Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Navajo Nation
Docket Nos. A-18-94, A-19-4
Decision No. 2952
July 9, 2019

DECISION

The Navajo Nation (Nation) has appealed a decision by the Administration for Children and Families (ACF) to disallow the expenditure of $792,317.66 of federal funds provided under a Head Start grant for the budget period November 1, 2013 through February 28, 2015. ACF issued the disallowance because it found that the Nation had not met the grant's non-federal matching obligation. The amount disallowed represents the alleged shortfall in the Nation's matching contribution during the grant's budget period and the resulting over-expenditure of federal funds.

The Nation chiefly contends in this appeal that it incurred "unrecovered indirect costs" that may be counted toward meeting its non-federal matching contribution and that, if so counted, suffice to eliminate the non-federal matching shortfall identified by ACF. However, the Nation has not substantiated the existence and amount of those indirect costs. Nor has it established that it met all the conditions for using the alleged costs for non-federal matching, assuming for purposes of argument that the applicable grant administration regulations permitted a grantee to use unrecovered indirect costs for this purpose. For these reasons, and because the Nation's other contentions are unpersuasive, we sustain the disallowance.

LEGAL BACKGROUND

The Head Start Act (Act), 42 U.S.C. § 9831 *et seq.*, authorizes federal grants to qualified organizations that operate Head Start and Early Head Start programs. Section 640(b) of the Act provides that federal funding of such programs "shall not exceed 80 percent of the approved costs of the assisted program or activities," unless ACF determines that

certain circumstances justify additional federal funding.[1] 42 U.S.C. § 9835(b).[2] This means that a grantee must cover – with non-federal resources (such as its own funds or third-party in-kind contributions) – 20 percent of the "approved costs" of operating its Head Start or Early Head Start program unless ACF authorizes a lower cost-sharing percentage. The terms "cost-sharing" and "matching" in this context mean the portion of the costs of a federally supported activity that is *not* borne by the federal government. *See* 45 C.F.R. §§ 92.3, 92.24 (Oct. 1, 2013); 45 C.F.R. § 1301.20 (Oct. 1, 2013). (We use the terms interchangeably in his decision.)

Recipients of Head Start grants are subject to grant administration regulations issued by the Department of Health and Human Services (HHS). 45 C.F.R. § 1303.3; *Webster Parish Police Jury,* DAB No. 2674, at 4 (2016). When the grant at issue in this case was awarded (October 2013), the HHS grant administration regulations applicable to tribal governments were found in 45 C.F.R. Part 92.[3] *See* 45 C.F.R. § 92.4(a) (Oct. 1, 2013) (stating that subparts A through D of Part 92, with irrelevant exceptions, "apply to all grants and subgrants to governments").

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[1] The relevant subsection reads: "Financial assistance extended under this subchapter [II of chapter 105 of title 42 of the United States Code] for a Head Start program shall not exceed 80 percent of the approved costs of the assisted program or activities, except that the Secretary [of Health and Human Services] may approve assistance in excess of such percentage if the Secretary determines that such action is required in furtherance of the purposes of this subchapter." 42 U.S.C. § 9835(b). The relevant subchapter authorizes financial assistance to both Head Start and Early Head Start programs. *Id.* §§ 9833, 9840a.

[2] Consistent with the Act, a section of the Head Start program regulations states:

> In accordance with section 640(b) of the Act, federal financial assistance to a grantee will not exceed 80 percent of the approved total program costs. A grantee must contribute 20 percent as non-federal match each budget period. The responsible HHS official may approve a waiver of all or a portion of the non-federal match requirement on the basis of the grantee's written application submitted for the budget period and any supporting evidence the responsible HHS official requires. . . .

45 C.F.R. § 1303.4. Similar language appears in the version of the Head Start program regulations in effect when the grant at issue in this case was issued. *See* 45 C.F.R. § 1301.20(a)(1) (Oct. 1, 2013) (stating that "[f]ederal financial assistance granted under the act for a Head Start program shall not exceed 80 percent of the total costs of the program, unless . . . [a]n amount in excess of that percentage is approved" by the "responsible HHS official" in accordance with other regulatory provisions).

[3] The Part 92 regulations were superseded, effective December 26, 2014, by the "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards" published in 45 C.F.R. Part 75. 45 C.F.R. §§ 75.104(b), 75.110(a); 79 Fed. Reg. 75,871, 75,889 (Dec. 19, 2014). We cite Part 92 here because it was in effect when the Head Start grant at issue was awarded. *Webster Parish Police Jury* at 4 n.4.

The Part 92 regulations impose various conditions and limitations on the costs that may be counted toward meeting a non-federal matching requirement. 45 C.F.R. § 92.24. In addition, the Part 92 regulations authorize enforcement actions to ensure that federal grant funds are properly spent. As relevant here, those regulations provide that if a grantee "materially fails to comply with any *term* of an award" of federal financial assistance, the awarding agency may take one or more actions, including disallowing – that is, denying use of federal funds and matching credit for – "all or part of the cost of the activity or action not in compliance." *Id.* § 92.43(a)(2) (italics added). The "[t]erms of a grant" include "all requirements of the grant . . ., whether in statute, regulations, or the award document." *Id.* § 92.3. The "closeout of a grant does not affect . . . [t]he Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review." *Id.* § 92.51(a).

