Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Community Action Agency of Central Alabama
Docket No. A-15-39
Decision No. 2797
June 16, 2017

DECISION

Community Action Agency of Central Alabama (CAACA) appealed the December 2, 2014 decision of the Administration for Children and Families (ACF), an agency of the Department of Health and Human Services (HHS), terminating CAACA's Head Start grant because CAACA did not timely correct three deficiencies related to the safety and maintenance of its Head Start facilities and to its monitoring and governance of its Head Start program.

ACF cited numerous conditions in various CAACA Head Start centers that ACF determined posed hazards to the health and safety of the children enrolled in CAACA's Head Start program and were violations of requirements for maintaining Head Start facilities. ACF also alleged that CAACA failed to adequately monitor and govern its Head Start program as required by statute, and that these failures were deficiencies that had permitted the hazardous conditions in Head Start facilities to develop and remain uncorrected.

For the reasons we explain below, we sustain the termination. We focus our analysis on two areas: fire safety hazards and playground hazards. We conclude that the record amply demonstrates that CAACA had problems in those areas that constituted a deficiency and that CAACA failed to correct those issues within the time period ACF afforded it. We also note additional conditions that demonstrate CAACA's failure to achieve and maintain a safe environment for children in its care. We conclude that the persistence of the fire hazards at the Henry Center for over two years prior to the March 2014 review, and the continued presence of similar hazards at other facilities, which were not discovered prior to fire marshal inspections after the corrective action period, demonstrate the existence of, and failure to correct, the monitoring deficiency. Based on the presence of ample grounds supporting the existence of those two deficiencies, and CAACA's failure to timely correct them, we do not address the governance deficiency.

In appealing the termination CAACA has argued principally that: most of the physical conditions at its Head Start centers were unsightly or ugly rather than hazardous or dangerous; CAACA corrected any hazardous or dangerous conditions; and conditions ACF cited as evidence that CAACA had failed to correct the deficiency related to its Head Start facilities were instead new conditions that CAACA had to be given a further opportunity to correct. CAACA also offered as defenses to its termination arguments that: ACF refused to provide needed assistance and training to CAACA's Head Start program; ACF ignored CAACA's response to the initial deficiency notice showing that ACF's findings were erroneous or CAACA had corrected any hazardous or dangerous conditions; and one or more ACF officials were biased against CAACA for firing, and/or not hiring, management staff favored by ACF and used the inspection and termination processes in retaliation.

We explain in the decision why we sustain the termination and reject CAACA's counter arguments. As discussed below, we conclude that the record establishes the existence of enough hazardous conditions not timely corrected to establish ACF's authority to terminate.

Legal background

Head Start is a national program to promote school readiness of low-income children by providing health, educational, nutritional, social and other services to enhance their cognitive, social, and emotional development. Section 641A(a) of the Head Start Act, (Act), 42 U.S.C. § 9836a(a), directs the Secretary of HHS to establish by regulations standards and minimum requirements for all aspects of Head Start programs, including standards for the conditions of Head Start facilities and for grantees' administrative and financial management of their Head Start programs.[1]

The Secretary reviews each Head Start grantee's program at least once every three years to determine whether it meets program performance standards. 42 U.S.C. § 9836a(c)(1)(A). If a grantee's program has one or more "deficiencies," the Secretary conducts a follow-up review to determine if the grantee has corrected them. 42 U.S.C. § 9836a(c)(1)(C). The law defines "deficiency" to include "a systemic or substantial material failure of an agency in an area of performance that the Secretary [of HHS] determines involves[,]" as relevant here, "a threat to the health, safety, or civil rights of children or staff" or "a denial to parents of the exercise of their full roles and

[1] Congress established Head Start through the Head Start Act (Act), Public Law No. 97-35, §§ 635-57 (1981), and subsequent amendments. The Act is codified at 42 U.S.C. §§ 9831 et seq. The current version of the Head Start Act is at http://eclkc.ohs.acf.hhs.gov/hslc/standards/law. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

responsibilities related to program operations[.]" 42 U.S.C. § 9832(2)(A). The Secretary may require the grantee Head Start agency to correct any deficiencies within either 90 days, or within up to one year pursuant to a quality improvement plan (QIP) approved by ACF. However, the Secretary requires the grantee to correct "immediately" any deficiency that "threatens the health or safety of staff or program participants or poses a threat to the integrity of Federal funds; . . . ." 42 U.S.C. § 9836a(e)(1)(B). In practice, ACF, which administers the Head Start program on behalf of the Secretary and oversees these reviews and termination actions, may afford the grantee up to 30 days to correct such "immediate" deficiencies. *Gulf Coast Cmty. Action Agency, Inc.*, DAB No. 2670, at 2 (2015). The Secretary must "initiate proceedings to terminate the designation of the agency [as a Head Start agency] unless the agency corrects the deficiency." 42 U.S.C. § 9836a(e)(1)(C).

A grantee's failure to timely correct a single deficiency authorizes ACF to terminate funding. 42 U.S.C. § 9836a(e)(1)(C); 45 C.F.R. § 1303.14(b)(4) (2013) (authorizing termination for failure to timely correct "one or more deficiencies"); *Avoyelles Progress Action Comm., Inc.*, DAB No. 2559, at 8 (2014).[2]

Background

ACF terminated CAACA's Head Start grant by notice dated December 2, 2014 following on-site reviews ACF conducted in March and October 2014 with the assistance of a contractor, Danya International. During that time, CAACA operated at least 16 Head Start centers in four counties in Alabama, one of which it had ceased using due to fire safety issues. Dunlap Decl. ¶¶ 6, 14, 25; Transcript of Hearing (Tr.) at 853. ACF notified CAACA of the findings of the March 2014 review in an "Overview of Findings" dated April 11, 2014 (April 2014 Overview) stating that CAACA had three "immediate" deficiencies it had to correct within 10 days to avoid termination of its grant, which ACF later extended for 10 more days at CAACA's request. CAACA Ex. 3, at 1, 4, 7, 8, 9; CAACA Ex. 5.

[2] ACF substantially revised the regulations governing the Head Start program effective November 7, 2016. 81 Fed. Reg. 61,294, 61,412 (Sept. 6, 2016); 45 C.F.R. Parts 1301-1305. We apply here the regulations in effect in 2014 when ACF reviewed CAACA's program and issued the notices of deficiencies and termination and when CAACA appealed the termination. These regulations were found in the edition of C.F.R. Title 42 published in October 2013 and were unchanged until the 2016 revision. Some of the provisions governing termination were re-designated but remain substantively unchanged, such as the authority to terminate funding if "[t]he grantee has failed to timely correct one or more deficiencies as defined in the Act." 45 C.F.R. § 1304.5; *compare* § 1303.14(b)(4) (2013) (authorizing termination for failure to timely correct "one or more deficiencies").

For the first deficiency, the April 2014 Overview alleged that CAACA "did not provide for the safety of its Head Start facilities" and had "multiple health and safety hazards" at eight CAACA Head Start centers constituting noncompliance with the requirements for "Head Start physical environment and facilities" in 42 C.F.R. § 1304.53(a)(7) and (10) (2013) (the physical environment and facilities deficiency).[3] CAACA Ex. 3, at 4-7. ACF on appeal classified health and safety hazards as fire safety hazards; playground hazards; building maintenance, safety and sanitary issues; and deteriorated paint conditions and presence of lead-based paint. ACF Motion for Summary Judgment & Response to CAACA's Motion to Dismiss (ACF MSJ). ACF determined that these findings were a deficiency as defined as a systemic or substantial material failure in an area of performance that involves a threat to the health, safety, or civil rights of children or staff. CAACA Ex. 3, at 7; 42 U.S.C. § 9832(2)(A).

The two other deficiency findings in the April 2014 Overview alleged noncompliance with statutory requirements that Head Start grantees "establish and implement procedures for the ongoing monitoring of their respective programs, to ensure that the operations of the programs work toward meeting program goals and objectives and standards" (the monitoring deficiency) and that their governing bodies "be responsible for ensuring compliance with Federal laws (including regulations) and applicable State, tribal, and local laws (including regulations)" (the program governance deficiency). 42 U.S.C. §§ 9836a(g)(3), 9837(c)(1)(E). ACF essentially based these deficiencies on CAACA's failure to prevent, detect, or remedy the health and safety hazards that ACF alleged under the physical environment and facilities deficiency. ACF alleged under the monitoring deficiency that CAACA's monitoring system was not effective and did not enable it to identify and resolve health and safety hazards. CAACA Ex. 3, at 7-8. ACF alleged under the program governance deficiency that CAACA's Board of Directors was "uninformed and uninvolved regarding the conditions of Head Start facilities and critical threats to the health and safety of children and staff" and "did not adequately participate in the evaluation of conditions in Head Start facilities." *Id*. at 8-9.

ACF notified CAACA of the findings of the October 2014 on-site review in a second "Overview of Findings" dated December 2, 2014 (December 2014 Overview) that ACF sent with the notice of termination. The December 2014 Overview stated that CAACA had corrected all physical environment and facilities issues at two Head Start centers and had closed a third Head Start center, that issues at two more centers were only partially corrected, and that there were "new health and safety issues" at 12 Head Start centers

[3] The April 2014 Overview also stated that CAACA "continued to occupy and serve children in a center ordered closed by the County" due to fire code violations. CAACA Ex. 3, at 7. As we note later, however, the parties agree that this statement is in error and that CAACA had ceased using this particular facility to provide services to children after its closure prior to the March 2014 review.

(including one of the two centers at which the previously-identified issues had been corrected and both centers at which the previously identified issues had been partially corrected). CAACA Ex. 2, at 7-10. ACF also determined that CAACA did not correct the monitoring and governance deficiencies. Based on those findings, ACF terminated CAACA's Head Start grant, and CAACA appealed the termination. In its response to CAACA's appeal, ACF also presented, as further evidence of CAACA's failure to timely correct the deficiency findings identified in April 2014 Overview, additional allegations of fact not made in the December 2014 Overview.

Proceedings before the Board

The appeal process before the Board has been protracted, with extensive briefing, delays, a discovery dispute, and a five-day evidentiary hearing. Each party filed multiple briefs and exhibits throughout the appeal process and identified witnesses for hearing.

CAACA filed a notice of appeal requesting a hearing, and its brief (CAACA NA Br.) and exhibits; ACF filed a response to the appeal (ACF Resp.) and exhibits; and CAACA filed a reply brief and a motion to dismiss the termination on several legal grounds (CAACA Reply). ACF then filed a combined motion for summary judgment and a response to CAACA's motion to dismiss (ACF MSJ); CAACA filed an opposition to ACF's motion for summary judgment (CAACA Opp. to MSJ); and ACF filed a reply to CAACA's opposition (ACF MSJ Reply).

On March 23, 2016, the Board issued a ruling denying both ACF's motion for summary judgment and CAACA's motion to dismiss the termination notice, and resolving several legal issues. *Ruling Denying Summary Judgment & Dismissal of the Termination Notice, & Ruling on Legal Issues* (Mar. 23, 2016) (*Ruling*) (attached).

During this briefing process, CAACA moved to compel production of certain documents that ACF withheld, and ACF opposed CAACA's motion. The Board reviewed the withheld documents in camera, sustained ACF's claims of privilege for some documents, and granted production of the rest.

The parties continued to file exhibits throughout the briefing and hearing process. CAACA filed 146 numbered exhibits prior to the hearing (CAACA Exs. 1-9, 11-68, 71-72, 75-82, 84-85, 87, 89-149, 153, 154)[4] and ACF filed 106 exhibits prior to the hearing and one exhibit during the hearing (ACF Exs. 1-107). After the hearing, CAACA filed a

[4] CAACA did not file Exhibits 10, 69, 70, 73, 74, 83, 86, and 88, which it designated as "reserved" on its several exhibits lists. CAACA did not file Exhibits 150, 151 and 152, which were listed on its final exhibit list. CAACA referred to its exhibits as "Tabs"; we refer to them as Exhibits (Exs.).

copy of a demonstrative exhibit – a floor plan of one its Head Start centers that the parties used and marked during the hearing (CAACA Ex. CAA-DEMO 1) – and ten documents comprising blue prints of another of its Head Start centers.

The Board held a pre-hearing conference on April 20, 2016. The Board and the parties agreed to hold the hearing during July 2016, and the parties then filed written direct witness testimony and identified witnesses to cross-examine. CAACA counsel filed a motion to withdraw on June 10, 2016, however, and the Board cancelled the July hearing pending CAACA obtaining new counsel, who entered his appearance by notice dated August 22, 2016.

The Board convened a second pre-hearing conference on September 21, 2016, during which the parties and the Board agreed to hold the hearing during November 2016. The Board issued the notice of hearing required by regulation on October 24, 2016. 45 C.F.R. § 1303.16(h). Prior to the hearing the Board also granted CAACA's prior counsel's motion to withdraw.

The Board convened the hearing by videoconference on five days, November 7-10 and 15, 2016. As the parties had already filed their witnesses' written direct testimony, the hearing was limited to cross-examination of witnesses (and any recross and redirect examination). Ten ACF witnesses and five CAACA witnesses appeared at the hearing. At the start of the hearing ACF reported that two witnesses who filed written direct testimony would not appear as scheduled for cross-examination, a former ACF program specialist who led the March 2014 review and a state fire marshal. Tr. at 20-22, 913. The Board thus struck the two witnesses' written direct testimony, consistent with Board policy and the hearing regulations requiring that witnesses who provide prepared written direct testimony be available for cross examination. Tr. at 926, 1022-23; 45 C.F.R. § 1303.16(d). The Board also ruled that it would strike documents the absent witnesses prepared or generated, and would disregard their statements that may appear in the statements of other witnesses. Tr. at 939-40, 1022-23. In particular, the Presiding Board Member agreed to strike CAACA's Exhibit 32, the report of an occupancy inspection of the Autaugaville Head Start Center on July 22, 2014 by one of the two absent witnesses, a state fire marshal, and denied ACF's request to file that document as one of its own exhibits.[5] Tr. at 939-40. In addition, the Presiding Board Member at the hearing permitted CAACA's counsel a broader leeway for cross-examination and redirect examination of certain witnesses to address CAACA's unexpected inability to cross-examine the former program specialist on various topics. Tr. at 85-86, 120, 844-47.

[5] Documents struck from the record are not considered for the Board's decision but remain on DAB E-File for the benefit of a court reviewing this ruling in an appeal of the Board's decision. Tr. at 939-40.

CAACA has strongly objected to the absence of the ACF program specialist, who CAACA has accused of having sought to undermine its Head Start program and of refusing to appear at the hearing. CAACA has requested additional relief due to her absence, essentially in the nature of a directed verdict. In this decision we address this witness's absence further and explain why we deny the requested relief.

After receiving transcripts of the hearing the parties filed simultaneous post-hearing briefs and post-hearing reply briefs. The parties were provided the transcript of the hearing and given the opportunity to note prejudicial errors in transcription. ACF noted errors, none of which affect our decisions. The parties filed simultaneous post-hearing briefs and reply briefs.

Analysis

I. Summary of analysis

We sustain the termination because the evidence establishes that CAACA's Head Start facilities had fire safety hazards, hazardous condition at its playgrounds, and other unsafe conditions that together demonstrated the existence of a deficiency under the Head Start law, and, moreover, that CAACA failed to correct this deficiency because it permitted the persistence or occurrence of similar hazardous conditions beyond the time period that ACF provided to correct the deficiency.[6] We conclude, moreover, that the substantiated findings related to fire safety and playground hazards each would have independently sufficed to demonstrate the presence of and the failure to correct the overall physical environment and facilities deficiency. Collectively, the findings of unsafe conditions to which the children were exposed amply support ACF's action. In addition, the persistence of fire safety hazards at its facilities over a period of several years plainly establishes that CAACA failed to adequately monitor its program to assure compliance with applicable laws and regulations as required by the Head Start Act, and that this failure was a deficiency that CAACA failed to correct within the time frame permitted.

[6] We recognize CAACA's argument that some of the conditions ACF identified at the Head Start facilities were not actually hazardous but merely unsightly. We do not address the validity of this argument for some of the allegedly defective conditions because the uncontested record readily establishes the existence of uncorrected hazardous conditions at CAACA Head Start facilities more than sufficient to demonstrate a deficiency that CAACA failed to timely correct, warranting termination. These uncorrected conditions included fire safety hazards and hazardous conditions at CAACA playgrounds. As these conditions constituted a deficiency or deficiencies as defined in the law, we do not address every condition that ACF identified.

Several well-established principles guide our analysis in sustaining the termination:

- As mentioned earlier, under the Head Start law and regulations, "a single uncorrected deficiency is sufficient to warrant termination of funding." *Avoyelles Progress Action Comm., Inc.* at 8. The regulations state that Head Start financial assistance may be terminated if "[t]he grantee has failed to **timely correct one or more** deficiencies as defined" in 45 C.F.R. Part 1304. 45 C.F.R. § 1303.14(b)(4) (emphasis added); *Avoyelles* at 8. The Head Start Act similarly directs the Secretary of HHS to "initiate proceedings to terminate the designation of the [Head Start] agency unless the agency corrects **the** deficiency" identified in a review of the Head Start grantee, and sets timeframes within which grantees must correct its deficiencies. 42 U.S.C. 9836a(e)(1)(B), (C) (emphasis added); *see also S. Del. Ctr. for Children & Families*, DAB No. 2073, at 22 (2007) (termination upheld even though grantee was able to "timely correct a significant number" of the deficiencies identified in the initial review). Thus, the fact that CAACA corrected some of the conditions ACF identified, and showed that others may not have posed the hazards ACF alleged, does not authorize us to reverse the termination.

Moreover, the fact that ACF cited, as only one deficiency, all of the defective conditions alleged at CAACA Head Start facilities and grounds – fire safety hazards; playground hazards; building maintenance, safety and sanitary issues; and deteriorated paint conditions and presence of lead-based paint – does not mean that we must find that all of those conditions, or any set percentage of them, existed in order to find that CAACA had a deficiency that it had to timely correct to avoid termination. ACF's citation of multiple conditions collectively as one deficiency neither diminished the significance of each condition nor relieved CAACA of its obligation to fully correct any conditions that posed threats to Head Start children and staff. To hold otherwise would permit hazardous conditions that threatened the health and safety of the young children enrolled in Head Start to persist uncorrected. In any event, the two categories of conditions on which we focus in sustaining ACF's findings – fire safety and playground hazards – by themselves each posed clear, apparent hazards to Head Start children as to constitute a "systemic or substantial material failure" that involves a threat to the health or safety of Head Start children and thus a deficiency as defined in the Head Start Act. 42 U.S.C. § 9832(2)(A). The fact that CAACA fixed many of the specific defective conditions reported in the April 2014 Overview, and that the record does not support some of ACF's other findings (e.g., the presence of "mold" on the outside wall of the Jemison Center), provide no basis to reverse the termination.

- As discussed in our *Ruling*, to avoid termination, a grantee must correct its deficiencies to the point of full compliance with the requirement(s) at issue to avoid termination. *Ruling* at 12-14. The Board in repeatedly affirming this principle has noted that to permit grantees to avoid termination by only partially correcting a deficiency to the point of only substantial compliance would effectively result in grantees never fully

complying with Head Start requirements. *Id*. at 13-14, citing *Municipality of Santa Isabel*, DAB No. 2230, at 10 (2009); *The Council of the Southern Mountains, Inc.*, DAB No. 2006, at 28-29 (2005); and *Jefferson Comprehensive Care System, Inc.*, DAB No. 2377, at 18-19 (2011). Thus, we conclude below that the uncontested presence, after the time for corrective action had passed, of fire code violations at CAACA facilities such as cooking stoves without required automatic fire suppression systems constituted failure to correct the physical environment and facilities deficiency without our having to determine whether those violations alone constituted a deficiency.

- As also noted in the *Ruling*, a federal 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." *Gulf Coast Cmty. Action Agency, Inc.* at 3, citing *Friendly Fuld Neighborhood Ctr., Inc*., DAB No. 2121, at 3 (2007). This burden arises because, as the Board "has long held . . . a grantee who receives federal funds has an affirmative duty to document that those funds are used for the purposes for which they were awarded." *Rural Day Care Ass'n of Ne. N.C.*, DAB No. 1489, at 8 (1994), *aff'd, Rural Day Care Ass'n of Ne. N.C. v. Shalala*, No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995), citing *Nat'l Urban League, Inc.*, DAB No. 289, at 2 (1982). The grantee, moreover, "is clearly in a better position to establish that it did comply with applicable requirements than ACF is to establish that it did not"; thus, "the ultimate burden of persuasion is on the grantee to show that it was in compliance with program standards." *Gulf Coast Cmty. Action Agency* at 3. Thus, once ACF presented evidence indicating that CAACA facilities had defective, hazardous conditions that could constitute a deficiency or deficiencies (i.e., once ACF had established a "prima facie case" that CAACA had deficiencies, which the evidence shows), CAACA bore the burden of showing either that there was no deficiency in the first place or that it timely corrected the deficiency(ies) to the point of being in compliance with the applicable requirements (for example, the requirements to provide for the "maintenance, repair, safety, and security of all Early Head Start and Head Start facilities, materials and equipment" and to assure that premises are "kept free of undesirable and hazardous materials and conditions"). 45 C.F.R. § 1304.53(a)(7), (a)(10)(viii).

- To avoid termination, a grantee with deficiencies must fully correct them within the time frame ACF grants. This requirement is apparent in regulations stating that HHS will issue a notice of termination if a Head Start grantee "fails to correct a deficiency, either immediately, or within the timeframe specified in the approved" QIP.[7] 45 C.F.R. § 1304.60(f); *see Philadelphia Hous. Auth.*, DAB No. 1977, at 14-15 (2005) (Head Start regulations "are clear that all deficiencies must be corrected by the end of the period for

[7] As stated above, ACF in practice may afford up to 30 days for "immediate" correction.

correction"), *aff'd*, *The Philadelphia Hous. Auth. v. Leavitt*, No. 05-2390, 2006 WL 2990391 (E.D. Pa. Oct. 17, 2006). Thus, "[e]vidence that a grantee came into compliance with the applicable requirements after the time provided for correction ended does not establish that the grantee corrected its deficiencies." *S.W. Ark. Dev. Council, Inc.*, DAB No. 2489, at 8 (2012), quoting *Jefferson Comprehensive Care Sys., Inc.* at 2. "As a matter of law, steps to correct deficiencies outside the time period ACF gives for correction cannot remove ACF's authority to terminate based on the failure to timely correct." *Pinebelt Ass'n for Cmty. Enhancement*, DAB No. 2611, at 11-12 (2014), citing *Babyland Family Servs.*, DAB No. 2109, at 20 (2007).

- A Head Start grantee seeking to correct a deficiency must timely remedy not only (for example) the individual conditions at its facilities that ACF identified in the notice of deficiencies, but must also cure other similar defective conditions that may exist at any of its facilities. In other words, "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." *S. Del. Ctr. for Children & Families* at 32-33, quoting *First State Cmty. Action Agency, Inc.*, DAB No. 1877, at 17 (2003). Thus, the Board has concluded in a prior case that a three-square-foot hole in a wall of an abandoned building bordering a playground, which was not identified by ACF's initial review but was seen during the revisit, showed that the grantee failed to correct a deficiency under the requirement to keep premises free of undesirable and hazardous materials and conditions (45 C.F.R. § 1304.53(a)(10)(viii)) that was based on other playgrounds' hazards (litter, broken glass and other debris). *Philadelphia Hous. Auth.* at 16-19 and 18 n.14. The Board rejected the grantee's argument that "it should have been given a further opportunity for correction" because "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* at 17.

Similarly, in *Southern Delaware Center for Children and Families*, defective conditions constituting a deficiency under the requirement to "provide for the maintenance, repair, safety, and security" of all Head Start "facilities, materials and equipment" (45 C.F.R. § 1304.53(a)(7)) included uncovered sandboxes, weeds, chipped paint in classrooms, broken toys with sharp edges, hanging ropes and splintered wooden climbing structures, bathrooms with broken and missing tiles exposing toxic materials, and a fence that did not enclose a playground to keep children from unsafe areas. DAB No. 2073, at 30-31. The Board concluded that different revisit findings (a damp and dirty bathroom with mold and mildew due to storage of wet towels and rugs in sink/vanity unit with splintering wood on its sides, a broken fence and protruding nails in an outdoor play area, toxic cleaning supplies stored in unlocked sink-level cabinets accessible to children) demonstrated that the grantee had "failed to fulfill its responsibility to maintain its equipment and facilities adequately so that they presented no hazards to Head Start children" and were "sufficiently similar in nature to those noted in the initial review as to

belie any argument that they constituted 'new' deficiencies." *Id.* at 31-32, 34. The Board concluded there that the initial review finding that the grantee "did not provide adequate maintenance and repairs to indoor and outdoor equipment and facilities," and that equipment at Head Start Centers "was in disrepair and hazardous to children," gave the grantee "notice of its responsibility to maintain its equipment and facilities adequately so that they presented no hazards to Head Start children." *Id.* at 34. 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." *Id.* Otherwise, the Board held, "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." *Id.*

This principle is especially important here, where CAACA apparently corrected some of the defective and hazardous conditions identified in the April 2014 Overview but did not correct other, similar conditions at other Head Start facilities (or permitted those conditions to develop), which continued to pose ongoing threats to the health and safety of the children in its care. ACF is not obliged to identify and provide an opportunity to correct every non-compliant condition at a Head Start facility, where ACF has already notified the grantee of the existence of similar or related conditions that constitute noncompliance with Head Start requirements.

