Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Leake and Watts Services, Inc.
Docket No. A-18-63
Decision No. 2910
November 26, 2018

DECISION

Leake and Watts Services, Inc. (L&W) appeals the March 28, 2018 decision by the Administration for Children and Families (ACF) to terminate L&W's designation as a Head Start grantee.[1] ACF based the decision on its finding, in a follow-up review of L&W's Head Start program beginning in December 2017, that L&W failed to timely correct a deficiency identified in a March 2017 review. Specifically, ACF determined that L&W failed to submit an application and obtain approval to charge a Head Start grant for interest on a loan for a facility used in the Head Start program.[2]

ACF moves for summary judgment on the ground that the undisputed facts show that L&W charged costs associated with mortgage interest to its Head Start grant without submitting the required application and obtaining approval to do so and did not correct the deficiency within the required timeframe.

For the reasons explained below, we grant ACF's motion and affirm the termination.

[1] This decision refers to Appellant by the name identified in ACF's termination decision. ACF Ex. 13. L&W notified the Board in its Notice of Appeal that it changed its corporate name to Rising Ground in February 2018, and would announce the change publicly in April 2018. *See* Notice of Appeal at 1, n.1.

[2] The Secretary of the Department of Health and Human Services revised and redesignated the Head Start regulations effective November 7, 2016. 81 Fed. Reg. 61,294, 61,412 (Sept. 6, 2016); 45 C.F.R. Parts 1301-1305. The termination notice generally cited to section 1309.10 of the earlier regulations when describing the noncompliance because ACF first identified L&W's noncompliance in 2015. ACF Ex. 13; ACF Motion for Summary Judgment at 1 n.2. Because ACF determined that the noncompliance was a deficiency in June 2017, the termination notice cited to the revised regulations when describing the authority to take the termination action. *Id.* In earlier documents discussing the steps that L&W needed to take to correct the deficiency, ACF cited to both section 1309.10 of the former regulations and sections 1303.41 and 1303.44 of the revised regulations, or solely to the revised regulations. *E.g.*, ACF Exs. 2, 3, 6, 7. This decision cites to both the earlier and revised regulations and explains why summary judgment in ACF's favor is appropriate under both.

Legal Background

1. *The Head Start program*

Head Start is a national program to promote the school-readiness of children with low incomes by providing health, educational, nutritional, social, and other services to enhance their cognitive, social, and emotional development. Head Start Act (Act) §§ 635, 636.[3] Section 641A(a) of the Act directs the Secretary of the Department of Health and Human Services (HHS) to modify by regulation program performance standards and minimum requirements for Head Start programs. Act § 641A(a)(1).

The Secretary, through ACF, periodically reviews each Head Start grantee's program to determine whether it meets program performance standards and requirements. Act § 641A(c). ACF will conduct a follow-up review if a Head Start grantee is found to have one or more "deficiencies" or "significant areas of noncompliance." Act § 641A(c)(1)(C)(i), (ii). The Act defines "deficiency" to include "a systemic or substantial material failure of an agency in an area of performance that the Secretary determines involves," among other things, the misuse of Head Start grant funds, Act § 637(2)(A)(iv), or "an unresolved area of noncompliance," Act § 637(2)(C).

The Act defines "unresolved area of noncompliance" to mean a "failure to correct a noncompliance item within 120 days, or within such additional time (if any) as is authorized by the Secretary, after receiving from the Secretary notice of such noncompliance item, pursuant to section 641A(c)." Act § 637(26). The regulation at 45 C.F.R. § 1304.61 (2015) defined "noncompliance" to mean "that the grantee is not in compliance with Federal or State requirements," including, as applicable in this case, 45 C.F.R. § 1309.10 (2015) (Applications for the purchase, construction and major renovation of facilities). The revised regulation at 45 C.F.R. § 1304.2(a) (2018) defines "noncompliance" as a determination that a grantee "fails to comply with any of the standards described in part 1301, 1302, and 1303 of this chapter," including, as applicable here, 45 C.F.R. §§ 1303.41 (2018) (Approval of previously purchased facilities) and 1303.44 (2018) (Applications to purchase, construct, and renovate facilities).

