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APPELLANT: MDQ Academy
1725 Brentwood Road (Bldg. #2)
Brentwood, NY 11717

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

STATE: New York; County of Suffolk

In the Matter of the Appeal by

MDQ ACADEMY
LEA CODE: 580512995496

from a decision by the New York State Education Department to reclaim reimbursement funds from the 2010-2011 school year under the National School Lunch Program

DECISION

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 it must reclaim $13,389.87 from appellant's 2010-2011 National School Lunch Program.

This Decision is rendered this 4th day of April, 2012

Maureen Lavare
Maureen Lavare
Hearing Officer

LIST OF REPRESENTATIVES

For the Appellant
Khurshid Khan, Ph.D.
Principal
MDQ Academy
1725 Brentwood Road (Bldg. 2)
Brentwood, NY 11717

For the Respondent
Paula Tyner-Doyle
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

SUBMITTED BY APPELLANT

1) February 17, 2012 letter to Hearing Officer Maureen Lavare from Khurshid Khan, Ph.D., Principal of MDQ Academy appealing a determination by the New York State Education Department's Child Nutrition Program to reclaim $13,389.87
2) March 16, 2012 letter to Hearing Officer Maureen Lavare from Khurshid Khan, Ph.D., Principal of MDQ Academy stating facts for consideration

SUBMITTED BY RESPONDENT

1) March 19, 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 responding to the appeal by MDQ Academy
2) Copies of portions of 7 CFR Part 210
3) New Sponsoring Agency Application (New York State Education Department Form) stamped "received June 12, 2009"

4) Child Nutrition Management System SFA profile/renewal of MDQ Academy with certification
5) May 31, 2011 email from Sandra Ragule, School Food Program Specialist III of the New York State Education Department's Child Nutrition Program to Khurshid Khan, Ph.D., Principal of MDQ Academy regarding being placed on reimbursement hold and requesting information
6) June 17, 2011 letter from Justin Lite, attorney for MDQ Academy suggesting that all buildings are safe and requesting that the reimbursement hold be lifted
7) July 26, 2011 letter from Sandra Ragule, School Food Program Specialist III of the New York State Education Department's Child Nutrition Program requesting paperwork previously requested in email
8) August 26, 2011 email from Sandra Ragule, School Food Program Specialist III of the New York State Education Department's Child Nutrition Program to the administration of MDQ Academy allowing documents to be submitted by September 9, 2011 and restating a phone conversation with Khurshid Khan, Ph.D., Principal of MDQ Academy
9) September 12, 2011 email from Justin Lite attorney for MDQ Academy attaching a copy of the building division certificate for 1514 East Third Avenue, Bayshore, New York 11706
10) February 1, 2012 letter from Sandra Ragule, School Food Program Specialist III of the New York State Education Department's Child Nutrition Program to Khurshid Khan, Ph.D., Principal of MDQ Academy stating that a May 24, 2011 coordinated review effort found that MDQ Academy was using sites that had not been identified and approved for program participation in the federal child nutrition program and stating that $13,389.87 would be reclaimed. Appeal information is attached to the letter

PROCEDURAL BACKGROUND

By letter dated and faxed to my office on February 17, 2012, Khurshid Khan, Ph.D., Principal of MDQ Academy (hereinafter "appellant") requested an appeal of a decision by the New York State Education Department's, Child Nutrition Program (hereinafter "respondent") to reclaim $13,389.87 from appellant's 2010-2011 school food service under the National School Lunch Program. Because it was unclear whether the appeal request was timely, by letter dated February 21, 2012 I directed appellant to submit proof of when it received the notice of reclaim from respondent. After receiving additional information, I decided that the request for appeal was made in a timely manner. By letter dated March 6, 2012, I notified the parties of my decision that the request for an appeal was timely, and I required the parties to submit any written documentation that it wanted considered as part of the appeal, to my office by March 21, 2012, with a copy to each other. Respondent was provided a copy of appellant's March 16, 2012 letter and respondent provided copies of its March 19, 2012 letter with attached documentation to appellant's representative, Dr. Khurshid Khan.

