

Viznitz Insts., Inc. v New York State Educ. Dept.
2024 NY Slip Op 35423(U)
April 11, 2024
Supreme Court, Albany County
Docket Number: Index No. 908174-23
Judge: James H. Ferreira
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

VIZNITZ INSTITUTIONS, INC. d/b/a BAIS
YISROEL SCHOOL,

Petitioner,

**DECISION &
ORDER/JUDGMENT**

-against-

Index No.: 908174-23

NEW YORK STATE EDUCATION DEPARTMENT
and BETTY A. ROSA, in her official capacity as
Commissioner of the New York State Education
Department,

Respondents.

(Supreme Court, Albany County, Article 78 Term)

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Commissioner of Education Betty A. Rosa*
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HON. JAMES H. FERREIRA, Acting Justice:

Petitioner Viznitz Institutions, Inc. (d/b/a Bais Yisroel School) brings this action via
verified petition against respondents New York State Education Department (SED) and Betty A.
Rosa in her official capacity as Commissioner of SED. Petitioner challenges SED's
determination, dated June 5, 2023, to deny its request to provide home-delivered non-congregate

meals in the summer of 2023 pursuant to the United States Department of Agriculture's (USDA) Summer Food Service Program (SFSP) as arbitrary and capricious and violative of lawful procedure. Petitioner requests that this Court grant judgment in its favor, pursuant to CPLR Article 78 by reversing, annulling, and setting aside the SED's determination. Respondent opposes the relief sought and requests that this proceeding be dismissed in its entirety with prejudice.

SFSP is a federally-funded program with the primary purpose of providing "food service to children from needy areas during periods when area schools are closed for vacation" (7 CFR 225.1). The United States Secretary of Agriculture is authorized "to assist States through grants-in-aid to conduct nonprofit food service programs for children during the summer months...." (*id.*). Respondent administers SFSP for New York and monitors the compliance of sponsors (defined in regulation as enumerated entities that are approved to provide food service during summer months for children, 7 CFR 225.2) with the regulatory requirements.

When petitioner first became a sponsor authorized to provide summer food service under the SFSP in 2020, petitioner was operating under USDA COVID-19 waivers applicable to the SFSP that allowed home delivery of meals in non-congregate settings (see NYSCEF No. 25). On February 28, 2023, the USDA issued guidance for summer 2023 to make permanent a non-congregate meal service option through the SFSP for rural areas with no congregate meal service (see NYSCEF No. 27).

In March 2023, SED conducted a webinar on SFSP operations for 2023, which included a discussion of the requirements for non-congregate meals. Following the webinar, petitioner reached out to SED, indicating that it wanted to provide non-congregate meals to children in the same area where petitioner had provided meals under SFSP previously (see NYSCEF No. 23).

SED explained that the COVID-19 flexibility for provision of non-congregate meals was not extended for the summer of 2023, and “SFSP operators in 2023 were encouraged to return to pre-pandemic operations to the greatest extent feasible to provide summer meals to children in a congregate setting” (id.) Petitioner indicated that they instead wanted to deliver meals. On May 2, 2023, SED informed petitioner via e-mail that it was not eligible for the non-congregate program because it was not located in a rural area (see NYSCEF No. 1, ¶ 33; NYSCEF No. 3 [“based on the data and information we have for that area, it isn’t a rural area and children have access to meals”]).

In mid-May 2023, petitioner submitted to SED a completed form titled “Request to Provide Non-Congregate Meals in Rural Areas,” explaining that many families in the surrounding areas, “especially seasonal residents with many children, do not have access to SFSP meals for their children as they are not enrolled in summer school or camp” (NYSCEF No. 5). In response, SED requested a registration list, delivery routes, and the physical address of where the meals would be prepared (see NYSCEF No. 6).

On May 18, 2023, petitioner provided the address where the meals would be prepared, and, with respect to the registration list and delivery routes, explained that that it had just initiated its enrollment drive and therefore could not provide the final enrollment list and delivery route in the few days SED had allowed (see NYSCEF No. 7). Instead, petitioner provided its enrollment roster and delivery routes from the prior year, as the petitioner expected that its summer 2023’s routes would “follow a similar pattern” (id.).

