

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: The Connector (Making the Connection), Inc.
Docket No. A-08-96
Decision No. 2191

DATE: August 5, 2008

DECISION

The Connector (Making the Connection), Inc. (The Connector) appealed the May 7, 2008 determination of the Administration for Children and Families (ACF) suspending, for more than 30 days, financial assistance to The Connector under its Early Head Start grant.

For the reasons explained below, we uphold ACF's suspension determination because we conclude that ACF had two independent grounds for its determination, that The Connector has raised no genuine dispute of fact material to those grounds, and that The Connector's procedural arguments have no merit.

Legal Background

Head Start is a national program providing comprehensive developmental services, including health, nutritional, educational, social and other services, to economically disadvantaged preschool children and their families. 42 U.S.C. § 9831 et seq. The Early Head Start Program specifically provides "low-income pregnant women and families with children from birth to age 3 with family-centered services that facilitate child development, support parental roles, and promote self-sufficiency." 45 C.F.R. § 1304.3(a)(8).

The Secretary of the Department of Health and Human Services (HHS) is empowered to establish by regulation performance standards for Head Start services. 42 U.S.C. § 9836a. Early Head Start grantees must comply with these requirements, which are related to administrative and fiscal management and the provision of high quality services responsive to the needs of eligible children and their families. See, e.g., 45 C.F.R. Parts 1301, 1304, 1305, 1306, 1308, 1320.

Under specific circumstances, ACF may suspend an Early Head Start grantee's financial assistance. See 42 C.F.R. §§ 1303.11 (suspension on notice and opportunity to show cause), 1303.12 (summary suspension and opportunity to show cause), 1303.13 (suspension continuing more than 30 days). Section 1303.2 defines "suspension" as a "temporary withdrawal of the grantee's . . . authority to obligate previously awarded grant funds pending corrective action by the grantee."

This suspension was first issued on March 17, 2008 pursuant to section 1303.12(a). Notice of Summary Suspension at 1. Section 1303.12(a) authorizes ACF to issue a suspension--

without prior notice . . . if it is determined that immediate suspension is necessary because of serious risk of:

(1) Substantial injury to property or loss of project funds; or

* * *

(3) If staff or participants' health and safety are at risk.

Under section 1303.12(f), such suspensions may not exceed 30 days unless certain conditions are met, including: "(1) The conditions creating the summary suspension have not been corrected, or (2) The parties agree to a continuation of the summary suspension for an additional period of time." ACF may --

modify the terms, conditions and nature of the summary suspension or rescind the suspension action at any time upon receiving satisfactory evidence that the grantee has adequately corrected the deficiency which led to the suspension and that the deficiency will not occur again.

45 C.F.R. § 1303.12(n).

With three exceptions that do not apply here, suspensions that remain in effect for more than 30 days are subject to section 1303.13. 45 C.F.R. § 1303.12(g). Under section 1303.13, ACF may extend a suspension or issue a suspension for more than 30 days. Section 1303.13(b) provides:

After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may suspend a grant for more than 30 days. A suspension may, among other bases, be imposed for the same reasons that justify termination of financial assistance or which justify a denial of refunding of a grant.

If ACF extends or issues a suspension for a period greater than 30 days, the grantee may (subject to inapplicable exceptions) appeal the suspension to the Departmental Appeals Board. 45 C.F.R. § 1303.13(b). Under section 1303.13(f), the appeal "must be made within five days of the grantee's receipt of notice of suspension [and] must be in writing and it must fully set forth the grounds for appeal and be accompanied by all documentation that the grantee believes is relevant and supportive of its position."

Section 1303.7 of 45 C.F.R. addresses a party's failure to file documents (such as those required under section 1303.13(f)) in a timely manner. It provides in pertinent part:

- (b) Whenever a party has failed to file a response or other submission within the time required in these regulations, or by order of an appropriate HHS responsible official, the party shall be deemed to have waived the right to file such response or submission.
- (c) A party fails to comply with the requisite deadlines or time frames if it exceeds them by any amount.
- (d) The time to file an appeal, response, or other submission may be waived in accordance with Sec. 1303.8 of this part.

