DAB Upholds Grant Termination for Failure to Timely Correct Deficiencies

By Allison Ma'luf, Esq., CAPLAW

Voorhees College Early Head Start Program DAB No. 2351 (2010)[1]

A recent decision of the U.S. Department of Health and Human Services (HHS) Departmental Appeals Board (DAB) upholds the termination of a grant awarded to Voorhees College Early Head Start Program (Voorhees) based on a failure to correct deficiencies in a timely manner.

Background

Voorhees provided Early Head Start (EHS) services in South Carolina. In April 2008, the Administration for Children and Families (ACF) performed a site review of Voohrees' EHS program to determine if it met applicable performance standards. ACF found at least one area of deficiency, which partly focused on Voorhees' non-compliance with two Head Start regulations.

ACF issued a report on the April 2008 review in March 2009. The report required the areas of deficiency to be fully corrected within six months from the date Voorhees received the report or within additional time, not to exceed one year. The report required Voorhees to submit a quality improvement plan (QIP) within 30 days of receipt of the report, and if the deficiencies remained uncorrected beyond the specified timeframes, ACF would terminate Voorhees' Head Start designation. ACF approved the QIP and required the deficiencies to be corrected by September 13, 2009. ACF conducted a follow-up review in October 2009. The report from the follow-up review found that Voorhees had yet to correct deficiencies relating to the two Head Start regulations. On August 25, 2010, ACF notified Voorhees that it was terminating EHS grant based on continued non-compliance with the two Head Start regulations.

Voorhees appealed the termination to the DAB but did not dispute the following: (1) findings of ACF's reports that it was not in compliance with two Head Start regulations at the time of each review; (2) the deficiency determinations relating to its non-compliance; (3) the notice received of the deficiencies on March 8, 2009; (4) the approval of its QIP on April 13, 2009; and (5) the deadline date of September 13, 2009 for correcting deficiencies.

Voorhees Failed to Correct Deficiencies in a Timely Manner

Voorhees argued that its EHS grant should not be terminated because it achieved full compliance with the Head Start regulations before receiving notice of the termination. Voorhees relied on language from the Head Start Act stating that ACF shall "initiate proceedings to terminate the designation of the [Head Start] agency unless the agency corrects the deficiency."[2] Voorhees contended that the language should be read to mean that ACF cannot terminate an agency's funding if it has corrected the deficiency, regardless of when the correction occurs.

The DAB found that Voorhees' argument ignored the content and intent of the Head Start Act. The section of the Act Voorhees relied on, 42 U.S.C. § 9836A(e), also sets forth specific timeframes in which a grantee must take corrective actions. The Act requires ACF to inform a grantee of deficiencies to be corrected and require the grantee either: (1) to correct the deficiency immediately; (2) to correct the deficiency no later than 90 days after identification of the deficiency or (3) to comply with the

> *"The DAB found that Voorhees' argument ignored the context and intent of the Head Start Act."*

requirements relating to a QIP requiring correction by the date specified in the plan which must be no later than one year after notice is received of the deficiency. The DAB explained further that the Act specifically states that to "retain a designation as a Head Start agency" or "continue to receive funds" a grantee with deficiencies must correct those deficiencies within one of the three

(Continued on page 17)

following these requirements is particularly important, where, as in SCSI's case, an employee does not spend 100% of his/her time on the grant. According to the DAB, requiring a part-time project director to be treated as an employee, particularly during the first year of a grant, significantly enhanced SAMHSA's ability to ensure that grant funds were properly charged and allocated to the grant. *(See end notes on page 19)*

Lessons Learned

- Ensure that your organization has a conflict of interest policy in place that prohibits officers and employees from providing professional services paid for with federal funds.
- Require board members to regularly sign and update disclosure forms for any possible conflicts of interest.
- Appoint a board committee, such as a governance committee, to review the disclosure forms at least once annually.
- Ensure that board minutes accurately reflect actions taken.
- Double check the consistency of all corporate filings.
- Read grant agreements, federal uniform administration requirements and cost principles to understand which changes from the budget require prior approval.
- Have written consultant agreements.

Termination

(continued from page 7)

timeframes stated above. Furthermore, the Head Start regulations state that "[i]f an Early Head Start or Head Start grantee fails to correct a deficiency, either immediately, or within the timeframe specified in the approved Quality Improvement Plan, the responsible HHS official will issue a letter of termination or denial of refunding."[3]

The DAB concluded that even if the Act is ambiguous, the regulations put Voorhees on notice that its Head Start funding would be terminated if it failed to correct the deficiency identified by ACF within the time period specified in its approved QIP. The DAB supported its conclusion with a prior DAB decision holding that "[a]s a matter of law, later steps to correct deficiencies still outstanding after a grantee has been given an opportunity to correct cannot remove authority from ACF to terminate based on the failure to timely correct."[4]

ACF Did Not Waive Its Right to Terminate Funding

Voorhees contended that ACF waived its right to terminate Voorhees' EHS funding in the following two ways: (1) by failing to provide timely reports to Voorhees on the April 2008 and October 2009 reviews and (2) by approving Voorhees' application for continued funding on August 19, 2010.

