

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

Avoyelles Progress Action Committee, Inc.
Docket No. A-13-114
Decision No. 2559
March 5, 2014

DECISION

Avoyelles Progress Action Committee, Inc. (APAC) appealed the August 22, 2013 determination of the Administration for Children and Families (ACF) to terminate federal financial assistance provided to APAC to operate a Head Start program. ACF based the termination on its finding, in a February 2013 follow up review of APAC's program, that APAC had failed to correct in a timely manner a deficiency identified in a review completed in February 2012.

ACF moved for summary disposition, arguing that APAC's appeal failed to raise any genuine issue of material fact and that ACF is entitled to judgment in its favor as a matter of law. For the reasons explained below, we grant ACF's motion and affirm ACF's decision to terminate APAC's Head Start grant.

Legal Background

Head Start program

Head Start is a national program that provides comprehensive health, educational, nutritional, social, and other services primarily to low-income children, ages three to five, and their families. Head Start Act (Act), § 636; 57 Fed. Reg. 46,718 (Oct. 9, 1992).¹

The Secretary of Health and Human Services (HHS) must review each Head Start grantee's program to determine whether it meets program performance standards, which include administrative and financial management standards, at least once every three years. Act § 641A(c)(1). A follow up review must be conducted if a Head Start agency is found to have "1 or more findings of deficiencies" or "significant areas of noncompliance." Act § 641A(c)(1)(C)(i), (ii). As relevant here, the definition of the

¹ The Head Start Act, as amended December 12, 2007, is codified at 42 U.S.C. § 9801 *et seq.* The sections of the Head Start regulations cited here were issued before the 2007 amendments to the Act and were not subsequently modified.

term “deficiency” includes “an unresolved area of noncompliance.” Act § 637(2)(C). “The term ‘unresolved area of noncompliance’ means 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); *see also* 45 C.F.R. § 1304.61(b) (“A grantee which is unable or unwilling to correct the specified areas of noncompliance within the prescribed time period will be judged to have a deficiency which must be corrected....”). The Act does not define “noncompliance”; however, the Head Start regulations at 45 C.F.R. § 1304.61, captioned “Noncompliance,” refer to a determination “that the grantee is not in compliance with Federal or State requirements (including, but not limited to, the Head Start Act or one or more of the regulations under parts 1301, 1304, 1305, 1306 or 1308 of [45 C.F.R.]) in ways that do not constitute a deficiency....” Thus, if a Head Start grantee is not in compliance with an applicable federal regulation, such as the cost principles in 2 C.F.R. Part 230 described below, and fails to correct that noncompliance within the prescribed time period, that noncompliance becomes a deficiency.

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). The Secretary may require a grantee to correct a deficiency immediately, if the deficiency threatens the health or safety of staff or program participants or poses a threat to the integrity of federal funds; within 90 days if the Secretary finds a 90-day period reasonable, in light of the nature and magnitude of the deficiency; or by the time specified in a Quality Improvement Plan (QIP) that the grantee must submit for the Secretary’s approval (which may not be later than one year after the grantee received notice of the deficiency). Act § 641A(e)(1)(B)(i)-(iii), (e)(2)(A); *see also* 45 C.F.R. § 1304.60(f) (“the responsible HHS official will issue a letter of termination or denial of refunding” if a Head Start grantee “fails to correct a deficiency, either immediately, or within the timeframe specified in the approved [QIP]”).

Head Start grantees are entitled to an evidentiary hearing before the Board to contest the basis for ACF’s termination decision. *See* 45 C.F.R. § 1303.16. The burdens of proof are well-settled: ACF must make a prima facie showing (that is, proffer evidence sufficient to support a decision in its favor absent contrary evidence) that it has a basis for termination under the relevant standards. *See, e.g., Friendly Fuld Neighborhood Ctr., Inc.*, DAB No. 2121, at 3 (2007), citing *First State Community Action Agency, Inc.*, DAB No. 1877, at 9 (2003), and *Rural Day Care Ass’n of Ne. N.C.*, DAB No. 1489, at 7-8 (1994), *aff’d*, *Rural Day Care Ass’n of Ne. N.C. v. Shalala*, No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995). If ACF makes this prima facie showing, the grantee must demonstrate by a preponderance of the evidence that it is in compliance with program standards. *See, e.g., Friendly Fuld Neighborhood Ctr.* at 3. A grantee always bears the burden to demonstrate that it has operated its federally funded program in compliance with the terms and conditions of its grant and the applicable regulations. *Id.* A grantee,

moreover, is clearly in a better position to establish that it did comply with applicable requirements than ACF is to establish that it did not. Therefore, the Board has held that the ultimate burden of persuasion is on the grantee to show that it was in compliance with program standards. *Id.* at 3-4.