If a review finds that a grantee has a deficiency, the Act requires the Secretary to "initiate proceedings to terminate the designation of the agency [as a Head Start agency] unless the agency corrects the deficiency." Act § 641A(e)(1)(C); *Avoyelles Progress Action Committee, Inc*., DAB No. 2559, at 8 (2014). The Secretary may require a grantee to

[3] The current version of the Head Start Act is available at https://eclkc.ohs.acf.hhs.gov/policy/head-start-act. Each section of the Act on that website contains a reference to the corresponding United States Code section.

correct a deficiency immediately or pursuant to an approved quality improvement plan (QIP), specifying the actions the grantee will take to correct the deficiency and the time frame within which it will correct the deficiency. Act §§ 641A(e)(1)(B)(i)-(iii), 641a(e)(2)(A); 45 C.F.R. § 1304.60 (2015); 45 C.F.R. § 1304.2 (2018). If a grantee fails to correct a deficiency within the time frame specified in the approved QIP, ACF will issue a letter of termination or denial of refunding. 45 C.F.R. § 1304.60(f) (2015); 45 C.F.R. § 1304.5(a)(2)(iii), (b) (2018).

2. *Head Start termination appeals*

A Head Start grantee is entitled to an evidentiary hearing before the Departmental Appeals Board (Board) to contest the basis for ACF's termination decision. Act § 646. The Board has held that in appropriate circumstances, it may grant summary judgment in a Head Start termination case without holding an evidentiary hearing when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. *E.g.*, *Avoyelles* at 3 (citing *Camden Cnty. Council on Econ. Opportunity*, DAB No. 2116, at 3-4 (2007), *aff'd*, *Camden Cnty. Council on Econ. Opportunity v. U.S. Dep't of Health & Human Servs.*, 586 F.3d 992 (D.C. Cir. 2009)).

A party moving for summary judgment bears the initial burden of showing the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a material factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial."' *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on general denials in its pleadings or briefs, but must furnish evidence of a genuine dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. *Id*. at 586 n.11; *Celotex*, 477 U.S. at 322. In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence in that party's favor. *United States v. Diebold, Inc.*. 369 U.S. 654, 655 (1962).

Case Background

1. *L&W's property purchase and April 2015 review*

On January 5, 2009, L&W purchased a property on Castle Hill Avenue, in the Bronx, New York. Appeal at 1; L&W Ex. A. L&W took out a mortgage on the property and entered into a promissory note for $3,795,737 in principal with interest at 6.5 percent per year, with certain offsets, secured by the mortgage. Appeal at 1; L&W Exs. A, B.

L&W became a Head Start grantee on July 1, 2013. L&W Appeal at 1. From the outset of the grant period, L&W used grant funds to pay for interest on the Castle Hill property mortgage. L&W Exs. D at 4, E at 3, F at 3, G at 3, H at 3.

In April 2015, ACF conducted a review of L&W's Head Start and Early Head Start programs. On September 15, 2016, ACF issued a report based on the review, which found in relevant part that L&W was noncompliant with 45 C.F.R. § 1309.10 (2015). Section 1309.10 provided that a "grantee which proposes to use grant funds to purchase a facility. . . must submit . . . to the responsible HHS official" a "written application" which includes specific types of information. The report stated that L&W "acquired a facility at 450 Castle Hill in the Bronx, New York," in January 2009. ACF Ex. 1, at 5. Although no federal funds were used to buy the property, L&W "placed a mortgage on the property" "after the purchase," and L&W charged 18.96% of the monthly interest payments from July 2013 through June 2014 to its Head Start grant. *Id.* ACF determined that L&W had not, however, submitted the requisite application to obtain ACF's approval to charge the mortgage interest to its Head Start grant. *Id.* The report notified L&W that the time frame for correction of the noncompliance was 120 days. *Id.* at 6.

2. *March 2017 follow-up review and June 2017 report*

ACF conducted a follow-up review of L&W in March 2017. Based on that review, ACF issued a report in June 2017 concluding that L&W had not corrected the previously-identified noncompliance and that its continued noncompliance had resulted in a deficiency. ACF Ex. 2, at 1, 8-9. ACF cited to both 45 C.F.R. § 1309.10 (2015) and the revised regulation at 45 C.F.R. § 1303.41 (2017) to support the noncompliance finding. Section 1303.41 provides in relevant part that if "a grantee purchased a facility after December 31, 1986, and seeks to use grant funds to continue to pay purchase costs for the facility," including principal and interest on approved loans, the grantee must submit an application that conforms to specific requirements and obtain approval of the application by the responsible HHS official.