Section 1303.8 addresses waiver of the filing requirements and provides:

- (a) Any procedural requirements required by these regulations may be waived by the responsible HHS official or such waiver requests may be granted by the Departmental Appeals Board in those cases where the Board has jurisdiction. Requests for waivers must be in writing and based on good cause.
- (b) Approvals of waivers must be in writing and signed by the responsible HHS official or by the Departmental Appeals Board when it has jurisdiction.
- (c) "Good cause" consists of the following:
 - (1) Litigation dates cannot be changed;
 - (2) Personal emergencies pertaining to the health of a person involved in and essential to the proceeding or to a member of that person's immediate family, spouse, parents, or siblings;
 - (3) The complexity of the case is such that preparation of the necessary documents cannot reasonably be expected to be completed within the standard time frames;

(4) Other matters beyond the control of the party requesting the waiver, such as strikes and natural disasters.

(d) Under no circumstances may "good cause" consist of a failure to meet a deadline due to the oversight of either a party or its representative.

(e) Waivers of timely filing or service shall be granted only when necessary in the interest of fairness to all parties, including the Federal agency. They will be granted sparingly as prompt resolution of disputes is a major goal of these regulations. The responsible HHS official or the Departmental Appeals Board shall have the right, on own motion or on motion of a party, to require such documentation as deemed necessary in support of a request for a waiver.

* * *

(g) The requirements of this section may not be waived.

A grantee bears the burden of proof in showing that it has complied with applicable standards. First State Community Action Agency, Inc., DAB No. 1877, at 9 (2003); Rural Day Care Association of Northeastern North Carolina, DAB No. 1489, at 8, 16 (1994), aff'd, Rural Day Care Ass'n of Northeastern N.C. v. Shalala, No. 2:94-CV-40-BO (E.D. N.C. Dec. 19, 1995).

Factual Background

On March 17, 2008, ACF notified The Connector that it was summarily suspending its Early Head Start Grant. Notice of Summary Suspension. Simultaneously, ACF appointed an interim grantee to administer the grant during the suspension. Id. ACF informed The Connector that based on ACF's on-site monitoring visits performed February 19-22, 2008 and March 6, 2008, additional information from a parent, and documentation from the Georgia State Day Care Licensing Consultants, ACF had concluded that The Connector had "areas of non-compliance with Head Start Performance Standards that pose serious risks of loss of project funds and to the health and safety of children enrolled and staff working in your Early Head Start program." Id. at 1. The Notice listed ACF's findings as to these allegations of noncompliance and the related Early Head Start Performance Standards. The findings concerned the physical safety of the premises; inadequate training related to dishwashing; fiscal improprieties related to rental charges and allocation of rental costs, including the lack of a cost allocation plan for rental costs; and noncompliance with Georgia licensing standards for day care providers.

On April 14, 2008, ACF convened a show cause meeting "to allow The Connector to present material, information, and any other evidence to support its position that [ACF] should rescind the summary suspension." Notice of Continuation of Suspension at 1. ACF's summary of that meeting states:

Representatives of The Connector made a presentation, under 45 C.F.R. 1303.12(i), that addressed the financial and safety violations cited in the Notice of Summary Suspension including presentation of material characterized as a Corrective Action Plan supporting its view that the grantee had corrected or planned to correct the deficiencies which led to the summary suspension. For most of the areas cited in the Notice of Summary Suspension, The Connector's proposed Corrective Action Plan stated the agency's intention to correct the violations "immediately upon re-assumption" of the grant. Furthermore the grantee states that it had already corrected some of the safety violations.

Id. at 1. The parties agreed to a three-week extension of the summary suspension until May 9, 2008 so that ACF could "validate that corrections had been implemented." Id.

On April 8 and 21-22, ACF representatives conducted on-site visits to The Connector to verify corrections. As a result of these visits, ACF notified The Connector on May 7 that The Connector --

has not adequately corrected areas of program performance which led to the suspension, has ongoing system and substantial material failures in the areas of performance posing a threat to the health and safety of children as well as to the integrity of Federal funds, and has not provided sufficient evidence that conditions creating the summary suspension will not occur again.

ACF Continued Suspension at 1. According to ACF, The Connector's failure included -

- a "continuing inability to establish that costs are allocated or will be allocated to the Early Head Start grant in proportion to the benefits received by the Early Head Start program";
- a failure to have made "all of the corrections claimed by The Connector";

- a finding by ACF that The Connector's Corrective Action Plan "addressing future corrections upon 're-assumption of the grant' [was] inadequate and it did not address the agency's ongoing monitoring and/or management oversight at the Executive or Board level."

