CAPLAW Legal Update
Spring 2011

What Do the Revised Americans with Disabilities Act Regulations Mean for CAAs?

By Allison Ma'luf, Esq., CAPLAW

If you are still wondering how to interpret and apply the 2008 amendments to Title I of the Americans with Disabilities Act of 1990 (ADA) – guidance has finally arrived! The Equal Employment Opportunity Commission (EEOC) recently adopted amendments to the ADA regulations, including an updated interpretive appendix, which became effective on May 24, 2011.

The 2008 amendments to the ADA were enacted in response to several U.S. Supreme Court decisions that applied the ADA in a narrow and restrictive manner. Rejecting the Court's approach, the 2008 amendments

clarified that the ADA favors broad coverage to make it easier for individuals seeking protection under the ADA to establish that they have a disability. The amended regulations and appendix expand on the broad interpretation of the definition of disability set forth in the 2008 amendments, support the EEOC's desire to follow the original intent of the ADA, and make disability determinations a less extensive and demanding analysis.

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May Employees Lend a Helping Hand?

By Anita Lichtblau, Esq., CAPLAW

So you have a big fundraising dinner in two weeks and some staff volunteered to help "off the clock"? Sounds great, doesn't it? Staff volunteers will really help cut costs, right? Wait a minute; not so fast. Asking staff to volunteer, or even accepting their offers to volunteer, for Community Action Agency (CAA) events or activities without pay may violate wage and hour laws. Before allowing staff

to volunteer, make sure you understand the rules and that you apply them consistently. Otherwise, your CAA may risk U.S. Department of Labor (DOL) penalties, state enforcement actions, and even private lawsuits by employees.

Staff volunteers are only a problem for employers if the volunteers are non-exempt employees, i.e. employees who are not classified as exempt under federal and state wage and hour laws. According to the federal Fair Labor Standards Act, (FLSA), non-exempt employees must be paid for every "hour worked" and paid time and a half for hours worked over 40 in one week. "Hours worked" includes any activities in which employees are directed, required (directly or indirectly), or coerced to participate. On the other hand, exempt employees are not paid based on the number of hours they work. If they are properly classified under the FLSA rules, they can volunteer after hours without additional pay.

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INSIDE

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CAPLAW Broadens T&TA Focus

By Linda DeLauri, EdM, CAPLAW

In 2010, with support from the Federal Offices of Community Services, CAPLAW embarked on a comprehensive external and internal assessment of the legal needs of the Community Action network, its own internal capacity to meet those needs, and the breadth of experience and geographic reach of its national network of attorneys and advisors.

CAPLAW employed multiple approaches to identify training and technical assistance needs, including analyzing pre-event surveys and post-event evaluations for CAPLAW training and technical assistance offerings; tracking issues addressed in phone and email consultations with CAAs; soliciting ideas and suggestions from CAAs, state associations, and others; drawing upon the results of CAPLAW's 2010 CAA Legal Needs Survey; and consulting and coordinating with national partners.

Among the Key Findings:

- Significant overlap exists in the legal, compliance, financial, governance, and resource development issues CAAs face.
- CAA leaders want easier access to timely and reliable information, advice, and resources to help them operate legally- and fiscally-sound organizations.
- One size does not fit all when it comes to preferred approaches to training and technical assistance.
- Untapped opportunities for collaboration, resource sharing, and peer learning exist among the Community Action network, its national partner organizations, and the larger nonprofit sector's capacity building and management assistance organizations.

CAPLAW is crafting a multi-leveled response to these findings—one that renews CAPLAW's longstanding commitment to high-quality training and technical assistance (T&TA) that meets the evolving needs of the CAA network. This response emphasizes stronger coordination, collaboration, and resource sharing with the national Community Action Partnership, the National Association of State Community Service Programs (NASCSP), Meliora Partners, Inc., and Virtual CAP (the National Partners).

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About CAPLAW

CAPLAW is a nonprofit membership organization dedicated to providing the legal resources necessary to sustain and strengthen the national Community Action Agency (CAA) network. For over 45 years CAAs have been fighting poverty, helping individuals become self-sufficient, building communities, and changing lives. Nationwide, approximately 1,000 CAAs leverage almost $10 billion in total funding, and provide a multitude of services, including job training, Head Start, economic development, energy assistance, and housing. Through its in-house legal staff and a network of private attorneys, CAPLAW provides consultations, training, and publications on a wide variety of legal and management topics. This assistance enables CAAs to operate legally sound organizations and to promote the effective participation of low-income people in the planning and delivery of CAA programs and services, thereby enhancing CAAs' ability to provide the nation's poor with opportunities to improve their quality of life and to achieve their full potential.

CAPLAW

Lobbying Q&A

By Anita Lichtblau, Esq., CAPLAW

QUESTION #1

Can Community Action Agencies (CAAs) lobby to influence legislation?

Yes, federal laws permit private nonprofit 501(c)(3) CAAs to lobby. Public CAAs, however, should check their local and state government's rules to determine if they may lobby.

QUESTION #2

Can CAA associations lobby to influence legislation? My state CAA association is a (c)(4) (or it has two entities, one a (c)(3) and one a (c)(4)). Are the rules any different?

Yes, somewhat. Most importantly, under federal law (the Simpson Amendment to the Lobbying Disclosure Act of 1995, 22 USC 611), 501(c)(4) organizations that engage in federal legislative lobbying (other than grassroots lobbying) may not receive federal grants. So, if your association is a (c)(4) and it receives federal grant funds, it cannot lobby on federal legislation (except grassroots lobbying), even with non-grant funds. If the association has two entities, for example a (c)(3) and a (c)(4), the (c)(3) should receive the federal grant and the (c)(4) can then lobby.

501(c)(4) organizations, unlike 501(c)(3)s, may engage in an unlimited amount of lobbying without jeopardizing their tax-exempt status, as long as the legislation that the 501(c)(4) attempts to influence pertains to the purpose for which it was formed. Make sure that you maintain clear distinctions and allocations of expenses between the (c)(3) and the (c)(4) and maintain the separate legal identities of the organizations through separate boards, board meetings, bank accounts, etc. See the Alliance for Justice's "The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations." To order, visit *www.afj.org*.

QUESTION #3

So what's the bottom line on the best way to lobby within the rules?

Because federal grant funds generally cannot be used for lobbying, we recommend that CAAs put aside a small amount of non-federal, unrestricted funds to pay for legislative lobbying expenses, including an allocation of staff time, travel, and other expenses. These lobbying expenses should be tracked for purposes of establishing that they were paid out of nonfederal funds and for reporting to the IRS. CAA associations, which may want to engage in a more substantial amount of lobbying, should put aside a larger amount of unrestricted funds and those that are 501(c)(3)s should consider electing under section 501(h) of the Internal Revenue Code to be subject to the expenditure test for determining if they have exceeded the limit on lobbying, or alternatively, set up a 501(c)(4) to engage in an unlimited amount of lobbying. Also, do not forget to check whether your state has lobbying registration and reporting rules that may apply to your lobbying activities.

QUESTION #4

What type of lobbying are we talking about here?

