



## **LIST OF REPRESENTATIVES**

### **For the Appellant East Meadow Union Free School District**

Carol A. Melnick, Esq.  
Jaspan Schlesinger, LLP  
300 Garden City Plaza  
Garden City, NY 11530

### **For the Appellant Aramark Educational Services, LLC**

Alan Charles Raul, Esq.  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, D.C. 20005

### **For the Respondent**

Frances O'Donnell  
Coordinator  
New York State Education Department  
Child Nutrition Program Administration  
Education Building, Room 55/119  
Albany, NY 12234

## **DOCUMENTS SUBMITTED AND REVIEWED**

### **SUBMITTED BY APPELLANT**

- 1) January 14, 2011 letter to Hearing Officer Maureen Lavare from Louis R. DeAngelo, Superintendent of Schools for East Meadow School District (EMSD) requesting a hearing
- 2) April 22, 2010 letter from Frances N. O'Donnell, Coordinator of the Child Nutrition Program (CNP) to Louis R. DeAngelo, ERSD Superintendent, notifying him that the CNP intends to reclaim all lunches in the schools from September 1, 2009 to the present.
  - a. February 23, 2010 CNP memo to school food service directors/managers, regarding the required milk component attached
  - b. Page from EMSD's web site regarding milk alternative
  - c. One page from contract between Aramark and EMSD
- 3) May 24, 2010 letter from Robert Hirschauer of Aramark to Louis R. DeAngelo, ERSD Superintendent, responding to the April 22, 2010 letter EMSD received from CNP
- 4) June 8, 2010 letter from Frances N. O'Donnell, CNP Coordinator to Louis R. DeAngelo, ERSD Superintendent, indicating the CNP spoke with Barbara Stabile, Aramark's Food Service Director serving EMSD, and there was no need to visit the district.

- 5) November 15, 2010 letter from Robert Gorman of EMSD to Elizabeth Lattanzio of the CNP requesting a release of the hold the CNP placed on EMSD's reimbursements with attached affidavit of Barbara Stabile Aramark's Food Service Director serving EMSD.
- 6) December 29, 2010 letter from Frances N. O'Donnell, CNP Coordinator to Louis R. DeAngelo, ERSD Superintendent, notifying ERSD that that the CNP is reclaiming a total of \$80,209 for allowing juice substitutions for milk.
  - a. Calculation sheets for 89,735 attached.
  - b. February 23, 2010 CNP memo to school food service directors/managers, regarding the required milk component attached.
  - c. November 12, 2009 memo (code: SP07-2010, CACFP 04-2010, SFSP 05-2010) from the United States Department of Agriculture regarding milk substitution for children with medical or special dietary needs.
  - d. Page from EMSD's web site regarding milk alternative.
  - e. Appeal process.
- 7) January 28, 2011 letter from Carol Melnick, counsel for EMSD, to Hearing Officer Maureen Lavare stating that an in-person hearing is no longer necessary.
- 8) January 28, 2011 letter from Alan Charles Raul, counsel for Aramark to Hearing Officer Maureen Lavare arguing why no lunches should be reclaimed from the EMSD for the 2009 – 2010 school year.
  - a. Copies of 2009-2010 school year menus attached.
  - b. Data on when milk is chosen as an *a la carte*.
  - c. Milk take-rates in surrounding school districts.

**SUBMITTED BY RESPONDENT**

- 1) January 31, 2011 letter from Frances N. O'Donnell, CNP Coordinator to Hearing Officer Maureen Lavare arguing why the reclaim of school lunches from the EMSD should be upheld.
- 2) Page from EMSD's web site regarding milk alternative.
  - a. February 23, 2010 CNP memo to school food service directors/managers, regarding the required milk component.
- 3) Notes from Sharon Smith regarding an April 20, 2010 phone conversation she had with Barbara Stabile, Aramark's Food Service Director serving EMSD.
- 4) June 8, 2010 letter from Frances N. O'Donnell, CNP Coordinator to Louis R. DeAngelo, ERSD Superintendent, indicating the CNP spoke with Barbara Stabile, Aramark's Food Service Director serving EMSD, and there was no need to visit the district.
- 5) November 15, 2010 letter from Robert Gorman of EMSD to Elizabeth Lattanzio of the CNP requesting a release of the hold the CNP placed on EMSD's reimbursements with attached affidavit of Barbara Stabile, Aramark's Food Service Director serving EMSD.
- 6) Revised page from EMSD's web site regarding milk alternative.
- 7) December 29, 2010 letter from Frances N. O'Donnell, CNP Coordinator to Louis R. DeAngelo, ERSD Superintendent, notifying ERSD that that the CNP is reclaiming a total of \$80,209 for allowing juice substitutions for milk.
- 8) Portions of the 2009-2010 contract between Armarak and EMSD.
- 9) Copies of portions of 7 CFR Part 210.

