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STATE OF NEW YORK

APPELLANT: Oorah

RESPONDENT: New York State Education Department

In the Matter of the Appeal by Oorah Sponsor LEA Code: 800000059497 From a decision by the New York State Education Department terminating its participation in the Summer Food Service Program	} } } } }	DECISION

I find that respondent acted in accordance with the federal Child Nutrition Program regulations, specifically those that pertain to the Summer Food Service Program found at 7 CFR Part 225, when it terminated Oorah from the Summer Food Service Program.

This decision is rendered this 6th day of November 2013.

Joan Gavrilik
Joan Gavrilik
Hearing Officer

Representatives

For appellant

Ben Turin, Esq.
General Counsel
Oorah
1805 Swarthmore Ave
Lakewood, NJ 08701

Avraham Krawiec
Camp Director
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For respondent

Erin C. Morigerato, Esq.
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Procedural Background

By letter dated September 3, 2013, Kylie Smith, School Food Program Specialist II, New York State Education Department ("respondent" or NYSED), notified Eliyohu Mintz, Oorah ("appellant" or "the sponsor"), that NYSED had deemed Oorah seriously deficient due to outstanding corrective action and that it was being terminated from the Summer Food Service Program (SFSP or "Program") effective August 19, 2013, citing §§225.11(f)(2) and 225.18(b)(2) of Title 7 of the Code of Federal Regulations (CFR) (HO1 and Respondent Exhibit L)[1]. The letter notified appellant of its appeal rights and included a copy of respondent's appeal procedures (HO2). By letter dated September 12, 2013, Ben Turin, Esq., appellant's General Counsel, requested a hearing to appeal the termination of Oorah from SFSP (HO3 and Respondent Exhibit M). The letter asked that a hearing not be scheduled prior to October 7, 2013. On September 16, 2013, I was named Hearing Officer in this matter by Paula Tyner-Doyle, respondent's Coordinator for Child Nutrition Program Administration (HO4). By letter dated September 16, 2013, I scheduled a hearing for October 9, 2013 and asked the parties to submit any written documentation that they wished to be considered in this appeal (HO5 and Respondent Exhibit O). At appellant's request, and without objection from respondent, the hearing was rescheduled for October 30, 2013 (HO6). Respondent submitted written documentation to be considered in this appeal[2]; appellant submitted no documentation. A hearing was held on October 30, 2013 at the New York State Education Department in Albany, NY. At hearing, appellant was represented by Avraham Krawiec, Camp Director. Respondent was represented by Erin C. Morigerato, Esq. Also in attendance were Louise DeCandia, Esq., of NYSED and Paula Tyner-Doyle, Kylie Smith, Kimberly Vumbaco, and Raemie Swain of respondent's Child Nutrition Program Administration office.

Issues

Respondent contends that based on federal regulations and the evidence it submitted it was required to terminate appellant's participation in the Program. It points to appellant's documented ongoing violations and failure to institute agreed-to corrective action measures. Respondent argues that its action

[1] A complete list of Hearing Officer documents is included as Appendix A to this decision.
[2] A complete list of respondent documents is included as Appendix B to this decision.

to terminate appellant was required under federal regulations, not discretionary, and that its determination was reasonable and rational, not arbitrary and capricious.

Appellant claims that although their Program is not perfect, it has a good working relationship with respondent, it has always agreed to recommended corrective action, and its Program has improved. Appellant asks that it be permitted to continue to run and improve its Program in cooperation with respondent.

Appellant argues that a review is a "snapshot" at a given point in time and is not necessarily reflective of the quality of their Program on a day-to-day basis. For example, during the July 30, 2013 site review, all children were not offered the same food. He explained that it was a one-time occurrence when food was burned and a substitution was made. Appellant argues that their Program should be looked at as a bigger picture over a longer period of time and asks that its efforts to improve its Program be acknowledged.

Appellant also contends that the findings are stated in very general terms – that is, that the same "finding" might reflect different specific situations which occurred at different times, and perhaps at different sites -- and should not be considered repeat findings or violations. Respondent argues that although this is true, it is a valid approach because it is reflective of appellant's systems and demonstrates appellant's ability, or lack thereof, to consistently run the Program as required.

Appellant also asked to clarify the record with respect to certain findings of the final site review at Oorah Catskill Retreat on August 19, 2013:

- With respect to the finding that applications were not correctly approved (Finding #1003), appellant contends that it was given an extension to resubmit application forms for all students and that they would all be reevaluated. Respondent contends that forms that were available on site were reviewed -- and violations found -- and that it agreed to review the remaining forms when they were submitted.

