Internal Revenue Service stating that Community Center of the Rockaway Peninsula is exempt from federal taxes
33) Community Center of the Rockaway Peninsula Certificate of Incorporation
34) Community Center of the Rockaway Peninsula By-Laws
35) Community Center of the Rockaway Peninsula, minutes of its Annual Board of Directors Meeting held on January 18, 2011
36) Community Center of the Rockaway Peninsula, minutes of its Annual Board of Directors Meeting held on January 18, 2010
37) Community Center of the Rockaway Peninsula, minutes of its Annual Board of Directors Meeting held on February 1, 2009
38) Community Center of the Rockaway Peninsula financial statements for the year ended August 31, 2011
39) Brochures for the Community Center of the Rockaway Peninsula (pool, vocational program)
40) June 11, 2012 email from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Pinkus Mayer, New Project Coordinator of the Community Center of the Rockaway Peninsula
41) July 16, 2012 email to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq. attaching additional documents to be considered at the hearing
42) FRAC data
43) July 19, 2012 letter to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq. explaining receipt date of documents from the New York State Education Department's Grants Management Office
44) July 23, 2012 email to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq. requesting on behalf of his client, that certain State Education Department officials to be present at the hearing scheduled for Tuesday, July 24, 2012
45) July 25, 2012 letter to Hearing Officer Maureen Lavare from Morton M. Avigdor, Esq. regarding the SFSP Application Timeline per the request of Hearing Officer Maureen Lavare made at hearing
46) July 31, 2012 facsimile from Morton M. Avigdor, Esq. to Hearing Officer Maureen Lavare regarding the timeline submission by the New York State Education Department's Child Nutrition Program

Respondent's Submissions

1) July 13, 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
2) Copy of Part 225.1
3) Comparison of Free/Reduced Lunch Eligibles to Enrollment for the Yeshiva Darchei Torah school
4) New York State Education Department – Summer Food Service Program – New Site Information Sheet – Non-Camp Sites form submitted by Community Center of the Rockaway Peninsula and dated April 25, 2012
5) Various information from Camp Simcha's website www.simchdavcamp.com
6) Copy of Simcha Day Camp - Camper's Handbook
7) New York State Education Department – Summer Food Service Program Completed 2012 Sponsor Application/Agreement, signed but not dated
8) Contact information on the Child Nutrition Management System for the Yeshiva Darchei Torah showing Rabbi Yehuda Harbater as the School Business Official
9) SED, Child Nutrition-Community Center of the Rockaway Peninsula-SFSP Timeline

Hearing Officer's submissions

1) June 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 to be premature as June 11, 2012 email from Child Nutrition Program Office was not formal action to deny sponsor's application
2) July 3, 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 timely, scheduling a hearing for Tuesday July 24, 2012 at 1:30 p.m. at the offices of the New York State Education Department, 150 EB and requiring that all documents either party wants to have considered as part of the appeal be submitted to the hearing officer by July 16, 2012, with a copy to the other party
3) New York State Education Department – Summer Food Service Program Appeal Procedures

PROCEDURAL BACKGROUND

On June 22, 2012 I received a request for appeal, dated the same date from Morton Avigdor, Esq. on behalf of Community Center of The Rockaway Peninsula (hereinafter "appellant") (appellant #1). Appellant appeals the decision of the New York State Education Department's Child Nutrition Program (hereinafter "respondent"), to deny its 2012 Summer Food Service Program ("SFSP") sponsor application (appellant #2). By letter dated June 27, 2012, I found that the appeal was premature as the June 11, 2012 email from Kylie Smith, which

Mr. Avigdor attached to his request as evidence that respondent denied appellant's 2012 SFSP sponsor application, did not constitute a final decision by respondent that it was denying appellant's application.

On July 2, 2012, I received from Mr. Avigdor a copy of respondent's June 21, 2012 letter to appellant formerly denying its application to become a 2012 SFSP sponsor. Therefore, by letter dated July 3, 2012 I found that the appeal request was made timely and I required both parties to submit all documents they wanted considered as part of the appeal to my office by July 16, 2012 (hearing officer #1). Both sides were directed to copy each other on any submitted documentation (hearing officer #1). A hearing was held July 24, 2012 at the offices of the New York State Education Department.

