

**Department of Health and Human Services**  
**DEPARTMENTAL APPEALS BOARD**  
**Appellate Division**

Kings Community Action Organization  
Docket No. A-12-133  
Decision No. 2534  
September 18, 2013

**DECISION**

Kings Community Action Organization (KCAO) appeals a determination by the Administration for Children and Families (ACF) disallowing \$79,286.52 that KCAO charged to its Migrant and Seasonal Head Start grant for the program year ending January 31, 2009. The disallowance was based on KCAO's failure to meet the 20 percent non-federal share requirement for the grant.

For the reasons discussed below, we find that ACF did not abuse its discretion in declining to grant KCAO's request for a retroactive reduction of its non-federal share. We also reject KCAO's contentions that ACF failed to provide adequate guidance regarding the non-federal share requirement and to adequately articulate the basis for the disallowance. Accordingly, we sustain the disallowance in its entirety.

**Legal Background**

Section 2(c) of the Head Start Improvement Act of 1992, Public Law No. 102-40, provides in relevant part:

Financial assistance extended under this subchapter for a Head Start program shall not exceed 80 percent of the approved costs of the assisted program or activities, except that the Secretary may approve assistance in excess of such percentage if the Secretary determines that such action is required in furtherance of the purposes of this subchapter. For the purpose of making such determination, the Secretary shall take into consideration with respect to the Head Start program involved--

(1) the lack of resources available in the community that may prevent the Head Start agency from providing all or a portion of the non-Federal contribution that may be required under this subsection;

(2) the impact of the cost the Head Start agency may incur in initial years it carries out such program;

(3) the impact of an unanticipated increase in the cost the Head Start agency may incur to carry out such program;

(4) whether the Head Start agency is located in a community adversely affected by a major disaster; and

(5) the impact on the community that would result if the Head Start agency ceased to carry out such program.

42 U.S.C. § 9835(b). The applicable regulations at 45 C.F.R. Part 1301 similarly provide that “Federal financial assistance granted under the act for a Head Start program shall not exceed 80 percent of the total costs of the program” except in certain circumstances. 45 C.F.R. § 1301.20(a)(1). Section 1301.21 provides:

The responsible [HHS] official, on the basis of a written application and any supporting evidence he or she may require, will approve financial assistance in excess of 80 percent if he or she concludes that the Head Start agency has made a reasonable effort to meet its required non-Federal share but is unable to do so; and the Head Start agency is located in a county:

(a) That has a personal per capita income of less than \$3,000 per year; or

(b) That has been involved in a major disaster.

*Id.* § 1301.21 (1979).<sup>1</sup> The reduction of a Head Start grantee’s non-federal share of program costs to a level below 20 percent is also referred to as a “waiver” of the grantee’s non-federal share. *See, e.g.*, KCAO Ex. 18, at 1 (Program Instruction from ACF concerning “Non-Federal Share Issues” explaining that the amount of a proposed non-federal share match “cannot be less than 20 percent unless a written waiver is received by the grantee” and detailing how to submit a “written request for waiver”).

If a recipient of federal funding materially fails to comply with the terms and conditions of an award, “whether stated in a Federal statute or regulation, an assurance, an application, or a notice of award,” the awarding agency may, among other things, disallow “all or part of the cost of the activity or action not in compliance.” 45 C.F.R. § 74.62(a)(2). The awarding agency’s final disallowance decision must contain a “complete statement of the background and basis” for the decision, as well as “[e]nough information to enable the recipient to understand the issues and the position” of the agency. *Id.* § 74.90(c).

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<sup>1</sup> Section 1301.21 has not been revised to reflect the Secretary’s expanded authority under the Head Start Improvement Act of 1992 to reduce the required non-federal share.

## **Factual Background**

KCAO, a non-profit organization based in Kings County, California, has operated Head Start, Early Head Start, and Migrant and Seasonal Head Start (Migrant Head Start) programs in the area for several years. KCAO received a Migrant Head Start refunding grant from ACF for the program year February 1, 2008 to January 31, 2009 (2008-2009 program year). The grant award provided that ACF would provide 80 percent of the cost of the program, equal to \$1,401,248, and KCAO would provide the remaining 20 percent, equal to \$350,312. ACF Ex. 1, at 1-2 (unnumbered pages).

