

DAB Examines Grant Termination Resulting from Non-Compliance

By *Chloe Major & Allison Ma'luf, Esq., CAPLAW*

Asian Media Access, DAB No. 3201 (2010)¹

A recent decision by the Departmental Appeals Board (DAB) of the U.S. Department of Health and Human Services (HHS) offers insight to grantees regarding the proper use of grant awards. The decision highlights the importance of adhering to specified grant requirements and work plans. In this decision, the DAB affirmed the Administration for Children and Family's (ACF) decision to revoke a Transitional Living Program (TLP) grant given to Asian Media Access (AMA), a Minnesota nonprofit, after it failed to comply with the regulations setting forth the uniform administrative requirements for awards and subawards and with the grant award terms and conditions.

Background

In 2007, AMA, a nonprofit organization dedicated to using multi-media and technology as a tool to promote education, cultural enrichment and other social goals, applied for a TLP grant authorized by the Runaway and Homeless Youth Act (RHYA). In its application, AMA explained that it planned to: (1) establish and operate an eight-bed shelter for its target population, Asian American and Pacific Islander runaway and homeless girls between the ages of 16 and 18; (2) provide a variety of "non-shelter" services to its target population; and (3) perform outreach and health prevention activities to support runaways and homeless youth on the street. AMA estimated that it would provide "non-shelter" services to 245 runaway or homeless youth per year. AMA submitted a work plan with the grant application, stating that AMA would develop the shelter during the first year of the grant, and begin operating it in 2008. In September 2007, ACF approved AMA's grant application and work plan by issuing a financial assistance award notice which included a list of standard terms and conditions.

Eight months after the initial grant award, ACF conducted a site visit and found that AMA had yet to develop or open the shelter it described in its grant application, did not have key information about employees, lacked documentation of personnel decisions, and failed to demonstrate oversight of the TLP by the board of directors. ACF placed AMA on a funding restriction requiring it to obtain advance approval from ACF for grant-related expenditures. ACF also referred AMA to an intensive technical assistance program specifically related to organizations providing runaway and homeless youth services.

In late August 2008, when ACF performed a second site visit, it found that the shelter was still not developed and only two individuals claimed to have received help from AMA's TLP program. These individuals later admitted to being paid for their statements. In its final report summarizing the two site visits, ACF concluded that AMA did not have a functioning TLP, had made very little, if any, progress despite receiving substantial technical assistance, and appeared to lack the capacity to fulfill grant requirements.

In August 2009, ACF notified AMA that the TLP grant was being terminated because AMA had materially failed to comply with the terms and conditions of the grant award by not providing shelter to homeless youth as required by the RHYA and by lacking the capability to do so. ACF also found that AMA had failed to provide homeless youth with the counseling, educational and other services that TLP grantees were obligated to provide as a condition of the grant. AMA appealed the termination, admitting that it had not yet provided shelter to homeless youth but claiming that the city had erected obstacles that prevented the organization from fulfilling the conditions of the grant and that it had not received proper notice of the grant's funding requirements.

Failure to Comply with Grant Terms and Conditions

AMA did not meet its timetable in the work plan for opening and operating the shelter. AMA contended that ACF should have given it more time to meet its legal obligations to provide shelter to its target population and blamed its failure to open the shelter on an inability to obtain necessary licenses, permits and zoning.



The DAB rejected AMA's arguments, finding that AMA materially failed to comply with the terms and conditions of the TLP grant by not meeting the timetable set forth in AMA's work plan. The DAB explained that non-governmental organizations that receive federal grants, such as AMA, are subject to provisions in the uniform administrative requirements for awards and subawards that authorize the awarding agency to terminate an award immediately, without giving the grantee an opportunity to take corrective action, if the "recipient materially fails to comply with the terms and conditions of [the] award, whether stated in a Federal statute or regulation, an assurance, an application, or a notice of

(continued on page 14)

DAB AMA

(continued from page 4)

award.² The TLP grant was bound by various standard terms and conditions subjecting the grant award to the requirements of the RHYA and obligating AMA to carry out the project according to its proposed work plan. The RHYA and the TLP grant announcement conditioned the receipt of federal financial assistance on the TLP grantee agreeing to provide homeless youth with shelter and other supportive services.³ The DAB found that the documents submitted by AMA offered no evidence that during the first year of its grant AMA had, or was in the process of implementing, a well-developed plan to renovate and open a shelter. Rather, the documents supported ACF reviewers' conclusions that AMA did not meet, or make meaningful progress toward, its responsibilities established by the grant and AMA's work plan.