Id. at 2.

In the Notice of Continuation of Suspension, ACF informed The Connector of its right to appeal within 5 days of receipt of the notice and the requirements for such an appeal. Id.¹

The Connector appealed the continuation of suspension pursuant to section 1303.13(f). The appeal was received by the Board on May 13, 2007. The appeal consisted of a three-page letter with no attachments. A Board paralegal contacted The Connector and requested a copy of the ACF letter suspending the Early Head Start grant. On May 20, 2008, The Connector faxed to the Board the ACF "Notice of Continuation of Suspension" dated May 7, 2008 and part of the ACF March 17, 2008 Notice of Summary Suspension. (The missing pages were subsequently faxed.) The May 20 fax transmittal cover stated "Additional information is being sent under separate cover."

On May 23, 2008, the Board issued a letter acknowledging receipt of The Connector's letter of appeal and subsequently faxed documents. It instructed The Connector as follows:

The Connector should immediately inform [the Board staff attorney] whether and when it transmitted the "additional information" referenced in the fax cover. . . . If it has not transmitted this material, it should do so immediately.

Board Acknowledgment Letter at 3.

¹ On May 5, 2008, ACF issued a report entitled "Overview of Findings." ACF referred to this report in its Notice of Continuation of Suspension. In the acknowledgment letter, the Board directed ACF to file a copy of the document, which ACF did. The report summarizes the findings of ACF reviewers for on-site reviews conducted August 19-24, 2007, April 18, 2008, and April 21-22, 2008. Among other things, it sets forth 16 deficiency findings, requires these deficiencies to be corrected within 30 days of receipt of the report, and informs The Connector that its Early Head Start grant will be terminated unless full correction is made.

As of June 9, 2008, the Board still had not received any such material from The Connector, nor had The Connector contacted the Board staff attorney or provided any reason why it had not submitted the additional information. Based on her preliminary analysis of The Connector's appeal, the Presiding Board Member determined that The Connector had failed to allege facts and to submit documentation that would provide a basis for the Board to conclude that The Connector has adequately corrected all of the conditions that led to the suspension and that the conditions will not occur again. The Board therefore issued an order, dated June 9, 2008, directing The Connector to show cause in writing, within 30 days, why the Board should not determine that no hearing is needed in this case and issue a decision upholding ACF's continuation of the summary suspension.

On July 8, 2008, The Connector responded to the Board's Order to Show Cause (Order) and submitted a package of documents, including its April 14, 2008 PowerPoint presentation to ACF of its corrective action plan.

In response to the Order, The Connector states that it is "appealing the suspension based on the fact that only one of the deficiencies violated Head Start directives and only two of the deficiencies were actually a violation at the time of the suspension." Response to Order at 1. The Connector also says it is pursuing its appeal based on the following: "(1) we were never given notice by Head Start that we were deficient in any area prior to suspension; and (2) there has been no opportunity given by Head Start to cure prior to suspension." Id.

Discussion

Below, we first discuss whether to waive The Connector's failure to timely submit its documents, finding that The Connector did not show good cause for the delay. We then discuss the grounds for the suspension, upholding ACF on two independent grounds for which The Connector raised no material dispute of fact.² Finally, we discuss The Connector's procedural arguments.

² In a case in which ACF denied refunding of a Head Start grant, the Board determined that no hearing was required because the grantee had not shown, in response to a Board order, that there was any genuine dispute of material fact. Campesinos Unidos, Inc., citing Travers v. Shalala, 20 F.3d 993, 998 (9th Cir. 1994); see also Camden Council on Economic Opportunity, DAB No. 2116 (2007).

1. The Connector's supporting documents were not timely submitted and The Connector has not shown good cause for a waiver.

The Board's Order noted that The Connector was required to file an appeal within five days of its receipt of the Notice of Continuation of Suspension, to "fully set forth the grounds for the appeal" and to submit "all documentation that the [appellant] believes is relevant and supportive of its position." 45 C.F.R. § 1303.13(f) (emphasis added). The Order contained the following directive:

If the Connector files documentation (such as its Plan of Correction) with its response to this order, it must request leave to file such evidence pursuant to section 1303.08 and show good cause why this material was not filed within 5 days of receipt of the Notice of Continuation of Suspension.

