

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Voorhees College Early Head Start Program
Docket No. A-11-2
Decision No. 2351
December 20, 2010

DECISION

Voorhees College Early Head Start Program (Voorhees) appealed the August 25, 2010 decision of the Administration for Children and Families (ACF) to terminate the grant awarded to Voorhees for an Early Head Start program. ACF based the termination on its finding, in a follow-up review of Voorhees' program conducted on October 20, 2009, that Voorhees had failed to correct in a timely manner deficiencies identified in an April 2008 review.

On appeal, Voorhees does not dispute that it failed to correct the deficiencies by September 13, 2009, as required by Voorhees' quality improvement plan (QIP) and approved by ACF. Voorhees argues, however, that its grant should not be terminated because it corrected the deficiency by March 25, 2010. Voorhees also argues that ACF waived its right to terminate the grant by approving Voorhees' application for continued funding for the next year and scheduling another monitoring review.

For the reasons discussed below, we conclude that Voorhees has not identified any valid legal basis for reversing ACF's determination to terminate the grant, and we therefore uphold that determination.

Legal Background

Head Start is a national program that provides comprehensive child development services. 57 Fed. Reg. 46,718 (Oct. 9, 1992). The Head Start program serves primarily low-income children, ages three to five, and their families. *Id.* The Early Head Start program provides "low-income pregnant women and families with children from birth to age 3 with family centered services that facilitate child development, support parental roles, and promote self-sufficiency." 45 C.F.R. § 1304.3(a) (8). Head Start grantees, including Early Head Start grantees, must comply with a range of requirements related to administrative and fiscal management and the provision of high quality services responsive to the needs of eligible children and their families. The Head Start

performance standards codified in 45 C.F.R. Part 1304 cover the entire range of Head Start services and constitute the minimum requirements that a Head Start grantee must meet in three areas: Early Childhood Development and Health Services; Family and Community Partnerships; and Program Design and Management.

Under the Head Start Act (Act), the Secretary is required to conduct a periodic review of each Head Start grantee at least once every three years. Act, section 641A(c)(1)(A).¹ If, as a result of a review, the Secretary finds a grantee to have a deficiency, the Secretary requires the grantee to correct the deficiency immediately, or within ninety days, or by the date specified in a Quality Improvement Plan (QIP), which must be not later than one year after the grantee received notice of the deficiency. Act, section 641A(e)(1)(B) and (e)(2)(A)(ii). The Secretary "shall . . . initiate proceedings to terminate" the Head Start grant if the grantee does not correct such deficiency. Act, section 641A(e)(1)(C).

Section 1303.14(b)(4) of 45 C.F.R. provides for ACF to terminate funding if a grantee "has failed to timely correct one or more deficiencies as defined in 45 C.F.R. Part 1304." 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 Development Corporation of Metropolitan St. Louis*, DAB No. 1703, at 2 (1999). A grantee always bears the burden to demonstrate that it has operated its federally-funded program in compliance with the terms and conditions of its grant and the applicable regulations. *Municipality of Santa Isabel*, DAB No. 2230 (2009), citing, *inter alia*, *Rural Day Care Association of Northeastern North Carolina*, DAB No. 1489, at 8, 16 (1994), *aff'd*, *Rural Day Care Ass'n of Northeastern N.C. v. Shalala*, No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995).

We identify other relevant statutory and regulatory provisions below.

Case Background

Voorhees provides Early Head Start services in Denmark, South Carolina. From April 13–18, 2008, ACF performed an on-site review (referred to below as the triennial review) to determine whether Voorhees met the applicable performance standards. ACF Ex. 1, at 1. ACF found that Voorhees had at least one area of deficiency within the meaning of paragraph (i)(C) of 45 C.F.R. § 1304.3(a)(6). *Id.* at 2-3.² That provision defines "deficiency" in relevant part as follows:

¹ The Act is codified at 42 U.S.C. § 9830 et seq.

² ACF asserted in its brief, and Voorhees does not dispute, that this is the applicable definition. ACF Motion for Summary Disposition (ACF Br.) at 4.

(i) An area or areas of performance in which an Early Head Start or Head Start grantee agency is not in compliance with State or Federal requirements, including but not limited to the Head Start Act or one or more of the regulations under parts 1301, 1304, 1305, 1306 or 1308 of this title and which involves:

* * * * *

(C) A failure to perform substantially the requirements related to Early Child Development and Health Services, Family and Community Partnerships, or Program Design and Management.

Specifically, ACF found that Voorhees failed to comply with three requirements in 45 C.F.R. Part 74, the uniform administrative requirements applicable to grant awards to institutions of higher education, hospitals and other nonprofit organizations: sections 74.21(b)(6), 74.23(i)(2), and 74.28. ACF also found that Voorhees failed to comply with two requirements in the Head Start regulations at 45 C.F.R. Part 1304, subpart D, captioned “Program Design and Management”: sections 1304.50(g)(2) and 1304.51(h)(2). ACF Ex. 1, at 3-5. Section 1304.50(g), captioned “*Governing body responsibilities*,” provides in paragraph (2) that “[g]rantee and delegate agencies must ensure that appropriate internal controls are established and implemented to safeguard Federal funds in accordance with 45 C.F.R. 1301.13.” Section 1304.51(h), captioned “*Reporting systems*,” states in relevant part: “Grantee and delegate agencies must establish and maintain efficient and effective reporting systems that: . . . (2) Generate official reports for Federal, State, and local authorities, as required by applicable law.”

