

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

Los Angeles County Department of Public Health  
Docket No. A-16-83  
Decision No. 2842  
January 4, 2018

**DECISION**

The Department of Public Health, Los Angeles County, California (DPH) appeals a March 30, 2016 determination by the U.S. Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA), disallowing \$5,270,383 in federal grant funds paid to the DPH under the federally-funded Ryan White HIV/AIDS Program, for the costs of medical and related support services for low-income individuals with Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS), between 2007 and 2009, and 2011 and 2013. HRSA disallowed the funds based on the audit findings of the County of Los Angeles, Department of Auditor-Controller (Auditor), which determined that the AIDS Healthcare Foundation, Inc., (AHF), which was under contract with the DPH's Division of HIV and STD Programs (DHSP) to provide various types of program services to eligible individuals in Los Angeles County, had improperly billed DHSP for certain expenditures. For the reasons set out below, the Board sustains the disallowance of \$5,270,383.

**I. Authorities**

The Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. 101-381, 104 Stat. 576 (1990), authorized federal grant funding to develop, organize, coordinate, and operate effective and cost-efficient health care and support services for medically underserved individuals and families affected by HIV/AIDS. Since its enactment in 1990, the Ryan White Act has been amended and reauthorized periodically. It was last reauthorized through the Ryan White HIV/AIDS Treatment Extension Act of 2009, Pub. L. 111-87, 123 Stat. 2885, as an amendment to the Public Health Service Act. The authorizing statutory provisions are codified in title XXVI of the Public Health Service Act. 42 U.S.C. § 300ff *et seq.* Part A of the program (42 U.S.C. §§ 300ff-11 – 300ff-20) provides for direct federal financial assistance for core HIV/AIDS medical and support services to defined eligible metropolitan areas and transitional grant areas, which are population centers that are most significantly affected by HIV/AIDS.

A fundamental provision of the Ryan White Act is what is commonly referred to as the “payer of last resort” requirement, that is, program funding is to fill gaps in coverage available through other sources, such as private insurance or Medicaid. In accordance with this requirement, grantees receiving Ryan White Act funding for Part A services, like the DPH here, must “ensure— . . . that funds received under a grant awarded under this subpart will not be utilized” to pay for any item or service “to the extent that payment has been made, or can reasonably be expected to be made . . . under any State compensation program, under an insurance policy, or under any Federal or State health benefits program[.]” 42 U.S.C. § 300ff-15(a)(6).

The regulations in 45 C.F.R. Part 92 in effect during HRSA’s awards under review<sup>1</sup> set out uniform administrative rules for federal grants and subawards for state and local awards. Among the post-award requirements set out in subpart C of Part 92 are financial management standards, and monitoring and reporting program performance requirements.

Office of Management and Budget (OMB) Circular No. A-87, “Cost Principles for State, Local, and Indian Tribal Governments,” sets out the cost principles applicable to this case.<sup>2</sup> OMB Circular A-87 states that, in order to be allowable, a cost must be “necessary and reasonable for proper and efficient performance and administration of Federal awards” and “[b]e allocable to Federal awards . . . .” OMB Circular A-87, Att. A, ¶ C.1. “A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received.” *Id.* ¶ C.3.a. A cost must also “[c]onform to any limitations or exclusions set forth in [the cost] principles, Federal laws, terms and conditions of the Federal award, or other governing regulations as to types or amount of cost items.” *Id.* ¶ C.1.d. Claimed costs also must “[b]e consistent with policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the governmental unit” and “[b]e accorded consistent treatment.” *Id.* ¶¶ C.1.e, f. Factors to consider in determining whether a cost is reasonable include “[s]ignificant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award’s cost.” *Id.* ¶ C.2.e.

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<sup>1</sup> Effective December 26, 2014, after the award periods at issue here, the regulations at 45 C.F.R. Part 92 were superseded by the “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards,” published in 45 C.F.R. Part 75. *See* 79 Fed. Reg. 75,871, 75,889 (Dec. 19, 2014).

<sup>2</sup> In December 2013, OMB consolidated OMB Circular A-87 and other OMB Circulars into one set of uniform administrative requirements, cost principles, and audit requirements for federal awards, currently published in 2 C.F.R. Part 200. *See* 78 Fed. Reg. 78,590 (Dec. 26, 2013).

HRSA's Notices of Award also include a standard provision that, "unless otherwise noticed" in the Notice of Award, "[a]ll discretionary awards issued by HRSA . . . are subject to the HHS Grants Policy Statement (HHS GPS)." *E.g.*, HRSA Ex. 1A, at 2.<sup>3</sup> The HHS GPS is available at <https://www.hhs.gov/grants/grants/grants-policies-regulations/index.html> (last accessed December 18, 2017).