CASE BACKGROUND

In a Notice of Award dated October 31, 2013, ACF approved grant number 90CI0216, which authorized federal funding of the Nation's Head Start and Early Head Start programs for the budget period November 1, 2013 through October 31, 2014. App. Ex. 6.[4] As specified in the notice's "Remarks" and "Attachment," the grant's terms included "any applicable statutory or regulatory requirements," including the non-federal matching requirement in section 640(b) of the Act, the grant administration requirements in 45 C.F.R. Part 92, and applicable provisions of the HHS Grants Policy Statement (July 1, 2007).[5] *Id.* at 2-4.

In September 2014, ACF approved the Nation's request to reduce the non-federal matching obligation for grant number 90CI0216 from 20 to 10 percent. App. Ex. 8, at 2. ACF later extended the grant's budget period by four months, from November 1, 2014 through February 28, 2015, and increased the amount of federal funds awarded. App. Exs. 10-12. These changes were memorialized in amendments to the original Notice of

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[4] The appeal file in this case consists of 23 exhibits: Exhibits 1 through 21 were submitted by the Nation (and will be cited as "App. Ex."); and Exhibits 22 and 23 were submitted by ACF (and will be cited as "ACF Ex.").

[5] The HHS Grants Policy Statement is available to the public on ACF's website at https://eclkc.ohs.acf.hhs.gov/fiscal-management/article/hhs-grants-policy-statement-gps. (Last visited July 8, 2019.)

Award. *Id.* In accordance with applicable grant administration requirements,[6] the Nation submitted its final Federal Financial Report (form SF-425) for grant number 90CI0216 in May 2015.[7] App. Ex. 13.

In compliance with the Single Audit Act, 31 U.S.C. §§ 7501-7507, the Nation underwent an independent audit for the fiscal year ending September 30, 2015 (FY 2015). *See* Exs. 16-17. One of the audit's findings was that the Nation failed to meet its non-federal matching obligation for the budget period of Head Start grant number 90CI0216. App. Ex. 14, at 5; App. Ex. 15; App. Ex. 16, at 3. The auditor, KPMG, found that non-federal resources constituted only 7.84 percent of the Nation's Head Start and Early Head Start program expenditures for the grant's budget period, instead of the required 10 percent. App. Ex. 14, at 5. KPMG calculated that the Nation's "under-match" (cost-sharing shortfall) equaled $581,361, a figure that KPMG labeled "questioned costs." *Id.* KPMG's audit report identified this finding as number "2015-019." App. Ex. 15.

On August 19, 2016, the HHS Office of Inspector General (OIG) notified the Nation of KPMG's audit findings, including finding number 2015-019. App. Ex. 16, at 1, 3. The OIG further advised the Nation that ACF, as the audit resolution agency, might request "additional information to resolve" that finding. *Id.*

On September 28 and October 3, 2016, ACF notified the Nation that it would make a final decision concerning the "questioned costs" in audit finding 2015-019 and invited the Nation to submit, by October 26, 2016, a response to that finding along with any supporting documentation. App. Ex. 17; ACF Ex. 22.

By letter dated October 28, 2016, the Nation responded to ACF's invitation but did not dispute that it had failed to meet its non-federal matching obligation for grant number 90CI0216. App. Ex. 18. Instead, the Nation described steps that it had taken, or was in the process of taking, "to ensure compliance with the required [non-federal] match" in the future. *Id.* The only other information that the Nation provided to ACF at that point was its final Federal Financial Report (SF-425) for the grant. App. Ex. 13; App. Ex. 18. The Nation closed its October 28, 2016 letter by stating that "[w]e appreciate your accepting our response and put the finding to closure." App. Ex. 18.

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[6] In general, a grantee must submit final financial and other reports within 90 calendar days after a grant's funding expires or is terminated. *See* 42 C.F.R. §§ 94.40(b)(1), 92.41(b)(4), and 92.50(b) (Oct. 1, 2013).

[7] The Nation's final Federal Financial Report for grant number 90CI0216 shows that "Federal funds authorized" under the grant totaled $25,600,733. App. Ex. 13 (line 10.d). The report also shows that the Nation expended $25,269,598 in federal funds and contributed $1,927,380.16 in non-federal resources to cover its Head Start and Early Head Start program costs during the grant's budget period. *Id.* (lines 10.h and 10.j). As discussed in the text below, ACF relied upon the expenditure amounts shown on the final Federal Financial Report to calculate the Nation's cost-sharing shortfall under grant number 90CI0216.