For purposes of this Q&A, we are only talking about legislative lobbying, i.e. activities for the purpose of influencing state or federal legislation (but not local legislation), or referenda or ballot initiatives (that are voted on by the general public, rather than the legislature). This includes appropriations bills and budget resolutions, such as activities in connection with influencing Congress's appropriation of funds for CSBG, but does not include trying to influence executive branch agencies in connection with actions that do not require legislative action, such as comments on proposed Head Start regulations or requests to the U.S. Department of Health and Human Services to release LIHEAP fuel

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Make Good Use of the Treasurer & Finance Committee

By Kate Barr, Nonprofits Assistance Fund
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Most nonprofit boards place a priority on having an active treasurer and finance committee. Too often, though, these crucial roles turn into nothing more than rote reviews of financial reports and audits. Committee members wonder why they accepted the position – and may even dread the meetings for the dull, unimportant tasks on the agenda. Fortunately, it's possible to reinvigorate the treasurer's and finance committee's roles so that they play a truly strategic part in oversight, planning, and governance. The first step is to be sure you have a clear understanding of the treasurer's and finance committee's job descriptions. The second is to find the right candidates for the jobs. Here's how to go about it.

Understand the Treasurer's Job Description

The treasurer's responsibilities are spelled out in the organization's bylaws: maintaining accounting records and bank accounts, and reporting financial results to the board. In practice, the task of accounting and banking are usually carried out by the staff. But no matter who does the accounting, the treasurer must be knowledgeable about the organization's financial affairs. The treasurer's key responsibility is assuring that the board receives accurate and timely financial information and uses it in making decisions. The treasurer is also involved in banking transactions, as an authorized signer for deposit accounts, and in initiating and managing mortgages and loans.

Find the Right Treasurer

A good candidate for treasurer is someone who understands financial information and can communicate it to the board. The treasurer must take the time to learn the particulars of the organization's finances, restrictions, and requirements. Keep in mind, though, that treasurers shouldn't feel, or be made to feel, that they have sole responsibility for the organization's financial health. Their role is to make sure that the board receives accurate financial information in a timely manner and that the board chair gives ample time and attention to priority financial issues. A treasurer's work goes beyond financial reports. The treasurer can become the most important financial advisor to the CEO or CFO, offering knowledgeable perspective and guidance. Ideally, the treasurer will present the financial reports at board meetings and highlight important observations or trends for the board to consider.

> *"... a finance committee may be crucial for nonprofits with many complex funding sources including grants, contracts, and fees for service, or for organizations that frequently use loans, bonds, or other financing."*

Understand the Finance Committee's Role

Finance committees participate in budget planning, recommend fiscal policies, and discuss financial statements in detail. Finance committee members should do more than just look at reports, though. They should use a financial lens to consider the organization's plans and challenges. The best finance committees help the staff and board think through financial questions and develop options. Not every nonprofit has, or needs, a finance committee. A finance committee isn't needed if the board as a whole can understand the financial information, provide guidance, and make financial decisions efficiently. As an example, nonprofits with just a few, understandable sources of income often don't need a finance committee. A finance committee in this case

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Helping Boards Be
Responsible Fiscal Stewards

By Chris Jenkins, Nonprofit Finance Fund
Originally appeared in Philanthropy Journal June 10, 2010
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A major responsibility of nonprofit boards is fiscal oversight. Why, then, are so many boards surprised by bad financial news? How can they be better prepared? The issue is twofold. First, board members need to acknowledge and accept this responsibility. Second, they need the right kind of information to carry out the responsibility effectively.

A few guiding principles may help set the stage to address this question:

- Nonprofits need to make an operating profit to be sustainable
- Sustainability means bringing in more operating (unrestricted) revenue each year than is spent
- Long-term sustainability requires recurring, reliable revenue, not emergency funding or special gifts
- Major growth generally cannot be financed by operating surpluses and requires equity-like capital which, in turn, must not be confused with operating revenue
- Very few funders make equity-like grants
- Because nonprofit accounting is different from for-profit accounting, board members need to have a basic understanding of the rules governing revenue restrictions
- Nonprofit audits and standard accounting reports are notoriously obscure and difficult for outsiders (including nonprofit executives!) to interpret
- Boards should never be surprised - year-to-date reports are not as helpful as re-forecasting year-end results

The key to knowledgeable financial oversight is timely reports that the board can understand. The purpose of the reports is to give a clear picture of what is happening to the organization financially and to provide information to guide decision making. From a board member's perspective, that means "are we staying afloat or sinking?" and "what happens if...?"

It is important to avoid accounting terminology such as "net assets released from restrictions", i.e., accountese. Rather, use language that relates to whether we are living within our means and what our prospects are.

The financial awareness of board members can be improved by information such as the following:

- What's happening to the balance sheet, e.g., whether reserves or endowments are being used to cover operating costs
- A clear picture of reliable, recurring revenue and what it can pay for
- Which revenue can be used this year, as opposed to being restricted to future years
- Windfalls or exceptional gifts recognized as nonrecurring, non-operating revenue
- Sources of revenue and the degree to which grants actually cover the cost of the services you agree to provide in exchange
- The revenue and expense of individual programs and what would happen if they were increased, reduced or eliminated
- The basis for projecting contributed revenue (history, verbal commitments, speculation)
- Which revenue is covering budgeted costs and which, if any, is connected to new, unbudgeted expense

Financial information should be delivered to the board by the chair of the finance committee. For this to happen, the chair needs to be intimately familiar with all of the above issues, along with others that will be particular to the organization's circumstances. While the numbers can be complicated and difficult to analyze, the story they tell needs to be simple. And while it's important to have a good idea of where you are at the moment, it's where you are going that really matters. Many "unexpected" financial crises are the result of an unidentified structural deficit that can only be corrected once it is recognized. Reports that transform sterile and obscure accounting reports into narratives that reflect the flesh and blood reality of your organization's day-to day life are the first step in keeping your board as financially aware as it should be.

(See end notes on page 19)

DAB Upholds Disallowance of Reimbursement Request

By Allison Ma'luf, Esq. and Allison McAndrew, CAPLAW

Strategic Community Services, Inc.
DAB No. 2333 (2010)[1]

A recent decision of the U.S. Department of Health and Human Services (HHS) Departmental Appeals Board (DAB) affirmed the disallowance of approximately $40,000 in compensation paid to a project director by a nonprofit receiving grant funds from the Substance Abuse and Mental Health Services Administration (SAMHSA). The DAB upheld the disallowance based on the project director being both an officer of the nonprofit and the brother of the nonprofit's president, in violation of federal conflict of interest requirements, the HHS Grants Policy Statement, and the nonprofit's conflict of interest policy. Additionally, the DAB found that the nonprofit's failure to obtain prior approval to hire the project director as a consultant, rather than as an employee, violated federal regulations and terms of the grant.

Background

Strategic Community Services, Inc. (SCSI) is a Maryland nonprofit operating a Drug Free Communities program in Florida under a five-year grant received from SAMHSA. The grant gave SCSI approval to hire a project director as a salaried employee. SCSI hired Jon Quinton, the brother of its president, for the position as a consultant rather than as an employee. An application to do business in Florida, filed before SCSI hired Mr. Quinton, listed Mr. Quinton as secretary and listed Mr. Quinton's sister, Sylvia Quinton, as president and was signed by her as president. While Mr. Quinton acted as project director, annual corporate reports filed in Florida for six consecutive years listed him as secretary and his sister as president and were signed by him as secretary. SAMHSA informed SCSI of its intention to disallow costs based on SCSI hiring its secretary and its president's brother as the project director and as a consultant rather than as an employee. SCSI responded by filing a corporate reinstatement form replacing Mr. Quinton and his sister as officers of SCSI.