ACF's Failure to Provide Timely Reports Is Not a Waiver of Its Rights

In arguing that ACF waived its right to terminate Voorhees' funding, Voorhees relied on a section in the Head Start Act requiring the Secretary of HHS to publish a summary report on the findings of reviews and outcomes of QIPs done during the fiscal year no later than 120 days after the end of the fiscal year.[5] Voorhees reasoned that it was logical to assume that ACF would have to submit its report to the grantees within that same time period.

"The DAB found that ACF's 10- or 11-month delay in providing Voorhees with the review report was not reasonably timely or prompt."

The DAB found that Voorhees' connection between the timing of a public summary of all Head Start review findings and the timing of individual reports to grantees was not an obvious one. Rather, the more relevant provision is the one that requires review findings to be presented to the grantee in a "timely manner."[6] Moreover, the Head Start regulations state that an HHS official will "notify the grantee promptly, in writing of any deficiencies found in a review."[7]

The DAB found that ACF's 10- or 11-month delay in providing Voorhees with the review report was not reasonably timely or prompt. However, relying on a prior DAB decision, the DAB held that nothing in the Head Start statute or regulations makes timely issuance of a grantee review report a prerequisite to termination. The DAB concluded that even though it is "important that ACF act promptly" when issuing grantee review reports, a delay in doing so does not justify the grantee's failure to correct deficiencies.

ACF's Approval of Continued Funding Does Not Preclude a Funding Termination

Voorhees argued that ACF waived its right to terminate the grant because it approved Voohrees' refunding application on August 19, 2010, before issuing the August

(Continued on page 18)

Termination

(continued from page 17)

25, 2010 funding termination notice. Voorhees contended that ACF failed to follow Head Start regulations requiring it to give Voorhees at least 30 days' notice of its intent to deny Voorhees' application for refunding. Rather, ACF approved Voorhees' refunding application and advanced funding within the 30-day period. Moreover, Voorhees received a pre-review document request for another program review on November 19, 2010 and that review was not cancelled until October 20, 2010.

The DAB explained that "Voorhees' argument reflects a misunderstanding of the regulatory scheme." The Head Start regulations "provide that funding will continue during a grantee's appeal of a termination decision and that if a decision has not been rendered at the end of the current budget period 'the responsible HHS official shall award an interim grant to the grantee until a decision has been made.'"[8] The DAB found that Voorhees was not prejudiced by ACF's continuing to fund Voorhees rather than giving 30 days' notice that it was denying its refunding application. Moreover, the DAB held that even though ACF approved Voorhees' application for refunding prior to the expiration of the current budget period, the approval was required by Head Start regulations which permit grantees to continue operations pending a final decision regarding termination of funding. The DAB explained further that the refunding notice specifically acknowledged that Voorhees was being reviewed for failing to correct prior deficiencies within the allotted timeframe. Thus, Voorhees had notice that approval of its refunding application did not preclude termination of its current grant at later date. *(See end notes on page 19)*

Lessons Learned

- Establish internal procedures for correcting deficiencies to ensure that they are addressed within the allotted timeframe established by ACF and correct deficiencies within that timeframe.
- Note that any delay by ACF in issuing a grantee review report does not preclude ACF from terminating funding when a grantee fails to correct deficiencies within the established timeframe.
- Understand that ACF is required to continue funding a grantee until a final determination on funding termination has been issued and that continued funding does not preclude a later decision to terminate the grant.

Good Use

(continued from page 4)

will be underused, and the members could probably be more helpful in another role. On the other end, a finance committee may be crucial for nonprofits with many complex funding sources including grants, contracts, and fees for service, or for organizations that frequently use loans, bonds, or other financing. Without a finance committee, such organizations risk having important financial decisions made without sufficient governance-level input.

Recruit Members for the Committee

While finance committee members need to understand financial reports, don't assume that only accountants, bankers, and businesspeople are qualified. Financial language can be learned, so consider asking board members with a good understanding of the organization's programs and community to be on the finance committee. Such people often bring fresh viewpoints and creative ideas. Be sure to provide training on the financial basics as soon as they join the committee.