By letter dated October 2, 2009 (a little over eight months after the grant award period ended), KCAO requested that ACF retroactively reduce KCAO's required non-federal share of program costs for the 2008-2009 program year. KCAO Ex. 3. KCAO acknowledged that "this request should have occurred in the program year," but argued that ACF should nonetheless approve the request because of "the lack of community resources and the impact upon the community if the [Migrant Head Start] program is discontinued." *Id.* Specifically, KCAO asserted that "[t]his valley has significant water issues that have greatly curtailed the agricultural activities, which have negatively impacted the program's ability to generate the required non-federal share." *Id.* In addition, KCAO argued that the "migrant and seasonal agricultural worker community would be negatively impacted if the program was not able to continue." *Id.* KCAO later provided additional details to ACF about the basis for its waiver request (described in the Analysis section below). *See* KCAO Ex. 5.

By letter dated December 14, 2009, KCAO also requested non-federal share waivers for its Migrant Head Start program for the 2009-2010 and 2010-2011 program years. KCAO Ex. 6. In a letter dated October 8, 2010, ACF acknowledged receiving KCAO's "letter dated December 14, 2009, requesting approval of a retroactive Non-Federal Share waiver for program year 2009/2010." KCAO Ex. 9. ACF explained that in accordance with its "post award approval procedures," it was unable to grant the request because it "was received after the expiration of the budget period (December 14, 2009)." *Id.*

An independent audit of KCAO for the 2009 calendar year determined that KCAO failed to meet the required 20 percent non-federal share for its Migrant Head Start program for the 2008-2009 program year and questioned \$458,588 in program costs as a result. KCAO Ex. 8, at 3; KCAO Ex. 12, at 5. The audit report noted that KCAO had requested waivers for the program years ending January 2009, 2010, and 2011. *Id.* The report further explained that KCAO's waiver request "for the grant period ended January 2009 has not been approved. The Organization was also not able to obtain the waiver reduction for the January 2010 grant . . . . However, the waiver reduction for the January 2011 grant was obtained and approved on a timely basis." KCAO Ex. 12, at 5.

As a result of the audit, by letter dated August 13, 2012, ACF notified KCAO that it was disallowing \$91,717.60 in costs KCAO had charged to its Migrant Head Start grant for the 2008-2009 program years.<sup>2</sup> KCAO Ex. 13, at 1. The letter explained that KCAO's failure to meet the required 20 percent non-federal share match constituted a material failure to comply with the terms and conditions of the award. *Id.* at 1-3. The letter also noted that KCAO had asserted it "sent a letter to the appropriate agency requesting a waiver" of its non-federal share but "did not receive any response from the agency." *Id.* at 2. The letter stated that "ACF indicated in its letter dated October 8, 2010, that the Organization's request for a retroactive Non-Federal Share waiver was denied." *Id.*

KCAO timely appealed the disallowance to the Board. While the appeal was pending, KCAO provided documentation to ACF demonstrating that KCAO made additional, previously unaccounted-for expenditures towards its required non-federal share during the 2008-2009 program year. In response, ACF reduced the disallowance amount to \$79,286.52. *See* ACF Ex. 2. ACF also notified KCAO that the October 8, 2010 letter from ACF to KCAO contained several "typographical errors." *Id.* According to ACF, that letter "incorrectly referred to the 2009-2010 program year, instead of the 2008-2009 program year," listed the wrong grant number, and incorrectly referenced KCAO's waiver request dated December 14, 2009 instead of its "retroactive waiver request for program year 2008-2009" dated October 2, 2009. *Id.* Despite these errors, ACF advised KCAO that the October 8, 2010 letter "correctly stated" that ACF "denied the retroactive waiver request in accordance with its award approval procedures." *Id.*

### **Standard of Review**

The authority to waive the non-federal share requirement is vested by 45 C.F.R. § 1301.21 in the responsible HHS official. *See Telamon Corp.*, DAB No. 1603, at 10 (1996); *Seminole Nation of Okla.*, DAB No. 1385, at 3 (1993). The Board does not have the authority to direct the responsible official to approve a waiver request, and may only consider whether the decision to deny such a request was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See River East Econ. Revitalization Corp.*, DAB No. 2087, at 7 (2007); *Rincon San Luiseno Band of Mission Indians*, DAB No. 1826, at 8 (2002).