Nineteen months later, on May 4, 2018, ACF issued a letter setting out decisions with respect to findings of the Single Audit for FY 2015. App. Ex. 21. One of those decisions was a disallowance of $792,317.66 of Head Start grant funding "resulting from audit finding 2015-019" – that is, a finding that the Nation did not meet its ten-percent non-federal matching obligation for the funding period of grant number 90CI0216. *Id.* at 1, 3, 5 (quoting KPMG's finding that the Nation "did not meet the required 10% contribution by the grant end date of February 28, 2015").

On June 26, 2018, the Nation filed a notice of appeal, which the Board docketed as appeal number A-18-94. On August 20, 2018, the Nation filed its opening brief and supporting exhibits, objecting to the disallowance on various grounds. One objection was that ACF's May 4, 2018 letter lacked "sufficient detail" concerning the basis for the disallowance. Appellant's Brief (App. Br.) at 1, 7-8. According to the Nation, the letter failed to explain the discrepancy between the amount disallowed ($792,317.66) and the amount of "questioned costs" ($581,361) identified by KPMG in audit finding 2015-019. *Id.* at 7-8.

On September 11, 2018 – three weeks after the Nation filed its opening brief – ACF issued a "revised" disallowance decision which leaves the amount disallowed unchanged and reiterates that the disallowance is based on the Nation's failure to meet the grant's 10 percent non-federal matching requirement. ACF Ex. 23, at 1, 5-6. In response to the Nation's complaint that ACF's May 4, 2018 letter did not explain the discrepancy between the amount of costs "questioned" by KPMG and the amount disallowed, the revised disallowance decision states that ACF found, through its "verification process," that KPMG had "understated" – by $210,956.66 – the amount of grant-funded expenditures subject to disallowance. *Id.* at 5. The revised decision then shows, as follows, how ACF computed the disallowance amount (that is, the Nation's alleged cost-sharing shortfall for the funding period of grant number 90CI0216):

Computation of Disallowance for Deficient Payment of the Non-Federal Share Requirement:

[1] 90% Federal Funds Awarded:	$25,600,733.00
[2] 10% Non-Federal Share:	$ 2,844,526.00
[3] Total Project Costs Awarded:	$28,445,259.00
[4] Federal Funds Expended:	$25,269,598.00
[5] Documented Non-Federal Share:	$ 1,927,380.15

[6] Total Project Cost [lines 4 plus 5]:	$27,196,978.15[8]
[7] Total Project Cost:	$27,196,978.15
Maximum Federal Share:	90%
[8] 90% Federal Share of Project Costs:	$24,477,280.34
[9] Federal Funds . . . Expended [from line 4]:	$25,269,598.00
[10] Federal Funds Allowed [from line 8]:	$24,477,280.34
Federal Funds Disallowed [line 9 minus line 10]:	$ 792,317.66

Id. at 5-6. The figures on lines 4 and 5 also appear on lines 10.e ("Federal share of expenditures") and 10.j ("Recipient share of expenditures") of the Nation's final Federal Financial Report for grant number 90CI0216. App. Ex. 13.

On September 19, 2018 – eight days after issuing the revised disallowance decision – ACF filed a response brief, which explained how ACF computed the disallowance amount and noted that the computation was based on the Nation's own expenditure reporting. Response Brief of ACF (Response Br.) at 4, 7-8.

On October 3, 2018, the Nation filed a reply brief, asserting that the revised disallowance decision is "inadequate" and restating other arguments from its opening brief.

On October 11, 2018, the Nation filed a notice of appeal concerning the revised disallowance decision. The Board docketed that notice as appeal number A-19-4. In doing so, however, the Board determined that the merits of the revised disallowance decision, as well as any issue about whether ACF had met its obligation to notify the Nation about the decision's legal and factual bases, had already been addressed by the parties in the briefs filed under docket number A-18-94. Consequently, the Board notified the parties on October 31, 2018 that it would consolidate appeal numbers A-18-94 and A-19-4 under lead docket number A-18-94 for purposes of resolving their dispute unless a party timely objected to consolidation. October 31, 2018 Acknowledgment of Notice of Appeal and Notice of Consolidation (Case Consolidation Notice). The Board also advised the parties on that date that if either wished to submit additional legal argument or evidence in the consolidated appeals, then it could file a motion requesting that opportunity. *Id*. Neither party objected to consolidation, and neither asked for leave to submit additional evidence or argument.

[8] This figure is one penny less than the amount reflected in the Nation's final Federal Financial Report for grant number 90CI0216. *See* App. Ex. 13 (lines 10.g. plus 10.j).

ANALYSIS

As the record shows, a term of grant number 90CI0216 required the Nation to cover, with non-federal resources, 10 percent of the approved costs of its Head Start and Early Head Start programs for the grant's budget period. A failure to meet that non-federal matching requirement necessarily means that grant-funded expenditures have exceeded a corresponding limit on federal financial assistance – the limit here being 90 percent of the Nation's approved Head Start and Early Head Start program costs. *Inter-Tribal Council of California, Inc.*, DAB No. 265, at 3-4 (1982) (noting the equivalence between the "shortfall in [the] Grantee's non-federal share" and the amount of federal grant funds used in excess of the maximum federal share). In these circumstances, the grantor agency is legally authorized to disallow the excess (unmatched) grant-funded expenditures because they represent a material failure to comply with a term of the grant. 45 C.F.R. § 92.43(a)(2) (Oct. 1, 2013).