> *"SCSI failed to comply with federal conflict of interest requirements and its own conflict of interest policies."*

The federal uniform administrative requirements for grants and subgrants to nonprofits are found in 2 C.F.R. Part 215 (OMB Circular A-110). Federal agencies including HHS have adopted similar versions in their regulations. HHS requires grantees to maintain written standards of conduct for procurement of goods and services that prohibit employees and officers from participating in the selection, award or administration of any federally funded contracts if a real or apparent conflict of interest exists.[2] The regulations explain that a conflict arises when an employee, officer, agent or any member of his or her family has a financial or other interest in a transaction supported by federal funds.

The HHS Grants Policy Statement specifically states that it applies to all discretionary grants (such as Head Start grants) but not to mandatory grants (including block grants such as the Community Service Block Grants (CSBG)).[3] The policy statement requires grantees to include in their written standards of conduct "safeguards to prevent employees, consultants, members of governing bodies, and others who may be involved in grant-supported activities from using their positions for purposes that are, or give the appearance of being, motivated by a desire for private financial gain for themselves or others, such as those with whom they have family, business, or other ties."[4]

SCSI Failed to Manage Conflicts of Interest

SAMHSA argued that SCSI's hiring of Mr. Quinton as project director violated the federal conflict of interest regulations because he was the brother of SCSI's then president and was an officer of SCSI. Moreover, SCSI failed to show that it hired Mr. Quinton in an arms-length manner. SCSI argued that Mr. Quinton was not an officer

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DAB Upholds Grant Termination for Failure to Timely Correct Deficiencies

By Allison Ma'luf, Esq., CAPLAW

Voorhees College Early Head Start Program
DAB No. 2351 (2010)[1]

A recent decision of the U.S. Department of Health and Human Services (HHS) Departmental Appeals Board (DAB) upholds the termination of a grant awarded to Voorhees College Early Head Start Program (Voorhees) based on a failure to correct deficiencies in a timely manner.

Background

Voorhees provided Early Head Start (EHS) services in South Carolina. In April 2008, the Administration for Children and Families (ACF) performed a site review of Voohrees' EHS program to determine if it met applicable performance standards. ACF found at least one area of deficiency, which partly focused on Voorhees' non-compliance with two Head Start regulations.

ACF issued a report on the April 2008 review in March 2009. The report required the areas of deficiency to be fully corrected within six months from the date Voorhees received the report or within additional time, not to exceed one year. The report required Voorhees to submit a quality improvement plan (QIP) within 30 days of receipt of the report, and if the deficiencies remained uncorrected beyond the specified timeframes, ACF would terminate Voorhees' Head Start designation. ACF approved the QIP and required the deficiencies to be corrected by September 13, 2009. ACF conducted a follow-up review in October 2009. The report from the follow-up review found that Voorhees had yet to correct deficiencies relating to the two Head Start regulations. On August 25, 2010, ACF notified Voorhees that it was terminating EHS grant based on continued non-compliance with the two Head Start regulations.

Voorhees appealed the termination to the DAB but did not dispute the following: (1) findings of ACF's reports that it was not in compliance with two Head Start regulations at the time of each review; (2) the deficiency determinations relating to its non-compliance; (3) the notice received of the deficiencies on March 8, 2009; (4) the approval of its QIP on April 13, 2009; and (5) the deadline date of September 13, 2009 for correcting deficiencies.

Voorhees Failed to Correct Deficiencies in a Timely Manner

Voorhees argued that its EHS grant should not be terminated because it achieved full compliance with the Head Start regulations before receiving notice of the termination. Voorhees relied on language from the Head Start Act stating that ACF shall "initiate proceedings to terminate the designation of the [Head Start] agency unless the agency corrects the deficiency."[2] Voorhees contended that the language should be read to mean that ACF cannot terminate an agency's funding if it has corrected the deficiency, regardless of when the correction occurs.

The DAB found that Voorhees' argument ignored the content and intent of the Head Start Act. The section of the Act Voorhees relied on, 42 U.S.C. § 9836A(e), also sets forth specific timeframes in which a grantee must take corrective actions. The Act requires ACF to inform a grantee of deficiencies to be corrected and require the grantee either: (1) to correct the deficiency immediately; (2) to correct the deficiency no later than 90 days after identification of the deficiency or (3) to comply with the requirements relating to a QIP requiring correction by the date specified in the plan which must be no later than one year after notice is received of the deficiency. The DAB explained further that the Act specifically states that to "retain a designation as a Head Start agency" or "continue to receive funds" a grantee with deficiencies must correct those deficiencies within one of the three

> *"The DAB found that Voorhees' argument ignored the context and intent of the Head Start Act."*

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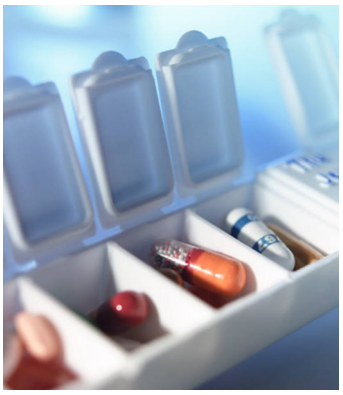
ADA Regulations *(continued from cover)*

Title I of the ADA prohibits private and public employers with 15 or more employees from discriminating against individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. An employer is required to make a reasonable accommodation for the known disability of an employee if doing so would not impose an "undue hardship" on the operation of the employer's business.
This article provides CAAs with a brief overview of the most relevant revisions to the regulations and interpretive guidance and offers practical approaches and steps for ensuring compliance.

Definition of Disability

Neither the 2008 amendments nor the amended regulations changed the ADA's definition of disability. Rather, both clarify the interpretations and application of the term. The three basic parts of the definition remain the same. They state that an individual suffers from a disability if s/he: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. The regulations clarify the definition by referring to each part as follows: the first prong is "actual disability"; the second prong is "record of" a disability; and the third prong is "regarded as" disabled.[1] Examples of the three prongs may now be found in the interpretive appendix.[2]



Major Life Activities

To establish disability under the first and second prongs, an employee must show that his/her impairment substantially limits a "major life activity" or that s/he has a record of an impairment that substantially limited a major life activity. The 2008 amendments expanded the list of "major life activities" to include a list of "major bodily functions." The EEOC's preamble to the regulations stresses that the list of "major bodily functions" added by the 2008 amendments is not an exhaustive one. The final regulations also added sitting, reaching and interacting with others to the list of major life activities.[3]

The regulations clarify that the previously applied U.S. Supreme Court standard for determining if an activity qualifies as a major life activity – that it be of "central importance to most people's daily lives" – no longer applies. Rather, now the regulations instruct employers ***not*** to interpret the term "major" strictly and avoid creating a demanding standard for a disability.[4] Even though the regulations do not offer an explicit standard for determining major life activities, the interpretive appendix offers guidance by giving examples such as lifting as a major life activity, regardless of whether an individual who claims to be substantially limited in lifting is actually performing lifting activities that are of central importance to the individual's daily life.[5]

Substantially Limits

Rules of Construction

To establish a disability under the first and second prongs, an employee must also show that the disability "substantially limits" a major life activity or that there is a record of the disability substantially limiting a major life activity. The regulations restructure this analysis and now list nine rules of construction based on the 2008 amendments.