ACF's June 2017 report stated that L&W had taken no corrective action to seek ACF's approval to charge the Castle Hill property mortgage interest to its Head Start grant. ACF Ex. 2, at 8. Nor did L&W remove the "$40,229.77 identified as unallowable in the previous monitoring report . . . from charges to the Head Start program and no Final SF-425 revisions were made for the 2013-14 program year." *Id.* at 9. Instead, the report stated, L&W's accountants asserted that "the charges were legitimate and did not require prior approval since the building was acquired prior to receiving the Head Start award and the budget with a narrative detailing the expense was approved by the Regional Office." *Id.* at 8. The accountants also stated that "reversal journal entries were not completed or necessary." *Id.* L&W's corrective action plan read: "at the inception of our

budget negotiation process with the ACF for an HS program, all documents relating to the site acquisition, including the notes payable and the amortization table, were fully disclosed as well as the plan to charge the HS-allocated share of depreciation—use allowance—and associated interest to the program." *Id.*

In response to L&W's assertions, ACF's June 2017 report stated that approval of an annual refunding application listing a line item expense does not meet the requirement for obtaining the responsible HHS official's approval of an application to use grant funds to pay facility costs. ACF Ex. 2, at 9. Accordingly, ACF advised L&W that it was a grantee with at least one area of deficiency and was required to submit a QIP within 30 days detailing its plan for corrective action. *Id.* at 1.

3. *June 2017 site visit*

On June 22, 2017, an ACF Grantee Specialist (GS) made a site visit to provide technical assistance to L&W. ACF Exs. 3, 4. According to the GS's site visit report, L&W representatives again asserted that the mortgage interest charge was a specific budget line item that it had included in its original budget and budget narrative, which ACF had approved. ACF Ex. 3, at 2. Due to the prior approval of the overall budget, L&W representatives stated, L&W did not have knowledge of the specific type of prior approval needed in order to charge the interest expenses to its grants. *Id.*; L&W Ex. K at 1.

The GS explained that ACF's approval of the overall budget did not excuse L&W from complying with the administrative and financial requirements for seeking approval from the responsible HHS official pursuant to 45 C.F.R. § 1304.41 (2017). ACF Ex. 3, at 2. The GS advised L&W that to correct the deficiency, it must submit a QIP within 30 days and implement the corrective actions within 180 days (on or about December 4, 2017). Among the specific actions needed to correct the deficiency, the GS explained, L&W must submit a "[r]equest for a retroactive approval of the use of grant funds to pay the facility costs by submitting an application including all the requirements stated in accordance with [the revised regulations at] 1303.44 (a)(1) through (14) and Cost-Comparison 1303.45[.]" *Id.* After the visit, the GS sent L&W multiple emails providing additional guidance for submitting the retroactive request for approval to use grant funds for the mortgage interest costs. ACF Exs. 5, 6, 7.

4. *L&W's QIP and subsequent actions*

On June 30, 2017, L&W submitted a QIP to ACF, stating that L&W intended to correct the deficiency by, among other things, requesting ACF's retroactive approval of the use of grant funds to pay the facility costs by submitting "an application including all the requirements stated in accordance with 1303.44(a)(1) through (14) and Cost-Comparison 1303.45." ACF Exs. 8, at 1; 10, at 1. L&W also stated that it would complete the Real Property Status Report SF-429-B form, "duly supported by all the requirements," by July 14, 2017. ACF Ex. 8, at 1.

By letter dated July 28, 2017, ACF approved the QIP and advised L&W that it was "required to fully correct the 45 CFR 1303.41 and 45 CFR 1309.10 deficiencies within the six month time frame specified in the report." ACF Ex. 10, at 1. The approval notice explained that ACF would conduct a final follow-up review immediately after the end of the corrective action period to validate full correction of the deficiency. *Id*.

L&W did not submit the application for approval to use grant funds to pay mortgage interest that its approved QIP required. Instead, L&W submitted a Head Start Budget Justification Narrative for the period January 1, 2018, through January 29, 2019, which included $34,500 in mortgage interest on the Castle Hill property as "other" costs to its Head Start grant. ACF Ex. 11, at 1, 4. ACF thereafter advised L&W that the mortgage interest costs were unallowable. ACF Ex. 12, at 2; L&W Ex. J at 30.