Order at 11-12. In response to the Order, however, The Connector gave no reason why it could not have submitted its documentation with its appeal.

The Head Start appeals regulations set out above modify the Board's normal procedures to provide for prompt resolution of disputes. The regulations limit the Board's authority to waive regulatory requirements by narrowly defining what constitutes "good cause" warranting a waiver. The regulations also provide that a party will be deemed to have waived the right to file a response or submission if it fails to timely file the response or submission.

Here, while The Connector timely filed a written appeal, dated May 9, 2008, setting forth its alleged grounds for appeal, the appeal was not accompanied by any documentation, much less all of the documentation on which The Connector is now relying. Other than copies of the suspension notices, the Connector did not submit any supporting documentation to the Board until July 8, 2008, two months after submitting the appeal. Despite the clear regulatory requirements and the Board's Order setting out those requirements, moreover, The Connector still has stated no reason why it could not have submitted the documents sooner.³

³ The Connector says the Order indicates that The Connector was "faxed a document and requested whether and when we transmitted additional information" but "[n]o such fax was ever
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The Connector's response to the Order does refer to the "large volumes of documents . . . being shipped under separate cover." Response to Order at 4. The Connector does not, however, assert that it was unable to gather or to send the documents sooner because of the volume or some other barrier beyond its control and, in fact, says that it provided the documents to "the reviewers during our June, 2008 Monitoring review." Id.

Since The Connector did not show good cause for its failure to timely submit its additional documents, The Connector is deemed to have waived its right to rely on those documents to support the merits of its appeal.

2. The undisputed, material facts show that ACF had at least two independent grounds for continuing the suspension.

The Order concluded preliminarily that, in order to prevail in this appeal, The Connector would have to prove with respect to each of the independent grounds for suspension of the grant award (1) that the conditions on which ACF originally relied did not exist; or (2) that those conditions did not pose a serious risk of loss of project funds or to the health and safety of staff or participants (section 1302.12(a)); or (3) that The Connector had provided to ACF during the show cause hearing or subsequent on-site reviews "satisfactory evidence" that it had "adequately corrected [each] deficiency which led to the suspension and that the deficiency will not occur again" (section 1303.12(n)). In response, The Connector did not disagree that this sets out the framework for our analysis of the suspension. We therefore apply it below.

³(...continued)

received by this office." Response to Order at 4. The Order, however, did not refer to a fax to The Connector, instead citing page 3 of the Board's May 23 acknowledgment letter, which referred to the fax cover sent by The Connector to the Board noting that The Connector was sending additional information under separate cover. The Board's records include a receipt card indicating receipt of the acknowledgment letter on June 6, 2008.

a. The Connector did not show that it adequately and timely provided satisfactory evidence that it had corrected a deficiency in meeting Head Start requirements for physical environment, which posed a serious risk to the health and safety of staff or participants, and that the deficiency would not occur again.

ACF based the suspension in part on safety problems posed by the physical condition of The Connector's South Fulton location. Among other things, ACF alleged that water for one classroom (described as the pink room) was brought into a sink in the room through a hose that was connected to an outside water source, that water from the sink was collected in a bucket under the sink, that the "water under the sink was dirty, stagnant and unsanitary," and that the cabinet containing the bucket did not have a child-proof lock. Notice of Summary Suspension at 3.

The Connector, in its appeal, stated that ACF had misdescribed the location of the sink as in the pink rather than in the lilac room. The Connector asserted that "this sink has been in this room since July, 2003. While this does not give approval to this being appropriate, there is a concern that neither the triennial review of 2004 & 2007 cited this as a violation." Appeal letter at 2.

The Board's Order noted that this response does not provide a basis on which the Board could find that The Connector has corrected the safety problem posed by the condition of this sink. The Board's Order also addressed The Connector's assertion that it could not implement some corrective actions while the interim grantee was in place, noting that The Connector had not shown why it could not fix the sink while the interim grantee manages the program. The Order further noted that, under the regulations, the fact that the grantee's funding has been suspended does not absolve it or prevent it from using its own funds to correct unsafe conditions, nor has The Connector explained why it could not adopt policies to prevent such conditions from occurring in the future. Finally, the Order noted that The Connector had not even described how it would correct the problem with the sink even if the suspension were lifted.