The nine rules address the following concepts:

- Construing the requirement broadly in favor of expansive coverage and not as a demanding standard;
- Comparing an individual who is substantially limited to most people in the general population without necessarily relying on scientific, medical or statistical analysis;
- Focusing on the organization's compliance with its obligations;
- Conducting individualized assessments that interpret and apply "substantially limits" to require a degree of functional limitation that is lower than the stricter standard applied prior to the 2008 amendments;
- Making a disability determination without regard to mitigating measures other than ordinary eyeglasses or contacts;
- Understanding that an impairment which is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
- Requiring that only ***one*** major life activity be substantially limited.[6]

The appendix to the regulations offers guidance on how to apply the nine rules. For instance, the appendix gives the following example of how to compare an individual

who is substantially limited to most people: "the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other amputees." The appendix also offers examples of mitigating measures that should be disregarded. For instance, someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be considered an individual with a disability if, without the medication, he or she would be substantially limited in functions of the cardiovascular or circulatory system. Moreover, the appendix points out that the determination of whether an individual's impairment substantially limits a major life activity is unaffected by the individual choosing to forgo mitigating measures. For example, if an individual decides not to use a hearing aid to correct a hearing impairment, the individual is still considered substantially limited in the major life activity of hearing. However, the fact that an employee opts to not wear a hearing aid may be relevant to an assessment of whether the employee can perform the essential functions of the job, with or without an accommodation, and/or whether the employee poses a direct threat to health or safety.[7]

Predictable Assessments

The revised regulations also establish that some impairments will, given their inherent nature, virtually always be found to impose a substantial limitation and, as a result, the necessary individualized assessment should be simple and straightforward. Examples of these impairments and the major life activity impaired by them are in the regulations and include:

- Deafness
- Blindness
- Intellectual disability (mental retardation)
- Partial or complete absence of limbs
- Mobility impairments requiring use of a wheelchair
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV/AIDS
- Muscular dystrophy
- Multiple sclerosis
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder
- Schizophrenia [8]

The regulations also replaced the section describing certain impairments that may not meet the definition for being substantially limiting, such as the common cold, with an affirmative statement in both the regulations and the appendix that "not every impairment will constitute a disability."[9]

Substantially Limited "in Working"

One major life activity that is no longer singled out is if someone is substantially limited "in working." The explanation of this activity has been moved from the regulations to the appendix. Rather than attempting to articulate a new "type of work" standard, the EEOC retained its original analysis in the appendix which explains that, in most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working because impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. Moreover, the appendix explains that in the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. The example given is if a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his/her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or she is substantially limited in performing the class of jobs that require heavy lifting.[10]

> *"The regulations include the terms 'condition, manner or duration' as concepts that may be relevant in certain cases to show how an individual is substantially limited."*

Condition, Manner or Duration Analysis

The regulations include the terms "condition, manner or duration" as concepts that may be relevant in certain cases to show how an individual is substantially limited.

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ADA Regulations *(continued from page 9)*

The regulations explain that "condition, manner or duration" may identify the difficulty or effort required to perform a major life activity, pain experienced when performing the activity, the length of time the activity can be performed and the way that an impairment affects the operation of a major bodily function. For example, the condition or manner in which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without these effects. Moreover, a person whose back or leg impairment precludes him/her from standing for more than two hours without significant pain would be substantially limited in standing since most people can stand for more than two hours without significant pain.[11]

"Regarded As" Prong

An employee receives protection under the third prong if the employer takes an adverse action (e.g., demoting, terminating, failing to hire) against him or her because the employer regards the individual as having a disability, either real or perceived. The regulations clarify that the question of whether an individual is substantially limited in a major life activity is not relevant to coverage under the "regarded as" prong. Rather an individual seeking coverage under the "regarded as" prong must only prove that s/he has an impairment or was perceived by the employer to have an impairment and that the employer discriminated against him/her because of the impairment.[12]

The regulations explain that an available defense to the "regarded as" prong is for the employer to show that the impairment is "transitory and minor."[13] The appendix, rather than the regulations, now includes examples illustrating the application of the transitory and minor exception. Additionally, the regulations specifically state that if an individual falls within the "regarded as" prong, the individual is not entitled to a reasonable accommodation; s/he is only entitled to protection from discrimination.[14]

Employer Action Steps

The regulations and appendix clarify that employers should expend less energy on determining if a disability exists and spend more time considering options for reasonable accommodations.

To this end, we recommend employers do the following:

- Be prepared to accept more impairments as disabilities and to propose more flexible and creative options for reasonable accommodations
- Train supervisors and human resources personnel on the new rules and how to work with employees who may have a disability, including how to handle requests for reasonable accommodations
- Ensure that your organization's procedures for hiring, termination, promotion, evaluation, etc. are not based on any criteria that could be viewed as discriminating against someone because of an actual or perceived disability.

The revised regulations and interpretive appendix with the EEOC's preamble discussing them is available at *http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf.*

(See end notes on page 19)

Volunteers *(continued from cover)*

Thus, the crucial question for employers is what time spent by non-exempt employees is considered "hours worked"? The FLSA and court cases applying that law interpret "hours worked" very broadly. The FLSA regulations state that:

> *Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.*[1]

To summarize the requirements of this regulation and the interpretation of it by DOL, a non-exempt employee of a nonprofit CAA may only "volunteer" (i.e. work without pay) for the CAA if ***all*** of the following are true:

- The time spent is outside the employee's normal work hours;
- The activity is not similar to the employee's normal job responsibilities;
- The employee is undertaking the activity completely voluntarily, and not at the employer's request or as a result of direct or indirect coercion;

- The employee does not expect or receive any compensation for performing the activity or service;
- The activity is charitable in nature (as opposed to, for example, working on a business venture of the CAA).[2]

The rules for public CAAs are similar, although different FLSA regulations apply. One difference is that the FLSA expressly permits employees of public CAAs to volunteer without being paid the minimum hourly wage and overtime premium pay - even if they are paid expenses, reasonable benefits, or a nominal fee to perform the services.[3] When assessing compliance, the CAA should also review its state wage and hour law with a local attorney to determine if there are further requirements.

Maintaining compliance with the FLSA means, for example, that a CAA should not allow a non-exempt employee to bring work home, on a "pro bono" basis, even if she really, really wants to, unless the CAA is prepared to pay for the time worked. CAAs also must watch out for situations where a non-exempt employee, such as a finance department clerk, agrees, on a volunteer basis, to record payments coming in for an evening charity event – that's too similar to his or her paid job. This is the case even if the employee signs an acknowledgement agreeing to volunteer without pay – employees cannot legally waive their right to pay under the FLSA.[4] On the other hand, a non-exempt finance department clerk may voluntarily offer to help serve food at a weekend holiday dinner for clients of the CAA's housing department.

"When assessing compliance, the CAA should also review its state wage and hour law with a local attorney to determine if there are further requirements. "

The FLSA requires non-exempt employees to be paid for any activities in which they are directed, required directly or indirectly or coerced to participate. This means a CAA supervisor or manager should not ask people who work for him or her to volunteer – that's inherently coercive. CAAs may generally promote volunteer opportunities by putting up posters, posting notices on websites, sending emails or memos to all employees and the like.[5] But it is recommended that interested employees contact the person running the event or activity, rather than their own supervisors, and that employees not volunteer in their own departments or for their own supervisors. It is also recommended that CAAs recruit volunteers from the general public, or some sector of the public, rather than just employees. Moreover, volunteering should not be a criterion in a performance evaluation.