5. *Final review and termination decision*

ACF determined in a final monitoring review conducted from December 5, 2017 to January 8, 2018, that L&W had not corrected the deficiency. ACF Ex. 13, at 5. The March 28, 2018 report also documented that L&W had not made adjustments to remove mortgage interest included in the Head Start facility charges for the periods ending January 31, 2014, 2015, 2016, and 2017. *Id.* at 8. In addition, the report noted, "Detailed General Ledger extracts for each period found interest charges for the periods ending January 31, 2014 [through] 2017 totaled $138,147." *Id.* Based on the final review, ACF issued its decision terminating L&W's designation as a Head Start grantee. *Id.* at 1-4.

6. *Board proceedings*

L&W appealed ACF's termination decision to the Board. The Board notified the parties in the acknowledgment of the appeal that, pursuant to section 646(a)(3)(B) of the Act, it would commence an in-person hearing within 120 days of its receipt of the appeal unless, among other things, the case was suitable for resolution by summary judgment.

ACF thereafter moved for summary judgment. L&W submitted a response opposing ACF's summary judgment motion.

Analysis

1. *The applicable program requirements*

The Head Start program requirements relevant here are established under section 644(f)(2) of the Act, which provides that a grantee may not use grant funds "to purchase a facility (including paying the cost of amortizing the principal, and paying interest on, loans) to be used to carry out a Head Start program unless the Secretary approves a request that is submitted by [the grantee] and contains" specific types of information, documents, and "such other information and assurances as the Secretary may require." Act § 644(f)(2)(A)-(F); *see also* Act § 644(c) (directing the Secretary to "prescribe rules or regulations to supplement" subsection (f) "which shall be binding on all" Head Start grantees).

Both the former and current regulations implementing section 644(f)(2) require a grantee to submit an application with specific categories of documents, information, and assurances, and to obtain HHS approval of that application, before the grantee may use Head Start grant funds to pay mortgage interest costs. The regulations also require a grantee to record a federal interest in the property for which grant funds will be used to pay mortgage interest. 45 C.F.R. § 1309.21 (2015); 45 C.F.R. § 1303.46 (2018). Section 1309.10 of the prior regulations provided that a "grantee which proposes to use grant funds to purchase a facility . . . *must* submit a written application to the responsible HHS official" that includes the detailed information required under subsections 1309.10(a)-(q).[4] (Emphasis added.) Section 1309.2 provided that "grantees which purchased facilities

[4] The required information included: a legal description of the site of the facility and explanation of the appropriateness of the location to the grantee's service area; plans and specifications of the facility; a detailed cost comparison; the intended use of the facility; an assurance that the facility complies with local licensing and code requirements; a statement of the effect that the acquisition or major renovation of the facility would have on the grantee's meeting the non-federal share requirement of the Act; certification by a licensed engineer or architect that the facility is structurally sound and safe for use as a Head Start facility; a statement of the effect that the acquisition or major renovation of a facility would have on the grantee's ability to meet the limitation on development and administrative costs in section 644(b) of the Act; an assessment of the impact of the proposed project on the human environment pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C)) and its implementing regulations; assurance that the grantee will comply with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. § 4601 *et seq.* and 49 C.F.R. Part 24); a statement of the share of the cost of acquisition or major renovation that will be paid with grant funds; and a statement of the extent to which the grantee has attempted to comply and will be able to comply with its rights and responsibilities in the event of a default on the mortgage or termination of the grantee. 45 C.F.R. §§ 1309.10, 1309.11, 1309.22 (2015).

after 1986, and which are continuing to pay costs of purchasing those facilities, may apply to receive Head Start funds to meet those costs by submitting" similar applications. Such a grantee "may only use grant funds to pay facility purchase costs incurred after the responsible HHS official approves its application." *Id*. Under section 1303.41 of the revised regulations, a grantee "*must* submit an application that conforms to requirements in this part and in the Act" and obtain HHS approval before "Head Start funds may be used to pay ongoing purchase costs, which include principal and interest on approved loans." (Emphasis added.) Section 1303.44 specifies the detailed information that the grantee "must submit to the responsible HHS official."[5]

2. *ACF's motion for summary judgment*

ACF moves for summary judgment on the ground that the undisputed facts show that L&W had a deficiency based on its failure to submit an application to ACF for approval to charge mortgage interest to its Head Start grant, as required by 45 C.F.R. § 1309.10 (2015) and 45 C.F.R. §§ 1303.41 and 1303.44 (2018). Because there is no dispute that L&W charged mortgage interest to its Head Start grants but failed to timely correct the deficiency by submitting an application for approval conforming to the regulatory requirements, ACF contends, it "had the authority to terminate L&W's grant pursuant to Section 641A(e)(1)(C) of the Act and 45 C.F.R. § 1304.5(a)(2)(iii)" (2018). Motion at 18.

