No. A22-0378

STATE OF MINNESOTA

IN COURT OF APPEALS

Youth Leadership Academy d/b/a Gar Gaar Family Services,

Relator,

v.

Minnesota Department of Education,

Respondent.

RESPONDENT'S BRIEF

BERENS & MILLER, P.A.

Barbara Podlucky Berens
Atty. Reg. No. 209788
Carrie L. Zochert
Atty. Reg. No. 291778

3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171

ATTORNEYS FOR RELATOR

KEITH ELLISON
Attorney General
State of Minnesota

KRISTINE K. NOGOSEK
ALEC SLOAN
Assistant Attorneys General
Atty. Reg. No. 0304803
Atty. Reg. No. 0399410

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1372

kristine.nogosek@ag.state.mn.us
alec.sloan@ag.state.mn.us

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Regulations

LEGAL ISSUE

Is the Minnesota Department of Education's denial of Relator's application to participate as a sponsor of the federal Child and Adult Care Food Program based on erroneous theories of law, arbitrary and capricious, unsupported by the evidence, or in violation Relator's due process rights?

Most apposite authorities:

42 U.S.C. § 1766(a)(6)(B)

7 C.F.R. § 226.6(b)(1)(xviii)

7 C.F.R. § 226.6(k)(5)

Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship, 356 N.W.2d 658 (Minn. 1984)

Markwardt v. State, Water Res. Bd., 254 N.W.2d 371 (Minn. 1977)

Anderson v. Comm'r of Health, 811 N.W.2d 162 (Minn. Ct. App. 2012)

Indep. School Dist. No. 709 v. Bonney, 705 N.W.2d 209, 213 (Minn. Ct. App. 2005)

STATEMENT OF THE CASE

Relator Youth Leadership Academy d/b/a Gar Gaar Family Services ("Gar Gaar") sought approval from the Minnesota Department of Education ("MDE") to operate as a sponsor of the federal Child and Adult Care Food Program ("CACFP"). On December 14, 2021, MDE's Food and Nutrition Services Division ("MDE-FNS") denied Gar Gaar's application because it determined Gar Gaar did not meet federal eligibility requirements for participation in the program.

Gar Gaar appealed MDE-FNS' decision pursuant to 7 C.F.R. § 226.6(k)(2)(i). MDE assembled a three-member panel to independently review MDE-FNS' decision. On February 25, 2022, the appeal panel issued a decision affirming MDE-FNS' denial of Gar Gaar's CACFP sponsor application.

This appeal by certiorari follows.

STATEMENT OF FACTS

I. OVERVIEW OF THE RELEVANT FEDERAL FOOD PROGRAMS.

This appeal centers on the regulatory framework of the summer food service program ("SFSP") and the CACFP—two complementary and interrelated federal food programs. The SFSP and CACFP evolved from the 1946 National School Lunch Act, 42 U.S.C. § 1751, which authorized federal subsidies to reduce the cost of school lunch for low-income children, and the 1966 Child Nutrition Act, 42 U.S.C. § 1771, which expanded the 1946 National School Lunch Act beyond providing school lunch to low-income children.

A. The Summer Food Service Program.

The SFSP was created by 42 U.S.C. § 1761 and is overseen by the United States Department of Agriculture ("USDA"). 42 U.S.C. § 1761(a)(2)(A). The SFSP aims to provide children with nutritious food during the summer months while schools are not in session. *See* 7 C.F.R. § 225.1. There are four layers to the administration of the SFSP: (1) "sites" are public or non-profit entities that distribute food to children; (2) "sponsors" are public or non-profit entities that regulate sites, provide sites with training and technical assistance, interact with the sponsoring state agency on behalf of the sponsored sites, and reimburse sites for proper expenses; (3) the "state agency" regulates sponsors and sites, provides technical assistance, and distributes program funds to sponsors; (4) the USDA promulgates and enforces regulations, provides administrative guidance, and reimburses state agencies for funds properly paid to sponsors. 7 C.F.R. §§ 225.2, 225.3 and 225.6(b). In Minnesota, MDE is the "state agency." Minn. Stat. § 127A.09, subds. 1 and 2.

To be eligible to participate in the SFSP, sponsors must meet criteria contained in federal regulations. 7 C.F.R. § 225.14. A SFSP sponsor applicant must, among other things, demonstrate its "financial and administrative capability for Program operations" and must accept "final financial and administrative responsibility for total Program operations at all sites. . . ." 7 C.F.R. § 225.14(c)(1); *see also* 42 U.S.C. § 1761(a)(3)(A). The applicant must also demonstrate "adequate management and the fiscal capacity to operate the Program." 7 C.F.R. § 225.14(d)(6)(iii). As the state agency, MDE is responsible for reviewing and deciding whether a SFSP sponsor applicant meets these regulatory criteria. 7 C.F.R. § 225.6(b)(4). After MDE approves a SFSP sponsor application, MDE retains regulatory

oversight and monitoring responsibility to ensure the sponsor's operations comply with the federal regulations. *See* 7 C.F.R. § 225.7.

