Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Appellate Division

SUBJECT: Southern Delaware Center for Children and Families
Docket No. A-06-20
Decision No. 2073

DATE: April 6, 2007

## DECISION

Southern Delaware Center for Children and Families (Southern Delaware) appealed an October 28, 2005 determination by the Administration for Children and Families (ACF) indefinitely suspending federal funding for Southern Delaware's Head Start program, on the grounds that Southern Delaware did not have sufficient funds to operate its Head Start program and had failed to timely file required financial statements. While the appeal was pending, ACF issued a November 3, 2005 determination terminating Southern Delaware's Head Start grant under 42 U.S.C. § 9831 et seq. for failure to correct deficiencies identified in reviews performed during March 15 - 19, 2004 and May 16 - 20, 2005, and failure to comply with Head Start requirements. By regulation, Southern Delaware's appeal of the termination merged with its appeal of the suspension. ACF moved for summary affirmance of the suspension and termination on the ground that Southern Delaware had failed to dispute any issue of material fact relating to ACF's findings.

As explained in detail below, we grant ACF's motion because we conclude that Southern Delaware has not raised a genuine dispute of material fact concerning specific deficiency findings ACF relies upon in support of its motion for summary affirmance of the suspension and termination and that these findings provide a sufficient legal basis to suspend indefinitely and terminate the federal funding for Southern Delaware's Head Start program.

### Legal Background

Head Start is a national program providing comprehensive developmental services, including health, nutritional, educational, social and other services, to economically disadvantaged preschool children and their families. See 42

U.S.C. § 9831; 65 Fed. Reg. 4763, 4764 (Feb. 1, 2000). The Department of Health and Human Services (HHS), through ACF, provides funds to grantees to serve as Head Start agencies within designated communities and periodically reviews their performance in meeting program and fiscal requirements. See generally 42 U.S.C. § 9836.

To ensure that eligible children and their families receive high quality services responsive to their needs, Head Start grantees must comply with the Head Start Program Performance Standards codified in 45 C.F.R. Part 1304. 61 Fed. Reg. 57,186 (Nov. 5, 1996). These performance standards cover the entire range of Head Start services and constitute the minimum requirements that a Head Start grantee must meet in three areas: Early Childhood Development and Health Services, Family and Community Partnerships, and Program Design and Management.

HHS is required to conduct a periodic review of each Head Start grantee at least once every three years. 42 U.S.C. § 9836a(c)(1)(A). If as a result of the review the "responsible HHS official" finds that a grantee has one or more "deficiencies," the official must "notify the grantee promptly, in writing, of the finding, identifying the deficiencies to be corrected and, with respect to each identified deficiency, . . . inform the grantee that it must correct the deficiency either immediately or pursuant to a Quality Improvement Plan" (QIP). 45 C.F.R. § 1304.60(b). The QIP must be approved by the responsible HHS official. See 45 C.F.R. § 1304.60(d). The period for correcting deficiencies under an approved QIP may not exceed one year from the date the grantee is notified about them. 42 U.S.C. § 9836A(d)(2)(A); 45 C.F.R. § 1304.60(c). The requirement that deficiencies be corrected within no more than one year ensures that families receive the full benefits of the Head Start program and that grantees have sufficient incentive to take prompt action to improve their programs. Target Area Programs for Child Development, Inc., DAB No. 1615 (1997).

This appeal concerns the circumstances under which ACF may suspend federal funding for a grantee's Head Start program and terminate a grantee's federal financial assistance and its designation as a Head Start agency. "A suspension may, among other bases, be imposed for the same reasons that justify termination of financial assistance or which justify a denial of refunding of a grant." 45 C.F.R. § 1303.13, "Appeal by a grantee of a suspension continuing for more than 30 days." Among the

reasons that justify termination are the following that ACF cited in its termination notice:

> (1) The grantee is no longer financially viable;
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> (3) The grantee has failed to comply with the required fiscal or program reporting requirements applicable to grantees in the Head Start program;
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> (4) The grantee has failed to timely correct one or more deficiencies as defined in 45 C.F.R. Part 1304;
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> (7) The grantee has failed to comply with the requirements of the Head Start Act;
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> (9) The grantee fails to abide by any other terms and conditions of its award of financial assistance, or any other applicable laws, regulations, or other applicable Federal or State requirements or policies.

45 C.F.R. § 1303.14(b).

As relevant here, the definition of "deficiency" in section 45 C.F.R. § 1304.3(a)(6) includes the following:

> (i) An area or areas of performance in which an Early Head Start or Head Start grantee agency is not in compliance with State or Federal requirements, including but not limited to, the Head Start Act or one or more of the regulations under parts 1301, 1304, 1305, 1306 or 1308 of this title and which involves:
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> (C) A failure to perform substantially the requirements related to Early Childhood Development and Health Services, Family and Community Partnerships, or Program Design and Management;
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> * * *

> (iii) Any other violation of Federal or State requirements including, but not limited to, the Head Start Act or one or more of the regulations under parts 1301, 1304, 1305, 1306 or 1308 of this title, and which the grantee has shown an unwillingness or inability to correct within the period specified by the responsible HHS official, of which the responsible HHS official has given the grantee written notice pursuant to section 1304.61.

Under subsection (iii) above, a violation of the Head Start Act or regulations that does not constitute a deficiency under sections 1304.3(a)(6)(i)(A)-(D) or 1304.3(a)(6)(ii) is deemed to be a deficiency after the grantee has demonstrated an inability or unwillingness to correct it within the timeframe specified by the responsible HHS official. At that point, the grantee has another opportunity to correct (immediately or pursuant to a QIP) the deficiency before funding must be terminated pursuant to section 1304.60(f) and section 1303.14(b)(4). 45 C.F.R. § 1304.61(b); The Human Development Corp. of Metropolitan St. Louis, DAB No. 1703, at 8 (1999). ACF is required to terminate a Head Start grantee that fails to correct deficiencies within the time frame specified in its QIP (which, as noted above, may not exceed one year from the date the grantee is notified about them). 45 C.F.R. § 1304.60(f); see 42 U.S.C. § 9836a(d)(1)(C).[1]

The responsible HHS official initiates a termination action by issuing a notice of termination that sets forth, among other things, the legal basis for termination, the factual findings on which the termination is based, and citations to appropriate legal authority. 45 C.F.R. § 1303.14(c). A terminated Head Start grantee has 30 days to appeal the termination to the Departmental Appeals Board, which is authorized to conduct a hearing on the matter on behalf of the Secretary. 45 C.F.R. § 1303.14; 57 Fed. Reg. 59,260 (Dec. 14, 1992), as amended at 65 Fed. Reg. 4769 (Feb. 1, 2000). A grantee's appeal must, among

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[1] Section 1304.60(f) also states that a deficiency that is not timely corrected shall be a material failure of a grantee to comply with the terms and conditions of an award within the meaning of 45 C.F.R. § 74.61(a)(1). Section 74.61(a)(1) is part of the Department's uniform administrative requirements for certain types of grant awards, including awards to nonprofit organizations such as Southern Delaware. It provides in relevant part that grants may be unilaterally terminated by the HHS awarding agency only "if a recipient materially fails to comply with the terms and conditions of an award."

other things: "[s]pecifically identify what factual findings are disputed"; "identify any legal issues raised, including relevant citations"; and "include . . . each document the grantee believes is relevant and supportive of its position." 45 C.F.R. § 1303.14(d)(2)-(4).

The regulations also provide that a suspension may be appealed to the Board within five days of the grantee's receipt of notice of suspension. 45 C.F.R. § 1303.13(f). The appeal must be in writing and must fully set forth the grounds for the appeal and be accompanied by all documentation that the grantee believes is relevant and supportive of its position. Id. During the period of suspension a grantee may not incur any valid obligations against federal Head Start grant funds, and the responsible HHS official may appoint an agency to serve as an interim grantee to operate the program until either the grantee's suspension is lifted or a new grantee is selected.[2] 45 C.F.R. § 1303.13(d),(e). If ACF institutes termination proceedings during a suspension, "the two actions merge and the grantee need not file a new appeal. Instead, the Board is automatically vested with jurisdiction over the termination action and will, pursuant to its rules and procedures, permit the grantee to respond to the notice of termination." 45 C.F.R. § 1303.13(i).