- Appellant argues that some of the findings were related to the "family dining room" and that after the review he immediately emailed respondent stating that he would remove the family dining room counts from the totals. Respondent contends that those findings were nevertheless findings of the site review.

- Appellant contends that the number of people they need to be prepared to serve varies greatly from day to day – varying by 30 or 40 – affecting the number of meals they prepare daily.

Findings of Fact

The following facts are based on respondent's documents, which were not disputed by appellant, except to the extent discussed above. Appellant was an SFSP sponsor during 2012 and 2013. During 2013, appellant was approved to operate two sites – Oorah Catskill Retreat (also known as GirlZone), Gilboa, NY and BoyZone, Stamford, NY (Respondent Exhibit A).

August 7, 2012 site review

On August 7, 2012, respondent conducted a site review at Oorah Catskill Retreat (Respondent Exhibit B). Findings included:

501. The site did not have an accurate system to count complete first meals served to children.
1003. Applications were not correctly approved.

The Findings Detail Sheet specifies corrective action to be taken by appellant. The Site Review Form indicates "No Sponsor Representative available for exit." The form is signed by a Site Supervisor/Representative indicating that the report was discussed, but not signifying agreement with its contents.

August 20, 2012 site review

On August 20, 2012, respondent conducted a follow-up site review at Oorah Catskill Retreat (Respondent Exhibit C). Findings included:

405. Meals served did not meet meal pattern requirements. Incomplete meals were served missing required components.
501. The site did not have an accurate system to count complete first meals served to children.
1003. Applications were not correctly approved.

The Findings Detail Sheet specifies corrective action to be taken by appellant. The Site Review Form is signed by a Sponsor Representative and indicates, "The sponsor representative agrees to implement the corrective action, at all sites operated by the sponsor within the time(s) established."

January 17, 2013 administrative review

On January 17, 2013, respondent conducted an SFSP administrative review of appellant's program (Respondent Exhibit D). According to the review forms, "The organization does not have any written policies/procedures available for review. All requested documentation will be submitted to [NY]SED within next 7 days."

July 1, 2013 notice of findings and corrective action

By letter dated July 1, 2013, respondent notified appellant of the findings of the three reviews (Respondent Exhibit E). The letter lists ten corrective actions to which appellant allegedly had agreed, including:

- The sponsor will implement an accurate meal count system within two days.
- The sponsor will not claim meals served that do not meet meal pattern requirements.
- The sponsor will train all staff on meal pattern requirements.
- The sponsor will correct all income applications within two days.
- The sponsor will only claim reimbursement for children that have complete and accurate eligibility documentation on file.

July 30, 2013 site review

On July 30, 2013, respondent conducted a site review at BoyZone (Respondent Exhibit G). Findings included:

404. All items/components were not offered throughout the meal service.
405. Meals served did not meet meal pattern requirements. Incomplete meals were served missing required components.
501. The site did not have an accurate system to count complete first meals served to children.
602. The procedure for preparing and ordering meals was not adequate to meet the objective of serving only one meal per child at each meal service.
1003. Applications were not correctly approved.

The Findings Detail Sheet specifies corrective action to be taken by appellant. The Site Review Form is signed by a Sponsor Representative and indicates, "The sponsor representative agrees to implement the corrective action, at all sites operated by the sponsor within the time(s) established."

August 13, 2013 letter to appellant

By letter dated August 13, 2013, respondent notified appellant that it was being placed on reimbursement hold due to outstanding corrective action (Respondent Exhibit H). The letter details the findings and agreed-to corrective action resulting from the 2012 and 2013 reviews. The letter informed appellant that "any future failure by the sponsor to comply with [NY]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."

Employment offers

Respondent submitted six letters dated August 15, 2013 offering positions to individuals for Specialty/Kitchen Supervisor and for Office Manage/SPSF Paperwork at both BoyZone and GirlZone (Oorah Catskill Retreat) (Respondent Exhibit I).

August 19, 2013 site review

On August 19, 2013, respondent conducted a site review at Oorah Catskill Retreat (Respondent Exhibit J). The findings were:

301. Meals prepared/delivered did not meet meal pattern requirements.
301a. The site was not able to meet the required item(s)/component(s) prior to meal service.
404. All items/components were not offered throughout the meal service.
405. Meals served did not meet meal pattern requirements. Incomplete meals were served missing required components.
501. The site did not have an accurate system to count complete first meals served to children.
602. The procedure for preparing and ordering meals was not adequate to meet the objective of serving only one meal per child at each meal service.
1003. Applications were not correctly approved.
Handwritten notes indicate "Sponsor was given until 8/31/13 to collect [missing information]"

The Findings Detail Sheet specifies corrective action to be taken by appellant. The Site Review Form is signed by a Sponsor Representative and indicates, "The sponsor representative agrees to implement the corrective action, at all sites operated by the sponsor within the time(s) established."