3. *L&W's Response*

In response to ACF's motion, L&W does not dispute that it used Head Start funds to pay mortgage interest costs, yet never submitted an application meeting the specific requirements of the statute, the former regulation at 45 C.F.R. § 1309.10 (2015), or the current regulations at 45 C.F.R. §§ 1303.41 and 1303.44 (2018). Instead, L&W argues that when it purchased the Castle Hill property, no prior approval was required because it was a delegate Head Start agency for the New York City Administration for Children's Services' Head Start program, "not a direct grantee." Appeal at 1; Response to Motion for Summary Judgment at 1. L&W did not become a Head Start direct grantee until July 2013, after it bought the Castle Hill property and took out the mortgage. Appeal at 1.

L&W also contends that the termination is "not legally justified" because, "[f]rom the inception of [its] budget negotiations with ACF for a Head Start program," it "provided all documents concerning the site acquisition, including the note payable and amortization schedule" to ACF. Appeal at 2, 4. Furthermore, L&W argues, ACF

[5] The requirements in section 1303.44 (2018) are similar to, though not exactly the same as, the requirements in section 1309.10(a)-(q) (2015).

repeatedly approved L&W's use of grant funds to pay the mortgage interest costs through the annual budget review and award process. L&W says that it "stated in each of its Budget Justification Narratives that costs at the 450 Castle Hill site 'include interest on our current mortgage at the site and standard depreciation costs.'" *Id.* at 2 (citing L&W Exs. D, E, F, G, H); *see also* Response to Motion for Summary Judgment at 1. "And every year, up until the budget period commencing February 1, 2018," L&W says, "ACF provided a Notice of Award that included those costs." Appeal at 4.

In addition, L&W argues that the performance demanded by ACF – that L&W seek prior approval to charge mortgage interest to its grants – was legally impossible. According to L&W, the "doctrine of impossibility thus discharges any duty [it] may have had to seek pre-approval for using Head Start grant monies to pay a proportionate share of mortgage interest." Appeal at 5.

Lastly, L&W asks for equitable relief. L&W asserts that it notified ACF of its intent to apply grant monies to pay mortgage interest, that "ACF benefitted from a below-market occupancy use cost," and that it has performed "acceptably and in good faith." Response to Motion for Summary Judgment at 2 (quoting *Emory Univ.*, DAB No. 9, at 4 (1975)).

4. *L&W has not established a genuine dispute of material fact or provided a legal basis for reversing the termination.*

    a. L&W's acquisition of the Castle Hill property before it became a Head Start grantee is not material to the outcome of this case.

The fact that L&W acquired the Castle Hill property before, rather than after, it became a direct Head Start grantee does not affect the outcome of this case under the governing law. As the Board pointed out in *Campesinos Unidos, Inc.*, DAB No. 2720, at 8-9 (2016), the regulation at 45 C.F.R. § 1309.3 (2015) defined the term "purchase" to mean not only "to buy an existing facility," but also to "continue paying the cost of purchasing facilities." In addition, the application requirements of section 1309.10 expressly included the "terms of any . . . existing loan(s) related to acquisition" of the facility and associated "repayment plans." 45 C.F.R. § 1309.10(g) (2015). Section 1309.2 (2015), in turn, required grantees "continuing to pay costs of purchasing" to obtain prior approval of an application "which conforms[s] to the requirements of" the Act and regulations. Thus, the Board previously held, "even where a grantee already owns a building, financing costs related to carrying an ongoing mortgage or undertaking refinancing. . . require approval from Head Start in order to obtain federal participation in those costs." *Campesinos Unidos* at 9. The wording of the revised regulations similarly makes clear that the application and approval requirements must be met in order for a grantee to use Head Start funds "to pay ongoing purchase costs, which include principal and interest on approved loans." 45 C.F.R. § 1303.41 (2018).

Accordingly, we reject L&W's argument that its purchase of the Castle Hill facility before it became a direct Head Start grantee exempted it from the obligation to submit and obtain approval of an application conforming to the criteria of the Act and regulations.

b. L&W's submissions and ACF's annual award notices do not satisfy the application and approval requirements of the statute and regulations.