Burden of proof and standard for summary disposition

The Board has held that once presented with a prima facie case that would support a termination, a grantee must present evidence sufficient to challenge ACF's case or risk disposition of its appeal without an evidentiary hearing. See, e.g., Springfield Action Commission, DAB No. 1547 at 5 (1995). A grantee always bears the burden to demonstrate that it has operated its federally funded program in compliance with the terms and conditions of its grant and the applicable regulations. See, e.g., Lake County Economic Opportunity Council, Inc., DAB No. 1580, at 5 (1996); Meriden Community Action Agency, Inc., DAB No. 1501, at 41 (1994), aff'd Meriden Community Action Agency, Inc. v. Shalala, 80 F.3d 524 (D.C. Cir. 1996); Rural Day Care Association of Northeastern North Carolina, DAB No. 1489, at 8, 16 (1994), aff'd Rural Day Care Ass'n of Northeastern N.C. v. Shalala, No. 2:94-CV-40-BO (E.D. N.C. Dec. 20, 1995); see also 45 C.F.R. § 74.21(b)(2). Moreover, a grantee is clearly in a better

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[2] In this case, ACF appointed Community Development Institute as interim Head Start grantee to administer the Head Start program during Southern Delaware's suspension. ACF Exhibit (Ex.) 5.

position to establish that it did comply with applicable requirements than ACF is to establish that it did not. Therefore, the Board has held that the ultimate burden of persuasion is on the grantee to show that it was in compliance with program standards.

In moving for summary affirmance, ACF sets forth the standard for granting summary judgment. Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Union Township Community Action Organization, DAB No. 1976, at 6. The party moving for summary judgment bears the initial burden of showing the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine factual dispute. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).[3] To defeat an adequately supported summary judgment motion, the non-moving party may not rely on general denials in its pleadings or briefs, but must furnish evidence of a genuine dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. Id. at 586, n.11; Celotex, 477 U.S. at 322. In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence in that party's favor. Union Township Community Action Organization.

Factual and procedural background

Southern Delaware is a Head Start grantee located in Bridgeville, Delaware that, prior to the suspension of its Head Start funding, operated a Head Start program at three Delaware sites. For calendar year 2005, Southern Delaware had a client population of

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[3] Compliance with certain Head Start requirements, e.g., recordkeeping, can be established only through documentary evidence. For those requirements, a genuine dispute of material fact can exist only when the party opposing summary judgment supports its position with documentary evidence, absent an allegation that the documentation is not available because of circumstances beyond the grantee's control. Thus, the absence of documentation in and of itself may be a basis for summary judgment. Union Township Community Action Organization at 7.

322 children and was awarded $1,319,179 in federal Head Start funds. ACF Ex. 1.

ACF conducted a comprehensive on-site monitoring review of Southern Delaware's Head Start program from March 15 - 19, 2004. ACF Ex. 8. ACF transmitted the report of its review to Southern Delaware with a letter dated May 5, 2004 stating that the review had identified deficiencies as well as areas of noncompliance that would be considered deficiencies if not remedied within 120 days. The letter instructed Southern Delaware to submit within 30 days a QIP that addressed the deficiencies and stated the period in which they would be corrected, which could not exceed one year. The letter advised that failure to correct the deficiencies within the specified timeframe would result in action to terminate Southern Delaware's Head Start grant. The letter also informed Southern Delaware that any areas of noncompliance that were not corrected within 120 days and became deficiencies would then have to be corrected pursuant to a QIP, within the specified timeframe. ACF Ex. 3.

Southern Delaware timely submitted a QIP on June 4, 2004, and a revised QIP on July 23, 2004, which was approved by ACF on October 6, 2004. Southern Delaware certified in a letter dated September 23, 2004 that some areas of noncompliance had been remedied, and requested an extension of time to remedy the others until October 29, 2004.

By letter of October 28, 2004, ACF informed Southern Delaware of newly-identified deficiencies resulting from Southern Delaware's failure to document that it had remedied some of the areas of noncompliance identified in the report of the March 2004 review. ACF informed Southern Delaware that it was required to eliminate those deficiencies within one year from receipt of the May 5, 2004 letter that had forwarded the report of the March 2004 review and instructed Southern Delaware to submit a QIP that addressed the newly-identified deficiencies.

Southern Delaware submitted an amended QIP on November 24, 2004. ACF advised Southern Delaware by letter dated February 8, 2005 that the QIP was not approved because it did not identify the new deficiencies to be corrected and did not specify dates for correction of each deficiency, and informed Southern Delaware that a follow-up review would be conducted from May 16 through May 20, 2005. Southern Delaware submitted a revised QIP by letter dated February 22, 2005, which ACF approved on March 5, 2005. ACF conducted its follow-up review from May 16 through 20, 2005. ACF transmitted the report of its follow-up review with its notice dated November 3, 2005, informing Southern Delaware of

the termination of its Head Start grant for failure to correct seven deficiencies. ACF's November 3, 2005 notice stated that Southern Delaware could submit a written appeal of the termination to the Board within 30 days after Southern Delaware received the letter.

Shortly before ACF issued the termination notice, however, ACF informed Southern Delaware, in a faxed letter dated October 28, 2005, that it was indefinitely suspending funding for Southern Delaware's Head Start program, effective November 3, 2005. Southern Delaware Ex. A. ACF stated that it was taking that action because Southern Delaware had overspent its 2005 budget and did not have sufficient funds to carry out its Head Start program through December 31, 2005, the end of the program year, and had failed to submit required financial status reports on time. ACF's notice stated that those findings warranted suspension because they represented grounds for termination under section 1303.14(b).

Southern Delaware timely appealed the suspension and requested an expedited hearing. Southern Delaware did not contest the facts that ACF alleged in the notice of suspension, but argued that ACF had failed to follow procedures in the regulations before issuing the suspension, and that the conduct of ACF staff had prevented Southern Delaware from remedying the funding shortfall.

The Board convened a telephone conference on November 14, 2005, during which the parties agreed that an in-person proceeding would be held in Washington, D.C. on November 30, 2005. On November 16, 2005, Southern Delaware's counsel withdrew from the case. On November 22, 2005, Southern Delaware's Executive Director requested, in response to the Board's inquiries about the status of the case, that the in-person proceeding be postponed until some time in December. Also on November 22, ACF counsel informed the Board of the termination action and provided a copy of the November 3, 2005 termination notice. The Board thereupon scheduled, with the parties' consent, a telephone conference for November 30, 2005 to establish further proceedings in light of the termination and the withdrawal of Southern Delaware's counsel.

Southern Delaware did not appear for the telephone conference. The Board contacted Southern Delaware's Board Chair, who stated that Southern Delaware was seeking replacement counsel. In response to further Board inquiries, Southern Delaware's Board Chair and Executive Director continued to report, as late as February 3, 2006, that Southern Delaware was still seeking replacement counsel.