Appellant August 19, 2013 email

By email dated August 19, 2013, appellant indicated that findings will be corrected and that the family dining room counts were being removed from the totals (Respondent Exhibit K).

Respondent September 3, 2013 notice of termination

By letter dated September 3, 2013, respondent notified appellant that respondent had deemed appellant seriously deficient due to outstanding corrective action and that it was being terminated from SFSP effective August 19, 2013 (HO1 and Respondent Exhibit L). This appeal ensued.

Conclusions of Law

Respondent, being the party that initiated this action (as reflected by its September 3, 2013 letter to appellant), has the burden of proof in this matter. That party must show that its action is supported by substantial evidence.

SFSP is administered pursuant to federal regulations found at 7 CFR Part 225. Section 225.1 provides, in pertinent part:

> Section 13 of the [National School Lunch] Act [as amended] authorizes the Secretary [of Agriculture] to assist States through grants-in-aid to conduct nonprofit food service programs for children during the summer months and at other approved times. The primary purpose of the Program is to provide food service to children from needy areas during periods when area schools are closed for vacation.

Sponsors are approved to participate in the Program and develop a special summer or school vacation program providing 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).

State agencies are responsible for administering the Program. State agency responsibilities include sponsor application approval, as well as Program monitoring and assistance. In addition, the regulations provide for the termination of a sponsor's Program, as well as the termination of specific sites.

In its notice of termination and at hearing, respondent stated that it was relying on 7 CFR §§225.11(f)(2) and 225.18(b)(2). In Ms. Morigerato's letter (Respondent 1), she also relies on 7 CFR §225.11(c).

Section 225.11(c) provides for "Denial of applications and termination of sponsors." Specifically, this section provides, in pertinent part:

> The State agency shall terminate the Program agreement with any sponsor which it determines to be seriously deficient (emphasis added). However, the State agency shall afford a sponsor reasonable opportunity to correct problems before terminating the sponsor for being seriously deficient. ... Serious deficiencies which are grounds ... for termination include, but are not limited to, any of the following:
>
> ...
>
> (4) Program violations at a significant proportion of the sponsor's sites. Such violations include, but are not limited to, the following:
>
> ...
>
> (ii) Failure to maintain adequate records;
>
> ...
>
> (vi) Service of a significant number of meals which did not include required quantities of all meal components;
>
> ....

Section 225.11(f)(2) provides for the termination of sites:

> The State agency shall terminate the participation of a sponsor's site if the sponsor fails to take action to correct the Program violations noted in a State agency review report within the timeframes established by the corrective action plan.

In addition, 7 CFR 225.18(b)(2) provides for termination a sponsor's participation as follows:

> A State agency shall terminate a sponsor's participation in the Program by written notice whenever it is determined by the State agency that the sponsor has failed to comply with the conditions of the Program.

The September 3, 2013 notice of termination (HO1 and Respondent Exhibit L) stated, in pertinent part:

> This letter is to notify you that the New York State Education Department ... has deemed Oorah seriously deficient due to outstanding corrective action and is being terminated from the SFSP, effective August 19, 2013 (emphasis added).
>
> ...
>
> Oorah was placed on reimbursement hold on July 30, 2013 pending a compliant site review. The third follow up site review conducted on August 19, 2013 at the sponsor's Oorah Catskill Retreat site resulted in findings.

As quoted above, 7 CFR §225.11(c) enumerates a nonrestrictive list of "serious deficiencies" that are grounds for termination of a sponsor's participation in the Program. That list specifically includes "Program violations at a significant proportion of the sponsor's sites" enumerating a nonrestrictive list of applicable Program violations, including failure to maintain adequate records and meal pattern violations. Thus, inadequate records and/or meal pattern violations at a significant proportion of a sponsor's sites

are grounds for sponsor termination, provided the sponsor was given a reasonable opportunity to correct the problems.

In this case, both parties agreed at hearing that the basis of the determination in question is the final site review on August 19, 2013 at Oorah Catskill Retreat. Any finding of the August 19, 2013 site review that was also a finding of a prior site review at either of the sponsor's sites,[3] may be grounds for sponsor termination. There had to have been a reasonable opportunity for corrective action and the violation must either be enumerated in §225.11(c) or be a similarly serious violation. (Any finding from a previous review that did not appear as an August 19, 2013 finding is irrelevant for the purpose of this analysis since there is no evidence that those violations continue uncorrected.)