## II. Background

Los Angeles County, California is an eligible metropolitan area that receives Ryan White Act funding to deliver Part A HIV/AIDS services to eligible individuals within the County. The DHSP within the DPH administers those services to the County. HRSA, which administers the program funding for HHS, awarded the DPH program funding for budget periods March 1, 2007 through February 28, 2009, and from March 1, 2011 through February 28, 2013. HRSA Exs. 1A-4. During the relevant time period, AHF, under contract with the DPH's DHSP,<sup>4</sup> provided various types of Part A services, to include HIV/AIDS medical outpatient services, to eligible individuals in the County. DPH Br. at 2. The DPH represents that the contract permitted it to review and monitor AHF's financial records to determine whether AHF complied with the contract terms and conditions, including whether AHF spent Ryan White Act funds in accordance with the law. *Id.* The Auditor performed such a contract compliance review of AHF for periods covering fiscal years (FYs) 2007-2009 and contract years (CYs) 2011-2013.<sup>5</sup> HRSA Exs. 5 and 6.

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<sup>3</sup> HRSA submitted exhibits marked 1A, 1B, 2, 3A through 3D, and 4 through 9, not paginated. The DPH submitted three exhibits, marked A, B, and C, not paginated. The DPH also attached the October 28, 2016 sworn declaration of Sharon A. Reichman, Assistant County Counsel in the Office of Los Angeles County Counsel and the Division Chief for the Health Services Division, which includes the DPH as a client, and the May 11, 2016 sworn declaration of Sat Avtar Khalsa, Senior Accountant-Auditor in the Department of the Auditor-Controller for the County of Los Angeles (Khalsa Decl.) to its opening brief.

<sup>4</sup> The DPH has not submitted the DHSP-AHF contract, but the DHSP and AHF apparently entered into a contract for AHF to provide program services in Los Angeles County in 1998 and, since then, the contract was amended periodically. DPH Ex. C, at 8-9, 26-29.

<sup>5</sup> The audit records indicate that CY 2011-2012 covered the period from March 1, 2011 through February 29, 2012, and that CY 2012-2013 covered the period from March 1, 2012 through December 31, 2012. HRSA Ex. 6, at 9, 10. Contract year 2012-2013 presumably covered a ten-month period because the DHSP's contract with AHF was terminated before the date that would have marked the end of CY 2012-2013, i.e., February 28, 2013. DPH Br. at 2 (stating that the DHSP-AHF contract was "terminated on December 31, 2012," at which time the DPH changed its reimbursement model for program-funded medical outpatient services contracts from a cost reimbursement fee structure to a fee-for-service structure).

On August 16, 2012, the Auditor reported its findings for FYs 2007-2009 on whether AHF appropriately spent Ryan White Act funds in accordance with the contract. HRSA Ex. 5, at 1. The Auditor's review included Auditor interviews of AHF management and examination of sample expenditures incurred by AHF between May 2008 and February 2009 to determine whether AHF properly allocated expenditures between DHSP-responsible patients and other, non-DHSP patients whose services were funded by other sources, such as Medi-Cal, private insurance, other grants, or patient service fees. *Id.* at 2, 4. The Auditor stated:

AHF did not have a written Cost Allocation Plan for the medical outpatient contract. In addition, AHF did not track most expenditures related to the DHSP contract. Instead, AHF billed DHSP the budgeted amounts for most costs. As a result, AHF charged DHSP for shared program expenditures that should have been allocated to non-DHSP patients, whose services were paid for by Medi-Cal, MediCare, other third-party coverage, or patient fees. AHF management indicated that revenue from other payers was used to offset [AHF's] non-billable costs.

We reviewed AHF's database of all patient/client outpatient medical visits from March 1, 2008 to February 28, 2009, and determined the percentage of DHSP-responsible patients and other patients. We then applied the percentage of DHSP-responsible patients (64%) to each of AHF's reported costs . . . [and determined that], based on the actual percentage of DHSP-responsible patients, AHF billed DHSP \$1,731,175 for costs that should have been allocated to non-DHSP patients.

*Id.* at 4.