The report on the triennial review, which ACF issued on March 9, 2009, stated that the “areas of deficiency must be fully corrected within six months from the date you receive this report or within such additional time not to exceed one year as authorized by the responsible HHS official per Sec. 641A(e)(1)(B)(iii)” of the Act. ACF Ex. 1, at 6. The report further stated that Voorhees must submit a QIP to the ACF Regional Office within 30 days of receipt of the report and that, “[i]f your program continues to have uncorrected deficiencies beyond the specified timeframe(s), you will be issued, pursuant to Section 641A(e)(1)(C), a letter stating our intent to terminate the Head Start designation of your agency.” *Id.*

Voorhees submitted a QIP on April 13, 2009. ACF Ex. 2. ACF approved the QIP and advised Voorhees that the deadline for correcting the deficiencies addressed in the QIP was September 13, 2009 (which was also the latest of the dates specified in the QIP itself for any of the corrective actions listed). ACF Ex. 3. During the correction period, ACF provided technical assistance to Voorhees on “the reporting/recordkeeping responsibilities” of the Head Start program. ACF Ex. 4. The technical assistance focused on “the importance of the timeliness and accuracy” of the “SF 269 and PSC 272.” *Id.*

ACF conducted a follow-up review from October 20-23, 2009. ACF Ex. 6, at 4. The report on this review indicated that Voorhees had corrected its noncompliance with sections 74.21(b)(6), 74.23(i)(2), and 74.28 but that previously identified deficiencies under sections 1304.50(g)(2) and 1304.51(h)(2) remained uncorrected. *Id.* at 4-5.

With respect to section 1304.50(g)(2), ACF concluded that Voorhees “remained out of compliance with the regulation because it did not ensure that appropriate internal controls were established and implemented to safeguard Federal funds.” ACF Ex. 6, at 8. In April 2008, the reviewers found in relevant part that copies of SF-269 Financial Status Reports for the period between September 30, 2006 and March 31, 2008 that Voorhees provided to the reviewers contained information that had been restated and that differed from the reports Voorhees actually filed, and that neither the filed nor the restated reports were reconciled to the general ledger. ACF Ex. 1, at 4; *see also* ACF Ex. 6, at 7-8. In the October 2009 follow-up review, the reviewers found that none of the SF-269s for the award periods August 31, 2007, 2008, and 2009 were signed; the SF-269s for the award periods ending August 31, 2008 and 2009 were both dated October 19, 2009 and were not complete; and none of the SF-269s were reconciled to the general ledger. In addition, the reviewers reported that during the follow-up review, Voorhees officials stated in an interview that “SF-269 reports were not signed or dated since the triennial [April 2008] review, and it was difficult to find the point at which the last accurate report was filed.” ACF Ex. 6, at 8. The SF-269 is used to report the status of funds for all nonconstruction projects or programs and must generally be submitted at least annually. *See* 45 C.F.R. § 74.52(a).

With respect to section 1304.51(h)(2), ACF concluded that Voorhees “remained out of compliance with the regulation because it did not maintain an effective financial reporting system to generate accurate SF-269 Financial Status Reports.” ACF Ex. 6, at 9. In April 2008, the reviewers found in relevant part that there were two “Final” SF-269 Financial Status Reports that reported different year-end amounts, that neither of these reports reconciled to the general ledger, and that one of these reports was signed but not dated. ACF Ex. 1, at 5; *see also* ACF Ex. 6, at 9. In October 2009, the reviewers found that none of the SF-269 Financial Status Reports for the award periods ending August 31, 2007, 2008 and 2009 were signed, dated, or reconciled to the general ledger. In addition, the reviewers reported that during the October 2009 review, the Interim Vice President, Chief Financial Officer, and Director of Financial Compliance of Grants and Sponsored Programs were unable to provide information as to when the last accurate SF-269 was filed. ACF Ex. 6, at 9.³

³ Since the report on the follow-up review cited only problems with the SF-269s as evidence of noncompliance with sections 1304.50(g)(2) and 1304.51(h), we do not describe other evidence of such noncompliance cited in the report on the triennial review.