The DAB also dismissed AMA's argument that its non-compliance should be excused by action or non-action of the local licensing authority. The DAB based its position on a prior DAB decision which held that the action or inaction of a local authority does not excuse material noncompliance on the part of a federal grantee. It is the grantee's responsibility, prior to submitting the grant application, to determine if the objectives of its federally financed project are achievable.⁴

AMA did not provide services to runaway and homeless youth. AMA submitted mental health case summaries of six girls who participated in a support group as evidence that it provided non-shelter services to runaway and homeless youth. AMA also contended that the ACF reviewer "failed to clearly state or itemize in writing her issues regarding" AMA's TLP and "never presented AMA with written reports of her visits," even after AMA requested them. AMA suggested that ACF should have continued funding its TLP because it provided, or would provide, beneficial services to youth who were in great need of its services.

The DAB found that AMA materially failed to comply with grant terms and conditions because no evidence existed showing that AMA had provided, or was providing, runaway and homeless youth with counseling or other non-shelter services. The DAB noted that the case studies submitted by AMA failed to indicate that the girls were homeless, revealed that a handful of the girls were below the statutory minimum age, and showed that none of the girls appeared to live in an unsafe environment. Moreover, the DAB determined that, even if one or two of the girls were found to be legitimate runaways or homeless, AMA failed to comply with the grant terms and conditions because its grant application stated that it would serve approximately 245 homeless and runaway youth per year.

The DAB also found that no evidence supported AMA's assertion that ACF failed to provide AMA with a written statement of its concerns and reports of its monitoring visits. Even though the record did not indicate that ACF sent a

written report to AMA, the DAB explained that a prior DAB decision established that "there is no requirement in [the regulations] that the awarding agency make reports available to the grantee; instead, [the regulations] require the grantee to submit program performance and financial reports to the agency."⁵ Moreover, the DAB found that AMA did not allege that it lacked actual notice or an adequate understanding of ACF's concerns. According to the DAB, AMA's email messages, its corrective action plan, and the technical assistance it received showed AMA "was fully aware of ACF's compliance concerns prior to termination."⁶

Lastly, the DAB based its decision on a prior DAB decision stating that a grantee must do more than just provide, or intend to provide, services beneficial to the community; rather, the grantee must show that it is using the money to achieve the specific purposes for which it received federal funding.⁷ The DAB found that ACF was under no obligation to continue funding an organization such as AMA "that demonstrated an inability to manage and fulfill its grant obligations."⁸ See **DAB lessons learned on page 15 and article end notes on page 19.**

DAB PYCE

(continued from page 5)

the DAB may not review a HHS denial of an application for continuation funding based on a grantee's failure to achieve project objectives and that PYCE's failure to achieve project objectives was alone sufficient to support SAMHSA's decision to deny PYCE continuation funding.

The DAB rejected this argument. The regulations governing the procedures of the DAB provide that the DAB reviews final written decisions in disputes arising over a denial of a noncompeting continuation award when the denial is for failure to comply with the terms of a previous award.² Similarly, the uniform administrative requirements for awards and subawards gives grant recipients the right to appeal final decisions by HHS awarding agencies.³ The DAB lacks authority to review a decision to deny continuation funding when it is not based on the grantee's failure to meet the terms and conditions of a previous award.⁴

The DAB found that it had jurisdiction over the dispute. SAMHSA had two grounds for denying PYCE's continuation award: (1) failure to achieve project objectives and (2) lack of compliance with terms and conditions of the first-year award. The DAB determined that SAMHSA based its decision mainly on PYCE's violation of terms and conditions of its first-year award, not PYCE's failure to meet project objectives. Additionally, the DAB found that SAMHSA's notice to PYCE provided PYCE with the option to appeal SAMHSA's decision.