Under the "applicable regulations and cost principles, a grantee bears the burden of documenting the existence and allowability of its expenditures of federal funds." *Touch of Love Ministries, Inc.*, DAB No. 2393, at 3 (2011). Since the Board is "bound by all

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<sup>2</sup> The letter explained that ACF had recalculated the costs questioned by the auditor based on KCAO's documented non-federal share contribution of \$235,665. KCAO Ex. 13, at 1-2.

applicable laws and regulations” when reviewing a disallowance (45 C.F.R. § 16.14), where a disallowance is authorized by law and the grantee has not disproved its factual basis, the Board must affirm the disallowance. *Id.*

### Analysis

#### **1. ACF did not abuse its discretion in denying KCAO’s request for a waiver of its non-federal share.**

On appeal, KCAO acknowledges that it failed to contribute the requisite 20 percent of program costs for the 2008-2009 program year. KCAO argues that ACF abused its discretion by denying KCAO’s request for a retroactive waiver of its non-federal share. KCAO contends that ACF failed to recognize that, although KCAO used its “best efforts” to meet the non-federal share requirement, the California drought of 2008-2009 was a major “disaster” that prevented it from satisfying the requirement. KCAO Br. at 8-10; KCAO Reply Br. at 2-3. KCAO asserts that as a “direct result” of the drought, enrollment and attendance in its Migrant Head Start program were much lower than in previous years. KCAO Br. at 9-10. It also says that “in-kind” contributions to the program decreased because parents had less time to volunteer and businesses were less willing to donate their services to the program. *Id.* at 3-4.

According to ACF, it denied the waiver request at issue here because KCAO submitted it nearly ten months after the end of the 2008-2009 program year. ACF Br. at 5-7. ACF further maintains that even if it had considered the merits of KCAO’s waiver request, it still would have denied the request because KCAO failed to show that it made a reasonable effort to meet the 20 percent non-federal share requirement. *Id.* at 7.

Under section 1301.21, even if a Head Start agency is located in a county that has been impacted by a major disaster, there is no basis for ACF to waive the agency’s non-federal share requirement unless ACF also determines that the agency made a reasonable effort to meet its required non-federal share. We agree that KCAO failed to demonstrate that it made a reasonable effort to meet the required 20 percent non-federal share, so ACF did not abuse its discretion by denying KCAO’s waiver request. In light of our conclusion, we need not address whether the untimeliness of the request alone provided a sufficient basis for denial.

In its correspondence with ACF regarding the waiver request, KCAO provided several explanations for its failure to meet the non-federal share requirement. *See* KCAO Ex. 3, 5. KCAO stated that, in addition to the problems caused by the drought, there was a “great lack in community resources (in-kind opportunities) because of the location and demographics of the community.” KCAO Ex. 5, at 2. KCAO did not assert to ACF that it reasonably attempted to generate non-federal share donations despite these challenges, much less describe or provide evidence of any steps it took to do so.

Before the Board, KCAO similarly failed to demonstrate that it made a reasonable effort to generate the required non-federal share. KCAO submitted declarations from its former Finance Director and current Executive Director (who did not assume the position until November 2011) alleging that KCAO used its “best efforts” to try to meet its required non-federal share for the 2008-2009 program year. However, KCAO provided no evidence or explanation of how it attempted to fulfill the requirement. *See* KCAO Ex. 16, 17. Neither declaration sheds any light on the reasonableness of KCAO’s efforts because the directors do not elaborate on the basis for their claims. Mere general assertions that KCAO used its “best efforts” to meet its non-federal share requirement are insufficient to establish that it actually made a reasonable effort to do so.

Because KCAO did not demonstrate that it made a reasonable effort to meet the non-federal share requirement, ACF did not abuse its discretion in denying KCAO’s request for a non-federal share waiver.