B. The Child and Adult Care Food Program.

The CACFP was created by 42 U.S.C. § 1766 and, like the SFSP, is a federal program administered by the USDA. 42 U.S.C. § 1766(a)(1)(B). The program's purpose is to, among other things, provide children in childcare or after school care settings with "nutritious foods that contribute to the wellness, healthy growth, and development of young children. . . ." 7 C.F.R. § 226.1; *see also* 42 U.S.C. § 1766(a)(1)(ii). The CACFP consists of the same four layers of administration as the SFSP. *See* 7 C.F.R. §§ 226.2, 226.6, 226.16. In Minnesota, MDE is the "state agency." Minn. Stat. § 127A.09, subds. 1 and 2.

As the state agency, MDE is responsible for establishing application procedures and must approve or deny a new sponsor's CACFP application based on eligibility criteria contained in 42 U.S.C § 1766 and the federal regulations. 42 U.S.C. § 1766(a)(6), (d)(1); 7 C.F.R. § 226.6(b)(1)(i) – (xviii).[1] MDE must deny a new sponsor's CACFP application if it "does not meet all of the requirements" in sections 226.6(b)(1), 22.6.15(b) and 226.16(b) of the CACFP federal regulations. 7 C.F.R. § 226.6(c)(1)(i); *see also* 42 U.S.C. § 1766(a)(6) and (d)(1) (listing criteria for CACFP eligibility).

[1] In the CACFP regulations, an "[i]nstitution" includes a "sponsoring organizations." *See* 7 C.F.R. § 226.2's definition of "institutions." A "new institution" is defined as "an institution applying to participate in the Program for the first time, or an institution applying to participate in the Program after a lapse in participation." *See* 7 C.F.R. § 226.6's definition of "[n]ew institution."

MDE must also deny an application from a new sponsor if it determines that there exists seriously deficiencies in its CACFP operations. 7 C.F.R. § 226.6(c)(1)(i)(A); 42 U.S.C. § 1766(a)(6)(B).[2] Under the regulations, a serious deficiency exists if the new sponsor's application contains false information or there is any other action affecting the sponsor's ability to "administer the Program in accordance with the Program requirements." 7 C.F.R. § 226.6(c)(1)(ii)(A)-(B).

II. GAR GAAR APPLIED TO PARTICIPATE AS A CACFP SPONSOR.

Gar Gaar first operated as a sponsor of multiple Minnesota sites in the SFSP during the summer of 2021. (AA 003.)[3] On August 22, 2021, Gar Gaar applied to MDE to operate as a sponsor of CACFP At-risk sites.[4] (AR 689.)[5]

Consistent with federal law, MDE-FNS assessed the application against the federal eligibility requirements, including CACFP's three core performance standards: financial viability and financial management, administrative capability, and program accountability. (AA 001, 003-005, 049-050) (citing 7 C.F.R. § 226.6(b)(1)(xviii)(A) – (C)). As part of its review, MDE-FNS sought information related to Gar Gaar's SFSP operations. (AR 134-

[2] Similar regulatory provisions exist requiring the denial of a new sponsor's SFSP application if the sponsor is seriously deficient. 42 U.S.C. § 1761(a)(3)(B); 7 C.F.R § 225.14(c)(2).

[3] Citations to "AA" refer to documents found in Relator/Appellant's Addendum.

[4] Within the CACFP, sponsors participate in the At-risk component by, among other things, providing nutritious eligible snacks and meals to children participating in an eligible afterschool care program. 7 C.F.R. § 226.17a. An application to operate At-Risk sites must meet the eligibility requirements for CACFP operations. 7 C.F.R. § 226.17a(f). Note that the CACFP regulations contain both a section 226.17 and a section 226.17a. The At-risk component is found at section 226.17a and not subparagraph (a) of section 226.17.

[5] Citations to "AR" refer to documents found in the Administrative Record.

50.) In addition, Gar Gaar submitted other required documentation such as a management plan, employee handbook, financial documents, and a budget. (*Id*.).

As part of the pre-approval process, MDE-FNS visited three of Gar Gaar's CACFP sites being operated as At-risk sites while Gar Gaar was applying for approval as a CACFP sponsor. (AR 651-52, 688-92.)[6] During the site visits, MDE-FNS deemed the sites ineligible At-risk sites. (AR 656) ("Three . . . sites were denied due to not meeting requirements of At-Risk Afterschool Care Center with an eligible afterschool care program that offers . . . . enrichment/educational activities.) *See* 7 C.F.R. § 226.17a(b) (defining eligible At-risk afterschool care program as organized primarily to provide afterschool care for children with organized, regularly scheduled activities that includes an educational or enrichment activity).