- In determining whether CAACA had uncorrected deficiencies requiring the termination of its Head Start grant, we will "consider additional matters first specified in ACF's Response Brief as possible evidence of failure to correct previously-identified deficiencies[.]" *Rulings on Prehearing Motions & Cancelling Hearing* at 1 (June 21, 2016). We rejected CAACA's argument that considering such allegations violated the requirement that the notice of termination set forth "the factual findings on which the termination is based . . . ." *Id.* at 2; 45 C.F.R. § 1303.14(c)(1); CAACA Reply at 8-9. The Board concluded that the lengthy passage of time since ACF filed the response, and the extensive development of the record during that time, minimized any potential prejudice to CAACA from having to address assertions raised in ACF's response to the appeal. *Rulings on Prehearing Motions & Cancelling Hearing* at 2-3. We based this conclusion in part on the Board's consistent holdings in appeals of other types of federal agency determinations (e.g., disallowances of federal funding) that the federal agency may raise new grounds for the determination under review during the appeal process (and cure inadequacies in the determination letter), as long as the appellant is afforded an opportunity to respond. *Id.* at 3, citing *W. Va. Dept. of Health & Human Res.*, DAB No. 2017, at 2 n.1 (2006); and *Philadelphia Parent Child Ctr. Inc.*, DAB No. 2356, at 4 (2010), citing *Recovery Resource Ctr.*, DAB No. 2063, at 7-8 (2007). CAACA here has had more than ample time and opportunity to respond to the allegations first raised in ACF's response.

II. The legal requirements at issue

For the facilities and physical environment deficiency, ACF alleges that the conditions found in CAACA's Head Start centers and on their grounds violated the following requirements in 45 C.F.R. § 1304.53(a) (2013), "Head Start physical environment and facilities":

> **1304.53(a)(7)**: [Grantees] must provide for the maintenance, repair, safety, and security of all Early Head Start and Head Start facilities, materials and equipment.
> **1304.53(a)(10)**: [Grantees] must conduct a safety inspection, at least annually, to ensure that each facility's space, light, ventilation, heat, and other physical arrangements are consistent with the health, safety and developmental needs of children. At a minimum, agencies must ensure that: . . .
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> > **(a)(10)(iii)** Flammable and other dangerous materials and potential poisons are stored in locked cabinets or storage facilities separate from stored medications and food and are accessible only to authorized persons. . . .
> > **(a)(10)(v)** Approved, working fire extinguishers are readily available;
> > **(a)(10)(vi)** An appropriate number of smoke detectors are installed and tested regularly;
> > **(a)(10)(vii)** Exits are clearly visible and evacuation routes are clearly marked and posted so that the path to safety outside is unmistakable (see 45 CFR 1304.22 for additional emergency procedures);
> > **(a)(10)(viii)** Indoor and outdoor premises are cleaned daily and kept free of undesirable and hazardous materials and conditions;
> > **(a)(10)(ix)** Paint coatings on both interior and exterior premises used for the care of children do not contain hazardous quantities of lead; . . . .

ACF, in this appeal, classified the findings under this deficiency as fire safety hazards; playground hazards; building maintenance, safety and sanitary issues; and deteriorated paint conditions and presence of lead-based paint. ACF MSJ. ACF determined that these findings collectively constituted a deficiency, defined as a systemic or substantial material failure in an area of performance that involves a threat to the health, safety, or civil rights of children or staff. CAACA Ex. 3, at 7; 42 U.S.C. § 9832(2)(A). ACF alleged "that CAACA failed to provide for the maintenance and safety of its facilities and playgrounds, and operated its programs in facilities that had lead paint, numerous fire-code violations, and unsafe playground conditions, among other hazardous conditions," in violation of these requirements in 45 C.F.R. § 1304.53(a)(7), (10). ACF Resp. at 1, citing CAACA Ex. 3, at 4-7.

For the monitoring deficiency, ACF alleged that CAACA failed to comply with the following statutory requirement:

> (3) **Ongoing monitoring**
>
> Each Head Start agency (including each Early Head Start agency) and each delegate agency shall establish and implement procedures for the ongoing monitoring of their respective programs, to ensure that the operations of the programs work toward meeting program goals and objectives and standards described in subsection (a)(1) [directing the Secretary to modify as necessary program performance standards including standards relating to the condition of facilities & requiring that facilities meet or exceed State and local licensing requirements concerning for such facilities, and such other standards as the Secretary finds to be appropriate].

42 U.S.C. § 9836a(g)(3) ("Standards; monitoring of Head Start agencies and programs . . . (g) Self-assessments . . . (3) Ongoing monitoring") (Head Start Act § 641A(g)(3)).

ACF alleged that "CAACA did not establish and implement an effective and ongoing monitoring system to ensure the safety of the children and that the program operated in compliance with the relevant Head Start requirements." ACF Resp. at 30. ACF alleged that CAACA "failed to identify numerous health and safety hazards" at the Henry Center before they were found in state fire inspections in 2011 and 2014 and "failed to identify and address health and safety hazards at seven other centers" including lead-based paint and additional "unaddressed hazards" including unsafe playground equipment. *Id*. at 30-31. ACF alleged that CAACA failed to timely correct the deficiency based on "numerous health and safety hazards well beyond the end of the corrective action period" including fire code violations cited at Head Start centers in July and August 2014 that resulted in the temporary closure of some centers. *Id*. at 32.

For the governance deficiency, ACF alleges that CAACA failed to comply with the following statutory requirement:

> The governing body shall— . . . be responsible for ensuring compliance with Federal laws (including regulations) and applicable State, tribal, and local laws (including regulations); . . .

42 U.S.C. § 9837(c)(1)(E)(iii) ("Powers and functions of Head Start agencies . . . (c) Program governance . . . (1) Governing body . . . (E) Responsibilities") (Head Start Act § 642(c)(1)(E)(iii)). ACF alleged that "CAACA's governing body failed to adequately execute its required functions and responsibilities" because it "did not

adequately participate in the evaluation of the Head Start centers' conditions. ACF Resp. at 36. ACF alleged that its staff member heard CAACA board members state at a March 6, 2014 board meeting that they "were not informed of and did not clearly understand" forms and checklists by which board members certified that CAACA "completed a health and safety screening of each Head Start site and that all centers comply with all applicable health and safety requirements" despite the presence of "conditions at many centers [that] posed significant health and safety hazards." *Id.* ACF alleged that CAACA failed to timely correct the deficiency because board members "stated that they have not develop[ed] a safety plan or plans to improve existing centers" despite "all the hazardous conditions identified during the March 2014 Review and all the fire code violations discovered in the months leading up to the October 2014" follow-up review. *Id.* at 37.

III. Fire safety hazards and playground hazards at CAACA Head Start centers evidenced a deficiency that CAACA failed to timely correct, authorizing ACF to terminate its Head Start grant.

A. **CAACA facilities had fire safety hazards that in themselves sufficed to demonstrate the existence of a deficiency that CAACA failed to timely correct.**

1. *Multiple, ongoing fire code violations at the E.M. Henry Center demonstrated the deficiency.*

a. Applicable law for compliance with Head Start fire safety requirements

A Head Start grantee's duty to keep its Head Start facilities free of fire safety hazards is apparent in regulations requiring that grantees provide for the "maintenance, repair, safety, and security" of Head Start facilities; conduct safety inspections at least annually, to ensure that each facility's "physical arrangements are consistent" with the "safety" of children;" and ensure "[a]t a minimum" that flammable materials are stored securely, that approved and working fire extinguishers are readily available, that smoke detectors are used and tested regularly, that exits are clearly visible and evacuation routes clearly marked and posted; and that premises be "kept free of undesirable and hazardous" materials and conditions. 45 C.F.R. § 1304.53(a)(7), (10). The requirement to keep Head Start facilities free of fire safety hazards is also apparent in the definition of "deficiency" as a systemic or substantial material failure of a Head Start grantee "in an area of performance that the Secretary determines involves . . . a threat to the health [or] safety" of Head Start children or staff. 42 U.S.C. § 9832(2)(A).

A grantee cannot meet those requirements if any of its facilities have persistent fire code violations. In our *Ruling*, we held that the "mandate" in the Head Start regulations "to maintain facilities used to serve Head Start children in a safe condition is reasonably read to entail compliance with any safety-related State and local requirements, such as fire codes, that apply to that type of structure or facility." *Ruling* at 12; *see also* 42 U.S.C. § 9836a(a)(1)(D)(i) (Head Start facilities must "meet or exceed State and local requirements concerning licensing for such facilities"). We thus rejected CAACA's argument that it did not receive adequate notice of deficiency findings that ACF based on violations of requirements (such as state fire codes) that do not appear explicitly among the requirements for Head Start facilities in section 1304.53(a)(7) and (10) of the regulations. *Ruling* at 11, citing CAACA Reply at 30 (arguing that the Head Start regulations "contain no requirement relating to range hoods" on cooking stoves in Head Start facilities). We found it "not reasonable to require or expect Head Start regulations to include the requirements of all safety-related regulations that individual states and localities have elected to apply to such structures and facilities." *Id*. at 12.

b. Summary

Based on our review of the record, we agree with ACF that CAACA "failed to maintain environments free of fire safety hazards" and "violated Alabama State Fire Codes, which establish fire safety standards and measures." ACF Post-H'g Br. at 2-3. We focus first on conditions at the E.M. Henry Center, a city-owned building in Clanton, Alabama, in which CAACA operated a Head Start center in leased space that included a kitchen. Paulk Decl. ¶ 7; Dunlap Decl. ¶ 12; CAACA Ex. 16. The record establishes that the Henry Center had, over a period of more than two years, multiple fire code violations that resulted in its closure as a Head Start facility and CAACA's consequent failure to provide services to the children it previously served there. To avoid termination, CAACA had to correct those violations at the Henry Center, as well other fire safety-related issues and violations that existed at its other facilities, within the time period ACF granted. The record also establishes that CAACA failed to do so, authorizing ACF to terminate the Head Start grant.

We address in detail two specific violations that existed at Henry and were later found at other CAACA facilities after the end of the correction period: the use of cooking stoves that lacked required automatic fire suppression systems (also referred to as commercial (vs. residential) cooking range "hoods," Crockett Decl. ¶ 4), and the lack of exit signs that illuminated as required by the state fire code. We address another violation at Henry, the construction at Henry, by the city of Clanton, of an automotive maintenance shop, because of the danger it posed to Head Start children as discussed by the fire marshal witnesses. We do not, however, address every specific fire code violation, as that is not necessary to support our conclusions.

c. Facts regarding State fire marshal inspection of the Henry Center in 2011, and SafeGuard Fire & Alarm, Inc. inspection of the Henry cooking range in 2013

The facts are as follows based on our review of the record. An Alabama state fire marshal conducted an occupancy inspection of E.M. Henry on November 2, 2011 and cited four violations, one under requirements of the 2009 International Fire Code (2009 IFC) that commercial kitchen ranges have exhaust hood and duct systems protected with approved automatic fire-extinguishing systems; two under requirements of the 2009 International Building Code for the placement and illumination of exit signs; and one under Alabama Code requirements to use a registered architect for alteration of buildings. ACF Ex. 10 (Nov. 2, 2011 inspection report).[8] The Alabama Chief State Fire Marshal and a Deputy State Fire Marshal (neither of whom conducted the November 2011 inspection) described this last violation as the "use of a residential range hood for commercial cooking without a required automatic fire-extinguishing system" and "using a residential range hood for commercial purpose without the installation of required automatic fire extinguishing system."[9] Paulk Decl. ¶ 6; Crockett Decl. at 2. The Chief State Fire Marshal stated that "the system that was over that stove was so old that it used a dry chemical as an extinguishing agent. That's been out of date for quite some time" and that both current and "old" fire codes "require UL 300-compliant liquid extinguishing agent over cook stoves for extinguishing of grease-laden vapor fires." Tr. at 968-69.

On April 16, 2013, SafeGuard Fire & Alarm, Inc. inspected the kitchen cooking range at E.M. Henry, at the request and payment of the City of Clanton, and issued a "Range Hood Systems Report" stating that the range hood did not meet "UL 300 standards" and had issues with unsealed or unwelded "Hood/duct penetrations" and filters. CAACA Exs. 17; 18, at 4; Dunlap Decl. ¶ 12. The inspection report states that the range hood system was "tested and inspected in accordance with procedures of the presently adopted NFPA," the National Fire Protection Association's model fire code, "and the

[8] CAACA "challenged the November 2, 2011 findings as not being raised by ACF until it filed its summary judgment motion." CAACA Opp. to MSJ at 46. This is incorrect; ACF cited the November 2, 2011 inspection report (ACF Ex. 10) in its initial response to CAACA's appeal. ACF Resp. at 5, 9-11, 30. Additionally, as we note below, the report of an inspection by the Deputy State Fire Marshal on February 4, 2014 cites the presence of four pre-existing violations – those identified in the November 2, 2011 inspection.

[9] Chief State Fire Marshal Paulk retired in July 2016. Tr. at 943. We use the title he held at the time pertinent to this appeal.

manufacturer's manual . . . ."[10] CAACA Ex. 17. The SafeGuard inspector affixed a "non-compliance inspection notice" or "red tag" containing the inspection report onto the wall near the range, or the range hood itself, or possibly in both places.[11] ACF Ex. 3; Tr. at 633-34, 671-72; CAACA Ex. 29, at 3. The Deputy State Fire Marshal who inspected E.M. Henry in February 2014 testified that the red tag notice meant that the automatic fire "suppression system" required of a "commercial hood system" is "either out of date, needs servicing, or something is wrong with the system." Tr. at 633.

d. Facts – regarding city fire marshal inspection of the Henry Center in January 2014

CAACA staff apparently ignored the "red tag" notice, as it was still in place on January 22, 2014, when the City of Clanton fire marshal found it while inspecting the Henry Center after an alarm had sounded. ACF Ex. 12, at 1, 4, 5; CAACA Exs. 20; 29, at 4; Dunlap Decl. ¶ 12; *see also* CAACA Ex. 29, at 3 (Dunlap Apr. 29, 2014 letter to ACF Office of Head Start stating "the tag was disregarded"). The city fire marshal issued an inspection report showing that the center failed 12 of 13 categories of a "Life Safety/Fire Code Inspection" titled general operations/fire precautions, maintenance of exits, maintenance of exit signs and emergency lighting, electrical use and maintenance, fire alarm system, fire suppression system, fire protection, special problems, roof access, emergency exit plans, fire drill plan, and hood suppression system. CAACA Ex. 20. The city fire marshal noted that the hood suppression system had been "tagged noncompliant" in April 2013, and he ordered no cooking until a new hood was installed. *Id.* Other notes on the inspection report state that there were padlocked doors with a sticker indicating a fire extinguisher was inside and that "gasoline and other flammable liquids" were stored near "open flame." *Id.* The city fire marshal also requested that the state fire marshal

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[10] The Alabama Division of Insurance State Fire Marshal regulations adopt both the 2009 IFC and the 2003 NFPA model code, depending on the age of a building and other factors. Ala. Admin. Code § 482-2-101-.01, .02. CAACA argued, particularly with regard to the stove range hoods, that the state fire marshal erroneously applied the 2009 IFC and that the range hoods at CAACA facilities met applicable fire code requirements. CAACA Reply at 31-33. Below we discuss why this argument is incorrect. The Alabama Fire Marshal regulations also adopt the "2009 International Building Code"; CAACA did not assert that these requirements were applied improperly. Ala. Admin. Code § 482-2-101-.03. Regulations of the State of Alabama Fire Marshal's office, a division of the Alabama Department of Insurance, are available at http://www.firemarshal.alabama.gov/Codes.aspx.

[11] ACF asserts that SafeGuard placed two red tags in the kitchen after the April 16, 2013 stove inspection, based on the former executive director's statement, in her April 29, 2014 letter responding to the April 2014 Overview, that the SafeGuard technician "folded the [inspection] report and put it in a red tag folder on the range hood[,]" and the Deputy State Fire Marshal's testimony that the red tag "was right close to the entrance of the kitchen" near a button or lever to activate a fire suppression system. ACF Post-H'g Br. at 5, citing CAACA Ex. 29, at 3, and Tr. at 671-72. The Deputy State Fire Marshal also testified that "[t]hey will put one on the pull station and they will put one on the stovetop itself, on the hood system itself"; however, his testimony refers to having seen a single red tag ("it"), and no witness reported seeing two red tags. Tr. at 633-34, 672.

inspect E.M. Henry, due to concerns over a possible conflict of interest because the center was owned by his employer, the City of Clanton. ACF Ex. 9, at 5; Dunlap Decl. ¶ 13; *see also* CAACA Ex. 29, at 4 (Apr. 29, 2014 letter from Dunlap stating that the city fire marshal "due to a possible conflict of interest removed himself from the case" and recommended that CAACA contact the State Fire Marshal for a "full inspection of the facility").

At this point, on or sometime shortly after January 22, 2014, CAACA ceased using the E.M. Henry Center to provide Head Start services to children, due to fire safety issues. *See*, *e.g.*, Tr. at 619, 642-43 (Deputy State Fire Marshal's testimony that there were no children at E.M. Henry when he inspected it on February 4, 2014, a day that was neither a weekend nor a holiday); CAACA Post-H'g Br. at 4 (Executive Director Dunlap "ordered it closed on January 23, 2014").

e. Facts – regarding State fire marshal inspection of the Henry Center in February 2014

On February 4, 2014, a Deputy State Fire Marshal performed an occupancy inspection of E.M. Henry, at the request of the city fire marshal who inspected it on January 22, 2014. CAACA Exs. 21, 29, at 4; Tr. at 605. The Deputy State Fire Marshal identified "36 serious fire code violations," four of which were "the same violations that had been cited by a state fire marshal back in November 2011, but the center had not corrected them." Crockett Decl. ¶ 4. The uncorrected violations from the November 2011 inspection included using a residential range hood for commercial purpose without the installation of required automatic fire extinguishing system, and altering the building without the use of a registered architect's service by adding, next to the classrooms and without a firewall, an "automotive maintenance shop" in which were stored lawn care machines and equipment and "combustible materials such as gasoline cans, diesel cans, oil cans and other ignitable liquids[.]" *Id.*

Comments on the report of the inspection on February 4, 2014 state that the City of Clanton "has a repair shop attached to the building. Storage of gasoline, oil and lawn equipment inside. No wall of separation could be located inside the building" and that the exit doors "had deadbolt locks" in violation of the requirement that egress doors "be readily openable from the egress side without the use of a key or special knowledge or effort." CAACA Ex. 21, at 3-4. The Chief State Fire Marshal testified that the addition of the maintenance shop at Henry made the building "mixed occupancy" requiring a sprinkler system, which the facility did not have at that time. Tr. at 951-54. The Deputy

State Fire Marshal recalled seeing padlocks on doors opening from a hallway to the auditorium and to a storage room and could not recall if other doors were padlocked. Tr. at 616-17, 627-30, 635. The Deputy State Fire Marshal also observed that the kitchen stove (described as a "stovetop and oven") was still "red tagged." Tr. at 631, 633-34.

Other findings from the February 4, 2014 inspection were violations relating to sprinklers and their maintenance; the number and accessibility of fire exits; exit signs; electrical wiring and the prohibited use of extension cords in place of permanent wiring; portable fire extinguishers; fire detection, alarm and extinguishing systems. CAACA Ex. 21 (inspection report). The Deputy State Fire Marshal testified that he saw only two fire extinguishers at Henry during the February 4, 2014 inspection and both were out of date, and that at least one of fire extinguishers shown on an evacuation plan for Henry was in a room with a door that was locked when he visited. Tr. at 666-68, 694.

Based on his "professional knowledge and experience," the Deputy State Fire Marshal "believed all lives in that building were at risk of serious harm" and thus "ordered everyone to evacuate the building."[12] Crockett Decl. ¶ 6. However, he "did not have to issue an official order to close the building" because he "was informed that either the city or the city fire marshal already had ordered the occupants to close the building." *Id.*

f. Analysis – regarding fire safety hazards and violations at the Henry Center

The Deputy State Fire Marshal explained the hazards of CAACA's use of "a residential range hood for commercial purpose without the installation of required automatic fire extinguishing system" as follows:

> The grease and cooking contaminants from cooking processes build up on the internal hood, duct, and fan surfaces. Accumulated grease can leak out through duct seams and joints, or can pool in some parts of the ductwork to provide reservoirs of warm, highly flammable fluids and vapors that are ripe for ignition. Flames, sparks and hot gases from food preparation can ignite residues in exhaust ducts. The combination of fuel, air movement and heat can result in a strong and significant fire event. Therefore, automatic fire extinguishing system is required for range hood used for commercial cooking.

[12] The Deputy State Fire Marshal who conducted the February 4, 2014 inspection saw no children there and five or six adults, including two in the kitchen and two in a classroom or office. Tr. at 619-20.

Crockett Decl. ¶ 4. The required hood fire suppression system that the Henry stove lacked "would automatically extinguish that fire if there was a fire on the stovetop." Tr. at 633. The Chief State Fire Marshal similarly explained that:

> One of E.M. Henry's outstanding fire code violations was use of a residential range hood for commercial cooking without a required automatic fire-extinguishing system. When using a stove, the grease build-up from the grease-laden vapors could catch a fire due to high heat. The residential range hoods are not built for excessive grease-laden vapors produced in commercial cooking, and additional safety measures are required to address the increased level of fire risk. For this reason, Alabama fire code required the range hood to be equipped with automatic extinguish system. Automatic fire-extinguishing system is designed to immediately extinguish fire or smoke without any intervention by human[s]. Such system significantly reduces the risk of stove fire spreading and causing serious damages to the other parts of the building.

Paulk Decl. ¶ 6.

The Chief State Fire Marshal also explained the basis for the requirement to use ranges and stoves with "UL 300" compliant range hoods in child care facilities:

> [I]n your residential home, you cook for your family and people that come to visit you and people who are intimate with you and your family. But in a commercial operation, we bring outside people in, and in this case, we're bringing people's children in. And especially in an occupancy that handles children, we owe it to them to be especially safe because we're caring for someone else's child, and no one wants to see a child injured. So if we utilize residential measures, there is no measure to extinguish the fire in a residential hood system. That's the reason we require the UL 300-compliant extinguishing system in there along with a Class K fire extinguisher.

Tr. at 980.

The Deputy State Fire Marshal also explained the dangers posed by the addition of the maintenance shop without the required construction approvals and without a firewall separating the rest of the Henry Center building from the shop, which contained gas cans, diesel fuel cans, lawn equipment, various power tools, and air compressors. Tr. at 638-39. A "wall of separation" in the attic "prevents a fire from getting into the attic and spreading down the whole building." Tr. at 668-69. Its absence, he explained, "means that fire, once it got into the attic, would run through the attic and pose a significant risk

to children" and "[a]nyone in these classrooms or anyone in this building, because there was no wall of separation built in, would be in danger." Tr. at 638. He also agreed that a fire in the maintenance shed could have spread through "an opening" he observed between the maintenance shed and the hallway of the Henry Center. Tr. at 670-71. He also testified that padlocked doors could be unsafe for firefighters who would not know what materials were behind the locked door. Tr. at 636-37.

The Chief State Fire Marshal associated the dangers related to the addition of the maintenance shop to the failure to use an architect in constructing the addition. He explained that "all alterations to educational buildings require service of a registered architect and the architectural plan must be approved by [the] Alabama State Building Commission," and the purpose of this requirement "is to ensure the alterations do not compromise the safety and code-compliance of the building." Paulk Decl. ¶ 11.

These multiple fire safety violations, some of which persisted over two years, constituted violations of Head Start requirements to "provide for the maintenance, repair, ***safety***, and security" of all Head Start "facilities, materials and equipment"; to "ensure that each facility's . . . physical arrangements are consistent with the health, ***safety*** and developmental needs of children"; and to "ensure that . . . [a]pproved, working fire extinguishers are readily available"; that "[e]xits are clearly visible" and that indoor premises are "kept free of undesirable and hazardous materials and conditions[.]" 45 C.F.R. § 1304.53(a)(7), (a)(10), (a)(10)(v), (vii), (viii) (emphasis added). We have no hesitation in concluding that these ongoing violations of Head Start requirements were a deficiency as defined as "a systemic or substantial material failure" in "an area of performance" that involves "a threat to the health [or] safety of children or staff." 42 U.S.C. § 9832(2)(A).