On February 7, 2006, the Board issued an order setting further procedures for Southern Delaware's appeal of the suspension and the termination. The Board's order noted that Southern Delaware had not provided any basis for appealing the November 3, 2005 termination, but that 45 C.F.R. § 1303.13(i) provides that if ACF institutes termination proceedings during a suspension, the two actions merge and the grantee need not file a new appeal. That regulation, the Board noted, further states that the Board is automatically vested with jurisdiction over the termination action and will, pursuant to its rules and procedures, permit the grantee to respond to the notice of termination. The Board therefore ordered Southern Delaware to submit a written statement of its grounds for appealing the termination that complied with the requirements for the contents of an appeal of a termination of a Head Start grant, at 45 C.F.R. § 1303.14, and any additional submission it wished to make in its appeal of the suspension, within fourteen days after Southern Delaware received the Board's order.[4]

In response, Southern Delaware, through new counsel, submitted on February 24, 2006 its "request for waiver, written appeal from termination and written appeal from suspension." In it, Southern Delaware responded briefly to some of the deficiency findings and made general allegations, in proffers of testimony, that it had corrected all of the deficiencies identified in the initial March 2004 review. Southern Delaware also requested that the Board waive the requirements in its order that Southern Delaware identify the factual findings in dispute and submit each document that Southern Delaware believed was relevant to its appeal. As

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[4] The order stated that Southern Delaware's written statement must, among other things:

- Specifically identify what factual findings are disputed;
- Identify any legal issues raised, including relevant citations;
- Include an original and two copies of each document Southern Delaware believes is relevant and supportive of its position (unless Southern Delaware requests and receives permission from the Board to submit fewer copies);
- Include any request for specifically identified documents Southern Delaware wishes to obtain from ACF . . . and a statement that Southern Delaware has attempted informally to obtain the documents from ACF and was unable to do so.

grounds for the waiver, Southern Delaware cited the illness of its Board Chair and illness and deaths in the family of the Executive Director during October through December 2005, and "multiple litigation," during November 2005 through January 2006, over ACF's efforts to obtain access to Head Start facilities and vehicles following the suspension. Southern Delaware also requested documents from ACF.

In response, ACF moved that the Board dismiss Southern Delaware's appeal of the termination as failing to comply with the requirements for an appeal stated in the regulations and adopted in the Board's order of February 7, 2006, and for failing to identify factual disputes for some of the deficiency findings. ACF also argued that Southern Delaware had not shown that it met the specific standards in the regulations for waiver of the procedural requirements in Head Start appeals. Southern Delaware thereafter submitted exhibits, and ACF responded with a submission reiterating its motion to dismiss Southern Delaware's appeal.

The Board denied ACF's motion to dismiss in an order setting further procedures, dated July 13, 2006. In that order, the Board viewed ACF's request to dismiss the appeal for failing to identify factual disputes for some deficiency findings as essentially a request for summary disposition. Given the requirement, in ruling on such a motion, to view the record in the light most favorable to the grantee and draw all reasonable inferences from the evidence in the grantee's favor, the Board concluded that it would not be appropriate to consider granting summary disposition without permitting Southern Delaware the opportunity to explain and support its assertions that it had corrected all of the deficiencies on which the termination was based. The Board permitted Southern Delaware to submit its complete argument within 30 days from the date it received documents it had requested from ACF, and gave Southern Delaware the following instructions for making full expositions of the factual disputes and any legal issues:[5]

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[5] The Board declined to address whether Southern Delaware had demonstrated that it met the specific standards, at 45 C.F.R. § 1303.8, for waiver of the requirements for Head Start appeals in Part 1303. As noted above, the Head Start appeal regulations contain no deadline for appealing a termination issued during an appeal of a suspension, and instruct the Board to permit the grantee to respond pursuant to the Board's rules and procedures. 45 C.F.R. § 1303.13(i). The Board's rules afford the Board

(continued...)

- For each deficiency finding, Southern Delaware must specify which facts asserted by ACF are disputed, and must cite any evidence supporting its position. Southern Delaware's failure to controvert a material fact asserted by ACF may result in the Board finding that the fact is undisputed.

- For each deficiency that Southern Delaware alleges that it has corrected, Southern Delaware must specify the date by which it alleges the deficiency was corrected, and must cite any evidence supporting its position.

- To the extent Southern Delaware argues that ACF was responsible for any deficiency or for Southern Delaware's failure to correct any deficiency, Southern Delaware must state with as much specificity as possible how any action by ACF affected Southern Delaware's performance with regard to each deficiency, and for what time period ACF allegedly had an effect on Southern Delaware's compliance.

- Southern Delaware must submit an appeal file containing any and all documents in support of its appeal.

The Board permitted ACF to respond to Southern Delaware's submission and to renew its motion for summary affirmance or dismissal.

Southern Delaware filed its "written appeal from termination and written appeal from suspension" on August 22, 2006, and requested a hearing on the termination. ACF responded with a motion for summary affirmance on September 25, 2006. Southern Delaware, with leave from the Board, filed its opposition to ACF's motion for summary affirmance on November 4, 2006.

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[5](...continued)
latitude to modify its procedures and extend deadlines. 45 C.F.R. §§ 16.4, 16.9, 16.13. The Board treated Southern Delaware's waiver request as a request for an extension of the fourteen day deadline in the Board's order for Southern Delaware to submit its written appeal of the termination, which the Board effectively granted by affording Southern Delaware the opportunity to perfect its appeal in response to ACF's motion to dismiss.

ACF subsequently provided, at the Board's request, a copy of Southern Delaware's final approved QIP addressing the deficiencies.

In our analysis below, we first address the suspension, and then the termination. As we explain in detail below, we conclude that Southern Delaware has not raised a genuine dispute of material fact concerning any of the bases for the indefinite suspension and that Southern Delaware has not raised a genuine dispute of material fact concerning three of the deficiency findings ACF relies upon for the termination, and that these conclusions provide a sufficient legal basis to suspend indefinitely and terminate the federal funding for Southern Delaware's Head Start program. Further, we conclude that although Southern Delaware argues that certain actions taken by ACF officials had affected its performance during the period at issue, such actions (which ACF has categorically disputed) could not provide a legal basis to excuse or forgive any of Southern Delaware's deficiencies and that Southern Delaware in any event failed to proffer evidence that these actions impacted Southern Delaware's performance on the specific requirements at issue here. Finally, we conclude that ACF properly applied the suspension and termination procedures in the regulations and that ACF's delay in sending notice of the findings of the follow-up review in May 2005 did not excuse any of the deficiencies or even make it more difficult for Southern Delaware to defend against any of the deficiency findings and provides no basis for reversing the termination. Accordingly, we grant ACF's motion for summary affirmance.

Analysis

I. The suspension

ACF determined that Southern Delaware had overspent its calendar year 2005 budget because, as of the beginning of October 2005, Southern Delaware had only $139,852 available to meet projected Head Start expenses of $313,608 for the last three months of 2005, resulting in a funding shortfall of approximately $173,756.[6] ACF notice of suspension, October 28, 2005. The suspension notice states that Southern Delaware's Executive

[6] The $139,852 available to Southern Delaware consisted of $63,674 remaining in the HHS Payment Management System and $76,178 in unobligated cash on hand. Projected monthly expenses were based on Southern Delaware's budget showing approximate monthly expenses of $104,536. ACF notice of suspension, October 28, 2005.

Director had indicated on October 3 that the available funds would permit Southern Delaware to provide Head Start services through November 4, 2005, and that Southern Delaware was attempting to obtain additional funds needed to continue operations through the end of 2005. Id.

ACF determined that by overspending its Head Start budget and not having sufficient funds to carry out its Head Start program, Southern Delaware violated the following requirements:

- 45 C.F.R. § 74.21(b)(3), which requires that grant recipients' financial management systems provide for "[e]ffective control over and accountability for all funds, property and other assets."

- Standard term and condition 5 of Southern Delaware's Head Start grant, which requires that "[t]he recipient organization must carry out the project according to the application as approved by the Administration for Children and Families (ACF), including the proposed work program and any amendments, all of which are incorporated by reference in these terms and conditions."

ACF also asserted that Southern Delaware had a history of failing to submit its required financial status reports (SF-269) on time and had submitted two of the reports from two to three months late. ACF reported, and Southern Delaware did not dispute, that Southern Delaware submitted the final SF-269 for the budget period ending December 31, 2004, which was due January 30, 2005, on April 4, 2005, and submitted the SF-269 for the period January 1 - June 30, 2005, which was due July 30, 2005, on October 20, 2005. ACF determined that by failing to submit financial status reports on time, Southern Delaware violated the following requirements:

- 45 C.F.R. § 1304.51(h)(2), which requires that Head Start grantees "must establish and maintain efficient and effective reporting systems" that "[g]enerate official reports for Federal, State, and local authorities, as required by applicable law."