During the hearing, appellant argued that its application was not approved or disapproved within 30 days as required by 7 CFR §225.6(b)(3). This argument was made in appellant's initial request for an appeal and hearing, however, neither party submitted any information or documentation regarding the allegation (appellant #1). Therefore, I asked both parties to submit a timeline to me by close of business, Friday, July 27, 2012, addressing the issue of the timeliness of respondent's disapproval of appellant's application. At respondent's request, the time to submit the timeline was extended to Monday, July 30, 2012. Both parties submitted a timeline to my office by close of business July 30, 2012. Respondent, however, included an inspection report – notice of violation issued by the New York City Department of Health and Mental Hygiene with its timeline. By letter dated July 31, 2012 and faxed to my office on that date, appellant objected to this report, objected to my extending the deadline to submit the timeline to July 30, 2012 and objected to the additional comments that respondent placed in its timeline.

I agree with appellant that the additional documentation submitted by respondent was inappropriate and does not appear to address the time line. Thus, I have not considered the document entitled "inspection report – notice of violation issued by the New York City Department of Health and Mental Hygiene." I disagree, however, with appellant's assertion that the one day extension was inappropriate. I find that respondent's explanation that it was undergoing a USDA audit, reasonable grounds to allow respondent an extra day to submit its timeline. Finally, since appellant submitted an additional letter and document responding to respondent's timeline, it had the final word in this matter and was not prejudiced by respondent's added comments to its timeline.

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 is a community center located at 257 Beach 17th Street, Far Rockaway, New York, which it describes as a "huge" campus that "comfortably" houses the community center and nonpublic school, Yeshiva Darchei Torah (appellant #4). Appellant applied to become a sponsor after it was told by respondent that it

"qualified" to be an open site (appellant # 15). Respondent received appellant's 2012 SFSP application on May 17, 2012 (respondent #9). Summer 2012 was appellant's first year applying to be a SFSP sponsor and it applied to be an "open site" which is defined as

> "a site at which meals are made available to all children in the area and which is located in an area in which at least 50 percent of the children are from eligible households that would be eligible for free or reduced price school meals under the National School Lunch program and the School Breakfast Program, as determined in accordance with paragraph (a) of the definition of areas in which poor economic conditions exist" (7CFR §225.2).

In accordance with the above, the definition of "areas in which poor economic conditions exist" is:

> "[T]he local areas from which an open site and restricted open site draw their attendance in which at least 50 percent of the children are eligible for free or reduced –price school meals under the National School Lunch Program and the School Breakfast Program, as determined (1) by information provided from departments of welfare and education, zoning commissions, census tracts, and organizations determined by the State agency to be migrant organizations; (2) by the number of free and reduced-price lunches or breakfasts served to children attending public and nonprofit private schools located in the areas of Program sites or (3) from other appropriate sources (7 CFR §225.2).

Appellant's new site information sheet states that it sought approval for an enrollment of 1000 children and that kosher meals would be served at its site (appellant #16, respondent #4). Appellant's site is located at 257 Beach 17th Street, Far Rockaway, New York. As stated above, this is the same address as Yeshiva Darchei Torah and Camp Simcha (respondent #5 and #6). To document that the site would be located in an area where poor economic conditions exist, appellant relied on census data (appellant #16, respondent #4). The census data, which is obtained from respondent's web site, demonstrates that the community where appellant is located is a poverty area (appellant #42).

Upon processing appellant's application, respondent became aware of several issues and attempted to obtain additional information from appellant to resolve its concerns (respondent document #1). Specifically, respondent did not think that census data was appropriate to demonstrate the "pocket of poverty"[1] appellant was attempting to feed through the SFSP. Instead, it felt that school data, and specifically, data from Yeshiva Darchei Torah which is located at the same address as appellant, was the appropriate data to be used (respondent #1).

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[1] The phrase "area in which poor economic conditions exist" is also referred to as "pocket of poverty" by respondent. These phrases will be used interchangeably throughout this decision.