The Board has held that it is appropriate to 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. *See, e.g., Camden County Council on Econ. Opportunity*, DAB No. 2116, at 3-4 (2007), *aff'd*, *Camden County Council on Econ. Opportunity v. U.S. Dep't of Health & Human Servs.*, 586 F.3d 992 (D.C. Cir. 2009). The 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 genuine factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If a 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. *Matsushita* at 586, n.11; *Celotex*, 477 U.S. at 322-24. 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. *Camden County Council*, DAB No. 2116, at 4.

Cost principles

The Head Start regulations make applicable to all grants made under the Act the uniform administrative requirements for grant awards for HHS grants to non-profit organizations, at 45 C.F.R. Part 74. 45 C.F.R. § 1301.10(a).² Part 74 incorporates the cost principles in Office of Management and Budget (OMB) Circular A-122 (now codified at 2 C.F.R. Part 230) for determining allowable costs under awards to non-profit organizations. 45 C.F.R. § 74.27(a). These cost principles require that, to be allowable, a cost must “[b]e reasonable for the performance of the award and be allocable thereto[.]” 2 C.F.R. Part 230, Appendix (App.) A, ¶ A.2.a. In addition, the cost principles provide that a cost is allocable to an award “in accordance with the relative benefits received.” *Id.*, ¶ A.4.a.

² Section 1301.10(b) lists two exceptions, neither of which applies here.

Costs must also be “adequately documented.” *Id.* ¶ A.2.g. As relevant here, the cost principles require specifically that “[t]he distribution of salaries and wages to awards must be supported by personnel activity reports, as prescribed in subparagraph 8.m.(2)[.]” 2 C.F.R. Part 230, App. B, ¶ 8.m.(1). Subparagraph 8.m.(2) states that “[r]eports reflecting the distribution of activity of each employee must be maintained for all staff members . . . whose compensation is charged in whole or in part, directly to awards.” Further, the reports must: (1) “reflect an after-the-fact determination of the actual activity of each employee”; (2) “account for the total activity for which employees are compensated and which is required in fulfillment of their obligations to the organization”; (3) are “signed by the individual employee, or by a responsible supervisory official having first hand knowledge of the activities performed by the employee [and indicate] that the distribution of activity represents a reasonable estimate of the actual work performed by the employee during the periods covered by the reports”; and (4) are “prepared at least monthly” and “coincide with one or more pay periods.” *Id.*, ¶ 8.m.(2).

Case Background

APAC is a community action agency located in Marksville, Louisiana that operates a Head Start program serving nearly 300 children. ACF Ex. 4, at 1-2. APAC receives other federal grants, including grants under the Community Services Block Grant Program, Weatherization Assistance Program, and Home Energy Program. *See, e.g.*, 10/3/13 appeal letter, 1st and 3rd pages; APAC Ex. III, 3rd page. During most of the relevant time period, APAC’s administrative staff consisted of an Executive Director, Assistant Executive Director/Human Resources Director, Accountant/Fiscal Officer, and Executive Secretary/Payroll Clerk, each of whom spent part of their time on activities associated with Head Start.³ *Id.*

From May 1 through 6, 2011, ACF conducted an on-site monitoring review of APAC’s Head Start program for which ACF issued a report signed by the Director, Office of Head Start, on August 19, 2011. ACF Ex. 11, at 19. ACF found four new areas of noncompliance, including a failure to comply with the requirement in paragraph 8.m.(1) of the cost principles that the distribution of salaries and wages to awards be supported by personnel activity reports. *Id.* at 20-21. In particular, ACF found that the Executive Director’s timesheet for the period April 1-15, 2011 showed that she spent 39% of her time (34 of 88 hours) on Head Start, but the General Ledger showed that 53% of her

