Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

H.O.P.E. Community Services, Inc.
Docket No. A-12-79
Decision No. 2487
November 30, 2012

DECISION

H.O.P.E. Community Services, Inc. (HOPE) appealed the August 13, 2012 decision of the Administration for Children and Families (ACF) to terminate the grant awarded to HOPE for a Head Start program. ACF based the termination on its finding, in a follow-up review of HOPE's program conducted in January 2012, that HOPE had failed to correct in a timely manner a deficiency identified in a January 2011 review.

ACF moved for summary judgment, arguing that none of the documentation submitted by HOPE contradicts ACF's factual findings demonstrating that HOPE had a deficiency that was not timely corrected. For the reasons explained below, we conclude that HOPE failed to raise a genuine dispute of material fact and that none of HOPE's other arguments provide a basis for reversing the termination. We therefore grant ACF's motion and affirm ACF's decision to terminate HOPE's Head Start grant.

Legal Background

The Secretary of Health and Human Services must review each Head Start grantee's program to determine whether it meets the program performance standards, which include administrative and financial management standards, at least once every three years. Head Start Act § 641A(c)(1).[1] If a review finds that a grantee has a "deficiency," the Head Start Act requires the Secretary to "initiate proceedings to terminate the designation of the agency unless the agency corrects the deficiency." *Id.* § 641A(e)(1)(C). As relevant here, a "deficiency" includes "a systemic or substantial material failure of an agency in an area of performance that the Secretary determines involves . . . (iii) a failure to comply with standards related to early childhood development and health services, family and community partnerships, or program design and management[.]" *Id.* § 637(2)(A).

[1] The Head Start Act, as amended December 12, 2007, is codified at 42 U.S.C. § 9801 *et seq.*

The Secretary may require a grantee to correct a deficiency immediately if it threatens the health or safety of staff or program participants or poses a threat to the integrity of federal funds. In other circumstances, the Secretary may require correction within 90 days or a time specified in a Quality Improvement Plan (QIP) not to exceed one year after the grantee received notice of the deficiency. Head Start Act § 641(e)(1)(B)(i)-(iii), (e)(2)(A); *see also* 45 C.F.R. §§ 1304.60(f) ("the responsible HHS official will issue a letter of termination or denial of refunding" if a Head Start grantee "fails to correct a deficiency, either immediately, or within the timeframe specified in the approved [QIP]"); 1304.60(c) (QIP timeframes for correcting a deficiency may not exceed one year from the date that the grantee received official notification of the deficiencies to be corrected). A single uncorrected deficiency is sufficient to warrant termination of funding. 45 C.F.R. § 1303.14(b)(4) (authorizing termination for failure to correct "one or more deficiencies"); *see, e.g.*, *The Human Dev. Corp. of Metro. St. Louis*, DAB No. 1703, at 2 (1999). The "findings of a followup review need not be identical to findings" of the review in which the deficiency was first identified in order to determine that a grantee has failed to correct a deficiency. *Philadelphia Hous. Auth.*, DAB No. 1977, at 18, n.14 (2005), *aff'd*, *Philadelphia Hous. Auth. v. Leavitt*, No. 05-2390, 2006 WL 2990391 (E.D.Pa. Oct. 17, 2006).

Head Start grantees are entitled to an evidentiary hearing before the Board to contest the basis for ACF's termination decision. *See* 45 C.F.R. § 1303.16. In this case, ACF has asked the Board to grant summary judgment in its favor without a hearing. The Board has held that, under appropriate circumstances, it may grant summary disposition in the nature of summary judgment in a Head Start termination case without holding an evidentiary hearing "when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law." *Camden County Council on Economic Opportunity*, DAB No. 2116, at 3-4 (2007), *aff'd*, 586 F.3d 992 (D.C. Cir. 2009); *Union Township Cmty. Action Org.*, DAB No. 1976, at 6 (2005). 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. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial."' *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

To defeat an adequately supported summary judgment motion, the non-moving party may not rely on general denials in its pleadings or briefs, but must furnish evidence of a genuine dispute concerning a material fact--a fact that, if proven, would affect the outcome of the case under governing law. *Id*. at 586, n.11; *Celotex*, 477 U.S. at 322-24. In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence in that party's favor. *Camden County Council on Economic Opportunity* at 4.