By letter dated August 25, 2010, ACF notified Voorhees that it was terminating its Early Head Start grant based on the “areas of noncompliance” identified in the October 2009 review, i.e., the noncompliance with sections 1304.50(g)(2) and 1304.51(h)(2), which “constitute continuing (uncorrected) deficiencies.” ACF Ex. 6, at 1-3. The letter further stated that termination was warranted under 45 C.F.R. § 1303.14(b)(4), which identifies as one reason for termination the grantee’s failure “to timely correct one or more deficiencies as defined in 45 CFR Part 1304[.]” *Id.* at 2. The letter also advised Voorhees that it could appeal the termination within 30 days of receipt of the letter and that it was entitled to a hearing pursuant to 42 U.S.C. § 9841. *Id.*

Voorhees appealed the termination on September 30, 2010. In response to the Board’s inquiry regarding whether Voorhees was requesting a hearing or consented to waive a hearing and have the Board decide the appeal based on the parties’ written submissions, Voorhees stated that it “consents to waive a hearing and have the Board decide the appeal based on the parties[’] written submission[s].”⁴ Voorhees e-mail dated 10/8/10. We therefore decide this case on the written record.

Analysis

In its appeal, Voorhees does not dispute the findings in the reports on the triennial and follow-up reviews that it was not in compliance with 45 C.F.R. §§ 1304.50(g)(2) and 1304.51(h) at the time of each review. Nor does Voorhees dispute that its noncompliance justified deficiency determinations in these areas within the meaning of 45 C.F.R. § 1304.3(a)(6). It is also undisputed that ACF notified Voorhees of the deficiencies in its March 9, 2009 report on the triennial review and subsequently gave Voorhees from the approval of its QIP on April 13, 2009 until September 13, 2009 to correct the deficiencies. Under section 641A(e)(1)(C) of the Head Start Act and the implementing regulations at 45 C.F.R. § 1303.14(b)(4), ACF is authorized to terminate an Early Head Start grant where, as here, the grantee fails to correct a deficiency within the period specified by ACF.

Moreover, the deficiency findings here go to the core integrity of Voorhees’ handling of and accounting for federal funds. The Board has explained in prior cases the vital role of the SF-269 form:

⁴ ACF’s regulations state that Early Head Start grantees may appeal terminations only under 45 C.F.R. Part 74 or Part 92, which incorporate by reference the procedures at 45 C.F.R. Part 16. *See* 45 C.F.R. § 1304.60(f). Unlike the Head Start appeal procedures at 45 C.F.R. § 1304.14, the Part 16 procedures do not give appellants the right to an evidentiary hearing and provide a longer period than the 30 days specified in section 1304.14(c)(2) for the appellant to submit its appeal. It makes no difference here that ACF notified Voorhees that the procedures at section 1304.14 applied since Voorhees has waived its right to a hearing and had ample opportunity to make additional written submissions after filing its appeal.

The SF-269 form is a financial report that a grantee has the obligation to complete accurately and is, along with required annual audits, one of two “key elements to ACF's ongoing oversight of Head Start grantees' fiscal management.” Child Opportunity Program, Inc., DAB No. 1700, at 3 (1999); Lake County Economic Opportunity Council, Inc. at 9. As ACF argues, the lack of reliable financial information provides ACF little assurance that the children the Head Start program is funded to serve will receive the appropriate Head Start services.

Southern Delaware Center for Children and Families, DAB No. 2073, at 21 (2007).

Voorhees nevertheless argues in its appeal that its grant should not be terminated. Below, we set out Voorhees' arguments and explain why we conclude that none of them have merit.

1. Voorhees' argument that termination is not authorized because Voorhees has corrected its noncompliance is without merit.

Voorhees argues that its Head Start grant should not be terminated because it achieved full compliance with sections 1304.50(g)(2) and 1304.51(h) prior to its receipt of notice of the termination, dated August 25, 2010.⁵ According to Voorhees, Head Start funding should not be terminated if the grantee “has corrected deficiencies prior to the initiation of termination.” Voorhees submission dated 11/15/10 (Voorhees Br.), at 14. In support of its argument, Voorhees cites the language of section 641A(e)(1)(C) of the Head Start Act, which provides that the Secretary shall “initiate proceedings to terminate the designation of the [Head Start] agency unless the agency corrects the deficiency” identified in a review. Voorhees Br. at 13. Voorhees contends that this language should be read to imply that ACF cannot terminate an agency if it has corrected the deficiency, regardless of when the correction occurs or at least if correction is completed before the termination letter is issued. *Id.* at 14.

Voorhees' argument ignores the context and intent manifested in the language and structure of section 641A(e) as a whole. Section 641A(e)(1) provides that where the Secretary determines on the basis of a review that a Head Start agency fails to meet the

⁵ To support its assertion that it was in full compliance as of May 25, 2010, Voorhees points to its Exhibit 1, comprised of copies of SF 269s for fiscal years 2007, 2008 and 2009 and the corresponding general ledgers that Voorhees sent to ACF on that date. ACF states that it “does not concede” that these reports “were accurate or demonstrate that grantee was in full compliance with the applicable performance standards” as of that date. ACF Reply dated 11/24/10. We need not determine whether Voorhees has established that was in full compliance as of May 25, 2010 in view of our conclusion that Voorhees was required by the statute and regulations to correct its deficiency by October 13, 2009, the end of the period specified in the approved QIP and set by ACF for completion of corrections.