³ APAC alleges, and ACF does not dispute, that the Assistant Executive Director was not paid after October 1, 2012 because she was on medical leave and not working and that she was later terminated. 10/3/13 appeal letter, 4th page; APAC Ex. IX, 3rd page (2/27/13 letter from APAC’s Executive Director to ACF Program Support Specialist).

salary was charged to Head Start. *Id.* at 21. ACF further found that this charge and charges to Head Start for salary costs of the Assistant Executive Director and Accountant were based on “pre-set payroll allocations” that were “not supported by personnel activity reports.” *Id.*

The August 19, 2011 report stated that the noncompliance “must be corrected within 120 days of the receipt of this report” and advised that “[p]ursuant to section 637(2)(C) of the Head Start Act, a grantee that fails to correct an area of noncompliance within the prescribed time period will be judged to have a deficiency that must be corrected within the time period required by the responsible HHS official.” *Id.* at 24.

From January 31 through February 3, 2012, ACF conducted a follow-up review of APAC’s Head Start program for which ACF issued a report signed by the Director, Office of Head Start, on August 27, 2012. ACF Ex. 8, at 1. ACF found that there was “an unresolved area of noncompliance” with paragraph 8.m.(1) that constituted a deficiency under section 637(2)(C) of the Act. *Id.* at 7. In particular, ACF found that APAC’s cost allocation plan (CAP) specified a “calculated Head Start percentage” of 41% for the Executive Director but showed that the “percent charged” was 53%, and that the “Explanation of Funding Decisions document” showed that “the Executive Director was allocated 50 percent to Head Start based on time spent working with the program.” *Id.* at 7-8. ACF further found that the Executive Director’s “Activity Sheets” for the period November 1-December 31, 2011 reported 40% of her time spent on Head Start. *Id.* at 8.

The August 27, 2012 report stated that the deficiency “must be fully corrected within six months from the date you receive this report or within such additional time not to exceed one year as authorized by the responsible HHS official per Sec. 641A(e)(1)(B)(iii)” of the Act. *Id.* The report also required APAC to submit a QIP to ACF’s regional office within 30 days of receipt of the report and advised that “[u]nder no circumstances may the period for correction under a QIP exceed one year from the date of notification to the grantee of deficiencies.” *Id.* at 8-9.

APAC submitted a QIP signed by the Chair of its Board of Directors on November 2, 2012. APAC Ex. VII. The QIP describes the “Action Steps” to correct APAC’s “Non Compliances” with paragraph 8.m.(1) as follows:

APAC, Inc. Administrative staff is keeping a Personnel Activity Report (PAR) of all each [*sic*] program they are currently working on to justify the time spent on each funding source. At the end of the each [*sic*] payroll period, a time sheet is prepared by the employees summarizing the hours spent on each fund. This report is signed by the employee and immediate supervisor. The Executive Director’s [*sic*] signs her time sheet and PAR then approved by the Board President.

Id. In addition, the QIP states: “Ongoing PAR is done daily. Time sheets are done bi-monthly. Percentage allocation determined monthly.”⁴ *Id.*

ACF advised APAC in a letter dated December 7, 2012 that “Your QIP appears to indicate an understanding of the deficiency related to Part 230, App[. B, ¶] (8)(m)(1); therefore we approve your QIP.” ACF Ex. 6, at 6. The letter further stated: “We would encourage your agency to regularly review your plan and amend it as needed to ensure that it provides clear direction for the correction of the deficiency within the specified corrective action period.” *Id.* ACF’s letter also informed APAC that “[a] final follow-up review will be conducted immediately following the end of the corrective action period to validate the full correction of the deficiency. If your program continues to have uncorrected deficiencies beyond the corrective action timeframe, OHS [Office of Head Start] will initiate proceedings to terminate the designation of your agency pursuant to section [641A(e)(1)(C)] of the Head Start Act.” *Id.*