Make the Committee Work

Some common obstacles for finance committees:

- The board assumes that the finance committee will take care of all financial matters and therefore doesn't carry out its financial responsibility.
- Finance committee meetings dwell on details with no higher level analysis or discussion.
- The treasurer's and finance committee's responsibilities are unclear.
- The board treasurer and the staff financial manager have a poor working relationship.
- Finance committee members don't understand the organization's key financial factors.

A finance committee without clear goals will get stuck on reviewing financial reports – focusing on details rather than the big picture. After recruiting strong members to the committee, it's a shame to assign them low-level work that the treasurer could complete without a committee.

A sampling of agendas for a high level finance committee includes:

- Develop key guidelines and assumptions before budget planning begins.
- Analyze trends in income sources.
- Discuss changes in types and reliability of income.
- Hold in-depth discussions of factors that will influence budgets for the next three years.
- Review and discuss the organization's financial policies. Are these policies adequate in light of the organization's size, complexity, and life-cycle stage? This review requires more than applying simplistic "best practices" from another organization.
- Evaluate the pros and cons of buying vs. leasing a new facility and the impact on cash flow, capital campaign needs, depreciation, and costs of ownership.

A more engaged finance committee will require a different role for the CFO or finance director - one that may not be as easy as working with a more perfunctory committee. The payoff in the quality of review, understanding, and financial governance will be worth it. For the committee to work well, the finance committee chair and CEO or CFO need to invest time in planning meetings, setting goals and expectations for the committee, and preparing good information for discussion. These activities will help inform board members when it comes time for them to make the final financial decisions.

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End Notes

Revised Americans with Disabilities Act Regulations

1. 1. 29 C.F.R. § 1630.2(g).
2. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
3. 29 C.F.R. § 1630.2(i).
4. 29 C.F.R. § 1630.2(i)(2).
5. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
6. 29 C.F.R. § 1630.2(j)(1).
7. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
8. 29 C.F.R. § 1630.2(j)(3).
9. 29 C.F.R. § 1630.2(j)(1)(ii).
10. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
11. 29 C.F.R. § 1630.2(j)(4).
12. 29 C.F.R. § 1630.2(g)(3).
13. 29 C.F.R. § 1630.2(j)(1)(ix).
14. 29 C.F.R. § 1630.2(g)(3).

May Employees Lend a Helping Hand?

1. 29 C.F.R. § 785.44.
2. *See* U.S. Department of Labor ("DOL") Wage and Hour Division Opinion Letter (Sep. 30, 1999) and DOL Wage and Hour Field Operations Handbook §10b03(c).
3. 29 U.S.C. § 203(e)(4)(A)(i). 29 C.F.R. §§ 553.101 and 553.103.
4. *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945).
5. *See* DOL Wage and Hour Division Opinion Letter No. FLSA2006-4 (January 27, 2006).

DAB Disallowance

1. Complete decision can be found at *http://www.hhs.gov/dab/decisions/dabdecisions/dab2333.pdf*.
2. See 45 C.F.R. § 74.42.
3. HHS Grants Policy Statement, page ii and Section I-3.
4. HHS Grants Policy Statement, Section II-7.
5. See 2 C.F.R. Part 230, Att. B, ¶ 37.b.8 stating that the allowability of consultant fees depends on a number of factors including the "[a]dequacy of the contractual agreement of the services (e.g., description of the services, estimate of time required, rate of compensation, and termination provisions)."
6. See 2 C.F.R. Part 230, Att. B, ¶ 37.1.
7. See 45 C.F.R. § 74.25(c)(7).
8. See 2 C.F.R. Part 230, Att. B, ¶ 8.m.13.

DAB Grant Termination

1. Complete decision can be found at *http://www.hhs.gov/dab/decisions/dabdecisions/dab2351.pdf*.
2. 42 U.S.C. § 9836A(e)(1)(C).
3. 45 C.F.R. § 1304.60(f).
4. *Babyland Family Services, Inc.*, DAB No. 21209, at 21 (2007).
5. See 42 U.S.C. § 9836A(f)(1).
6. See 42 U.S.C. § 9836A(c)(4)(A).
7. 45 C.F.R. § 1304.60(b).
8. 45 C.F.R. § 1303.14(f)(1).

Make Good Use of the Treasurer & Finance Committee

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Robinson, Bridget, "Financial Stability: An Impossible Dream?", Nonprofit World, Vol. 15, No. 3. Ruiz, Rosemarie, "Are You Fulfilling Your Financial Trust?", Nonprofit World, Vol. 17. No. 1.

These resources are available at *www.snpo.org/members*. Also see Learning Institute programs on-line: Board Governance (*www.snpo.org/li*).

Helping Boards be Respoinsible Fiscal Stewards

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