2. *The presence of fire code violations at CAACA Head Start facilities after the period ACF granted to correct deficiencies shows that CAACA failed to correct the physical environment and facilities deficiency.*

The April 2014 deficiency notice alerted CAACA that the numerous fire safety hazards and violations at the Henry Center constituted a deficiency and obliged CAACA to not only correct the violations at Henry, but to identify and correct any similar fire safety issues at any of its facilities within the 20 days that ACF provided. The record establishes that CAACA failed to do so.

There is no dispute that as late as August 2014, three of CAACA's other Head Start centers (the Jemison, Tallassee and Maplesville Centers) were using cooking stoves without the required exhaust hoods with automatic fire suppression systems, one of the ongoing violations cited at Henry. Deputy State Fire Marshal Crockett inspected Jemison

on August 15, 2014 and found that the facility was "using a residential range hood for commercial cooking without the required automatic extinguishing system." Crockett Decl. ¶ 7; Tr. at 661-63; ACF Ex. 47. He closed the facility. Crockett Decl. ¶ 7. CAACA program summaries and emails from August 2014 show that on August 15, 2014 a state fire marshal apparently closed Tallassee or ordered no cooking there due to a non-compliant range hood, and that CAACA at that point realized that the stove at the Maplesville Center was similarly non-compliant and staff unplugged the stove to prevent its use. ACF Exs. 69, at 4; 71, at 1, 4, 5, 9, 13, 14.

CAACA's continued use of stoves without the required hoods with fire suppression system at three of its Head Start facilities over four months after the notice of deficiencies cited the non-compliant stove at the Henry Center establishes that CAACA failed to timely correct the physical environment and facilities deficiency. The testimony of the Chief and Deputy State Fire Marshals amply explained the potential dangers posed by the use of non-compliant stoves in child-care facilities.

CAACA asserts that it "expeditiously" responded "at great expense" to the fire marshal's citation of noncompliant range hoods at the Jemison, Tallassee and Maplesville Centers by ordering "new range hoods and range hood extinguishing systems to replace the allegedly non-compliant hoods, and had them all installed within 18 days, at a total cost of over $10,000." CAACA Reply at 37, citing Goodson 2nd Decl. ¶ 3.h.; CAACA Ex. 132 (invoices for new range hood systems shipped to Jemison, Tallassee and Maplesville Centers on August 26 and 28, 2014). These repairs do not permit us to overlook CAACA's continued noncompliance or reverse the termination finding because they took place long after the time period in which CAACA was required to correct the deficiencies. *See*, *e.g.*, *Pinebelt Ass'n for Cmty. Enhancement* at 11-12 ("[a]s a matter of law, steps to correct deficiencies outside the time period ACF gives for correction cannot remove ACF's authority to terminate based on the failure to timely correct"); *S.W. Ark. Dev. Council, Inc.* at 8 ("[e]vidence that a grantee came into compliance with the applicable requirements after the time provided for correction ended does not establish that the grantee corrected its deficiencies"). As noted earlier, this requirement is based on Head Start regulations which the Board is bound to apply. 45 C.F.R. § 16.14 (the Board "shall be bound by all applicable laws and regulations").

The record also establishes (and it is not disputed) that CAACA facilities continued to have problems with exit doors being unmarked, unilluminated or essentially unusable. Code violations related to exits were cited in the inspections of Henry in November 2011,

and January and February 2014 and were noted in the April 2014 Overview, affording CAACA ample notice that it needed to correct those problems in order to provide the safe environment that the regulations require.[13] Despite this notice, the record shows that:

- Deputy State Fire Marshal Crockett inspected the Jemison Center on August 15, 2014 and cited a fire safety violation for an exit door from a trailer unit that "opened to a dead end of a walkway," meaning that the door "swung out to a narrow walkway and blocked the entire width of [the] walkway" so that "[t]he person exiting that door had to close the door behind him/herself in order to get through the walkway to the ground level." Crockett Decl. ¶ 7; Tr. at 662 (agreeing that the door "was swinging in such a way that it actually blocked the route of egress" and that the "emergency exit route would be blocked when the door was opened"). Due to this violation and the noncompliant range hood, he determined that "[t]he fire safety hazards at Jemison were [a] significant threat to life and property, so I ordered the center to close until the issues were corrected." Crockett Decl. ¶ 7.

- An Alabama state fire marshal (JG) cited the Tallassee Center for a violation in the category "egress door illumination" in an occupancy inspection on July 22, 2014, and for violations of two 2009 IFC requirements, one for the inspection, testing and maintenance of fire detection, alarm and extinguishing systems, and one for keeping records of such inspection, testing and maintenance. ACF Ex. 62, at 1-2. The report of the inspection describes those violations as "Severe but Corrected." *Id*. at 2. Alabama state fire marshal JG cited the Eclectic Center for those same three violations in an occupancy inspection on August 8, 2014. ACF Ex. 40.

- The fire department of Millbrook, Alabama cited the Robinson Springs Center for an exit sign illumination violation found during an inspection on August 15, 2014. ACF Ex. 54.

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[13] Deputy State Fire Marshal Crockett testified that "exit signs are not required in rooms or areas that require only one exit or exit access," information that appears on the report of his February 4, 2014 inspection of the Henry Center. Tr. at 651; CAACA Ex. 21, at 2, 4, 5. CAACA argues that this "exception . . . overcame some alleged deficiencies at classrooms by reviewers who did not know the fire code exception and the Overviews which were based on flawed reports of such findings." CAACA Post-H'g Reply at 8. We address here only those exit sign violations cited on fire inspection reports, and not allegations of absent exit signs made only by ACF reviewers. *See*, *e.g.*, CAACA Ex. 3, at 5 (April 2014 Overview stating that "[a]n observation at the Robinson Springs Center found three classrooms in the facility did not have exit signs posted above the single-exit doors leading out of the classrooms").

The presence of these multiple fire safety hazards identified by state and local fire departments establishes that CAACA failed to correct the physical environment and facilities deficiency, which authorized ACF to terminate the Head Start grant.

3. *CAACA's arguments about the fire safety hazards provide no basis to reverse the deficiency.*

a. Errors in the April 2014 Overview about the closure of the Henry Center do not affect our decision.

CAACA repeatedly points to the April 2014 Overview's mistaken allegations that a state fire marshal ordered the Henry Center closed after finding 36 fire safety violations in an inspection on April 16, 2013, and that CAACA continued to serve Head Start children there. CAACA Ex. 3, at 4-5. As discussed earlier, the April 16, 2013 inspection was actually SafeGuard's inspection of the kitchen stove, and the inspection that found 36 violations was the Deputy State Fire Marshal's inspection on February 4, 2014, by which time CAACA had ceased using Henry as a Head Start center. *See* ACF MSJ at 27 n.5 ("ACF acknowledges that the report of a State Fire Marshal's February 4, 2014 fire safety inspection with 36 code violations was mistakenly dated as April 16, 2013" in the April 2014 Overview).[14] As we discuss further below, there record does not contain any official, written order closing Henry, and CAACA apparently stopped using it for Head Start services shortly after the city fire marshal's inspection on January 22, 2014.

CAACA argues that these errors made any noncompliance seem worse and caused ACF to require "immediate" correction of the deficiency rather than affording CAACA a longer period for correction pursuant to a QIP. CAACA and its witnesses expressed considerable displeasure about the finding of immediate deficiencies and the resulting short time frame for corrections. *See*, *e.g.*, CAACA NA Br. at 4-5, 11 n.9 (Apri1 2014 Overview "riddled with factual errors that, in the aggregate, led ACF erroneously to conclude CAACA's facilities posed a hazard to health and safety constituting an 'immediate deficiency' . . . . By framing the deficiencies as health and safety-related,

[14] The ACF official who was regional program manager in 2014 attributed the error to a January 22, 2014 e-mail from CAACA's then-Head Start director (initials JB) to CAACA officials stating that the city fire marshal "just called me and said that building was shut down April 2013 due to multiple violations and age of building." ACF Ex. 12, at 1; Tr. at 111-14. We have found no earlier reference in the record to the Henry Center being ordered to close in 2013. The former Head Start director's incorrect email, however, would not explain why the April 2014 Overview attributes the erroneous contentions to "[a] review of an Inspection Report . . . ." CAACA Ex. 3, at 4-5. CAACA accuses "[t]he troublesome HS Dir[ector,]" JB, of having given ACF program specialist Ms. Jackson negative and false information about CAACA, including that "CAACA had knowingly operated a HS facility at Clanton, Al. (EM Henry) after a Fire Marshall had ordered the building closed[.]" CAACA Post-H'g Br. at 3. Regardless of how ACF came to misunderstand or misstate the history of the closing of the center, however, our conclusions are not affected by those errors.

ACF did an end-run around having to offer CAACA a quality improvement plan"); Dunlap Decl. ¶ 19 ("though no children had been in the building since late January of 2014," ACF "treated the situation in the E. M. Henry Center as though it presented an immediate danger to program participants").

The errors in the April 2014 Overview do not in fact overstate the severity of CAACA's noncompliance, as CAACA argues, because the record shows that fire safety hazards existed at Henry for over two years during which CAACA was indeed serving Head Start children there, as verified by the state and city fire marshals' inspections in November 2011 and January and February 2014, and by SafeGuard's inspection of the stove in April 2013. CAACA does not allege that the 36 fire safety-related violations the Deputy State Fire Marshal found there on February 4, 2014 arose only after CAACA stopped using Henry and thus never posed any hazard to the Head Start children previously served there. *See*, *e.g.*, CAACA Ex. 20 (report of January 22, 2014 inspection noting that "gasoline and other flammable liquids" were stored near "open flame"). Indeed, all four violations cited in November 2011 were found, uncorrected, in the February 4, 2014 inspection. Crockett Decl. ¶ 4 (four of the 36 violations he identified on February 4, 2014 "were the same violations that had been cited by a state fire marshal back in November 2011, but the center had not corrected them").

Above, we focused on CAACA's prohibited use at Henry of a stove without an exhaust hood with an automatic fire suppression system required by fire codes, and the state fire marshals' descriptions of the dangers that violation posed. That violation was cited in the report of a state fire marshal's inspection in November 2011. ACF Ex. 10, at 1. The stove violation was still present during the January 22 and February 4, 2014 inspections, even though the fire and alarm company SafeGuard had put a "red tag" notice on or near the stove in April 2013, which CAACA staff simply ignored and which was still there at the time of the city fire marshal's inspection on January 22, 2014. While Ms. Dunlap stated in an April 29, 2014 letter to the Office of Head Start that CAACA had no notice of SafeGuard's inspection report prior to January 22, 2014, the date of the city fire marshal's inspection, CAACA does not deny that it ignored the red tag notice that was in plain view since April 2013. CAACA also does not allege that it took any measures to remedy the fire safety violations at Henry (including the impermissible range hood) prior to issuance of the April 2014 Overview and deficiency notice, other than ceasing to use the building as a Head Start center.

In light of CAACA's continued use of the Henry Center notwithstanding the numerous or repeated fire code violations, ACF's determination that the fire safety hazards and violations there demonstrated potential threats to Head Start children that constituted an "immediate" deficiency would not have been unreasonable, even had ACF understood that CAACA was not housing classes there at the moment. *See* 61 Fed. Reg. 57,186, 57,207 (Nov. 5, 1996) (preamble to final rulemaking establishing the Head Start program

performance standards, stating "that a grantee can be required to correct a deficiency immediately or within less than a 12-month period" and that "[d]eficiencies which endanger the health and safety of Early Head Start or Head Start children, families and staff, among others, would fall into this category"). The testimony of the fire marshals established the hazards to any occupants of the Henry Center posed by the stove violation and the unauthorized presence of the maintenance shed without any wall of separation. In any event, as we stated in our *Ruling*, the Board "has held that ACF has authority to require a grantee to correct deficiencies without a QIP," and the Board "has seen 'no basis' for 'concluding that ACF is required, as part of its prima facie case for termination, to prove or even explain its basis for requiring a grantee to correct under one or another of the three time frames prescribed' in the Head Start Act." *Ruling* at 16, citing *Camden Cnty. Council on Econ. Opportunity*, DAB No. 2116, at 7, 14 (2007), *aff'd*, *Camden Cnty. Council on Econ. Opportunity v. U.S. Dept. of Health & Human Servs.*, 563 F. Supp. 2d 262, (D.D.C. 2008), *aff'd*, 586 F.3d 992 (D.C. Cir. 2009). We thus held that "CAACA has not shown that ACF abused its discretion (i.e., acted arbitrarily or capriciously) in denying it the opportunity to correct the deficiencies pursuant to a QIP and over a period of time longer than the [20] days ACF afforded for correcting the 'immediate' deficiencies." *Id.* at 16-17).

Thus, the errors in the April 2014 Overview about the closure of the Henry Center do not detract from the evidence establishing the presence of multiple, ongoing fire safety hazards that constituted a deficiency that CAACA was required to correct to avoid termination.

b. The closure of Henry as a Head Start center does not undercut the deficiency finding.

Based on CAACA's continued use of the Henry Center in apparent disregard of the fire code violations that persisted there over a period of years, we also reject the suggestion in CAACA's arguments that those fire safety hazards could not constitute a deficiency because CAACA was no longer providing services to children in its Head Start program there when ACF conducted the on-site review in March 2014. *See* CAACA NA Br. at 6 ("[a]t the time of ACF's March site visit, the E. M. Henry Center was not in use"); CAACA Post-H'g Br. at 4 ("CAACA had vacated the building before the March review . . . [t]his fact was not disclosed . . . in the [April 2014] report of review findings"). We are aware of no authority barring ACF from citing a deficiency based on past safety hazards that are well documented by records of inspections by state and local fire authorities and that posed ongoing hazards to Head Start children.

Moreover, CAACA's abandonment of the Henry Center did not correct the deficiency because CAACA never resumed serving the children who had attended Henry, and the evidence discussed above establishes that fire safety hazards continued to exist at other CAACA facilities well beyond the time ACF provided for correction. *See* Tr. at 890, 901 (testimony of Executive Director Dunlap that the children were not served after the Henry closure). CAACA asserts, and ACF does not contest, that ACF effectively denied its request to operate a home-based Head Start program for the children who had attended the Henry Center by declining to officially respond to the request. CAACA NA Br. at 10-11; Dunlap Decl. ¶¶ 15, 17, 18. Even if we could review ACF's determination to deny a grantee's request to administer a home-based Head Start program, we see no basis to conclude that the closure of Henry due to multiple uncorrected fire safety hazards obliged ACF to approve CAACA's request. CAACA's failure to address the fire safety hazards at the Henry Center posed an ongoing threat to the children who were served there and ultimately resulted in those children being denied the Head Start services that ACF funded CAACA to provide to them.

Finally, it is not material whether CAACA ceased using the Henry Center voluntarily, as it asserts, rather than pursuant to a fire marshal's order, as ACF has argued. *See*, *e.g.*, ACF Post-H'g Br. at 5 ("According to CAACA's record, E.M. Henry 'had to be closed' on January 22, 2014, because [city] Fire Marshal . . . said E.M. Henry 'cannot operate in that building' and 'the children must be removed from the building.'"). CAACA's executive director reported in an April 21, 2014 letter to the ACF Office of Head Start that Henry "was closed by the Fire Marshall due to safety violations that had been reported by to the landlord (the City of Clanton), but not to us" and on appeal initially agreed that Henry was orally ordered to close by either the state or city fire marshal. CAACA Ex. 154, at 3; CAACA NA Br. at 6. CAACA later asserted that its executive director ordered Henry closed on January 23, 2014, after the city fire marshal's inspection on January 22, 2014, and cites Deputy State Fire Marshal Crockett's testimony that no one from his office ordered the Henry Center to close. CAACA Post-H'g Br. at 6; CAACA Post-H'g Reply at 8; Tr. at 680; 688-89. Crockett also testified that "[t]he City of Clanton basically shut down this building so they could do renovations." Tr. at 652.

Even if we accept that CAACA voluntarily abandoned the Henry Center after the January 22, 2014 inspection, that does not help CAACA's case, because, just 13 days later, Deputy State Fire Marshal Crockett inspected the building and found fire safety conditions there so hazardous and threatening to life and safety that he immediately ordered the building vacated. Crockett Decl. ¶¶ 3-6. CAACA's selective citation of Crockett's testimony that no one from his office ordered the Henry Center to close does not tell the whole story. CAACA Post-H'g Reply at 8. Crockett testified that he "did not have to issue an official order to close the building" following his inspection on February 4, 2014 "because I was informed that either the city or the city fire marshal already had

ordered the occupants to close the building." Crockett Decl. ¶ 6. Given that he saw no children and only five or six adults at Henry on that non-holiday weekday, and that it had been "communicated to [him] that they had already said shut the building down or can't operate until they get everything fixed," this belief was reasonable. Tr. at 619, 642-43, 684-85. And while the executive director testified that it was she who made the decision to close Henry (because "we needed to have firewalls put up") and that the building had not been ordered to close by anyone in authority, she also testified that CAACA "was made aware by either the City or State Fire Marshal that it could not use the facility for Head Start until the discrepancies were corrected." Tr. at 887-88, 890; Dunlap Decl. ¶ 14. We find, based on the evidence, that CAACA ceased using the Henry building as a Head Start center because of documented, ongoing fire safety hazards that posed a threat to the health and safety of the children there.

c. Ownership of the Henry Center is not an issue.

CAACA asserts that the "Henry Center's closure resulted from conditions over which CAACA had little control as the tenant," as the City of Clanton owned the Henry building, constructed and had exclusive use of the maintenance or repair shop that lacked the required wall of separation (and thus owned whatever hazardous or flammable materials that the fire marshal observed there). CAACA Reply at 1; CAACA NA Br. at 5, 6. This provides no basis to reverse ACF's deficiency determination. The Head Start regulations hold grantees responsible for ensuring the safety of the children they serve and for complying with the requirements to provide a safe environment free from hazardous conditions.

The Head Start regulations state that the ***grantee*** ("Grantee and delegate agencies") must provide for the safety of all Head Start facilities, materials and equipment; must conduct safety inspections "at least annually to ensure that each facility's . . . physical arrangements are consistent with" the "safety" of children; must ensure "[a]t a minimum" that flammable materials are stored securely, that approved and working fire extinguishers are readily available, that smoke detectors are used and tested regularly, that exits are clearly visible and evacuation routes clearly marked and posted, and; that premises be "kept free of undesirable and hazardous" materials and conditions. 45 C.F.R. § 1304.53(a)(7), (10). The regulations provide no exceptions based on the ownership of, or legal responsibility for, the premises and facilities that the grantee elects to use.

At the hearing, CAACA asked Deputy State Fire Marshal Crockett hypothetical questions about whether a tenant that occupied only part of a building would be cited for fire code violations found in another part of the building occupied by a different tenant. Tr. at 657-60. The fire marshal indicated that citations apply to entire buildings rather than individual tenants. As he made clear, in citing fire safety violations, "[i]t's all one

building" because "[i]f there's a fire in one side of the building, it directly affects the other side." Tr. at 658, 660. CAACA has not alleged that it was unaware of the inspections by a state fire marshal on November 2, 2011, and the report of that inspection lists, as "Contact," a person identified as being with the Head Start program operated at Henry. ACF Ex. 10, at 1. While Executive Director Dunlap stated in an April 21, 2014 letter to the ACF Office of Head Start that the violations found by the city fire marshal's inspection on January 22, 2014 "had been reported to the landlord (the City of Clanton) but not to us[,]" the former Head Start director informed her of the fire marshal's visit on the day of the visit. ACF Ex. 12, at 1 (emails). CAACA was apparently unaware of the inspection of the kitchen stove by SafeGuard in April 2013, because staff ignored the "red tag" notice affixed to the stove or the wall, which was seen by the city and state fire marshals who inspected Henry in January and February 2014, respectively. Finally, CAACA's lessee status would not excuse violations within its control, such as the use of the stove without the required fire suppression system. ACF is not obliged to excuse or countenance ongoing, hazardous conditions that could threaten the safety of Head Start children on the grounds that the some party other than the grantee is legally responsible for correcting those conditions.

The grantee's ultimate responsibility is to provide a safe environment for the education of Head Start children, regardless of what party may be responsible for the repair and upkeep of the buildings that the grantee has elected to use for that purpose. As the Board noted in *The Connector (Making The Connection), Inc.,* DAB No. 2191 (2008), the physical environment and facilities regulation at 42 C.F.R. § 1304.53(a) –

> clearly placed a duty on The Connector to inspect the facilities (**whether or not owned by The Connector**) and to ensure that [in that case] only sources of water approved by the local or State health authority are used, that all sewage and liquid waste is disposed of through a locally approved sewer system, that handwashing facilities are in good repair, and that the premises are kept free of hazardous materials and conditions.

DAB No. 2191, at 12 (emphasis added). The evidence shows that CAACA failed in meeting its obligation to provide a safe environment and did not even take steps to remedy those hazards that were within its control until faced with the possibility of the termination of is Head Start grant.

d. <u>CAACA has not shown that the state fire marshals cited inapplicable fire codes in finding fire safety violations.</u>

As noted in the *Ruling*, CAACA argued that the state fire marshal's inspection reports "erroneously apply requirements" of the 2009 IFC "which Alabama regulations only adopted prospectively in 2010 and which therefore should not have been applied to the CAACA facilities" which, CAACA asserted, "'all predate 2010.'" *Ruling* at 17, citing

CAACA Reply at 33. CAACA argued that Alabama regulations "instead apply to pre-2010 facilities" the 2003 NFPA code, under which, Alabama claimed, some of the fire safety violations would not have been cited, including the use of range hoods without automatic fire suppression systems. *Id.* CAACA cited its support services manager's testimony that Chief State Fire Marshal Paulk told an ACF official that the cooking ranges complied with "the old codes," and asserted that Paulk would testify at the hearing that "'because his computer system only has the 2009 IFC loaded into it, he and his deputies cite to it regardless of actual applicability.'" *Id.* at 17-18, citing CAACA Reply at 31-33. ACF argued that some of the 2009 IFC positions applied retroactively, that fire officials could apply the 2009 IFC to any structure that constituted "distinct hazards to life or property," and cited "provisions of the 2003 NFPA code that, like the 2009 IFC, appear to require exhaust hoods with fire suppression systems[.]" *Id.* at 18, citing ACF MSJ at 5, and ACF MSJ Reply at 9. As we noted, CAACA did not respond to ACF's citation of provisions of the 2003 NFPA code that seem to require exhaust hoods with fire suppression systems and did not assert that the older fire code would have permitted any of the many other conditions the fire marshal cited as violations. *Id.*

We ruled that the parties could present evidence at the hearing "on whether the conditions the fire marshal cited existed or whether the citations were factually wrong" but not on whether "the fire marshal's reports cite the correctly applicable fire code" as it is a "legal issue" and "not a matter of fact on which the Board will receive evidence at the hearing." *Id.* We thus did "not resolve that legal issue" in the *Ruling* and permitted the parties to "further brief this issue" post-hearing and "address whether Alabama offers, and whether CAACA used, any process for appealing Fire Marshal citations for fire code violations." *Id.* We also rejected CAACA's argument that a state fire marshal erred in citing a violation at a Tallassee Center classroom for inadequate "egress door illumination" because, according to CAACA, daytime window light satisfied the code requirement for illumination. *Id.* at n.9, citing CAACA Reply at 35. We found that CAACA cited no fire code provisions "indicating that window light may satisfy the requirement for exit or egress door illumination" and that the 2009 IFC requires that "[t]he power supply for means of egress illumination shall normally be provided by the premises' electrical supply" and that "exit signs … shall be connected to an emergency power system provided from storage batteries, unit equipment or an on-site generator." *Id.*, citing 2009 IFC §§ 1006.3, 1011.5.3 (ACF Ex. 92, at 15, 17).

CAACA's post-hearing briefing did not address or reference its earlier contentions that the fire marshals applied incorrect fire code provisions and cited violations in error and, again, did not respond to ACF's citation of old fire code provisions that appear to require exhaust hoods with fire suppression systems nor assert that the old code would have permitted any of the conditions the fire marshals cited as violations.

We accordingly conclude that CAACA has shown no errors in the state (and city) fire marshals' reports of their inspections of CAACA Head Start facilities and has raised no basis not to assign probative weight to those reports. ACF is not required to "look behind" inspection reports of Head Start facilities issued by state and local fire authorities to independently determine whether the violations they cite in those reports are correct prior to finding that the violations posed hazards to children who attend those facilities.

Based on the above analyses, we conclude that fire safety hazards at CAACA Head Start facilities constituted a deficiency that CAACA failed to timely correct, authorizing ACF to terminate its Head Start grant.