In a letter dated June 5, 2023, SED advised petitioner that “your request does not fall within the newly established allowances for non-congregate meals and therefore cannot be approved” (NYSCEF No. 11). SED noted that it made its determination based on the USDA’s

policy guidance on non-congregate meal service in rural areas, petitioner's formal request submitted in May 2023, and the multiple conversations and e-mail exchanges with petitioner (see id.). Among other things, SED advised that it did not have needed information from petitioner "to ensure criteria for the non-congregate delivery allowance is met," namely that petitioner was proposing to serve a group of identified children "that reside in a geographically isolated area with no access to a congregate meal site" (id.). The position taken by SED in its June 5, 2023, letter is consistent with what SED had advised petitioner previously: the area that petitioner wants to serve "isn't a rural area and children have access to meals" (NYSCEF No. 5).

In its June 5, 2023, letter, SED encouraged Bais Yisroel School "to operate a SFSP congregate feeding site at its school...." (NYSCEF No. 11). This is consistent with what SED had previously advised petitioner (see NYSCEF No. 5). On May 30, 2023, petitioner was sent a system-generated reminder e-mail from SED that petitioner's 2023 Summer Food Service Program Renewal had not been submitted and was due by June 1, 2023 (see NYSCEF No. 23, ¶ 24). On June 1, 2023, petitioner submitted their 2023 Annual Application/Renewal to participate in the SFSP to operate a closed-enrolled site in a non-needy area, using school certification, with a cap of 13,000 meals per day (NYSCEF No. 23, ¶ 25). On June 14, 2023, SED sent an e-mail to petitioner, asking if they still intend "on operating under normal congregate circumstances this summer," because the application that they had submitted on June 1, 2023, was incomplete (NYSCEF No. 35). SED specified in that e-mail the information that was needed from petitioner to complete their application and advised that the failure "to submit the requested information by June 21, 2023 will result in your application being deemed abandoned" (NYSCEF No. 35). Petitioner failed to complete its renewal application, such that SED advised petitioner in a letter dated June 26, 2023, that SED deemed petitioner's 2023 SFSP renewal application abandoned

(see NYSCEF No. 36).

On June 15, 2023, petitioner sent SED a letter advising that “we hereby file this appeal of the denial of [petitioner’s] request to provide 2023 Summer Food Service Program non-congregate meals” and requesting a hearing (NYSCEF No. 12). With a letter dated June 21, 2023, petitioner submitted materials in support of their appeal (see NYSCEF No. 13). In a letter dated June 22, 2023, SED advised that “SED’s decision to not approve Bais Yisroel School’s non-congregate meal service model plan... is not an appealable action in accordance with 7 CFR § 225.13” (NYSCEF No. 14). SED noted that “SED did not deny Bais Yisroel School’s sponsorship or site(s) from participation in the 2023 SFSP,” such that “the appeal request will not be considered” (*id.*).

In a letter dated June 26, 2023, petitioner requested that SED reconsider its determination that its June 5, 2023, denial of petitioner’s request to provide non-congregate meals is not appealable (see NYSCEF No. 15). Petitioner argued that 7 CFR 225.13 allows an entity applying to participate in the non-congregate program the right to appeal from “the denial of a sponsor’s application for a site” (*id.*). Further, petitioner noted that the USDA’s guidance states that if “the State agency denies a sponsor’s non-congregate meal service, it must notify the sponsor of its right to appeal” (*id.*).

Petitioner filed a verified petition dated August 28, 2023, challenging what it deemed to be “the procedurally defective and arbitrary and capricious determination of the SED to deny Bais Yisroel’s application to provide home-delivered non-congregate meals” (NYSCEF No. 1, ¶ 1). Petitioner requests that this Court enter judgment reversing, annulling, and setting aside the SED’s determination to decline to allow petitioner to provide meals in a non-congregate setting.