- Standard term and condition 10 of Southern Delaware's Head Start grant, which provides that failure to submit reports when due (i.e, financial progress or other required reports) on time may be the basis for withholding financial assistance payments, suspension, termination or denial of refunding, and that a history

> of such unsatisfactory performance may result in designation of a "high risk" status for the recipient organization and may jeopardize potential future funding from DHHS.

ACF determined that these findings justified the suspension of funding for Southern Delaware's Head Start grant because they constituted the following grounds for termination of a Head Start grant that are listed in 45 C.F.R. § 1303.14(b): failure to comply with the required fiscal or program reporting requirements applicable to grantees in the Head Start program, and failure to abide by any other terms and conditions of the grantee's award of financial assistance, or any other applicable laws, regulations, or other applicable federal or state requirements or policies. 45 C.F.R. § 1303.14(b)(3),(9).

Southern Delaware does not dispute any of the facts asserted in ACF's notice of suspension, and acknowledges not having sufficient funds to continue its Head Start program after November 4, 2005. Southern Delaware appeal of suspension, November 2, 2005, at 8. Nor does Southern Delaware claim that these facts do not evidence a material failure to comply with the terms of the Head Start award. Instead, Southern Delaware argues that ACF cannot suspend funding because ACF failed to provide Southern Delaware with notice of the bases of the suspension and an opportunity to correct them prior to issuing the suspension. In addition, Southern Delaware argues that the suspension is improper because ACF contributed to the funding shortfall by hindering Southern Delaware's efforts to obtain replacement funding. We explain below why these arguments are unavailing.

A. <u>ACF was not required to provide Southern Delaware with an opportunity to correct the bases for the suspension prior to suspending Southern Delaware's Head Start funding.</u>

Southern Delaware argues that ACF may not suspend funding because ACF failed to first afford Southern Delaware notice of the findings that ACF relied on as the bases for the suspension and an opportunity to correct, as would be required prior to terminating a Head Start grant for failure to timely correct deficiencies under 45 C.F.R. § 1303.14(b)(4). 42 U.S.C. 9836a(d)(1); 45 C.F.R. § 1304.60(b). Southern Delaware cites <u>The Human Development Corporation of Metropolitan St. Louis</u>, where the Board held that some types of noncompliance do not constitute deficiencies until after the grantee has been given an opportunity to correct them, after which they are still subject to the QIP process. Southern Delaware argues that the suspension

notice was its first notice of the grounds for suspension and would not have been sufficient notice to terminate Southern Delaware's Head Start grant, and thus cannot support the indefinite suspension under section 1303.13.

We conclude that ACF was authorized to suspend Southern Delaware's Head Start funding for the uncontested violations cited in the notice of suspension without first providing Southern Delaware an opportunity to correct them. The following essential differences between suspensions and terminations support our conclusion:

- The Head Start statute and the suspension regulation do not provide for notice and opportunity to correct violations prior to suspension. The statute's only references to suspension are the requirements that financial assistance not be suspended, except in emergency situations, unless the recipient agency has been given reasonable notice and opportunity to show cause why it should not be suspended, and that financial assistance must not be suspended for more than 30 days unless the recipient has been afforded reasonable notice and opportunity for a full and fair hearing. 42 U.S.C. § 9841(a). The statute does not require that a grantee be given notice of violations and an opportunity to correct them prior to suspension. By contrast, both the statute and the regulations require notice and an opportunity to correct deficiencies prior to termination. 42 U.S.C. § 9836a(d); 45 C.F.R. § 1304.60(b).

- A suspension is effective immediately. Upon suspension the grantee may not obligate Head Start funds and ACF may appoint an interim grantee to run the program, and an appeal to the Board does not stay those actions. 45 C.F.R. § 1303.13(d),(e). By contrast, in terminations, the grantee's funding continues during the appeal (unless the grantee has been suspended), and ACF is not authorized to appoint an interim grantee until after the Board upholds the termination. 45 C.F.R. § 1303.14(f). Consistent with the immediate nature of a suspension, the regulation provides for a faster appeal process for suspensions than for terminations. A grantee must appeal a suspension within five days of receipt of notice but has 30 days to appeal a termination. 45 C.F.R. §§ 1303.13(f), 1303.14(c)(2).

- The applicable regulation anticipates that a suspended grantee may be restored to the Head Start program if it corrects the conditions that led to the suspension. 45 C.F.R. § 1303.13(e) (permitting ACF to name an interim grantee to run the program until the suspension is lifted or a new grantee is selected). Thus, the opportunity to correct occurs after the suspension.

- ACF may suspend a grantee for other, unspecified bases than the violations that would justify termination. The regulation provides that "[a] suspension **may**, **among other bases**, be imposed for the same reasons that justify termination of financial assistance or which justify a denial of refunding of a grant." 45 C.F.R. § 1303.13(b) (emphasis added). Southern Delaware's argument that ACF would have to provide notice and an opportunity to correct prior to suspension for reasons that would support a termination does not take into account that a grant may be suspended for these other, unspecified bases.

Thus, suspension is an immediate, temporary remedy that enables ACF to address quickly situations that pose imminent threats to the ongoing provision of Head Start services to economically disadvantaged preschool children and their families or to the federal fisc. ACF's ability to suspend funding and assure the continued provision of those services, through an interim grantee, would be rendered meaningless if ACF were required to first provide the grantee whose Head Start program is in such a situation with notice and an opportunity to correct the grounds for the suspension before ACF could take those protective actions. The regulation's inclusion, among the bases for suspension, of "the same reasons that justify termination" thus does not require in the case of suspensions the procedural requirements that ACF must observe before acting to terminate a Head Start grant. 45 C.F.R. § 1303.13(b).

Owing to these differences between terminations and suspensions, The Human Development Corporation of Metropolitan St. Louis, which did not involve a suspension, does not warrant a different result here. That decision considered the type of notice that ACF must provide before treating certain types of noncompliance that do not initially rise to the level of a deficiency as material noncompliance with the terms and conditions of a grant justifying termination. It simply did not address what procedural requirements apply in the case of suspensions.

B. Southern Delaware's assertion that ACF was responsible for the funding shortfall provides no basis to reverse the suspension.

Southern Delaware also alleges that ACF contributed to the funding shortfall that ACF cites as a basis for the suspension by failing to issue promptly the results of its May 2005 follow-up review as Southern Delaware says was required by regulations. Southern Delaware asserts that this caused the Delaware Department of Education (DOE) to withhold funds under its Early Childhood Assistance Program (ECAP). Southern Delaware argues that ACF was required to provide promptly the results of its May 2005 follow-up review by 45 C.F.R. §§ 1304.60(b) (ACF will "promptly notify" a grantee of deficiencies to be corrected either immediately or pursuant to a QIP) and 1304.61(a) (ACF will "promptly notify" a grantee of noncompliances that do not constitute deficiencies and of the period for their correction). Southern Delaware also cites a statement in ACF's 2005 Program Review Instrument for Systems Monitoring of Head Start grantees (PRISM) that the "final Head Start Review Report" must be mailed to the grantee within 45 days after the end of the on-site review. Southern Delaware Ex. B. Southern Delaware submitted an August 25, 2005 letter from the Delaware DOE stating that DOE had not received the results of the follow-up review and that the ECAP funding, for slots for 126 children, would be put out for competitive bidding because Southern Delaware was considered to be a program in deficiency. Southern Delaware Ex. C. Southern Delaware also asserts that a representative of the ACF regional office interfered with Southern Delaware's attempts to obtain $175,000 from a bank with which it had a relationship, to make up for the loss of the ECAP funds, and discouraged a business from loaning funds to Southern Delaware. Southern Delaware asserts that a third party who had agreed to act as an "accommodation party on any such extension of credit" retracted his offer after the ACF representative contacted him to discourage him from assisting Southern Delaware in its dealings with the bank. Southern Delaware cites federal court decisions as holding that the federal government is bound in its agreements with private parties to operate fairly and in good faith, and argues that ACF violated that duty and as a matter of equity cannot suspend Southern Delaware for its funding shortfall when ACF played a substantial role in creating that funding shortfall.

Those arguments are not persuasive because:

- As ACF argues, Southern Delaware was supposed to have funded its Head Start program for the entire year with its federal award (plus its 20% non-federal share).