In a separate regulatory action, on October 14, 2021, MDE-FNS denied the three sites, due to Gar Gaar's violations of federal regulations noted during the site visits. (AR 651-52.) Gar Gaar appealed the denial of two of the three sites. (AR 693-702.) MDE assembled a three-member appeal panel, accepted information from both sides, and affirmed the denial of the two sites in a December 15, 2021 decision. (AR 703-08.) Gar Gaar did not appeal the December 15, 2021, decision to this Court and the decision that the sites' operations violated the CACFP regulations is final. Minn. Stat. § 606.01.

[6] Pre-approval site visits are required by 7 C.F.R. § 226.6(b)(1) ("For new private nonprofit . . . institutions, such procedures must also include a pre-approval visit by the State agency to confirm the information in the institution's application and to further assess its ability to manage the program.")

MDE-FNS considered Gar Gaar's CACFP sponsor application complete on November 29, 2021. (AA 001.) Between August and November, 2021 MDE-FNS assisted Gar Gaar during meetings, in writing, and during site visits to try to resolve outstanding issues with the application. (AA 001-002, 682-83, 689.) MDE-FNS denied the application on December 14, 2021, because Gar Gaar failed to demonstrate financial viability, administrative capability, and program accountability. (AA 001.) In its findings, MDE-FNS identified numerous instances of mismanagement within Gar Gaar's SFSP operations, including paying vendors without proper food licenses, refusal by three counties to issue food and beverage licenses to Gar Gaar, failing to withhold payroll taxes from employee wages, and an inability to account for the use of over $2,000,000 in federal SFSP funds, which Gar Gaar identified in its financial records as "miscellaneous debits." (AA 003-004.)[7] Additionally, MDE-FNS denied Gar Gaar's application because it failed to demonstrate a need in the community for additional CACFP sites, failed to demonstrate its capability for evaluating whether sites qualify as At-risk afterschool care centers, as demonstrated by the fact that all pre-approval visits to Gar Gaar's CACFP sites were ineligible for inclusion in the program. (AA 005-006; AR 683.)[8]

[7] The federal regulations require sponsors, as recipients of federal dollars to comply with 2 C.F.R. 200, subp. D. 7 C.F.R. § 225.7(f); 7 C.F.R. § 226.6(b)(1)(xviii)(A). Subpart D of 2 C.F.R. 200 contains detailed financial management, internal controls, and record keeping requirements for a sponsor (defined as the "non-Federal entity."). 2 C.F.R. §§ 200.302(b), .303, .334, and .337. The financial management obligations require the sponsor to identify in its accounts the federal awards received, and the use of those funds spent on allowable program expenses. 2 C.F.R. § 302(b)(2), (3), (4). The licensing requirements are found at 7 C.F.R. § 226.17a(d).

[8] In this case, Gar Gaar's sites were denied as ineligible under 7 C.F.R. §§ 226.17a(a)(2)(i)(A)-(B) and 226.17a(b). (AR 683.)

On December 14, 2021, "due to the amount and severity" of MDE-FNS' findings of noncompliance with the SFSP and CACFP regulations, MDE-FNS denied Gar Gaar's CACFP application and declared Gar Gaar seriously deficient under the CACFP federal regulations. (AA 002) (referring to a serious deficiency under 7 C.F.R. § 226.6(c)(ii)(A)).[9] The serious deficiency determination is not subject to administrative review. 7 C.F.R. § 226.6(k)(3)(ii). The denial of the sponsor application is however subject to administrative review. 7 C.F.R. § 226.6(k)(2)(i). Gar Gaar appealed the denial of its application on December 29, 2021. (AR 31.)

III. MDE'S ADMINISTRATIVE APPEAL PANEL.

MDE assembled a three-member panel of individuals within the agency to conduct the administrative review of MDE-FNS' application denial. (AR 12, AA 57.) As part of its appeal, Gar Gaar submitted a 41-page, single spaced letter and approximately 1,000 pages of documents to the panel. (AA 007-047, 054, ¶ 11; AR 34-1134.) Based on the parties' submissions, the panel affirmed the denial. The bases for the denial, detailed in the panel's findings of fact, can be grouped into two categories. The first category groups specific deficiencies found in Gar Gaar's CACFP sponsor application and CACFP operations and are as follows:

- Gar Gaar acknowledged in its argument that it submitted and proposed sites for inclusion in its CACFP operations that were not eligible as At-risk afterschool care centers;

- In its argument, Gar Gaar stated that its main office occupancy was only $72,000, but in the attachments to its CACFP budget Gar Gaar included

[9] Gar Gaar is also seriously deficient under 7 C.F.R. § 226.6(c)(1)(ii)(B) arising out the denial of their sites for non-compliance with 7 C.F.R. § 226.17a. *See supra* n.8.

office space rent of $53,892 and $408,000, whereas other documents submitted with its application showed different amounts of rent;

- Gar Gaar acknowledged it sought to operate CACFP sites that were already being operated by another CACFP sponsor;

- Gar Gaar failed to submit documentation showing it implemented policies to correct its difficulties with using accurate addresses for CACFP At-risk site locations; and

- Gar Gaar's attempts to revisit MDE's final determination affirming the denial of two operating CACFP At-risk sites was not appropriate as the panel had already decided Gar Gaar's appeal of the site denials.