On February 28, 2013, ACF conducted a review of APAC’s Head Start program for which ACF issued a report signed by the Director, Office of Head Start, on August 26, 2013. ACF Ex. 3, at 1. ACF found that the deficiency involving uncorrected noncompliance with paragraph 8.m.(1) had not been corrected.⁵ *Id.* at 3. In particular, ACF found that “the actual percentage of time worked for Head Start did not correspond with the portions of the salaries charged to Head Start; rather the charges were based on pre-set allocation percentages.” *Id.* ACF based this finding on a review of the Executive Director’s and Accountant’s daily personnel activity reports for the two most recent pay periods—January 16 to February 15, 2013. *Id.* ACF concluded that APAC “remained out of compliance with” paragraph 8.m.(1) because it “did not ensure the distribution of salaries and wages charged to Head Start were supported by PARS [personnel activity reports] reflecting after-the-fact determinations of total activity.” *Id.*

⁴ This language appears in a column captioned “Timeframe.” The QIP does not specify a timeframe, or date, by which the “noncompliance” described in the QIP (which constituted a deficiency) will be corrected. As noted above, however, ACF’s August 27, 2012 report on the February 2012 review stated that the deficiency based on APAC’s failure to timely correct the noncompliance identified in the May 2011 review “must be fully corrected within six months from the date you receive this report[.]” ACF Ex. 8, at 8. Thus, although not specifically stated in the QIP, the timeframe for completion of the corrective measures set out in that document could not have exceeded the six months allotted by ACF, at least absent any evidence that ACF approved a longer timeframe within the statute’s one-year maximum, and there is no evidence ACF did this. On the contrary, ACF’s subsequent termination letter referred to “the time period specified in the ... notice sent to [APAC] on August 27, 2012.” ACF Ex. 2, at 3.

⁵ The report includes a chart that shows May 1, 2011 as the “Date of Review in which Deficiency was identified.” ACF Ex. 3, at 2. However, it is clear from the text beneath the chart that this was the date on which ACF first found APAC out of compliance with paragraph 8.m.(1) and that this noncompliance was not cited as a deficiency until the follow-up review completed in February 2012. *Id.* at 2-3.

The report on the February 2013 review also stated that ACF determined based on the review that APAC “is a grantee with at least one uncorrected deficiency in its Head Start program,” requiring that ACF “initiate termination proceedings under 42 U.S.C. § 9836A(e)(1)(C) and 45 C.F.R. § 1303.14(b)(4).” ACF Ex. 3, at 1.

In a letter that was attached to the report on the February 2013 review, ACF gave “official notification” to APAC that ACF “is terminating financial assistance under the Head Start Act pursuant to 42 U.S.C. § 9836A(e)(1)(C) and 45 C.F.R. § 1303.14(b)(4)” as a “result” of APAC’s “failure to correct the deficiency within the time period specified in the prior written notice sent to you on August 27, 2012.” ACF Ex. 2, at 3 (8/22/13 letter).

APAC timely appealed the termination and requested an evidentiary hearing. *See* Board’s 10/23/13 Acknowledgment of Appeal at 2. APAC submitted arguments in support of its appeal in the form of an October 3, 2013 letter signed by the President of its Board of Directors, which was accompanied by APAC Exhibits I – IX. On November 22, 2013, ACF filed a “Written Submission to Grantee’s Appeal or, in the Alternative, Motion and Brief in Support of Summary Disposition” (referred to below as “Motion”) and ACF Exhibits 1-22. Pursuant to a December 19, 2013 request by the Board for clarification of the statutory basis for the termination, ACF filed a “Supplement to its Brief Motion and Brief in Support of Summary Disposition” and an additional exhibit, ACF Exhibit 23. In the Supplement, ACF stated that “it is relying on the definition of deficiency as set forth in section 637(2)(C) of the Head Start Act as the basis for its termination of APAC’s Head Start grant.” 12/19/13 Supplement at 2, citing ACF Ex. 23; *see also* ACF Ex. 23, at 1 (Declaration of Regional Program Manager dated 12/19/13). APAC did not file a reply to ACF’s Motion, although the Board notified APAC on several occasions of its opportunity to do so. *See* Board letters dated 10/23/13, at 3; 12/19/13, at 2; and 1/16/14, at 2.

Analysis

ACF moves for summary disposition on the ground that “APAC’s appeal fails to raise any genuine issue of material fact” regarding the basis for the termination, i.e., that APAC failed to timely correct a deficiency. Motion, 1st page. According to ACF, it is undisputed that APAC was not in compliance with the cost principles in paragraph 8.m.(1) at the time of ACF’s May 2011 review and that APAC remained out of compliance with those cost principles at the time of both the review completed in February 2012 and the February 2013 review.

