



DAB Decision Reinforces Importance of Meeting Non-Federal Share Requirements

Circle of Parents, No. 2439 (2012)

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Meeting match requirements is not always easy, especially in tough economic times. A recent U.S. Department of Health and Human Services (HHS) Department of Appeals Board (DAB) decision acknowledges the struggle some organizations face in securing the non-federal share for their federal grants, but notes that these difficulties do not excuse an organization's failure to comply with the law.

In this decision¹, the DAB upheld a determination by the Administration for Children and Families (ACF) to disallow \$15,432² in federal funds when a social services organization, Circle of Parents, provided only \$93,964 of the \$111,121 non-federal matching funds required under the terms and conditions of its Promoting Responsible Fatherhood Program award for fiscal year 2009. The funding announcement for the award specifically stated that "[f]ailure to provide the required amount [of non-federal share] will result in the disallowance of Federal funds." The DAB concluded that Circle of Parents failed to provide adequate grounds for reversing ACF's decision.

ACF's Determination

ACF based its disallowance determination on the following:

- Terms and conditions of the grant award requiring a match and disallowance if the match was not obtained;
- HHS uniform grants administration requirements (45 C.F.R. § 74.62(a)(2)) giving ACF the authority to disallow funds if a grantee materially failed to comply with the terms and conditions of an award;
- HHS uniform grants administration requirements (45 C.F.R. § 74.25) requiring grantees to report budget deviations and request prior approval for some budget revisions; and
- Circle of Parents' acknowledgment that it failed to meet the 10% match requirement outlined in the grant award's terms and conditions and to obtain the prior approval needed to reduce the match to less than 10%.

Circle of Parents' Appeal

Circle of Parents appealed ACF's decision to the DAB and requested that the DAB waive the disallowance. In support of its request, Circle of Parents explained that it had exercised its best efforts to meet the full required match and that it was successful in raising 85% of the required match in spite of the economic downturn and the prohibition in OMB Circular A-122, Appendix B (2 C.F.R. Part 230, Attachment B) against using federal grant funds for fundraising. Circle of Parents stated further that, on two separate occasions in the course of the grant year, its executive director informed ACF of the challenges the organization was experiencing in raising the full match amount and was told that it should continue to make a good faith effort to meet the full match. Circle of Parents explained that it did not formally seek to reduce the non-federal match because it remained hopeful that it would meet it by the end of the grant period and felt that the executive director's communications with ACF were sufficient. Circle of Parents also noted that because of changes it instituted in response to findings and management recommendations it received, it was able to exceed its non-federal match for fiscal year 2011.

DAB's Initial Response and Order to Show Cause

In response to Circle of Parents' appeal, the DAB explained that it did not have the authority to waive the non-federal share requirement. The DAB also received clarification that Circle of Parents was only seeking a retroactive waiver from ACF of its non-federal share requirement and was not challenging the underlying findings or the disallowance.

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Are Social Workers Exempt

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requirements met the test:

- A master's degree in social work, human services, drug and alcohol, education, counseling, psychology, or criminal justice, or
- A bachelor's degree in human behavioral science which includes 30 semester or 45 quarter hours either in development of human behavior, child development, family intervention techniques, diagnostic measures, or therapeutic techniques, such as social work, psychology, sociology, guidance and counseling, and child development.

Alternatively, requiring a social worker to be licensed by the state, if the licensing procedure requires a specialized course of study, would also be sufficient. What is not sufficient are general degree requirements that can be satisfied with any number of diverse academic majors such as:

- A bachelor's degree in social sciences
- A bachelor's degree in human services, behavioral sciences, or an allied field.

Remember: you cannot use years of experience as a social worker alone to meet the professional exemption despite the vast knowledge that a non-degreed social worker may have. Simply stated, an employee cannot be an exempt professional unless the job requires the employee to have previously completed a course of specialized intellectual instruction.

So go through your job descriptions and review the minimum educational qualifications in light of the primary duties of the position to evaluate whether the educational prerequisites are narrowly drafted to evidence specialization for the work that the employee will perform. Be as specific as possible about the number and type of courses that are required if the degree is not directly related to the position (for example, a biology degree for a biologist).