On July 30, 2014, the Auditor issued its report of findings of a contract compliance review of sample transactions of AHF, for CYs 2011 through 2013. HRSA Ex. 6. The Auditor again found that AHF did not properly allocate medical outpatient contract costs such that AHF had over-billed the DHSP \$3,539,208 for CY 2011-2013 expenditures that should have been allocated for "non-Ryan White-responsible client services." *Id.* at 1-2. The Auditor stated:

AHF did not allocate costs appropriately for the Medical Outpatient Contract. Specifically, [AHF] billed up to [its] contract maximum amount on [its] contract budget for some expenditures, instead of allocating the expenditures using an equitable and supported cost allocation methodology. After our fieldwork, AHF provided an alternative allocation methodology

which was also unsupported and not in compliance with the . . . contract [with DHSP]. Based on the percentage of Ryan White-responsible client visits to total AHF client visits, AHF overbilled DHSP by \$1,623,264 in CY 2011-12 and \$1,915,944 in CY 2012-13. We noted a similar finding in our prior monitoring review.

*Id.* at 2.

By letter dated March 30, 2016, HRSA notified the DPH that, based on the audit results, it was disallowing a total of \$5,270,383 that represented “unallowable reimbursements” the DPH had made to AHF for FYs 2007-2009 and CYs 2011-2013. HRSA Ex. 7, at 1-2. HRSA also noted audit findings of “additional unallowable costs and unsupported expenditures” of \$21,264 for FYs 2007-2009<sup>6</sup> and \$247,547 for CYs 2011-2012.<sup>7</sup> *Id.* at 2 n.2. HRSA stated that it received “verbal reports” representing that these additional unallowable costs were “resolved” and “no longer subject to repayment,” but also stated that these expenditures could be subject to future audit or review. *Id.*

The DPH appealed HRSA’s March 30, 2016 disallowance determination to the Board pursuant to the regulations in 45 C.F.R. Part 16.

### **III. Discussion**

The DPH does not raise specific arguments concerning the audit findings underpinning HRSA’s disallowance of \$5,270,383. Rather, in essence, the DPH maintains that, notwithstanding the audit results, AHF had \$3,514,966 in other expenditures that the DPH asserts are “allowable” under the Ryan White Act, but which were not reimbursable under the contract. In so asserting, the DPH seems to be asking the Board to reduce the disallowed amount of \$5,270,383 by \$3,514,966, or to order \$3,514,966 that it claims were allowable to be offset against the disallowed amount.

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<sup>6</sup> The Auditor determined that AHF had charged the DHSP \$12,763 for unallowable earthquake and flood insurance costs that were not included in the approved contract budget and \$8,501 for various other unsupported expenditures related to “HIV advancing testing,” psychiatry/psychotherapy, and health education/risk reduction, in the amount of \$21,264. HRSA Ex. 5, at 2, 5, 6-7, 9.

<sup>7</sup> The audit report for CY 2011-2013 indicates that AHF also billed additional unallowable expenditures (aside from the \$3,539,208 that HRSA disallowed for this period) totaling \$321,241 (\$290,168 for costs “not supported by [AHF’s] financial records” plus \$31,073 for other “unsupported or unallowable expenditures”). HRSA Ex. 6, at 2, 11. AHF later provided the Auditor additional documentation to support billing a total of \$73,694 for the two groups of questioned costs (\$61,493 plus \$12,201), reducing the amount of \$321,241 to \$247,547 (i.e., \$321,241 minus \$73,694) for those costs. *Id.* at 2, 6, 8, 11.

As we explain below, on the core question before the Board – whether or not HRSA’s disallowance of \$5,270,383 should be upheld – we find that the DPH has not shown that any part of the \$5,270,383 is in fact allowable. Accordingly, we uphold the disallowance in full for the reasons set out below, in subsections A and B. We also address the DPH’s arguments for reduction or offset below, in subsection C.

A. *The DPH, the grantee, bears the burden to prove that the disallowed amount of \$5,270,383 is allowable.*

As an initial matter, a discussion of the burden of proof is in order. “In an appeal of a federal agency’s disallowance determination, the federal agency has the initial burden to provide sufficient detail about the basis for its determination to enable the grantee [i.e., the non-federal party] to respond.” *Me. Dept. of Health & Human Servs.*, DAB No. 2292, at 9 (2009), *aff’d*, *Me. Dep’t of Human Servs. v. U.S. Dept. of Health & Human Servs.*, 766 F. Supp. 2d 288 (D. Me. 2011). If the federal agency carries this burden, which is “minimal,” then the non-federal party must show that the costs are allowable. *Mass. Exec. Office of Health & Human Servs.*, DAB No. 2218, at 11 (2008), *aff’d*, *Mass. v. Sebelius*, 701 F. Supp. 2d 182 (D. Mass. 2010). “When[, as here,] a disallowance is supported by audit findings, the grantee typically has the burden of showing that those findings are legally or factually unjustified.” DAB No. 2218, at 11, citing *Wis. Dep’t of Health and Soc. Servs.*, DAB No. 1121, at 15-16 (1989) and *Ind. Dep’t of Pub. Welfare*, DAB No. 970, at 6-7 (1988).