Additionally, based on the substantiated evidence showing the persistence of fire hazards at the Henry Center for a period well over one year that CAACA failed to address despite repeated notification, and the presence of similar fire hazards at other Head Start facilities, we also conclude that CAACA failed to "implement procedures for the ongoing monitoring of [its Head Start] program[], to "ensure," among other requirements "that facilities meet or exceed State and local licensing requirements concerning licensing for such facilities[.]" 42 U.S.C. § 9836a(g)(3), (a)(1). This failure constituted "a systemic or substantial material failure" involving "a threat to the health [or] safety" of children (i.e., a deficiency) that CAACA failed to timely correct, also authorizing ACF to terminate its Head Start grant. 42 U.S.C. § 9832(2)(A).

B. Playground hazards at CAACA facilities evidenced a deficiency that CAACA failed to timely correct.

1. Multiple, ongoing playground hazards at the CAACA Head Start centers identified in the March 2014 review in themselves sufficed to demonstrate the existence of a deficiency.

In this section, we focus on what the record as a whole establishes as to the disputed facts about playground hazards at CAACA facilities in the March 2014 review. We based our preceding analysis of fire safety hazards primarily on the written reports of inspections of CAACA facilities conducted by state and city fire marshals (and in one instance, the report of an inspection by a fire and alarm company), and the testimony of state fire marshals. In this section, we reference primarily the reports of observations by ACF reviewers as recorded in the two overviews, and on the testimony of the reviewers and CAACA witnesses. We find that conditions at the Eclectic and Billingsley play areas during the March 2014 monitoring visit constituted a deficiency affecting the health and safety of the children or staff in the Head Start program under the applicable standards.

The facts are as follows based on our review of the record. The March 2014 onsite review, as reported in the April 2014 Overview, identified a number of health and safety concerns related to conditions in and surrounding the playgrounds at CAACA's centers. Reviewers reported that bolts protruded around the plastic base surrounding the play area at the Eclectic Center "posing tripping and gouging hazards." CAACA Ex. 3, at 6; *see also* ACF Ex. 4, at 1-4 (photographs of a protruding bolt). Moreover, the playground equipment at that center was "rusted and old," with "several layers of chipping paint," and some Little Tikes equipment was not "age-appropriate" for the children at the center. CAACA Ex. 3, at 6; *see also* ACF Ex. 4, at 5-10 (photographs of play equipment). The playground at the Billingsley Center was found to have trash including cigarette butts, which the reviewers indicated the center staff attributed to people attending games at the adjacent high school playing field. CAACA Ex. 3, at 6; *see also* ACF Ex. 2, at 3-4 (photographs of cigarette butts). ACF also indicated that this failure to identify "unsafe playground equipment" conditions contributed to the deficiency cited for failure to adequately monitor operation of the Head Start program. CAACA Ex. 3, at 8.

At the hearing, CAACA cross-examined the reviewer, Ms. Collins, who took the photographs of play equipment at Eclectic that ACF cited as hazardous. ACF Ex. 4. In response to questions, Ms. Collins explained that the connecting bolt shown at ACF Ex. 4, at 1-4, created a risk of "[t]rip and fall, snagged, impalement injury" because it was allowed to protrude rather than driven fully into the ground. Tr. at 236. In her direct testimony, Ms. Collins pointed out that the photographs also portrayed marks in the sand, which indicated that children were stepping on the borders right by the bolt. Collins Decl. ¶ 19. CAACA presented nothing that undercut this evidence that children were exposed to a real danger from playing around this protruding bolt. In an April 29, 2014 CAACA letter responding to the April 2014 Overview, Ms. Dunlap merely stated that bolts in the playgrounds had now been driven into the ground. CAACA Ex. 29, at 9.

Counsel for CAACA questioned why Ms. Collins was concerned about the sliding equipment shown in ACF Ex. 4, at 5. She responded as follows:

> A I think that it was the fact that it wasn't bolted down, and the number of children playing on it at one given time could cause an injury. So it just didn't seem the appropriate piece of equipment for the children in the program.
> Q Did you have particular knowledge about that one type of sliding board there, or were you just suspicious that it might ought of be tied down?
> A Well, it wobbled. And I asked the director did all of the children come out at one given time, and that was the only piece of -- a majority of the children played on that piece of equipment. That was based on what the director told me.

Tr. at 237. This explanation was consistent with her direct testimony:

> In the playground, I observed outdoor play equipment that was developmentally inappropriate and unsafe for the older children who attended Eclectic. ACF Ex. 4, pp. 5-7. The children using that playground were predominantly 4 years old; however, the Little Tikes play equipment is for children 1 to 2 years old. Play equipment that is too small for the age of the children poses hazards to older children. Smaller equipment and spaces can cause problems for bigger children. The size and weight of older children stresses equipment made for younger children causing a possible breaking of the equipment or collapse of the structure. Either possibility could injure children through cuts, fall or being crushed.

Collins Decl. ¶ 17. CAACA argues that the equipment was not shown to be inappropriate for the ages of the children based on what it describes as online product descriptions. CAACA NA Br. at 7, citing CAACA Exs. 3, 28.[15] The climbing equipment shown at CAACA Ex. 28 bears no resemblance to the item photographed at ACF Ex. 4, at 5. The "Clever Climber All Out" in CAACA Ex. 28 is plainly much larger and more elaborate, is specifically identified as Little Tikes commercial equipment, and is designed for use by multiple children ages 2-5. CAACA provided no evidence that the Little Tikes climbing toy equipment at Eclectic was appropriate for the number and ages of children at that center.

Ms. Collins also testified that metal bike and train structure shown in ACF Ex. 4, at 8-10 "were made of worn, rusted metal with chipping layers of paint" which, in her opinion, "put the children at risk of tetanus infection or potential lead poisoning." Collins Decl. at 18. She stated that she asked the Center Manager whether this equipment "had been tested for lead-based paint," and reported that the Center Manager "admitted it was old, but stated she did not know if it had been tested for lead." *Id*. On cross-examination, she explained further that ACF expected paint to be tested because children in Head Start may eat paint chips and that, in any case, the rust and deterioration appeared to be weakening the structure of the play equipment which might crack and cause injuries if children climbed on it. Tr. at 241-42.

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[15] CAACA Ex. 3 is a copy of the April 2014 Overview and contains no information indicating that the Little Tikes equipment used in the Eclectic playground was age appropriate.

Ms. Vigil was the reviewer who visited the Billingsley playground and noted that "cigarette butts and other trash were strewn throughout" the fenced playground area. Vigil Decl. ¶ 7. She testified that she observed staff attempting to clean the area of trash when she started taking photographs. *Id.* According to Ms. Vigil, the staff told her that people attending nearby games entered the fenced area and left trash in the evenings but that staff cleaned up every morning. *Id.* ¶ 8. Ms. Vigil testified that the staff "obviously did not" clean up every morning as claimed and opined that staff knew trash was a "regular occurrence" but failed to ensure it was cleaned before children played there, which created a risk they would put items in their mouths. *Id.* ¶¶ 8-9. On cross-examination, Ms. Vigil reaffirmed that the playground had more trash on it than the two cigarette butts shown in the photographs, reiterating that staff was "around picking up other trash" as she took the pictures. Tr. at 47.

The April 29, 2014 CAACA letter from Ms. Dunlap did not dispute the observations about trash in the playground, asserting instead that the center staff had now been instructed to be more "diligent" about cleaning. CAACA Ex. 29, at 9. Nor did CAACA dispute that young children might encounter health risks from, for example, picking up cigarette butts or placing them in their mouths. Permitting such conditions on Head Start playgrounds violates the regulatory requirement that "[i]ndoor and outdoor premises are cleaned daily and kept free of undesirable and hazardous materials and conditions." 45 C.F.R. § 1304.53(a)(10)(viii).

We conclude that the evidence on the record as a whole amply supports a conclusion that the playground conditions at the Eclectic and Billingsley Centers in March 2014 presented health and safety hazards for the children served at those locations, and that these hazards constituted a deficiency that CAACA was required to correct within the time frame ACF provided in order to avoid the termination of its Head Start grant.

2. *The evidence supports the October 2014 review findings of multiple playground hazards at CAACA Head Start centers after the period for correcting the deficiency.*

The October 2014 onsite revisit as reported in the December 2014 Overview found no playground hazards at the Eclectic Center, but new playground hazards at the Billingsley, J.R. Foster, Tallassee, Vincent, Montevallo, and Maplesville Centers. CAACA Ex. 2, at 7-10. ACF also noted, in relation to the monitoring deficiency, that the Robinson Head Start Center had been placed on probation for violation of state day care standards for, among other reasons, having too many children on the playground at one time (15 children between 20 months and three years old). *Id.* at 13.

In this section, we focus on what the record as a whole establishes as to the disputed facts about playground hazards at CAACA facilities found in the October 2014 review. For the reasons explained below, we find that the evidence demonstrates the existence of playground conditions hazardous to children at Billingsley, Tallassee, Montevallo, and Maplesville, but not at Foster, and conclude that we need not resolve a disagreement between the parties' witnesses over whether conditions at Vincent posed hazards to children. We next conclude that those hazardous conditions evidence CAACA's failure to correct the deficiency with respect to playground hazards, and we reject CAACA's argument that those playground hazards, as well as other health and safety conditions, should be viewed as unrelated to the deficiency findings in the April 2014 Overview. *See, e.g.*, CAACA Opp. to MSJ at 27. We first address the findings for each center.

a. Billingsley

The December 2014 Overview reported that the reviewers returned to Billingsley to follow up on playground conditions and made the following observations:

> The exterior and playground at the Billingsley Head Start Center were unsafe and presented hazards. The Head Start classroom and facilities were in the center of a long brick building, with empty space and rooms on each side. The space on each side of the Head Start center's space posed potential hazards. Observations found three boarded and broken-down doorways with peeling paint, and old boards were nailed to the doors, with windows boarded up or broken out. To reach the playground, children exited the front door through a locked, fenced-in area, passed three boarded-up doorways, and turned right toward the end of the building where there was a large, hazardous area approximately 8 feet long by 3 feet wide and 3 to 4 inches deep, with broken pavement, rocks, dirt, and gravel. Children had to go around the area and cross the width of a small football field to get to the playground. In addition, rubberized plastic covering the bottom of a post in the ground in the playground area was ripped and torn, allowing the metal edges to protrude.

CAACA Ex. 2, at 8. Reviewers also noted that the playground checklist form recorded dates and initials for whether the playground was clean but did not specify what was being checked. *Id.* ACF also alleged that photographs from the October follow-up revisit showed sharp metal edges, broken jagged plastic tubes, and protruding screw heads that could present hazards to children. ACF MSJ at 19; ACF Ex. 33, at 1-6.

CAACA contended in opposing summary judgment that the photographs of the Billingsley play areas, which ACF claimed showed "torn and jagged plastic tubes," the "exposed sharp edge of one of the metal post bases," and a "loosely embedded screw nail," actually show "that there were no protruding metal edges and that the screw appears firmly affixed in the wooden base." CAACA Opp. to MSJ at 23-24, quoting from ACF MSJ at 16, 19; *see also* CAACA Reply at 42. As to the photographs (as well as all the other evidence discussed in CAACA's opposition to summary judgment), CAACA asked that the most favorable reasonable inference as to their significance be drawn. CAACA Opp. to MSJ at 24, citing *Brightview Care Ctr.*, DAB No. 2132 (2007). CAACA also suggested that what was portrayed in the photographs might be clarified at a hearing through testimony by the photographer and CAACA personnel. *Id.*

In the current posture of the case, we are not required to draw inferences in favor of either party, but rather view the photographs, testimony, and other evidence objectively to determine their credibility and the appropriate weight to assign to each. The reviewer who took the Billingsley photographs in October 2014 offered the following description of her observations:

> My impression of Billingsley was that it was an old and unsafe place for children. Its playground and the pathway to the playground posed various hazardous conditions. In the playground, the metal bases for a shade shelter were covered with long black hard plastic tubing. The edges of two tubes were supposed to be folded down and held in place by metal screws to keep the sharp metal edges covered. However, the tube edges fell apart and opened up, exposing the metal edges as well as the sharp jagged plastic edges of the tubes. Erlinda [Trujillo, a second reviewer] and I observed that this condition increased the possibility of children getting cut by the sharp edges. I was particularly concerned for the safety of the children because the sharp plastic and metal edges and loosely embedded screw nails were readily accessible to children in the playground. One of those hazardous bases was sitting right beside a small playhouse where children played. The torn edges of tubing material were sharp and hard, and could have caused serious lacerations to children.

Habersaat Decl. ¶ 5; *see also* Trujillo Decl. ¶ 13 (Habersaat's photographs "accurately show" condition of "tattered plastic tubing material at the bases of the shade shelter" which "posed laceration risk"). Ms. Habersaat did not alter her description on cross-examination and further explained on redirect that the tubing looked like a "real heavy rubberized type of thing, but it was very sharp, because we cut some. It was very sharp. And then the metal edges down below were sticking out." Tr. at 405. We find these descriptions consistent with the conditions depicted in the photographs. ACF Ex. 33, at 1-6.

The Head Start Support Services Manager testified that the bottom of the post "does not have jagged edges or edges that protrude beyond the fact that the base is square-shaped and slightly wider than the pole that rises up from it." Goodson Decl. ¶ 5.a, citing CACAA Ex. 51 (photograph of base of one post). The post portrayed in this photograph appears to be in different condition than the posts in the photographs taken during the October 2014 revisit. In any case, while metal edges may not have been "protruding," they were clearly accessible to children due to the deterioration of the cracking plastic tubes. And Mr. Goodson's testimony does not contradict Ms. Habersaat's report that the cracked tubing itself formed sharp edges.

CAACA played down the significance of the area of disrepair on the path to the playground, with Ms. Johns (CAACA's interim director since April 2014) testifying that "[t]he area of disrepair is easily avoidable." CAACA NA Br. at 27, quoting Johns Decl. ¶ 6.b. CAACA provided a photograph which looked outward from the area across the expanse of a parking lot. CAACA Ex. 43. Ms. Habersaat was questioned about this, however, and explained that before reaching the parking lot after they rounded the corner of the building, the children had to detour around the broken pavement on the path very close to an unprotected area through which vehicles traveled. Tr. at 339-51. She put it as follows: "The children had to walk around the jagged pavement, which put them in very close proximity -- there was pavement they could walk on. But it put them in very close proximity to the road. Then they had to come to the edge of the building." Tr. at 339. Indeed, as Ms. Habersaat pointed out, another photograph provided by CAACA itself demonstrated just how close to the pathway at the corner of the building vehicles came because it showed a school bus and car parked in the area in a view from across the expanse of the parking lot. Tr. at 346; CAACA Ex. 44.

b. Foster

At Foster, three of four playground units observed were not anchored to prevent injury. CAACA Ex. 2, at 8-9. Long bolts and chains protruded from the equipment. Although the Center Director stated that these would be driven into the ground to complete repairs before children were allowed on the playground, the observers did not find evidence "to show how that was being enforced." *Id*. at 9.

CAACA contends that all the equipment at Foster except a tall climbing structure was portable and not required to be anchored by manufacturer instruction manuals or by Alabama law. CAACA Opp. to MSJ at 29. At the same time, while not denying that the equipment was unanchored, CAACA asserts that did not present a hazard "because the equipment was unanchored during a period in which the playgrounds . . . were closed to use and . . . are surrounded by tall fences." *Id*. CAACA relies on a handwritten statement dated January 8, 2015 and signed by Jennifer Hooks, whom CAACA describes as the Center Manager. CAACA Ex. 65, at 1; CAACA Opp. to MSJ at 29. Ms. Hooks

asserts that, at the time of the October revisit, "the playground area was in the process of routine maintenance to add mulch," and that she "instructed the staff not to use the outside playground area" for 2-3 days until "all play equipment was securely anchored." CAACA Ex. 65, at 1.[16] She acknowledged that, during the revisit, a 24-inch bolt was "lying under the red and blue slide" during repairs, but stated that the "slide and equipment was securely anchored after the visit from the review team." *Id*.

We find the claim that no anchoring was needed for this playground equipment inconsistent with the statement by CAACA's own staff member that children were not permitted to use the equipment until it was all securely anchored. The assembly instructions provided for some of the playground equipment do not resolve how they are to be safely used for a Head Start center. For example, the "play ball fun climber" instructions state that the equipment is "Only for family domestic outdoor use by children from ages 1½ to 4 years old" and limit use to one child of up to 43 pounds. CAACA Ex. 64, at 12. Users are warned to choose a "level location" in order to "reduce the likelihood of the play set tipping over." *Id*.; *see also* CAACA Ex. 78, at 2 (double slide climber). The instructions do not speak to anchoring, whether to require or preclude it, but do raise questions about whether and how the equipment may be used by multiple children in this Head Start playground.

CAACA also cites Alabama "Minimum Standards for Day Care Centers and Nighttime Centers," section II(C)(5)(g), as supporting its claim that the equipment at the Foster playgrounds did not have to be anchored. CAACA NA at 37. CAACA quotes the relevant language as follows: "The outdoor play area shall be free of apparent hazardous conditions. . . (3) Playground equipment which is not designed to be portable shall be securely anchored so that it cannot be tipped over by an adult." *Id*. ACF does not dispute that CAACA was required to meet the minimum standards set by state law but disagrees with CAACA's interpretation of equipment "which is not designed to be portable." CAACA suggests that "portable" refers to anything "capable of being carried or moved about." CAACA Reply at 45, quoting Merriam-Webster Dictionary (online) definition of "portable" available at http://www.merriamwebster.com/dictionary/portable. ACF, by contrast, considers some of the playground equipment to be too "unwieldy and heavy" to be easily moved about and limits the idea of "portable" to toys meant to be moved in use, such as picnic chairs. ACF Resp. at 24.

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[16] Ms. Hooks later revised her statement to explain that three of the four playground spaces remained closed for "up to six more business days" before the "playground equipment was safely secured." *Id*. at 8. ACF argues that documentation of when the mulch was installed at Foster indicates that the period when the equipment was not anchored lasted 17 days. ACF Resp. at 25. We need not resolve the exact number of days.

Neither party cited any definitive interpretation by the state itself about the meaning of "portable," but we note that the context favors ACF in that the state standard does not say that portable equipment need not be anchored but rather that any playground equipment **not designed to be** portable must be anchored. We read this phrasing to stress the importance of anchoring in two ways: first, by making anchoring the default and second, by looking not at whether the equipment could be moved or carried but rather whether that is the designed usage.

Ultimately, we find CAACA's arguments unsupported by the evidence of its own staff's actions. CAACA acknowledges that the largest play unit at Foster could not possibly be viewed as portable but says that children were therefore kept away from this "newly installed" item until it was properly anchored. CAACA Reply at 45. But Ms. Hooks, the Center Manager at Foster, never said that children were to be kept away only from this one piece of equipment until it was secured but rather that all of the four play areas and associated equipment were placed off limits until the playground equipment was anchored. We infer from Ms. Hooks' statement that, at a minimum, CAACA's staff had determined that safe use of the equipment in the communal Head Start playground areas at Foster required secure anchoring of all the equipment.[17] Certainly, the presence of 24-inch bolts and attached chains entangled with play equipment as shown in ACF's photographs is not safe in an area when young children have access. ACF Ex. 41, at 2-3.

The remaining question as to playground hazards at Foster then is whether the dangers were sufficiently mitigated by Ms. Hooks' alleged instruction to teachers not to use the outdoor play areas. ACF asserts that it was not clear how this instruction was being enforced. ACF Resp. at 25; ACF MSJ at 21. In written direct testimony, Ms. Hooks (now Ms. Belyeu) states that she reviewed playground checklists and determined which days each playground was closed and reiterated that no children were allowed "on any closed playground during a time it was closed." Belyeu Decl. at 2. She explained that this rule was enforced by having informed "all teachers of the closures during the 'in-serve' meetings," by keeping the children in the classrooms, and by the presence of "tall fences" around each playground. *Id.*

[17] ACF also cited unanchored playground equipment in two other centers: Tallassee and Maplesville. CAACA Ex. 2, at 9, 10. CAACA also argues that the items involved were portable and did not require anchoring. In Tallassee, the items were a plastic playhouse and a plastic basketball hoop. CAACA Ex. 71 (photographs of the two items). CAACA provided a manual for the playhouse which does not include an anchoring requirement in its instructions. Johns Decl. ¶ 10.b; CAACA Ex. 72. Ms. Johns also testified that the basketball hoop was hollow and very lightweight and could injure a child only "[v]ery minimally" if it fell. Tr. at 746; *see also* CAACA Ex. 116. In Maplesville, the items were plastic picnic tables for which CAACA supplied photographs and an instruction manual. Johns Decl. ¶ 14; CAACA Ex. 89. The instructions state that the tables are intended to fold for portability and do not include any anchoring recommendation. Unlike the situation with the equipment at the Foster Center, the record does not include any indication that CAACA staff intended to anchor these items but had not yet done so. We therefore do not rely on these finding relating to unanchored playground items.

We have already stated that it is not sufficient to rely on supervision alone to protect children from an accessible hazard. The testimony presented by CAACA in relation to the Foster playgrounds establishes more than mere supervision. Ms. Hooks/Belyeu describes physical barriers around the hazards and specific practices for keeping the children indoors so that the play areas were inaccessible to them. We have no reason to disbelieve her statements that all teachers were instructed as to when the play areas were off limits and that those teachers effectively prevented their children from going outdoors on those days. This is quite different from trusting even well-intentioned teachers to maintain such tight control over children in an open area as to prevent any child from reaching nearby, easily accessible hazards that have not been repaired or enclosed. We therefore conclude that the conditions in the Foster playgrounds during the period when they were closed for anchoring the equipment and replacing the mulch do not demonstrate a failure to correct the playground hazards found in the April 2014 Overview.

c. Tallassee

At Tallassee, the playgrounds had unanchored play equipment (playhouses and basketball hoop), a dismantled concrete table and protruding tree roots, all creating risks for tripping and injuries. CAACA Ex. 2, at 9. Ms. Burns, a reviewer during the October 2014 revisit, described the “extensive network of exposed tree roots” as being “in the middle of the playground.” Burns Decl. ¶ 12. Nothing in the cross-examination of Ms. Burns challenged her report of the situation in the Tallassee playground area.

In opposing summary judgment, CAACA asked us to draw a favorable inference that conditions at Tallassee (and at Montevallo, discussed below) did not create tripping hazards based on the assertions of Ms. Johns, the interim Head Start Director, to that effect, and suggested that further testimony from Ms. Burns and from CAACA staff at a hearing might shed more light. CAACA Opp. to MSJ at 34. As we mentioned earlier, we now have the benefit of a fully developed record on which to evaluate the evidence as a whole including the cross-examination of the ACF reviewers.

Ms. Johns pointed to photographs of the tree roots at Tallassee and opined that removing them would “unnecessarily harm the trees.” Johns Decl. ¶ 11.b, citing CAACA Ex. 76 (photographs of trees with large root network). While removing the tree roots might not have been the optimal solution, Ms. Johns does not explain why other measures could not have been taken to avoid exposing children to the tripping hazard created by their playing on ground made visibly uneven by the extensive roots above ground.

CAACA does not dispute the presence of the discarded concrete tabletop on the ground in the playground, but again Ms. Johns simply asserts that its presence "does not pose any particular threat as a tripping hazard." CAACA NA Br. at 44, quoting Johns Decl. ¶ 11.b. Ms. Johns also notes that the tabletop is near some concrete benches (which may be seen in one of the photographs in CAACA Ex. 77). We find more credible that tripping is a real concern for children playing in this area especially given the proximity of the discarded slab on concrete on the ground to the expanse of tree roots. The area is most reasonably viewed as not a safe spot for very young children to run or play.

