

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Teaching and Mentoring Communities, Inc.
Docket No. A-16-134
Decision No. 2790
May 15, 2017

DECISION

This appeal is a sequel to an earlier appeal filed by Teaching and Mentoring Communities, Inc. (TMC), a Head Start grantee. In the prior appeal, the Board sustained a 2014 determination by the Administration for Children & Families (ACF) to disallow \$811,572 in “risk management” costs that TMC had charged to its Head Start awards for fiscal years 2010 through 2013. *Teaching and Mentoring Communities, Inc.*, DAB No. 2636 (2015). The bulk of those costs were subject to disallowance, the Board found, either because they were not properly assigned to a risk management cost pool or because they had not been allocated equitably (or shown to have been allocated equitably) among TMC’s Head Start programs and other organizational functions, or both. Because some of the costs might nevertheless have been allowable had they been allocated equitably outside of the risk management cost pool, the Board explained that its decision did not preclude TMC from proposing to ACF a different allocation methodology.

After the Board issued its decision, TMC proposed to reallocate some of the disallowed costs. Based on that proposal, ACF issued a revised disallowance determination on August 3, 2016. That determination reduced the disallowance applicable to TMC’s Head Start awards for fiscal years 2010-2013 from \$811,572 to \$262,485.

TMC now appeals the August 3, 2016 determination. It seeks a further reduction in the disallowance – from \$262,485 to \$118,785 – contending that it has already “repaid” the Department of Health & Human Services (HHS) for the difference (\$143,700).

We sustain the August 3, 2016 disallowance determination and hold that TMC must present its repayment claim to the appropriate HHS officials as part of the claims collection process under 45 C.F.R. Part 30.

Background

TMC operates Head Start and Migrant and Seasonal Head Start programs. We use the term “Head Start” to refer to both programs, unless otherwise indicated.

The parties' ongoing dispute stems from an ACF-commissioned audit of TMC's internal risk management fund. DAB No. 2636, at 3. The fund was a vehicle for pooling TMC's insurance costs – mainly worker's compensation premiums and claims payments – for eventual reallocation to its various child care and education programs. *Id.* at 2-3. TMC allocated the costs pooled in the risk management fund by applying risk management charges (calculated using modified worker's compensation premium rates) to its Head Start programs and to other organizational "cost objectives." *Id.* at 3. TMC recorded those charges as "revenue" to the risk management fund. *Id.* The audit sought to verify that TMC's risk management charges during fiscal years ending in 2010 through 2013 were allowable under the terms and conditions of its Head Start awards for those years. *Id.* at 1 n.1, 3.

The risk management fund was supposed to operate on a "break even" basis – meaning that, for each reporting period, the fund's revenues (amounts charged to TMC's Head Start programs and other functions for risk management) and expenses (the fund's accumulated costs) were supposed to be in balance. *Id.* at 3. However, ACF's auditor found that the fund "operated at either a profit or loss in all of the years analyzed" and that TMC's Head Start awards had been either "overcharged (in years when the fund showed a positive balance) or undercharged (in years when the fund showed a negative balance) for worker's compensation insurance and related risk management costs." *Id.* at 3, 4. The auditor determined that the cumulative net overcharge – that is, the extent to which risk management revenue exceeded risk management costs – across the four-year period examined was approximately \$230,720 and that TMC's Head Start programs had absorbed \$146,472 of that overcharge. *Id.* at 4.

ACF's auditor also found that TMC had improperly pooled in the risk management fund – and thus improperly allocated to Head Start – \$159,151 in consultant's fees and \$505,949 in salary costs that were unrelated to risk management. *Id.* at 4-5. The auditor suggested that some of those costs would have been allowable had they been "direct charged" or allocated from TMC's indirect cost pool based on its negotiated indirect cost rate.¹ *Id.*

¹ "Indirect costs are those expenses that benefit common objectives and therefore cannot be readily assigned to a specific cost objective or project. At nonprofit organizations, such costs normally are classified into one overall pool of costs. This pool is then divided by the allocation base the nonprofit organization has chosen in order to calculate a rate." *Council for Econ. Opportunities in Greater Cleveland*, DAB No. 1980, at 2 n.2 (2005) (quoting the "Review Guide for Non-Profit Organization's Indirect Cost Proposals" published by HHS's Division of Cost Allocation (now known as Cost Allocation Services)).