## **PROCEDURAL BACKGROUND**

On January 18, 2011 I received a letter dated January 14, 2011 from the East Meadow School District (hereinafter "EMSD") requesting an appeal. EMSD sought to appeal a decision by the State Education Department, Child Nutrition Program (hereinafter "respondent") reclaiming lunch reimbursements in the amount of \$80,209 from the 2009-2010 school year. EMSD also requested that its food service management company, Aramark Educational Services LLC (hereinafter "Aramark", and collectively with EMSD referred to as "appellants") be permitted to intervene. By letter dated January 20, 2011 I found that the appeal request was made timely and scheduled a hearing for February 3, 2011. I also allowed Aramark to intervene and be a party to the matter. By letter dated January 28, 2011 from EMSD's attorney, EMSD stated that an in-person hearing was no longer necessary and that Aramark's submission would represent EMSD's position also. I confirmed the cancellation of the hearing with a letter dated February 1, 2011.

A letter with attachments dated January 28, 2011 from Aramark's attorneys was received in my office on January 31, 2011, and a January 31, 2011 letter with attachments from respondent was received on the same day. All letters and documentation were copied to the opposing parties.

## **FACTUAL BACKGROUND**

EMSD is a school food authority as that term is defined in the regulations governing the National School Lunch Program (7 CFR §210.2). EMSD operates a National School Lunch Program in its schools. Aramark is EMSD's food service management company.

On or about April 14, 2010 respondent found the following statement on EMSD's web site:

### **MILK ALTERNATIVE**

We have added 100% orange, fruit punch, apple and grape juices to the beverage menu. These items are approved by the State and can be substituted for the milk when purchasing a lunch. Juices are also available a la carte.

On April 20, 2010 Sharon Smith, a School Food Program Specialist III with respondent, spoke with Barbara Stabile, Aramark's Food Service Director serving EMSD and allegedly confirmed that EMSD was serving 100% juice and lemonade as beverage alternatives to milk in all of EMSD's schools, since September 2009. As part of this appeal, appellants have submitted an affidavit from Barbara Stabile stating that this conversation never took place. In response to

the web site statement and its discussion with Barbara Stabile, by letter dated April 22, 2010, respondent notified EMSD that it was serving and claiming meals that did not meet the National School Lunch Program requirements listed in 7 CFR §210.10.

Aramark responded by letter dated May 24, 2010 to EMSD, which was also provided to respondent, stating that the "intent of the website was to inform parents and students that there is a selection of beverages available in the cafeteria that would include milk and juice, milk as the milk component and juice as the fruit component." The letter further clarified that juice is not being used as a substitute for milk and that records indicate that 69% of all reimbursable meals included a carton of milk as one of the components. By letter dated June 8, 2010, respondent responded to Aramark's May 24, 2010 letter and stated that the information on EMSD's website and its conversation with Barbara Stabile was enough evidence for it to conclude that appellant's were serving and claiming meals that did not comply with the requirements set forth in 7 CFR §210.10. Respondent stated that it did not need to inspect EMSD and acknowledged that the web site information was changed.

On November 15, 2010 EMSD wrote respondent requesting that it release all holds and forward all reimbursements due the district. EMSD also attached an affidavit from Barbara Stabile stating that she never spoke with respondent. Finally EMSD states that there was "no non-compliance in our program" and invited respondent to review their food service operation.

On December 20, 2010 respondent notified EMSD that it was reclaiming \$80,209 for 89,735 lunch meals where it cannot be proven that students were offered fluid milk as a required meal component. This appeal ensued.

#### **ARGUMENTS MADE ON APPEAL**

Appellants argue that respondent failed to prove that juice was offered as a substitute for milk because students are not required to take milk with their lunch and appellants' 70% milk take-rate is equivalent to surrounding districts. Appellants also argue that the web site inaccurately stated the district's policy and that it never authorized milk to be replaced with juice. Finally, appellants argue that respondent is required to conduct a review before determining that a violation has occurred.