program performance standards in the Head Start regulations, the Secretary shall “inform the agency of the deficiencies that shall be corrected” and require the agency: to correct the deficiency immediately, to correct the deficiency not later than 90 days after identification of the deficiency, or “to comply with the requirements of paragraph (2) concerning a quality improvement plan[.]” Sections 641A(e)(1)(A) and (e)(1)(B)(i), (ii), and (iii). Paragraph (2) of section 641A(e) provides:

To retain a designation as a Head Start agency . . . , a Head Start agency that is the subject of a determination described in paragraph (1) . . . (excluding an agency required to correct a deficiency immediately or during a 90-day period . . .) shall--

(i) develop in a timely manner, a quality improvement plan that shall be subject to the approval of the Secretary, . . . and that shall specify --

(I) the deficiencies to be corrected;

(II) the actions to be taken to correct such deficiencies; and

(III) the timetable for accomplishment of the corrective actions specified; and

(ii) correct each deficiency identified, not later than the date for correction of such deficiency specified in such plan (which shall not be later than 1 year after the date the agency or Head Start program that is determined to have a deficiency received notice of the determination and of the specific deficiency to be corrected).

Under this provision, a grantee that is required to develop a QIP must correct each deficiency not later than the date for correction specified in the approved QIP in order to “retain a designation as a Head Start agency[.]” Read in light of this section, section 641A(e)(1)(C) necessarily means that the Secretary shall initiate proceedings to terminate such designation unless the Head Start agency corrects each deficiency *within the time specified in its approved QIP* (or immediately or within 90 days if required by the Secretary pursuant to section 641A(e)(1)(B)(i) or (ii)).

Moreover, the Head Start regulations plainly state that “[i]f an Early Head Start or Head Start grantee fails to correct a deficiency, either immediately, or within the timeframe specified in the approved Quality Improvement Plan, the responsible HHS official will issue a letter of termination or denial of refunding.” 45 C.F.R. § 1304.60(f). Thus, even if there were any ambiguity in the language of the statute, the regulation put Voorhees on notice that its Head Start funding would be terminated if it failed to correct the deficiency identified by ACF within the time period specified in its approved QIP. Accordingly, as the Board has previously held, “As a matter of law, later steps to correct deficiencies still outstanding after a grantee has been given an opportunity to correct cannot remove

authority from ACF to terminate based on the failure to timely correct.” *Babyland Family Services, Inc.*, DAB No. 2109, at 21 (2007).

2. *ACF has not waived its right to terminate Voorhees.*

Voorhees argues that ACF waived its right to terminate Voorhees’ Head Start funding in two ways. First, Voorhees argues that ACF waived its right to terminate because ACF failed to timely provide to Voorhees reports on the April 2008 and October 2009 reviews. Voorhees relies on section 641A(f)(1) of the Head Start Act, which requires that, “[n]ot later than 120 days after the end of each fiscal year,” the Secretary shall publish a summary report on the findings of reviews and the outcomes of QIPs during that fiscal year. Voorhees reasons that if “the Secretary of HHS is required to publish a summary report within 120 days after the fiscal year, it would only be logical that ACF, would have to submit its review reports to the Grantees by that time period.” Voorhees Br. at 8. The claimed logical connection between a public summary of Head Start review findings and outcomes and the timing of full reports of review findings to grantees is not obvious.

In any case, the Act has a more relevant provision at section 641A(c)(4)(A) that requires in part that review findings shall “be presented to the [Head Start] agency in a timely . . . manner[.]” In addition, the Head Start regulations provide that the responsible HHS official will “notify the grantee promptly, in writing” of any deficiencies found in a review. 45 C.F.R. § 1304.60(b). ACF’s report on the April 2008 review is dated March 9, 2009, and its report on the October 2009 review is dated August 26, 2010. *See* ACF Ex. 1, 1; ACF Ex. 6, at 4. A delay of 10 or 11 months in providing a report on a review cannot reasonably be considered timely or prompt, and ACF does not claim that it was prompt. The question before us is whether the delay redounds to the benefit of the grantee agency to somehow prevent ACF from acting on its authority to terminate in the face of uncorrected deficiencies.

The Board addressed a similar situation in *Friendly Fuld Neighborhood Center, Inc.*, Ruling on Motion for Summary Disposition (June 27, 2007).⁶ The Board found that nothing in the statute or regulations makes timely issuance of review reports a prerequisite to termination. The Board observed that—

the primary purpose of requiring prompt notice of deficiencies is to ensure prompt correction of those deficiencies so that Head Start children and funds are protected and that the children receive the services for which funding is provided. A delay by ACF in issuing a [review] report does not harm the grantee since the time frame for correcting the deficiencies starts

⁶ A copy of this ruling is attached hereto and is also available as an attachment to *Friendly Fuld Neighborhood Center, Inc.*, DAB No. 2121 (2007), and can be accessed at <http://www.hhs.gov/dab/decisions/dab2121.pdf>.

with receipt of the official notification of deficiencies. 45 C.F.R. § 1304.60(c). Indeed, if a grantee becomes aware of any deficiency during the review, ACF's delay actually gives it more time to correct the deficiency.