The availability of ECAP or other funds does not alter the fact that Southern Delaware exhausted its entire award of federal Head Start funds for 2005 with approximately two months remaining in that year. Even if replacement funds had been available from non-federal sources, this would not eliminate the implication of mismanagement that led to the funding shortfall and is one basis of the suspension.

- Southern Delaware has not proffered any evidence that earlier issuance of the report of ACF's May 2005 follow-up review would have enabled Southern Delaware to obtain funding from the Delaware DOE. The review report, when it was issued in November 2005, found that Southern Delaware had failed to timely correct its previously-identified deficiencies. Thus, even assuming that the fact that ACF had not yet issued the report caused DOE to decline to award the ECAP funds to Southern Delaware, as Southern Delaware asserts, Southern Delaware submitted nothing from which we could reasonably infer that earlier issuance of the report would have changed DOE's determination that Southern Delaware was a program in deficiency or would have caused DOE to award the ECAP funding to Southern Delaware.

- The requirement in the regulation for prompt notification of review results that Southern Delaware cites, by its terms, refers to notification of deficiencies that must be corrected immediately or pursuant to a QIP, and not to notice of results of follow-up reviews, which are conducted after a grantee has already been afforded an opportunity to correct deficiencies. 45 C.F.R. § 1304.60(b). Here, the review in question in May 2005 was a follow-up review to determine if Southern Delaware had corrected deficiencies identified as a result of the review conducted in March 2004. Even assuming ACF failed to act promptly here, the regulations do not provide any consequence for such failure and certainly do not provide for invalidating the notice for that reason. See Council of the Southern Mountains, DAB No. 2006, at 27, n.25 (2005) (finding no authority to invalidate ACF's notice of an initial on-site review simply because ACF did not send it within the 45-day time frame provided at that time in the PRISM Guide).

- Southern Delaware proffered no evidence to show that it would have been permitted to use the state ECAP funds, which were intended to fund 126 children, to pay for Head Start services for 322 children for the last two months of 2005, for which Southern Delaware had already been provided federal Head Start funds. Even if Southern Delaware had been permitted to use the ECAP funds for Head Start services, it is not clear that Southern Delaware would have had any funds remaining after paying for ECAP services.

- Southern Delaware proffered no evidence that ACF discouraged a bank from providing Southern Delaware with a loan or a line of credit. Southern Delaware additionally did not proffer testimony or assert that the terms of the loan it sought would have permitted Southern Delaware to use the money for Head Start operating expenses in lieu of the federal Head Start funds intended to finance Southern Delaware's Head Start program during the final two months of 2005. In this respect, we note that ACF provided a declaration of a financial management specialist in its regional office recounting her participation in a conference call with Southern Delaware staff (including the Executive Director) and a representative of the bank, during which the bank stated that the $175,000 increase in Southern Delaware's line of credit that the bank was considering (from $75,000 to $250,000) could be used only for construction. ACF Ex. 32. Southern Delaware does not dispute that report.

- As to Southern Delaware's efforts to obtain a loan from another business, a proffer of testimony from Southern Delaware's Executive Director states only that in October of 2005 "someone from the ACF Region called Kaplen, a company with whom [Southern Delaware] does financial business and told Kaplen that if it lends money to [Southern Delaware] it will not get its money repaid." Southern Delaware written appeal from termination and written appeal from suspension, August 22, 2006, unnumbered exhibit. This proffer fails to identify any of the individuals involved, does not state who informed Southern Delaware of the communication or state how Southern Delaware otherwise learned of it. More important, nothing in the proffer indicates that, but for the alleged call, Kaplen would have loaned Southern Delaware sufficient funds to permit it to operate the Head Start program through the

> end of the year. Finally, although Southern Delaware cited case law for the notion that the government is bound to operate fairly and in good faith, Southern Delaware did not state how that principle would provide the Board with a legal basis to overturn the suspension, even assuming the truth of its proffer.

Accordingly, Southern Delaware's assertions that ACF contributed to the funding shortfall provide no basis to reverse the suspension.

C. ACF was authorized to suspend funding for Southern Delaware's Head Start program.

We now turn to whether the suspension was permissible. As noted above, Southern Delaware does not dispute ACF's findings that Southern Delaware faced a funding shortfall and the exhaustion of its federal Head Start funding with two months remaining in 2005, and that Southern Delaware failed to timely file two required financial statements for 2005. Southern Delaware also does not challenge ACF's conclusion that Southern Delaware thereby violated the Head Start regulation requiring that grantees establish and maintain efficient and effective reporting systems that generate official reports for federal authorities as required by applicable law, and that grantee financial management systems provide for effective control over and accountability for all funds, property and other assets. 45 C.F.R. § 1304.51(h)(2); 45 C.F.R. § 74.21(b)(3). Southern Delaware also does not contest ACF's determination that Southern Delaware violated standard terms and conditions of its Head Start grant that required Southern Delaware to carry out its Head Start project according to its approved grant application and to submit required financial reports on time. Nor does Southern Delaware contest that its failure to comply with the terms and conditions was material.

The Head Start regulations provide that ACF may impose a suspension for the same reasons that justify termination of financial assistance, among other bases. 45 C.F.R. § 1303.13(b). Termination is authorized if a grantee "fails to abide by any other terms and conditions of its [grant] award . . . or any other applicable laws, regulations, or other applicable Federal or State requirements or policies." 45 C.F.R. § 1303.14(b)(9). ACF was thus authorized to suspend Southern Delaware's Head Start grant based on Southern Delaware's failure to comply with the above requirements in the federal regulations and the terms and conditions of its grant award. Termination is also authorized if a grantee "has failed to comply with the required fiscal or

program reporting requirements applicable to grantees in the Head Start program." 45 C.F.R. § 1303.14(b)(3). In Utica Head Start Children and Families, Inc., DAB No. 1749 (2000), the Board held that a grantee's failure to submit financial documentation to ACF that was required by regulation (in that case, the requirement at 45 C.F.R. § 74.52(a)(1)(iv) to timely submit SF-269s) provided an independent basis for its termination.

Southern Delaware's likely exhaustion of its entire federal Head Start budget for 2005, well before the end of that year, jeopardized the provision of Head Start services to the children and families whom Southern Delaware was funded to serve. Southern Delaware's late submission of required financial reports may have contributed to this problem by impeding ACF's ability to remain fully apprised of Southern Delaware's financial situation. The SF-269 form is a financial report that a grantee has the obligation to complete accurately and is, along with required annual audits, one of two "key elements to ACF's ongoing oversight of Head Start grantees' fiscal management." Child Opportunity Program, Inc., DAB No. 1700, at 3 (1999); Lake County Economic Opportunity Council, Inc. at 9. As ACF argues, the lack of reliable financial information provides ACF little assurance that the children the Head Start program is funded to serve will receive the appropriate Head Start services.

ACF was thus authorized to indefinitely suspend funding Southern Delaware's Head Start program.

## II. The termination

### A. Southern Delaware's assertions that ACF personnel unduly influenced its operations provide no basis to reverse ACF's deficiency findings.

Before considering the deficiency findings upon which ACF bases its motion for summary affirmance of the termination, we address Southern Delaware's overarching argument that an ACF program specialist pressured Southern Delaware to hire, and later fire, an Executive Director that Southern Delaware blames for the existence of the deficiencies and for Southern Delaware's failure to timely correct them. We conclude that Southern Delaware's allegations, even if established to be true, would not provide a legal defense for the three deficiencies that we cite in granting ACF's motion for summary affirmance.