The Connector's response to the Order on this issue was:

The room with no sink with running heated water. As we pointed out in our earlier correspondence[, it] had never been cited by Licensing; was not cited in the August, 2007 triennial review which we finally received

nine months later; and had not been cited in the previous review of August, 2004. If it in fact was a violation and had been pointed out, it would have been corrected. We beg to differ with you regarding our incurring the expense of having this expensive plumbing work done while we are under suspension. The cost exceeds \$5,000 in a building that we don't own; the lease agreement will expire in two years with a likelihood that it will not be renewed; and not to mention that we don't have control of the program with no indication of when or if it will be returned to us. Even if we had the funds, that would not be a wise business decision.

Response to Order at 2. The response also refers to "the room with no running water" as the deficiency that it alleges "did not violate a Head Start directive." Id. at 1.

This response does not provide a basis for reversing the suspension. First, contrary to what The Connector suggests, there is no question that the facts alleged by ACF regarding the sink (which were undisputed by The Connector) establish a violation of Head Start requirements. Head Start Performance Standards at 42 C.F.R. Part 1304, include the following provision, in relevant part:

(a) Head Start Physical Environment and Facilities

* * *

(10) Grantee and delegate agencies must conduct a safety inspection, at least annually, to ensure each facility's space, light, ventilation, heat, and other physical arrangements are consistent with the health, safety and developmental needs of children. At a minimum, agencies must ensure:

* * *

(viii) Indoor and outdoor premises are cleaned daily and kept free of undesirable and hazardous materials and conditions;

* * *

(xiii) Only sources of water approved by the local or State health authority are used;

(xiv) Toilets and handwashing facilities are adequate, clean, in good repair, and easily reached by children. .

. . . ;

* * *

(xvi) All sewage and liquid waste is disposed of through a locally approved sewer system, and garbage and trash are stored in a safe and sanitary manner;

45 C.F.R. § 1304.53.

This regulation clearly placed a duty on The Connector to inspect the facilities (whether or not owned by The Connector) and to ensure that only sources of water approved by the local or State health authority are used, that all sewage and liquid waste is disposed of through a locally approved sewer system, that handwashing facilities are in good repair, and that the premises are kept free of hazardous materials and conditions. The alleged fact that licensing authorities had not previously cited the conditions surrounding the sink as a violation of state or local requirements is not tantamount to approval of the source of the water or of the means of disposal. Moreover, The Connector does not allege that either licensing inspectors or ACF reviewers were even aware of these conditions previously. The ACF review report notes that, since the sink had faucets, it appeared as if water was available. Review Report at 14.

Second, The Connector does not deny that the conditions surrounding the sink posed a serious risk to the health and safety of staff or participants. Indeed, the review report notes and The Connector does not deny that it had posted signs above the sink in both English and Spanish warning: "Do not drink water." *Id.* at 14. The Connector does not assert that the Early Head Start children - who were no older than 3 years old - could read this warning and would know not to drink this water or the stagnant, unsanitary water under the sink.

Finally, The Connector's general assertion that "all of the conditions alleged in the summary suspension have been corrected" is contradicted by its admission that the sink has not been repaired. The Connector seeks to excuse its failure to correct by arguing that it does not own the facility and that it would not be wise to spend the over \$5,000 needed to correct the problem since it only has a lease on the facility, the lease runs only two more years, and The Connector has no assurance it will reassume management of the program. These arguments are not persuasive, in light of the nature of the problems and the risk to staff and participants.⁴

⁴ We note that, while The Connector says it would not be wise to spend its own funds on the repair (despite the safety
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Moreover, The Connector has not timely provided or proffered any evidence that it had, prior to the continuation of the extension, adopted policies and procedures to prevent such a safety problem from occurring again. Indeed, The Connector does not specifically assert that it had adopted such policies and procedures prior to the date ACF continued the suspension for more than 30 days. The Connector acknowledges that the documents it submitted to the Board late were developed with technical assistance and provided to ACF in June 2008.⁵ Response to Order at 4. Thus, we conclude, The Connector has raised no genuine dispute of fact regarding whether it provided to ACF satisfactory evidence that it had corrected the deficiency and that the unsafe conditions would not occur again.

Overall, The Connector's response to the findings raises a question about whether the grantee is sufficiently familiar with the Head Start requirements regarding physical environment to provide adequate assurance even now that there would be no serious risk to staff or participant health or safety if funding were resumed, much less that it provided such assurance to ACF prior to continuation of the suspension.