Summary judgment for ACF is appropriate here. APAC does not dispute any of ACF’s specific findings based on the three reviews that the administrative staff salary costs charged to Head Start did not reflect the percentage of time an employee actually spent on Head Start activities. Nor does APAC dispute that ACF properly determined based on

these findings that APAC was not in compliance with paragraph 8.m.(1) of the cost principles in 2 C.F.R. Part 230, Appendix B, and that APAC's failure to correct this noncompliance by the time of the February 2012 review constituted a deficiency. It is also undisputed that ACF notified APAC that it had six months from its receipt of the August 27, 2012 report on the second review to fully correct this deficiency. ACF asserts in its Motion, to which APAC did not reply, that this six-month period ended on February 28, 2013. ACF Motion, 14th page.

Furthermore, APAC does not allege that it corrected the deficiency by February 28, 2013. According to APAC, in April 2013, it allocated administrative staff salary costs for March 2013 among all of the programs operated by APAC based on the staff's personnel activity reports for January and February 2013. 10/3/13 appeal letter, 3rd and 4th pages. However, APAC concedes that it was not until that time that it "began using the percentages of time recorded on the PAR's [personnel activity reports] to figure wages from each funding source rather than using the pre-set percentages from Head Start allocations." *Id.*, 4th page. As indicated above, APAC does not dispute ACF's finding that APAC's use of pre-set allocation percentages to charge administrative staff salary costs to Head Start did not comply with paragraph 8.m.(1). Thus, APAC does not claim to have corrected the deficiency until after the six-month correction period set by ACF had expired.

Under 641A(e)(1)(C) of the Act and the Head Start regulations at 45 C.F.R. § 1304.60(f), ACF is required to terminate a Head Start grant where the grantee fails to correct a deficiency within the prescribed period under the statute and regulations. Thus, as the Board has observed, "As a matter of law, later steps to correct deficiencies still outstanding after a grantee has been given an opportunity to correct cannot remove authority from ACF to terminate based on the failure to timely correct." *Babyland Family Servs.*, DAB No. 2109, at 20 (2007); *see also Jefferson Comprehensive Care System*, DAB No. 2377, at 2 (2011) ("Evidence that a grantee came into compliance with the applicable requirements after the time provided for correction ended does not establish that the grantee corrected its deficiencies.").

In addition, a single uncorrected deficiency is sufficient to warrant termination of funding. *See* 45 C.F.R. § 1303.14(b)(4) (authorizing termination for failure to correct "one or more deficiencies"). In any event, the deficiency at issue here was not a mere technicality. APAC charged administrative staff salary costs to its Head Start grant using pre-set percentages that exceeded the percentage of time each of the individuals in question recorded on their personnel activity reports as spent on Head Start activities. Thus, APAC used Head Start funds for administrative staff salary costs that were allocable to other programs. In so doing, APAC reduced the amount of Head Start funds available for services to children enrolled in the Head Start program. Indeed, APAC does not dispute the assertion of the Head Start Program Specialist assigned to APAC from March 2011 to October 2013 that in May 2012, APAC requested permission (which ACF

denied) “to discontinue providing services to children six weeks early in order to meet payroll.” ACF Ex. 21, at 3-4 (Declaration of Program Specialist dated 11/20/13). Thus, based on the undisputed facts, ACF had authority to terminate APAC’s Head Start funding.