As noted, HRSA awarded the DPH program funding for budget periods March 1, 2007 through February 28, 2009, and from March 1, 2011 through February 28, 2013. HRSA Exs. 1A-4. As HRSA’s Notices of Award show, the DPH is the grantee, or recipient, of subject funding as authorized by the Ryan White Act, as amended. HRSA Exs. 1A, at 1; 1B, at 1; 2, at 1; 3A, at 1; 3B, at 1; 3C, at 1; 3D, at 1; 4, at 1. And, as HRSA’s disallowance determination indicates, based on the findings of the Auditor, HRSA determined that the DPH “was being charged unallowable costs by AHF under the Ryan White grant.” HRSA Ex. 7, at 1-2. The Auditor’s findings that form the foundation of HRSA’s disallowance determination are of record as HRSA Exhibits 5 (audit for FYs 2007-2009) and 6 (audit for CYs 2011-2013).

We are satisfied that HRSA has carried its initial burden to sufficiently demonstrate the basis for its disallowance. Accordingly, the question for the Board is whether the DPH has borne its burden to prove that the amount HRSA disallowed is in fact allowable. Our standard of review in appeals of disallowance determinations is *de novo*. *Cnty. Med. & Dental Care, Inc.*, DAB No. 2556, at 4 n.1 (2014) (the Board reviews the disallowance *de*

novo, and “does not simply review HRSA’s determination to determine whether it is reasonable and supported by substantial evidence”); *Minn. Dep’t of Human Servs.*, DAB No. 2122, at 25 (2007) (“the Board’s review is de novo”); *Minn. Dep’t of Human Servs.*, Ruling No. 2008-3 on Request for Reconsideration of Decision No. 2122, at 2 (Feb. 15, 2008) (“The Board determines the facts de novo, based on the entire record before it, including evidence from both parties.”).

B. *The DPH, as the grantee, must prove, but has not proven, that the disallowed amount of \$5,270,383 is allowable.*

1. The DPH retains responsibility for all grant expenditures.

The DPH, the grantee, received Ryan White Act monies awarded by HRSA. AHF, under contract with DPH’s DHSP, administered Ryan White Act services in Los Angeles County. The Auditor determined that AHF had charged the DPH for expenditures that were not allowable and in violation of the Ryan White Act’s “payer of last resort” provision, chiefly because AHF had simply billed DHSP up to the budgeted amount under the contract without properly allocating expenditures between those related and unrelated to the contract. As an initial matter, we explain that the DPH retains responsibility for the allowability of all costs for which it claims federal funding even if the expenditures were incurred by its contractor.

The grantee has the burden to document the existence and allowability of its expenditures of federal funds. *See Suitland Family & Life Dev. Corp.*, DAB No. 2326, at 2 (2010); *Cent. Piedmont Action Council, Inc.*, DAB No. 1916, at 10 (2004); *Rincon San Luiseno Band of Mission Indians*, DAB No. 1826, at 2 (2002). That burden includes the responsibility to show that it spent grant funds in support of grant objectives and in compliance with the terms and conditions of the grant. *See Tuscarora Tribe of N.C.*, DAB No. 1835, at 10-11 (2002). The grantee’s accountability for the proper use and expenditure of grant funds extends to overseeing a contractor’s use and expenditures to ensure that the contractor, too, complies with applicable requirements. *See N.D. Children’s Servs. Coordinating Comm.*, DAB No. 1399, at 12 (1993). Accordingly, the

DPH is subject to disallowance based on a finding that its contractor AHF that administered the services for which HRSA awarded funding to the DPH did not meet applicable grant requirements.<sup>8</sup>