Based on the final Federal Financial Report for grant number 90CI0216, ACF calculated that expenditures charged to that grant exceeded 90 percent of the total approved costs of the Nation's Head Start and Early Head Start programs for the grant's budget period, and that these excess expenditures, which constitute the Nation's non-federal matching shortfall, totaled $792,317.66. The Nation does not disagree that its own official financial reporting shows a non-federal matching shortfall of $792,317.66. In addition, during the audit resolution process that culminated in the disallowance, the Nation gave ACF no reason to think that the non-federal share of expenditures reported on line 10.j of the grant's final Federal Financial Report was understated. Because the information available to ACF during the audit resolution process disclosed that the Nation had expended $792,317.66 of federal funds in violation of the grant's non-federal matching requirement, ACF lawfully issued a disallowance for that amount.

The Nation nonetheless contends that the disallowance should be reversed. None of the grounds has merit.

A. The Nation did not substantiate its claim that it incurred allowable unrecovered indirect costs that it argues may be counted toward meeting its non-federal matching obligation under grant number 90CI0216.

The Nation chiefly contends that it incurred substantial "unrecovered indirect costs" that should be counted toward meeting its non-federal matching obligation and that, if so counted, would suffice to eliminate the cost-sharing shortfall calculated by ACF. App.

Br. at 8; Reply Br. at 3.[9] The Nation asserts that for the relevant budget period (and for prior budget periods as well), it "under-recovered" – that is, it did not charge grant number 90CI0216 for – substantial indirect costs related to its Head Start programs because it applied its negotiated indirect cost rate only to its "administrative direct costs" even though it could properly have applied the rate to its "entire direct cost base" (with some exceptions). App. Br. at 8, 10; Reply Br. at 3-4. The Nation alleges that it incurred $2.2 million in "allowable" but unrecovered indirect costs during the relevant grant's budget period. App. Br. at 2, 8.

ACF responds that neither 45 C.F.R. Part 92, the grant administration regulations in effect, and thus applicable, when grant number 90CI0216 was issued, nor the then-applicable federal cost principles, "make . . . explicit reference to including unrecovered [indirect costs] as part of non-federal cost matching." Response Br. at 9. In addition, ACF contends that while the current grant administration regulations in 45 C.F.R. Part 75 permit a grantee in some circumstances to count unrecovered indirect costs toward meeting a cost-sharing or matching requirement (*see* § 75.306(c)), those regulations do not apply in this case because they took effect after grant number 90CI0216 was issued.[10] *Id.* at 10.

The Nation does not dispute ACF's assertion (with which we agree) that Part 75's regulations are inapplicable to grant number 90CI0216. The Nation also agrees that "Part 92 did not explicitly provide for the use of unrecovered [indirect costs] as non-federal matching funds." Reply Br. at 3. However, the Nation contends that this "silence" should not be treated as a "prohibition" on that use. *Id.*

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[9] The grant administration regulations in 45 C.F.R. Part 92, which are terms and conditions of grant number 90CI0216, do not define the term "unrecovered indirect cost." However, other grant administration regulations in effect when that grant was issued define the term to "mean[ ] the difference between the amount awarded [for indirect costs] and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate." 45 C.F.R. § 74.2 (Oct. 1, 2013) (definitions for grant administration regulations applicable to non-profit organizations and other entities); HHS Grants Policy Statement at II-26 (referring indirectly to unrecovered indirect cost by recognizing that some of a grantee's indirect costs relating to its grant-funded program(s) might not be recovered because "allowable indirect cost reimbursement" – as determined "on the basis of statute, regulation, or policy" – may be "less than full indirect cost reimbursement" under the grantee's approved indirect cost rate). Current grant administration regulations define unrecovered indirect cost similarly. 45 C.F.R. § 75.306(c) (defining the term as "the difference between the amount [of indirect cost] charged to the Federal award and the amount which could have been charged to the Federal award under the non-Federal entity's approved negotiated indirect cost rate").

[10] The Part 75 regulations became effective on December 26, 2014, during the budget period of grant number 90CI0216. 45 C.F.R. § 75.110(a) (stating that "the standards set forth in this part [75] which affect administration of Federal awards issued by HHS agencies become effective December 26, 2014 unless different provisions are required by statute or approved by OMB"). As initially promulgated, section 75.306(c) stated that "[u]nrecovered indirect costs, including indirect costs on cost sharing or matching may be included as part of cost sharing or matching." 79 Fed. Reg. at 75,907. In January 2016, as part of a rulemaking to "add information that was erroneously omitted" from the December 2014 rulemaking, HHS amended section 75.306(c) to state that unrecovered indirect costs may be included as part of cost sharing or matching "only with prior approval from the HHS awarding agency." 81 Fed. Reg. 3004, 3016 (Jan. 20, 2016).