The burdens of proof applicable to Head Start grant terminations are well-settled: 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 regulatory standards. *Friendly Fuld Neighborhood Ctr., Inc*., DAB No. 2121, at 3 (2007); *First State Cmty. Action Agency, Inc*., DAB No. 1877, at 9 (2003); *Rural Day Care Ass'n of Northeastern N.C.*, DAB No. 1489, at 7-8 (1994), *aff'd, Rural Day Care Ass'n of Northeastern N.C. v. Shalala* , No. 2:94-CV-40-BO (E.D.N.C. Dec. 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*.

In Head Start termination appeals, a grantee 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. *Norwalk Econ. Opportunity Now, Inc.*, DAB No. 2002, at 7 (2005). A 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. Therefore, the Board has held that the ultimate burden of persuasion is on the grantee to show that it complied with program standards. *Friendly Fuld Neighborhood Ctr., Inc*. at 3-4.

Procedural Background

From January 11-14, 2011, ACF conducted an on-site monitoring follow-up review of HOPE's Head Start program to determine whether a deficiency identified in a November 2009 review had been corrected.[2] In a September 19, 2011 report on the January 2011 review (ACF Ex. 3), ACF indicated it had determined that the deficiency identified in 2009 had been corrected but that HOPE had a new deficiency. *See* ACF Ex. 3, at 2-6. The report advised HOPE that the new deficiency "must be fully corrected within 30 days from the date you receive this report" and that if HOPE continued to have an uncorrected deficiency beyond the specified timeframe, ACF would issue a letter stating its intent to terminate HOPE's Head Start designation. *Id*. at 6. HOPE received ACF's September 19, 2011 report ("letter") on September 26, 2011. *See* Undated Notice of Termination, 2nd page. Thus, HOPE had 30 days from September 26, 2011, or until October 26, 2011, to correct the deficiency identified in the January 2011 review.

[2] The November 2009 review was a follow-up review to determine whether a deficiency identified in an October 2008 on-site monitoring review had been corrected. *See* ACF Exs. 1 (report on 2008 review) and 2 (report on 2009 review).

From January 22-24, 2012, ACF conducted a follow-up review to determine whether the deficiency identified in the January 2011 review had been corrected. In an April 30, 2012 report on the January 2012 review, ACF indicated that it had determined that the deficiency identified in 2011 had not been corrected and was attaching a notice of termination to the report. ACF Ex. 4, at 1-6.

HOPE timely appealed ACF's notice of termination, which was undated, on May 24, 2012 and requested an evidentiary hearing. After the Board acknowledged the appeal, each of the parties made a written submission. However, on August 3, 2012, the Board advised the parties that it had determined that the notice of termination did not meet the requirements of 45 C.F.R. § 1303.14(c) and that it was remanding the termination action to ACF in accordance with section 1303.14(c)(6) for the purpose of reissuing the notice of termination with the necessary corrections. ACF issued a new notice of termination dated August 13, 2012, which the Board determined met the requirements of section 1303.14(c). This notice stated, in pertinent part, that the termination—

> is based on the fact that your Head Start program failed to timely correct the findings determined to constitute deficiencies from the Office of Head Start Monitoring Review conducted in January 2011. With respect to this termination action, under the Head Start Act at section 637(2)(A)(iii), the term "deficiency" means a "systemic or substantial material failure of an agency in an area of performance that the Secretary determines involves – a failure to comply with standards related to early childhood development and health services, family and community partnerships, or program design and management."

ACF's 8/13/12 letter at 1.

HOPE timely appealed the August 13, 2012 notice of termination on September 5, 2012 (HOPE's 9/5/12 letter and enclosures), after which the parties made submissions pursuant to 45 C.F.R. § 1303.14(d). At HOPE's request, the record for the present appeal also includes all of HOPE's previous submissions (i.e., its May 24, 2012 appeal letter, its letter dated June 24, 2012, and all of the documents submitted with those letters). *See* HOPE's 10/5/12 e-mail. In addition, we have determined that it is appropriate to include in the record for the present appeal ACF's Exhibits 1-4, which ACF submitted with its response to the May 24, 2012 appeal.

Basis for ACF's Motion for Summary Judgment

In its motion for summary judgment, ACF argues that no hearing is necessary because none of the documentation submitted by HOPE contradicts the factual findings in ACF's reports on its January 2011 and January 2012 reviews, which ACF alleges establish that HOPE had a deficiency that was not timely corrected. We describe below the findings in these reports.