Based on the audit's findings, in 2014, ACF disallowed \$811,572 in costs charged to TMC's Head Start awards for fiscal years 2010-2013. *Id.* at 5. The amount disallowed was the sum of the \$146,472 risk management overcharge, plus the \$159,151 in consultant's fees and \$505,949 in salaries found to have been improperly pooled in, and allocated from, the risk management fund. *Id.*

The Board's 2015 decision upheld the disallowance in its entirety. *Id.* at 1, 13. The Board found that TMC had overcharged its Head Start programs for risk management by \$146,472, in violation of the federal cost principle that federal awards, such as TMC's Head Start grants, be charged only for reasonable costs. *Id.* at 6-8. The Board also held that the consultant's fees and employee salaries questioned by the auditor were subject to disallowance because TMC had not shown that its method of allocating those costs through the risk management fund complied with applicable federal cost principles. *Id.* at 9, 11-12. The Board advised the parties that its decision did not preclude TMC from proposing to reallocate the consulting fees and salary costs using a different, appropriate method or preclude ACF from reducing the disallowance based on an acceptable reallocation. *Id.* at 12.

Following the Board's decision, TMC submitted to ACF a proposal to reallocate the disallowed salary costs. TMC Ex. 1, at 2. The proposal called for moving those costs from the risk management fund to TMC's indirect cost pool; recalculating the indirect cost rate (a ratio of indirect to direct costs) for fiscal years implicated by the disallowance; then using the adjusted rate(s) to recalculate the Head Start programs' allocable share of indirect costs for those years.² *Id.* ACF accepted the proposal and issued the revised disallowance determination now before us. *Id.* at 1-2.

The revised determination states that TMC may charge its Head Start programs an additional \$549,087 in indirect costs for the fiscal years ending on January 31, 2011, January 31, 2012, and January 31, 2013 – "leav[ing] a net disallowance of \$262,485 (\$811,572 [minus] \$549,087)." *Id.* at 2. ACF also advised TMC that it "must repay the total \$262,485 disallowed amount" by check payable to HHS. *Id.* at 3.

² ACF indicated in its disallowance letter that it sent TMC's reallocation proposal to Cost Allocation Services, the HHS office responsible for negotiating indirect cost rates for non-profit organizations that receive federal grant funding. There is no evidence that Cost Allocation Services found any deficiency in TMC's cost reallocation proposal.

TMC's Appeal

In this appeal, TMC does not dispute the validity of the remaining disallowance, but instead effectively contends that it has already “repaid” HHS for \$143,700 of the disallowed costs. *See* Appellant’s Reply Brief in Support of Appeal (Reply) at 1; Appellant’s Brief in Support of Appeal (TMC Br.) at 1, 10. In support of that claim, TMC has submitted accounting records and other evidence that, it says, establish the following facts.

Beginning in its fiscal year 2015 (the 12-month period ending on January 31, 2015), TMC changed how it operated the risk management fund by “collect[ing] risk management revenue from its cost objectives based solely on rates established by TMC’s worker’s compensation insurer.” TMC Br. at 3. This changed practice continued through fiscal year 2016. *Id.* For fiscal year 2016, TMC’s risk management expenses exceeded risk management revenue (the amounts that TMC charged Head Start and other cost objectives) by \$50,807.03. *Id.* at 2, 4, 6. Of the \$50,807.03 in excess risk management costs incurred by TMC for fiscal year 2016, \$49,845.49 were allowable costs under its Head Start awards for those years, as follows:

Allowable FY 2016 Excess Risk Management Costs

Migrant Seasonal Head Start (“MSHS”) Grant No. 90CM6896	\$ 41,909.04
 Starr-Zapata Head Start and Early Head Start (“Starr-Zapata”) Grant No. 06CH7181	 \$ 4,972.69
 Victoria Head Start (“Victoria”) Grant No. 06CH7061	 <u>\$ 2,963.76</u>
	Total: \$49,845.49

TMC Br. at 6, 7, 9.³ TMC paid these costs with a portion of the risk management fund’s “surplus.” *Id.* at 2. That surplus, according to TMC, represented funds generated by the disallowed risk management overcharges (totaling \$146,472) during fiscal years 2010-2013. *Id.* at 4 (stating that the surplus consisted of “the precise funds that have been disallowed here”).

³ The figures in the table were calculated using percentage estimates of each program’s “participation” in the risk management fund. TMC Br. at 4-6.

After using a portion of the risk management fund surplus to pay excess fiscal year 2016 risk management costs, TMC “closed the Risk Management Fund and refunded the remaining surplus, in the amount of \$95,664.89 to its cost objectives [which included its Head Start programs, two state-funded early childhood education programs, and its indirect cost pool] . . . according to the proportion by which each cost objective had contributed to the Risk Management Fund.”⁴ TMC Br. at 2, 3, 4-6. The “refunds” applied to TMC’s fiscal year 2016 Head Start program accounts totaled \$93,854.38, as follows:

Head Start Program Refunds After Risk Management Fund Closure

MSFS (Grant No. 90CM6896):	\$78,910.79
Starr-Zapata (Grant No. 06CH7181):	\$ 9,363.10
Victoria (Grant No. 06CH7061):	<u>\$ 5,580.49</u>
Total:	\$93,854.38

In short, TMC submits that, as of fiscal year 2016, TMC’s risk management fund had a surplus of \$146,472; that it used \$49,845.49 of that surplus to pay allowable risk management costs of its Head Start programs for fiscal year 2016; and that it credited an additional \$93,854.38 of the surplus to its Head Start program accounts for fiscal year 2016. The sum of these alleged expenditures and credits is approximately \$143,700 (rounded to nearest dollar):

Disposition of Risk Management Fund Surplus

Payment of FY 2016 Risk Management Expenses:	\$ 49,845.49
Crediting of FY 2016 Head Start Program Accounts:	<u>\$ 93,854.38</u>
Total:	\$143,699.87

TMC asserts that its use of the risk management fund surplus resulted in TMC’s Head Start programs “drawing down, in fiscal year . . . 2016, less federal money than it was entitled to draw down” and should therefore be treated as a “repayment of a portion of the disallowance.” Reply Br. at 3 (asserting that its actions “are functionally equivalent to

⁴ As noted in the text, TMC alleges that it used \$50,807.03 of a risk management fund surplus to pay excess fiscal year 2016 risk management costs that were allocable to both Head Start and non-Head Start objectives; and that it refunded the “balance” of the surplus – \$95,664.89 – to its Head Start programs and other “cost objectives” after closing the fund. The sum of \$50,807.03 and \$95,664.89 is \$146,472 (rounded to the nearest dollar), which is equal to the disallowed risk management overcharge to TMC’s Head Start grants for fiscal years 2010-2013.

writing a check to ACF in the amount of \$143,700 . . . and then drawing down \$143,700 in additional federal funds for the allowable and allocable costs TMC incurred in FY 2016”). TMC asks the Board to “reduce” the disallowance by \$143,700 and issue a “revised disallowance . . . in the amount of \$118,785.” Reply Br. at 5.

In response to the appeal, ACF contends that the Board should fully sustain the disallowance because TMC’s allegations show that it “violated 45 C.F.R. § 74.28 [by using] \$143,700 in Head Start grant funds awarded in earlier funding periods [fiscal years 2010-2013] to cover obligations incurred in a later funding period [fiscal year 2016].” Agency’s Brief in Support of Disallowance (Response Br.) at 6-7.