In addition, we find no merit in L&W's claim that the Board should reverse the termination because L&W provided sufficient notice and information about its purchase of the property and ACF "repeatedly approved" L&W's use of Head Start grant funds to pay the mortgage interest. Appeal at 3. Drawing all reasonable inferences from the evidence in L&W's favor, we accept for purposes of summary judgment that L&W provided ACF with documents relating to its acquisition of the Castle Hill property (including the note payable and amortization schedule), that L&W notified ACF in its annual Head Start budget justification narratives that it intended to use grant funds to pay mortgage interest, and that ACF issued annual award notices that covered the Castle Hill property mortgage costs. These facts, however, are not material to whether L&W complied with the statute and regulations.

Providing ACF with documents relating to the purchase of a property and stating an intent to pay mortgage interest in a budget justification narrative do not satisfy the application requirements established under the Act, 45 C.F.R. Part 1309 (2015) and 45 C.F.R. §§ 1303.41 and 1303.44 (2018). Quoted above, the plain language of section 644(f)(2) states that property purchase costs will not be approved "unless" the request "submitted … contains" specific documents and "such other information and assurances as the Secretary may require." In turn, the compulsory wording of both the 2015 and revised regulations – that a grantee "must" submit an application that conforms to the specified requirements – provides no exception to, or substitution for, the information, documentation, and assurances that a grantee is obligated to submit for review and approval before it may use Head Start funds to pay mortgage interest costs.

Furthermore, we reject L&W's claim that ACF "repeatedly approved" the Castle Hill property mortgage interest costs. Under the wording of the statute, the necessary type of approval that a grantee must obtain in order to charge mortgage interest to its Head Start grant is an approval of an application which "contains" the documents, information and assurances specified under the Act and regulations. Act § 644(f)(2). Similarly, both the earlier and revised regulations implementing section 644(f)(2) require approval by a "responsible HHS official" of an application that conforms to the requirements in the statute and regulations. Because there is no dispute that L&W never submitted a complete application meeting the requirements of the Act and regulations, it did not and

could not obtain the type of approval necessary to charge mortgage interest to its Head Start grants. Moreover, L&W's contention that ACF "repeatedly approved" its use of grant funds for the mortgage interest costs is undercut by ACF's notices to L&W in 2016 and 2017 that it was not in compliance with the regulations, and ACF's July 2017 letter approving the QIP, which told L&W that if the deficiency remained uncorrected by December 4, 2017, the grant would be terminated. ACF Ex. 2; ACF Ex. 10, at 1.

L&W's assertion that it "did not have knowledge of [the] specific prior approval needed from the responsible HHS official to charge the interest expenses" also has no merit. Appeal at 2 (quoting L&W Ex. K). A Head Start grantee "is responsible for knowing the legal requirements governing its use of the federal grant funds it receives to operate its Head Start and Early Head Start programs." *Bright Beginnings for Kittitas Cnty.*, DAB No. 2608, at 6 (2014). Moreover, notices of L&W's annual awards expressly stated that the grants were subject to L&W's compliance with the Act and regulations, including the requirement that "[p]rior approval must be obtained under 45 C.F.R. Part 1309 to use Head Start grant funds for the initial or ongoing purchase . . . of facilities," and "[n]o Head Start grant funds may be used toward the payment of one-time expenses, principal and interest for the acquisition . . . of a facility without the express written approval of [ACF]." L&W Ex. J at 3; *see also id.* at 7-8, 20 (grant subject to requirements of regulations including 45 C.F.R. Part 1309), 24 (grant subject to requirements of regulations including 45 C.F.R. Part 1303). We also note that ACF's published guidance to Head Start grantees is explicit: "Prior written approval" to "expend federal funds" to purchase a facility "is separate from an approved Notice of Financial Assistance." *Responses to Facility Questions Concerning Acquisition, Rent, and Major Renovations*, ACF-PI-HS-09-10 (Dec. 8, 2009) (available at https://eclkc.ohs.acf.hhs.gov/policy/pi/acf-pi-hs-09-10).

c. The contract doctrine of impossibility of performance does not apply in this case.