Respondent relied, in part, on the United States Department of Agriculture's 2012 Administrative Guidance for Sponsors when making this decision (appellant #6). Additionally, at hearing, respondent explained that, in this instance, public school data would not provide the most accurate data on a pocket of poverty because, generally, students who eat kosher meals do not attend public schools[2]; therefore, the most relevant site information was a nonpublic school, such as Yeshiva Darchei Torah which is located at the same address as appellant. Yeshiva Darchei Torah's data shows that only 36% of its enrollment qualifies for free or reduced price meals during the school year (respondent # 3).

Further, there are already eight open sites in the same area as appellant, which are operated through the New York City Board of Education (appellant #3, respondent #1). These sites, however, do not serve kosher meals. Respondent also states that, when processing appellant's application, it became aware that Camp Simcha was located at the same address and that the children enrolled at Camp Simcha would be fed through appellant's proposed open site (appellant #3, respondent #1). Other than the Camp Simcha children and an additional 60 children, respondent stated that appellant was unable to identify what other children it was planning on feeding. Finally, respondent states that it proposed other options to appellants, such as operating a closed-enrolled site in a non-needy area or to enroll the Camp Simcha children with supporting eligibility documentation, but appellant was only interested in operating an "open site" (appellant #3).

Because its concerns were not addressed by appellant, by letter dated June 21, 2012 respondent notified appellant that it was denying its application to participate in the 2012 SFSP, citing 10 reasons upon which its decision was based. The letter also notified appellant that it had the right to appeal respondent's decision in accordance with the requirements of 7 CFR §225.13(b)(1) and (2) (appellant #3). This appeal ensued.

ARGUMENTS MADE ON APPEAL

Appellant argues that respondent's decision was arbitrary and capricious and incorrect. Appellant states that respondent denied the application on the premise that some of the children attending the camp located at the same address, and who may be fed at the open site, are not needy. 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 did not submit relevant eligibility documentation that targets the population they intend to serve at the proposed "open site." Respondent asserts that it is more appropriate to rely on school data rather than census data, as proposed by appellant, when determining whether the area to be served constitutes a pocket of poverty. Respondent lists multiple concerns it has with appellant's proposed open site. Finally, respondent states that it is more appropriate to have Camp Simcha, located at the same address as appellant, approved

[2] According to respondent's statements at hearing, The National School Lunch Program is not required to provide kosher meals to children.

as a closed enrolled site, rather than feed the children attending the camp through appellant's proposed open site[3].

FINDINGS

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 sent its application to respondent, via overnight mail, on Tuesday, May 15, 2012 (appellant #45). Respondent states that it received appellant's application on Thursday, May 17, 2012 (respondent # 9). Thus, if the application was deemed "complete and correct" upon receipt, appellant should have been notified of respondent's determination by Monday, June 18, 2012. A letter denying appellant's application was sent and dated Thursday, June 21, 2012, three days later than required if the application was complete and correct.

Respondent, however, argues that the application was not deemed complete and correct, upon receipt (respondent #9). As evidence of this, respondent's timeline references its outreach with appellant during the application process, including training on May 18, 2012, a new program site visit on June 6, 2012, and phone conversations between June 7 and 11, 2012 (appellant #9).

Also, on June 11, 2012 appellant was notified by email from respondent that "the site is not eligible to operate as an open site" (appellant #40). Although this email did not constitute a final decision by respondent that it was denying appellant's application, it put appellant on notice that its application was not going to be approved, as submitted. Additionally, in accordance with the "technical assistance" requirement of 7 CFR §225.6(b)(3), the June 11, 2011 email proceeds to offer appellant other options to sponsor a 2012 SFSP, it states "the camp could be a camp or closed enrolled site in a non-needy area if you are able to establish the eligibility through individual documentation"(appellant #40). Appellant chose not to pursue these proposed options and a final denial letter was issued on June 21, 2012. Therefore, I find that appellant's initial application was not complete and respondent's determination was not untimely.

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[3] At hearing and in its July 13, 2012 letter, respondent asserted that it had conversations with the New York City Department of Health (NYCDOH) wherein the NYCDOH had concerns about the children at Camp Simcha being fed at the proposed open site. However, no evidence was submitted from NYCDOH.