ACF cited to the Consumer Product Safety Commission's Playground Safety Handbook (CPSC Handbook) checklist for playground hazards which specifically warns against "exposed footings or anchoring devices and rocks, roots, or any other obstacles in a use zone." ACF MSJ Reply at 19, quoting ACF Ex. 82, at 23. The CPSC Handbook also explains that "[p]lay areas should be free of tripping hazards (i.e., sudden change in elevations) to children who are using a playground." ACF Ex. 82, at 19. CAACA has not shown why ACF should not rely on this government document as an authority on what conditions would fall short of the regulatory requirement for Head Start playgrounds for "[t]he selection, layout, and maintenance of playground equipment and surfaces [to] minimize the possibility of injury to children." 45 C.F.R. § 1304.53(a)(10)(x).

d. Montevallo

At the Montevallo Center, observers reported a tripping hazard due to "large broken-up areas" in the playground blacktop, while they found three plastic picnic tables in the mulched area of the playground at Maplesville that were not anchored. CAACA Ex. 2, at 10. Ms. Habersaat, a reviewer who visited Montevallo, noted that a blacktop area which was "used for games and riding tricycles" had broken and uneven pavement which she considered "unsafe and a tripping hazard." Habersaat Decl. ¶ 7; *see also* CAACA Ex. 2, at 10. She talked to a teacher and reviewed more than two months of prior playground check documentation but no mention had been made of the condition of the surface and the teacher had not been aware of it. Habersaat Decl. ¶ 7. The area is shown in several photographs in ACF Exhibit 50. On cross-examination, Ms. Habersaat indicated that one of the photographs showing an adult shoe inside one of the broken spots was of her foot to show the depth of the deterioration. Tr. at 362, indicating ACF Ex. 50, at 3. She estimated the broken areas were depressed about 1½ to 2 inches below the surface of the intact pavement. Tr. at 366-67. She explained she considered the pavement "unsafe" for the children playing and riding about on the area because: "[C]hildren could catch their feet. They can trip. They can fall. They can ride their bicycles. The bicycles can go over the (inaudible) onto pavement." Tr. at 365. Therefore, she concluded, the damage should have been repaired. *Id.*

CAACA offered two more photographs of the Montevallo blacktop which, according to Ms. Johns, were to show that "the pavement is worn, but does not present a tripping hazard or other hazard to health or safety." Johns Decl. ¶ 13.a, citing CAACA Ex. 85. CAACA's evidence does not undercut the clear showing from testimony and photographs that children were playing and riding on a surface with deep cracks and depressions and broken blacktop which could easily cause tripping and falls.

e. Vincent

The December 2014 Overview states that at Vincent, an old air-conditioning unit and sharp metal scraps were reportedly "stored just outside the gate to the playground," although the Center Director asserted that children were escorted and so would not be able to access them. CAACA Ex. 2, at 9. Witnesses disputed whether this presented a hazard to Head Start children. Ms. Burns asserted that it was "also close to the front entrance" and children could access it on their way to and from the center. Burns Decl. ¶ 14. Ms. Johns, however, asserted that the air conditioner had been located on the side of the building away from the front entrance and blocked by a fence from the playground (not a gate). Johns Decl. ¶ 12.a. She cited a photograph which purports to show the area (CAACA Ex. 82-1) and which is consistent with her description but which no longer shows the old air conditioner. Since the findings of hazards at other Head Start centers are more than sufficient to support our conclusion that CAACA failed to correct the deficiency with respect to playground hazards, we need not resolve this factual dispute.

f. Maplesville

The reviewer who visited Maplesville found three plastic picnic tables in the mulched area of the playground at Maplesville that were not anchored. CAACA Ex. 2, at 10. As we stated above, we do not rely on the findings relating to unanchored playground items at Maplesville and at Tallassee.

3. CAACA has not shown that supervision of children negated the hazards that these playground conditions posed.

CAACA argues that no real danger existed for the children in passing by or playing around the various hazards that we found above were present at some of its Head Start centers because the children were always escorted and supervised by teachers to ensure they avoided any harm. For the reasons below, we disagree.

CAACA particularly disputed ACF's concern that various conditions along the pathway to the Billingsley playground posed hazards for children. CAACA Opp. to MSJ at 24-25. These conditions included doors with peeling paint, broken and boarded-up windows, and what ACF described as "a large area of torn up pavement with steep edges, broken

pavement pieces and rocks." ACF MSJ at 20; *see* ACF Ex. 33, at 7-11 (photographs of peeling door, broken and boarded windows, and damaged pavement). CAACA pointed to statements by its interim Head Start Director to the effect that the doors are "admittedly unattractive but pose no hazard" and that the "area of disrepair is easily avoidable" and the children "are escorted at all times." Johns Decl. ¶ 6; CAACA Opp. to MSJ at 25. Moreover, according to CAACA, Mr. Goodson asserted that the only broken window was "40 feet from the route the children walk to the playground under supervision." CAACA Opp. to MSJ at 28. CAACA denied that the poor condition of the building passed on their way to the playground could violate Head Start regulations when it was not a Head Start facility and further pointed out that these conditions were all present in March 2014 but were not cited as hazards in the April 2014 Overview. CAACA Reply at 17; CAACA Opp. to MSJ at 11, 25. Finally, CAACA again suggested that testimony from Ms. Habersaat, who took the photographs of these conditions, and of CAACA witnesses at a hearing would further develop the record. CAACA Opp. to MSJ at 25.

Ms. Habersaat explained why she considered the route to the Billingsley playground as presenting "many hazardous conditions," as follows:

> One of the boarded up doors, in particular, had visible rust and large pieces of peeling paint. The chipping paint posed a laceration risk and a choking risk to curious children who may ingest them. The rusty doorknob could have posed the risk of tetanus if a child was scratched. The area with badly ripped-up pavement, filled with rocks and other debris, was just around the corner of the building where the children must pass enroute to the playground. That area stretched wide across the pathway to the playground, and children could have easily tripped and fallen into this area. If the staff were to direct the children to avoid crossing the badly ripped-up pavement, he/she would have had to get the children to walk far out to an area which was close to the road, had no barrier and which vehicles drove through and parked. Also enroute to the playground was a window with broken glass and a pile of rubber hose. These conditions were of concern because the pathway to the playground was not fenced or otherwise restricted. The children would be crossing across a large open area, and could have easily rushed to those conditions before a teacher could stop him/her or if they were not being closely monitored.

Habersaat Decl. ¶ 6; *see also* ACF Ex. 33. Ms. Habersaat was cross-examined at some length about why she viewed the route to the playground as unsafe for the mostly 4-year-old children in the single classroom group at Billingsley. Tr. at 336-61. She further reinforced the basis for that concern, explaining that the individuals from the group of 20 children escorted by two teachers could easily come in contact with the rusted peeling

doors or broken window when they passed close to them and could avoid the 3-by-8-foot damaged area of pavement only by detouring very close to an unprotected roadway by the parking lot (based on the route she was shown by the classroom teacher). *Id.*; *see also Tr.* at 399-402 (redirect, reiterating that children this age commonly wander or run off, touch things, and put things in their mouths). She made clear that, even if the hazardous properties were not under the control of the Head Start program or staff, the Head Start grantee remained responsible to correct the conditions in a manner that protected the children in its care. *Tr.* at 355-56.

We find that ACF's witness testimony about the potential for curious young children to quickly escape supervision and to be attracted to dangerous objects is credible, and supported by other authority cited by ACF, including the CPSC Handbook. ACF Ex. 82. CAACA did not dispute that the CPSC Handbook was an appropriate source of guidelines for playground safety. The CPSC Handbook recommends checking for and clearing any hazards found on the way of the travel pattern of children to and from the playground. *Id*. at 8. In addition, the state guidelines (to which CAACA cited regarding "portable" equipment) establishes a requirement that "[o]utdoor play areas shall adjoin, or be safely accessible to, the indoor area." ACF Ex. 83, at 14. This requirement suggests that, especially where the playground area is such a long distance from the classroom, the program must ensure safety enroute.

Moreover, this requirement is imposed in addition to an independent requirement that **"[a]ll children shall have staff supervision at all times**." *Id*. at 19 (bold in original). The Board has rejected similar arguments in a prior Head Start case also involving a physical hazard (a hole in an exterior wall not belonging to the Head Start program) to which children could have access from the outdoor playground. The Board opined that "adult supervision would not substitute for diligent efforts to eliminate the hazardous condition and to comply with the regulatory requirement that outdoor premises be kept free of hazardous conditions." *Philadelphia Hous. Auth*. at 19.[18] We conclude that

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[18] ACF also questions whether CAACA could rely on assumptions about adequate staff supervision in light of its history of citations in April 2014 by the state for incidents, including one in which a 4-year-old child left the Robinson Springs unobserved and a staff member was seen sleeping in a class instead of supervising children. ACF MSJ at 21, citing ACF Exs. 55, at 1-8; 56. CAACA did not deny that Robinson Springs was placed on probation as a result of these events, but asserted that the center was removed from probation prior to the October revisit and denied their relevance to the question of whether the April 2014 overview findings were corrected. CAACA NA Br. at 73. We need not evaluate what the Robinson Springs incidents say about the adequacy of supervision in the CAACA Head Start program overall because we conclude, even without those incidents, supervising children is not a sufficient substitute for correcting or preventing access to hazardous conditions. Nevertheless, the nature of the incidents helps to illustrate the larger point that supervision is not a fully reliable solution.

CAACA was, and should have known that it was, responsible for providing a safe route to the playground and that it could not simply rely on supervision of the children as they traveled the route in lieu of correcting or eliminating access to hazardous conditions on the way.[19]

4. Hazardous conditions identified in the October 2014 revisit constitute failure to correct the deficiency with respect to playground conditions.

We have concluded that specific conditions in playgrounds operated by CAACA presented health and safety hazards for Head Start children in both March 2014 and October 2014. The question that remains for us to consider is whether the findings made during the October 2014 review demonstrate a failure to correct the deficiency found in the March 2014 review.

CAACA repeatedly contended that it could not be held accountable for conditions observed during the October 2014 review because it was not provided notice of and an opportunity to correct each individual situation. *See, e.g.,* CAACA Opp. to MSJ at 24-28, 35, all citing *Norwalk Econ. Opportunity Now, Inc.*, DAB No. 2002 (2005). We explained in our Ruling the applicable legal standards. *Ruling* at 9. To summarize, the Board will conclude that an original deficiency has not been corrected, even though the identical condition has not been found in the same location, where "sufficient similarity" is found between the original and repeat deficiency findings. *Id*. The Board basically looks to whether the scope of the initial deficiency finding was broad enough to put the grantee on notice to take steps that should have precluded the conditions found at the follow-up review or whether, on the contrary, the deficiencies found at the follow-up review were too different in nature to fairly find such notice. *Id*. at 9-10. This question turns on the evidence as to each deficiency in the specific case. *Id*. at 10.

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[19] The reviewers in October 2014 did not report finding trash on the Billingsley playground, but felt that the forms used by teachers for recording playground checks did not provide adequate clarity about what they were to check. CAACA Ex. 2, at 8. CAACA disputed this finding, citing statements by Ms. Johns that, after the April 2014 Overview, a memorandum was issued to Billingsley staff to check the "playground daily for trash or other debris before the children arrive" and to "initial a log confirming they have done the checks." CAACA NA at 29, quoting Johns Decl. ¶ 6.e. CAACA provided copies of the memorandum and sample logs. CAACA Exs. 47, 48, 49. CAACA also stated that the Support Service Manager (Mr. Goodson) was to conduct periodic checks and fill out a more complete checklist of playground conditions shown at CAACA Ex. 49a. While the teachers' forms do simply provide a minimal space each day for initials or comments, the memorandum was explicit about what the teachers were to do: "It is imperative for all staff to monitor the play area each day before the children go outside and throughout the day. It is the staff's responsibility to ensure the area used by children is free of hazardous materials and trash, not even a single cigarette butt." CAACA Ex. 47. ACF did not explain why these instructions, especially given the finding that the playground was free of trash at the follow-up visit, were not sufficient. We therefore do not rely on the finding about the inadequacy of the teachers' forms.

We have no difficulty discerning that the deficiency findings in the first review that related to playground conditions should have sufficiently apprised CAACA of the need to monitor all of its playground areas for cleanliness and safety of equipment and access. Both the nature of the applicable regulatory standards and the nature of the noncompliance involved on each occasion are similar enough that CAACA should have been aware that it needed to correct and maintain conditions in and around its playgrounds overall, and not merely clean one playground or remove one dangerous rusty item.

The Board reached the same conclusion in a similar case also involving problems found in multiple playgrounds operated by a Head Start program. *See Camden Cnty. Council on Econ. Opportunity* (granting summary judgment to ACF in Head Start termination action). Just as the Board noted then, so we find here that the applicable "cited regulation clearly sets out the expectation that all outdoor premises will be cleaned daily and kept free of undesirable and hazardous materials and conditions." *Id.* at 16. Moreover, then as in this case, the "conditions cited as deficient (such as trash and unsafe objects) are the same or similar in both reviews, even though they were found at different locations." *Id.*[20] As the Board explained in *Camden*, deficiency findings are necessarily based on inspecting only "a portion, or a sample, of a grantee's program," and any problems identified thereby "are assumed to be representative of problems that may exist elsewhere in the program and that must be addressed in order to fully correct the deficiency citation." *Id.* While the review and correction process is indeed "designed to give grantees an opportunity to correct deficiencies," grantees should not expect "to play cat and mouse with ACF by correcting one premise while allowing other premises to be or become noncompliant or by correcting one set of hazards while allowing similar hazards to exist." *Id.* at 16-17, citing *Philadelphia Housing Auth.* at 18 n.14. Moreover, Head Start grantees can properly "be charged with some knowledge of what conditions might be undesirable or hazardous for the children within its care, even in the absence of explicit guidance from ACF." *Id*. at 17.

The kinds of hazardous conditions which were allowed to persist in and around the Eclectic and Billingsley playgrounds as observed in March 2014, such as neglected trash and cigarette butts, rusting and unsafe equipment, and protruding bolts, should have alerted CAACA that attention had to be directed to a careful review of the safety and cleanliness of the playgrounds to which its children were being brought. The unawareness demonstrated toward equipment deteriorated to the point that sharp edges are accessible, and toward obvious risks for tripping and falling, belies any claims that

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[20] The first review found vines, leaves, trash, and "a play structure with splinters and rusty nails," while the second found "trash and leaves, grills . . . , sunken metal tent poles, and a fallen tree" in playgrounds at different centers. *Id*. at 15.

such corrective attention was directed to the playgrounds even as of October 2014, much less within the corrective action period. Indeed, as ACF points out, CAACA itself provided a photograph of the Billingsley playground that plainly shows the very same kind of anchoring bolts cited at the Eclectic playground in March 2014 again left protruding. ACF MSJ Reply at 19-20; *compare* CAACA Ex. 141, at 5 *with* ACF Ex. 4, at 1-4. While the recently-submitted photograph at Billingsley is apparently from long after the corrective action period, it reinforces the failure of CAACA to grasp the importance of eliminating hazardous conditions from its playgrounds even at so late a date.

CAACA argued that many of these conditions were already present when the March 2014 review visit took place and yet were not cited as part of the original deficiency report in the April 2014 Overview. CAACA Reply at 45. We addressed this argument in our *Ruling* and explained that ACF was not barred from citing "'new' findings solely on the basis that they were, according to CAACA, readily observable" during the initial visit. *Ruling* at 10. Moreover, we held that we "will not assume that reviewers must have seen but not considered significant every condition that may have been present during a visit," but that we would permit CAACA to present, in relation to whether the later findings were sufficiently similar to the initial findings to show failure to correct, that a condition was actually observed by reviewers and determined not to constitute noncompliance. *Id.*

Ms. Johns averred that the doors and windows in the abandoned building and deteriorated pavement encountered on the way from the classroom to the playground at Billingsley were in the same condition in March 2014 but were "not noted in ACF's April 2014 report." Johns Decl. ¶ 6.a. She also declared that the concrete slab and aboveground tree roots were present in the Tallassee playground "since prior to March 2014" but were not reported in the April 2014 Overview. *Id.* ¶ 11.b. She did not state that the different team of reviewers that visited in March 2014 followed the children's route from the classroom to playground at Billingsley or was shown the area at issue in the Tallassee playground. We do not find that CAACA has demonstrated that reviewers in March 2014 actually observed these conditions and decided that they were not hazardous or did not constitute noncompliance.

Indeed, if anything, the insistence that these hazardous conditions had been in place for seven months or longer is disturbing. In particular, the long tolerance of these conditions speaks not only to their evidencing a failure to correct the health and safety deficiency relating to playground hazards but even more so to the failure to correct the monitoring deficiency. In short, the staff and leadership responsible for ensuring the playgrounds were safe either failed to become aware of these conditions or failed to take seriously the need to correct the hazards or protect the children from them over a long period of time.

C. **<u>Some of the other conditions cited by ACF provide further evidence of deficiencies affecting health and safety and monitoring, and of failure to fully correct those deficiencies</u>.**

Besides the fire safety and playground hazard findings, ACF cited a variety of environmental issues as a result of the March 2014 and October 2014 review visits. Given our conclusions above that CAACA's fire safety and playground conditions in March 2014 constituted a deficiency under 45 C.F.R. § 1304.53 which CAACA failed to correct based on the October 2014 revisit, we need not fully explore every other condition observed by the reviewers. We therefore discuss here only those findings that we consider significant evidence of further health and safety failures and/or that contribute to our conclusions about the monitoring deficiency.

1. ACF's findings regarding other environmental hazards

In the April 2014 Overview, the reviewers made a number of observations at multiple centers alleging significant failures to maintain a safe and clean physical environment in addition to those already discussed. CAACA Ex. 3, at 5-7. The most alarming finding was that peeling paint at Swindle contained hazardous amounts of lead. *Id.*; ACF Ex 23, at 2, 5-15 (independent lead paint inspection conducted at CAACA's request after the March review confirmed multiple locations with lead paint, some of it not intact). Peeling paint was also reported at other locations, including an Eclectic Center classroom and a bathroom at Billingsley.

ACF viewed these findings as demonstrating failure to meet regulatory requirements that grantees "provide for the maintenance, repair, safety, and security" of Head Start facilities and, at a minimum ensure that "[p]aint coatings on both interior and exterior premises used for the care of children do not contain hazardous quantities of lead." 45 C.F.R. § 1304.53(a)(7) and (a)(10)(ix).

In the October 2014 Overview, reviewers reported that the lead paint situation at Swindle had been addressed by the time of the revisit as had most of the other specific conditions cited in March. However, the reviewers noted a number of conditions not reported in March which they found concerning.

Among the newly cited condition was a bathroom used by children at Autaugaville had been converted from a laundry room without approved architectural plans. CAACA Ex. 2, at 7; Tr. at 959-60, 988; *see also* ACF Ex. 29 (photograph); ACF Ex. 106 (email chain between ACF counsel and Alabama building commission staff confirming no plans were submitted between 2010 and November 2015; attached plans submitted in November 2015 and February 2016 for the bathroom conversion were rejected. Reasons for rejection included absence of exit lighting and fire alarm specifications).

Several facilities were noted to have indications of present or earlier water damage from leaks, possible mold or algae, and odors unpleasant enough to require closure of the facility for remediation. CAACA Ex. 2, at 7-10.

2. Conclusions regarding other health and safety conditions

The lead paint situation at Swindle is particularly egregious. It is undisputed that lead-based paint that is not intact presents a serious threat of lead poisoning for young children. *See, e.g.*, Sikes Decl. at 5 (lead is "particularly dangerous to children under age 6 because it is a neurotoxin and can cause serious harm to the developing nervous system"). In February 2014, a lead inspector from the Alabama Department of Health followed up on a complaint that CAACA was conducting sanding and painting operations in the classrooms at Swindle while children were present. ACF Ex. 21, at 1-2. Their testing showed lead-based paint was present and all work was ordered halted unless and until a certified remediator was used. *Id.* On March 13, 2014, a visit to Swindle by the Alabama Department of Human Resources found substantiated complaints about peeling paint throughout the center and renovation work conducted without required reporting to the state (as well as hazardous playground conditions). ACF Ex. 25, at 3-5. Yet, in September 2013, CAACA staff had affirmed in writing that the center was free of lead. ACF Ex. 26, at 4. CAACA disputed who filled out the form,[21] and denied that it demonstrated a failure of monitoring because, by the time of the October revisit, the peeling lead paint at Swindle had been resolved. CAACA Opposition to MSJ at 50.

CAACA had a lead inspection done by an inspector from a university environmental program (UA SafeState), Mr. John Sikes, on March 19, 2014 at Swindle and three other centers built before 1978. Sikes Decl. at 1, 4; ACF Ex. 23. Mr. Sikes found hazardous lead paint conditions only at Swindle, but Autaugaville also had an area that tested high for lead-based paint that was intact but needed frequent monitoring. *Id.*; ACF Ex. 17, at 2. Mr. Goodson testified that he became a certified lead renovator in April 2014 and could now test for lead and supervise remediations. Goodson Decl. ¶ 13. ACF does not dispute that the areas where lead paint was in poor condition at Swindle were remediated by the time of the October 2014 revisit.

[21] Mr. Goodson's name appears on the form but he denies that he filled it out. Goodson 2nd Decl. ¶ 4.c. CAACA does not deny that the form was completed by CAACA staff. Mr. Goodson suggests that the paint may not have been peeling in September 2013, but might have deteriorated due to "the very cold winter in Alabama in 2014," which was the very condition he "was working to remediate in March 2014 when the lead paint concern arose." *Id.* This statement reinforces the concern that CAACA was oblivious to the importance of determining whether lead paint was present in its aging facilities precisely in order to respond quickly and appropriately to any change in condition that might cause the lead to be released into the children's environment.

The condition of the lead paint at Swindle in March 2014 clearly presented a serious threat to the health and safety of the children there, made even worse by the failure to use qualified lead paint removal personnel and techniques in renovations in the classroom. As ACF has pointed out, CAACA should have investigated whether lead-based paint was present in its old buildings even before it began serving children in them, in order to be aware of the monitoring and handling required to prevent the release of lead. ACF MSJ Reply at 26. Certainly, by February 2014, the complaint about improper renovation work being done in the Swindle classroom should have alerted CAACA to take immediate steps to ensure all its children were protected from hazardous lead paint conditions. Yet, CAACA did not remove the children from the classrooms or remediate the paint conditions at the Swindle facility until after March 21, 2014. ACF Exs. 17, 23; Tr. at 868-69 (Dunlap). We conclude that this evidence supports ACF's finding that lead paint at Swindle contributed to the deficiency that threatened the health and safety of children in the program. We also conclude that CAACA's use of untrained staff to sand and paint an old classroom without determining if lead paint was present, as well as its sluggish response to warnings about the lead paint hazard, contribute to the basis for the monitoring deficiency.

As noted, during the period for correction, CAACA did remediate Swindle's deteriorated lead paint and contracted with Mr. Sikes' organization to examine the condition of paint in other older centers, as well as obtaining training for Mr. Goodson to be able to test for and remediate lead paint in the future. Despite taking these steps to abate the serious hazard of lead paint, CAACA did not eliminate the problem of peeling paint in several facilities. Non-lead based paint does not present the same neurotoxin poisoning danger of lead paint but, as CAACA's witness Mr. Sikes pointed out, "substantial areas of deteriorated non-lead-based paint" still may present a "low-risk hazard to children, mostly because the paint chips might be dirty and unsanitary and/or residues from cleaning detergents or soaps might be present." Sikes Decl. at 5. Moreover, ingestion of paint chips may cause choking or other problems for young children. *Id.*; *see also* Tr. at 744-45 (Ms. Johns testified that chips of paint or pasteboard would be "equally hazardous to children" if they "ingested it and choked."). Mr. Sikes found deteriorated non-lead based paint at Robinson Springs but was under the impression that only a "threat to health or safety" would be relevant. Sikes Decl. at 3, 6. As we have explained, while a threat to health or safety establishes the presence of a deficiency, the grantee must fully correct the deficiency once cited. Therefore, we consider the uncontested persistence of peeling paint to which the children were exposed as of the October revisit to further demonstrate the failure to correct both the health and safety and monitoring deficiencies.[22]

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[22] Reviewers in October 2014 found peeling paint or pasteboard at Foster (CAACA Ex. 61); Autaugaville (CAACA Ex. 36; ACF Ex. 29, at 1-3); Tallassee – a yellow bookcase (ACF Ex. 61, at 15, 16); and along the route to the Billingsley playground (CAACA Ex. 2, at 8).

In relation to various findings about stains or possible growths during both reviews (e.g., ACF Post-H'g Br. at 19-21, and record citations therein), CAACA offered evidence that later testing revealed that no moisture remained present and that the growths did not include any mold that might threaten children's health.[23] *See*, *e.g.*, CAACA Ex. 92, at 2-3. We accept these reported findings as showing that most of the conditions did not present imminent threats to health or safety when observed. CAACA has not rebutted, however, evidence presented by ACF that CAACA did not investigate the origins of those stains in order to prevent recurrence. Even CAACA's expert Mr. Sikes pointed out that CAACA should be monitoring such stains and ensure that the roof is not leaking, and further noted that such stains "are a symptom of a possible condition (*i.e.*, roof leak or condensation drip) that if left uncorrected could lead to mold growth, which mold growth could become a threat to health or safety." *Id.*; Sikes Decl. at 11. Mr. Sikes stated that the observations made about multiple water-damaged areas in the December Overview stop at noting the stains but did not actually determine if a threat had developed and that he later found the tiles dry. Sikes Decl. at 11-12. However, he had not, and CAACA has not claimed to have itself, discovered and corrected the cause of the staining and damage to prevent later development into a threat to health. Hence, this condition demonstrates continued failure to correct the health and safety and monitoring deficiencies. Moreover, Mr. Sikes identified a section of ceiling at Tallassee weakened by repeated leaks as a health or safety threat when he observed it on April 21, 2014 (although he asserted that Mr. Goodson told him that repairs were made before May 1, 2014). Sikes Decl. at 7. Clearly, CAACA should have known that allowing leaks to recur without determining their source and making lasting repairs was problematic. We conclude that the failure to identify the sources of staining in various facilities, and especially to observe and act on the condition of the Tallassee ceiling, contribute to the validity of the monitoring deficiency cited in the April Overview.