2. The DPH has not shown any error in the audit findings on which the disallowance is based.

Not only does the DPH not identify any reason to reject the findings, its own auditors discovered the overcharges in a compliance review of the contractor. The DPH informs the Board that it “sought reimbursement of the \$5,270,383 . . . from AHF. AHF disagreed with each audit finding. AHF sued [the DPH] to invalidate the audit findings and [the DPH] counter-sued AHF for breach of [c]ontract.” DPH Br. at 3-4.<sup>9</sup> The DPH also submitted the sworn declaration of Senior Accountant-Auditor Khalsa, who attests that the audit team determined that, of the charges AHF had billed between March 2008 and February 2009, \$1,731,175 in charges were found to have been over-billed, meaning that those charges were determined to be non-reimbursable costs under the contract. The audit team later determined that, of the charges AHF had billed to the DHSP between March 2011 and December 2012, \$3,359,208 in charges were determined to have been

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<sup>8</sup> The DPH refers to AHF as its “subgrantee.” DPH Br. at 2; DPH Reply at 2. AHF is an indirect recipient of subject awards in the sense that the contract between the DHSP and AHF presumably provided for AHF to be paid with the DPH’s award money for AHF administering the program services for the DHSP. However, based on the record before us, it is not clear that AHF is a “subgrantee” to which a “subgrant” has been awarded within the meaning of these terms as defined in 45 C.F.R. § 92.3. But, regardless of whether AHF is a “subgrantee” or merely a contractor used by the DPH to carry out its grant activities, the DPH, as the grantee, retains responsibility for ensuring that the grant monies are used in accordance with applicable requirements. *See Cmty. Relations – Soc. Dev. Comm. in Milwaukee Cnty.*, DAB No. 134, at 2 (1980) (“The legal relationship created by a grant award is between the Agency and the Grantee. The subgrantee is accountable to the Grantee not the Agency . . . The Grantee is, therefore, responsible to the Agency for adequate documentation of expenditures made by the subgrantee.”); *Pa. College of Podiatric Medicine*, DAB No. 299, at 4 (1982) (“The grantee, not the subgrantee, is solely accountable to the awarding agency for the use of the funds.”); 45 C.F.R. §§ 92.20(a) (the grantee and its “subgrantees and cost-type contractors” must maintain certain fiscal control requirements), 92.40(a) (grantees are responsible for “managing the day-to-day operations of grant and subgrant supported activities” and “monitor[ing] grant and subgrant supported activities”); HHS GPS at II-2 (in general, the requirements to which grantees are held are considered to “flow down” to “subrecipients and contractors”).

<sup>9</sup> The DPH and AHF evidently are engaged in litigation in the Superior Court of California, County of Los Angeles. DPH Br. at 7-8 (stating that AHF seeks to declare the audits invalid and that the DPH filed a cross-complaint for breach of contract, and that the Superior Court has denied the parties’ cross-motions for summary judgment, “necessitating a trial”); DPH Ex. C. The audit report for CY2011-2013 also refers to the lawsuit and states that the DPH “continues to be in disagreement with AHF’s cost allocation methodology.” HRSA Ex. 6, at 2.



over-billed, or non-reimbursable under the contract. Khalsa Decl. ¶¶ 1-8. These statements clearly establish that the DPH does not dispute the audit findings on which HRSA's determination to disallow \$5,270,383 was based. The DPH does not assert, or show, that any part of the \$5,270,383 that the Auditor determined were over-billings was allowable under the Ryan White Act and not incurred in violation of the statute's "payer of last resort" provision. Nor does the record contain evidence that would cause us to question the reliability or accuracy of the amounts the audits found were over-billed.

As the above Board decisions establish, the grantee must carry its burden to show that the disallowed amount is in fact allowable. The DPH neither disputes the audit findings nor offers any evidence on which we can determine any part of the \$5,270,383 should not have been disallowed. We must uphold a disallowance where it is authorized by law and the grantee has not disproved the factual basis for the disallowance. *See Tenderloin Health*, DAB No. 2420, at 2 (2011) (and cases cited therein); *Puerto Rico Dep't of Health*, DAB No. 2385, at 29 (2011) (the Board must uphold a disallowance if it is supported by the evidence and is consistent with applicable law), *reconsideration denied*, Ruling No. 2011-5 (Sept. 30, 2011); *see also* 45 C.F.R. § 16.14 ("The Board shall be bound by all applicable laws and regulations.").

We therefore uphold the disallowance of \$5,270,383.