As noted above, L&W also argues that "the performance that ACF demanded of [L&W], to seek prior approval of the mortgage interest amounts, was a legal impossibility for the agency." Appeal at 4. Under the Act, L&W points out, the "request must include, 'in the case of a request regarding a previously purchased facility, information demonstrating that the facility will be used principally as a Head Start center, or a direct support facility for a Head Start program . . . .'" *Id.* (citing 42 U.S.C. § 9839(f)(2)(E)). However, L&W explains, the Castle Hill facility is not "used principally as a Head Start center."[6] Appeal

[6] Section 1309 of the 2015 regulations defined "Head Start center or a direct support facility for a Head Start program" to mean a "facility used primarily to provide Head Start services to children and their families, or for administrative or other activities necessary to the conduct of the Head Start program." We note that L&W does not indicate, nor does the record show, whether the Castle Hill facility is used for administrative or other activities necessary to the conduct of the Head Start program.

at 1, 4; L&W Ex. C (Castle Hill Property Allocation). L&W contends "that a party has no duty to perform a contractual obligation if 'performance is rendered impossible or impracticable, through no fault of the party, because of a fact, existing at the time the contract was made, of which the party neither knew nor had reason to know and the nonexistence of which was a basic assumption of the party's agreement.'" Appeal at 4 (quoting *Mass. Bay Transp. Auth v. United States*, 254 F.3d 1367, 1372 (Fed. Cir. 2001)). When it "entered into the contract to provide Head Start services," L&W asserts, "it was with the understanding that [it] was using mortgage interest as a basis on which to charge for occupancy of the site . . . ." *Id.* Consequently, L&W says, when ACF demanded in 2016 that L&W "seek prior approval for mortgage interest," such an application "would have been futile." *Id.*

The impossibility of performance doctrine is inapplicable here. As a general matter, the "straightforward or wholesale application of common law contract doctrines is inappropriate in determining a party's rights and obligations under a federal grant." *Tex. Tech Physician Assoc.*, DAB No. 2671, at 18 (2015) (citations omitted), *aff'd, Tex. Tech Physician Assoc. v. Azar*, No. 5:16-CV-038-C (N.D. Tex. Mar. 28, 2018). "While it is true that a federal grant may have characteristics of a contract, such as terms which impose mutual and legally enforceable obligations," the Board has stated, "the analogy of a grant to a contract is imperfect." *Id.* at 17. "Rather than a voluntary agreement negotiated between two parties, a grant-in-aid program . . . is an exercise by the federal government of its authority under the spending power to bring about certain public policy goals." *American Hosp. Assoc. v. Schweiker*, 721 F.2d 170, 182-83 (7th Cir. 1983) (citation omitted), *cert. denied*, 466 U.S. 958 (1984). In the case of a federal award, the "government acts by inducing a state or private party to cooperate with the federal policy by conditioning receipt of federal aid upon compliance by the recipient with federal statutory and administrative directives." *Id.* Furthermore, the U.S. Court of Appeals for the Fourth Circuit has expressly rejected an argument that it should apply the "impossibility of performance" doctrine in the public assistance context because it "relates to commercial contracts and not to grant in aid programs." *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 762 F.2d 406, 408-09 (4th Cir. 1985).

But even if the doctrine applied to federal grants, we would find no basis for applying it here. We note at the outset that nothing in the record before us indicates that L&W claimed before this appeal that it was impossible to correct the deficiency, and L&W's submission of a QIP (which assumes correction of a deficiency is possible) undercuts this argument. L&W also does not address whether the common law of contracts would even

recognize the availability of an "impossibility" defense where, as here, the party has not even tried to perform, despite being given many opportunities to do so. *See* ACF Motion for Summary Judgment at 20 ("Since L&W never submitted an application under § 1303.44 or a cost-comparison under § 1303.45, there is no basis for its assertion that ACF would have automatically denied the application.").[7]

When ACF notified L&W in September 2016 that L&W was not in compliance with the mortgage interest cost application and approval requirements, it also provided L&W the opportunity to submit an application meeting those requirements and provided extensive technical assistance for L&W to prepare the requisite application. *See* ACF Exs. 1; 6; 9, at 1. ACF also approved L&W's QIP, which stated that L&W would submit an application that would include the information required in section 1303.44(a)(1) through (14) of the revised regulations and the cost comparison requirements in section 1303.45. ACF Ex. 8 at 1. In a July 12, 2017, email, ACF reiterated that L&W could seek approval for charging mortgage interest to the grant by submitting an application under the revised regulations. ACF Ex. 9 at 1.[8]

For all of these reasons, we reject L&W's argument that the performance demanded by ACF of L&W was legally impossible and that the termination of its grant must be reversed for that reason.

d. The Board has no authority to grant L&W's request for equitable relief.