APAC nevertheless appears to take the position that its failure to timely correct the deficiency should be excused because ACF did not provide adequate technical assistance on how to prepare a CAP that would properly allocate administrative staff salaries among APAC’s programs. According to APAC, before the May 2011 review found it out of compliance with paragraph 8.m.(1), ACF requested that APAC develop a CAP.⁶ 10/3/13 appeal letter, 1st page. APAC alleges that after ACF rejected its initial CAP, APAC submitted a second CAP which ACF also rejected even though, in developing the CAP, APAC had followed “in great detail” the recommendations of a consultant ACF had recommended. *Id.* APAC also alleges that it submitted a third CAP to ACF in August 2012 after being told by the Program Specialist in July 2012 that its CAP should split the salaries between all funding sources instead of allocating them only to Head Start and one other program. *Id.*, 2nd page. Soon thereafter, APAC alleges, it received the report on the February 2012 review finding that APAC had a deficiency due to its failure to correct its noncompliance with paragraph 8.m.(1). *Id.* APAC notes that the report required APAC to submit a QIP and points out that the report stated that “the Regional Office will provide training and technical assistance . . . with respect to the development or implementation of the QIP[.]” *Id.* APAC also alleges that the Head Start Program Specialist then “offered to put the APAC staff in contact with . . . a TA [technical assistance] Coordinator, and ask [the TA Coordinator] to come to Marksville to assist them in developing the QIP, or addressing the continued issues with cost allocation.” *Id.*, 3rd page. APAC further alleges that it scheduled the TA Coordinator’s visit for January 2013 but was informed shortly before the scheduled visit that it had to be cancelled “due to budget restraints.” *Id.* Thus, APAC says, “we still had not received guidance or assistance on developing an acceptable Cost Allocation Plan.” *Id.* APAC implies that

⁶ The cost principles that apply to non-profit organizations like APAC do not specify that grantees must have a CAP in order to allocate direct costs among multiple benefitting programs. However, the awarding agency may reasonably conclude that a CAP is necessary to establish that direct costs have been allocated to a particular grant “in accordance with the relative benefits received,” as required by paragraph A.4.a. of 2 C.F.R. Part 230, Appendix A. *See, e.g., The Connector (Making the Connection), Inc.*, DAB No. 2191, at 14-16 (2008) (concluding that Head Start grantee failed to correct deficiency involving allocation of space costs where it did not have a CAP). Here, ACF determined that APAC needed to adopt and implement a CAP to ensure that the administrative staff salary costs APAC charged to Head Start funds were allocated based on the time actually spent on activities that benefitted the Head Start program. Ultimately, ACF also issued a notice of award for APAC’s Head Start grant for the budget period July 1, 2012 through June 30, 2013 that “restricted” COLA (cost of living adjustment) funds for the administrative staff at issue here until an approvable CAP was submitted. ACF Ex. 3, at 9-10 (notice of award signed June 6, 2012). APAC proffered no evidence or testimony to dispute the assertion of ACF’s Grant Management Specialist that as of July 2013, APAC still did not have a CAP ACF found acceptable. *See* ACF Ex. 20 (Declaration of Grant Management Specialist dated 11/19/13) at 3.

ACF should have taken the lack of such assistance into account in its findings on the February 2013 review. *See id.*, 4th page (stating that August 2013 review report makes “[n]o mention” of “Cost Allocation Plans” submitted after the May 2011 review or APAC’s “request for assistance”).

The Act requires that the Secretary “provide, directly or through grants, contracts, or other agreements or arrangements as the Secretary considers appropriate, technical assistance and training for Head Start programs for the purposes of improving program quality and helping prepare children to succeed in school.”⁷ Act § 648(a)(1).

However, nothing in the Act indicates that a failure by ACF to provide adequate technical assistance with matters that have resulted in noncompliance or a deficiency would be a basis for excusing that noncompliance or deficiency. As the Board has previously stated, “allegations of inadequate technical assistance are not sufficient to excuse the failure to comply with requirements.” *Rural Day Care*, DAB No. 1489, at 103; *see also Springfield Action Comm.*, DAB No. 1547, at 11 (1995) (“Ultimately, however, the actual number of [on-site technical assistance] visits provided by ACF is irrelevant to the issue of whether the cited deficiencies at issue here actually existed.”). As the Board pointed out in *Rural Day Care*, “ultimately [the grantee’s] management must take responsibility for not . . . operating a program [that meets] legal requirements.” *Rural Day Care* at 2.