Lastly, don't forget that in addition to the educational requirement to qualify for the learned professional exemption, the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is "predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment."

For additional details on the professional exemption see the [DOL's fact sheet on the professional exemption](#).

On Reflection

What is scary about the *Solis* case is that it was not a lawsuit filed by a group of disgruntled employees, but was an enforcement action filed by the DOL based on the complaint of a single employee . . . and it overturned the overtime exempt status of hundreds of employees in 44 field offices. Undertaking a proactive review of your job descriptions and overtime classifications is a great way to avoid this fate and steer clear of the Obama administration's increased enforcement activities.

Non-Federal Share Decision

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The DAB received further clarification that ACF did not have authority under the statute and regulations governing the Promoting Responsible Fatherhood Program to retroactively waive the matching fund requirement.

Based on these clarifications, the DAB concluded that there was no basis to reverse ACF's disallowance and ordered Circle of Parents to provide reasons why the DAB should not uphold the disallowance. The DAB also noted that Circle of Parents materially failed to meet the express terms of the grant and that nothing in the record supported retroactive relief, even if ACF had the authority to grant

Make sure your organization understands what the requirements are and, if the funding source permits waivers, how your organization may request one.

it. The DAB explained further that ACF could have reasonably concluded that Circle of Parents' arguments on appeal – its use of best efforts, the bad economy, the fundraising prohibition and its communications with ACF – were insufficient to support a retroactive reduction of the

non-federal share. The DAB observed that Circle of Parents' ability to exceed the federal share requirement in fiscal year 2011 showed that challenges to raising non-federal funds were possible to overcome.

Circle of Parents' Response to Order to Show Cause

Circle of Parents argued that its communications with ACF, some of which were documented in emails submitted to the DAB, showed that ACF: (1) had the discretion as part of the grant closing process to proportionately reduce the grant or perform a "de-obligation" to compensate for the unmet match; and (2) had encouraged Circle of Parents to make a good faith effort to meet the match requirements. Based on these communications, Circle of Parents asserted that it was led to believe that ACF would reduce or de-obligate the match requirement when the grant ended since Circle of Parents was making every effort to meet the match requirement. Circle of Parents also requested that the excess it earned in meeting its fiscal year 2011 match should be used to cover the incomplete matches from prior fiscal years.

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Circle of Parents Did Not Specify a Valid Basis for Reversing or Modifying the Disallowance

The DAB determined that Circle of Parents failed to provide a valid basis for reversing or modifying ACF's disallowance. The Board explained that, contrary to Circle of Parents' interpretation of its communications with ACF, ACF did not indicate that it might grant a retroactive waiver. Rather, ACF advised that, if Circle of Parents failed to meet the non-federal share, ACF had the authority to reduce the federal funds previously awarded under the grant.

The DAB also restated that it is bound by the applicable regulations requiring Circle of Parents to obtain prior approval for a budget revision and authorizing ACF to disallow funds if Circle of Parents failed to comply with the terms and conditions of the award.³ Circle of Parents had acknowledged that the federal share requirement was an express term of its award and that it had failed to seek the requisite prior approval to revise its budget.

Lastly, the DAB explained that it did not have the authority to permit Circle of Parents to use the unspent balance of federal funds from the fiscal year 2011 award to meet the matching funds shortfall for fiscal year 2009.

Lessons Learned

- Do not assume that communications with your funding source will support your organization's failure to comply with the law. If clear legal requirements exist, your organization must comply with them, unless the law permits the funding source to waive those requirements and your organization requests and obtains a written waiver.
- Following match requirements is essential even in tough economic times. Make sure your organization understands what the requirements are and, if the funding source permits waivers, how your organization may request one. For Head Start grantees, ACF recently issued [Program Instruction \(PI\)-HS-12-02](#) as a reminder of the importance of complying with the Head Start Act's non-federal share requirement and of requesting a waiver if necessary.

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Accountability and Transparency

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in place to safeguard those funds, and alone would have justified termination of the awards.