We need not, and do not, decide whether Part 92 permitted grantees to use unrecovered indirect costs for non-federal matching because the disallowance here is lawful regardless of whether Part 92 did permit that use. The disallowance here must stand because the Nation has neither substantiated the existence and amount of the alleged unrecovered indirect costs nor established that all generally applicable requirements for claiming the non-federal matching share (requirements specified largely in 45 C.F.R. § 92.24) are met with respect to those costs.

In order for a cost (direct or indirect) to be used for non-federal matching, the cost must be "allowable" under the grantee's federal award. 45 C.F.R. § 92.24(a)(1) (Oct. 1, 2013); *The Human Develop. Corp. of Metro. St. Louis*, DAB No. 1759, at 9 (2001) (noting that "a Head Start grantee's non-federal share must be comprised of costs that are both allowable and allocable to the grant"), *aff'd in part and rev'd in part on other grounds*, *The Human Develop. Corp. of Metro. St. Louis v. U.S. Dep't of Health & Human Servs.*, 312 F.3d 373 (8th Cir. 2002). This means that the cost must meet criteria and requirements specified in the applicable federal cost principles, grant administration regulations, and elsewhere. 45 C.F.R. §§ 92.20(b)(5), 92.22 (Oct. 1, 2013); HHS GPS at II-45 ("[C]osts that the recipient incurs in fulfilling its matching or cost-sharing requirement are subject to the same requirements, including the cost principles, that are applicable to the use of Federal funds, including prior approval requirements and other rules for allowability described in . . . 45 CFR 92.24.").

Applicable cost principles provide that a cost is allowable under a federal award only if it is (among other things) "necessary and reasonable for proper and efficient performance and administration" of the award; is "allocable to" the award; "[c]onform[s] to any limitations or exclusions set forth in th[e] [cost] principles, Federal laws, terms and conditions of the Federal award, or other governing regulations as to types or amounts of cost items"; and is "adequately documented." 2 C.F.R. Part 225, App. A, ¶ C.1 (Jan. 1, 2013). In addition, applicable grant administration regulations state that, unless federal law provides otherwise, a cost may not be counted toward satisfying a cost-sharing or matching requirement if the cost has been "borne by another Federal grant" or if the cost has been, or will be, counted toward satisfying a cost-sharing or matching requirement of another federal award or contract. 45 C.F.R. § 92.24(b)(1), (b)(3).

Echoing the general criterion that a cost be "adequately documented," the grant administration regulations further provide that "[c]osts . . . counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of" the grantee. 45 C.F.R. § 92.24(b)(6) (Oct. 1, 2013). Consistent with these provisions, the Board has long held that in a disallowance appeal, the grantee bears the burden of documenting the existence and allowability of its costs, including costs that it claims as its non-federal matching contribution. *See Kings Cmty. Action Org.*, DAB No. 2534, at 4-5 (2013)

(holding that the grantee has the burden of demonstrating that its expenditure of federal funds meets conditions for allowability); *White Mountain Apache Tribe*, DAB No. 1787, at 5 (2001) (stating that the burden-of-proof rule is "equally applicable to amounts claimed as [the] non-federal share").

The Nation did not carry that burden here. It proffered no evidence (such as accounting records, cost reports or analyses, or declarations from employees who could testify authoritatively and knowledgeably about the Nation's programs, administrative operations, and cost accounting) verifying the existence and amount of unrecovered indirect costs for the relevant budget period. Nor did the Nation demonstrate that such costs, assuming they were incurred, were allocable to grant number 90CI0216 under its approved indirect cost rate agreement and satisfied all of the other conditions (summarized above) for using them to meet the grant's non-federal matching requirement.

One such condition merits extended discussion. As noted, a cost is not allowable unless it "[c]onform[s] to . . . limitations or exclusions set forth in Federal laws." Under the federal Head Start Act, federal funding of a Head Start grantee's "development and administrative" costs is limited. Section 644(b) of the Act states that "no financial assistance shall be extended . . . in any case in which the Secretary determines that the costs of developing and administering a [Head Start or Early Head Start] program under this subchapter exceed 15 percent of the total costs, including the required non-Federal contributions to such costs, of such program." 42 U.S.C. § 9839(b). This statutory provision is implemented in Head Start program regulations, which in relevant part provide: "Allowable costs for developing and administering a Head Start program may not exceed 15 percent of the total approved costs of the program, unless the responsible HHS official grants a waiver approving a higher percentage for a specific period of time not to exceed twelve months." 45 C.F.R. § 1301.32(a) (Oct. 1, 2013), *revised and recodified in* 45 C.F.R. § 1303.5(a); 81 Fed. Reg. 61,412 (Sept. 6, 2016) (promulgating the recodification). Because the statutory limit on development and administrative costs is a percentage of a Head Start program's *total* approved costs (*including* costs covered by the grantee's non-federal matching contribution), and because costs of "administrative" activities are often claimed under an award as "indirect" costs,[11] the Nation needed to show – in addition to meeting all other requirements for allowability – that any unrecovered indirect costs that it believes could be used to meet its non-federal matching obligation would not cause the federal government's financial assistance under grant number 90CI0216 to exceed the 15 percent statutory limit.