FACTUAL BACKGROUND

In June 2009 appellant applied to become a school food authority as that term is defined in the regulations governing the National School Lunch Program (7 CFR §210.2) (respondent document #3). Appellant sought to operate a food service providing free lunches to qualified children in its private school located at 1514 East Third Avenue, Bayshore, New York 11706 (the "site") for the 2009-2010 school year (respondent document #3). Respondent conducted a new program visit at the site on December 1, 2009 and observed that the children were being served meals at one of the buildings on the site (respondent document #1).

On August 17, 2010 appellant submitted its National School Lunch Program annual renewal on-line application for the 2010-2011 school year to respondent. The application stated that the site was the only place it would continue to provide meals. Additionally, the application included a certification by appellant that it would comply with all federal and State laws and regulations, including 7 CFR Part 210 (respondent document #4).

As part of its requirement to conduct administrative reviews of all school food authorities (7 CFR §210.18), on May 24, 2011, respondent conducted a coordinated review effort ("CRE") at the site to evaluate appellant's compliance with Part 210 of the Code of Federal Regulations. During this CRE respondent observed that appellant "had added two new school sites and had moved its cafeteria facilities to the basement of a mosque... that was located at the far side of the parking lot" (respondent document #1). Respondent states that it had "concerns over the safety of the school children and the integrity of the federal nutrition program" (respondent document #1). By email sent on May 31, 2011 respondent notified appellant that it was "being placed on reimbursement hold as a result of claiming meals for students that were coming from multiple sites not approved by SED and for changing the food service site without notifying SED" (respondent documents #1 and #5). The email also requested that appellant forward a "501-C3, certificate of occupancy, certificate of incorporation and fire inspection report for the buildings being used as your school and for the mosque since the food is being served there" (respondent documents # 1 and #5).

In response to this email, appellant's attorney, by letter dated June 17, 2011 suggested that the buildings were safe and requested respondent provide appellant the "opportunity to complete any additional paperwork you require and invite a (re)inspection by your office" (respondent document #6). By letter dated July 26, 2011, respondent informed appellant that the requested documentation needed to be submitted by August 16, 2011 and forewarned appellant "we may not be able to reimburse you for any meals served in the unapproved sites" (respondent document #7).

Appellant did not submit the requested documentation and therefore on August 26, 2011 respondent called appellant (respondent document #8). Appellant stated that it would not be applying to renew its National School Lunch Program during the 2011-2012 school year (respondent document #8). Appellant sought an additional extension of time to submit the requested documentation and respondent extended the submission deadline to September 9, 2011(respondent document #8). This phone conversation was documented in an email of the same date (respondent document #8).

By email dated September 12, 2011, appellant's attorney sent respondent a building certificate for 1514 East Third Avenue, Bayshore, New York, 11706 (respondent document #9). The certificate appears to include three one-family dwellings and the Bay Shore Mosque (respondent document #9). Respondents found this building certificate to be insufficient because "it did not support that the "cellar" of the mosque was certified to be used as a school cafeteria or that the house structure was approved to be used as a school. There was no information submitted regarding the modular structure or the original main building that SED approved to operate the CN [Child Nutrition] programs" (respondent document #1).

By letter dated February 1, 2012 respondent notified appellant that it intends to reclaim $13,389.87 received by appellant for meals served in unapproved sites (respondent document #10). This appeal ensued.

ARGUMENTS MADE ON APPEAL

Appellant requests that it's case be "reconsidered" because the school experienced upheaval during the school years 2008 through 2010; they are uncertain as to what paperwork was originally provided to respondent; they lost money implementing their food service program during the 2010-2011 school year and they were under the impression that respondent had already approved the use of the basement of the mosque for school lunch use (appellant document #2). Additionally, appellant states that they "have always had sincere desire and shown consistent effort to follow the procedures as closely as possible" (appellant document #2).

Respondent argues that it must reclaim appellant's National School Lunch Program funding from September 2010 through April 30, 2011 because appellant fed children enrolled in buildings respondent did not approve as eligible to participate in the National School Lunch Program and it served meals at a site that was not authorized or recognized by respondent.