The grantee in this case appears to have been particularly uncooperative in responding to the CDC's requests for documents and information. Nevertheless, the decision still offers valuable lessons for all grantees on preparing for and responding to monitoring. Where monitors request specific documents, it is important to be responsive to their requests. Either provide the documents requested or articulate a reason for not doing so and, where possible, offer to provide the underlying information the monitors are seeking in another format. For example, if monitors request documentation of volunteer hours counted toward matching requirements, it is best to provide contemporaneous documentation, such as actual sign-in sheets that provide the name of the volunteer, the date, hours worked, volunteer activities, and the volunteer's signature. However, it may be possible instead to submit a summary compiled by staff that reports the number of hours each volunteer worked and the activities on which they worked during a specific period, with affidavits from each of the volunteers certifying that the information recorded on the summary sheets is true and accurate.³ Remember that grantees have the burden of demonstrating that costs they charge to their federal grants are allowable.⁴ Prepare for a monitoring visit by reviewing the monitoring checklist or similar tool that the monitors will be using (if available), anticipating what documents the monitors are likely to request onsite and what questions they are likely to ask, and ensuring that those documents are readily available when the monitors arrive and that staff are prepared to answer their questions.

Costs cannot be shifted from one award to another to overcome funding deficiencies or to avoid restrictions imposed by law or by the award terms.

Under the federal cost principles for nonprofit organizations, cost shifting from one federal award to another federal award is not permitted to overcome funding deficiencies or to avoid restrictions imposed by law or by the award terms.⁵

The organization in this case had exhausted the funds available under one of its cooperative agreements and had only \$95 available under the other, even though the budget or project periods for those awards were to continue for three more months. The DAB found that the organization used funds from an extension of an unrelated CDC award to reimburse costs associated with the cooperative agreements without obtaining prior approval to redirect those funds. The DAB concluded that, in so doing, the grantee violated the OMB Circular A-122 (2 C.F.R. Part 230) prohibition against shifting costs from one award to another to overcome funding deficiencies, as well as the award terms, which required prior approval from the CDC before redirecting funds. However, even if the grantee had requested prior approval to redirect the funds, it seems unlikely that the CDC would have granted that request where redirecting the funds

Article End Notes

Ready, Set, Go: Preparing for the New Head Start Renewal System

1. 45 C.F.R. Part 1307.
2. 42 U.S.C. § 9832(2) (emphasis added).

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3. *Circle of Parents, Decision No. 2439 (2012)*
4. For an explanation of how the a disallowance resulting from a grantee's failure to meet a non-federal share requirement was calculated by the Administration for Children and Families (ACF), see *ACF Grants Policy Note No. 11-01: Computation of Disallowances for Deficient Grantee Payment of the Non-Federal Share Requirement*
5. See 45 C.F.R. §§ 74.25, 74.62(a)(2). It is important to note that 45 C.F.R. § 74.25 requires a grant recipient to seek prior approval for budget and program revisions only in certain situations. The DAB in this decision did not offer any information regarding what actions on the part of Circle of Friends triggered the need for prior approval under 45 C.F.R. § 74.25.

DAB Decision Focuses on Accountability and Transparency

1. See 45 C.F.R. § 74.62(a)(3).
2. See 45 C.F.R. § 74.53(e).
3. See, e.g., Philadelphia Parent Child Center, DAB No. 2297 (2009)
4. See, e.g., Marie Detty Parent and Family Service Center, Inc., DAB No. 2024 (2006).
5. 2 C.F.R. Part 230, App. A ¶ 4.a.3. and 2 C.F.R. Part 225, App.
6. See 45 C.F.R. § 74.21(b)(2), (3) and (7).
7. See 45 C.F.R. § 74.25(c).
8. Renaissance III, DAB No. 2034 at 13 (2006).

An Executive Director's Guide to Financial Leadership

1. The Chronicle of Philanthropy; Money and Mission; "Shattering the Myth about Diversified Revenue," *blog entry* by Clara Miller, September 2, 2010
2. William Foster and Gail Fine [Perreault], "How Nonprofits Get Really Big," *Stanford Social Innovation Review* (Spring 2007): 46.
3. Jeanne Bell and Elizabeth Schaffer, *Financial Leadership: Guiding Your Organization to Long-Term Success* (New York: Turner Publishing / Fieldstone Alliance, 2005), 21.