(AA 054-055, ¶¶ 13, 15, 19, 20, 21.)

The second category groups deficiencies found by the panel in Gar Gaar's SFSP operations and are as follows:

- In its SFSP operations, Gar Gaar acknowledged sending payments of hundreds of thousands of dollars noted in its records as "miscellaneous debts" and did not provide invoices or receipts for those expenses;

- That the unaccounted expenses from the federal SFSP funds totaled $2,040,957.40;

- Gar Gaar did not provide invoices or receipts verifying the use of the federal SFSP funds from a cashier's check in the amount of $463,768; and

- Gar Gaar did not dispute, in response to MDE-FNS' concern that three county health departments denied issuing Gar Gaar food and beverage licenses, and instead stated in its argument that it would work with any denied site to reapply, and that Gar Gaar will disallow any claims for sites without adequate documentation of state health licensure.

(AA 055-56, ¶¶ 14, 16, 21.)

The panel affirmed the denial because Gar Gaar failed to demonstrate financial viability (Performance Standard 1) and program accountability (Performance Standard 3).

(AA 056, ¶ 4.) As to Performance Standard 2—administrative capability—the panel concluded that the record was unclear as to whether MDE-FNS considered Gar Gaar's management plan and employee handbook. (AA 057, ¶ 5.)

SCOPE OF REVIEW

On certiorari appeal from a quasi-judicial agency decision not subject to the Administrative Procedures Act, this Court examines the record to review "questions affecting the jurisdiction of the [agency], the regularity of its proceedings, and, as to the merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, [made] under an erroneous theory of law, or without any evidence to support it." *Anderson v. Comm'r of Health*, 811 N.W.2d 162, 165 (Minn. Ct. App. 2012) (quotation omitted). An agency's decisions "are not arbitrary and capricious so long as a 'rational connection between the facts found and the choices made' has been articulated." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

"Upon judicial review of an action taken by an administrative agency, the party seeking review has the burden of proving that the conclusions of such agency violate one or more of the provisions" applicable on appeal. *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). When reviewing an agency's decision, appellate courts in Minnesota "adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training,

education and experience." *Indep. School Dist. No. 709 v. Bonney*, 705 N.W.2d 209, 213 (Minn. Ct. App. 2005) (quotation omitted).

ARGUMENT

I. THE APPEAL PANEL CORRECTLY AFFIRMED THE DENIAL OF GAR GAAR'S CACFP SPONSOR APPLICATION.

The appeal panel correctly affirmed the denial of Gar Gaar's CACFP sponsor application. The decision demonstrates the panel weighed the evidence in the record and correctly applied the law. Because the panel engaged in reasoned decision-making and applied the law to the relevant facts, this Court should affirm. *Cable Commc'ns Bd. v. Nor-West Commc'ns P'ship*, 356 N.W.2d 658, 669 (Minn. 1984) (quotations omitted).

A. In Denying the Application, MDE Correctly Applied Federal Law When It Considered Gar Gaar's Past Performance in the SFSP.

This Court reviews a state agency's interpretation of a federal regulation *de novo*. *See In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 516 (Minn. 2007). Gar Gaar contends that MDE erred as a matter of law when it looked to Gar Gaar's performance in the SFSP to determine whether Gar Gaar was eligible to participate in the CACFP. (Relator's Brief ("Rel. Br.") 27-31) (citing 7 C.F.R. § 226.6(b)(1)(xviii)). Gar Gaar's argument is incorrect for at least three reasons.

First, in the CACFP enabling statute, Congress spoke clearly when it said applicants that have "been seriously deficient in its operation of the child and adult care food program, or any other program under this chapter or the Child Nutrition Act of 1966 . . . ." are ineligible to participate in the CACFP. 42 U.S.C. § 1766(a)(6)(B). Under this clear

statutory mandate, MDE correctly denied Gar Gaar's application because (i) MDE-FNS had declared Gar Gaar seriously deficient under the CACFP regulations, (AA 1110-33); and (ii) Gar Gaar was deficient in its SFSP operations, (AA 002-006.)[10]

Second, the language of 7 C.F.R. § 226.6(b)(1)(xviii) does not, contrary to Gar Gaar's contention, constrain MDE to considering only past performance in the CACFP. The regulation relied on by Gar Gaar states:

> in ensuring compliance with these performance standards, the State agency should use its discretion in determining whether the institution's application, in conjunction with its past performance in CACFP, establishes to the State agency's satisfaction that the institution meets the performance standards.

7 C.F.R. § 226.6(b)(1)(xviii). Nowhere in the text of the regulation does it restrict MDE-FNS from using its discretion to consider the applicant's past performance in other child nutrition programs. Rather, all that can be said about the regulation's language is that in exercising the discretion granted to it, MDE is prohibited from choosing not to take the applicant's past performance in the CACFP into consideration.