ACF's report on the January 2011 review concluded that HOPE had a "deficiency as defined under Sec. 637(2)(A)(iii) of the Head Start Act as a systematic or substantial material failure in the area of performance that the Secretary determines involves a failure to comply with standards related to early childhood development and health services, family and community partnerships, or program design and management."[3] ACF Ex. 3, at 4. ACF found specifically that there was a deficiency with respect to the "Applicable Standards" in 45 C.F.R. §§ 74.21(b)(3) and 74.22(b)(2).[4] *Id*. ACF's report on the January 2012 review concluded, under the heading "Status of Previously Identified Deficiency Determinations," that the deficiency with respect to each of these regulatory requirements was not corrected. ACF Ex. 4, at 2.

Section 74.21, captioned "Standards for financial management systems," states in pertinent part:

> (b) Recipients' financial management systems shall provide for the following:
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> * * * * *
>
> (3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.
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> * * * * *

ACF found that HOPE failed to comply with this requirement on the grounds that HOPE failed 1) to follow its leave policies and 2) to make timely remittances of payroll taxes to the IRS. With respect to the leave policies, ACF's report on the January 2011 review stated that HOPE's sick leave policy allowed employees who enrolled in a sick leave bank to receive up to 45 days of donated sick leave, but only if they had exhausted all of their leave balances. However, according to the report, HOPE's Sick Leave Use and Accrual report showed that on May 8, 2009, an employee who was about to retire donated a total of 600 hours of her accrued sick leave to HOPE's Executive Director and Human Resources Manager, neither of whom had exhausted their sick leave at the time of the donation and each of whom had a positive sick leave balance as of December 31, 2009. ACF Ex. 3, at 4-5.

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[3] ACF does not expressly state what part of section 637(2)(A)(iii) is implicated in this case. However, as discussed below, it is clear that the alleged violations constitute a failure to comply with standards related to program design and management.

[4] These regulations are made applicable to Head Start grants by 45 C.F.R. § 1301.10(a).

ACF's report on the January 2012 review identified another leave policy which it said HOPE was not following. The report stated that under HOPE's leave policies, an employee on extended leave could not accrue annual or sick leave until the employee "returned to active leave status." ACF Ex. 4, at 4. However, according to the report, an employee who requested 392 hours from the sick leave bank to bring the employee's leave balance to zero accrued annual and sick leave while absent from work between September 2 and December 9, 2011, so that the employee had 55.38 hours of leave after the transfer of the 392 hours. *Id.*[5]

With respect to the payroll taxes, ACF's report on the January 2011 review found that HOPE did not timely remit to the IRS $74,116 due for payroll taxes withheld from employees' salaries for pay periods between November 5 and December 31, 2010, $16,834 of the employer's share of Medicare and Social Security taxes for the same pay periods, and $1,207 owed for periods before November 5, 2010. ACF Ex. 3, at 5. ACF's report on the January 2012 review found that HOPE did not timely remit to the IRS $88,323 due for payroll taxes for the quarter ended December 31, 2012. ACF Ex. 4, at 4.

Section 74.22, captioned "Payment," states in pertinent part:

> (b) (2) Unless inconsistent with statutory program purposes, cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

ACF found that HOPE failed to comply with this requirement based on HOPE's handling of drawdowns of federal funds. ACF's report on the January 2011 review stated that HOPE's drawdowns exceeded Head Start expenditures by $136,207 for July 2009 and by $46,653 for August 2009 and that there were also excess drawdowns for the period April through November 2010.[6] ACF Ex. 3, at 5-6. According to the report, HOPE's finance

[5] ACF's report on the January 2012 review also stated that HOPE's leave policy capped individual annual leave balances at 160 hours, but a review of leave records found 29 employees had leave balances exceeding the threshold, with balances ranging from 189 to 910 hours. ACF Ex. 4, at 4. However, ACF's motion for summary judgment does not refer to this finding.

[6] The report does not specify the amount of the excess drawdowns for this period, but instead states that for "the budget period of January 1 to December 31, 2010, drawdowns exceeded expenses by a cumulative total of $250,382 on July 31, 2010." ACF Ex. 3, at 6.

director stated in an interview that excess cash was drawn from the payment management system to alleviate a shortage in cash flow experienced by HOPE during July and August 2009 and that she intentionally drew down cash in excess of Head Start cash needs during June and July 2010.[7] *Id*. at 6. Further, according to the report, HOPE's executive director stated in an interview that she was aware of the excess drawdowns in June and July 2010 and that they were meant to keep HOPE afloat until cash flow improved. *Id*. ACF's report on the January 2012 review stated that, as required by ACF beginning in May 2011, HOPE submitted for ACF's prior approval on November 2, 2011 a drawdown request which included $76,496 for a payroll tax disbursement on November 11, but HOPE did not disburse the funds drawn down for this purpose and had an unpaid liability for quarterly payroll taxes of $88,323 as of January 31, 2012.[8] ACF Ex. 4, at 5-6.[9]