[11] "The concepts of 'administrative costs' under Head Start and 'indirect costs' are quite separate, and the purposes of the categories are quite different," but "the two concepts coincidently will cover some of the same type of costs." *St. Martin, Iberia, LaFayette Cmty. Action Agency, Inc. (SMILE)*, DAB No. 633, at 2 (1985).

Despite its correspondence with ACF on this topic prior to filing the appeal (*see* App. Ex. 20), the Nation failed to provide a detailed cost analysis or other supporting evidence that the 15 percent cap would not limit its ability to use unrecovered indirect costs to meet its non-federal matching obligation. The Nation suggests that sufficient room exists under the 15 percent cap because its "actual administrative costs were $1,906,604," an amount that it says is only "6.95 percent of the total grant expended." App. Br. at 6, 8. But the Nation does not explain how it calculated its "administrative" costs, and it proffered no evidence showing that its calculation was consistent with the Head Start program's definition of "development and administrative costs." In short, in addition to not otherwise showing the alleged unrecovered indirect costs actually exist and are allowable under its Head Start grant, the Nation has failed to demonstrate that using unrecovered indirect costs to meet its cost-sharing obligation under grant number 90CI0216 would not result in a violation of the statutory 15 percent cap on administrative and development costs.

The Nation also argues that the HHS Grants Policy Statement permits use of unrecovered indirect cost as part of its non-federal match. Reply Br. at 3 (citing GPS Part II-45, 46). ACF does not appear to dispute that the Policy Statement would allow such use if certain requirements specified in the Statement are met but argues that the Nation did not meet those requirements. *See* Response Br. at 10 (stating that "the HHS GPS includes requirements for using unrecovered [indirect costs] to satisfy cost-sharing or matching requirements that the Nation did not meet") (footnote omitted).[12] The GPS provision at issue states that a non-federal matching requirement may be met "by not claiming the full indirect cost reimbursement to which the recipient is otherwise entitled." HHS GPS at II-46. However, if the grantee seeks to use that option, it must "reduce its charge to the grant to reflect the amount claimed" and explain in the "Remarks" section of its Federal Financial Report that the amount of the reduction is being used for matching or cost-sharing. *Id.* Here, as it acknowledges (Reply Br. at 3), the Nation did not follow this procedure with respect to any unrecovered indirect costs that it claims are allowable under grant number 90CI0216. Not only did it not follow this procedure, but when it requested a reduction of the statutory 20 percent non-federal matching requirement, the Nation told ACF that it intended to meet its cost-sharing obligation entirely with cash and "in-kind contributions," thus indicating no intent to use this option. ACF Ex. 4, at 1.

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[12] Neither party discusses what legal effect should be accorded this GPS provision in light of Part 92's silence as to whether unrecovered indirect costs may be used as part of a grantee's non-federal match. We need not, and do not, resolve this issue given our agreement with ACF that the Nation did not meet the requirements of the GPS provision.

Finally, the Nation's belated attempt to claim previously unreported indirect costs as part of its non-federal match runs afoul of the grant's general financial reporting requirements. The HHS Grants Policy Statement states that if a grantee wishes to claim costs or expenditures not previously reported on a final Federal Financial Report, it must submit to the grantor agency a revised Federal Financial Report "not later than 1 year from the due date of the original report, i.e., 15 months following the end of the budget period." HHS GPS at II-84. ACF asserts that the Nation never attempted to revise its final Federal Financial Report to include previously unreported indirect costs on the line designating its non-federal matching contribution, Response Br. at 11 n.10, and the Nation does not deny that it failed to follow that required procedure.

B. *During this appeal, ACF timely proffered sufficient information concerning the bases for the disallowance to enable the Nation to prepare and submit its case.*

The Nation contends that the disallowance should be vacated because ACF's May 4, 2018 letter, which contained the initial disallowance decision, failed to provide "appropriate notice and sufficient detail about the basis for the determination to enable the Nation to respond." App. Br. at 1; Reply Br. at 1-2, 5. The initial disallowance decision was "defective and inadequate," says the Nation, "because it referred to the wrong grant number . . . and lacked details about the *legal and mathematical basis* for the disallowance." Reply Br. at 1-2 (italics added).