Like the CACFP performance standards, the SFSP regulations require Gar Gaar to manage the program with administrative and financial responsibility. 42 U.S.C. § 1761(a)(3)(A); 7 C.F.R. § 225.14(c)(1), (d)(6)(iii). Because of the similarity in the financial and administrative requirements between the two programs, for a sponsor applicant that

[10] The federal regulations contemplate the possibility of a new sponsor applicant being seriously deficient even before its CACFP application is approved. 7 C.F.R. § 226.6(c)(1)(i) ("If, in reviewing a new institution's application the State agency determines that the institution has committed one or more serious deficiency listed in paragraph (c)(1)(ii) of this section . . . .") The regulation goes on to say that the serious deficiency determination requires the State agency to initiate action to deny the new institution's application. 7 C.F.R. § 226.6(c)(1)(ii)(A).

has acted as a sponsor in another USDA food program, its performance in that program is highly probative of its ability to meet the CACFP performance standards, and MDE-FNS was well-advised and within its discretion to consider that evidence.

Third, in addition to the plain language of 42 U.S.C. § 1766(a)(6)(B) and the discretion granted to MDE-FNS under 7 C.F.R. § 226.6(b)(1)(xviii), cases from other jurisdictions contradict Gar Gaar's argument that MDE erred when it assessed Gar Gaar's performance in the SFSP to determine whether Gar Gaar met the CACFP performance standards. *See, e.g.*, *Dovid v. United States Department of Agriculture*, No. 11 Civ. 2746(PAC), 2013 WL 775408, at *7 (S.D.N.Y. Mar. 1, 2013) ("There is no justification and no reason for allowing those sponsors who were deficient in child nutrition programs to participate in the SFSP"), *aff'd* 577 Fed. Appx. 87 (2d Cir. 2014); *In re Camden Cnty. Council on Economic Opportunity*, 2009 WL 1675480, at *3-4 (N.J. Super. Ct. App. Div. June 17, 2009) (holding that the department properly terminated the participant from the CACFP because it was terminated from a different child nutrition program) (citing 42 U.S.C. § 1766(a)(6)(B); *Arkansas Dept. of Human Servs. v. Arkansas Child Care Consultants*, 889 S.W.2d 24, 26 (Ark. 1994) (affirming the termination of a CACFP participant because it was seriously deficient in the SFSP).

The Ninth Circuit's decision in *Alcaraz v. Block* most aptly states the reasoning behind the cross-application of the child nutrition program regulations:

> [T]he Summer Program and Care Program evolved out of the school meals program to fill the nutritional gap created by summer vacation and long holidays. Treating the various programs as independent would therefore be artificial: not only do they share income eligibility guidelines, but the

> language of the various statutes includes a multitude of cross-references encompassing a complex, unified statutory scheme.

746 F.2d 593, 606-07 (9th Cir. 1984) (internal quotation marks omitted).

There is no basis for Gar Gaar to argue that MDE erred when it considered Gar Gaar's performance in the SFSP as part of the reason it denied the application.[11] This Court should reject Gar Gaar's argument and rule that Gar Gaar was ineligible to participate as a CACFP because the denial follows the clear language of 42 U.S.C. § 1766(a)(6)(B) and is within the discretion granted to it under 7 C.F.R. § 226.6(b)(1)(xviii).

B. Gar Gaar's Reliance on *Partners In Nutrition* Is Misplaced.

CACFP's Performance Standard 1—financial viability and financial management—requires Gar Gaar to, among other things, demonstrate its ability to comply with 2 C.F.R. 200, subpart D. *See* 7 C.F.R. § 226.6(b)(1)(xviii)(A). MDE-FNS specifically cited, as a part of its reason for its denial, Gar Gaar's failure to demonstrate that its SFSP operations complied with subpart D of 2 C.F.R. 200. (AA 003.) Subpart D of 2 C.F.R. 200 contains detailed financial management, internal controls, and record keeping requirements for a sponsor. 2 C.F.R. §§ 200.302(b), .303, .334, and .337. Gar Gaar does not address, how, considering all its troubles properly managing the SFSP, it has demonstrated its

[11] This is especially true where Gar Gaar asked the appeal panel to consider its performance in the SFSP to demonstrate its ability to operate as a CACFP sponsor. (AA 008) ("Gar Gaar contends that its past performance amply demonstrates its ability to manage properly the CACFP At-Risk Program."). Gar Gaar's true complaint is not that the panel considered its SFSP performance in its decision, but that in doing so the panel found its performance demonstrated that Gar Gaar lacked the ability to operate as a sponsor of CACFP.

ability to meet Performance Standard 1, including its compliance with 2 C.F.R. 200, subp. D.

Despite this, Gar Gaar contends it meets the financial viability and financial management standard because, in the words of this Court, the "[f]ederal regulations establish a relatively minimal standard for financial viability." (Rel. Br. 21) (citing *In re Partners in Nutrition's Appeal*, 896 N.W.2d 564 (Minn. Ct. App. 2017). Gar Gaar's reliance on *Partners in Nutrition* is misplaced.