Ruling at 7. The Board also noted that the regulations refer to timeliness in issuing a report of a triennial review, not a report of a follow-up review, and that a grantee "did not need to receive formal notice of the findings of a follow-up review in order to have corrected its deficiencies from the earlier review within the time frame specified in its approved QIP." *Id.* at 8, *citing Southern Delaware Center for Children and Families* at 24-25. Accordingly, the Board concluded that, "although we consider it important that ACF act promptly on these matters, ACF's delay simply is not a sufficient basis to excuse any failure on the part of [the grantee] to correct any deficiencies it had in complying with Head Start requirements. Reading the regulations to require such a result would be inconsistent with their purpose and with the statutory goals of the Head Start Act." *Id.* We see no reason to reach a different conclusion here.

Second, Voorhees argues that ACF waived its right to terminate the grant because it approved Voorhees' application for continued funding on August 19, 2010. Voorhees points out that the Head Start regulations provide that where ACF intends to deny a grantee's application for refunding for any or all of the reasons for which a grant may be terminated, "the responsible HHS official will provide the grantee as much advance notice . . . as is reasonably possible, in no event later than 30 days after the receipt" of the application by ACF. 45 C.F.R. § 1301.15(b). Voorhees asserts that, instead of giving notice of its intent to deny Voorhees' application for refunding within the 30-day period specified in the regulation, ACF approved the application and advanced funds to Voorhees. Voorhees Br. at 10. Voorhees also notes that on August 23, 2010, it received a pre-review document request for another program review scheduled for November 19, 2010, and that this review was not cancelled until October 20, 2010. *Id.* at 4, *citing* Voorhees Exs. 4 and 6. According to Voorhees, "it was not unreasonable for Voorhees to rely on such actions by the ACF as proof of its intention to continue the grant." *Id.* at 11.

Voorhees' argument reflects a misunderstanding of the regulatory scheme. As ACF points out, the Head Start regulations provide that funding will continue during a grantee's appeal of a termination decision and that if a decision has not been rendered at the end of the current budget period, "the responsible HHS official shall award an interim grant to the grantee until a decision has been made." 45 C.F.R. § 1303.14(f)(1). In this case, although ACF approved Voorhees' application for refunding before the current budget period expired, the effect of that approval has been to allow Voorhees to continue to operate pending a decision by the Board on Voorhees' appeal of the termination. Voorhees can hardly claim that it was prejudiced by the fact that ACF continued its funding instead of giving 30 days' notice that it was denying the application for refunding. Moreover, Voorhees itself points out that the letter informing Voorhees that

its refunding application had been approved states that Voorhees “is currently being reviewed in light of the OHS [Office of Head Start] Monitoring report, which reflected that the grantee had not corrected prior deficiencies within the time allotted for completion” and that “[a] determination has to be made as to the status of the grantee agency because of this failure” Voorhees Ex. 3, at 2 (quoted in Voorhees Br. at 3). Thus, Voorhees had notice that approval of its refunding application did not preclude a later decision to terminate its current grant.

Conclusion

For the reasons explained above, we affirm ACF’s decision to terminate funding for Voorhees’ Head Start grant.

/s/
Stephen M. Godek

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member

ATTACHMENT TO DAB DECISION NO. 2351

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Friendly Fuld Neighborhood
Center, Inc.
Docket No. A-07-79

DATE: June 27, 2007

RULING ON MOTION FOR SUMMARY DISPOSITION

Friendly Fuld Neighborhood Center, Inc. (Friendly Fuld) appealed a determination by the Administration for Children and Families (ACF) to terminate funds for Friendly Fuld's Head Start grant. On appeal, Friendly Fuld moves for summary disposition, arguing that the deficiency findings on which ACF based the termination are invalid because of ACF delays in issuing its initial and follow-up review reports and because ACF improperly conducted its follow-up review prior to the time ACF gave to Friendly Fuld to correct its deficiencies. Friendly Fuld also argues that no hearing is necessary because Friendly Fuld's documentary evidence establishes that it timely corrected the deficiencies.

For the reasons stated below, we deny the motion and conclude that a hearing is necessary.

Legal Background

Head Start is a national program that provides comprehensive child development services. 42 U.S.C. § 9831; 57 Fed. Reg. 46,718 (October 9, 1992). The program serves primarily low-income children, ages three to five, and their families. *Id.* The Department of Health and Human Services (HHS), through ACF, awards grants to community-based organizations that assume responsibility for delivering Head Start services – including education, nutrition, health, and social services – to their communities. *Id.*

To ensure that eligible children and their families receive high quality services responsive to their needs, Head Start grantees must comply with the Head Start Program Performance Standards codified in 45 C.F.R. Part 1304. Head Start Performance Standards (final rule), 61 Fed. Reg. 57,186 (Nov. 5, 1996). These performance standards cover the entire range of Head Start

services and constitute the minimum requirements that a Head Start grantee must meet in three areas: Early Childhood Development and Health Services; Family and Community Partnerships; and Program Design and Management.