"In an appeal of a federal agency's disallowance determination, the federal agency has the initial burden to provide sufficient detail about the basis for its determination to enable the grantee to respond." *E Center*, DAB No. 2657, at 5 (2015) (internal quotation marks omitted); *see also Appellate Div. Practice Manual* (stating that an "appellant has a right to obtain from the respondent sufficient detail concerning the basis for the disallowance to enable the appellant to prepare its case").[13] However, the Board has consistently held that a grantor agency may "cure any inadequacies in a final decision during the appeal process as long as the [grantee] has an opportunity to respond." *Delta Health Alliance, Inc.*, DAB No. 2624, at 5 (2015), *appeal dismissed pursuant to stipulation*, No. 4:15-cv-00058 (N.D. of Miss. Aug. 16, 2017); *see also Recovery Resource Ctr.*, DAB No. 2063, at 7-8 (2007). Hence, when the grantee contends that the final disallowance decision inadequately specifies the bases for disallowance, the salient issue on appeal is whether that decision, together with any "additional development of the record during th[e] appeal," has provided the grantee "with a fair opportunity for review." *Delta Health Alliance* at 5.

[13] The Practice Manual is available at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/practice-manual/index.html. (Last visited July 8, 2019.)

During this appeal, ACF adequately specified the background and bases – legal and factual – for the disallowance. The initial disallowance decision states that it was based on the Nation's failure to cover the legally mandated non-federal matching share of Head Start program costs for a budget period ending on February 28, 2015. App. Ex. 21, at 1, 4-5. The initial decision cited both the governing program regulation (45 C.F.R. § 1301.20 (Oct. 1, 2013)) and the audit finding (2015-019) which identified a cost-sharing shortfall. *Id.* at 1, 3, 5. It is true that the initial decision misidentified the grant that funded the disallowed expenditures as grant number 90CI9889. However, the error was corrected in the revised (September 11, 2018) disallowance decision. Moreover, the Nation does not allege that this error was prejudicial; indeed, the Nation's opening brief shows that it understood what grant was implicated by the disallowance. App. Br. at 4 n.4, 7 (stating that the "grant in question is actually number 90CI0216/45").[14]

It is also true that the initial disallowance decision did not acknowledge or explain the discrepancy between the expenditure amount "questioned" by KPMG and the amount of the disallowance. However, ACF cured that omission by including details of its calculation of the cost-sharing shortfall in the revised disallowance decision. The Nation asserts that the revised disallowance decision "fail[s] to explain the *reason for the difference* between [the] disallowed cost and the independent auditor's questioned cost in the Single Audit" report. Reply Br. at 1-2 (italics added). Such explanation was unnecessary because the disallowance is based on ACF's calculation of the cost-sharing shortfall, not KPMG's. *Cf. Delta Health Alliance* at 5 (noting that a disallowance decision need only specify the federal agency's reasons for disallowing grant-funded expenditures). In any event, the Nation does not allege that it was unable to determine the reason for the discrepancy in KPMG's and ACF's calculations; nor does the Nation suggest that the reason was important to its case.[15] Furthermore, the Nation had an opportunity in its reply brief to question the validity of ACF's calculation of the cost-sharing shortfall.

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[14] The parties seem to agree that 90CI9889 identifies a Head Start grant whose funding period post-dates the funding period of grant number 90CI0216. App. Br. at 4 n.4, 7 (stating that 90CI9889 "is for the current grant period 2015-2019"); Response Br. at 9 (acknowledging that 90CI0216 and 90CI9889 "refer to different grant budget periods").

[15] The reason is readily apparent from the exhibits submitted by the parties: KPMG calculated the cost-sharing shortfall for the budget period of grant number 90CI0216 using figures for total Head Start program expenditures and the non-federal matching contribution that were different than the figures used by ACF. *Compare* App. Ex. 14, at 5 *and* ACF Ex. 23, at 5-6. As noted in the text above, ACF calculated the shortfall based on information in the final Federal Financial Report (SF-425) for grant number 90CI0216. (The Nation does not allege that ACF should have consulted any other source of information in making the calculation.)

The Nation asserts that it is "troubling that the ACF attempted to correct the original deficient notice with the Revised Decision outside of this appeal process pending before the Departmental Appeals Board and that it had the right to appeal the revised disallowance" along "a new appeal timeline." Reply at 2. The suggestion that ACF somehow tried to sidestep the appeals process is not supported by the record of these proceedings. ACF did issue the September 11, 2018 revised disallowance decision after the Nation filed its appeal from ACF's May 4, 2018 disallowance notice, but the Board docketed the Nation's appeals from both notices and then consolidated them. In the Case Consolidation Notice, the Board gave both parties an opportunity to object to consolidation and to request an opportunity to supplement the record. The Nation neither objected to consolidation nor asked to supplement the record.

"Board procedures are designed to be fair, impartial, quick and flexible," and none of those procedures required the Board to restart the appeal process after the second appeal notice was filed so long as the Nation received an adequate opportunity in the pending appeal to respond to new information in the revised disallowance decision. *W. Central Wisc. Cmty. Action Agency*, DAB No. 861, at 7 (1987) (finding that it was "completely proper under Board procedures" to permit the federal agency to submit a revised disallowance decision that altered the initial decision's legal rationale but which did not change the amount or nature of the costs disallowed, and that the issuance of the revised disallowance did not "void" the initial disallowance decision); *Teaching and Mentoring Communities, Inc.*, DAB No. 2636, at 6 n.5 (2015) (holding that the federal awarding agency could supplement its rationale for the disallowance in its response brief because the grantee received an opportunity to address the supplemental reasoning in the reply brief). The Board expressly gave the Nation an opportunity to object to the consolidation of its appeals and to request supplemental briefing following the consolidation. Accordingly, there is no basis for the suggestion that the Board somehow infringed the Nation's right to appeal the revised disallowance decision.