*C. We decline to order \$3,514,966 offset against the disallowed amount of \$5,270,383 sought by the DPH.*

The DPH argues that it should be allowed to substitute for the disallowed costs other expenditures incurred by AHF which it contends would have been allowable but which were not billed to the DPH because they did not meet the terms of the contract. DPH Br. at 4-7. The DPH maintains that further Auditor review of AHF's documentation showed that AHF had additional expenditures totaling \$3,514,966, which were a part of over \$6 million in "unreimbursed, appropriate and allowable costs" that AHF had incurred to the benefit of the contract during the time periods encompassed by the audits. *Id.* at 4, 7-8. The DPH states that, "[w]hile AHF's contract with [the DHSP] would not allow AHF to bill for such costs, these costs are permissible under" the Ryan White Act and that the DPH, which may "waive its contractual requirements, as long as the funds are used in a manner that is consistent with" the Ryan White Act, "has decided to exercise its discretion to credit AHF for funds that [AHF] spent for services that may be reimbursable" under the statute "even though those costs would not otherwise be reimbursable under the [c]ontract." *Id.* at 7.

The DPH states that the additional expenditures of \$3,514,966 are comprised of:

- \$242,702 in “adjusted payroll balances for 2008-2009” that the Auditor found were attributable to mathematical error, and which purportedly were not found earlier because supporting documentation was not made available during the first audit (for FY 2007-09) and therefore not considered during that audit. *Id.* at 4.
- \$830,959 (2009) and \$575,702 (2013) in “payroll costs for benefits counselors, referral coordinators and registered nurses who rendered services to all of AHF’s clients, including [Ryan White] Act-eligible clients.”<sup>10</sup> According to the DPH, the services in question are not specifically covered by other insurance providers and the costs are allowable under the Ryan White Act. *Id.* at 6.
- \$592,255 (2009) and \$415,719<sup>11</sup> (2013) in Ryan White Act-allowable costs that “exceeded the [c]ontract’s budgeted line-item” (e.g., equipment rental costs, insurance fees, refuse services fees and utility fees). The DPH states that the Auditor derived these figures by applying the “same allocation percentage calculation[s] for both the 2009 and the 2013 audit periods . . . to accurately allocate these costs between AHF’s patient payment sources.” According to the DPH, while AHF incurred these costs “to the benefit of the [c]ontract, they were not submitted . . . for reimbursement as these costs exceeded the budgeted line-item.” *Id.*
- \$118,203 (2009) and \$447,905 (2013) in Ryan White Act-allowable costs that were “unbudgeted general overhead line-items,” which the DPH says AHF also had incurred to the benefit of the contract but were not submitted for reimbursement because they were not set forth in AHF’s budget. Examples of such costs included costs for staff training and recruitment, postage, printing, equipment repairs and maintenance, security, taxes, and licenses. The DPH represents that these amounts were derived by applying the “same approximately 64% calculation . . . to these costs for the 2009 audit period and approximately 58% calculation . . . to these costs for the 2013 audit period to accurately allocate the costs between AHF’s patient payments sources.” *Id.*

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<sup>10</sup> The DPH does not specifically explain whether there is any overlap between the \$830,959 purportedly incurred in 2009 for payroll costs and the \$242,702 in “adjusted payroll balances for 2008-2009” that the Auditor on subsequent review attributed to mathematical error.

<sup>11</sup> Senior Accountant-Auditor Khalsa’s declaration, ¶ 10(b), refers to an amount of \$415,718.

- \$103,698 (2009) and \$436,279 (2013) in Ryan White Act-allowable costs that were “unbudgeted line-items on behalf of patients.” Examples of such costs included charges for hospital outpatient services, medical transport, parking validation, and patient incentives. According to the DPH, “[s]ince these costs were not specifically tied to patients and are allowable under the [Ryan White] Act, 100% of these costs were deemed allowable.” *Id.*

*See also* Khalsa Decl. ¶¶ 9-11 (similar discussion).<sup>12</sup>

With respect to all of the above costs other than \$242,702 (adjusted payroll costs for 2008-2009) that the DPH says the Auditor later determined were attributable to mathematical error, the DPH represents that the costs are “allowable” and, specifically, that they did not run afoul of the “payer of last resort” mandate. DPH Br. at 4-5, citing 42 U.S.C. § 300ff-15(a)(6). According to the DPH, that statutory mandate is “specific to the *services* being covered and not to the individual” (our emphasis), meaning that the bare fact that an individual has such other coverage or source of health care benefits does not necessarily make that *individual* ineligible to receive services that would otherwise be permitted to be paid with Ryan White Act funds (as “last resort” funding). *Id.* As we understand the DPH’s position, the additional charges outlined above, for which AHF purportedly was not reimbursed, were nevertheless charges AHF properly incurred to deliver Ryan White Act services (or, as the DPH says, were “allowable” under the statute).