Some additional measures a CAA can take to ensure compliance are to have:

- Each employee who wants to volunteer sign a statement describing the volunteer services he or she will be performing and indicating that he or she understands that CAA has no expectation that he/she perform those services and that time spent performing the services will be unpaid and will not result in additional benefit accruals;
- The individual overseeing the CAA's volunteer program who is familiar with the rules discuss them with all staff who wish to volunteer;
- All decisions about whether nonexempt employees may volunteer for your CAA be made and the reasons for them documented by a single department or person (e.g., by the HR department or HR director) to ensure consistency throughout the organization;
- The person or department making the volunteer decisions keep a file that includes written documentation of the reasons for those decisions and any statements signed by employees concerning their volunteer services.

For a sample nonprofit CAA employee volunteering policy, form, and examples, visit *www.caplaw.org* and click on "Model Policies."

(See end notes on page 19)

T&TA *(continued from inside cover)*

In January 2011, the National Partners convened in Washington, DC to share current resources and explore opportunities for collaboration and streamlining of effort. The National Partners recognize the need to identify areas of crossover in order to lessen or eliminate redundancies. The goal is both to maximize the value of the Office of Community Services' investment in T&TA, and to provide CAAs with a comprehensive, readily accessible menu of high quality T&TA resources. The National Partners are actively working together to better coordinate activities and respond to CAA Network T&TA needs.

The CAPLAW National Nonprofit Financial & Grants Management Training Program

Beginning in 2011 and continuing at least through 2012, CAPLAW will develop a National Nonprofit Financial and Grants Management Training Program as an expansion of its core legal education and assistance services. The Program's goals are: 1) to identify and share best practices from within the CAA network and adapt external models to CAA structure; 2) to develop a diverse menu of training programs in a range of formats, e.g., synchronous and asynchronous webinars, peer learning audio-conferences, interactive online training modules, hands-on workshops, etc.; 3) to commission and disseminate a series of CAA-specific toolkits on financial, governance, and administrative challenges; 4) to improve and expand CAPLAW website resources; and 5) to facilitate communication, resource sharing, and peer learning by CAAs.

On April 27, 2011, CAPLAW, in collaboration with Meliora Partners, Inc., launched "Beyond The Basics: Strategic Approaches to Organization-wide Compliance, Risk Management, and Resource Development." This in-depth multi-session webinar series will help executive directors, financial officers, fundraisers, program managers, and board members work together to adopt a proactive and solutions-driven approach to the risks, compliance demands, and financing challenges CAAs face today. Sessions in the "Beyond the Basics" series will help both seasoned and emerging CAA leaders identify and incorporate best practices and aim for the Community Action Partnership Standards of Excellence and other nonprofit sector high performance standards. "Beyond the Basics" extends through September 2011. Visit *http://www.caplaw.org/audioconferences/beyondthebasics2011.html* to learn more about the series, access archived sessions and materials and register for one of the remaining sessions.

CAPLAW WANTS TO HEAR FROM YOU!

If you would like to learn more about CAPLAW's training and technical assistance programs, or to share your ideas, questions, and concerns, please contact Linda DeLauri, CAPLAW's Project Director for the National Nonprofit Financial and Grants Management Training Program, at linda.delauri@caplaw.org or (617) 348-6466. We are especially interested in hearing from CAAs who are willing to share their success stories as well as ongoing fiscal or administrative challenges with their Community Action network peers. We invite all CAAs to consider participation in CAPLAW webinars, audio conferences, and workshops as presenters, panelists, or content contributors. If your CAA has policies, procedures, or financial tools that have proven effective, consider sharing them with us.

Lobbying *(continued from page 3)*

assistance funds to the states. However, you should check the terms and conditions of your grants for additional lobbying restrictions.

QUESTION #5

So, is every contact with a legislator or his or her staff lobbying?

No, not unless it's made for the purpose of influencing legislation. The key factor usually is whether specific legislation is discussed.

QUESTION #6

Isn't there a limit on how much lobbying we can do?

If your organization is a nonprofit 501(c)(3) CAA or a CAA association, the Internal Revenue Code does limit the organization's legislative lobbying; it cannot be a "substantial part" of the organization's overall activities. There is no strict percentage of budget test to determine whether lobbying is "substantial"; rather, the IRS looks at all of the "facts and circumstances," including not only expenditures, but also time spent by volunteers. The IRS will balance the significance of the lobbying

activities against the objectives and circumstances of the organization as a whole, rather than just looking at the time or money spent. For most CAAs, however, because the vast majority of their efforts are focused on providing direct services to and administering and coordinating antipoverty programs for low-income individuals and families, it is unlikely that lobbying activities will exceed the "substantial part" test. A CAA association, however, may want to spend a larger portion of its overall activities on lobbying.

A 501(c)(3) nonprofit CAA or CAA association may elect to be subject to the "expenditure test" rather than the "substantial part" test described above, for measuring lobbying activity. The "expenditure test" election is made under internal revenue code section 501(h) and subjects the organization to a sliding scale expenditure test measured on the basis of a four-year average. The organization may spend annually up to 20% of the first $500,000 of its total expenditures for a tax-exempt purpose on legislative lobbying; 10% of the next $500,000, and 5% of the balance of expenditures, up to a total of $ 1 million per year. The election may be made by filing IRS Form 5768. Another alternative is to form a 501(c)(4) entity that may engage in unlimited lobbying if it does not receive federal grants.

QUESTION #7

Do we need to report to the IRS on lobbying?

Yes, if your organization is a 501(c)(3), it must answer questions on the Form 990 (the informational return filed annually with the IRS) about legislative lobbying activities. If the 501(h) election is not made (most CAAs have not made this election), you must answer questions about the specific type of activity (including volunteer time and other unpaid activities) and, for some questions, lobbying expenditures. We recommend reviewing the Form 990 and instructions relating to lobbying to better understand information that must be collected.

QUESTION #8

But I thought that CAAs can't lobby because they receive so much federal funding?

Even 501(c)(3)s that receive federal funding may conduct lobbying activities, so long as they do not use federal funds to do so. This means that resources paid with federal funds, such as staff time (paid with direct or indirect funds), supplies, equipment, postage, or space, generally may not be used for lobbying activities relating to state or federal legislation (local legislation is OK). Don't forget that program income and federal matching funds are also considered federal funds for purposes of restrictions on their use.

QUESTION #9

How do we lobby without using federal funds?

There are generally three ways:

1. **Use unrestricted funds**. Allocate resources so that any time, supplies, etc. spent on legislative lobbying is tracked and paid for out of nonfederal, unrestricted funds (also check rules and/or grant and contract terms of other funding sources, such as state funds, to determine if lobbying use is allowed). Don't forget, though, that lobbying costs may not be included in the indirect cost pool if your organization has a federally negotiated indirect cost rate. These lobbying costs must still be separately identified in the indirect cost rate proposal.
   - Example: If one staff member is primarily responsible for lobbying, then some or all of that person's compensation should be paid out of nonfederal funds.
   - Example: If staff members, either in addition to or instead of one primary person, spend just a small amount of time engaging in lobbying activities, then based on past history, you could estimate the percentage of time spent on lobbying by each person (as long as lobbying constitutes no more than 25 percent of the employee's total work time) and pay that percentage of compensation from nonfederal funds. See 2 C.F.R. Part 230, App. B, ¶ 25 (c)(4). Or charge time spent on lobbying out of nonfederal funds as needed based on actual reporting.
   - Example: If the compensation of an employee who lobbies is charged to indirect costs, a portion of the compensation must be charged as a direct cost and paid out of nonfederal funds. This lobbying time could be tracked on a time card on an ongoing basis, or as an "exception report" when the employee engages in lobbying activities.