Discussion

We first clarify the issue now before us. In its August 3, 2016 decision, from which the appeal was taken, ACF determined that \$549,087 of the \$811,572 in costs charged to TMC’s Head Start awards for fiscal years 2010-2013 but disallowed in 2014 are now – as a result of cost reallocation – allowable costs under those awards. TMC Ex. 1, at 2. ACF further determined that the balance of the previously disallowed costs – totaling \$262,485 (or \$811,572 minus \$549,087) – remains unallowable based on audit findings that the Board effectively adopted in its 2015 decision.

As our background narrative shows, TMC does not contest the merits of the revised disallowance determination. More specifically, TMC does not contend that its cost reallocation justified a reduction in the 2014 disallowance greater than \$549,087. Nor does TMC dispute that it charged \$262,485 in unallowable costs to its Head Start awards for fiscal years 2010-2013 so that balance was properly disallowed. TMC has thus identified no basis to reduce the disallowance of those grant-funded costs.

The uncontested determination that TMC expended \$262,485 in grant funds for unallowable costs establishes a “debt” to the federal government – a debt that TMC must, of course, repay. See 45 C.F.R. § 75.73 (Oct. 1, 2013) (“Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government.”); *id.* § 75.391 (containing language similar to section 75.73). In general, the validity of a disallowance, and questions relating to repayment of the resulting debt, are distinct issues. Cf. *Licking Cnty. Econ. Action Dev. Study*, DAB No. 1159, at 5 (1990) (stating that a “grantee’s ability to repay a disallowance is immaterial to the propriety of the disallowance”); *Md. Dept. of Human Resources*, DAB No. 358, at 6 (1982) (noting that “[i]f the substantive basis for [the] disallowance is valid, then the [non-federal party]

must repay the funds[.]” and “[t]he question is merely what method should be used”). In this case, TMC’s appeal briefs clearly show that its request to “reduce” or further “revise” the disallowance is not, in substance, a challenge to the disallowance’s validity but, rather, a request that we find that it has already reduced the resulting debt by means other than cash repayment.⁵

We decline to make that finding, for a number of reasons. First, there was nothing unlawful about ACF’s demand – stated in the August 3, 2016 notice of disallowance – for repayment of the entire debt in cash. Grant administration regulations applicable to TMC permit the grantor agency to demand repayment in cash, as ACF has done here, and then to use other collection methods, including “administrative offset against other requests for reimbursements,” if the debt is not repaid “within a reasonable period.” 45 C.F.R. § 75.73 (Oct. 1, 2013); *see also* 45 C.F.R. § 75.410 (“Payments made for costs determined to be unallowable . . . must be refunded (including interest) to the Federal Government in accordance with instructions from the Federal agency that determined the costs are unallowable unless Federal statute or regulation directs otherwise.”).⁶ Consistent with these regulations, the Board has said, in analogous contexts, that the “general rule” is that a grantee must repay a disallowance-based debt in cash (from non-federal sources) within a reasonable time.⁷ *See, e.g., Tex. Dept. of Human Servs.*, DAB No. 1954, at 10 (2004) (internal quotation marks omitted); *Project Bravo, Inc.*, DAB No. 925, at 4 (1987).

⁵ TMC offhandedly asserts in its reply brief that it is “challenging the factual basis for the [August 3, 2016] disallowance.” Reply Br. at 3. The factual bases for the disallowance are the audit findings documented in the record of TMC’s first appeal, to the extent that they have not been rendered irrelevant by ACF’s acceptance of the cost reallocation proposal. TMC does not contend that those audit findings fail to substantiate the residual disallowance of \$262,485 in grant-funded costs for fiscal years 2010-2013. TMC also asserts that its current appeal creates a dispute about ACF’s “calculation” of the August 3, 2016 disallowance. Reply Br. at 3. However, TMC does not try to show that ACF miscalculated the amount of unallowable costs charged to TMC’s awards for fiscal years 2010-2013. Instead, it tries to show that it has *reduced the debt resulting from the disallowance* by using a risk management fund surplus to pay allowable Head Start program costs incurred during fiscal year 2016.