When reviewing an Article 78 petition, a Court must assess whether an agency’s

determination “was made in violation of lawful procedure, was affected by an effort of law, or was arbitrary and capricious or an abuse of discretion” (Matter of Wilson v New York City Dept. of Hous. Preserv. & Dev., 145 AD3d 905, 907 [2d Dept 2016]; see CPLR 7803 [3]; Matter of Ward v City of Long Beach, 20 NY3d 1042, 1043 [2013]; Matter of Bais Sarah Sch. for Girls v New York State Educ. Dept., 99 AD3d 1148, 1150 [3d Dept 2012], lv denied 20 NY3d 857 [2013]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]). A determination supported by a rational basis must be sustained “even if the court concludes that it would have reached a different result than the one reached by the agency” (id.; see Matter of Heintz v. Brown, 80 NY2d 998, 1001 [1992]). A “determination of an agency acting pursuant to its authority and within its area of expertise is entitled to judicial deference” (Matter of Riverkeeper, Inc. v Johnson, 52 AD3d 1072, 1074 [3d Dept 2008], lv denied 11 NY3d 716 [2009]).

Petitioner sought approval from SED to provide SFSP meals in a non-congregate setting during the summer months (see NYSCEF No. 5). It is clear from communications to the petitioner from SED that SED did not believe such could be allowed because the area that the petitioner wanted to serve “isn’t a rural area and children have access to meals” (id.). The USDA’s February 28, 2023, memorandum regarding “Implementation Guidance: Summer 2023 Non-Congregate Meal Service in Rural Areas – Revised”¹ advises that the Consolidated Appropriations Act, 2023 (PL 117-328) authorizes non-congregate meal service through the SFSP “for rural areas with no congregate meal service” (NYSCEF No. 27). In that USDA

¹ This memorandum notes that it “provides guidance that serves as the instructions for State agencies and Program operators on how to implement the SFSP and SSO rural non-congregate meal service during summer 2023” (NYSCEF No. 27).

guidance document, the question is posed “Where can a sponsor provide non-congregate meals,” with the answer that sponsors “can provide non-congregate summer meals in rural areas that do not have congregate meal service” (*id.*). The document also poses the question “How can State agencies and sponsors determine which areas are rural,” with the answer as follows:

The definition of ‘rural’ in the Summer Food Service Program (SFSP) has not changed. SFSP regulations (7 CFR 225.2) define rural as: *(a) any area in a county which is not a part of a Metropolitan Statistical Area or; (b) any “pocket” within a Metropolitan Statistical Area which, at the option of the State agency and with FNS concurrence, is determined to be geographically isolated from urban areas.*

States should continue designating rural areas as they have in prior summers. These designations now apply to both congregate and non-congregate meal service operations. FNS developed the Rural Designation Map to assist State agencies and sponsors in designating sites as rural. Instructions for using the map are available on the map link at <http://www.fns.usda.gov/rural-designation>”

(NYSCEF No. 27, page 4).

Petitioner maintains that (1) the determination of whether an area is rural is based on census data, (2) it is undisputed that Sullivan County (the area in which the petitioner was proposing to provide non-congregate meals) is designated by the USDA as a rural area based on census data, and (3) SED does not have the authority to deviate from that “rural” designation. Respondent maintains that, while Sullivan County is designated by the USDA as a rural area based on its census reported year-round population of 79,000 residents, the population of Sullivan County triples in the summer due to vacationers, such that it does not qualify for a rural designation in the summer, and the area where the petitioner proposed to provide non-congregate meals is a “non-isolated area populated with bungalow communities and children’s summer camps” (NYSCEF No. 23, ¶ 29). Respondent’s position was informed by the fact that respondent has “conducted in-person SFSP monitoring visits during the summer months at locations throughout the area over the course of the last twenty years” (*id.*). Respondent affirmed that it knows that

the vacation facility areas where petitioner indicated that it wanted to provide non-congregate meal service in the summer months are “not geographically isolated, but actually in very close proximity, situated on the same or adjacent properties in townhouses or bungalows next to each other resulting in many children in very close proximity to each other during the summer months” (NYSCEF No. 23, ¶ 31). Respondent noted that petitioner’s own submission indicates that, of the 13,000 children that petitioner proposed to serve, 180 were enrolled in petitioner’s school, living within two miles of one of petitioner’s schools, where congregate meals could be provided, and the other 12,820 children “consisted of vacationers in Sullivan County,” which, based upon the delivery addresses, “lived within close proximity to each other” (NYSCEF No. 40, p. 12; see also NYSCEF No. 32). The data provided by petitioner to SED “showed deliveries to multiple children within the same area, not geographically isolated” (NYSCEF No. 23, ¶ 23).