2. **Lobby on personal time**. Employees may lobby on their own time and without using the organization's resources to do so. The organization should have a written policy indicating regular work hours. Even if an executive director is expected to be "on duty" 24/7, that doesn't mean that s/he is never on personal time.

(Continued on page 14)

Lobbying *(continued from page 13)*

Example: An executive director may choose to take an afternoon off to meet with legislators at the state capital to lobby for passage of increased state supplemental Head Start appropriations. In that case, not only the time spent meeting with the legislators, but also preparation time spent either by the executive director or staff, must also be either done on personal time or compensated out of nonfederal funds. If this is done during the regular workday and workweek, however, make sure that time cards or other records reflect that this activity is done on personal time.

Also, be careful if non-salaried employees (i.e. those that are ***not*** exempt from being paid overtime under federal and state wage and hour laws) "volunteer" to lobby on their own time. If they are asked or required to lobby, or if the lobbying relates to their paid job, they must be paid to do so; otherwise this may result in a violation of the wage and hour laws.

3. **Use board members or other volunteers**. A third way to lobby without using federal funds is to use board members or other volunteers. Again, make sure that any resources used to prepare for or carry out the lobbying activities (for example, staff time to research and provide talking points, food or space for meetings, phones, paper, etc.) are not paid out of federal funds.

QUESTION #10

But we don't lobby legislators, we educate them. That's OK with federal funds, right?

Hate to sound like lawyers, here, but it depends. Just because you call it "educating," doesn't mean it isn't lobbying as well. If the "education" is done for the purpose of passing, defeating, or introducing state or federal legislation or a referendum or ballot initiative, then it's still lobbying and federal funds generally can't be used. Don't forget that legislation also includes appropriations bills.

- Lobbying Example: If you meet with, call or email your U.S. representative or a member of his/her staff to ask him/her to increase Head Start appropriations, that is lobbying. Of course, you can still do it, but not on federally-funded time or using federally-funded resources.
- Education Example: If you invite your state senator to visit and tour your job training program and explain the program and needs of your clients, and perhaps even ask the legislator to hold a hearing on the job training needs of your community, but do not discuss any pending or proposed legislation, then that is education, or advocacy, but not lobbying. If costs associated with that meeting fall within one of your grants, and are otherwise allowable under 2 CFR Part 230 (OMB A-122) (i.e. documented, reasonable, allocable, etc.), then they could be charged to federal funds.

QUESTION #11

Can you give us some other examples of legislative lobbying activities?

- Signing on to a letter to legislators about proposed legislation or appropriations.
- Paying dues or donating to an organization primarily engaged in lobbying, such as the National Community Action Foundation (NCAF), and encouraging others to do so.
  - Contributions to lobbying organizations must be made out of unrestricted, non-federal funds. Any such contributions would be counted as lobbying for IRS and Form 990 purposes.
- Paying dues to a CAA association, to the extent the dues are used for lobbying. If a CAA pays dues to an organization that does some lobbying, but that is not its primary activity, such as a state 501(c)(3) CAA association, and if the association uses dues to pay lobbying expenses, then that portion of dues used for lobbying expenses should be paid out of nonfederal funds.
- Asking your U.S. representative or senator to sign on to a "Dear Colleague" letter requesting support for a piece of legislation or increase a legislative appropriation.
- Legislative liaison activities, such as attendance at legislative hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support or in knowing preparation for an effort to influence legislation. But, if such activities are not carried out for that purpose, but rather to keep informed about programs and appropriations for purposes of budgeting and planning, that is not considered lobbying.

- Asking the governor to sign legislation.
- Asking clients or staff to engage in the activities described above.

QUESTION #12

What about lobbying on the Internet, Facebook, Twitter, etc.?

The same rules apply, just different media. Be careful about including links to websites or pages that are lobbying; it can be done but will count as lobbying. If employees are lobbying on their personal Facebook pages or Twitter accounts, that should be done on their own time and without reference to their CAA or CAA association positions, or counted as lobbying if done on work time or with work resources, such as computers. For a more comprehensive answer, take a look at the Alliance for Justice's "E-Advocacy for Nonprofits," available at *http://www.afj.org/for-nonprofits-foundations/resources-and-publications/free-resources/e-advocacy-for-nonprofits-1.html*

QUESTION #13

Can CAA or CAA association employees or board members lobby as private citizens?

Yes. If they don't represent themselves to be acting on behalf of the CAA, and don't use any CAA resources or the CAA name, then they would be lobbying as private citizens (or perhaps on behalf of another organization). That's fine and the CAA would not need to report that activity on the IRS Form 990 or allocate any unrestricted CAA funds to the activity.

QUESTION #14

Aren't there some exceptions in 2 C.F.R. Part 230 (OMB A-122) to the general rule that federal funds can't be used for lobbying:

Yes, there are:

- Lobbying in connection with local legislation.
- Lobbying to influence state legislation in order to directly reduce the cost, or to avoid material impairment of the organization's authority to perform the grant, contract, or other agreement.
    - Example: Lobbying for legislation to lower unemployment insurance premiums
- Providing a technical and factual presentation of information on a topic directly related to the performance of a grant or contract:
    - Through hearing testimony, statements or letters;
    - To Congress or a state legislature, or subdivision, member, or cognizant staff member of such body;
    - In response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing);
    - Provided such information is readily obtainable and can be readily put in deliverable form; and
    - Provided costs for travel, lodging or meals are unallowable unless incurred to offer testimony at a regularly scheduled Congressional hearing pursuant to a written request for the presentation made by the chairman or ranking minority member of the committee or subcommittee conducting the hearing.
- Any activity specifically authorized by statute to be undertaken with grant funds.

QUESTION #15

Can you boil down the implications of those exceptions to the OMB A-122 lobbying restrictions?

The only exception that a CAA is likely to be able to make much use of is the third one listed in Q14 – the technical and factual presentation. But read the numerous requirements carefully. It does not cover phone calls or meetings; only written or oral testimony or letters in response to a documented request and it generally doesn't cover travel and hotel costs in connection with the presentation. The clearest activity to come within this exception is personally testifying at and/or submitting a written statement to a public hearing held by a legislature or legislative committee (although, again, travel costs are not generally allowable). Due to the fact that language in annual federal appropriations laws prohibiting use of appropriated federal funds for lobbying to influence federal, and sometimes state, legislation, does not explicitly include these exceptions, if your CAA is receiving federal funds indirectly, such as through the state, it is important to confirm whether OMB A-122 (or 2 C.F.R. Part 230) applies to your subgrant or state contract. You can check this in the grant terms and conditions or state contract provisions.