In sum, ACF determined that HOPE had an uncorrected deficiency within the meaning of section 637(2)(A)(iii) of the Head Start Act on the grounds that—

- HOPE had violated the requirement in section 74.21(b)(3) for financial management systems that provide for effective control over and accountability for all funds by failing to follow its own policy requiring that an employee exhaust all sick leave before being eligible for a leave donation and by failing to timely remit payroll taxes to the IRS, and this violation was uncorrected because after the deadline for correction HOPE failed to follow its own policy prohibiting an employee on extended leave to accrue annual or sick leave and failed to timely remit payroll taxes to the IRS; and

- HOPE had violated the requirement in section 74.22(b)(2) that cash advances be limited to the organization's immediate cash requirements in carrying out the purpose of the approved program by drawing down Head Start funds in excess of Head Start cash needs, and this violation was uncorrected because after the deadline for correction HOPE drew down Head Start funds for a disbursement of payroll taxes which it then failed to make.

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[7] Payments to a grantee generally are made by electronic transfer through the Department's Division of Payment Management, Payment Management System (PMS), pursuant to a request by the grantee to draw down federal funds to the grantee's account. *See* HHS Grants Policy Statement, January 2007, at I-36 (available at http://www.hhs.gov/asfr/ogapa/grantinformation/hhsgps107.pdf).

[8] HOPE's request for prior approval to draw down Head Start funds was made pursuant to a requirement imposed by ACF when it advised HOPE that it was designated as a high risk grantee. ACF Ex. 14, at 2 (stating "You must submit a request for Advance Payment (SF-270) to [the] Contract Financial Management Specialist at leave five (5) days prior to the transfer of funds to permit authorization by the Grants Officer. A detailed listing of payments and accruals representing each PMS request must be attached to the SF-270.") (emphasis omitted).

[9] ACF's report on the January 2012 review also stated that a review of 31 individual cash requests made during the period January 1 –December 31, 2010 found 30 requests totaling $1,707,784 had no supporting documentation. ACF Ex. 4, at 5. ACF's motion for summary judgment does not refer to this finding.

The alleged violations of section 74.21(b)(3) and 74.22(b)(2) support ACF's determination that HOPE had an uncorrected deficiency within the meaning of section 637(2)(A)(iii) of the Head Start Act because they relate to the regulatory standards for program design and management at 45 C.F.R. § 1304.50(g)(2). That section provides that "Grantee and delegate agencies must ensure that appropriate internal controls are established and implemented to safeguard Federal funds in accordance with 45 CFR 1301.13." Section 74.21(b)(3) expressly requires a grantee to have financial management systems that provide "[e]ffective control over . . . all funds, property and other assets" and to "adequately safeguard all such assets," and this requirement is implicit in section 74.22(b)(2).

Analysis

I. HOPE has raised no genuine dispute of material fact.

HOPE does not specifically dispute that the facts alleged in ACF's January 2011 and January 2012 review reports make out violations of sections 74.21(b)(3) and 74.22(b)(2) or that violations of these regulatory requirements would constitute a deficiency. However, HOPE makes several statements that appear to dispute discrete allegations of fact. HOPE also makes assertions about several other matters which we liberally construe as arguments for reversal of the termination.

Below, we first explain why we conclude that HOPE has not raised any genuine dispute of fact material to whether ACF has a valid basis for terminating the grant. We then explain our conclusion that HOPE's other arguments do not provide a basis for reversing the termination.

A. HOPE's letter to ACF regarding its designation as a high risk grantee does not raise a genuine dispute of material fact regarding the finding in the January 2011 review that HOPE violated section 74.22(b)(2).

HOPE states that it "challenged some of the findings cited as a result of an onsite review" in a letter it sent on September 21, 2011 to Linda Savage, ACF's Acting Regional Program Manager. HOPE's 9/5/12 letter at 1.[10] HOPE's letter to Ms. Savage responded to a letter from ACF dated May 26, 2011 advising HOPE that it had been designated as a high risk grantee in part because HOPE used "Head Start funds in 2009 and 2010 to alleviate cash flow shortages for other programs operated by HOPE in the amount of

[10] HOPE submitted a September 21, 2011 letter to Ms. Savage with its June 14, 2012 letter in this appeal.