⁶ A Head Start grantee must (with some exceptions not relevant here) comply with grant administration requirements published by the Department of Health & Human Services (HHS) in the Code of Federal Regulations. *See* 45 C.F.R. § 1303.3. Those requirements were, until late 2014, found in 45 C.F.R. Part 74. *Id.*; 45 C.F.R. Part 74 (Oct. 1, 2013). Effective December 26, 2014, Part 74 was 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. 75,872, 75,875-76 (Dec. 19, 2014). Except where otherwise indicated, we cite to the Part 74 regulations because they were in effect during the funding periods in which the disallowed expenditures were made.

⁷ HHS’s grant administration regulations currently state that the grantor agency will use administrative offset or other tools to collect a debt “[i]f not paid within 90 calendar days after demand.” 45 C.F.R. § 75.391(a). Previously, those regulations allowed HHS to use those tools if the debt was not paid “within a reasonable period after the demand for payment.” *Id.* § 74.73(a) (Oct. 1, 2013).

Apart from its lawfulness, ACF's demand for repayment of \$262,485 was plainly reasonable because TMC had not previously presented ACF with evidence of partial repayment. Although the transactions supporting TMC's repayment claim were allegedly performed during or shortly after January 31, 2016 (the end of fiscal year 2016), TMC did not present that claim to ACF until late August 2016, *three weeks after* receiving the revised disallowance determination. TMC Ex. 17; Declaration of Ricardo Gonzalez ¶ 5. And when it first raised the issue on August 30, 2016, TMC provided only a brief email asking ACF to remove \$146,462 from the disallowance and attaching an unaudited journal entry purporting to support that the risk management fund had been dissolved. TMC Ex. 17.

TMC has provided additional evidence with its appeal briefs, but we decline to make findings as to what that evidence shows or does not show. The Board has consistently ruled that matters relating to repayment of a valid debt arising from a disallowance – including disputes about the acceptability of the form of repayment – are outside its scope of review under 45 C.F.R. Part 16. *See Licking Cnty. Econ. Action Dev. Study* at 5 (stating that the Board's holding that a disallowance was correct “ends our inquiry” and that “repayment of the disallowance,” and more specifically the grantee's “ability to repay,” was “a matter between the [g]rantee and [the grantor federal agency]”); *Telamon Corp.*, DAB No. 1603, at 1, 10 (1996) (holding that the Board lacked the authority to grant the Head Start grantee's request that a valid debt, arising from a disallowance based on the grantee's failure to satisfy Head Start's non-federal match requirement in one “program year,” be reduced to the extent of any “excess non-federal share” contributed in the same or subsequent program year, and stating that the grantee's entitlement to such a reduction was “outside the scope of the Board's review”); *Camden Cty. Council on Econ. Opportunity*, DAB No. 881, at 7 (1987) (noting that the Board “has no independent authority to fix a repayment schedule or determine the form of repayment” and observing that the Head Start agency's policy required the grantee to “repay the funds with cash or a check . . . rather than a deposit into the Head Start account”); *Tex. Dept. of Human Servs.* at 11 (noting that the federal government may permit a debtor to use other means of repayment but that a decision not to use other methods is generally within the federal agency's discretion); *N.Y. City Human Resources Admin.*, DAB No. 720, at 12 (1986) (“the use of any method [of repayment] other than the return of the disallowed funds in cash would be solely at the discretion of the Agency”), *rev'd and remanded on other grounds sub nom., City of N.Y. v. Shalala*, 34 F.3d 1161 (2nd Cir. 1994); *Miss. Dept. of Public Welfare*, Ruling on Req. for Reconsideration of DAB No. 431, at 3-4 (1983) (declining to rule on the propriety of the state's proposal to repay the disallowed amount by “offset” against a future grant award, stating that “[t]he Board's powers over appeals and the appeals process do not authorize it to dictate how or when a disallowance is repaid”); *Texas Migrant Council, Inc.*, Board Docket No. A-2000-83, “Rejection of Appeal for Lack of Jurisdiction,” dated June 28, 2000 (attached as an Appendix to this decision, and holding that a dispute about whether a disallowance repayment check was drawn on an account containing federal funds was a “claims collection dispute” over