A grantee's noncompliance with a program performance standard or other Head Start requirement constitutes a "deficiency" if it meets one of the definitions of that term in 45 C.F.R. § 1304.3(a)(6). HHS is required to conduct a periodic review of each Head Start grantee at least once every three years. 42 U.S.C. § 9836a(c)(1)(A). If as a result of a review the "responsible HHS official" finds that a grantee has one or more "deficiencies" --

he or she will notify the grantee **promptly**, in writing, of the finding, identifying the deficiencies to be corrected and, with respect to each identified deficiency, will inform the grantee that it must correct the deficiency **either immediately or pursuant to a Quality Improvement Plan.**

45 C.F.R. § 1304.60(b) (emphasis added).¹³

If the responsible HHS official permits the grantee to correct a deficiency pursuant to a Quality Improvement Plan (QIP), the grantee must submit a QIP that specifies, for each identified deficiency, "the actions that the grantee will take to correct the deficiency and the time frame within which it will be corrected." 45 C.F.R. § 1304.60(c). The QIP must be approved by the responsible HHS official. See 45 C.F.R. § 1304.60(d). The period for correcting deficiencies under an approved QIP may not exceed one year from the date the grantee is notified of them. 42 U.S.C. § 9836A(d)(2)(A); 45 C.F.R. § 1304.60(c).

If a grantee with an approved QIP fails to correct its deficiencies within the time frame specified in the QIP, then ACF may terminate funding. 45 C.F.R. § 1304.60(f); First State Community Action Agency, DAB No. 1877, at 9 (2003). Section 1303.14(b)(4) more generally authorizes ACF to terminate funding if a grantee "has failed to timely correct one or more deficiencies as defined in 45 C.F.R. Part 1304." This is one of

¹³ Section 641A(d)(1)(B)(ii) of the Head Start Act, which was added to the Act on October 27, 1998, several months after section 1304.60(b)'s effective date, gives ACF specific authority to require correction within 90 days without a QIP. See Pub. L. No. 105-285, § 108(d); 61 Fed. Reg. 57,186 (Nov. 5, 1996).

nine grounds for termination set out in section 1303.14(b), which states that "[f]inancial assistance may be terminated for any or all of [these] reasons."

Factual Background

From April 11, 2005 to April 15, 2005, ACF conducted a review of Friendly Fuld's Head Start program, using the Program Review Instrument for Systems Monitoring (PRISM). By letter dated October 28, 2005 (received by Friendly Fuld's Board Chairperson on November 2, 2005), ACF notified Friendly Fuld that it had been designated as a grantee with deficiencies. The letter and the attached report, submitted by Friendly Fuld with its appeal, identified a number of areas of deficiency and prescribed periods of time for correcting the deficiencies in different categories. FF Ex. A, 2d document at 2-4. Specifically, a "Time Frame for Compliance" of 30 days was set out for areas of noncompliance constituting a deficiency listed under heading A, and a "Time Frame for Compliance" of 90 days was set out for areas of noncompliance constituting a deficiency listed under heading B. Id. The letter did not specify a time frame for deficiencies listed under heading C, but had the following statement regarding deficiency category C: "The area(s) of noncompliance constituting this (these) deficiency(ies) must be fully corrected pursuant to the time frames and requirements specified in your approved Quality Improvement Plan (per Sec 641A(d)(1)(B)(iii), 42 U.S.C. 9836A(d)(1)(B)(iii))." Id. at 4. The letter further stated:

If your program continues to have uncorrected deficiencies beyond the specified timeframe(s), pursuant to Sec. 641A(d)(1)(C) of the Head Start Act, 42 U.S.C. 9836A(d)(1)(C), we will initiate proceedings to terminate your Head Start grant.

Id. at 5.

Friendly Fuld timely submitted its QIP. By letter dated December 22, 2005, ACF acknowledged receipt of the QIP and approved the QIP as submitted. FF Ex. B. This letter stated:

Based on the completion dates for all activities as indicated in the QIP, all deficiencies must be corrected by November 2, 2006.

Id. (first page, unnumbered). The letter also states: "We plan to schedule a follow-up visit at the end of the one year period to determine if all corrections have been made." Id.

ACF had, however, already conducted a follow-up review during the week of December 5, 2005 on those deficiencies identified under heading A and conducted another review on February 21, 2006.

On March 19, 2007, Friendly Fuld received a letter from ACF, with an attached Follow-up Head Start Review Report, informing Friendly Fuld that it had failed to timely correct "the findings determined to constitute deficiencies from the PRISM Monitoring Review conducted in April 2005." FF Ex. A, first document at 1. The letter cited five regulatory requirements as unmet, and referred the grantee to "the enclosed February 2006 Head Start Review Report . . . for a detailed summary of the specific deficiencies that were not timely corrected." Id. at 2. The letter further stated that, pursuant to federal regulations, ACF must issue a letter of termination . . . if a Head Start grantee fails to correct a deficiency" and that "any deficiency that is not timely corrected constitutes a material failure to comply with the terms and conditions of the grant and is a sufficient basis for termination." Id., citing 45 C.F.R. § 1304.60(f).