$1,707,784." ACF Ex. 14, at 1 (emphasis omitted). Although it was issued independently of ACF's letter about HOPE's high risk status, ACF's report on the January 2011 review similarly found that HOPE drew down Head Start cash in excess of immediate needs during July and August 2009 and again from July through November 2010 and that the excess drawdowns for July and August 2009 and for June and July 2010 were intentionally made to alleviate a cash flow problem. ACF Ex. 3, at 5-6.

Contrary to what HOPE suggests, its letter to Ms. Savage about its high risk status does not raise a dispute of fact material to the findings in the January 2011 review. Indeed, HOPE itself admits that its letter to Ms. Savage challenges only "some" of the findings from the 2011 review. The letter states in pertinent part:

> As we have reviewed the financial records for 2009 and 2010, we can find no instance in 2009 where money was taken from Head Start to keep other programs operating. Quite the contrary, in 2009 Head Start went over budget and the Agency had to absorb the deficit. It is true that during the period June to November 2010 Head Start funds were used for other agency expenses; however in every instance these funds were replaced. We submit that during this five month period the total did not come to $1,707,785.00.

HOPE's 9/21/11 letter at 1. The first two sentences quoted above, viewed in the light most favorable to HOPE, might be read as denying that HOPE used any drawdowns of Head Start funds made in 2009 for other programs. However, the third sentence expressly admits that HOPE used Head Start funds drawn down during the period July through November 2010 "for other agency expenses." ACF's January 2011 review report noted a similar admission, stating that HOPE's finance director and executive director both admitted in interviews that in 2010 HOPE drew down funds in excess of Head Start cash needs to pay expenses of other programs. ACF Ex. 3, at 6. The facts to which HOPE admitted are sufficient to support the finding in the January 2011 review that HOPE drew down Head Start funds in excess of its immediate Head Start cash needs and used the funds for other programs, in violation of section 74.22(b)(2). It is therefore immaterial whether HOPE used drawdowns of Head Start funds made in 2009 for other programs.[11]

[11] HOPE also complains that ACF did not respond to its September 21, 2011 letter to Ms. Savage. HOPE's 9/5/12 letter at 1. It is not clear why HOPE believes this is significant, but we find it irrelevant.

B. The Office of Inspector General's findings on its May 2010 audit do not raise a genuine dispute of material fact regarding the finding in the January 2011 review that HOPE violated section 74.21(b)(3).

HOPE states that it "was audited by the Inspector General's Office in May 2010 and was found 'to have the capacity to manage and account for Federal funds and is capable of operating a Head Start Program.'" HOPE's 5/24/12 letter at 2. HOPE provided a transmittal letter and a two-page excerpt from a draft report by the Office of Inspector General (OIG), titled "Results of Limited Scope Review at Heartland Opportunities for Partnership and Empowerment Community Services, Inc." *See* HOPE's 9/5/12 letter, 3rd attachment. The excerpt does not include any of the OIG's findings, although it includes the statement that the "objective of our limited scope review was to assess [HOPE]'s capacity to account for Federal funds and to operate its Head Start program in accordance with Federal regulations." *Id.* at 3rd page of attachment.

HOPE appears to be arguing that the OIG's alleged findings contradict ACF's finding in the January 2011 review that HOPE violated the standards for financial management in section 74.21(b)(3). Even assuming HOPE correctly represented the OIG's findings, HOPE's argument has no merit. Having the "capacity to manage and account for federal funds" does not necessarily equate to actually complying with financial management requirements. Nothing in the transmittal and excerpt from the draft OIG report indicates that the OIG reviewed HOPE's compliance with the specific requirements at issue here. Nor do those documents indicate that the purpose of the OIG review was the same as the purpose of ACF's review, which was conducted pursuant to a process mandated by statute for determining whether Head Start grantees meet Head Start performance standards and whether any deficiencies in meeting those standards are timely corrected. The excerpt from the draft OIG report states only that the OIG performed its review in response to a "limited scope request from ACF[.]" *Id.* at 3rd page of attachment. Even more important, the excerpt from the draft OIG report identifies the "review period" for that report as limited to July 1, 2008 through June 30, 2009 (*id.*), while the January 2011 review found violations of section 74.21(b)(3) in July-August 2009 and in 2010. Thus, even if the OIG had in effect found that HOPE was complying with section 74.21(b)(3) during the period ended June 30, 2009 (which it did not), that finding would not show that HOPE was complying with section 74.21(b)(3) during the later periods addressed in the January 2011 review.

Thus, we conclude that the documents HOPE provided relating to the OIG review do not raise a genuine dispute of fact about the finding in ACF's January 2011 review that HOPE failed to comply with section 74.21(b)(3).