In *Partners in Nutrition*, as in this case, an organization applying to be a CACFP sponsor challenged MDE's denial. *In re Partners in Nutrition's Appeal*, 904 N.W.2d 223, 226 (Minn. Ct. App. 2017).[12] This is where the similarities end. The relator in *Partners in Nutrition*, who had not previously participated in a child nutrition program, challenged two practices: (1) MDE's use of a multi-tiered application process, in which a new applicant to be a CACFP sponsor must sponsor a single site for one year before reapplying to sponsor multiple sites; and (2) MDE's requirement that CACFP sponsor applicants make a robust showing of financial solvency, including having non-program sources of income. *Id*. at 230-31, 233. The Court held that the federal regulations did not grant MDE the power to limit all sponsors to a single site for one year and that USDA guidance prohibited denial of sponsor applications solely due to a lack of non-program funding. *Id*. at 234. In the current case, MDE did not impose either of these requirements on Gar Gaar. Rather, MDE

[12] Gar Gaar cites to the first court of appeals decision in *Partners in Nutrition*. (*See* Rel. Br. 21 (citing *In re Partners in Nutrition's Appeal*, 896 N.W.2d 564 (Minn. Ct. App. 2017)). That decision was superseded by a second decision of the court of appeals, and MDE, accordingly, cites to that second decision.

considered Gar Gaar's application to be a multi-site sponsor and denied it for multiple reasons, none of which included a lack of non-program funding. Because *Partners In Nutrition* is factually different from the current case, it provides no support for Gar Gaar's argument.

C. Gar Gaar's Reliance on the "Rule of Reason" is Without Merit.

Gar Gaar contends that MDE misapplied the "rule of reason" referenced in 76 Fed. Reg. 34546 to assess Gar Gaar's application to operate as a sponsor of multiple CACFP sites. (Rel. Br. 22-23.) This contention is incorrect.

Gar Gaar uses Federal Register quotes out of context to support its argument. When viewed as a whole, the Federal Register provides no support for Gar Gaar's argument. The "rule of reason" is a suggestion from the USDA to state agencies meant to address concerns that "at-risk afterschool centers would have great difficulty meeting the performance standards and, should not be held to the same standards as larger Program operators like sponsoring organizations of centers. . . ." 76 Fed. Reg. 34546. The "rule of reason" allows a state agency to apply a lower level of scrutiny "when examining applications submitted by independent child care centers, as opposed to sponsoring organizations of hundreds (or in some cases, thousands) of facilities." *Id*.

Contrary to Gar Gaar's argument, the "rule of reason" does not allow MDE to take a more relaxed review of Gar Gaar's financial viability because Gar Gaar neither operates a childcare center nor is a small operator. Gar Gaar did not apply to operate as an independent childcare center but applied to continue its SFSP operations during the school year under the CACFP. In its SFSP operations, Gar Gaar's sites were serving 50,000 meals

per day, (AA 009),[13] and received SFSP reimbursement of $23,873,362.01 for its Summer 2021 operations, (AA 436.) Gar Gaar projected similar reimbursement dollars and meal counts in its CACFP application. (AA 378, 396.) The "rule of reason" does not apply to an sponsor applicant with large scale operations like Gar Gaar and the Court should reject its application in this case.

D. The Panel's Decision is Supported by the Evidence and is Not Arbitrary and Capricious.

An agency's decision is "not arbitrary and capricious so long as a 'rational connection between the facts found and the choices made' has been articulated." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d at 277 (quotation omitted). In this case, the appeal panel made detailed findings of fact outlining the deficiencies, *see supra* § III, in Gar Gaar's application and determined, based on those deficiencies, that Gar Gaar did not meet two of the three performance standards. (AA 49-51, 54-57.) In addition to its findings about Gar Gaar's SFSP operations, the panel considered Gar Gaar's CACFP deficiencies, including Gar Gaar's operation of three sites that MDE-FNS denied because they did not meet the At-risk eligibility requirements. (*Id*., *see also* AR 682-83.) These findings establish that Gar Gaar did not demonstrate it could operate the CACFP in compliance with the financial management and program accountability standards required by the federal regulations.

[13] *See also* AA 242-46, 308-12, 316, 333-37 which set forth meal counts for some of Gar Gaar's SFSP sites.

In addition to Performance Standard 1 requiring compliance with 2 C.F.R. 200, subp. D, *supra* § II.B, which Gar Gaar's SFSP performance establishes it cannot meet, Gar Gaar must also demonstrate as part of Performance Standard 1 that its CACFP operations will serve an unmet need in the community and that its budget is necessary, reasonable, allowable, and appropriately documented. 7 C.F.R. § 226.6(b)(1)(xviii)(A)(1), (3). Gar Gaar admitted to the appeal panel that it submitted site applications for sites operating under another CACFP sponsor, demonstrating a lack of a need in the community for another CACFP sponsor. (AA 055, ¶ 19.) Gar Gaar presented inconsistencies in its budget and supporting documents about the amount of Gar Gaar's rent for office space. (AA 055, ¶ 15.) This demonstrates that Gar Gaar failed to appropriately document a significant expense on its budget, which totaled almost $500,000. (*Id*.) Gar Gaar has not, in its application or in its submissions to the appeal panel, demonstrated it meets the requirements of Performance Standard 1 and the appeal panel's decision is accordingly not arbitrary and capricious.