which the Board lacked jurisdiction).⁸ “[O]nce the Board concludes that there is a valid debt,” as we do here, “the Federal Claims Collection Act regulations at 45 C.F.R. Part 30 provide a separate process for the Secretary [of HHS] (or her designee within an operating division or regional office) to determine how the debt should be repaid.” *United Maine Families*, DAB No. 1707, at 5 (1999) (rejecting a request by a grantee that the grantor agency “accept a subrogation of [the grantee’s] rights to compensation under [the grantee’s] insurance policy in lieu of immediate payment of [a disallowance-based] debt”); *White Mountain Apache Tribe*, DAB No. 1787, at 5 (2001) (quoting *United Maine Families*’ holding that 45 C.F.R. Part 30 establishes a “separate process” to resolve disputes about how a debt should be repaid and rejecting a request to waive accumulated interest on the debt); *Mich. Dept. of Cmty. Health*, DAB No. 2225, at 16 (2009) (also quoting *United Maine Families*, stating that “the Secretary’s decisions under 45 C.F.R. Part 30 are not subject to Board review,” and rejecting the state of Michigan’s request to instruct CMS “to consider available options for deferral or reduction of the disallowance in light of the State’s severe economic distress”).

Another obstacle is that granting the relief sought by TMC would require us to overlook the violation by TMC of a grant administration regulation in 45 C.F.R. Part 74. To operate a Head Start program, a grantee receives discrete annual federal “awards,” with each award corresponding to a specified “funding period,” also known as “budget period.” See *Council for the Spanish Speaking, Inc.*, DAB No. 2718, at 1-2 (2016); *Action for a Better Cmty.*, DAB No. 2104, at 2 (2007). A “funding period” means the “period of time when Federal funding” under an award “is available for obligation by the [award] recipient.” 45 C.F.R. § 74.2 (Oct. 1, 2013). Section 74.28 provides that when a federal award specifies a funding period, as TMC’s Head Start awards do, the grantee “may charge to the award only allowable costs resulting from obligations incurred during

⁸ The Head Start regulations in 45 C.F.R. Part 1304 allow grantees to appeal terminations of financial assistance and denials of refunding. See 45 C.F.R. § 1304.5. In addition, the Board’s regulations at 45 C.F.R. Part 16 specify other types of appealable decisions involving Head Start (and other “direct, discretionary project”) grants. They include:

- (1) A disallowance or other determination denying payment of an amount claimed under an award, or requiring return or set-off of funds already received. . . .
- (2) A termination for failure to comply with the terms of an award.
- (3) A denial of a noncompeting continuation award where the denial is for failure to comply with the terms of a previous award.
- (4) A voiding (a decision that an award is invalid because it was not authorized by statute or regulation or because it was fraudulently obtained).

45 C.F.R. Part 16, App. A, ¶ C.(a). None of these apply to TMC’s arguments here.

the funding period”⁹ 45 C.F.R. § 74.28 (Oct. 1, 2013). In other words, grant funds earmarked for one funding period may not be used to pay costs incurred outside that period.¹⁰ *Council for the Spanish Speaking* at 6; *see also Central Piedmont Action Council*, DAB No. 1916, at 3 (2004) (“[A]pplicable legal principles require that grant funds awarded for one funding period [must] be used to pay for expenses from that year only, and not for any other program year.”). This limitation “reflects the general requirement [reflected in longstanding federal cost principles] that allowable costs charged to a federal award must be allocable to the award.” *Council for the Spanish Speaking* at 6.