Denial of Continuation Funding

The DAB upheld SAMHSA's denial of continuation funding because PYCE materially failed to comply with the terms and conditions of its first-year award. STOP Act grant recipients must comply with financial management requirements in

the uniform administrative requirements, the HHS Grants Policy Statement (GPS) and Office of Management and Budget (OMB) Circular A-122. The financial management requirements provide that a recipient may “charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the HHS awarding agency.”⁵ The requirements also state that recipients’ financial management systems must provide “effective control over and accountability for all funds, property and other assets” consistent with the applicable cost principles, such as OMB Circular A-122.⁶ The GPS reiterates many of the financial management requirements, including the requirement that recipients adequately safeguard assets under the award.⁷ OMB Circular A-122 requires organizations to support salaries with personnel activity reports that: (1) reflect an after-the-fact determination of each employee’s actual activity; (2) account for the total activity for which employees are compensated and which is required to fulfill their obligations; (3) are signed by the employee or by a responsible supervisory official and reflect a reasonable estimate of the actual work performed by the employee during the reported periods; and (4) are prepared at least monthly in conjunction with one or more pay periods.⁸

The DAB found that PYCE had violated all of the financial management requirements cited by using nearly \$5,000 of its first-year funds for personnel and insurance costs incurred in the month prior to the funding period without first receiving authorization from SAMHSA to do so. According to the DAB, PYCE also failed to exercise prudent stewardship over grant funds when it knew that nearly all of its grant proposals had been rejected but continued to deplete its STOP Act funds by paying for costs not approved in the budget. In addition, the DAB found that PYCE violated OMB Circular A-122 by failing to report the number of hours its executive director dedicated to the STOP Act project and how the executive director’s time was spent.

Additional Time to Correct Deficiencies

PYCE argued that it should have more time to take corrective action because it had consistently cooperated with SAMHSA’s requests and was working on its financial issues. PYCE also argued that it was moving forward with program initiatives through the work of volunteers and was still in the process of raising funds. PYCE further asked the DAB to recognize that its former executive director had left the organization with health problems and, as a result, the organization had little time to comply with SAMHSA requests.

The DAB rejected PYCE’s request for more time to correct its financial management and programmatic deficiencies. The DAB relied on its past decisions holding that grantor agencies are not required to provide a grantee an opportunity to remedy deficiencies prior to denying an application for continuation funding.⁹ The DAB further found that SAMHSA gave PYCE ample opportunity to correct its deficiencies before denying PYCE’s application for continued funding. SAMHSA placed PYCE on “high risk status” in February 2009, requested additional information and a repayment plan, and scheduled a site visit in August 2009 to determine whether PYCE could

achieve the objectives of the grant award. By September 2009, PYCE still remained insolvent without a plan to implement its STOP Act project.

Unallowable Expenditures

PYCE acknowledged that it had \$16,757.67 in unallowable expenditures, but asked the DAB to reconsider approximately \$12,000 of those expenditures relating to the executive director’s salary by crediting the in-kind, donated hours of staff who continued working on STOP Act grant initiatives.

The DAB rejected PYCE’s request to reduce the \$16,757.67 it owed SAMHSA. OMB Circular A-122 states that the value of donated or volunteer services is not reimbursable as a direct or indirect cost.¹⁰ Therefore, the DAB found that the value of such time could not be used to reduce the amount PYCE owed SAMHSA in unallowable expenditures. **See article end notes on page 19.**

DAB Lessons Learned

- Do all of the research and legwork to make sure that you submit a realistic grant application and work plan.
- Review and understand the uniform administrative requirements for awards and subawards and all grant terms and conditions.
- Ensure that your organization, from its board of directors to its employees, is committed to the effort required to meet the terms and conditions of the award and understands the risks, benefits and commitment involved in accepting grant funds.
- Maintain proper records and take care to follow the guidelines and requirements set forth in the grant application.
- Only use grant funds to pay employees the portion of their salary included in the grant budget and keep detailed records of hours each employee works on grant-funded projects as well as the total hours they work.
- Inform grantor agencies of financial problems early, and safeguard award funds during times of financial hardship.
- Receive written approval from the grantor agency for costs incurred prior to the funding period.

Article End Notes

DAB Examines Grant Termination Resulting from Non-Compliance

1. The complete decision can be found online at <http://www.hhs.gov/dab/decisions/dabdecisions/dab2301.pdf>.
2. 45 C.F.R. § 74.62(a) (3); Renaissance III, DAB No. 2034, at 11 (2003).
3. 42 U.S.C. § 5714-2(a).
4. Tuscarora Tribe of North Carolina, DAB No. 1835 (2002).
5. Tuscarora Tribe of North Carolina, DAB No. 1835 at 13 (2002).
6. Asian Media Access, DAB No. 2301, at 17 (2010).
7. Renaissance III, DAB No. 2034, at 12 (2003).
8. Asian Media Access, DAB No. 2301, at 17 (2010).