FINDINGS

There is no dispute that, except for one class, appellant used the basement of the mosque to serve children National School Lunch Program meals. There is also no dispute that after the 2009-2010 school year, appellant failed to notify respondent that it would be serving lunch in a different building for the 2010-2011 school year. Indeed, it appears from the record that respondent was not aware of this change until it conducted a CRE on May 24, 2011.

Although respondent requested documentation on numerous occasions, it wasn't until August 12, 2011 that appellant submitted a copy of the Town of Islip's Building Division Certificate for 1514 East Third Avenue, Bay Shore, New York 11706 to respondent. While this document certifies that improvements made to the property "conform substantially with the terms and requirements of the New York State Building Code and the Town of Islip Zoning Ordinance," it does not address whether the mosque, or any of the buildings, meet applicable sanitation and health standards (respondent document #9). Appellant, a school food authority, is

charged with ensuring that "school storage, preparation and service is in accordance with the sanitation and health standards established under State and local law and regulations" (7 CFR §210.13 *and see* §210.9[b][14] and [16]). Additionally, and without any explanation, appellant failed to provide respondent with its 501 C3 tax exempt status and the fire inspection documents it also sought. Particularly disconcerting, is the fact that a fire certificate has not been provided to respondent after it has requested this documentation several times over the course of many months. One would expect that a school's administration could readily prove the safety of its facilities to any government official requesting such documentation.

I must point out, however, that it is unclear whether appellant provided documentation that the building originally used to provide meals (during 2009-2010 school year) met applicable health and sanitation standards and whether the required documentation of a certificate of occupancy, fire inspection and 501 C3, were submitted for the 2009-2010 school year. Further, respondent does not state what, if any, federal or State laws and/or regulations it is relying on when it requires appellant to submit a fire inspection and certificate of occupancy (subsequently issued guidance also provides no reference as to the legal or regulatory requirements for these documents *see* http://portal.nysed.gov/portal/page/pref/CNKC/NeedToKnow/Ensuringnonpublicschoolsareoperatinginsitesthathavebeenrecognizedassafeforschoolchildre.htm).

In administrative legal practice the burden of proof lies with the party who initiated the proceeding (New York State Administrative Procedure Act §306 [1]; D'Agostino v. Dinapoli, 24 Misc. 3d 1090, *citing* Matter of Mayflower Nursing Home v. Office of Health Sys. Mgt. of Dept. of Health of the State of N.Y., 59 NY2d 935, 938 [1983] and Matter of Kingston v. Gorman, 17 A.D.3d 1079 [4th Dept., 2005]). In this case, appellant offers no proof that respondent's decision to reclaim appellant's National School Lunch Program funds from the 2010-2011 school year was improper in any manner. Indeed, appellant appears to admit that it failed to comply with respondent's demands, referring to the matter as an "unintentional oversight" (appellant document #2). Appellant's alleged "appeal", which consists of nothing more than its March 16, 2012 letter, can only be construed as a request for reconsideration by the program (appellant document #2). Although appellant appeals respondent's decision to reclaim its funding, without additional documentation it remains unclear whether the buildings that appellant uses to school and feed its students meet applicable health and safety requirements. Therefore, I find that respondent's actions were reasonable.

The federal regulations at 7 CFR §210.24 state that "[T]he state agency shall withhold Program payments, in whole or in part, to any school food authority which has failed to comply with the provisions of this part." Additionally, the federal regulations state that "fiscal action should be extended back to the beginning of the school year or that point in time during the current school year when the infraction first incurred, as applicable" (CFR §210.19[c][2][ii]). In this case, information was provided to respondents during the CRE that the National School Lunch Program meals were being served to the children in the new unapproved site, in the mosque's basement, since the beginning of the school year. Respondent's reclaim of $13,389.87 from appellant's 2010-2011 National School Lunch Program is therefore reasonable.

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 it must reclaim $13,389.87 from appellant's 2010-2011 National School Lunch Program.