Respondent asserts that between the information obtained from EMSD's web page and the phone conversation Sharon Smith, School Food Program Specialist III had with Barbara Stabile, Aramark's Food Service Director serving EMSD, it was evident that appellants were allowing juice and/or lemonade substitutions for milk. The nature of this violation did not require that respondent conduct an on-site review. Finally, respondent asserts that in accordance with 7 CFR §210.19(c) it is required to take fiscal action against school food authorities, such as EMSD when claims are not properly payable.

## FINDINGS

Although appellants initially asserted that the language used on EMSD's web site regarding milk alternatives (quoted above), did not mean that a student could substitute milk for juice (see appellants' document #3), the plain meaning of the statement "can be substituted for the milk when purchasing a lunch," leads to a contrary interpretation. Later documentation submitted by appellants referred to the district's web site as being "incorrect" (see appellants' document #5). EMSD eventually changed the wording regarding milk alternatives on its web site to reflect that fruit juice may only be taken as a fruit alternative, not a milk alternative.

Respondent has documented that milk substitutions are not allowed in the National School Lunch Program unless the substitution meets certain requirements listed in 7 CFR §210.10(m)(3) (calcium, protein, Vitamin A, Vitamin D, magnesium, phosphorous, potassium, riboflavin, and Vitamin B-12). 7 CFR §210.10(m)(1)(i) requires schools to offer students fluid milk "under all menu planning approaches." Additionally, 7 CFR §210.10 (m)(4) states that a school "must not directly or indirectly restrict the sale or marketing of fluid milk at any time or at any place on school premises." Indeed, it appears that the problem of schools offering juice or other beverages in substitution of milk required respondent to issue a February 23, 2010 memo to school food service directors and managers specifically addressing the fact that milk is a required component in the breakfast and lunch programs (see appellants' document #6 and respondent's document #2). Respondent also states that other schools have had meals reclaimed because they offered improper milk substitutions to students. Respondent's February 23, 2010 memo clearly states that "schools that encourage or promote other beverage choices, including water, and do not identify milk as the only required beverage component will be considered as not meeting the intent of 7 CFR §210.10, which is to provide students with milk at every meal." Based on the requirements of the National School Lunch Program's regulations and its February 23, 2010 memorandum, I find that it was reasonable for respondent to conclude that the statement on EMSD's web site regarding milk alternatives, constituted a promotion of other beverage choices, in place of the milk component.

Appellants also argue that respondent cannot reclaim funds without first conducting an administrative review in accordance with the National School Lunch program regulations at 7 CFR §210.18. I disagree. 7 CFR §210.19(a)(5) states that the "State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities." This section clearly gives respondent discretion as to how it will investigate infractions of the Child Nutrition Program. In this instance, Frances O'Donnell, the Coordinator of New York State's Child Nutrition Program stated that the information obtained from EMSD's web site and a phone conversation with Barbara Stabile constituted her office's investigation into this irregularity and neither a full administrative review or a site visit to the school were necessary.

Finally, appellants argue that because EMSD operates an "offer versus serve" program, and its milk take-rate is the same as neighboring schools, respondent cannot prove that juice was substituted for milk in any of the lunches. Alternatively, respondent states that in accordance with 7 CFR §210.19(c)(2) it identified accurate counts of reimbursable lunches through available

data. Specifically, respondent states that appellants were able to show that 199,733 meals of 289,468 served at EMSD did include a fluid milk component. Because EMSD could not prove that students were only offered fluid milk as a beverage choice for the remaining 89,735 lunch meals served, it is using that amount to calculate its reclaim of \$80,209. I have already determined that it was reasonable for respondent to conclude that appellants offered juice as a milk substitute. Therefore, it is also reasonable for respondent to disclaim the lunches where there is no evidence that they included a fluid milk component. It is not the duty of respondent to further break this amount down into meals where milk may have been legitimately refused as part of the "offer versus serve" program, but rather the duty of appellants to ensure that all of the necessary meal components are provided and that no student or parent is given reason to believe, correctly or incorrectly, that the student has a choice of juice and/or lemonade as a substitute for milk.

### **CONCLUSION**

I find that respondent acted in accordance with the Federal Child Nutrition Program's regulations, specifically those that pertain to the National School Lunch Program found at 7 CFR Part 210 when it determined that a reclaim of \$80,209 must be taken from EMSD's 2009-2010 National School Lunch Program reimbursement.