At the outset, we note that ACF has vehemently disputed the allegation that the program specialist exerted undue influence on Southern Delaware's hiring and firing decisions for this

Executive Director who resigned in November 2004. However, we conclude that it is not necessary for us to resolve any of the factual allegations because they would in no instance be legally sufficient as a defense for any of the deficiencies, even if true. Our reasons are as follows:

- In our order setting further procedures in this appeal, we directed Southern Delaware to state with as much specificity as possible how any action by ACF was responsible for any deficiency or for Southern Delaware's failure to correct the deficiency, and for what time period ACF allegedly had an effect on Southern Delaware's compliance. Order at 4. In spite of this directive, Southern Delaware failed through its arguments or its proffers of evidence to relate any of the specific deficiencies substantively or chronologically to any action of an ACF official. Southern Delaware also failed to provide an evidentiary link to the actions of the former Executive Director, or to the organization's ability to timely correct three of the deficiencies at issue. For example, none of the proffers discusses the findings from the May 2005 follow-up review of a failure to correct a deficiency, nor do the proffers relate those failures to the actions of the former Executive Director, who resigned in November 2004.

- Southern Delaware provides no reason why it could not have corrected specific deficiencies after the Executive Director left in November 2004 and before the deadline for correction. In fact, Southern Delaware was able to timely correct a significant number of the other deficiencies identified in the 2004 review. Some of the deficiencies that ACF found to be uncorrected were serious - in some instances placing the children served by the program in physical jeopardy, and unquestionably could have been corrected within the time frame for correction following the resignation of the Executive Director.

- Southern Delaware acknowledges that the Executive Director in question had been hired "in or about 2001" and resigned in November 2004. Southern Delaware written appeal from termination and written appeal from suspension, August 22, 2006, at unnumbered pages 1-2. Even if ACF had in some way influenced the hiring of the Executive Director in 2001, Southern Delaware retained the responsibility to closely evaluate her

performance after she had been hired. Certainly, Southern Delaware could have requested her resignation sooner if, after monitoring her performance, Southern Delaware recognized that she was affecting Southern Delaware's ability to comply with Head Start requirements, but Southern Delaware does not allege that it took prompt action to terminate her employment based on this assessment.

- If the Board of Directors of Southern Delaware believed that an ACF official was applying undue influence in the organization's efforts to hire a new executive director in 2001, its proper course of action was to file a complaint with higher officials in ACF, not to succumb to the influence. It is an abrogation of a board of directors' fiduciary responsibility to succumb to any form of undue influence in the hiring of an executive director. Perhaps the single most important responsibility of a board of directors of a Head Start organization is the hiring of an effective and competent Head Start director. See 45 C.F.R. § 1304.52(c) (the Early Head Start or Head Start director must have demonstrated skills and abilities in a management capacity relevant to human services program management); 45 C.F.R. § 1304.50, App. A, Chart III (grantee's governing body has general responsibility for hiring and terminating the Early Head Start or Head Start director).[7] Moreover, once having hired a Head Start director, it is the board's responsibility to closely monitor the director's performance and to terminate the director for cause if the director is unable to perform his or her duties in a satisfactory manner. These responsibilities simply cannot be abrogated for any reason, much less for undue influence from any source. Thus, even if it could be established that an ACF official exerted undue influence in the hiring of Southern Delaware's Head Start Director, Southern Delaware cannot justify any of its deficiencies on this basis because its Board of Directors should not have succumbed to undue influence from this or any other source.

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[7] Information in the record indicates that Southern Delaware's Executive Director is also its Head Start Director. ACF Ex. 29; ACF Ex. 31, at ¶ 9 (letter and declaration of ACF program specialist discussing Southern Delaware's hiring of a Head Start Director).

- If we were to carry Southern Delaware's arguments to their logical extreme, Southern Delaware would have no responsibility whatsoever for its performance from 2001 to May of 2005 (even for deficiencies that placed its children's safety in jeopardy) merely because Southern Delaware allegedly succumbed to undue influence from an improper source in the hiring of an executive director.

Southern Delaware also argues that ACF improperly delayed in providing notice of the report of the May 2005 follow-up review and asserts that such delay should excuse the deficiencies ACF relied upon for the termination. As noted in our analysis of the suspension, Southern Delaware cites a statement in the PRISM guide indicating that the report must be mailed within 45 days after the end of the on-site review. While ACF's delay in notifying Southern Delaware about the deficiency findings arising from the 2005 follow-up review may have been unfortunate, the 45-day period contemplated by the PRISM guide, as we observed above, did not arise as the result of any regulatory requirement pertaining to the termination (or suspension) procedures ACF must provide, and the guide in any event provides no sanction against ACF as part of the termination process in the event that ACF fails to issue the report within 45 days. Thus, the PRISM guide clearly is not a basis for ACF or the Board to excuse any of the deficiency findings at issue here. Moreover, Southern Delaware was unquestionably aware of some of the follow-up review findings during the review itself. Southern Delaware does not dispute that it was asked to perform needed repairs to its physical facilities identified in the follow-up review before the follow-up review had been completed, as we discuss below, and the review process necessarily involved a dialogue between ACF reviewers and Southern Delaware's teachers and staff.

Furthermore, as we already pointed out with regard to the suspension, Southern Delaware did not need to receive formal notice of the findings of the follow-up review in order to have corrected its deficiencies from the earlier review within the time frame specified in its approved QIP. Southern Delaware had already been notified of its deficiencies by the report of the initial review in March 2004 and by ACF's letter of October 28, 2004 informing Southern Delaware of newly-identified deficiencies resulting from its failure to remedy areas of noncompliance identified by the initial review, and had been provided the opportunity to correct the deficiencies pursuant to its original and amended QIPs. Neither the statute nor the regulations contemplate a second opportunity to correct previously-identified deficiencies. Finally, Southern Delaware does not allege, much less proffer evidence to substantiate, that it was substantially

impaired in its ability to present its appeal of the termination because of ACF's delay in issuing its notice.

B. Southern Delaware has not raised a disputed issue of material fact concerning three of the deficiency findings that ACF cited in its motion for summary affirmance, justifying the termination.

In its motion for summary affirmance, ACF argues that Southern Delaware has failed to raise any genuine dispute of material fact as to the existence of six of the seven numbered uncorrected deficiency findings cited in ACF's November 3, 2005 termination notice.[8] We conclude that Southern Delaware has not raised a disputed issue of material fact concerning three of the six deficiency findings ACF cites. Accordingly, we determine that summary disposition is appropriate, and we sustain ACF's termination of Southern Delaware's Head Start grant. Since the existence of even one uncorrected deficiency is sufficient to support termination, we limit our analysis below to those three deficiencies, which we address in the order in which they appeared in the termination notice.[9]

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[8] In moving for summary affirmance of the termination, ACF appears to have dropped its reliance on the first of the seven deficiency findings identified in the November 3, 2005 termination notice.

[9] In light of our determination that Southern Delaware has failed to raise a genuine dispute of material fact regarding three of the deficiencies, the meaning and intent of the Head Start review notes that ACF submitted (which Southern Delaware argues must be determined through testimony) is irrelevant. Moreover, although Southern Delaware asserts that the consultants and trainers that Southern Delaware used to correct the deficiencies will testify that they have all been corrected, Southern Delaware nowhere identified these "consultants and trainers." Even if we were to view this as a proffer of testimony despite the absence of any identification of any of the potential witnesses, we would find it inadequate to raise a genuine dispute of material fact. Like the proffers for witnesses whom Southern Delaware does identify, this proffer asserts only that the witnesses would testify generally that "the deficiencies were corrected." Southern Delaware made no proffer regarding any specific deficiencies, and no proffer that any deficiency was corrected within the timeframe established for

(continued...)

Recordkeeping and reporting

ACF cited an uncorrected deficiency in complying with 45 C.F.R. § 1304.51(h)(1), which provides:

> (h) Reporting systems. Grantee and delegate agencies must establish and maintain efficient and effective reporting systems that:
>
> (1) Generate periodic reports of financial status and program operations in order to control program quality, maintain program accountability, and advise governing bodies, policy groups, and staff of program progress; ...

The 2004 Head Start review report centered on Southern Delaware's failure to generate accurately various reports needed in its operations, and its failure to use information in reports that it did generate. These included a fiscal report of December 31, 2003 that had to be revised because of a mathematical error resulting in an unanticipated carry-over balance of $54,216, staff meeting minutes with little information about observed inadequate facilities and classroom materials, and reports that "[f]ar too often" did not apprise the administrative staff of weaknesses in the delivery of services to children and unmet performance targets. The review found that when reports did identify problems, management did not always follow through with more than an "immediate quick fix response to a crisis." ACF Ex. 8, at 14. This last finding, the report states, was supported by Southern Delaware's failure to find solutions to hiring new teaching staff and adequately staffing the classrooms when vacancies occurred.