Further, 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). Finally, appellant makes no showing of substantial prejudice based on its claim that its application was denied three days late. Thus, for all of the reasons discussed above, petitioner is not entitled to any relief on this basis.

Reasonableness of Application Denial

The parties disagree as to whether appellant's application for an "open site" can be approved based on the census data it submitted. Appellant included census data in its new site information sheet, part of its 2012 SFSP sponsor application, as evidence that its proposed open site is located in an area in which poor economic conditions exist (appellant # 16). At hearing, appellant explained that this data was taken from respondent's web site. The information, referred to as "FRAC" demonstrates that appellant's proposed open site is located in a needy area (appellant #42). Respondent does not dispute the FRAC data, nor does there appear to be any dispute that appellant's proposed site is located in a needy area.

Alternatively, respondent states that for several reasons, it is not appropriate to rely solely on census data to find a pocket of poverty that appellant may feed through an open SFSP site. First, respondent cites to the Summer Food Service Program 2012 Administrative Guidance for Sponsors document which states, in part,

> "[H]owever, sponsors are encouraged to use school data rather than census data because it is usually more comprehensive than the census survey data, and more accurately represents current neighborhood economic conditions. There may be certain circumstances that warrant the use of census data to establish area eligibility even when current-year local school data is available. Some of these circumstances include:
>
> -The potential site is located in a rural area, where geographically large elementary school attendance areas obscure localized "pockets of poverty," which can be identified through the use of Census Block Group (CBG) data.
>
> - Available current-year school data shows an area to be close to, but under, the 50 percent threshold, and the CBG data may reveal specific portions of the school's attendance area that are SFSP eligible.

- Mandatory busing has affected the percentage of children in the neighborhood schools who are eligible for free and reduced-price meals, and the school is unable to "factor out" the pupils bused in from other areas and provide the sponsor with data on the percentage of free and reduced-price eligible children living in the schools immediate neighborhood." (appellant #6, pages 18 and 19).

Respondent asserts that none of the above described circumstances apply to appellant and therefore appellant should not use census data rather than school data to document the pocket of poverty it expects to serve. Further, respondent states that because there are already eight open sites operated by the New York City Board of Education in the area, and this site will serve kosher meals, which public schools do not serve through Child Nutrition Programs, it was more appropriate to use data from a local nonpublic school[4]. Specifically, respondent asserts that information pertaining to Yeshiva Darchei Torah, which is located at the same address as appellant, is the most appropriate school data to use when deciding if there is a pocket of poverty in the area. Information pertaining to Yeshiva Darchei Torah shows that 32% of its student population receives free or reduced price meals, thus it does not meet the 50% requirement to allow appellant to operate an open site at the same address (respondent documents #3 and #1 and 7 CFR §255.2).

Appellant argued that Yeshiva Darchei Torah does not provide appropriate data because students are bused to the Yeshiva from surrounding communities, however, no evidence was provided of this and I note that Yeshiva Darchei Torah's contact for respondent is Rabbi Yehuda Harbater who is also appellant's Executive Director (appellant #16 and respondent #8). Therefore, the information on the number of students bused to Yeshiva Darchei Torah who are not from the community could have been provided to respondent and in this appeal. I find that respondent's reliance on data from Yeshiva Darchei Torah was in compliance with the SFSP regulations and guidance given in this area (appellant #6, pages 18 and 19). The uniqueness of this circumstance in that the open site is being proposed in a community center that houses a nonprofit private school and the fact that there were already multiple other open sites in the area (that unfortunately do not serve kosher meals) required respondent to look at data other than census data and local public school data.