Thus, we conclude on the record properly before us that there is no genuine dispute of material fact regarding the deficiency in meeting physical environment requirements, and we uphold ACF's suspension on this ground.

⁴(...continued)
risk), The Connector does not claim it sought authorization from ACF to spend federal funds for that purpose. See 45 C.F.R. § 1303.11(i)(obligations incurred during suspension period not allowed "unless the grantee agency expressly authorizes them in the notice of suspension or an amendment to it").

⁵ The Connector's appeal letter faulted ACF for not providing it with technical assistance prior to continuing the suspension, but this does not excuse The Connector's failure to take steps to correct an obvious violation of safety requirements.

b. The Connector was improperly allocating rental costs of another program to Early Head Start funds, thus posing a serious risk of loss of federal funds, and did not provide satisfactory evidence to ACF that it adequately and timely corrected this deficiency and that the deficiency would not occur again.

Grant administration requirements at 45 C.F.R. Part 74 are applicable to Early Head Start grantees. 45 C.F.R. § 1301.10. Standards for financial management systems include that the systems provide for:

Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

45 C.F.R. § 74.21(a)(6). The cost principles applicable to non-profit organizations such as The Connector are in Office of Management and Budget Circular A-122, now codified at 2 C.F.R. Part 230. 45 C.F.R. § 74.27. One of the basic considerations in determining what costs may be charged to federal funds is whether the costs are allocable to the federal award. Specifically, the cost principles state:

(a) A cost is allocable to a particular cost objective, such as a grant, contract, or other activity, in accordance with the relative benefits received. A cost is allocable to a Federal award if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

* * *

(2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received, or

2 C.F.R. Part 230, App. A, § (A)(4).

ACF found that The Connector failed to properly allocate rental costs for its North Fulton Center between its Early Head Start program and other activities, did not have a cost allocation plan in place to determine space costs for its North Fulton Center, was making a \$13,037.22 monthly profit on the amount of rent charged to the Early Head Start program, was exceeding the amount budgeted for rent in the grant, and was improperly charging rent rather than depreciation or a use allowance for the center, even though it was owned by The Connector. Notice of Summary Suspension at 4. After the April meeting and on-site reviews,

ACF concluded that there was "a continuing inability to establish that costs are allocated or will be allocated to the Early Head Start program in proportion to the benefits received" Notice of Continuation of Suspension at 2.

In its appeal letter, The Connector admitted the rent was improperly allocated, stating that it "does not deny the inappropriate process for allocating cost or failing to utilize the appropriate procedure for determining rental cost for the building that we own" Appeal letter at 1. The Board's Order noted that, while The Connector faulted ACF for not discussing or considering what The Connector referred to as its "future plan for allocation," The Connector did not specifically allege that it had adopted and approved a cost allocation plan that would properly allocate costs in the future. The Order also noted that, in context, the reference to "the future plan for allocation" could simply be referring to the corrective action plan submitted to ACF, rather than to a cost allocation plan - that is, a plan specifying the methodologies The Connector will use to ensure that the Early Head Start program bears only the costs that benefit it. The Connector, the Order noted, appeared to be relying primarily on its argument that continuing the suspension when there has been no "opportunity to implement the plan" would be "unfair." Id.

The Order preliminarily concluded that The Connector's assertions would not provide a basis on which the Board could find that The Connector had corrected the fiscal management practices with respect to cost allocation cited by ACF and that these practices no longer pose a serious risk to federal funds. The Order noted that, while The Connector alleged that it cannot "implement" fiscal changes when it is not managing the program, The Connector did not explain why it could not have developed and adopted policies and procedures for fiscal management and proper allocation of costs to the Early Head Start program, nor did it submit to the Board any such policies or procedures for the Board to review to determine whether they adequately addressed the risk to federal funds. The Order also preliminarily concluded that only a written cost allocation policy and methodology would protect the integrity of federal funds.

The Connector's response to the Order does not address the problem, other than to identify it as one of the two deficiencies that was "actually a violation at the time of the suspension" and to assert generally that "all of the conditions alleged in the summary suspension have been corrected." Response to Order at 1, 4. The response does not allege that The Connector had developed fiscal policies and a cost allocation plan (including a

methodology for allocating space costs) by the date that ACF continued the suspension or otherwise assert that it had timely provided satisfactory evidence that the deficiency would not occur again. Finally, The Connector does not dispute the ACF determination that this deficiency posed a serious risk to project funds.