To meet Performance Standard 3, Gar Gaar must have "internal controls and other management systems in effect to ensure fiscal accountability . . . ." 7 C.F.R. 226.6(b)(1)(xviii)(C). Fiscal accountability requires written policies to assure:

> (i) Fiscal integrity and accountability for all funds and property received, held and disbursed;
>
> (ii) The integrity and accountability of all expenses incurred;
>
> * * *
>
> (iv) The funds and property are properly safeguarded and used, and expenses incurred, for authorized Program purposes

7 C.F.R. § 226.6(b)(1)(xviii)(C)(i), (ii), (iv). The panel's decision that Gar Gaar failed to demonstrate compliance with Performance Standard 3 is not arbitrary and capricious. That decision is support by the panel's detailed findings about Gar Gaar's lack of financial management in its SFSP operations and demonstrates that Gar Gaar's written policies, including its Accounting Policies and Procedures which applies to its SFSP and CACFP operations, (AA 596-615), do not meet the fiscal accountability required by Performance Standard 3.

Performance Standard 3 also requires that Gar Gaar have in place monitoring provisions to ensure that the sites it sponsors "appropriately operate the Program", 7 C.F.R. § 226.6(b)(1)(xviii)(C)(4)(ii), including that the sites have proper licensing and meet state and local health and sanitation requirements, 7 C.F.R. § 226.6(b)(1)(xviii)(C)(5)(ii)-(iii). The record demonstrates, and the panel found, that three of Gar Gaar's operating sites were not operating appropriately as At-risk sites. (AA 054, ¶ 13.) The record also demonstrates, and the panel found, that three county health departments denied Gar Gaar food and beverage licenses necessary to operate as food sites. (AA 055, ¶ 21.) In addition to the panel's detailed findings about Gar Gaar's lack of fiscal accountability, the record shows, and the panel found, that Gar Gaar lacked internal controls sufficient to ensure that its sites operate appropriately under the At-risk regulations.

Because the panel engaged in "reasoned decision-making" this Court should affirm the application denial even if it would have come to a different conclusion. *Cable Commc'ns Bd.*, 356 N.W.2d at 669 (quotations omitted). Despite this, Gar Gaar contends

the panel's decision is arbitrary and capricious because it failed to address all of Gar Gaar's evidence and arguments, and that the panel merely "rubber-stamped" MDE-FNS' denial. (Rel. Br. 23-26, 31-37.) Gar Gaar's arguments are incorrect.

First, there is no requirement that the appeal panel address all of Gar Gaar's arguments and evidence in its decision. *See, e.g.*, *Request for Issuance of the SDS General Permit*, 769 N.W.2d 312, 323 (Minn. Ct. App. 2009) ("MPCA's failure to address the risks associated with each new invasive species . . . [does not render] its nondegradation arbitrary and capricious") (internal quotation marks omitted). Second, the panel's decision demonstrates that it did not merely "rubber-stamp" MDE-FNS' denial. In its decision, the panel reviewed and incorporated portions of the arguments in Gar Gaar's 41-page letter (a document that post-dates MDE-FNS' denial), (AA 54-56, ¶¶ 12-23), and the documents Gar Gaar submitted to the panel for review, (AA 56, ¶ 24). Based on its review of the record, the panel affirmed MDE-FNS' conclusion that Gar Gaar lacked financial viability and program accountability. The panel did not, however, affirm MDE-FNS' conclusion that Gar Gaar lacked administrative capability. There is simply no basis for Gar Gaar to argue that the panel "rubber-stamped" MDE-FNS' denial.

II. MDE DID NOT VIOLATE GAR GAAR'S DUE PROCESS RIGHTS.

Gar Gaar asserts that MDE violated its due process rights by conducting a "secret" investigation of its performance as a SFSP sponsor.[14] (Rel. Br. 27-31.) This assertion is

[14] Although Gar Gaar never says so in its brief, it presumably believes that the purported due process violation should result in a reversal of the CACFP application denial. Gar Gaar never explains how this remedy would follow even if it were to establish a due process violation.

unfounded. First, as a factual matter, there was no "secret" investigation. The emails exchanged between MDE-FNS and Gar Gaar during the CACFP application process establish that MDE-FNS sought, and Gar Gaar willingly provided, documents and information about Gar Gaar's SFSP operations. (AR 134-50.) There is simply no factual basis for Gar Gaar's argument about a "secret" investigation.[15]

Second, even if MDE-FNS had conducted a "secret" investigation, which it did not, this would not violate Gar Gaar's due process rights. If a person or entity is to be deprived of a life, liberty, or property interest by the government, the person or entity must be afforded constitutionally sufficient procedures. *Werlich v. Schnell*, 958 N.W.2d 354, 371-72 (Minn. 2021). At its essence, due process is notice and a meaningful opportunity to be heard. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012) (quotations omitted).