C. HOPE's allegation that it made corrections pursuant to a corrective action plan (CAP) does not raise a genuine dispute of material fact regarding the finding in the January 2012 review that HOPE did not timely correct violations of sections 74.21(b)(3) and 74.22(b)(2).

HOPE alleges that at the January 2012 review, ACF's reviewer "arrived asking questions about deficiencies that had already been addressed in the corrective action plan, indicative of his not familiarizing himself with strategies that had already been submitted and approved." HOPE's 5/24/12 letter at 1-2. This presumably refers to a "Corrective Action Plan" HOPE submitted as an attachment to its June 24, 2012 letter. The CAP, which shows October 24, 2011 as the "Date Plan Submitted," includes "Action Steps/Strategies" for addressing "Deficiency Determinations/Performance Standard(s): 74.21(b)(3)" and "Deficiency Determinations/Performance Standard(s): 74.22(b)(2)."[12] HOPE appears to be arguing that it successfully completed the CAP, showing that, contrary to the finding in ACF's January 2012 review, HOPE timely corrected the deficiency that was based on violations of these regulatory requirements.

The action steps in the CAP for addressing violations of section 74.21(b)(3) generally consist of reviewing certain policies and procedures, proposing policy and procedure "updates," and obtaining the necessary approvals of the updated policies and procedures. Under the action step "Review all policies and procedures," the CAP states in relevant part, "Develop Sick Leave Share procedure to ensure adequate control over program" and "Review Financial procedure for timely deposit of payroll taxes." CAP at 1-2. The CAP also lists as an action step "Strengthen existing procedure to include reporting of payroll tax deposit to the Executive Director." *Id.* at 3. The CAP shows October 25, 2011 as the "time frame" for final approval of the updated policies and procedures. However, even assuming HOPE approved the updated policies and procedures by that date, that does not necessarily mean that HOPE implemented the procedures, much less that HOPE ensured that violations of section 74.21(b)(3) were no longer occurring as of October 26, 2011, the final date set by ACF for correction of the deficiency identified in the January 2011 review. Indeed, HOPE does not dispute that, as stated in ACF's report on the January 2012 review, HOPE's "Executive Director, Human Resource Director and Board Treasurer" told reviewers that HOPE's "Sick Leave Share and Annual Leave Policies,"

[12] ACF disputes HOPE's assertion that ACF approved this CAP. *See* ACF reply dated 11/14/12, at 1. It is irrelevant whether the CAP was approved by ACF since the CAP was not submitted pursuant to any requirement by ACF that HOPE correct the deficiency identified in the January 2011 review within the time specified in an approved QIP. As indicated above, ACF instead required that, in order to avoid termination, HOPE correct the deficiency within 30 days of its receipt of the report on the January 2011 review. We also note that ACF required HOPE to submit a CAP (among other things) in order to be removed from high-risk status. *See* ACF Ex. 14, at 2.

including the sick leave policy revised October 11, 2011, "were not enforced." ACF Ex. 4, at 3-4. In addition, HOPE does not specifically dispute the findings in the January 2012 review that, as late as December 2011, HOPE was not following its leave policies or timely remitting payroll taxes. Thus, even if HOPE timely completed the action steps in the CAP relating to section 74.21(b)(3), that would not raise a genuine dispute regarding whether HOPE timely corrected the violations of that section.

The CAP also lists three action steps for addressing the violations of section 74.22(b)(2). These action steps have as their objective "Implementation of an additional level of accountability to ensure accuracy of financial reporting." CAP at 4-5. The action steps consist of having the Finance Director meet monthly with the Finance Committee to review detailed expenditures, reporting all committee meetings and observations to the Executive Director, and e-mailing ACF's grantee specialist a copy of a "procedural checklist" for review. *Id*. The CAP shows October 19, 2011 as the completion date for these action steps. The CAP also lists as an action step "Ensure there is a procedure limiting funds to three (3) days for whatever they are designated for."[13] CAP at 2. The CAP shows October 25, 2011 as the completion date for this action step. However, even assuming HOPE instituted these procedures by the dates specified in the CAP, that does not necessarily mean that HOPE ensured that violations of section 74.22(b)(2) were no longer occurring as of October 26, 2011. Indeed, HOPE does not specifically dispute the finding in the January 2012 review that, as late as November 2011, HOPE drew down Head Start funds that it failed to use for the costs for which ACF authorized the drawdown. Thus, even if HOPE timely completed the action steps in the CAP relating to section 74.22(b)(2), that would not raise a genuine dispute regarding whether HOPE timely corrected the violations of that section.