Disallowance *(continued from page 6)*

of SCSI and "never participated in any of the SCSI board or corporate activities." Mr. Quinton simply signed the Florida corporate forms and filed them without consulting a lawyer or SCSI. SCSI relied on a corporate form filed in Maryland and an IRS filing, neither of which named Mr. Quinton as an officer or a board member. SCSI also contended that SAMHSA knew of Mr. Quinton's familial relationship with SCSI's president. SCSI provided an email from Mr. Quinton to SAMHSA which explained that his sister "did not participate in the selection, award, or administration of the contract because [she was] not the authorized official on the grant … not a member of the board of directors, and … does not manage the affairs of the organization in Florida."

The DAB found that SCSI failed to comply with federal conflict of interest requirements and its own conflict of interest policy when it hired an officer of SCSI and its president's brother. The DAB first rejected SCSI's arguments that Mr. Quinton was neither an officer nor a board member. The Maryland forms provided by SCSI were inconsistent with one another and with the Florida forms and both the Maryland and IRS forms were incomplete. The DAB explained that SCSI could have submitted other documents, such as testimonial evidence and board meeting minutes, to support its position that Mr. Quinton was not an officer and to show that, even if he were an officer, he and his sister recused themselves from the decision-making process.

Moreover, according to the DAB, the failure of SCSI to execute a consultant contract for Mr. Quinton until a year after his date of hire suggested a lack of an arm's-length relationship. No written agreement setting compensation, duties and performance standards existed as is required by the federal cost principles for consultant costs to be allowed.[5] Furthermore, Ms. Quinton's alleged absence on the board failed to support SCSI's argument that the hiring was devoid of conflicts. Rather, the DAB found that Ms. Quinton ran SCSI without meaningful board participation because SCSI failed to submit board meeting minutes reflecting its decisions and filed conflicting corporate documents.

Lastly, SAMSHA's knowledge of SCSI's plans to hire the president's brother did not absolve SCSI from its responsibility to document that the hiring was conducted as an arm's-length transaction, free from Ms. or Mr. Quinton's influence.

SCSI Violated Cost Principles

SAMHSA argued that SCSI violated the federal cost principles by hiring Mr. Quinton as a consultant when he was an officer of the SCSI board. The federal cost principles codified at 2 C.F.R. Part 230 (formerly OMB Circular A-122) set rules for which costs may be charged to federally-funded grants to nonprofits. They prohibit the hiring of a consultant or any person providing professional services who is also an officer or employee of the grantee.[6] Because the DAB found that the project director was an officer of SCSI at the time he was hired as a consultant, federal funds could not be used to pay him as a consultant.

SCSI Failed to Obtain Prior Approval to Hire a Consultant

SAMHSA asserted that SCSI failed to follow the year one grant budget by hiring the project director as a consultant, rather than as an employee. SCSI contended that the hiring did not require prior approval because at the time SCSI was not on "high risk status" and the "reallocation of funds did not exceed 25% of the total grant award amount." Moreover, SCSI argued that SAMHSA approved the shift from employee to consultant in the budget for the two years following the first grant year.

The DAB explained that the federal uniform administrative requirements for grants provide that "recipients shall obtain prior approvals from the HHS awarding agency for…[the] transfer or contracting out of any work under an award."[7] The DAB further found that prior approval was required for the first year of the grant even if it were proven that SAMHSA approved the shift in later years.

Moreover, the DAB explained that even if SAMHSA approved the shift to consultant in later years, this approval did not change the fact that SAMHSA had not given approval for the shift the first year and that SCSI failed during the first year to follow the federal cost principles' requirement that employee costs be documented. The cost principles require documented payrolls approved by a responsible official of the organization and personnel activity reports that: (1) "reflect[] the distribution of activity of each [grant] employee"; (2) "reflect an after-the-fact determination of the actual activity of each employee"; (3) "account for the total activity for which employees are compensated"; (4) are "signed by the individual employee, or by a responsible supervisory official having first hand knowledge of the activities performed by the employee."[8] The DAB noted that

following these requirements is particularly important, where, as in SCSI's case, an employee does not spend 100% of his/her time on the grant. According to the DAB, requiring a part-time project director to be treated as an employee, particularly during the first year of a grant, significantly enhanced SAMHSA's ability to ensure that grant funds were properly charged and allocated to the grant. *(See end notes on page 19)*

Lessons Learned

- Ensure that your organization has a conflict of interest policy in place that prohibits officers and employees from providing professional services paid for with federal funds.
- Require board members to regularly sign and update disclosure forms for any possible conflicts of interest.
- Appoint a board committee, such as a governance committee, to review the disclosure forms at least once annually.
- Ensure that board minutes accurately reflect actions taken.
- Double check the consistency of all corporate filings.
- Read grant agreements, federal uniform administration requirements and cost principles to understand which changes from the budget require prior approval.
- Have written consultant agreements.

Termination

(continued from page 7)

timeframes stated above. Furthermore, the Head Start regulations state that "[i]f an Early Head Start or Head Start grantee fails to correct a deficiency, either immediately, or within the timeframe specified in the approved Quality Improvement Plan, the responsible HHS official will issue a letter of termination or denial of refunding." [3]

The DAB concluded that even if the Act is ambiguous, the regulations put Voorhees on notice that its Head Start funding would be terminated if it failed to correct the deficiency identified by ACF within the time period specified in its approved QIP. The DAB supported its conclusion with a prior DAB decision holding that "[a]s a matter of law, later steps to correct deficiencies still outstanding after a grantee has been given an opportunity to correct cannot remove authority from ACF to terminate based on the failure to timely correct."[4]

ACF Did Not Waive Its Right to Terminate Funding

Voorhees contended that ACF waived its right to terminate Voorhees' EHS funding in the following two ways: (1) by failing to provide timely reports to Voorhees on the April 2008 and October 2009 reviews and (2) by approving Voorhees' application for continued funding on August 19, 2010.

ACF's Failure to Provide Timely Reports Is Not a Waiver of Its Rights

In arguing that ACF waived its right to terminate Voorhees' funding, Voorhees relied on a section in the Head Start Act requiring the Secretary of HHS to publish a summary report on the findings of reviews and outcomes of QIPs done during the fiscal year no later than 120 days after the end of the fiscal year.[5] Voorhees reasoned that it was logical to assume that ACF would have to submit its report to the grantees within that same time period.

> *"The DAB found that ACF's 10- or 11-month delay in providing Voorhees with the review report was not reasonably timely or prompt."*

The DAB found that Voorhees' connection between the timing of a public summary of all Head Start review findings and the timing of individual reports to grantees was not an obvious one. Rather, the more relevant provision is the one that requires review findings to be presented to the grantee in a "timely manner."[6] Moreover, the Head Start regulations state that an HHS official will "notify the grantee promptly, in writing of any deficiencies found in a review."[7]

The DAB found that ACF's 10- or 11-month delay in providing Voorhees with the review report was not reasonably timely or prompt. However, relying on a prior DAB decision, the DAB held that nothing in the Head Start statute or regulations makes timely issuance of a grantee review report a prerequisite to termination. The DAB concluded that even though it is "important that ACF act promptly" when issuing grantee review reports, a delay in doing so does not justify the grantee's failure to correct deficiencies.