DAB Upholds Denial of Continuation Award and Repayment of Disallowed Expenditures

1. The complete decision can be found online at <http://www.hhs.gov/dab/decisions/dabdecisions/dab2306.pdf>.
2. 45 C.F.R. Part 16, App. A, ¶ C. (a)(3).
3. 45 C.F.R. §74.90.
4. Vance-Warren Comprehensive Health Plan, Inc., DAB No. 2180, 2-3.
5. 45 C.F.R. §74.28.
6. 45 C.F.R. §74.21(b)(2).
7. HHS Grants Policy Statement, II-61.
8. 2 C.F.R. Part 230, App. B, ¶ 8.c.
9. Vance-Warren at 16.
10. OMB Circular A-122, App. B, ¶ 12.b(i).

Head Start Enrollment and Eligibility Requirements Refresher

1. U.S. Government Accountability Office Testimony Before the Committee on Education and Labor, House of Representatives, *Head Start Undercover Testing Finds Fraud and Abuse at Selected Head Start Centers*, May 18, 2010, (GAO-10-733T) ("GAO Testimony").
2. Letter from Kathleen Sibelius to the Honorable George Miller, Chairman, Committee on Education and Labor, May 17, 2010 ("Sibelius Letter").
3. GAO Testimony at 6.
4. GAO Testimony at 5.
5. 42 U.S.C. 9836; 645(a)(1)(B), 645A(c).
6. 45 C.F.R. 1305.4; 42 U.S.C. 9840; 645 (a)(1)(B).
7. 42 U.S.C. 9840; 645(a)(1)(B).
8. 42 U.S.C. 9835; 640(d)(1).
9. 45 C.F.R. 1305.3(b), Head Start regulations require that each Head Start grantee have an approved service area and that service area must not overlap the service area of another grantee.
10. Office of Head Start-Policy Clarification-I-043 (OHS-PC).
11. 45 C.F.R. 1305.4.
12. OHS-PC-I-015.
13. 42 U.S.C. 9836; 645A(c)(12). Early Head Start grantees must (1) assist pregnant women to access comprehensive prenatal and postpartum care, (2) provide pregnant women and other family members, as appropriate, with prenatal education on fetal development (including risks from smoking and alcohol), labor and delivery, and postpartum recovery (including maternal depression) and (3) provide information on the benefits of breastfeeding to all pregnant and nursing mothers.
14. OHS-PC-I-080.
15. OHS-PC-I-086.
16. Id.
17. OHS-PC-I-002.
18. OHS-PC-I-016.
19. OHS-PC-I-005.
20. OHS-PC-I-020.
21. 42 U.S.C. 9840; 645(a)(1)(C); OHS-PC-I-008.
22. OHS-PC-I-008.
23. OHS-PC-I-011.
24. OHS-PC-I-005.
25. OHS-PC-I-034.
26. Attachment to Administration for Children and Families-Information Memorandum-HS-07-05 (ACF-IM).
27. OHS-PC-I-006.
28. OHS-PC-I-007.
29. 45 CFR 1305.2.
30. Administration for Children and Families-Program Instruction-HS-09-04 (ACF-PI).
31. ACF-PI-HS-09-04.
32. 45 CFR 1305.4; ACF-PI-HS-10-02.
33. Sibelius Letter.
34. OHS-PC-I-085.
35. 45 CFR 1305.4; ACF-PI-HS-10-02.
36. OHS-PC-I-008.
37. OHS-PC-I-007.
38. ACF-PI-HS-10-02; see also Head Start Eligibility Verification form at <http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/Pls/2010/Head%20Start%20Eligibility%20Verification%20Form,%20expires%2002-28-2013.pdf>.

Mission Possible: Understanding and Developing an Effective Mission Statement

1. Jean Vogt, *Demystifying the Mission Statement*, NONPROFIT WORLD, January/February 1994, at 29, 29, available at <http://www.snpo.org/samples/V120129.pdf> (last visited 04/05/2010); *The Deming System of Profound Knowledge*, The W. Edwards Deming Institute Website, available at <http://deming.org/index.cfm?content=66> (last visited 04/05/2010).
2. Personal communication (November 17, 2009).