II. HOPE's other arguments do not show that termination was not warranted as a matter of law.

A. HOPE's plans for hiring a finance director for its Head Start program are not a basis for reversing the termination.

In its May 24, 2012 appeal letter, HOPE states, under the caption "Proposed Changes and Strategies for Improvement," as follows:

[13] Although this is listed as one of the action steps relating to section 74.21(b)(3), it appears to require that federal funds be disbursed within three days of drawdown for the purpose authorized and, thus, to relate to the finding in the January 2011 review that HOPE violated section 74.22(b)(2).

> We propose to reorganize our finance department and hire a Finance Director specifically for the Head Start Program. Employment requirements will include a minimum of an undergraduate degree in accounting. Their prior work experience will have to include knowledge of federal grants. In addition, we would request that a finance specialist from the regional office train and mentor this individual to assure that there is no further problem with the financial oversight of the program.

5/24/12 letter at 2-3. HOPE's September 9, 2012 appeal letter makes essentially the same proposal. 9/5/12 letter at 2. The finance director is identified in HOPE's October 24, 2011 CAP as the one of the persons responsible for taking all but one of the action steps relating to sections 74.21(b)(3) and 74.22(b)(2). Thus, HOPE seems to anticipate that if it hires a Head Start program finance director with the stated qualifications and ACF provides training and mentoring for this individual, HOPE will be able to comply with sections 74.21(b)(3) and 74.22(b)(2).

Contrary to what HOPE suggests, these plans to ensure future compliance have no bearing on whether termination is warranted. As the Board has previously noted, the Head Start regulations "are clear that all deficiencies must be corrected by the end of the period for correction." *Philadelphia Housing Authority* at 14, citing 45 C.F.R. § 1304.60(c). 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." *Jefferson Comprehensive Care System, Inc.* DAB No. 2377, at 2 (2011). Accordingly, even if HOPE had corrected the deficiency identified in ACF's January 2011 review after the period for correction ended, that would not be sufficient to avert termination. It is all the more clear that mere plans to correct the deficiency in the future are not a basis for reversing the termination, even assuming that hiring a Head Start finance director as planned would be sufficient to correct the deficiency.

B. <u>HOPE's claim that it did not receive adequate assistance from ACF to enable it to correct the deficiency is not a basis for reversing the termination.</u>

In its September 5, 2012 appeal letter, HOPE seems to blame ACF for not providing adequate assistance to enable HOPE to correct its deficiencies. According to HOPE, there was no "offer to send a fiscal specialist to work with our Finance Department, nor did the Regional Specialist ever visit with the Head Start Manager and her staff." HOPE's 9/5/12 letter at 1. HOPE continues, "Technical assistants (T/As) were assigned by the regional office to give programmatic guidance[;] however, based on the citation in the Letter of Termination, the fiscal area was the weakest area of the Agency . . ., and assistance from the regional office would have been invaluable." *Id.* at 1-2. To the extent that HOPE intended to argue that the termination should be reversed on this basis, that argument has no merit.

We note preliminarily that HOPE's claim that ACF did not provide technical assistance to address the deficiency identified in ACF's January 2011 review is undercut by evidence provided by ACF that a "Grantee Specialist" was assigned to work with HOPE in September 2011 "immediately upon the issuance" of the report on the January 2011 review and that the Grantee Specialist provided technical assistance focused "on the two areas of deficiency that were identified in [that] report: 45CFR 74.22(b)(2) and 45CFR 74.21(b)(3)" on October 11 and 19, 2011. ACF Ex. 5, at 2 ¶ 8-9 (Affidavit of Elizabeth Firsten), 12-15 (Training and Technical Assistance Report for 10/11/11), 22-23 (Training and Technical Assistance Report for 10/19/11); ACF Ex. 6, at 1-4 (Training and Technical Assistance Report: Grantee View – Comprehensive).

In any event, HOPE has not cited to, nor are we aware of, any statutory or regulatory requirement that ACF provide any assistance, much less a particular quantum or type of assistance, to help a grantee correct the particular type of noncompliance at issue here.[14] Absent such a requirement, there is simply no basis for finding that ACF was responsible for ensuring that HOPE had the capacity to comply with the regulations at issue here. Section 74.21(b)(3) requires a grantee to have financial management systems that meet basic requirements any business organization should be able to meet, while section 74.22(b)(2) sets out requirements for the timing of drawdowns of federal funds with which any federal grantee--especially a long-time recipient of Head Start grants like HOPE--should be familiar. C*f. Marie Detty Youth & Family Servs. Ctr., Inc.*, DAB No. 2024, at 38 (2006) (a Head Start grantee has "an obligation to be aware of the federal laws governing the allowable uses of Head Start funds and to conform its expenditures to those laws.").