Respondent noted that the USDA’s guidance, quoted above, specifically provides that states “should continue designating rural areas as they have in prior summers” (NYSCEF No. 27). Because Sullivan County has a significant influx of summer residents, and, according to petitioner’s own delivery records, the children to be serviced during the summer “lived within close proximity to each other” (NYSCEF No. 40, p. 12), SED has designated that area, consistent with the flexibility afforded to it by the USDA, as a non-rural area. While petitioner argues that SED does not have the authority to evade the language in the USDA’s guidance and regulations which states the definition of rural includes “any area in a county which is not part of a Metropolitan Statistical Area,” the USDA’s Implementation Guidance – Summer 2023 Non-Congregate Meal Service in Rural Areas can be read to support the opposite interpretation. The USDA Implementation Guidance is clear that “the non-congregate option is not intended to replace congregate meal service,” and non-congregate meal service is intended to address areas

that “the congregate SFSP cannot reliably reach” (NYSCEF No. 27). SED’s interpretation is not “without sound basis in reason” (Matter of Peckham, 12 NY3d at 431 [citation omitted]). Deference to an agency “is particularly appropriate when the matter under review involves a factual evaluation in the area of the agency’s expertise” (Matter of Warder v Board of Regents of Univ. of State of N.Y., 53 NY2d 186, 194 [1981], cert denied 454 US 1125 [1981] [internal citation omitted]). SED had advised petitioner repeatedly that SED was of the view that the area in question was not rural, and this Court finds that the SED determination was not “without sound basis in reason” (Matter of Peckham, 12 NY3d at 431).

Petitioner also complains that SED failed to inform petitioner of any deficiencies in its submissions prior to denying its request to provide non-congregate meals, in violation of 7 CFR 225.6 (b) (3), and that SED’s refusal to allow an appeal by petitioner is in violation of 7 CFR 225.6 (b)(3) (NYSCEF No. 1, ¶ 99). In response, SED takes the position that petitioner’s request to provide non-congregate meal service was not entitled to procedural protections because it was not an application within the meaning of 7 CFR 225.13. The relevant regulations provide for an appeal in limited circumstances, including when there is a denial “of an application for participation” (7 CFR 225.13). Further, the regulations require notification if an application is incomplete, and that the agency provide technical assistance, and also advise the applicant of its right to appeal (see 7 CFR 225.6 [b][3]). The regulations direct these protections to “applications” (7 CFR 225.6 [b][“Approval of sponsor applications”]). SED, noting that it did not deny petitioner from participation in the 2023 SFSP (see NYSCEF No. 34), argues that the procedural protections apply to the SFSP application itself, which petitioner never completed, as opposed to the form requesting authorization to provide non-congregate meals within the context of the SFSP (see NYSCEF No. 23, ¶ 42). Indeed, the language in the regulations is specific to

applications, and SED's interpretation of such as applicable to the SFSP application, which the petitioner never completed, and not the non-congregate meal request form (titled "Request to Provide Non-Congregate Meals in Rural Areas," NYSCEF No. 28) within the SFSP context is rational.

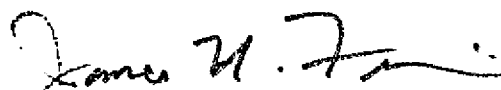
Accordingly, it is hereby ORDERED AND ADJUDGED that the Article 78 petition of Viznitz Institutions, Inc. d/b/a Bais Yisroel School seeking to reverse, annul, and set aside the respondent's determination to deny the petitioner's request to participate in the non-congregate program is denied.

The foregoing constitutes the Judgment of the Court

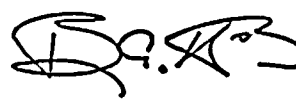
SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
April 11, 2024



Hon. James H. Ferreira
Acting Justice of the Supreme Court



04/12/2024

Papers Considered:
NYSCEF Documents Numbered 1-16; 22-40; 44.