What Health Care Reform Means for Community Action Agencies

1. A copy of the Patient Protection and Affordable Care Act (Pub.L. 111-148), as modified by the Health Care and Education Reconciliation Act (Pub.L. 111-152) is available online at <http://docs.house.gov/energycommerce/ppacacon.pdf>. When citing the statutory changes, we have cited to the U.S. Code provisions where the changes will be codified; the easiest way to find these changes is to download the combined document previously mentioned in this endnote and search for the U.S. Code citations.
2. 29 U.S.C. § 207.
3. 75 Fed. Reg. 34,537, 34,558-60, 34,562-65 (June 17, 2010).
4. Id. at 34,559-60 and 34,564.
5. Id. at 34,558.
6. 42 U.S.C. § 300gg-14.
7. 75 Fed. Reg. 27,122, 27,135-36 (May 13, 2010).
8. IRS Notice 2010-38, 2010-20 I.R.B. 682, available at <http://www.irs.gov/pub/irs-irb/irb10-20.pdf>.
9. 42 U.S.C. § 300gg-11.
10. 75 Fed. Reg. 37,188, 37,223-24 (June 28, 2010).
11. 42 U.S.C. § 300gg-3.
12. 42 U.S.C. § 18001.
13. 42 U.S.C. § 300gg-12.
14. 75 Fed. Reg. 37,188, 37,225, 37,231.
15. Id. at 37,225; 37,231.
16. 42 U.S.C. § 300gg-11.
17. 42 U.S.C. § 300gg-3.
18. 42 U.S.C. § 300gg-7.
19. 42 U.S.C. § 300gg.
20. 42 U.S.C. § 300gg-16; 26 U.S.C. § 105(h).
21. 42 U.S.C. § 300gg-19.
22. 42 U.S.C. § 300gg-13.
23. 42 U.S.C. § 300gg-19a.
24. Id.
25. 75 Fed. Reg. 37,188, 37,225-27, 37,232-33.
26. Id. at 37,240.
27. 26 U.S.C. §§ 106(f), 220(d)(2)(A), 223(d)(2)(A).
28. 26 U.S.C. §§ 220(f)(4)(A), 223(f)(4)(A).
29. 26 U.S.C. § 125(i).
30. 26 U.S.C. § 6051(a).
31. See IRS webpage "Affordable Care Act Tax Provisions" available at <http://www.irs.gov/newsroom/article/0,,id=220809,00.html?portlet=6>.
32. 42 U.S.C. § 300gg-15.
33. 29 U.S.C. § 218b.
34. 26 U.S.C. § 6055.
35. 26 U.S.C. § 6056.
36. 29 U.S.C. § 218a.
37. 26 U.S.C. § 5000A(f).
38. 26 U.S.C. § 4980H(a).
39. 26 U.S.C. §§ 4980H(b); 36B(c)(2)(C).
40. 42 U.S.C. § 18101.
41. 26 U.S.C. § 4980H.
42. 26 U.S.C. § 4980I.
43. 42 U.S.C. § 13031.
44. 42 U.S.C. § 1302(b).
45. Id. at 13022.
46. 42 U.S.C. § 18022.
47. 42 U.S.C. § 18071.
48. 26 U.S.C. § 36B.
49. 42 U.S.C. § 18071.
50. 42 U.S.C. § 13031.
51. 42 U.S.C. §§ 13031, 18024.
52. 42 U.S.C. § 18032.
53. 42 U.S.C. § 18091.
54. Id.
55. Id.
56. 42 U.S.C. § 1396a.
57. 42 U.S.C. § 1397ee(b).
58. 42 U.S.C. § 1395w-152.
59. 42 U.S.C. §§ 1395w-102, 1395w-114a.

Health Reform Law Expands Form 1099 Reporting

1. See Patient Protection and Affordable Care Act, Pub. L. 111-148, § 9006.
2. See 26 U.S.C. § 6041(a), 26 C.F.R. § 1.6041-1(a)-(b) and 1.6041-3(p), and Instructions to Form 1099-MISC, available at <http://www.irs.gov/pub/irs-pdf/i1099misc.pdf>.
3. See H.R. 5141 and Apr. 26, 2010 press release "Lungren Fights for Small Business" on Rep. Lungren's website <http://lungren.house.gov/index.cfm?sectionid=39&parentid=6§iontree=6,39&itemid=544>.