Analysis

Friendly Fuld moves for summary disposition on several grounds. First, Friendly Fuld argues that ACF's determinations should be set aside because ACF erred in failing to follow regulations regarding the timing of notice to grantees of review findings thereby acting illegally. Second, Friendly Fuld argues that ACF cannot terminate Friendly Fuld's Head Start grant because ACF erred in conducting a follow-up review prior to the established deadline for corrections. Finally, Friendly Fuld argues that ACF erred in concluding that Friendly Fuld had deficiencies that remained uncorrected as of the February 2006 monitoring inspection and has failed to establish an adequate basis for termination.

In reviewing a motion for summary disposition in the nature of summary judgment, the Board has applied a standard similar to that applied in court. Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Union Township Community Action Organization, DAB No. 1976, at 6. The party moving for summary judgment bears the initial burden of showing the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine factual dispute. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec.

Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on general denials in its pleadings or briefs, but must furnish evidence of a genuine dispute concerning a material fact--a fact that, if proven, would affect the outcome of the case under governing law. Id. at 586, n.11; Celotex, 477 U.S. at 322. In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence in that party's favor.

Even if summary disposition might be appropriate, moreover, the Board could still hold a hearing if it decided that presentation of evidence in an evidentiary hearing might aid its decisionmaking. 45 C.F.R. § 16.11.

Here, we conclude that Friendly Fuld has not shown that it should prevail as a matter of law, that ACF has shown that there is a genuine dispute of material fact requiring a hearing, and that, in any event, a hearing would aid the Board's decisionmaking.

ACF's delay in notifying Friendly Fuld of the results of the reviews does not provide a basis for summary disposition in Friendly Fuld's favor.

Friendly Fuld points out that ACF conducted the first PRISM review during the week ending April 15, 2005, but did not issue its report until October 2005, six months later, and that the follow-up report was not issued until March 2007, over a year after the February follow-up review. Friendly Fuld argues that these delays violated section 1304.60(b) of the Head Start regulations, which provides that the responsible HHS official will "notify the grantee promptly, in writing" of any deficiencies found in a review. Friendly Fuld also argues that the delay violated ACF's own PRISM Guide (which Friendly Fuld refers to as an ACF regulation). Friendly Fuld relies on the following statement in the 2004 PRISM Guide (and its accompanying footnote, which we set out after the statement):

The final Head Start Review Report and accompanying cover letter must be mailed to the Grantee governing body president within 45 calendar days of the end of the on-site review.

The footnote states:

The Head Start Program Performance Standards require that the grantee be notified "promptly" in writing of any noncompliance or deficiency (see 45 CFR 1304.61(a) and 45 CFR 1304.60(b), respectively). For this reason, delivery of the final Head Start Review Report within 45 calendar days of the end of the on-site phase of the review is imperative.

FF Notice of Appeal, at 6th unnumbered page. Friendly Fuld argues that the federal Administrative Procedure Act (APA) "allows the reviewing court to hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and/or without observance of procedure required by law" Id., citing 5 U.S.C. §§ 706(2)(a) and (d). In Community Action of Laramie County, Inc. v. Bowen, 866 F.2d 347 (10th Cir. 1989), Friendly Fuld asserts, the federal court "made clear that a violation of the Head Start Act or HHS regulations by HHS was reviewable" under the APA. Id.

ACF does not dispute that it failed to notify Friendly Fuld of its deficiencies within 45 days of the end of the triennial review and does not assert that it "promptly" notified Friendly Fuld of the review findings. ACF argues, however, that the 45-day period set forth in the PRISM guidelines is not a regulatory deadline and that, in any event, neither the Head Start Act nor its implementing regulations provide that deficiency findings will be invalidated because of a delay in notice. ACF Br. at 3, citing The Council of the Southern Mountains, DAB No. 2006 (2005). "Equally important," ACF asserts, Friendly Fuld "has not alleged that it was prejudiced in any way by ACF's delay in issuing the notification of results following the triennial review." Id. ACF also asserts that the "Board has held that the requirement in the regulation for prompt notification of review results refers only to notification of deficiencies that must be corrected immediately or pursuant to a QIP, and not the results of follow-up reviews which are conducted after a grantee has already been afforded an opportunity to correct deficiencies." ACF Br. at 3, citing Southern Delaware Center for Children and Families, DAB No. 2073 (2007). Thus, while ACF admits that the delay was "unfortunate," ACF asserts that the delay "does not invalidate ACF's findings." Id.