For all these reasons, we reject the Nation's suggestion that the disallowance is void because of deficiencies in ACF's initial and revised disallowance decisions.

C. *ACF lawfully issued the disallowance regardless of whether it failed to provide the Nation with technical assistance concerning the non-federal matching requirement and other matters.*

Finally, the Nation suggests that the disallowance should be overturned because ACF failed to provide requested "technical assistance." The Nation alleges that it "repeatedly requested technical assistance from the ACF with regard to the matching requirement" but that "ACF failed to respond adequately and in a timely manner." Reply Br. at 5. The Nation also alleges that ACF did not respond to "multiple" requests for technical

assistance about "how [it] should budget for and recover [indirect costs] on the Head Start grant and [about] whether unrecovered [indirect costs] could be used to satisfy the matching requirement" – implying that it would have avoided violating the matching requirement had ACF timely responded to its requests for guidance about these subjects. App. Br. at 2, 7, 9.

These contentions imply that ACF's disallowance authority is conditioned upon its compliance with what the Nation suggests is a legally enforceable obligation to provide technical assistance. However, the law imposes no such condition.[16] *See* 45 C.F.R. § 92.43 (Oct. 1, 2013). And the Board has consistently held that a federal agency's failure to offer or provide technical assistance does not excuse a grantee's noncompliance with grant terms and conditions. *Cf. W.Va. Dept. of Health & Human Res.*, DAB No. 2529, at 9 (2013) (noting that "[a]ny failure by ACF to offer or provide technical assistance would not . . . have relieved [the state agency] of its obligation to comply with applicable regulations governing the claiming of federal title IV-E funds"); *Cmty. Action Agency of Central Ala.*, DAB No. 2797, at 59 (2017) (declining to reverse a Head Start grant termination "as a remedy for any failure by ACF to provide the training and technical assistance CAACA says it needed to comply with Head Start requirements"). The grantee is ultimately responsible for ensuring that it spends federal funds in accordance with applicable laws and other terms and conditions of its grant. *Ctr. for Enterprise Cmty. Initiatives & Dev., Inc.*, DAB No. 2432, at 17 (2011); *New Opportunities for Waterbury, Inc.*, DAB No. 1512, at 13 (1995) (receipt of a grant obligates the grantee to expend the grant's funds "in accordance with applicable laws, regulations, and guidelines").

In any event, the Nation did not substantiate its allegation that ACF failed to provide requested technical assistance. To support that allegation, the Nation proffered email messages indicating that it asked ACF in early March 2018 – long after the close-out of grant number 90CI0216 and several months after telling ACF that it did not dispute KPMG's audit finding – for "technical assistance regarding the budgeting/recovery of indirect cost under the federal Head Start statute and its respective regulations and guidelines."[17] App. Ex. 19. A May 4, 2018 email indicates that ACF responded to the March request later that month. App. Ex. 20, at 2 (email from ACF's lawyer stating that "[i]n March, we discussed your questions regarding the indirect cost rate and the Navajo Nation's Head Start grant"). On May 7, 2018, three days after ACF issued the initial

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[16] Because any failure by ACF to provide technical assistance did not preclude a disallowance of the Nation's unmatched expenditures under grant number 90CI0216, we need not discuss the legal authorities cited by the Nation (42 U.S.C. § 9853(l)(4) and 45 C.F.R. § 75.513(c)(2)) as requiring ACF to render technical assistance.

[17] Although the March 2018 email is an apparent request for technical assistance, it does not indicate that the Nation was seeking advice about using unrecovered indirect costs to satisfy a non-federal matching obligation.

disallowance decision, the Nation asked ACF if there was "any restriction in indirect costs that the Nation incurs (and that is supported by the [indirect cost] agreement) being identified as in-kind match for the purposes of demonstrating the match funds that the Nation is providing for this specific grant." *Id.* at 4. ACF responded to that question on June 13, 2018. *Id.* at 1. None of the emails sought guidance concerning the audit finding which resulted in the disallowance, and none suggests that the Nation considered ACF's responses to be inadequate or incomplete. Furthermore, there is no evidence that the Nation sought technical assistance concerning its non-federal matching obligation *during the budget period or close-out phase* of grant number 90CI0216, when such guidance might have helped the Nation avoid making or reporting unmatched expenditures of federal funds.

Conclusion

For the reasons stated above, we affirm ACF's decision to disallow the expenditure of $792,317.66 of federal funds provided under grant number 90CI0216 for the budget period of November 1, 2013 through February 28, 2015.

/s/

Susan S. Yim

/s/

Constance B. Tobias

/s/

Sheila Ann Hegy
Presiding Board Member