C. HOPE's complaints about a reviewer who performed the January 2012 review are not a basis for reversing the termination.

In its June 14, 2012 letter, HOPE said it was forwarding in support of its appeal additional documents including a January 27, 2012 letter to Acting Regional Program Manager Linda Savage, which HOPE described as "a formal complaint about the manner in which the [January 2012] follow-up review was conducted." HOPE's 6/14/12 letter at 1. The January 27, 2012 letter, signed by HOPE's Executive Director, states that the reviewer "was rude, poorly prepared and obnoxious" and that "[h]is people skills were poor, to the point of being aggressive and even combative." 1/27/12 letter at 1. The letter also states that the reviewer "never sent the Head Start Director, Finance Director

[14] We note that while section 641(a)(2) of the Head Start Act requires the Secretary to set aside a portion of the funds appropriated for Head Start for training and technical assistance to "help[] Head Start programs address weaknesses identified by monitoring activities conducted by the Secretary under section 641A(c)," section 641(a)(2) further provides that "nothing in this section shall be construed to deny the Secretary the authority … to terminate … funding to a Head Start agency."

nor the Human Relations Manager a list of the items he wished to review[.]" *Id*.; *see also* HOPE's 5/24/12 letter at 1. In addition, the letter expresses concern "about the lack of racial diversity among the review team members," stating that "[a]lthough our Head Start student population is more than 80 percent African American and our staff is more than 65 per cent minority, there has not been a single African American on a monitoring [team] in the past decade." *Id*. at 1-2.

HOPE's complaints about the reviewer do not provide a basis for reversing the termination. HOPE does not identify any relationship between the reviewer's alleged conduct at the review and the findings in the January 2012 review report. If HOPE is implying that the reviewer was biased, it has offered no evidence to support that implication. Moreover, mere allegations of reviewer bias cannot overcome HOPE's failure to dispute the material facts on which ACF based its determination to terminate the grant. *Cf. First State Cmty. Action Agency, Inc.* at 22 (finding testimony of allegedly biased reviewers reliable where, among other things, "Most of what [the reviewers] said they heard in their interviews or discovered in their documentation reviews is undisputed, and very few of their factual findings were rebutted by any persuasive evidence.").

Furthermore, to the extent HOPE is arguing that it did not have an adequate opportunity to provide relevant documentation during the January 2012 review because the reviewer did not provide advance notice of the documents ACF wished to review, that argument does not advance HOPE's case. The Board provides a de novo review in which it determines whether ACF had grounds under the applicable regulations to terminate a Head Start grant. Thus, HOPE had ample opportunity to provide relevant documentation in the proceedings before the Board.

D. <u>HOPE's assertion that termination of its Head Start grant could harm the children and the community is not a basis for reversing the termination.</u>

HOPE asserts that "[p]erhaps the most important reason for not terminating HOPE's Head Start Program lies in the history of our community[.]" HOPE's 5/24/12 letter at 2. According to HOPE, the largest county in which its Head Start program operates "closed its schools for five years (1959-1964) rather than integrate" and families in the surrounding counties "lived in fear that the government would allow other school systems to also deny children a public education." *Id*. HOPE states that the "Head Start Program in this region . . . has brought healing and racial reconciliation between various segments of the community, and it has caused grandparents who were denied an education to become involved with their school systems once again." *Id*. HOPE maintains that the "termination of the HOPE Head Start Program will be tantamount to once again denying low income children in this area an equal education." *Id*.; *see also* HOPE's 9/5/12 letter at 2.

HOPE's argument fails to recognize that the decision to terminate its grant does not mean that the children for whom the federal government paid HOPE to provide Head Start services will now be deprived of those services. If the termination is upheld, ACF will award the Head Start grant to another organization from among qualified applicants in the same community served by HOPE. *See* Head Start Act § 641(d); 45 C.F.R. § 1307.5; ACF submission dated 10/22/12, at 9; and ACF Ex. 5 at 2 ¶ 5 (Affidavit Elizabeth Firsten), 4-6 (ACF letter dated 12/16/11). There is no reason to doubt that, with a new grantee, the educational gains HOPE attributes to its Head Start program, including parent trust and involvement, will be maintained.

Conclusion

For the reasons explained above, we grant ACF's motion for summary judgment and affirm ACF's decision to terminate HOPE's Head Start grant.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member