3. *Further conclusions regarding failure to correct monitoring deficiency*

In addition to the comments already made about how the persistence of other environmental issues reflects on the quality of CAACA's monitoring of conditions in its facilities, we find that the history of repeated forced closures of CAACA centers to which ACF alluded demonstrates that, long after the April Overview, CAACA was still not effectively monitoring its facilities. Specifically, ACF pointed out, and CAACA did not dispute, the following closures:

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[23] CAACA repeatedly questioned why the reviewers for ACF were not equipped to test lead paint or take moisture measurements. *See, e.g.*, Tr. at 245-47 (cross-examination of Teresa Collins); 371-72 (cross-examination of Patricia Habersaat). This mistakes the role of the reviewers, which is to identify strengths and issues in the grantee's compliance with Head Start standards. It is the grantee which is responsible for knowing the conditions of its centers and which should have been able to answer questions about whether lead paint was present or what the causes of ceiling stains or odors were and what measures had been or would be taken to address those concerns.

- Autaugaville - closed by the State Fire Department as a result of several fire code violations. ACF Ex. 71, at 1, 4, 9, 11, 14, 16. The first day of the Head Start program for Fall 2014 was August 11, 2014. ACF Ex. 71, at 6. However, Autaugaville could not begin the school year until September 8, 2014. *Id*. at 14.

- Autaugaville – closed from September 17 - 19, 2014 to clean out the sewage area beneath the building that caused severe odor in the center. CAACA Exs. 2, at 7-8; 154, at 64; ACF Ex. 32.

- Autaugaville – closed on October 14, 2014 due to severe odor in the center. CAACA Ex. 2, at 7-8; ACF Ex. 32, at 8.

- Jemison - closed by the State Fire Department on August 15, 2014 due to fire code violations. ACF Exs. 47; 71, at 1, 9. The center reopened sometime between August 28 and September 10, 2014. ACF Ex. 71, at 10-11; CAACA Ex. 94, at 1.

- Tallassee - closed by the State Fire Department for a week starting August 15, 2014, due to fire code violations. ACF Ex. 71, at 1.

- Robinson Springs – kitchen was closed by the Alabama Department of Public Health (ADPH) for the first week of September 2014. ACF Ex. 71, at 13-14.

- J.R. Foster – closed on August 22, 2014 due to a circulation problem with the water heater, which was discovered during an inspection by ADPH. ACF Exs. 68, at 1; 71, at 6-7, 9.

See ACF Post-Hearing Br. at 28-29. CAACA argued that the recurrent foul odor at Autaugaville might have been the result of a local paper mill rather than the sewer problems, but CAACA's expert who observed the conditions there in October 2014 stated that it would be difficult to distinguish the paper mill odor from the smell of the backed-up sewer and that he could not say which was the source of the odor, and he recommended repairing the crack in the old sewer line and filling in the pipe chase. Sikes Decl. at 9-11. While he did not believe the concentration of hydrogen sulfide was likely to approach the threat level, we note that the smell was bad enough to require both children and teachers to leave the center on multiple occasions. Such disruptions, on top of the closure of and failure to replace the Henry Center, inevitably detract from the quality of learning and service to the Head Start children and their families.

Finally, we note that CAACA improperly converted a laundry room at Autaugaville for use as a bathroom for staff and parents. ACF's reviewers noted that it was not compliant with requirements for disability access and found it unsafe due to size, accessible pipes and missing tiles. Trujillo Decl. ¶ 10; Tr. at 516-18 (Trujillo testimony); ACF Ex. 29, at 14-18; CAACA Ex. 37. Mr. Sikes visited the bathroom and denied that it was in disrepair or threatened health or safety. Sikes Decl. at 12. However, even if the conditions in the bathroom were not themselves a threat, CAACA's Head Start Support Services Manager Goodson stated that CAACA had been given a year to make corrections and it is uncontested that no building approvals or architectural input was obtained for the conversion. Goodson Decl. ¶ 4.h.[24] We view this failure to understand the importance of meeting accessibility and safety standards and requiring the services of a professional architect when altering a building to be similar to the failures in facility maintenance and monitoring shown in relation to the fire safety hazards and thus to further contribute to our conclusion that the monitoring deficiency was not corrected.

We do not address the parties' disputes about the adequacy of various forms and checklists which CAACA adopted for monitoring conditions because we conclude for the reasons already given that whatever means CAACA used to attempt to be aware of and respond to issues in its center did not result in effective monitoring.

D. CAACA's equitable and other arguments provide no bases to reverse the termination.

CAACA also seeks relief from the termination in part on equitable grounds based on what it perceives as unfair treatment by ACF. CAACA essentially asserts that ACF officials punitively targeted CAACA with a nitpicking review intended to ensure failure after CAACA's former Head Start director (JB) made false allegations about its Head Start program. CAACA "urge[s] the members of the Board to read" an April 21, 2014 letter to ACF from its executive director, Ms. Dunlap, that "speaks for itself about reported abuses of Region IV officials, including the [ACF program specialist Cheryl Jackson] and the Region IV Program Manager" Mr. Fredericks. CAACA Post-H'g Br. at 5, citing CAACA Ex. 154. CAACA claims that JB falsely disparaged its Head Start

[24] We note that blueprints of planned bathroom renovations at the Autaugaville Center that CAACA filed after the hearing are not relevant to this appeal. "Autauga Blueprints.01-.10." CAACA submitted the blueprints in response to ACF's submission, three days before the hearing, of emails from the Alabama State Building Commission indicating that CAACA's plans for improvements at Autaugaville had not been approved as of the end of October 2016. ACF Ex. 106; Tr. at 927-28. The blueprints and cover sheet bear dates ranging from March 9, 2015 to November 30, 2016, all far beyond the end of the time for CAACA to complete correcting all deficiencies. In any event, in this decision we do not rely on CAACA's findings, from the October 2014 revisit, of indoor hazards at Autaugaville, as the evidence of uncorrected playground hazards at other CAACA facilities is sufficient to conclude that CAACA failed to correct the physical environment and facilities deficiency.

program to ACF after Ms. Jackson disclosed to her CAACA's intent to fire her for misconduct, a matter Dunlap had discussed with Jackson in supposed confidence.[25] CAACA Ex. 154, at 2-5 (also alleging "collusion between the Regional Office and [JB] as evidenced by emails implying that [JB] knew about the unannounced visit" in March 2014).[26] Ms. Dunlap's letter also attributes to JB a list of misbehavior including falsifying documents, lying about her whereabouts during work, poor job performance, unprofessional conduct, and insubordination. *Id.* at 1. In addition to suggesting that ACF was generally hostile to CAACA based some improper relationship with JB, CAACA pointed to a number of other reasons that it argued ACF's deficiency findings should be rejected, including the following:

- CAACA alleged that the March 2014 visit "was conducted in an unprofessional manner" with the reviewers "request[ing] documents that they had no legislative authority to request" and providing "no exit interview or even a goodbye when they departed," and that the resulting April 2014 Overview "contains so many falsifications and misrepresentation of facts that it is hard to believe." CAACA Ex. 154, at 5. CAACA points to "vague or misleading" allegations such as green mold on an exterior wall at Jemison that was found upon testing to be algae, and "water damage" stains on ceiling tiles at the Autaugaville Center that ACF cited as posing a threat of mold but which a moisture meter proved were dry. CAACA Post-H'g Br. at 4, 7, 15-16; ACF MSJ 22-23; CAACA Ex. 3, at 6-7. CAACA also cites "[t]he most grossly misstated fact . . . that [CAACA] exposed children to the danger of a building fire when it knew that the [Henry] building had been Ordered Closed by a Fire Marshall." CAACA Post-H'g Reply at 3.

- CAACA complains that ACF ignored Ms. Dunlap's April 29, 2014 letter responding to the April 2014 Overview, which "reported that all corrections had been made before the deadline date, or else debunked the errors of fact" therein and "is the very foundation of the Grantee's proof of full compliance." *Id.* at 4, 10; CAACA Ex. 29. CAACA accuses ACF of having "concealed it from Mr. Young," the team leader for the October 2014 revisit, who testified that he did not see the April 29 response prior to receiving a copy from Ms. Dunlap at the start of the revisit, and cites Ms. Dunlap's testimony that Mr. Young, after receiving the response, told her that CAACA had corrected all the conditions reported in the April 2014 Overview. CAACA Post-H'g

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[25] We address below Ms. Jackson's failure to appear at the hearing for cross-examination by CAACA.

[26] Ms. Dunlap also asserted that in July 2014, Mr. Fredericks recommended that she hire, as CAACA's new Head Start director, an individual who was a consultant with Danya International, instead of the CAACA employee who had been selected for the position. Dunlap Decl. ¶¶ 31-32. The implication appears to be that CAACA attributed hostility to Mr. Fredericks based on CAACA's failure to follow his recommendation.

Reply at 10; CAACA Post-H'g Br. at 6; Tr. at 525-27, 877. CAACA "argues that the fact that it filed [the April 29] Response . . . with the documented proof of multiple reviewer errors should be tantamount to proof after a reasonable period of ACF silence that all correctable actions had been completed." CAACA Post-H'g Br. at 11.

- CAACA argues that the length of the interval between the March 2014 review and the October 2014 revisit undermines ACF's allegations that conditions found in March 2014 posed immediate threats to the health and safety of children. CAACA Post-H'g Br. at 14 ("ACF did <u>nothing at all</u> to insure the health and safety of children in the Head Start Program of CAACA. . . . for seven months after [CAACA's April 29, 2014 Response claiming] that CAACA had corrected all of the dangers") (CAACA's underscore). CAACA suggests this was intended to increase the likelihood of termination. CAACA Reply at 25 ("All ACF need[ed] do is exactly what it has done in this case: cite a grantee for myriad minor infractions, wait six months, come back and cite the grantee for myriad different minor infractions.").

- CAACA complains that ACF failed to provide technical assistance and training to help CAACA attain compliance. *See*, *e.g.*, CAACA Post-H'g Reply at 9, 15 (Fredericks did not "offer any assistance with compliance to CAACA" which "was on its own in all endeavors after the March review"). In particular, CAACA cites the cancellation, on the same day it was scheduled to take place, of in-person training on home-based services for the children who had attended the closed Henry Center, at great inconvenience to CAACA staff who travelled to attend the training. ACF has not disputed CAACA's assertion that ACF and Ms. Jackson ordered the same-day cancellation. CAACA NA Br. at 10; CAACA Post-H'g Br. at 7; Tr. at 885-86, 1003-04, 1016-17; CAACA Exs. 23, at 2, 4, 5; 154, at 4; Dunlap Decl. ¶ 17.

- CAACA also complains that ACF officials declined to formally rule on CAACA's request to provide home-based services to children who had attended Henry, with Fredericks telling Dunlap that he would "pocket veto" the request by not responding to it. Dunlap Decl. ¶ 18; Tr. at 886.

These arguments provide no basis to reverse the termination, as explained in the following sections.

1. *CAACA's claims of bias and unfair treatment provide no grounds to reverse the termination.*

CAACA's claims of bias and unfair treatment provide no grounds to reverse the termination because they do not detract from the objective record evidence that, we have found, establishes that CAACA facilities had defective, hazardous conditions as cited in the April 2014 Overview, and, moreover, that similar conditions existed well after the

end of the corrective action period at CAACA facilities, where they posed potential threats to the safety of the children being taught there. *See, e.g.*, *First State Cmty. Action Agency, Inc.* at 21 ("even if [the] reviewers were biased, [the grantee] had ample opportunity to dispute their findings before us"). As discussed above, these objectively-established conditions included cooking stoves without the required fire suppression systems at two Head Start centers, resulting in the temporary closure by fire authorities, and the continued presence of tripping and other hazards at CAACA playgrounds.

The presence of such hazards months after the end of the corrective action period demonstrates that CAACA failed in its obligation to eliminate, from *all* its facilities, *all* hazards of the types identified in the April 2014 Overview. Instead, CAACA apparently limited its efforts to correcting the specific, individual conditions ACF found in the March visit – or to disputing the validity of the overview findings – and did not determine, as it was required to do, whether such hazards existed elsewhere in any of its facilities. This is evident from the October 2014 revisit findings that CAACA had corrected most of the individual conditions reported in the April 2014 Overview but had permitted the existence or development of similar conditions among its facilities. CAACA has not shown how any bias or poor conduct by ACF officials and on-site reviewers caused its failure to apprehend its obligation to correct all defective conditions of the nature of those cited in the April 2014 Overview and to prevent those conditions from arising at any of its facilities.

In the analogous context of sanctions arising from compliance surveys of nursing facilities by the Center for Medicare & Medicaid Services, the Board has repeatedly rejected arguments that it focus on how a survey was conducted rather than on the merits of the evidence about the deficiency findings resulting from the survey. In those cases, the Board has frequently pointed out that "the appeals process is not intended to review the conduct of the survey but rather to evaluate the evidence of compliance regardless of the procedures by which the evidence was collected." *Beechwood Sanitarium*, DAB No. 1906, at 43-44 (2004), *modified on other grounds, Beechwood v. Thompson*, 494 F. Supp. 2d 181 (W.D.N.Y. 2007). Thus, "[a]llegations of errors or irregularities in the survey and enforcement process will not upset a determination of noncompliance when reliable evidence . . . supports that determination." *Perry Cnty. Nursing Ctr.*, DAB No. 2555, at 7 (2014), *aff'd*, *Perry Cnty. Nursing Ctr v. U.S. Dept. of Health & Human Servs.*, 603 F. App'x 265 (5th Cir. 2015), citing *Del Rosa Villa*, DAB No. 2458, at 20 (2012), *aff'd*, *Del Rosa Villa v. Sebelius*, 546 F. App'x 666 (9th Cir. 2013).

The same principle applies here. The appeals process established by the regulations allows a grantee to challenge the underlying factual findings about compliance on which the agency (here, ACF) relies in imposing any sanction or remedy (here, termination). It does not empower the Board to evaluate the performance, motivation or methods of reviewers but rather to evaluate the evidence generated by the review or produced by the

grantee to ascertain the facts. In this case, we conclude that CAACA's contentions about how ACF and its contractor conducted the reviews of CAACA's Head Start facilities, and how they interacted with CAACA officials and staff, do not counteract or undermine the validity of deficiency findings that are supported by objective evidence, including photographs, documents, party admissions, and testimony by witnesses subject to cross-examination during these proceedings.

2. *CAACA's April 29, 2014 response, and ACF's declining to reply to it, do not affect our determination.*

CAACA's failure to identify and correct, at all facilities, fire safety and playground hazards like those cited in the April 2014 Overview means that CAACA's April 29, 2014 response does not have the relevance or probative weight CAACA assigns to it. The response alleges correction (or disputes the validity) of only the specific conditions the overview cites. CAACA Ex. 29. CAACA's claims in the response did not lessen ACF's obligation to verify not only that the defective conditions the overview identified had in fact been corrected, but that such conditions did not exist elsewhere at CAACA facilities. The April 29, 2014 response did not purport to assure ACF that CAACA had identified and corrected similar conditions at all its facilities, or that it would do so. *Id*. Even if it had made such a claim, ACF would be entitled to verify the assertions by a revisit. Similarly, Mr. Young's purported statement after receiving the response that CAACA had corrected all the conditions reported in the April 2014 Overview, even if accurately recounted, does not address whether similar conditions existed at CAACA facilities at the time of the revisit in October 2014. Indeed, Mr. Young testified that the revisit found "continued deficiencies" based on "information that we collected when we were onsite doing the review."[27] Tr. at 533.

CAACA's response, moreover, did not oblige ACF to verify CAACA's claims therein that some of the overview findings were incorrect because the regulations provide no formal process for a grantee to challenge ACF's Head Start review determinations that a grantee has deficiencies or items of noncompliance until ACF terminates, suspends, or denies refunding of the Head Start grant. To the extent CAACA chose to rest on its April

[27] Mr. Young testified that he included CAACA's April 29, 2014 response which was provided to him during the October 2014 revisit in the evidence folder of relevant documents collected by his team but did not discuss whether he indeed told Ms. Dunlap that the letter showed corrections of the conditions found in March 2014. Tr. at 528. Since his team did ultimately conclude that deficient conditions found in March 2014 at all but two of the centers were corrected, the alleged statement may merely have meant to convey that rather than to indicate that the deficiencies overall had been eliminated. In any case, we need not make any findings about what exactly was said or meant, because the controlling document expressing ACF's conclusions about corrections was the December 2014 Overview so the issue before us is whether CAACA has disproven the findings in that report regardless of what personal opinion Mr. Young may have expressed at one point.

29 letter as refuting findings in the April 2014 Overview, it did so at the risk that, unless ACF found all deficiencies corrected, CAACA would have to back up its refutation in an eventual termination appeal with evidence that no deficiency in fact existed at the initial review. It has not done so. Additionally, the fact that the April 2014 Overview did contain admitted errors about the closure of the Henry Center did not disprove or counteract the other findings of multiple, ongoing fire hazards there as documented in fire marshal inspections over a period of years, or provide any basis for CAACA to ignore the fire safety findings in the April 2014 Overview that CAACA was aware of as a result of those inspections.

ACF has the option upon finding deficiencies to require a QIP, as explained earlier, but requires immediate correction where ACF finds threats to health and safety, as it did here. 42 U.S.C. § 9836a(e)(1)(B). CAACA appears to want ACF to have treated its response as in the nature of a QIP and, moreover, to have evaluated the assertions in its response as its demonstration of completing all needed corrections. But ACF did not request a QIP but rather required action and based its evaluation of whether corrections were completed on its own inspections rather than on CAACA's assertions. We do not have authority to retrospectively require ACF to use the QIP process.

In short, CAACA's April 29, 2014 response served to memorialize its positions about the accuracy of the factual findings in the April 2014 Overview and about alleged corrective measures taken by CAACA in response. It did not, however, have any legal impact in terms of shifting the burden to ACF to disprove any of CAACA's assertions or requiring any earlier re-review of CAACA.

3. *The interval between the reviews does not undermine the deficiency findings that we sustain.*

The interval of some seven months between the initial on-site review in March 2014 and the revisit in October 2014 provides no basis to reverse the termination and does not excuse the existence of hazardous conditions at CAACA facilities well after the 20-day period ACF afforded to correct noncompliance. We are aware of no authority for the Board to address, in retrospect, the timing of the revisit to verify that deficiencies have been fully corrected. The Head Start statute states only that ACF conducts the revisit "not later than 6 months after the Secretary provides notification" of the initial review findings "or not later than 12 months after such notification if the Secretary determines that additional time is necessary for an agency to address such a deficiency prior to the review; . . . ." 42 U.S.C. § 9836a(c)(1)(C). In any case, the Head Start Act and regulations do not provide any sanctions on ACF if it conducts a revisit beyond that time frame and do not permit the Board to ignore or overturn deficiency findings supported by evidence on such procedural grounds.

Additionally, no authority conditions the timing of a revisit on the length of the period that ACF provides for a grantee to correct its deficiencies or otherwise links to the two events, except that presumably the revisit should take place after the end of the period ACF has provided for correction of the deficiencies. Even if a grantee corrects the defective conditions at its facilities that ACF identified in its initial notice, such actions are meaningless if the later revisit finds that those conditions have recurred or uncovers other conditions similar to those found earlier that show that the grantee's facilities are not fully free from the sort of hazards that led ACF to cite deficiencies in the first place. A grantee's ignorance or tolerance of those conditions well after the end of the corrective action periods also raises questions as to whether the grantee monitors and governs its program effectively.

4. Failure to provide training or technical assistance is not a ground to reverse a termination.

We have rejected CAACA's equitable arguments on the ground that the circumstances CAACA alleges (bias, unfair treatment, failure to address CAACA's response) do not detract from the evidence showing that CAACA failed to correct or prevent the kinds of hazards and defective conditions identified in the April 2014 Overview. That reasoning also impels us to reject arguments for reversing the termination as a remedy for any failure by ACF to provide the training and technical assistance CAACA says it needed to comply with Head Start requirements. As the Board has held, "allegations of inadequate technical assistance are not sufficient to excuse the failure to comply with requirements" and that "ultimately [the grantee's] management must take responsibility for not . . . operating a program [that meets] legal requirements." *Avoyelles Progress Action Comm., Inc.* at 10, citing *Rural Day Care Ass'n of Ne. N.C.* at 2, 103. We have thus held that "the actual number of [on-site technical assistance] visits provided by ACF is irrelevant to the issue of whether the cited deficiencies at issue here actually existed." *Springfield Action Comm., Inc.*, DAB No. 1547, at 11 (1995).

Moreover, the record shows that ACF did offer training assistance in complying with Head Start requirements and does not support CAACA's claims that it sought training or assistance, other than the cancelled training in home-based Head Start services. ACF Program Manager Laura Cross visited CAACA in March 2014, and attended a board of directors meeting on March 6, 2014. CAACA Exs. 25, at 1; 93, at 3. According to an email she sent to Ms. Dunlap and ACF officials on April 11, 2014, she advised CAACA on the possibility of applying to the ACF regional office for supplemental funding to assist with "emergency unsafe facility situations, usually those out of the grantee's control, not a result of lack of routine maintenance, age or negligence." CAACA Ex. 25,

at 1. Ms. Cross advised contacting the Head Start "ECLKC" (Early Childhood Learning & Knowledge Center)[28] for information on "one-time/emergency applications" that other grantees had requested for expenses that "could include immediate needed renovations and repairs to buildings and their operating systems or improvements to outside play areas, even those stemming from natural disaster." *Id*. at 1-2. She also reported having informed board members that the ACF regional office could provide training and technical assistance "to provide guidance for the Board's facilities plan to quickly provide safe and fully compliant facilities as certified . . . ." *Id*. at 2.

Ms. Dunlap stated that CAACA "requested emergency funding" of $11,000 to test Head Start centers for the presence of lead but received a "scathing reply" from Ms. Cross – apparently Ms. Cross's April 11 email – and also contacted ACF for assistance as per Ms. Cross's advice but was "laughed out of the [ACF regional] office." CAACA Ex. 154, at 4; Tr. at 902-03. In her declaration testimony, however, she conceded that CAACA did not actually request emergency funding, alleging that CAACA "was deterred from formally requesting emergency funding" by Ms. Cross's statement "that supplemental funding would usually be 'to assist with emergency unsafe facility situations, usually out of the grantee's control, not as a result of lack of routine [maintenance], age, or [negligence].'" Dunlap Decl. ¶ 16. This record provides no basis to conclude that ACF wrongly withheld or refused to provide any requested opportunities for training or assistance to CAACA.

CAACA has not identified any specific training requests other than on providing home-based services that CAACA wanted to use to make up for the loss of the Henry Center. We recognize that CAACA staff felt ill-treated by the cancellation of that training on the day it was scheduled to occur, and by ACF's decision to essentially ignore CAACA's request to provide home-based services rather than formally denying that request. Given the apparently tenuous nature of CAACA's proposal to provide home-based services for the children who had attended the closed Henry Center, however, we decline to sustain claims of bias or unfair treatment based on the cancellation.

While CAACA proposed to "immediately" implement a "temporary" "home visitation" program for the children who had attended Henry, it offered few details about its proposal and was unable to answer ACF's questions about when center-based services could be expected to resume at the Henry Center (or at a replacement center). CAACA Exs. 22, at 1-2; 22a, at 1; Tr. at 1000-01, 1013, 1015-16. Moreover, it soon transpired that CAACA's proposal required waivers of requirements that ACF concluded would violate some core principles of the home-based program, such as a requirement that a

[28] https://eclkc.ohs.acf.hhs.gov/hslc

home-based program also focus on the children's parents who thus needed to be present during the home sessions. Tr. at 1012-17. This evidence indicates that CAACA did not plan to, or was not able to, operate a home-based program that met regulatory requirements. And although CAACA complained about the "pocket veto" of its efforts to provide home instruction to make up for the loss of the Henry Center, it admits that it continued to receive and retain Head Start funding for providing services to the children who had been at the Henry Center after CAACA had abandoned that building, even though only a few were accommodated at other CAACA centers. Tr. at 885-87, 890, 901-04.