## **2. KCAO’s other arguments lack merit and do not provide a basis for reversing the disallowance.**

KCAO also challenges the disallowance on the grounds that it received insufficient guidance from ACF regarding the procedure for requesting a non-federal share waiver and that ACF failed to provide a timely formal denial of its waiver request. KCAO Br. at 11-13; KCAO Reply Br. at 3-4. Both of KCAO’s arguments lack merit.

KCAO maintains that ACF staff never “mention[ed] . . . the need for a waiver in circumstances where it was likely that the non-Federal share requirement would likely not be met.” KCAO Br. at 11. However, the Notice of Award that KCAO received notifying it of the Migrant Head Start grant award for the 2008-2009 program year specifically indicated that the award was subject to several regulations, including those at 45 C.F.R. Part 1301. *See* ACF Ex. 1, at 2. As noted above, section 1301.20 explains that federal financial assistance for a Head Start program generally cannot exceed 80 percent of total program costs. Section 1301.21 further provides that “on the basis of a written application and any supporting evidence he or she may require,” an HHS official will approve additional federal financial assistance if he or she determines that certain criteria are met. These regulations (as well as the fact they were referenced in the Notice of Award) put KCAO on notice that if it could not contribute the 20 percent of program costs provided for in the award, it needed to seek approval from ACF to contribute a lesser amount. KCAO contends that it is “unclear” who “has the burden of initiating the written application and supporting evidence” under section 1301.21. KCAO Br. at 11. This argument is without merit because it is obvious under the regulation that a Head Start grantee must initiate the process of applying for a waiver rather than the federal agency and that the evidence which would be required by the HHS official to demonstrate if the regulatory criteria are met would be within the possession or control of the grantee seeking a waiver.

KCAO further argues that the Board should overturn the disallowance because ACF did not provide a timely “formal denial” of KCAO’s waiver request. Nothing in the statute or regulations requires ACF to provide such a denial. However, according to KCAO, by failing to provide a formal denial, ACF violated its obligation under section 74.90(c) to articulate the basis for its disallowance decision and to provide enough information for KCAO to understand the pertinent issues and ACF’s position. KCAO Br. at 12; KCAO Reply Br. at 4. We disagree.

ACF’s disallowance letter to KCAO dated August 13, 2012 fulfilled ACF’s responsibilities under section 74.90(c). As noted above, in that letter ACF explained that the disallowance was based on KCAO’s failure to meet the required 20 percent non-federal share match for its Migrant Head Start program for program year 2008-2009. KCAO Ex. 13, at 1-3. The letter acknowledged that KCAO had applied for a retroactive non-federal share waiver, but stated that ACF had denied the request in its letter dated October 8, 2010. *Id.* at 2. Although the October 8 letter in fact (erroneously, ACF now says) referenced KCAO’s waiver request for the 2009-2010 program year, the disallowance letter made clear that ACF had not granted KCAO’s waiver request for the 2008-2009 program year.<sup>3</sup> Thus, the disallowance letter adequately articulated the basis for the disallowance, the pertinent issues, and ACF’s position on those issues.

In any event, the Board has consistently held that a federal agency may cure any inadequacies in a determination letter during the appeal process so long as the grantee has an opportunity to respond. *See Philadelphia Parent Child Ctr.*, DAB No. 2356, at 4 (2010). ACF elaborated on the basis for the disallowance in its brief and KCAO subsequently filed a reply brief. KCAO does not assert that it still lacks information about the basis for the disallowance, so any deficiencies in the August 13, 2012 disallowance letter would not be material in any case since they have been cured through the information provided to KCAO both before and during these proceedings.

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<sup>3</sup> We note that KCAO does not assert, nor does the record support, that it reasonably believed ACF had granted its waiver request for the 2008-2009 program year prior to its receipt of the August 13, 2012 disallowance letter either. To the contrary, as discussed above, the independent auditor’s report that was the basis for the disallowance stated, presumably based on information that it received from KCAO: “The waiver for a reduction in the non-Federal share match for the grant period ended January 2009 has not been approved. The Organization also was not able to obtain the waiver reduction for the January 2010 grant . . . .” KCAO Ex. 12, at 5.

**Conclusion**

For the foregoing reasons, the Board affirms the disallowance in the full amount of \$79,286.52.

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Stephen M. Godek  
Presiding Board Member