There were seven findings as a result of the August 19, 2013 review (enumerated above). Even setting aside finding #1003 (incorrect application approval), about which the parties disagree, four of the other findings were findings in previous site reviews and the subject of agreed-to corrective action (#404, #405, #501, and #602). Two of those findings (#405 and #501) appeared in more than one previous site review, including both of the sponsor's sites. These two topics – failing to meet meal pattern requirements/serving incomplete meals and failing to have an accurate system to count meals served -- are specifically enumerated in regulations at 7 CFR §§225(c)(4)(ii) and (vi) as constituting "serious deficiencies" that are grounds for sponsor termination. Each of these site reviews included a corrective action component, and in all cases (other than the August 7, 2012 site review where a sponsor representative was not available) the corrective action was agreed to by a representative for appellant. Either of these repeated violations alone constitutes substantial evidence that serious deficiencies existed at a significant proportion of sponsor sites. (Since appellant operated two sites during the time period in question, one site constitutes a significant proportion of sponsor sites.) The site review forms indicate that appellant was afforded the opportunity to correct these problems. Appellant has failed to adequately comply and grounds for termination exist.

I note that I agree with respondent that such findings are at an appropriate level of specificity. If meals are incomplete, the finding should be the same regardless of the missing meal component. Similarly, the inability of a sponsor to ensure that meals are counted accurately is a serious deficiency even though it may manifest itself differently on different days or at different sites.

I do, however, reject respondent's position at hearing and in Ms. Morigerato's letter (Respondent 1) that it terminated appellant's sites individually as well as terminating appellant as a sponsor. Respondent's September 3, 2013 notice to appellant states that "Oorah ... is being terminated from the SFSP" (HO1 and Respondent Exhibit L). The letter does contain a stand-alone recitation of 7 CFR §225.11(f)(2), which provides for the termination of a sponsor's site. In addition, the letter notifies appellant that "Oorah has the right to appeal the State agency's decision to terminate the participation of the sponsor and the sponsor's sites." Nevertheless, I find this insufficient notice that respondent was terminating both the Oorah Catskill Retreat site and the BoyZone site individually. To find otherwise would mean that the findings of the August 19, 2013 site review at Oorah Catskill Retreat would be the basis for terminating the BoyZone site individually, which is contrary to the concept of individual site termination. (Indeed, at hearing, appellant's representative expressed surprise that the individual sites were being terminated as well as the sponsor's participation.) Other than this insufficient letter of notice, I have no other evidence that these sites were individually terminated.

[3] The parties agree that corrective action measures are intended to be applied to all sites.

While the issue of site termination is academic to the extent that a sponsor that has been terminated cannot operate any individual sites, it does raise an issue as to the overall sufficiency of the notice. I do find, however, that the notice was sufficient to notify appellant of the action being taken (termination of appellant as a Program sponsor) and the basis for the action (the August 19, 2013 Oorah Catskill Retreat site review and the legal authority at 7 CFR §225.18[b][2]). Inclusion of the additional site termination language in the notice did not prejudice appellant or impair its ability to appeal the decision or defend its position.

I found appellant's representative at hearing, Avraham Krawiec, to be credible and his desire to improve appellant's Program laudable. However, the question before me is whether respondent's determination -- based on the law and the facts -- was reasonable and rational, rather than arbitrary and capricious.

I conclude that respondent's decision to terminate Oorah as a Program participant was reasonable and rational. In light of this determination, I need not address the parties' remaining contentions.

Conclusion

Respondent's determination was rational, reasonable and supported by the record. Therefore, the determination is affirmed and the appeal is dismissed.

Appendix A: Hearing officer documents

HO1: Letter dated September 3, 2013 from Kylie Smith, NYSED, to Eliyohu Mintz, Oorah, notifying him that Oorah was being terminated from the SFSP effective August 19, 2013. The letter enclosed the hearing procedures listed as HO2 below. (2 pages without enclosure)

HO2: New York State Education Department Summer Food Service Program Appeal Procedures (3 pages)

HO3: Letter dated September 12, 2013 from Ben Turin, General Counsel, Oorah, to NYSED requesting a hearing to appeal the termination of Oorah from the SFSP. (1 page)

HO4: Letter dated September 16, 2013 from Paula Tyner-Doyle, NYSED, to Joan Gavrilik assigning her as Impartial Hearing Officer regarding the 2013 SFSP appeal request from Oorah. The letter enclosed the documents listed as HO1 and HO3 above. (1 page without enclosures)

HO5: Letter of September 16, 2013 from Joan Gavrilik, Hearing Officer, to the parties' representatives – Ben Turin, Esq. for appellant and Erin C. Morigerato, Esq. for respondent – scheduling the hearing for October 9, 2013 and directing them to submit any written documentation that they wished to be considered in the appeal. (2 pages)