5. Any misconduct by CAACA's former Head Start director does not excuse noncompliance.

Finally, CAACA's criticisms of its former Head Start director, JB, whom it fired and accuses of misconduct, cannot excuse its noncompliance. We have held that "the responsibility for the quality of a grantee's staff rests squarely on the grantee, and that the grantee does not cease to be responsible for the actions of its staff or their consequences simply by asserting that the staff involved have been fired." *Pinebelt Ass'n for Cmty. Enhancement* at 9, citing *Rural Day Care Ass'n of Ne. N.C.* at 27, 55. This is especially so in light of a grantee's "obligation under the Head Start Act to adopt rules that 'assure that only persons capable of discharging their duties with competence and integrity are employed.'" *Rural Day Care* at 27, citing 42 U.S.C. § 9839(a)(2) (now at § 9839(a)(3)). Thus, neither the former Head Start director's misfeasance nor incompetence (even if proven, which they were not here) could excuse the hazards that existed at CAACA's facilities or CAACA's failure to prevent and cure them. *See DOP Consol. Human Servs. Agency, Inc.*, DAB 1689, at 11 (1999) ("DOP must as a grantee ultimately bear responsibility for the actions of the terminated employees").

6. The absence from the hearing of an ACF witness, the former program specialist, does not warrant dismissal of the termination.

CAACA also requested relief from the termination due to the failure of former ACF program specialist Ms. Jackson, an ACF witness, to appear at the hearing for cross examination as scheduled. As program specialist, Ms. Jackson was assigned to work with CAACA in the administration of its Head Start grant and was the team leader of the March 2014 on-site review, and therefore her findings may have contributed to the April 2014 Overview. Tr. at 230-32; ACF Ex. 107, at 1. As noted above, CAACA essentially accuses Ms. Jackson of working to discredit its Head Start program in retaliation for CAACA suspending and then firing JB, its Head Start director who was friendly with or favored by Ms. Jackson.

At the start of the hearing on November 7, 2016, ACF counsel reported that Ms. Jackson, who no longer worked for ACF, would not appear that day as scheduled, and, on the fourth day of the hearing (November 10), counsel stated that Ms. Jackson would not appear regardless of the hearing dates or efforts to accommodate her schedule and that ACF no longer wished to present her as a witness. Tr. at 20-22, 830-32 ("we kind of burned our bridges . . . [i]t began as a scheduling problem. . . . and we later concluded [that] it would be better if we just did not have her testify"). The Board then struck Ms. Jackson's written direct testimony, and ruled that it would strike documents she prepared or generated, would disregard any of her statements that may appear in the statements of other witnesses, and "may draw any negative inferences that it finds appropriate based on her failure to defend her purported statements, observations, and testimony." Tr. at 28, 1022-23.

According to CAACA, that en banc ruling requires the exclusion of "the report of facts" in the April 2014 Overview, the notes from the March 2014 on-site review that were uploaded to an ACF computerized file and went into the April 2014 Overview, and the portions of the December 2014 Overview that quote the April 2014 Overview. CAACA Post-H'g Br. at 7, 8, 10. CAACA thus argues that a "strict and plain application of the Exclusion Ruling will result in nearly no need for CAACA to disprove anything which remains of the March Overview [i.e., the April 2014 Overview], and that absent those findings, the December 2014 Overview "will have a nearly zero basis for contending that there are uncorrected deficiencies." CAACA Post-H'g Br. at 8.

We disagree with CAACA that the Board's ruling during the hearing requires that we exclude the entire April 2014 Overview from the record, conclude that CAACA did not have uncorrected deficiencies, or otherwise dismiss the termination. We base our decision to affirm the termination not on Ms. Jackson's personal observations or conclusions or on any of her work product, but solely on undisputed facts gleaned from other sources, such as documentary evidence in the form of fire inspection reports, and the testimony of other witnesses. For example, the facts concerning the ongoing fire safety violations at the E.M. Henry Center derive from fire inspection reports and the testimony of witnesses who appeared for cross-examination and are, in any event, largely undisputed by ACF or CAACA. Similarly, the parties argued about the existence of playground hazards based on photographs they submitted and on the testimony of witnesses other than Ms. Jackson. Ms. Jackson's excluded written direct testimony, moreover, is limited in scope and has little bearing on any of the findings on which we base our decision to affirm the termination. Her stricken testimony indicates that she visited the Henry Center in March 2014, reviewed fire inspection reports for that center, and interviewed CAACA's executive direction (Ms. Dunlap), and that she visited the Autaugaville Center. Jackson Decl. Her review of the fire inspection reports did not convert them into her work product barred by the exclusionary ruling; those reports speak for themselves. None of our findings depend on that testimony, and her failure to appear provides no basis to reverse the termination.

Conclusion

We affirm ACF's decision to terminate CAACA's Head Start grant.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member

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Attachment to DAB No. 2797

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Community Action Agency of Central Alabama
Docket No. A-15-39
March 23, 2016

RULING DENYING SUMMARY JUDGMENT AND DISMISSAL OF THE TERMINATION NOTICE, AND RULING ON LEGAL ISSUES

As explained in this Ruling, the Board declines to grant the Administration for Children and Families' (ACF's) motion for summary judgment and denies Community Action Agency of Central Alabama's (CAACA's) motion to dismiss the termination notice, for the reasons explained below, and rules on some of the legal issues raised in the appeal. The Board will convene a hearing in this appeal pursuant to 45 C.F.R. §§ 1303.14 and 1303.16.

Background

CAACA, a Head Start grantee that operated Head Start sites with over 600 slots in four counties in Alabama, appeals ACF's December 2, 2014 determination terminating CAACA's Head Start grant. ACF reviewed CAACA's Head Start program in March 2014 and reported its findings in an April 11, 2014 "Overview of Findings" (April 2014 Overview) informing CAACA that it had three "immediate" deficiencies it had to correct within 10 days to avoid termination of its grant. CAACA Ex. 3, at 1, 4. The first deficiency alleged in the April 2014 Overview related to noncompliance with Overview requirements for "Head Start physical environment and facilities" set out in 42 C.F.R. § 1304.53(a)(7) and (a)(10)(iii), (v)-(ix). The two other deficiencies arose in large part from the same facts as the first deficiency and involved noncompliance with statutory requirements that Head Start grantees monitor their programs under 42 U.S.C. § 9836a(g)(3) (the monitoring deficiency) and that their governing bodies ensure compliance with all applicable laws and regulations under 42 U.S.C. § 9837(c)(1)(E) (the governance deficiency). The April 2014 Overview identified "multiple health and safety hazards" at eight Head Start centers, which ACF on appeal classifies as fire safety hazards; playground hazards; building maintenance, safety and sanitary issues; and deteriorated paint conditions and presence of lead-based paint. CAACA Ex. 3, at 4; ACF Motion for Summary Judgment & Response to CAACA's Motion to Dismiss (ACF MSJ).

ACF conducted a second review in October 2014 and reported its findings in a December 2, 2014 "Overview of Findings" (December 2014 Overview) attached to the notice of termination. ACF determined that CAACA had corrected all physical environment and facilities issues at two Head Start centers and had closed one Head Start center; that issues at two centers were only partially corrected; and that 12 Head Start centers (including the two with only partial corrections) had "new health and safety issues" that ACF alleged constituted failures to correct the physical environment and facilities deficiency. CAACA Ex. 2, at 7. ACF also determined that CAACA did not correct the monitoring and governance deficiencies. Based on those findings, ACF terminated CAACA's Head Start grant.

CAACA appealed the termination and requested a hearing. CAACA Notice of Appeal and Request for Hearing (CAACA NA Br.). ACF filed a Response to Appellant's Appeal (ACF Resp.) after which CAACA filed a Reply Brief and Motion to Dismiss (CAACA Reply & MD) seeking to dismiss the termination on grounds including that ACF had failed to notify it of the basis of the deficiency and termination decision in accordance with the Head Start Act and regulations. ACF then filed its Motion for Summary Judgment and Response to CAACA's Motion to Dismiss (ACF MSJ). CAACA filed an Opposition to ACF's Motion for Summary Judgment (CAACA Opp. to MSJ) and ACF filed a Reply to Appellant's Opposition to ACF's Motion for Summary Judgment (ACF MSJ Reply).

Board Rulings

1. The Board declines to grant summary judgment in favor of ACF.

The Board has long held that it may grant summary disposition or judgment when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. *Philadelphia Hous. Auth.*, DAB No. 1977, at 7 (2005), *aff'd*, *The Philadelphia Hous. Auth. v. Leavitt*, No. 05-2390, 2006 WL 2990391 (E.D.Pa. Oct. 17, 2006); *Campesinos Unidos, Inc.*, DAB No. 1518, at 10 (1995), citing *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994); *see also Pinebelt Assoc. for Cmty. Enhancement*, DAB No. 2611, at 2 (2014). 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. *Pinebelt Assoc. for Cmty. Enhancement* at 2-3, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether summary disposition is appropriate, the Board will view the proffered evidence in the light most favorable to the non-moving party, and draw all reasonable inferences from the evidence in that party's favor. *Camden Cnty. Council on Econ. Opportunity*, DAB No. 2116, at 4 (2007), *aff'd*, *Camden Cnty. Council on Econ. Opportunity v. U.S. Dep't of Health & Human Servs.*, 563 F. Supp. 2d 262 (D.D.C. 2008), 586 F.3d 992 (D.C. Cir. 2009); *Richmond Cmty. Action Program, Inc.*, DAB No. 1571, at 14 (1996).

The Board's regulations, however, permit the Board to hold a hearing whenever it determines that its "decisionmaking would otherwise be enhanced by oral presentations and arguments in an adversary, evidentiary hearing." 45 C.F.R. § 16.11(a). The Board may thus deny a motion for summary judgment and hold a hearing, even if summary disposition might be permissible, if it decides that presentation of evidence in an evidentiary hearing might aid its decisionmaking. *Friendly Fuld Neighborhood Ctr., Inc.*, Docket No. A-07-79, Ruling on Motion for Summary Disposition at 5 (June 27, 2007).

The Board declines to grant ACF's motion for summary judgment because the appeal presents significant factual disputes over whether the physical condition of CAACA's Head Start facilities constituted (for example) failures to "provide for the maintenance, repair [and] safety" of the facilities or to keep their premises "free of undesirable and hazardous materials and conditions," 45 C.F.R. § 1304.53(a)(7), (10)(viii), of sufficient severity to demonstrate either a deficiency or the failure to correct a deficiency. We note that each party has submitted over 150 photographs of the interior and exterior premises of those facilities. We decline to adopt ACF's position that whether the conditions shown in the photographs "amounted to safety hazards and a material deficiency" is necessarily or entirely a legal question, as ACF argues. ACF MSJ at 18. Indeed, the parties contest whether some of those conditions were actually hazardous or, according to the declaration of CAACA's support services manager, "old and in places not particularly attractive, but . . . safe," and whether other photographs accurately portray what the parties allege they depict.[1] CAACA Ex. 97, at ¶ 2. While photographs might as a general matter speak for themselves, as ACF states, what they say is open to interpretation, and determining whether the photographs (and other evidence) demonstrate the presence of unsafe or hazardous conditions entails weighing and evaluating evidence. *See*, *e.g.*, *BGI Retirement, LLC, d/b/a Crossbreeze Care Ctr.*, DAB No. 2620, at 12-13 (2015) (in nursing facility's appeal of sanctions for having sprinklers that did not meet fire code standards, Board found no compelling reason to reject ALJ's rationale for assigning weight to photographs of sprinklers, where ALJ evaluated photographs "not in isolation, but in light of" other evidence "especially the [state

[1] For example, the parties dispute whether a bathroom utility sink at the Autaugaville center shown in both parties' photographs was "dirty/decrepit" and part of "hazardous or unsanitary conditions" as ACF charges, or simply stained but not dirty or in disrepair, as CAACA's support services manager states in his declaration. ACF MSJ at 15; ACF Ex. 29, at 15-16; CAACA Opp. to MSJ at 21; CAACA Exs. 37, 97 at ¶ 4.e. For another example, the parties dispute whether photographs of the grounds outside the Billingsley center show torn, jagged plastic tubes, exposed sharp edge of a metal post bases, and a loosely embedded screw nail, and ACF argues that CAACA photographs display apparent repairs and must have been taken beyond the corrective action period. ACF MSJ at 16, 18-19; CAACA Opp. to MSJ at 23-24. Apart from findings that rest on photographic evidence, the parties also dispute, for example, whether CAACA staff periodically checked or tested smoke detectors at Head Start facilities, as CAACA asserts. ACF MSJ at 13-14; CAACA Opp. to MSJ at 19.

agency] inspector's testimony" about the taking of the photographs). As a general matter, adjudicators in granting summary judgment may not weigh and evaluate evidence but rather are to accept as true the evidence presented by the non-movant and to draw all reasonable inferences in the non-movant's favor.

We also note that ACF's findings for the two other uncorrected deficiencies involving noncompliance with Head Start Act requirements that grantees monitor their programs, and ensure compliance with all applicable laws and regulations, rest in large part on the existence of the numerous hazardous physical conditions ACF alleges in support of the deficiency based on noncompliance with the "Head Start physical environment and facilities" requirements at 45 C.F.R. § 1304.53(a). Resolution of CAACA's appeal of those two deficiencies thus also entails resolution of factual disputes concerning the physical state of CAACA's Head Start facilities.

After viewing the evidence of record in the light most favorable to CAACA and drawing all reasonable inferences from the evidence in CAACA's favor, we conclude that summary disposition is not appropriate in this case at this time. Given the complexity of the issues this appeal poses, we have determined that the Board's decisionmaking would be significantly enhanced by the presentation of related testimony in the context of an evidentiary hearing. Accordingly, in the interest of issuing a sound and persuasive decision, the Board denies ACF's motion for summary judgment and will convene the hearing called for by the Head Start Act and regulations. 42 U.S.C. § 9841(a)(3); 45 C.F.R. § 1303.14, 1303.16.

2. We deny CAACA's motion to dismiss the termination.

CAACA asks that the Board dismiss the termination without prejudice on the ground that the termination notice did not comply with the requirement that it "shall set forth . . . [t]he legal basis for the termination . . . and citation to any statutory provisions, regulations, or policy issuances on which ACF is relying for its determination." 45 C.F.R. § 1303.14(c)(1); *see also id.* § 1303.14(c)(6) (ACF's "failure . . . to meet the requirements of this paragraph may result in the dismissal of the termination action without prejudice, or the remand of that action for the purpose of reissuing it with the necessary corrections"). CAACA also argues that the termination notice was deficient because it did not cite the current definition of "deficiency" in the Head Start Act and instead cited a prior definition in the regulations; did not identify some of the specific legal requirements with which ACF on appeal alleges that CAACA did not comply; and because the notice cited, as evidence of failure to correct the physical environment and facilities deficiency, new facility-related findings which were not identified in the initial notice of deficiencies and which CAACA was therefore not given an opportunity to correct prior to termination. For the reasons explained below, we conclude that none of

these arguments require dismissal of the notice of termination, and we deny CAACA's motion. In general, we conclude that CAACA has been given sufficient information about the deficiencies and the basis for the termination to permit CAACA to respond and to present its case during this appeal.

a. *The notice of termination's citation of the regulatory definition of "deficiency" does not warrant dismissal.*

CAACA argues that the termination notice did not comply with the requirement at section 1303.14(c)(1) that it set forth the legal basis for the termination because it did not cite the current definition of "deficiency" in the Head Start Act. The Head Start Act as amended in 1997 defines a "deficiency" to include "a systemic or substantial material failure of an agency in an area of performance that the Secretary [of HHS] determines involves," as relevant here, "a threat to the health, safety, or civil rights of children or staff [or] a failure to comply with standards related to early childhood development and health services, family and community partnerships, or program design and management[.]" 42 U.S.C. § 9832(2)(A); Pub. L. 110–134, § 3(a)(5) (1997). The termination notice states that the legal of basis of the termination is the failure to timely correct "one or more deficiencies as defined in 45 C.F.R. Part 1304." The regulations predate the current definition in the Head Start Act and the regulatory language has not been revised.

We decline to dismiss the termination (or to remand it to ACF) on this basis because we conclude that CAACA has been sufficiently apprised of the bases for the termination.

First, the April 2014 Overview cites the statutory definition and language for each of the three deficiencies, except for its use of the word "systematic" where the statute uses "systemic." It states that the alleged noncompliance with the Head Start physical environment and facilities requirements at section 1304.53(a) "constitutes a deficiency as defined under Sec. 637(2)(A)(i) of the Head Start Act [42 U.S.C. § 9832(2)(A)(i)] as a systematic or substantial material failure in the area of performance that the Secretary determines involves a threat to the health, safety, or civil rights of children and staff;" and that the alleged noncompliance with the "ongoing monitoring" requirement at 42 U.S.C. § 9836a(g)(3) and the "governing body responsibilities" requirements at 42 U.S.C. § 9837(c)(1)(E) each "constitutes a deficiency as defined under Sec. 637(2)(A)(ii) of the Head Start Act as a systematic or substantial material failure in the area of performance that the Secretary determines involves a denial to parents of the exercise of their full roles and responsibilities related to program operations." CAACA Ex. 3, at 7, 8, 9. While the "glossary" section of the April 2014 Overview defines "deficiency" using the language of the regulations, without citation, the discussion of the findings themselves accurately informed CAACA of the legal basis of the determination that it was a grantee with deficiencies that, if uncorrected, would result in the termination of its Head Start grant.

The December 2014 Overview attached to the notice of termination informed CAACA of ACF's determination that the deficiencies had not been timely corrected. CAACA Ex. 2.

Second, ACF's first filing on appeal states that the March 2014 review of CAACA "revealed significant hazardous conditions, which demonstrate a systemic, material failure to meet the program performance standards related to maintaining safe physical environments [that] constituted a deficiency that threatened the health and safety of children and required immediate correction" that CAACA had failed to correct, and cited 42 U.S.C. § 9832(2)(A), the statutory definition of deficiency. ACF Resp. at 9.[2] In other types of cases where an HHS agency was required to state in its notice the basis for the appealable determination, the Board has permitted the agency to clarify the statement in its notice or even advance a new basis during the appeal, so long as the appellant has an adequate opportunity to respond. *E.g.*, *W. Va. Dep't of Health & Human Res.*, DAB No. 2017, at 2 n.1 (2006), citing *Iowa Dep't of Human Servs.*, DAB No. 1874, at n.2 (2003) (federal agency may raise new grounds for a disallowance after a disallowance letter is issued as long as the appellant is afforded an opportunity to respond); *Union Hosp., Inc.*, DAB No. 2463, at 8 (2012), citing *Green Hills Enterprises, LLC*, DAB No. 2199, at 8 (2008); *see also NHC Healthcare Athens*, DAB No. 2258, at 17 (2009) (citations omitted) (in nursing facility's appeal of sanctions based on failure to meet program standards, the agency's statement of deficiencies "does not rigidly frame 'the scope of evidence to be admitted concerning any allegation relating to a cited deficiency,' so long as the facility has notice and an opportunity to respond to any allegation raised").

The Board has previously pointed out that some of the definitions of deficiency in the Head Start regulations are similar to the statutory definition. *Gulf Coast Community Action Agency, Inc.*, DAB No. 2670 (2015), and *Pinebelt Association for Community Enhancement* involved deficiencies the statute defines as "includ[ing] 'a systemic or substantial material failure of an agency in an area of performance that the Secretary determines involves . . . (i) a threat to the health, safety, or civil rights of children or staff'" or "'(iii) a failure to comply with standards related to early childhood development and health services.'" The Board in both decisions noted that "the Head Start regulations, which predate the definition of 'deficiency' in the Head Start Act, similarly define deficiency as including," as there relevant, "'[a]n 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 [Head Start] regulations'" and which "involves: (A) A threat to the health, safety, or

[2] As the termination notice references only "deficiencies as defined in 45 C.F.R. Part 1304," the Board's letter acknowledging receipt of appeal told ACF to specify the statutory definition it relied on.

civil rights of children or staff" or "(C) A failure to perform substantially the requirements related to Early Childhood Development and Health Services . . . ."[3] DAB No. 2670, at 2 n.2; DAB No. 2611 at 2 n.2; each citing 45 C.F.R. § 1304.3(a)(6). We thus conclude that CAACA has been informed of the definition(s) of deficiency on which ACF relies to a degree to permit CAACA to adequately respond to the termination on appeal and that ACF's citation of the regulatory definition in the termination notice did not prejudice CAACA.

b. *CAACA's arguments about materiality of particular noncompliance findings do not support dismissal.*

CAACA also asserts in its motion to dismiss that the noncompliances in the December 2014 Overview were not "material failure[s]" and argues that "ACF fails to show the materiality of any of [those] alleged findings," citing examples "not limited to[] an allegation of a worn seal at the base of a door at Autaugaville, an allegation of bird excrement on a window at Tallassee, an allegation of dirty walls at Tallassee, and even allegations of slightly ajar window screens at Tallassee." CAACA NA Br. at 17-19. Whether or not the alleged conditions existed and whether they rose to the level of a deficiency (either alone or in combination with other verified allegations) are matters to be resolved at the hearing and not in the context of this ruling on the parties' motions for disposition without a hearing.

We agree that, to the extent ACF alleges that CAACA failed to implement measures or take actions not required by applicable laws and regulations or by ACF issuances, those failures are not, by themselves, violations of the Head Start Act provisions and regulations cited for the deficiencies.[4] Failure to take such actions or implement such measures, however, may still be relevant evidence of noncompliance with the

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[3] The "Head Start physical environment and facilities" requirements at 45 C.F.R. § 1304.53(a) are part of the "Program Design and Management" requirements at subpart D of 45 C.F.R. Part 1304. The regulatory definition of "deficiency" as a "failure to perform substantially" the requirements related to Program Design and Management is similar to the statutory definition as including a "systemic or substantial material failure of an agency in an area of performance [involving] a failure to comply with standards related to . . . program design and management[.]"

[4] For example, in response to ACF's finding, for the program governance deficiency under 42 U.S.C. § 9837(c)(1)(E)(iii), that CAACA Board members "were unable to state whether they visited all centers and classrooms to determine the status of the needed corrections and conditions of the facilities," CAACA Ex. 2, at 14, CAACA argues that "[t]here is no requirement in the Head Start Act or regulations that volunteer Board members visit all centers and classrooms" and that this finding thus "fails to articulate a clear legal standard applicable to the ongoing monitoring requirement under the Head Start Act that has been violated and how the violation of that standard implicates health and safety." CAACA NA Br. at 77. ACF alleges no requirement that Board members visit all Head Start centers but appears to have cited this finding as evidence that the CAACA governing body did not satisfy its responsibility "for ensuring compliance with Federal laws (including regulations) and applicable State, tribal, and local laws (including regulations)." CAACA Ex. 2, at 13, 14, quoting 42 U.S.C. § 9837(c)(1)(E)(iii). Whether CAACA complied with 42 U.S.C. § 9837(c)(1)(E)(iii) and whether any noncompliance constituted a deficiency are among the ultimate issues in this appeal that the parties may address at hearing and in their briefs.

requirements of the Head Start Act provisions and regulations and have a bearing on whether a material failure was present. Whether CAACA was not in compliance and whether any noncompliance constituted deficiencies are among the ultimate issues in this appeal that the parties may address at hearing and in their briefs.

c. *That the December 2014 Overview cites findings not cited in the April 2014 Overview as evidence that CAACA failed to correct deficiencies does not warrant dismissal.*

CAACA further contends that the termination is improper because the findings on which it was based were different from those cited in the April 2014 Overview. Thus, CAACA argues it "never received the reasonable notice to which it is entitled" by the Head Start Act because "ACF alleged approximately 30 specific facilities findings from its March 2014 site visit . . . and now alleges approximately 60 different facilities findings . . . from its October 2014 site visit, many of which were readily observable in March yet never noted in ACF's initial deficiency findings." CAACA NA Br. at 2, citing CAACA Exs. 2-3; 42 U.S.C. § 9836a(e)(1)(A) (ACF "shall . . . inform the [Head Start] agency of the deficiencies that shall be corrected"). CAACA provides a list of 40 findings at 11 centers from the December 2014 Overview that CAACA calls "'Out of Scope' Findings" and says "are outside the scope of any reasonable notice provided by the April Overview of Findings." CAACA Reply & MD at 14-15.

As ACF argues, the Board has held that the way a deficiency manifests itself on a revisit need not be identical to the way it was manifested on the initial visit in order to constitute failure to correct the deficiency. In *Southern Delaware Center for Children and Families*, DAB No. 2073 (2007), the Board noted its prior holding 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." *Id.* at 32-33, citing *First State Cmty. Action Agency, Inc.*, DAB No. 1877, at 17 (2003). This is so, the Board held, because deficiencies "may manifest themselves in different ways which are evidence of the deficiency, rather than the deficiency itself [and] [a]ddressing a specific manifestation and not the structural or systemic problem that permitted it to flourish does not amount to correction of the deficiency[.]" *Id.* at 33. Thus, to support a determination that a grantee has failed to correct a deficiency, "there need be only 'sufficient similarity in the findings to provide notice that the grantee needed to come into compliance with the requirement at issue.'" *Jefferson Comprehensive Care Sys., Inc.*, DAB No. 2377, at 8 (2011), citing *Union Twp. Cmty. Action Org., Inc.*, DAB No. 1976, at 12 n.7 (2005).