ACF's Approval of Continued Funding Does Not Preclude a Funding Termination

Voorhees argued that ACF waived its right to terminate the grant because it approved Voohrees' refunding application on August 19, 2010, before issuing the August

(Continued on page 18)

Termination

(continued from page 17)

25, 2010 funding termination notice. Voorhees contended that ACF failed to follow Head Start regulations requiring it to give Voorhees at least 30 days' notice of its intent to deny Voorhees' application for refunding. Rather, ACF approved Voorhees' refunding application and advanced funding within the 30-day period. Moreover, Voorhees received a pre-review document request for another program review on November 19, 2010 and that review was not cancelled until October 20, 2010.

The DAB explained that "Voorhees' argument reflects a misunderstanding of the regulatory scheme." The Head Start regulations "provide that funding will continue during a grantee's appeal of a termination decision and that if a decision has not been rendered at the end of the current budget period 'the responsible HHS official shall award an interim grant to the grantee until a decision has been made.'"[8] The DAB found that Voorhees was not prejudiced by ACF's continuing to fund Voorhees rather than giving 30 days' notice that it was denying its refunding application. Moreover, the DAB held that even though ACF approved Voorhees' application for refunding prior to the expiration of the current budget period, the approval was required by Head Start regulations which permit grantees to continue operations pending a final decision regarding termination of funding. The DAB explained further that the refunding notice specifically acknowledged that Voorhees was being reviewed for failing to correct prior deficiencies within the allotted timeframe. Thus, Voorhees had notice that approval of its refunding application did not preclude termination of its current grant at later date. *(See end notes on page 19)*

Lessons Learned

- Establish internal procedures for correcting deficiencies to ensure that they are addressed within the allotted timeframe established by ACF and correct deficiencies within that timeframe.
- Note that any delay by ACF in issuing a grantee review report does not preclude ACF from terminating funding when a grantee fails to correct deficiencies within the established timeframe.
- Understand that ACF is required to continue funding a grantee until a final determination on funding termination has been issued and that continued funding does not preclude a later decision to terminate the grant.

Good Use

(continued from page 4)

will be underused, and the members could probably be more helpful in another role. On the other end, a finance committee may be crucial for nonprofits with many complex funding sources including grants, contracts, and fees for service, or for organizations that frequently use loans, bonds, or other financing. Without a finance committee, such organizations risk having important financial decisions made without sufficient governance-level input.

Recruit Members for the Committee

While finance committee members need to understand financial reports, don't assume that only accountants, bankers, and businesspeople are qualified. Financial language can be learned, so consider asking board members with a good understanding of the organization's programs and community to be on the finance committee. Such people often bring fresh viewpoints and creative ideas. Be sure to provide training on the financial basics as soon as they join the committee.

Make the Committee Work

Some common obstacles for finance committees:

- The board assumes that the finance committee will take care of all financial matters and therefore doesn't carry out its financial responsibility.
- Finance committee meetings dwell on details with no higher level analysis or discussion.
- The treasurer's and finance committee's responsibilities are unclear.
- The board treasurer and the staff financial manager have a poor working relationship.
- Finance committee members don't understand the organization's key financial factors.

A finance committee without clear goals will get stuck on reviewing financial reports – focusing on details rather than the big picture. After recruiting strong members to the committee, it's a shame to assign them low-level work that the treasurer could complete without a committee.

A sampling of agendas for a high level finance committee includes:

- Develop key guidelines and assumptions before budget planning begins.
- Analyze trends in income sources.
- Discuss changes in types and reliability of income.
- Hold in-depth discussions of factors that will influence budgets for the next three years.
- Review and discuss the organization's financial policies. Are these policies adequate in light of the organization's size, complexity, and life-cycle stage? This review requires more than applying simplistic "best practices" from another organization.
- Evaluate the pros and cons of buying vs. leasing a new facility and the impact on cash flow, capital campaign needs, depreciation, and costs of ownership.

A more engaged finance committee will require a different role for the CFO or finance director - one that may not be as easy as working with a more perfunctory committee. The payoff in the quality of review, understanding, and financial governance will be worth it. For the committee to work well, the finance committee chair and CEO or CFO need to invest time in planning meetings, setting goals and expectations for the committee, and preparing good information for discussion. These activities will help inform board members when it comes time for them to make the final financial decisions.

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End Notes

Revised Americans with Disabilities Act Regulations

1. 1. 29 C.F.R. § 1630.2(g).
2. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
3. 29 C.F.R. § 1630.2(i).
4. 29 C.F.R. § 1630.2(i)(2).
5. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
6. 29 C.F.R. § 1630.2(j)(1).
7. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
8. 29 C.F.R. § 1630.2(j)(3).
9. 29 C.F.R. § 1630.2(j)(1)(ii).
10. Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act.
11. 29 C.F.R. § 1630.2(j)(4).
12. 29 C.F.R. § 1630.2(g)(3).
13. 29 C.F.R. § 1630.2(j)(1)(ix).
14. 29 C.F.R. § 1630.2(g)(3).

May Employees Lend a Helping Hand?

1. 29 C.F.R. § 785.44.
2. *See* U.S. Department of Labor ("DOL") Wage and Hour Division Opinion Letter (Sep. 30, 1999) and DOL Wage and Hour Field Operations Handbook §10b03(c).
3. 29 U.S.C. § 203(e)(4)(A)(i). 29 C.F.R. §§ 553.101 and 553.103.
4. *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945).
5. *See* DOL Wage and Hour Division Opinion Letter No. FLSA2006-4 (January 27, 2006).

DAB Disallowance

1. Complete decision can be found at *http://www.hhs.gov/dab/decisions/dabdecisions/dab2333.pdf*.
2. See 45 C.F.R. § 74.42.
3. HHS Grants Policy Statement, page ii and Section I-3.
4. HHS Grants Policy Statement, Section II-7.
5. See 2 C.F.R. Part 230, Att. B, ¶ 37.b.8 stating that the allowability of consultant fees depends on a number of factors including the "[a]dequacy of the contractual agreement of the services (e.g., description of the services, estimate of time required, rate of compensation, and termination provisions)."
6. See 2 C.F.R. Part 230, Att. B, ¶ 37.1.
7. See 45 C.F.R. § 74.25(c)(7).
8. See 2 C.F.R. Part 230, Att. B, ¶ 8.m.13.

DAB Grant Termination

1. Complete decision can be found at *http://www.hhs.gov/dab/decisions/dabdecisions/dab2351.pdf*.
2. 42 U.S.C. § 9836A(e)(1)(C).
3. 45 C.F.R. § 1304.60(f).
4. *Babyland Family Services, Inc.*, DAB No. 21209, at 21 (2007).
5. See 42 U.S.C. § 9836A(f)(1).
6. See 42 U.S.C. § 9836A(c)(4)(A).
7. 45 C.F.R. § 1304.60(b).
8. 45 C.F.R. § 1303.14(f)(1).

Make Good Use of the Treasurer & Finance Committee

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Robinson, Bridget, "Financial Stability: An Impossible Dream?", Nonprofit World, Vol. 15, No. 3. Ruiz, Rosemarie, "Are You Fulfilling Your Financial Trust?", Nonprofit World, Vol. 17. No. 1.

These resources are available at *www.snpo.org/members*. Also see Learning Institute programs on-line: Board Governance (*www.snpo.org/li*).

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Chris Jenkins is managing director for knowledge and advocacy at the Nonprofit Finance Fund, Originally appeared in Philanthropy Journal June 10, 2010 *http://www.philanthropyjournal.org/resources/managementleadership/helping-boards-be-responsible-fiscal-stewards*

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