Lastly, L&W argues that "the equities demand that the [Board] reverse ACF's decision to terminate [L&W's] designation as a Head Start grantee[.]" L&W Response to Motion for Summary Judgment at 2. L&W asserts that the Board "may honor the clear equities in favor of the grantee, especially where 'the grantee had performed acceptably and in good faith and … the arrangement made economic sense … and cost the government nothing or saved the government money.'" *Id.* (quoting *Emory Univ.* at 4; also citing *S. Ill. Univ. – Carbondale,* DAB No. 49, at 5 (1978)).

[7] In an observation preceding this statement, ACF notes that 45 C.F.R. § 1303.44(a)(8) (2018), unlike the prior regulation at 45 C.F.R. § 1309.10, does not specifically require the grantee to include in its application information that the property "will be used principally as a Head Start center, or a direct support facility for a Head Start program." ACF Motion for Summary Judgment at 20 (comparing 45 C.F.R. § 1303.44(a) (2018) with 45 C.F.R. § 1309.10(d) (2015)). Although it does not take a firm position, ACF suggests a question exists as to whether the requirement cited by L&W for its "impossibility" argument still exists. We need not decide this issue, since we conclude there is no basis for applying the impossibility doctrine here, regardless of whether this requirement still exists.

[8] We note that although the July 12, 2017, email is actually ACF Exhibit 9, as stated in ACF's list of exhibits, the exhibit itself is incorrectly marked "ACF Ex. 10."

The Board's role on review of an ACF decision to terminate a Head Start grantee is not to assess the equities, but to apply the governing statutes and regulations to the facts underlying ACF's action. *Sw. Ark. Dev. Council, Inc.*, DAB No. 2489, at 9 (2012) (citing *Bedford Stuyvesant Restoration Corp*., DAB No. 1404, at 20 (1993) (stating, "The Board is empowered to resolve legal and factual disputes. We cannot provide equitable relief; we are bound by all applicable laws and regulations. 45 C.F.R. § 16.14.")). As explained above, section 641A(e)(1)(C) of the Act and implementing regulations require termination if a grantee, such as L&W in this case, fails to timely correct a deficiency. Since the Board is bound by all applicable laws and regulations, it has no authority to grant the equitable relief that L&W seeks.

Moreover, the decisions cited by L&W do not support the proposition that the Board may grant equitable relief in derogation of governing statutes and regulations. *Emory University* involved a Public Health Service grant governed by Office of Management and Budget (OMB) cost principles that apply generally to grants to educational institutions, not the program-specific statutory and regulatory requirements governing a Head Start grantee's purchase and major renovation of Head Start facilities. Moreover, in *Emory*, the Board reversed a disallowance of the interest component of a time-purchase of computer equipment *only* after it concluded: there was "no legal obstacle to honoring" the equities; the "grantee sought and obtained" the federal agency's approval of the arrangement; the "interest component was fully absorbed by the grantee;" and "[f]ull allowance of the challenged cost item" did not violate the applicable cost principles. *Emory Univ.* at 1, 2, 4. *Southern Illinois University* also did not involve the grant requirements at issue here, but, rather, those governing a veterans' education grant. The Board ruled that the grantee was not required to return expended grant funds after the grantee discovered that it had miscalculated its eligibility for the grant, subsequently ceased making expenditures, and refunded all unexpended funds. The Board expressly stated that even though the case was "a compelling one from the point of view of equities," it could not "disregard settled law in its decision-making process." *Southern Illinois* at 2. Based on prior Comptroller General Decisions that held that the requirement of recovery was not "absolute" and that "there was room to consider the specific facts of specific cases," the Board concluded it was appropriate to permit the University to retain the funds at issue in light of the unique circumstances of the case and the purpose of the grant and the governing statutes. *Id.* at 4. We find no such leeway in the laws governing this case. But even if such leeway existed, we would find no circumstances in this case that would support the resolution in equity sought by L&W.

Conclusion

Based on the foregoing discussion, we conclude that the undisputed material facts show that L&W failed to timely correct a deficiency based on its noncompliance with the Head Start Act and regulations requiring a grantee to apply for and receive ACF's approval to charge mortgage interest to its Head Start grant. Accordingly, we affirm ACF's decision to terminate L&W's designation as a Head Start grantee pursuant to section 641A(e)(1)(C) of the Act and 45 C.F.R. § 1304.5(a)(2)(iii).

/s/
Christopher S. Randolph

/s/
Susan S. Yim

/s/
Sheila Ann Hegy
Presiding Board Member