ACF's May 2005 follow-up review determined that Southern Delaware still did not generate reports that assisted in maintaining

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[9](...continued)
correction in Southern Delaware's approved QIP. Under the regulations, to avoid termination, a grantee must correct each deficiency within the timeframe specified in the QIP. 45 C.F.R. § 1304.60(f); see 42 U.S.C. § 9836a(d)(1)(C). While (for purposes of summary judgment) we must view Southern Delaware's proffer in the light most favorable to it, we do not think that this requires us to infer that the witnesses meant that the deficiencies were timely corrected, given that Southern Delaware did not amend its proffer in response to the Board's direction to Southern Delaware to "specify [for each deficiency] the date by which it was corrected." Order dated July 13, 2006, at 4.

program quality and program accountability. ACF noted problems with the accuracy of fiscal reports and the usefulness of programmatic reports, including absence of expenditures and budgeted categories of funds that were listed in prior reports, and failure to provide Southern Delaware's Board and its Policy Council with fiscal reports from December 2004 through March 2005. ACF noted that a financial report provided at a Policy Council meeting on December 16, 2004 was inaccurate. ACF determined from interviews with Board and Policy Council members that fiscal reports were too complicated for the members to understand and lacked narrative summaries that would have been useful. Thus, according to ACF, Southern Delaware's Board lacked timely fiscal data and could not determine how funds were spent, what was the current fiscal status of the program, and whether cost principles were being followed. ACF determined that monthly program progress reports lacked information about performance indicators, the status of content plans, or corrective action needed, and failed to include statistical data about content/program performance. Thus, ACF found, the reports did not assist the governing bodies in controlling program quality and maintaining program accountability. ACF Ex. 28, at 18-19.

Southern Delaware argues that its fiscal agent or officer left in November 2004 when its former Executive Director resigned. Southern Delaware reports that once a new fiscal agent was hired, she prepared all fiscal reports required by the regulations for the period November 2004 to March 2005 and thereafter. Southern Delaware argues that ACF's November 3, 2005 notice of termination acknowledges that fiscal reports were prepared, since it "states that the Policy Council did receive a December 2004 report at the December 16, 2004 Policy Council meeting," and that the Board and the Policy Council complained about the format used for fiscal reports. Southern Delaware also reports that it spent funds above and beyond those provided by ACF to correct this deficiency.

We conclude that Southern Delaware does not raise a genuine issue of material fact with respect to this deficiency. Southern Delaware does not dispute ACF's factual findings from the follow-up review related to its failure to generate periodic reports of financial status and program operations. In particular, Southern Delaware does not dispute that it failed to provide its Board of Directors and its Policy Council with financial or fiscal reports from December 2004 through March 2005, nor provide any argument

about why it would not have been required to do so to timely correct the deficiency in fiscal reporting.[10]

Southern Delaware's primary defense for this deficiency was its argument (without any supporting evidentiary proffer or documentation) that its fiscal agent or officer left when its former Executive Director resigned in November 2004. ACF, however, argued in its motion for summary affirmance that the documentary evidence "clearly contradicts the grantee's claim that it did not have fiscal staff in place to prepare reports," (ACF motion for summary affirmance at 17), and Southern Delaware failed to dispute this allegation in its reply brief. Evidence in the record indicates that Southern Delaware had two fiscal staff - Southern Delaware's fiscal officer, and another employee listed as an "AP/AR coordinator" and described by ACF as fiscal staff - until their resignations on April 22, 2005, and that Southern Delaware thereafter employed a fiscal consultant until it hired a new fiscal officer. Id.; ACF Ex. 9, at 8, 14, 32 (reviewer notes). In any event, it is a grantee's responsibility to comply with critical requirements such as the need to generate accurate periodic reports of financial status even if it must rely on substitute or temporary staff on occasion. It would be unacceptable for a grantee to abrogate this responsibility for a period covering four to five months during the middle of the school year simply because one employee may have resigned. Without accurate, contemporaneous reports, Southern Delaware's Board of Directors and Policy Council could not perform their fiduciary responsibilities, which are critical for a grantee's operation of its program. Southern Delaware offers no argument about how the belated production of reports in April 2005 would meet that need or otherwise show it timely corrected the deficiency in fiscal reporting. In its QIP, Southern Delaware had committed to monitor its fiscal reports for accuracy and content to reduce errors when reporting to its Board of Directors and Policy Council, with the "Estimated Date of Completion" listed as "11/04 and Ongoing." ACF Ex. 30, at 11. Obviously if Southern Delaware was not providing the reports at all on a timely basis, it was not complying with what it had committed to

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[10] While Southern Delaware tries generally to characterize all of ACF's findings in the May 2005 review as "new deficiencies," we see no notice problem here. Clearly, if Southern Delaware had notice that providing inaccurate monthly fiscal reports to its Board was unacceptable, it could not reasonably believe that providing no reports at all over a four-month period would be acceptable.

do in its QIP. We therefore uphold ACF's findings concerning this deficiency.

Human resources

ACF cited an uncorrected deficiency in complying with 45 C.F.R. § 1304.52(h)(1)(iii), which provides:

> (h) Standards of conduct. (1) Grantee and delegate agencies must ensure that all staff, consultants, and volunteers abide by the program's standards of conduct. These standards must specify that:
>
> * * *
>
> (iii) No child will be left alone or unsupervised while under their care; . . .

The 2004 Head Start review found that Southern Delaware left children under its care unattended. The review found that, during a site visit, 17 children were seen on a playground without supervision, and numerous children were seen unattended in the hallway and restrooms at two centers; center managers confirmed that children were allowed to use the bathroom unattended. ACF Ex. 8, at 15-16.

ACF's 2005 follow-up review found that Southern Delaware's code of conduct had been revised and that children were not being left unattended in the centers as during the 2004 review. The report of the review, however, states a finding that while ACF was at Southern Delaware conducting the review, a child was left alone on a Head Start bus parked in the grantee's main office lot; this was after children had been dropped off at a center, and the bus staff did not complete a walk-through of the bus. The incident was acknowledged by bus staff. Southern Delaware's Director of Services "indicated that this may have been a willful act by staff," but did not indicate that the incident was reported to the local child protection agency for investigation. ACF Ex. 28, at 23.

Southern Delaware argues that it should not be held responsible for a willful act by the staff when Southern Delaware addressed the willful conduct by dismissing the employee. Southern Delaware notes that its code of conduct provides that no child will be left alone or unsupervised, and staff was trained on the code of conduct and on this standard on August 7 and September 7, 2004, and on February 21 and March 3, 2005.

We conclude that Southern Delaware does not raise an issue of material fact with respect to this deficiency. Southern Delaware does not dispute that during the 2005 review its employees left a child alone on a Head Start bus. This failure to ensure that staff abide by a critical standard of conduct is particularly serious because it unquestionably placed the safety of Southern Delaware's children in jeopardy. Moreover, as discussed below, it is clearly no defense for this failure that Southern Delaware dismissed the employee most directly involved, who Southern Delaware suspected had acted willfully.

After the 2004 review, Southern Delaware had the obligation to ensure that each and every one of its employees met this critical standard of conduct that no child ever be left alone or unsupervised while under its care. Southern Delaware was obliged not only to train its employees and verify that they would act responsibly at all times but was also obliged to ensure that its employees carried out their responsibilities as reflected in the standard of conduct. Simply by alleging that an employee who indisputably failed to meet the standard of conduct during the follow-up review had been dismissed and that employees had previously been provided with training does not raise an issue of material fact that the standard had in fact been met and that this lapse of conduct could not have been prevented. Such an argument ignores the fact that Southern Delaware's performance must be evaluated on the basis of how the organization as a whole is functioning and responding to the deficiency first identified during the 2004 review: for example, did the organization subsequently hire and retain only responsible individuals who could comply with critical standards of conduct, and did it properly supervise them to ensure that they had met the standards and never left children alone or unsupervised. Southern Delaware failed to dispute that the incident occurred and failed to proffer documentary or other evidence that it had taken measures and adopted the necessary policies and procedures to ensure that its employees always met this critical standard of conduct. It is not sufficient to adopt a code of conduct and train personnel about the code if there is no system for monitoring and enforcing compliance with the code. Accordingly, we uphold ACF's findings on this deficiency.