The USDA regulations specify the level of due process sponsors are entitled to when a state agency denies a sponsor application. 7 C.F.R. § 226.6(k)(5). The regulation's requirements include notice of the denial, the right to appeal within 15 days, the right to be represented, the right to review the information on which the agency relied, the right to oppose the determination orally or in writing, the right, upon request, to a hearing, the right to review by individuals not involved in the challenged decision or answerable to those

[15] In its Brief, Gar Gaar suggests there exists a "review report" detailing the violations MDE-FNS found during its purported "secret" investigation. (Rel. Br. 12.) Just like there was no secret investigation, there is no review report. The reasons for MDE-FNS' denial, including the violations of the SFSP regulations, are detailed in the December 14, 2021 notice. (AA 003-006.)

who made the decision, and the right to a decision based on the information presented to the reviewing individuals. *See id*.

MDE complied with the requirements of 7 C.F.R. § 226.6(k)(5). In doing so, it provided Gar Gaar with ample notice and opportunity to be heard. *See Sawh*, 823 N.W.2d at 632. MDE-FNS notified Gar Gaar of the denial of its application. (AA 001-006.) The notice informed Gar Gaar of its right to appeal. (AA 002.) After receiving this notice, Gar Gaar invoked its appeal right, and was provided with an opportunity to be heard. Gar Gaar provided legal argument to the appeal panel in a 41-page, single-spaced letter. (AA 007-047.) It supported this letter with more than 1,000 pages of documentation it believed supported its argument. (AR 0034-1134.) The appeal panel accepted Gar Gaar's submissions and considered them in deciding the appeal. (AA 049, ¶ 3.) This process complied with the federal regulations and was ample for a denial of a sponsor application under the CACFP.

Gar Gaar also complains that MDE-FNS "cherry-pick[ed] documents" that it requested from Gar Gaar. (Rel. Br. 28). There are at least two problems with this argument. First, there is nothing in the record to support Gar Gaar's assertion. It is merely an inflammatory spin on MDE-FNS' requests. (AR 141) ("Please explain the miscellaneous amounts [totaling over $2,000,000] and please include copies of backup documents if you have receipt/invoice or any types [sic] documents".) Second, if Gar Gaar believed that the SFSP documents it had supplied MDE-FNS painted a misleading picture of its operations, it had ample opportunity to clear up any misconception. Most relevant here, Gar Gaar could have supplied those clarifying documents to the appeal panel and explained how the

addition of those documents should change the outcome of its CACFP sponsor application. Gar Gaar did, in fact, supply hundreds of pages of documents and 41 pages of argument to the appeal panel. To the extent Gar Gaar disagrees with the panel's analysis of these documents, that is germane to its appeal of the panel decision, not to any claimed due process violation.

Gar Gaar relies on an unpublished district court order from Rhode Island as support for its due process violation. (Rel. Br. 29) (citing *Building Sys., Inc. v. Town of Lincoln Zoning Bd. of Review*, No. C.A. PC99-3437, 2000 WL 1273997 (R.I. Super. Ct. Aug. 8, 2000). Even if this Court were inclined to follow this non-precedential authority, *Building Systems* provides no support for Gar Gaar's position. In that case, a municipal planning board belatedly informed a builder that it would apply a new construction of an ordinance and then denied the builder's request for a variance without discussion, or the recorded vote required by law. *Id.* at *5. Here, by contrast, MDE-FNS provided Gar Gaar with the reasons for its denial, and Gar Gaar was able to vigorously contest those reasons before the appeal panel. A further problem with Gar Gaar's reliance on *Building Systems* is that the court in that matter, despite the above- noted problems, did *not* find a due process violation. *Id.* at *6. It reversed on a different ground and, therefore, provides no support for Gar Gaar's claim of a due process violation. *See id*.

MDE afforded Gar Gaar with all the appeal rights required by the federal regulations, including notice and the opportunity to be heard. There is no basis for Gar Gaar's argument that MDE violated its due process rights.

CONCLUSION

For all the above reasons, MDE respectfully requests that this Court affirm the denial of Gar Gaar's application to become sponsor under the CACFP.

Dated: June 15, 2022

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ KRISTINE K. NOGOSEK
KRISTINE K. NOGOSEK
Assistant Attorney General
Atty. Reg. No. 0304803
ALEC SLOAN
Assistant Attorney General
Atty. Reg. No. 0399410

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1372 (Voice)
(651) 297-8265 (Fax)
kristine.nogosek@ag.state.mn.us
alec.sloan@ag.state.mn.us

ATTORNEYS FOR RESPONDENT MINNESOTA DEPARTMENT OF EDUCATION