Respondent had other concerns about the proposed open site. During its review of appellant's application, respondent learned that a summer camp, Camp Simcha, would be located at the same address. Camp Simcha, although providing breakfast, lunch and snack to its campers, did not apply to be a SFSP site (respondent documents #5 and 6). Appellant denied that it had any information regarding Camp Simcha or how the children attending the camp were being fed (respondent #1). At hearing, when questioned if appellant's proposed site was to feed the children attending Camp Simcha, appellant stated that the intent of the open site was not to feed the campers, but if the campers went to the open site to be fed, appellant would not turn

[4] The Summer Food Service Program 2012 Administrative Guidance for Sponsors document references both local public school districts and non-profit private schools "serving the area in which a sponsor intends to offer the SFSP students in the area"(appellant #6 at 17) . It is therefore appropriate to use data from a non-profit private school.

them away[5]. The evidence submitted in this appeal shows that the proposed dates of operation of appellant's open site, listed in its new site information sheet, are exactly the same dates that Camp Simcha is open (first day - June 28, 2012, last day - August 20, 2012 and closed on July 4, 2012) (compare appellant document # 16 to respondent document #6).

Also, at hearing, respondent stated that it had concerns that the proposed open site was not accessible enough because it has a gate and requires a bell to be rung in order to enter the dining area. Additionally, respondent stated that appellant had not clearly identified exactly who in the community it was attempting to serve. When appellant was questioned at hearing as to where the number of proposed meals (1000 for lunch and 1000 for breakfast) came from, appellant explained that the facility can accommodate 544 people and that two shifts of each meal would equal approximately 1000 meals for breakfast and also for lunch. In other words, appellant's answer was based on what its facility can accommodate and not what the needs of the surrounding community are. Alternatively, appellant stated that, in one day, it had 60 families display interest in the open site but that it had to stop advertising the site since it was unclear if it was going to receive approval from respondent to become a SFSP sponsor.

Respondent's suspicion of appellant's application was reasonable based on the evidence that Camp Simcha and appellant share the same address, are operating on exactly the same dates and that Camp Simcha is providing meals to its children without otherwise applying as a camp in the SFSP. Appellant made no attempt to appease respondent's legitimate suspicion that the open site was primarily intended to feed the children attending Camp Simcha. Further, respondent offered to address the needs of the children attending Camp Simcha by assisting appellant with qualifying Camp Simcha as a "closed enrolled" site. A closed enrolled site would require a review of the individual children attending Camp Simcha to determine if 50% or more are eligible for free or reduced price meals (7 CFR §225.2). This offer was rejected by appellant. Accordingly, appellant has not demonstrated that its proposed open site is not being used primarily to feed the children attending Camp Simcha who may not qualify for the SFSP.

Appellant rightfully points out that the United States Department of Agriculture has stated that the SFSP is underutilized and that State agencies are to make a continued effort to increase participation in the SFSP (appellant #6, page 10). I disagree, however, with appellant's assertion that in accordance with this directive, any proposed site located within a poor economic area must be approved. In order to maintain the integrity of the SFSP, respondent is charged with diligently reviewing each new sponsor application and ensuring that each site will be feeding individuals who rightfully qualify for government assistance for free meals[6]. In this case, unanswered questions pertaining to Camp Simcha and the use of data from Yeshiva Darchei Torah led respondent to the determination that appellant did not adequately describe the pocket of poverty it seeks to feed at its open site and I find respondent's determination to be reasonable.

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[5] Open sites are required to make meals available to all children in the area on a first-come, first-serve basis (appellant #6, page 14 citing 7 CFR §225.2)

[6] Indeed, it is well documented that the SFSP has been subject to widespread abuse placing additional burdens on State agencies when reviewing applications for new sponsors (*see The Summer Feeding Program – How to Feed Children and Stop Program Abuses* (April 15, 1977) ("GAO Report (April 15, 1977)") (*and see generally* 7 CFR §225.6).

Finally, appellant also alleges that its proposed open site was not approved due to discrimination. I will consider this argument to be that respondent's decision to deny appellant's application was a pretext and that the true reason for the decision was discrimination. I note that even if appellant presented a prima face claim of discrimination, it can be successfully rebutted by a showing that the decision was reasonable and rational and not a pretext for discrimination (*see* McDonnell Douglas Corp. v. Green, 411 U.S. 792). In view of my decision that respondent's determination was reasonable and rational because it was based on legitimate concerns about the proposed open site that were not addressed by appellant during the application process, respondent's action cannot be construed as a pretext for discrimination.

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.