We understand TMC to allege that it has repaid a portion of its debt by using *federal funds* awarded for its fiscal year 2010-2013 funding periods – funds accounted for as a surplus in its risk management fund – to pay costs incurred during, or otherwise allocable to, its Head Start awards for fiscal year 2016. ACF submits that those transactions violate the funding-period restriction in section 74.28. TMC all but concedes that point by failing to discuss section 74.28 in its reply brief and stating that “ACF may be correct that, under a substitute costs theory, TMC could not substitute disallowed costs with allowable costs from a later fiscal year.”¹¹ Reply Br. at 3.

⁹ The current grant administration regulations, codified in 45 C.F.R. Part 75, contain a provision comparable to section 74.28. *See* 45 C.F.R. § 75.309(a) (“A non-Federal entity may charge to the Federal award only allowable costs incurred during the period of performance (except as described in § 75.461) and any costs incurred before the HHS awarding agency or pass-through entity made the Federal award that were authorized by the Federal awarding agency or pass-through entity.”); *id.* § 75.2 (defining the term “period of performance” to “mean[] the time during which the non-Federal entity may incur new obligations to carry out the work authorized under the Federal award”).

¹⁰ There are some exceptions to this rule but none that appear relevant. Section 74.28 expressly authorizes one exception – for “pre-award costs [that is, costs incurred prior to the funding period] authorized by the HHS awarding agency pursuant to § 74.25(d)(1).” Another exception, found elsewhere in HHS’s grant administration regulations, allows the grantor federal agency to approve the “carryover” (or “carry forward”) of a budget period’s unobligated grant funds to a future budget period. *See* 45 C.F.R. §§ 74.2 (Oct. 1, 2013) (defining “Federal funds authorized” to include “any authorized carryover of unobligated funds from prior funding periods when permitted by the HHS awarding agency’s implementing instructions or authorized by the terms and conditions of the award”) and 74.25(b), (d)(3) (permitting the grantor agency to authorize the “[c]arry forward [of] unobligated balances to subsequent funding periods”); *Learning Systems Group*, DAB No. 2077 (2007) (discussing “carry forward [of] unobligated balances to subsequent funding periods”).

¹¹ TMC’s apparent violation of section 74.28 is one fact that distinguishes its case from a line of cases in which the Board allowed grantees to offset disallowed costs with unclaimed allowable costs; in those cases, the offset was allowed only with respect to costs allocable to the specific grant and funding period implicated by the disallowance. *See, e.g., Marie Detty Youth & Family Servs. Ctr., Inc.*, DAB No. 2024, at 7 (2006) (citing other Board decisions and stating that a grantee “may offset a disallowance . . . by documenting that it [had] used its own funds to pay for allowable, allocable costs for which it did not claim federal funds”); *Piedmont Cmty. Actions, Inc.*, DAB No. 2595, at 18-19 (2014) (noting that “offset of under-recoveries against over-recoveries . . . is appropriate only on an individual award basis” and that under-recoveries in one year could not be offset against over-recoveries from later years (*italics added*)); *N.J. Dept. of Health*, DAB No. 2497, at 4 (2013) (stating that an offset may be accomplished only with costs “allocable to the same grant and grant funding or budget period . . . to which the

(Continued . . .)

In *Council for the Spanish Speaking*, the issue was whether the grantee could “offset [an] alleged ‘underpayment’ of \$163,311.48” relating to grant number 05SA8290/02 “against the amount it owe[d] for the disallowed costs” associated with four other awards. DAB No. 2718, at 5. The Board held that the proposed offset violated section 74.28 and stated that the grantee was effectively “seek[ing] to charge costs allocable to grant 05SA8290/02 to other grants with different funding periods or different funding sources and objectives.” *Id.* at 6. Like the grantee’s proposed use of a funding period’s “underpayment” in *Council for the Spanish Speaking*, TMC’s requested relief would result in effectively charging costs incurred during one funding period (fiscal year 2016) to multiple awards for other funding periods from which that surplus was derived.