In any event, APAC did not proffer any evidence or testimony to rebut the declaration of the Program Specialist, in which she states that ACF provided training and technical assistance “on developing a Cost Allocation plan to ensure that each program bore its fair share of cost” on November 3-4, 2011 and again on January 26-27, 2012. ACF Ex. 21, at 3. The declaration continues:

TTA [training and technical assistance] was provided by [D.T.], CPA working as a consultant for the OHS Region 6 TA network, and [C.W.], Grantee Specialist with the Region 6 TTA network. Grantee participants included P.B. (assistant executive director), L.F. (fiscal officer) and M.J. (executive secretary/payroll clerk). A second TA visit occurred January 26-27, 2012. This visit was held, in part, because the previous fiscal officer was terminated for inappropriate actions. Grantee attendees during the second TA visit included [B.W.] (executive director), [F.B.] (new fiscal officer) as well as [P.B.] and [M.J.] from the first meeting. The second TTA visit focused on completing the Cost Allocation Plan as well as tracking personnel activity.

⁷ According to the Office of Head Start’s website, to carry out this mandate, ACF provides training funds directly to each grantee to address its own program improvement efforts and also employs training and technical assistance specialists and grantee specialists to assist grantees. *See* <http://www.acf.hhs.gov/programs/ohs/assistance>.

Id. Moreover, as noted above, APAC acknowledges receiving assistance from a consultant with developing a CAP after ACF found APAC's initial CAP unacceptable. Thus, it is undisputed that between August 2011, when ACF issued the report on the May 2011 review, and January 31, 2012, when the next review began, ACF staff and consultants provided four days of technical assistance to APAC. While APAC complains that its second CAP was rejected even though it allegedly followed the consultant's recommendations, APAC does not point to any evidence that the consultant provided incorrect advice.

Furthermore, the October 18, 2012 revised notice of award for APAC's Head Start grant for the budget period July 1, 2012 through June 30, 2013 provided the following guidance on what the applicable cost principles, including paragraph 8.m.(1), require:

Costs must be allocated to all programs of an organization "in accordance with the benefits received", based on Federal Costs Principles (2 CFR 230, Appendix A, Section A.4). This includes your administrative salary costs which must be allocated to all of your agency's programs using an allocation method for each salary cost that is based on the type of work actually being performed by each individual employee. Those cost allocation methods must be included in the agency's Cost Allocation Plan.

All charges to Federal awards for salary costs, whether treated as direct or indirect costs, are required to be supported by Personnel Activity Reports (PAR's) prepared by each employee every pay period throughout the year, based on Federal Cost Principles (2 CFR 230, Appendix B, Cost item #8.m), which account for each day of the pay period and reflect the daily activities of each employee. The actual percentage of time each employee spent working on each program, based on the PAR's, should then be compared periodically (i.e., at least quarterly) to the costs that were charged based on the Cost Allocation Plan, and the accounting record should be adjusted up or down as necessary.

ACF Ex. 6, at 70. APAC does not dispute that it received this notice of award, to which the Program Specialist's declaration expressly refers. *See* ACF Ex. 21, at 4.

APAC does not explain why it needed additional training or technical assistance in order to take the steps described in this notice of award, which might have brought APAC into compliance with paragraph 8.m.(1). Thus, even if inadequate training and technical assistance were a basis for reversing ACF's decision to terminate a Head Start grant (which it is not), APAC has not shown that any such inadequacy was material here.

Finally, we note that APAC asserts that, at some point after August 10, 2012, it suspended payments of Head Start funds to its administrative staff. 10/3/13 appeal letter, 2nd page (“In an effort to comply with the Regional Office’s instructions regarding the Head Start allocation, all Head Start funds paid to administrative staff was suspended until a Cost Allocation Plan was submitted and accepted.”). However, APAC provided no evidence to show how long, if at all, payments were suspended. APAC also did not raise a dispute regarding ACF’s finding that, at the time of the February 2013 review, APAC was charging to Head Start funds salary costs of APAC’s Executive Director and Accountant. In any event, APAC could not have corrected its failure to allocate administrative staff salary costs to the Head Start program in accordance with the cost principles merely by suspending its payments of those costs out of Head Start funds for some unspecified period of time. Adopting and implementing an allocation method ensuring it would comply with those principles was the only way APAC could correct its deficiency.

Conclusion

For the foregoing reasons, we grant ACF’s motion for summary disposition and affirm ACF’s decision to terminate APAC’s Head Start grant.

/s/

Judith A. Ballard

/s/

Constance B. Tobias

/s/

Sheila Ann Hegy
Presiding Board Member