As CAACA notes, the Board has declined to find a failure to correct in a case where revisit findings were not sufficiently similar to the findings in the initial deficiency notice, which the grantee corrected in accordance with its approved quality improvement plan (QIP). CAACA Reply & MD at 10-12; *Norwalk Econ. Opportunity Now, Inc.*, DAB No. 2002, at 1, 8 (2005) (involving initial findings for a "Fiscal Management" deficiency regarding "internal control systems for fiscal management and [] vendor practices" versus a later finding "not cited in the [initial] review or a subsequent financial review" of failure to perform "timely, monthly reconciliations of bank accounts" and "regular analyses of balance sheet accounts, in accordance with 'standard practice,'" and where grantee had completed the steps in approved quality improvement plan for addressing the earlier issue). Thus, the lack of "sufficient similarity between a finding supporting a 'repeat deficiency' and the original deficiency finding" relating to performance standards "might raise a legitimate notice question" of whether the grantee failed to correct a deficiency previously found, as opposed to simply showing evidence of a new deficiency. *First State Cmty. Action Agency, Inc.* at 17, citing *Richmond Cmty. Action Program*, Board Docket No. A-95-167, Ruling (Jan. 31, 1996). CAACA acknowledges the principles underlying these cases when it argues that "to the extent any of the newly-alleged findings ***are different in nature*** from the originally-alleged findings, CAACA is entitled to a new notice and opportunity to correct the alleged failure." CAACA NA Br. at 17 (emphasis added).

Based on these precedents, the Board will not bar ACF as a matter of law from citing individual findings from the December 2014 Overview as evidence that CAACA failed to correct the deficiency, solely on the ground that those findings are not reported in the April 2014 Overview. Whether those individual findings are sufficiently similar to the findings in the April 2014 Overview to be manifestations of the same conditions involves evidentiary questions the Board cannot resolve absent evidence on each finding. The Board's decisions involving this issue have turned on the particular facts of the initial and repeat deficiency findings.

We also will not bar ACF from citing "new" findings solely on the basis they were, according to CAACA, readily observable during the March 2014 initial visit. Whether any "new" finding of a condition representing a deficiency is sufficiently similar to earlier findings as to be encompassed by the initial deficiency notice requiring CAACA to correct the deficiency is an evidentiary question. As part of the evaluation of that question, CAACA may present evidence that ACF in the initial review observed the "existing condition" and that it did not constitute noncompliance with applicable requirements and did not support a deficiency finding. However, the Board will not assume that reviewers must have seen but not considered significant every condition that may have been present during a visit.

Moreover, to the extent CAACA means to suggest that ACF's failure to cite an existing condition in the initial deficiency notice should estop it from later citing that condition as evidence of failure to correct the deficiency, the Board has long recognized that it is questionable whether equitable estoppel can ever lie against the federal government and that establishing estoppel would require a showing of affirmative misconduct or intentional misrepresentation on the part of the government. *Babyland Family Servs., Inc.*, DAB No. 2109, at 19-20 (2007), citing *Northstar Youth Servs., Inc.*, DAB No. 1884 (2003) and cases therein, including *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990) and *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51 (1984). This is especially so where the Head Start Act and regulations require ACF to take enforcement action upon discovery of a deficiency. 42 U.S.C. § 9836a(e)(1); 45 C.F.R. § 1304.60 (If ACF determines that a grantee has deficiencies, it shall inform the Head Start agency of the deficiencies that need to be corrected and initiate termination for failure to correct deficiencies). The Board cannot require ACF to continue funding a grantee with deficiencies of which it had notice and failed to correct within the required time period.

3. <u>We determine certain legal issues are ripe for resolution.</u>

In their submissions prior to this Ruling, the parties argued a number of legal issues. We have determined that some of those issues are sufficiently developed for us to resolve them at this stage. We also conclude that doing so will assist the parties by clarifying the relevant issues before proceeding to an evidentiary hearing.

a. ACF is not precluded from citing compliance requirements that do not spell out detailed standards in the regulations.

CAACA asserts that its due process rights are denied because some of the Head Start regulations cited for the deficiencies do not contain specific standards a grantee must meet, or actions it must take, to achieve compliance. CAACA describes the facilities maintenance regulations as "quite vague and for which ACF has promulgated almost no implementing guidance." CAACA Reply & MD at 24.

For example, ACF made findings that cooking ranges at some CAACA facilities lacked exhaust hoods with fire suppression systems, and that one facility (Montevallo) had an electrical outlet without a "ground fault circuit interrupter" (GFCI) required because of proximity to a sink. CAACA Ex. 2, at 10; ACF Ex. 51, at 1. CAACA argues that the

Head Start regulations at 45 C.F.R. § 1304.53(a)(10), which specify 17 safety-related requirements, "contain no requirement relating to range hoods [or] GFCI-equipped outlets."[5] CAACA Reply & MD at 30.

The absence of express requirements relating to cooking range exhaust hoods and electrical outlets from the list in section 1304.53(a)(10) does not mean that CAACA lacked appropriate notice that it had to employ those safety measures. ACF's findings about both the exhaust hoods and the lack of a GCFI were based in part on inspection reports by the Alabama State Fire Marshal that cited the lack of those safety measures as violations of Alabama fire code requirements.[6] The section of the Head Start Act that ACF cites for the program governance deficiency mandates compliance with applicable State laws and regulations. 42 U.S.C. § 9837(c)(1)(E)(iii) (Head Start governing body "responsible for ensuring compliance with Federal laws (including regulations) and applicable State, tribal, and local laws (including regulations)"). Section 1304.53(a)(7), the other regulation cited for the facility and environment deficiency, requires Head Start grantees to "provide for the maintenance, repair, ***safety***, and security of all Early Head Start and Head Start facilities, materials and equipment" (emphasis added). The introductory language of section 1304.53(a)(10) states that grantees must employ the measures specified in the numbered subparagraphs "at a minimum" and is thus not an exhaustive or exclusive list of what grantees must do to comply with the regulation's overarching requirement to "ensure that each facility's . . . physical arrangements are consistent with the health, safety and developmental needs of children."

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[5] ACF found CAACA not in compliance with the following six of the 17 requirements that follow the introductory, overarching requirements of section 1304.53(a)(10):

> (10) Grantee and delegate agencies must] conduct a safety inspection, at least annually, to ensure that each facility's space, light, ventilation, heat, and other physical arrangements are consistent with the health, safety and developmental needs of children. At a minimum, agencies must ensure that: . . .
>
> (iii) Flammable and other dangerous materials and potential poisons are stored in locked cabinets or storage facilities separate from stored medications and food and are accessible only to authorized persons. All medications, including those required for staff and volunteers, are labeled, stored under lock and key, refrigerated if necessary, and kept out of the reach of children; . . .
>
> (v) Approved, working fire extinguishers are readily available;
>
> (vi) An appropriate number of smoke detectors are installed and tested regularly;
>
> (vii) Exits are clearly visible and evacuation routes are clearly marked and posted so that the path to safety outside is unmistakable (see 45 CFR 1304.22 for additional emergency procedures);
>
> (viii) Indoor and outdoor premises are cleaned daily and kept free of undesirable and hazardous materials and conditions;
>
> (ix) Paint coatings on both interior and exterior premises used for the care of children do not contain hazardous quantities of lead; . . . .

CAACA Exs. 1-3.

[6] In addition, the lack of a fire code-compliant cooking range hood at the E.M. Henry Center was cited by a fire and alarm company in April 2013, and by the City of Clanton Fire Department in January 2014. CAACA Exs. 17, 20.

The mandate to maintain facilities used to serve Head Start children in a safe condition is reasonably read to entail compliance with any safety-related State and local requirements, such as fire codes, that apply to that type of structure or facility. It is not reasonable to require or expect Head Start regulations to include the requirements of all safety-related regulations that individual states and localities have elected to apply to such structures and facilities. For these reasons, the requirement in section 1304.53(a)(7) to provide for the safety of Head Start facilities, materials and equipment is not "vague" and "ambiguous" and does not render it "impossible under these circumstances for Appellant to know exactly what it is supposed to do to reach 'compliance,'" as CAACA asserts, to the extent it requires compliance with applicable fire and safety requirements imposed by State and local regulations, of which grantees are presumed to be aware. CAACA NA Br. at 2; CAACA Reply & MD at 16.

As discussed below under subheading "d" regarding CAACA's contention that the State Fire Marshall cited violations of an inapplicable fire code, the parties in their briefs may address the issue of what state regulations applied to CAACA's facilities, and at hearing may address whether the facilities were in compliance with the applicable requirements.

b. Grantees must correct deficiencies to the point of full compliance with the relevant requirement to avoid termination.

ACF argues in favor of the termination that CAACA did not "fully correct" the three deficiencies and that the Board has required that deficiencies be corrected to the point of full, versus substantial, compliance. ACF Resp. at 19, 28; ACF MSJ at 26, 33, 35. As ACF states, the Board has held that a grantee agency with a deficiency "must 'fully correct its noncompliance'" with the requirement at issue "'in order to avoid termination,'" that "the standard that applies in determining whether a grantee has corrected its deficiencies is 'full compliance'" with the performance standard at issue, and "that '[t]o permit grantees to only partially correct a deficiency to avoid termination would effectively result in grantees never fully complying with Head Start requirements.'" ACF Resp. at 3-4, citing *Municipality of Santa Isabel,* DAB No. 2230, at 9-10 (2009); *Jefferson Comprehensive Care* at 18; *Philadelphia Hous. Auth.* at 10-11; *The Council of the Southern Mountains,* DAB No. 2006, at 17 (2005); and *DOP Consol. Human Servs. Agency, Inc.,* DAB No. 1689, at 5 (1999).

CAACA argues that those Board decisions requiring full correction of deficiencies have been preempted by the 2007 enactment of the statutory definition as a "systematic or substantial material failure" in the specified areas of performance. 42 U.S.C. § 9832(2)(A)(i); CAACA Reply & MD at 23. CAACA argues that because the Head Start Act "unambiguously states that grants may only be terminated for uncorrected 'deficiencies,'" if a grantee "after taking corrective measures . . . no longer exhibits a

'systemic or substantial material failure to comply' with pertinent regulations, it no longer exhibits a 'deficiency'" and cannot be terminated, and that "ACF no longer has authority to interpret the meaning of 'uncorrected deficiency' so flexibly as it has in the past, and the Board can no longer permit ACF to do so." *Id*. at 23-24.

We find no basis in the cited statutory language to disturb the Board's longstanding precedent requiring grantees to fully correct deficiencies.[7] In *Philadelphia Housing Authority*, the grantee made an analogous argument that a deficiency defined as "a failure to perform substantially" must be considered corrected by substantial compliance with the relevant requirement rather than only upon full compliance. The Board rejected that contention, explaining that–

While the definition of a deficiency sets forth substantial performance as the applicable standard for an initial finding of a deficiency in the listed areas, that definition does not address the standard for correction of an identified deficiency in any area that is set forth as a basis for termination. Specifically, the provision at 45 C.F.R. § 1304.60(f) [requiring termination if the grantee "fails to correct a deficiency"] does not incorporate a substantial performance standard; nor is there any mention of substantial performance in the termination provision for failure to timely correct deficiencies at 45 C.F.R. § 1303.14(b)(4). Furthermore, ACF explained a reasonable basis for the interpretation that correction requires full compliance; to permit grantees to only partially correct a deficiency to avoid termination would effectively result in grantees never fully complying with Head Start requirements . . . .

DAB No. 1977, at 10-11; *Municipality of Santa Isabel* at 10; *The Council of the Southern Mountains, Inc.* at 28-29; *Jefferson Comprehensive Care* at 18-19; *see also Camden Cnty. Council on Econ. Opportunity* at 2-3 n.2; *Friendly Fuld Neighborhood Ctr., Inc*., DAB No. 2121, at 2-3 n.2 (2007).

CAACA has not explained why defining "deficiency" as "a systemic or substantial material failure" that involves a failure to comply with Head Start performance standards (as in the statute) instead of a failure "to perform substantially the requirements related to" the performance standards (as in the regulation) renders inapplicable the rationale for requiring full correction. That rationale was based on the plain language of the regulation requiring termination if the grantee "fails to correct a deficiency," as well as the absence of any reference to substantial compliance in regard to correction. 45 C.F.R. § 1304.60(f); *e.g.*, *Friendly Fuld Neighborhood Ctr., Inc*. at 3 n.2; *Philadelphia Hous. Auth.* at 10-11. Enactment of the statutory definition of "deficiency" did not change that

[7] The Board has considered whether grantees "fully corrected" deficiencies under the 2007 statutory definition within the required time frame for correction, without addressing whether the statutory definition affected its prior precedent. *Southwest Ark. Development Council, Inc.*, DAB No. 2489 (2012); *Pinebelt Assoc. for Cmty. Enhancement* at 8, 10.

rationale. The Head Start Act continues to require termination unless the grantee "corrects the deficiency," with no change after the addition of the statutory definition. 42 U.S.C. §§ 9836a(e)(1)(C) (current), 9836a(d)(1)(C) (1994, 2005). The regulations implement this requirement that a grantee with a deficiency be terminated "unless the [Head Start] agency corrects the deficiency." 61 Fed. Reg. 57,210, 57,211 (Nov. 5, 1996). Neither the statute nor the regulation has ever included any suggestion that a failure to correct an existing deficiency must be proven to also rise independently to the level of a deficiency (whether that level is lack of substantial performance – as in the regulation – or systemic or substantial material failure – as in the statute).

CAACA's argument is essentially the same one that the Board rejected in its decisions requiring full correction. That argument does not depend on which definition of "deficiency" is applied and our rejection of it remains applicable in the present case.

c. The Board will apply the longstanding standard for the burdens of production and proof in Head Start termination appeals.

The distribution of burdens in a Head Start hearing is "well-settled." *Gulf Coast Cmty. Action Agency, Inc.* at 3. ACF "must make a prima facie showing (that is, proffer evidence sufficient to support a decision in its favor absent contrary evidence) that it has a basis for termination under the relevant standards." *Id.*, *citing*, *e.g.*, *Friendly Fuld Neighborhood Ctr., Inc*. at 3, citing *First State Cmty. Action Agency, Inc*. at 9, and *Rural Day Care Ass'n of Ne. N.C*., DAB No. 1489, at 8 (1994), *aff'd, Rural Day Care Ass'n of Ne. N.C. v. Shalala*, No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995). If ACF makes this prima facie showing, the grantee "must demonstrate by a preponderance of the evidence that it is in compliance with program standards." *Id*., *citing Friendly Fuld Neighborhood Ctr*. at 3.

CAACA calls this allocation inconsistent with the requirement in the Administrative Procedure Act that in administrative adjudications, "the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The Board has consistently rejected that argument in another type of case, appeals by nursing facilities of remedies, including money penalties and terminations of agreements to participate in Medicare, that the Centers for Medicare & Medicaid Services (CMS) imposes for failure to comply with Medicare participation requirements in the regulations. In those cases the Board also places on the appellant facility the burden of showing continuing compliance with the regulatory requirement at issue once CMS has met its burden to establish a prima facie case of noncompliance. *Evergreen Nursing Care Ctr.*, DAB No. 2069, at 7 (2007); *see also Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, No. 04-3687 (6th Cir. 2005). The Board "has consistently held, based on analysis of the applicable statutory and regulatory provisions, that allocating the burden of persuasion [to show compliance] to the [nursing facility]

does not violate APA procedural requirements." *Carrington Place of Muscatine*, DAB No. 2321, at 24 (2010) (citations omitted). The Board "has observed that the facility appealing a CMS finding of noncompliance with program requirements is the 'proponent of an order'" certifying that it has reached the required degree of compliance with nursing facility requirements, so that it may continue to receive payment for participation in the Medicare program. *Gooding Rehab. & Living Ctr.*, DAB No. 2239, at 9 (2009).

The detailed program requirements for continued participation in Head Start place grantees in that program in an analogous position of having to be prepared to show that they continue to meet those requirements when the question is properly raised, as it is here. The Board, in cases including Head Start termination appeals, "has long held that a grantee who receives federal funds has an affirmative duty to document that those funds are used for the purposes for which they were awarded." *Rural Day Care Ass'n of Ne. N.C.* at 8, citing *Nat'l Urban League, Inc.*, DAB No. 289, at 2 (1982); *see also Gulf Coast Cmty. Action Agency* at 3, citing *Friendly Fuld Neighborhood Ctr.* at 3 (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" and "is clearly in a better position to establish that it did comply with applicable requirements than ACF is to establish that it did not"). We accordingly see no reason not to apply the same distribution of the burdens of production and proof in this Head Start termination appeal as the Board has historically applied.

We also note, however, that Board has made clear that the question of where the ultimate burden of proof lies is meaningful only where the evidence is in equipoise. *E.g., Batavia Nursing & Convalescent Inn* at 12. In other words, since it is undisputed that the standard of proof is preponderance of the evidence, if the preponderance of the evidence favors one party, then that party must prevail. Only if neither party has proven its case by the preponderance of the evidence will the decision-maker have to conclude that the party with the burden of proof must lose.

d. The Board will not review ACF's designation of deficiencies as health and safety related.

ACF, in the April 2014 Overview, found that CAACA facilities presented multiple "health and safety hazards" constituting "immediate" deficiencies it had to correct within 10 days to avoid termination. CAACA Ex. 3, at 1, 4. ACF "interprets 'immediate corrective action' as specified in the Act, as those situations that must be resolved at the point of discovery or up to 30 days from when the notice of deficiency is given." *Id*. at 3. CAACA argues that "[c]haracterizing these deficiencies as health and safety-related provided ACF with the pretext for requiring their 'immediate' correction" and that "[b]y

framing the deficiencies as health and safety-related, ACF did an end-run around having to offer CAACA a quality improvement plan" which "would have given CAACA what it lacked here: a clear, well-defined standard by which to measure the steps it would need to take to correct any identified deficiencies." CAACA NA Br. at 11 n.9.

The Head Start Act vests the Secretary of HHS (and thus ACF through designation) with the discretion "to require a grantee to correct deficiencies immediately, or within 90 days, or pursuant to a QIP." *Camden Cnty. Council on Econ. Opportunity* at 7. Thus, ACF, acting for the Secretary, may require a grantee "to correct the deficiency immediately, if the Secretary finds that the deficiency threatens the health or safety of staff or program participants or poses a threat to the integrity of Federal funds" or "to correct the deficiency not later than 90 days . . . if the Secretary finds, in the discretion of the Secretary, that such a 90-day period is reasonable" or "in the discretion of the Secretary (taking into consideration the seriousness of the deficiency and the time reasonably required to correct the deficiency), to comply with the requirements . . . concerning a quality improvement plan; . . . . " 42 U.S.C. § 9836a(e)(1).

The Board has held that ACF has authority to require a grantee to correct deficiencies without a QIP, and has seen "no basis" for "concluding that ACF is required, as part of its prima facie case for termination, to prove or even explain its basis for requiring a grantee to correct under one or another of the three time frames prescribed" in the Head Start Act. *Camden Cnty. Council on Econ. Opportunity* at 7, 14. CAACA has not shown that ACF abused its discretion (i.e., acted arbitrarily or capriciously) in denying it the opportunity to correct the deficiencies pursuant to a QIP and over a period of time longer than the 10 days ACF afforded for correcting the "immediate" deficiencies.

All three deficiencies arise in part from findings that several CAACA facilities had conditions constituting fire hazards or which otherwise posed potential threats to the Head Start children and staff who used them. Without presenting a comprehensive list of the deficiency findings, we note that ACF found that the E.M. Henry Center was cited for multiple fire code violations by the Alabama State Fire Marshal, the city fire marshal, and a fire alarm company, over the period November 2, 2011 through January 22, 2014, during which time CAACA continued to provide services to children there, and that on February 4, 2014 the State Fire Marshal found 36 fire code violations, including four he had previously identified on November 2, 2011. CAACA Exs. 17, 20, 21; ACF Ex. 10; ACF Resp. at 10; CAACA NA Br. at 6 ("at some point in late January or early February [2014], the Center was orally ordered closed by either the State Fire Marshal or [the] City of Clanton Fire Marshal"). These findings alone justify ACF's description of the deficiencies as health and safety related.

We recognize that CAACA disputes the validity of the Alabama State Fire Marshal's findings of fire code violations at several CAACA Head Start facilities, which ACF cites in support of deficiency findings it classifies as fire safety hazards (ACF Resp. at 9; ACF MSJ at 4), on the ground that the Fire Marshal (and deputies) cited inapplicable fire code provisions. CAACA argues that the Fire Marshal's reports erroneously apply requirements of the 2009 International Fire Code (2009 IFC) which Alabama regulations only adopted prospectively in 2010 and which therefore should not have been applied to the CAACA facilities which, CAACA asserts, "all predate 2010."[8] CAACA Reply & MD at 33. CAACA argues that Alabama regulations instead apply to pre-2010 facilities the "National Fire Protection Association's (NFPA) 2003 model code" (2003 NFPA code) and asserts that the State Fire Marshal whom ACF has listed as a witness will testify that "because his computer system only has the 2009 IFC loaded into it, he and his deputies cite to it regardless of actual applicability." *Id.* at 31-33, citing Ala. Admin. Code § 482-2-101-.01.

ACF states that "[t]he administrative, operational and maintenance provisions of IFC 2009" apply retroactively and that "the maintenance requirements under IFC 2009 . . . were applicable to all of CAACA's centers regardless of their construction dates" but has not addressed whether those retroactivity provisions cover the conditions cited in the fire marshal's reports. ACF MSJ at 5, citing 2009 IFC § 102.2; ACF MSJ Reply at 12-13. ACF also states that the 2009 IFC "is applicable in entirety" to existing structures that, "in the fire code official's opinion, constitute distinct hazards to life or property" but has not averred that the 2009 IFC provisions were applied on that basis. ACF MSJ at 5, citing 2009 IFC § 102.1.

CAACA disputes the citation of some CAACA facilities for not meeting 2009 IFC requirements for cooking range exhaust hoods with fire suppression systems, citing its support services manager's testimony that the Alabama State Fire Marshal told an ACF official that the cooking ranges complied with "the old codes." CAACA Reply & MD at 32; CAACA Ex. 97a, at ¶ 3.c. CAACA has not, however, responded to ACF's citation of provisions of the 2003 NFPA code that, like the 2009 IFC, appear to require exhaust hoods with fire suppression systems, nor does CAACA assert that the 2003 NFPA code it argues applied to its facilities would have permitted any of the many other conditions the fire marshal cited as violations. ACF MSJ Reply at 9.

At the hearing, the parties may present evidence on whether the conditions the fire marshal cited existed or whether the citations were factually wrong. Whether the fire marshal's reports cite the correctly applicable fire code is a legal issue, however, and not

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[8] CAACA cites Alabama fire code regulations as adopting the 2009 IFC (with some exceptions) "for projects on which the date of the architectural services contract is on or after the effective date of this chapter as revised" which, according to the regulation available at the web site of the Alabama Department of Insurance, is November 22, 2010. https://aldoi.gov/PDF/FireMarshal/RevisedReg482-2-101.pdf (accessed March 4, 2016).

a matter of fact on which the Board will receive evidence at the hearing. We do not resolve that legal issue in this ruling and will receive further argument on it in post-hearing briefing. The parties may further brief this issue and may address whether Alabama offers, and whether CAACA used, any process for appealing Fire Marshal citations for fire code violations.[9]

Next steps

The Board will hold a pre-hearing conference by telephone during the week of April 4, 2016, for the purposes stated in the Board's letter of January 23, 2015, as well as to set possible dates and time for the hearing and to discuss other hearing-related logistics. The Board will then issue the notice of hearing required by 45 C.F. R. § 1303.16(h) stating the issues for hearing as simplified or narrowed at the pre-hearing conference. We will contact you shortly to schedule the pre-hearing conference.

/s/
Susan S. Yim

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member

[9] We note, however, that the Board will not overturn the finding that the Alabama State Fire Marshal, based on an inspection on July 22, 2014, cited the Tallassee Center for a fire code violation in the category "egress door illumination" merely on the ground that, according to CAACA, "the means of egress is more than adequately illuminated (requirement is only one footcandle) at all times the center is occupied, i.e. during the day, by numerous adjacent windows." ACF Ex. 62, at 1, 2; CAACA Reply & MD at 35, citing 2009 IFC §§ 1006.1, 1006.2. CAACA cited no provisions in the fire code indicating that window light may satisfy the requirement for exit or egress door illumination. Such interpretation seems contrary to IFC requirements that "[t]he power supply for means of egress illumination shall normally be provided by the premises' electrical supply" and that "exit signs … shall be connected to an emergency power system provided from storage batteries, unit equipment or an on-site generator." 2009 IFC §§ 1006.3, 1011.5.3 (ACF Ex. 92, at 15, 17).