As an administrative adjudicative body, the Board must issue decisions consistent with applicable statutes and regulations; it has no authority to ignore or waive an otherwise applicable grant administration requirement such as section 74.28. *See* 45 C.F.R. § 16.14 (stating that “[t]he Board shall be bound by all applicable laws and regulations”); *Mo. Dept. of Social Servs.*, DAB No. 2677, at 12 (2016) (holding that the Board could not issue a decision which “circumvent[ed]” or was “inconsistent with” an applicable expenditures reporting requirement); *Telamon Corp.* at 2 (stating that the Board “does not have authority to grant a waiver of the non-federal matching requirement or to authorize the application of the current or a subsequent year’s overmatch to [the grantee’s] non-federal shortfall”).

(Continued . . .)

disallowed costs were allocable”). TMC does not cite any of these cases in support of its repayment claim, and we do not find them applicable.

TMC further contends that we should find that partial repayment has occurred because its use of the risk management fund surplus to pay allowable fiscal year 2016 costs amounts to “administrative offset,” a debt collection tool whose use is expressly authorized by HHS’s grant administration and claims collection regulations.¹² Reply Br. at 3. We reject this characterization. Administrative offset entails the grantor agency’s affirmative *withholding* of federal funds that are payable to the grantee under an existing award for costs that are allowable under that award and were paid with *non-federal* funds. See 45 C.F.R. § 30.12(a)(1) (defining administrative offset as the “withholding of funds payable by the United States to . . . a person to satisfy a debt”); HHS Grants Policy Directive 4.02 (TMC Ex. 16), ¶ C.7.¹³ In this case, there has been no withholding or denial of federal reimbursement for costs that TMC has paid with non-federal funds – only the grantee’s own alleged *use of federal funds* obtained under prior awards to pay costs allowable under, or charged to, its existing awards. “A disallowance made because of the unallowable nature of the expenditure of federal funds must result in a *reduction* in the amount of federal funds used by [the] Grantee.” *Ventura Cty. Comm. on Human Concerns and Cmty. Dev.*, DAB No. 359, at 2 (1982) (italics added); see also *Gila River Indian Cmty.*, DAB No. 264, at 6 (1982) (holding that in-kind contributions could not be used to offset a disallowance because they do not reduce the amount of federal funds used by the grantee). No such reduction has been shown to have occurred in this case.¹⁴

¹² See 45 C.F.R. §§ 74.73 (Oct. 1, 2013) and 30.12.

¹³ Grants Policy Directives (GPDs) contain policies governing the issuance and administration of HHS awards, including awards issued under the Head Start Act. *William Smith, Sr. Tri-City Child Dev. Council, Inc.*, DAB No. 2647, at 4 n.6 (2015).

¹⁴ We also note that TMC’s documentation leaves questions unanswered that we need not resolve in light of our conclusion that we cannot adjudicate this post-disallowance repayment dispute. For example, while TMC submitted general ledger or journal entries purporting to show that it used the alleged risk management fund surplus to pay “excess” risk management costs incurred in fiscal year 2016, TMC did not justify its corresponding statement that those costs were “otherwise allocable” to its Migrant and Seasonal Head Start Program for fiscal year 2016. See TMC Br. at 6. TMC’s only documentary evidence of those excess costs (see TMC Ex. 3) are accounting entries which are often insufficient to establish allowability. See, e.g., *Galveston Cty. Cmty. Action Council, Inc.*, DAB No. 2514, at 4-5, 5-6, 6-7 (2013) (holding that the grantee’s cost documentation, which included general ledger entries, was insufficient evidence of allowability). In addition, TMC’s evidence does not so much “prove that it repaid a portion of the disallowance . . . by drawing down . . . less federal money than it was entitled to draw down” [Reply Br. at 2-3] from its fiscal year 2016 Head Start awards, as simply assume that certain costs that TMC asserts it would have otherwise charged to those awards were allowable under those awards.

Conclusion

We sustain ACF's August 3, 2016 disallowance and decline to rule on TMC's claim that it has repaid \$143,700 of the resulting debt.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member