First, with respect to the \$242,702 in “adjusted payroll balances for 2008-2009,” we have only the DPH’s representation in its brief that there were such additional adjusted payroll balances. Even were we to assume that those were costs the Ryan White Act would authorize as “last resort payer” costs (and we cannot make that determination based on the record before us), we have no *evidence* to support the DPH’s representation that AHF in fact incurred \$242,702 in “adjusted payroll balances for 2008-2009.” For example, the DPH did not submit a report by the Auditor of the re-review of additional AHF documentation following the audit for FY 2007-2009. Nor do we have the additional

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<sup>12</sup> It is not clear to us exactly how the DPH derived the total amount of \$3,514,966 for such additional “allowable” expenditures. A reasonable reading of its brief would be that all of the amounts as stated in pages 4 through 6 its brief (including \$242,702 attributed to mathematical error) total \$3,514,966. But adding all of those amounts yields an amount that exceeds \$3,514,966 by almost \$250,000. We also note that Senior Accountant-Auditor Khalsa’s declaration does not discuss \$242,702 attributed to mathematical error; the declaration itemizes all of the amounts except for \$242,702, and then states that \$3,514,966 in Ryan White Act-allowable charges were incurred. Khalsa Decl. ¶¶ 10 and 11. Adding all of the charges other than \$242,702 does not yield \$3,514,966. Given our resolution here, it is not necessary for us to resolve these inconsistencies.

supporting AHF documentation that the DPH acknowledges was “not made available [earlier] and not reviewed [by the Auditor] during the first fiscal review.” DPH Br. at 4. The record thus does not include appropriate “source documentation,” as defined in 45 C.F.R. § 92.20(b)(6) to include payroll and time and attendance records, to evaluate whether applicable OMB Circular A-87 cost principles are met. *See* OMB Circular A-87, Att. A (including allowability and allocability requirements) and *id.*, Att. B (including cost principles specific to compensation for personal services).<sup>13</sup>

In its response brief, HRSA states, “[The DPH] argues, without any documentary evidence, that a mathematical error to the benefit of AHF was ‘found.’ No indication of how this error was found, by whom, when it was discovered, or even what the error consists of was asserted; only that the error is in the amount of \$242,702 in favor of AHF.” HRSA Br. at 9. HRSA thus questions the amount of \$242,702 as lacking appropriate substantiation. “Once a cost is questioned as lacking documentation, the grantee bears the burden to document, with records supported by source documentation, that the costs were actually incurred and represent allowable costs, allocable to the grant.” *Northstar Youth Servs., Inc.*, DAB No. 1884, at 5 (2003). In its reply brief, the DPH does not squarely respond to these statements by HRSA concerning the \$242,702, and does not claim that it has made available to HRSA documentation supporting its claim that, due to mathematical error, AHF had properly incurred an additional \$242,702 in payroll-related expenditures in 2008-2009. The DPH instead takes the position that it has produced relevant, material, and competent *testimonial* evidence in the form of Senior Accountant-Auditor Khalsa’s declaration to support its claim that AHF had incurred additional allowable expenditures, including \$242,702. DPH Reply at 4. We do not question the competence of Senior Accountant-Auditor Khalsa, a part of the team that audited AHF’s records for contract compliance, as a witness. Nowhere in the declaration, however, does Senior Accountant-Auditor Khalsa specifically discuss the \$242,702 in payroll expenditures. Thus, no testimonial or documentary evidence supports those costs.

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<sup>13</sup> The Board has long held that grantees must have financial management systems capable of adequately identifying the source and utilization of federal grant monies and that their accounting records must be supported by appropriate source documentation. *See, e.g., Webster Parish Police Jury*, DAB No. 2674, at 4 (2016); *Ohio Dep’t of Job & Family Servs.*, DAB No. 2643 (2015); *N.J. Dep’t of Health*, DAB No. 2497, at 4 (2013); *Puerto Rico Treasury Dept.*, DAB No. 1593, at 7 (1996); *N.J. Dep’t of Human Servs.*, DAB No. 899, at 3 (1987); *see also* 45 C.F.R. § 92.20(b)(2) (grantee must maintain records that adequately identify the sources and application of program funds) and OMB Circular A-87, Att. A, ¶ C.1.j (costs claimed under federal awards must “[b]e adequately documented”).