HO6: Letter of October 2, 2013 from Joan Gavrilik, Hearing Officer, to the parties' representatives rescheduling the hearing for October 30, 2013. (2 pages)

Appendix B: Respondent documents

Respondent 1. Letter dated September 26, 2013 from Erin C. Morigerato, Esq., attorney for respondent, enclosing the following exhibits: (5 pages excluding exhibits)

Respondent Exhibit A: 38 pages

- 2013-2014 SFSP Profile (1 page)
- 2013-2014 Site Information (1 page)
- Nonprofit Organization Administrative Form (5 pages)
- Certificate of Liability Insurance (1 page)
- Consolidated Financial Statements for the year ending 12/31/12 (18 pages)
- Board meeting minutes for 5/6/12, 8/17/12, and 1/6/13 (9 pages)
- Board meeting dates (1 page)
- Certificates of Liability Insurance (2 pages)

Respondent Exhibit B: 19 pages

- SFSP Site Review Form for Oorah Catskill Retreat on 8/7/12 (5 pages)
- Schoharie County Health Department permits (2 pages)
- Findings Detail Sheet pages 6, 10, 12, 13, 14, and 19 (6 pages)
- Worksheet for Incorrectly Approved Applications (6 pages)

Respondent Exhibit C: 9 pages

- SFSP Site Review Form for Oorah Catskill Retreat on 8/20/12 (5 pages)
- Findings Detail Sheet pages 10, 12, and 19 (3 pages)
- Worksheet for Incorrectly Approved Applications (1 page)

Respondent Exhibit D: 4 pages

- SFSP Administrative Review Form, 1/17/13 (3 pages)
- Findings Detail Sheet page 15 (1 page)

Respondent Exhibit E: 6 pages

- Letter dated July 1, 2013 from Kylie Smith, NYSED, to Eliyohu Mintz, Oorah, summarizing site reviews of 8/7/12 and 8/20/12, an administrative review of the sponsor on 1/17/13, and corrective action expected to be taken, with UPS tracking information.

Respondent Exhibit F: 2 pages

- Schoharie County Health Department Permits

Respondent Exhibit G: 17 pages

- SFSP Site Review Form for BoyZone on 7/30/13 (5 pages)
- Findings Detail Sheet pages 6, 9, 10, 12, 13, 14, 15, 16, 18, 19, and 21 (11 pages)
- Worksheet for Incorrectly Approved Applications (1 page)

Respondent Exhibit H: 8 pages

- Letter dated August 13, 2013 to Eliyohu Mintz, Oorah, from Kylie Smith, NYSED, notifying him that Oorah was being placed on reimbursement hold due to outstanding corrective action, with UPS tracking information.

Respondent Exhibit I: 6 pages

- Six letters dated 8/15/13 offering individuals positions at BoyZone and GirlZone

Respondent Exhibit J: 12 pages

- SFSP Site Review Form for Oorah Catskill Retreat on 8/19/13 (5 pages)
- Findings Detail Sheets pages 7, 9, 10, 12, 15 and 19 (6 pages)
- Worksheet for Incorrectly Approved Applications (1 page)

Respondent Exhibit K: 1 page

- Email dated 8/19/13 to Kylie Smith, NYSED, from Avraham Krawiec, Oorah, regarding Oorah lunch program (1 page)

Respondent Exhibit L: 9 pages

- Letter dated September 3, 2013 from Kylie Smith, NYSED, to Eliyohu Mintz, Oorah, notifying him that Oorah is being terminated from SFSP effective August 19, 2013 and enclosed appeal procedures, with UPS tracking information.

Respondent Exhibit M: 1 page

- Letter dated September 12, 2013 to NYSED from Ben Turin, General Counsel, Oorah, requesting a hearing to appeal the termination of Oorah from the SFSP (1 page)

Respondent Exhibit N: 1 page

- List of websites where 7 CRF Part 225 can be accessed (1 page)

Respondent Exhibit O: 5 pages

- Letter dated September 16, 2013 from Joan Gavrilik, Hearing Officer, to Ben Turin, Esq., Oorah, and Erin C. Morigerato, Esq., NYSED, scheduling a hearing for October 9, 2013. (2 pages)
- Email dated September 20, 2013 from Joan Gavrilik, Hearing Officer, to Erin C. Morigerato, Esq., NYSED, and attached letter from Ms. Gavrilik to Ms. Morigerato and Ben Turin, Esq., Oorah, granting Ms. Morigerato's request for an extension for document submission until September 27, 2013. (3 pages)