Thus, we conclude on the record properly before us that there is no genuine dispute of material fact regarding the deficiency in meeting fiscal requirements regarding allocation of space costs and that this deficiency provides an independent ground for the suspension.

c. While The Connector disputes some of ACF's other findings, those disputes are not material since each of the two bases discussed above is adequate to support ACF's determination to continue the suspension.

The Board's Order noted that the only factual findings from the suspension notice that appeared to be disputed in The Connector's appeal related to whether The Connector's pest control practices met standards, whether its cook had been trained in the three-sink method of washing dishes, and whether the wrong milk was given to a child by staff of The Connector. Order at 7-8. The Order noted that the undisputed findings, such as those related to the sink and cost allocation issues, appeared to establish sufficient grounds for suspension to the extent they pose a serious risk of loss of project funds or to staff and participant health and safety. Id.

In response to the Order, The Connector does raise some additional disputes with respect to ACF's other findings and does claim with respect to some findings that the issues were corrected when noted by the licensing inspectors and/or that the finding "does not rise to the level of suspension." Id. at 2-3. We do not agree with all of the evaluations by The Connector regarding the seriousness of the admitted failures. Also, while The Connector alleges that the suspension was based "primarily on licensing matters that had already been corrected prior to the suspension" and, "in most cases," while the licensing representative was present, The Connector's discussion of some of the individual licensing matters is vague on when the problem was in fact corrected. Id. at 1. For example, with respect to licensing findings regarding staff not washing hands following each diaper change, staff leaving the room to go to the bathroom (so that the staff to child ratio was inadequate), and the lack of safe storage for cornflakes, Cheerios, and taco shells, The Connector merely alleges that training was provided, without

specifying when the training was provided. Id. at 2-3. Thus, it is not clear that The Connector is alleging that all of the licensing matters had been corrected prior to the continuation of the suspension. We do not need to resolve these issues, however, since we have concluded above that the failures to timely correct the physical environment and cost allocation deficiencies each provided an adequate basis for continuing the suspension.

3. The Connector's procedural and other challenges to ACF's actions have no merit.

In its appeal, The Connector alleged that ACF officials have exhibited bias in their treatment of its staff and parents in the program. Appeal letter at 2-3. The Board's Order noted that the Board provides a de novo review in which the Board determines whether ACF had grounds under the applicable regulations to suspend the grant, and that the Board, when appropriate, will review allegations of bias to the extent they might undercut the veracity of a reviewer's factual reporting. The Order further noted, however, that the Board will not reach questions of bias if the grantee does not dispute material facts on which ACF based its suspension or show why reviewer bias prevents it from doing so. In response to the Order, The Connector did not pursue its argument regarding bias.

As noted above, however, The Connector says in response to the Board's Order that The Connector is pursuing its appeal based on the following: "(1) we were never given notice by Head Start that we were deficient in any area prior to suspension; and (2) there has been no opportunity given by Head Start to cure prior to suspension." This argument has no merit. As noted above, section 1303.12(a) of the Head Start regulations authorizes ACF to issue an immediate suspension "without prior notice" if ACF determines such suspension is necessary because of serious risk of loss of project funds, or because of a risk to staff or participants' health and safety. For reasons stated above, we have concluded that this standard was met here. In addition, after providing the notice of the summary suspension on March 17, ACF conducted a show cause hearing on April 14, 2008 and site visits on April 8 and 21-22, before issuing the March 7 notice that it was continuing the suspension for more than 30 days. Thus, The Connector had an adequate opportunity to correct the deficiencies, after receiving notice that ACF considered them to be deficiencies warranting suspension, before the suspension was continued. This is consistent with the regulatory procedures.

Conclusion

For the reasons stated above, we conclude that there is no need for an evidentiary hearing in this case and uphold the determination by ACF continuing the suspension beyond 30 days. Our decision on the merits is based on the record timely submitted to us in the appeal of the suspension. If ACF terminates The Connector's grant, any decision on appeal of the termination would be based on the record for that appeal. The Board may, however, incorporate part or all of the record from the suspension appeal into any later appeal, after giving the parties notice and an opportunity to comment. 45 C.F.R. § 16.21.

_____/s/
Sheila Ann Hegy

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member