With respect to the other expenditures that the DPH claims are Ryan White Act-allowable costs not reimbursed under the contract, like \$242,702 for 2008-2009 payroll expenditures, the DPH has not produced supporting documentary evidence, including appropriate source documentation. Thus we do not have a basis on which we can determine their allowability and allocability, and whether those expenditures comport with applicable cost principles. The only supporting evidence concerning those expenditures the DPH has submitted is the Khalsa declaration, attesting that the audit team determined on further review that AHF had various types of unreimbursed Ryan White Act-allowable costs in certain specified amounts. Khalsa Dec. ¶¶ 9-11. But the declaration is not itself contemporaneous source documentation supporting any of the costs discussed therein. Rather, it is akin to summary statements (albeit given as sworn attestations) about the findings of the audit team’s review and the conclusions the audit team drew based on that review (e.g., that the payroll costs of \$830,959 (2009) and \$575,702 (2013) “are not specifically covered by other insurance providers,” *id.* ¶ 10(a)). In that respect, the declaration is not an adequate and reliable substitute for underlying source documentation. *See Ohio*, DAB No. 2643, at 33 (certain documents the state grantee offered to support its claims that disallowed costs were not charged to federal funds did not appear to be documents used in the ordinary course of business but rather were created for litigation purposes and, while they may be admitted as summary evidence, they do not substitute reliable source documentation). While the Board has not held that affidavits or declarations can never constitute adequate supporting documentation,<sup>14</sup> in this case, the Board has before it only the after-the-fact conclusions of an auditor in a declaration, but no appropriate contemporaneous evidence to bolster the testimony.

The absence of sufficient evidentiary foundation for the costs of \$3,514,966 aside, the Board is concerned that, as to these costs, the DPH is in effect asking the Board to become involved what is at its core a contract dispute between the DPH/DHSP and AHF. The DPH has repeatedly indicated to the Board that the *contract* with AHF did not allow AHF to bill for such costs for one reason or another (e.g., the costs exceeded the contract’s budgeted line-items or were the contract did not budget for certain line-items). DPH Br. at 4, 6, 7, 8. The DPH argues that it may “exercise its discretion” under the contract to “credit AHF” for such additional expenditures. *Id.* at 7. This contention

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<sup>14</sup> *Compare Ca. Dep’t of Health Servs.*, DAB No. 1155, at 18-21 (1990) (affidavits together with certain evidence concerning social worker time on grant activities could constitute adequate documentation for payroll expenditures) and *Second Street Youth Ctr. Inc.*, DAB No. 1270, at 4-7 (1991) (affidavits accompanying payroll records that did not specifically show which program employee time was spent on and how time was allocated to grant program did not constitute sufficient proof).

amounts to a speculative suggestion that the DPH might exercise such discretion if HRSA (or the Board) agreed that the DPH could thereby draw down federal funds to reimburse it. The DPH has not shown at this point that it has incurred such expenditures, i.e., compensated AHF for the additional costs, or that the expenditures meet all requirements for claiming federal funds. Essentially, the DPH seeks to have the Board allow it to skip the usual procedures for documenting and claiming federal reimbursement and instead treat the expenditures of its contractor mentioned by the Auditor as if they were allowable claimed costs. *Id.* at 8 (“[I]t is requested that HRSA withdraw its request for repayment and permit [the DPH] to exercise its discretion to waive certain requirements of the [c]ontract and resolve the audit findings with AHF.”); DPH Reply at 3 (“HRSA fails to address the fact that [the DPH] can choose to pay allowable costs beyond the terms of the subject contract. The [DPH] should be allowed to exercise its discretion to make these fiscal adjustments, and permit AHF to claim reimbursement for allowable [Ryan White Act] costs for services that AHF provided to eligible persons within Los Angeles County.”).

The core issue before the Board is whether any of the disallowed amount of \$5,270,383 is in fact allowable, and we have determined based on the record before us that the DPH has not proven that any of the amount is allowable. If the DPH determines that it has reimbursed AHF for additional expenditures allowable under the Ryan White Act, our decision does not preclude the DPH from submitting to HRSA, or HRSA from reviewing, any of those expenditures which meet the requirements for federal claiming.

Lastly, to the extent the arguments concerning \$3,514,966 the DPH claims are additional allowable costs may be viewed as a request that the Board equitably reduce the disallowed amount of \$5,270,383 by \$3,514,966, Board has long said it has no authority to sit in equity. *See Puerto Rico Dept. of Health*, DAB No. 2385, at 29 (2011) (and cases cited therein); *Mental Health Ass’n of Or.*, DAB No. 2590, at 9 (2014) (“The Board has no authority to waive a disallowance on the basis of equitable principles.”).

**Conclusion**

The Board sustains HRSA's determination to disallow \$5,270,383.

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

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

\_\_\_\_\_/s/  
Susan S. Yim  
Presiding Board Member