Facilities, materials, and equipment

ACF cited an uncorrected deficiency in complying with 45 C.F.R. § 1304.53(a)(7), which provides:

> (7) Grantee and delegate agencies must provide for the maintenance, repair, safety, and security of all

Early Head Start and Head Start facilities, materials and equipment.

The 2004 review found inadequate maintenance and repairs of indoor and outdoor equipment and facilities; equipment in disrepair and hazardous to children, including uncovered sandboxes, weeds, chipped paint in classrooms, broken toys with sharp edges, hanging ropes and splintered wooden climbing structures at a playground. The review reported bathrooms with broken and missing tiles exposing toxic materials at one center, and a fence at another center that did not enclose the playground and restrict children from unsafe areas. ACF wrote that timely hiring of a facilities coordinator could have provided assistance in this area. ACF Ex. 8, at 18.

The 2005 follow-up review found that equipment was not maintained. The reviewers noted that a health and safety checklist completed at the "Stepping Stone" family day care home "highlighted a bathroom sink/vanity unit in disrepair," and they observed that the sink/vanity unit had splintering wood on its sides. ACF Ex. 28, at 29. Additionally, the interior of this site/bathroom was found to be damp and dirty with mold and mildew due to the storage of wet towels and rugs in the vanity. ACF observed that one center, the Laverty center, had a broken fence, protruding nails in the outdoor play area, and toxic cleaning supplies stored in unlocked sink-level cabinets that were easily accessible to children. The report states that Southern Delaware corrected the conditions at the Laverty center during the follow-up review, after the ACF regional office provided Southern Delaware a letter stating that they were a deficiency that had to be corrected prior to the end of the review. Id.

Southern Delaware disputes that equipment at the Laverty center was not maintained, noting that the center was inspected by the State and issued a license for March 1 - November 30, 2005. Southern Delaware also disputes that the sink cabinet at Laverty (used to store cleaning supplies) was a violation, alleging that it was four and a half feet from the floor, more than the height of any child in the Head Start program. Southern Delaware also notes that it made repairs while ACF was on site for the 2005 review.

We conclude that Southern Delaware does not raise an issue of material fact with respect to the existence of this deficiency. ACF conducted its follow-up review from May 16 through May 20, 2005 and the reviewers identified multiple maintenance, repair and safety problems related to Southern Delaware's facilities and equipment. Although Southern Delaware points to a state license

that was issued for its Laverty Center from March 1 - November 30, 2005 as a basis for refuting the existence of the identified problems at that center, Southern Delaware proffered no evidence to substantiate when that license was issued or why the license would demonstrate that the problems identified from May 16 through May 20 by the reviewers in that center did not in fact exist. The mere fact that a facility has been found to meet state licensing standards does not necessarily mean that it meets all federal requirements. Further, Southern Delaware's assertion that it corrected the problems by May 20 is in effect an admission that they did exist. The fact that ACF insisted that the problems be corrected immediately is an indication of the seriousness of the problems from ACF's perspective. Moreover, even assuming the truth of Southern Delaware's assertion that an unlocked cabinet containing cleaning supplies was above the height of its Head Start children, this would not necessarily rebut ACF's finding that the cabinet was accessible. Southern Delaware did not proffer evidence that curious, determined children would not have been able to gain access to the unlocked cabinet.

Regarding the findings of the May 2005 follow-up review, we do not agree that the findings identified in the follow-up review constituted "new deficiencies," as Southern Delaware's former Director of Services suggests in a proffer of testimony. Southern Delaware written appeal from termination and written appeal from suspension, August 22, 2006, unnumbered exhibit. The Board has held that "the mere fact that a deficiency was exhibited in a certain way in one review does not mean that different evidence may not be used to support a finding that a grantee continued to be deficient in meeting a requirement."

First State Community Action Agency, Inc., DAB No. 1877, at 17 (2003). The Board there held that deficiencies-

> may manifest themselves in different ways which are evidence of the deficiency, rather than the deficiency itself. Addressing a specific manifestation and not the structural or systemic problem that permitted it to flourish does not amount to correction of the deficiency. . . . Limiting ACF's enforcement abilities to individual symptoms of a deficiency would permit grantees to avoid addressing underlying management problems. In sum, First State confuses individual manifestations of a deficiency with the deficiency itself. Corrective measures aimed at those manifestations but not at the underlying problems that made it possible for them to arise are not sufficient to bar a termination action, where ACF has adequately notified the grantee of what is expected.

Id. at 78-79.

The Board has applied this principle to find that a grantee failed to correct a deficiency cited under the requirement that indoor and outdoor premises must be kept free of undesirable and hazardous materials and conditions (45 C.F.R. § 1304.53(a)(10)(viii)), that was based on observations of different playground hazards in the initial review (the presence of litter, broken glass and other debris) and in the follow-up review (a child-accessible hole in a wall of an abandoned building that served as a perimeter wall of a playground). Philadelphia Housing Authority, DAB No. 1977, at 16-19 and n.14 (2005), aff'd, The Philadelphia Housing Authority v. Leavitt, 2006 WL 2990391 (E.D.Pa. Oct. 17, 2006). The Board rejected the grantee's argument that it should have been given a further opportunity to correct the deficiency since the hole had not been specifically cited in the initial review. The Board noted that the initial review had found unsafe conditions on the grantee's playgrounds and that ACF had given the grantee notice that it needed to keep the playgrounds free from hazards. Yet, a hazard - the hole - existed at the time of the follow-up review. The fact that the hazard was of a different type did not mean that the underlying deficiency had been corrected. "As we have indicated in prior decisions, the findings of a followup review need not be identical to findings of the initial or earlier review." Id. at 18, n.14, citing First State Community Action Agency, Inc. at 17.

Here, the report of the initial review in March 2004 informed Southern Delaware that it "did not provide adequate maintenance and repairs to indoor and outdoor equipment and facilities" and that "[o]bservations at three Head Start Centers and two Family Day Care Homes revealed that equipment was in disrepair and hazardous to children." ACF Ex. 8, at 18. Southern Delaware was thus given notice of its responsibility to maintain its equipment and facilities adequately so that they presented no hazards to Head Start children. It was thus incumbent on Southern Delaware to make sure that it had corrected all of the problems identified during that review and that it regularly inspected its facilities to make sure that no new problems arose. Otherwise, a Head Start grantee could rely on the federal reviewers to identify problems and then simply correct those specific problems during the review, effectively leaving its facilities unmaintained, unrepaired, and unsafe between reviews. The conditions observed during the follow-up review demonstrate that Southern Delaware had failed to fulfill its responsibility to maintain its equipment and facilities adequately so that they presented no hazards to Head Start children. Moreover, the conditions that the reviewers noted in the follow-up review were sufficiently similar in nature to those noted in the initial review as to belie any argument that they constituted "new" deficiencies. Finally, Southern Delaware cannot reasonably rely on its efforts to correct the problems on May 20 as a defense for this deficiency. Southern Delaware was required to correct this deficiency within the time period specified in its QIP, which could be no later than one year after it received ACF's May 5, 2004 letter forwarding the report of the 2004 review. Southern Delaware does not assert that it corrected this deficiency within that time, nor would making repairs to specific equipment or facilities adequately address the underlying problems. Accordingly, we uphold ACF's findings on this deficiency.

Conclusion

For the reasons discussed above, we grant ACF's motion for summary affirmance and uphold ACF's suspension and termination of Southern Delaware's Head Start grant.

Judith A. Ballard

Sheila Ann Hegy

Donald F. Garrett
Presiding Board Member