Certainly, it would have been preferable for ACF to have acted more quickly after each of its reviews. We do not need to decide here, however, whether the six months ACF took to issue the PRISM

report can be considered "prompt" under the regulations or whether the 45 days in the PRISM guide is binding on ACF. Even assuming Friendly Fuld is correct that the delay violated regulatory procedures, it does not automatically follow that the delay invalidates ACF's findings, as Friendly Fuld asserts, or would be a basis for a reviewing court to overturn ACF's termination action. The Supreme Court has held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." United States v. James Daniel Good Real Properties et al., 510 U.S. 43, at 62 (U.S. Hawaii 1993) (refusing to overturn a forfeiture action because government officials failed to comply with certain timing standards of the forfeiture statute), and cases cited therein. In determining whether a failure to comply with a timing provision should result in a judicially-imposed consequence, courts have considered the intent of the body that created the provision and the purpose of the time provision. See Brock v. Pierce County, 476 U.S. 253, 260-62 (1986) (allowing the Secretary of Labor to recover funds in an administrative action even though he failed to issue a decision within 120 days of receipt of a complaint as required by statute). Nor does the APA provide an independent basis for overturning a government action simply because it did not meet a timeliness standard. See Beard v. Glickman, 189 F.Supp.2d 994 (C.D. Cal. 2001).

Friendly Fuld cites to nothing indicating that ACF intended a failure to issue notice of deficiency findings promptly to be a ground for overturning a termination action based on failure to correct those deficiencies. In the context of the review scheme set up by the Head Start Act, the primary purpose of requiring prompt notice of deficiencies is to ensure prompt correction of those deficiencies so that Head Start children and funds are protected and that the children receive the services for which funding is provided. A delay by ACF in issuing a PRISM report does not harm the grantee since the time frame for correcting the deficiencies starts with receipt of the official notification of deficiencies. 45 C.F.R. § 1304.60(c). Indeed, if a grantee becomes aware of any deficiency during the review, ACF's delay actually gives it more time to correct the deficiency.

As ACF points out, moreover, the regulations and PRISM Guide refer to timeliness in issuing a report of a triennial (PRISM) review. Friendly Fuld cites no comparable provision for issuing reports of follow-up reviews. Even if a reviewing court might find that ACF's delay of a year in issuing the follow-up review report was unreasonable and inconsistent with the purpose of the reviews, however, that does not mean that the delay precludes ACF

from terminating Friendly Fuld's grant. Nothing in the statute or regulations makes timely issuance of review reports a prerequisite to termination. To the contrary, they both direct that, if ACF finds that a grantee has failed to timely correct its deficiencies, ACF must terminate the grant.

In Southern Delaware, the Board noted that "Southern Delaware did not need to receive formal notice of the findings of a follow-up review in order to have corrected its deficiencies from the earlier review within the time frame specified in its approved QIP." Southern Delaware at 24-25. Similarly here, Friendly Fuld had notice (albeit late) that the PRISM review had found deficiencies that Friendly Fuld had to correct within specified time frames. The lateness of the follow-up review report was not (and could not have been) a factor affecting whether Friendly Fuld was able to correct any deficiencies in a timely manner.

Like Southern Delaware, Friendly Fuld also fails to "allege, much less proffer evidence to substantiate, that it was substantially impaired in its ability to present its appeal of the termination because of ACF's delay in issuing its notice" of termination. Id. Even assuming a termination could be reversed based on a procedural lapse by ACF, a grantee would, at a minimum, have to show that it was prejudiced by that lapse. Yet, here, Friendly Fuld continued to receive Head Start funds during the delay.

In sum, although we consider it important that ACF act promptly on these matters, ACF's delay simply is not a sufficient basis to excuse any failure on the part of Friendly Fuld to correct any deficiencies it had in complying with Head Start requirements. Reading the regulations to require such a result would be inconsistent with their purpose and with the statutory goals of the Head Start Act.

The timing of the follow-up review is not a basis for reversing the termination.

Friendly Fuld also moves for summary disposition based on the timing of the follow-up review. According to Friendly Fuld, ACF may not rely on the findings in the follow-up review (conducted from February 21 through 24, 2006) as a basis for termination since ACF's December 22, 2005 letter approving Friendly Fuld's QIP gave Friendly Fuld until November 2, 2006 to correct all the deficiencies under the QIP.

In response, ACF states that its October 28, 2005 letter identified deficiencies in three categories, indicating that deficiencies under category A were required to be corrected

within 30 days, deficiencies under category B were required to be corrected within 90 days, and deficiencies under category C were required to be corrected pursuant to a QIP. ACF admits that there may have been some confusion regarding alleged deficiencies under 45 C.F.R. §§ 1304.51(h)(1) and (h)(2) because these deficiencies were listed under both category B and category C and were included in the QIP. ACF Br. at 4. In its brief, ACF gave notice that it "hereby withdraws as a basis for termination the failure to correct these deficiencies" because of the confusion regarding the time frame that Friendly Fuld was given to correct these deficiencies. *Id.* ACF argues, and we agree, that ACF's withdrawal renders this issue moot.

While ACF's action in including the deficiencies under 45 C.F.R. §§ 1304.51(h)(1) and (h)(2) in two categories may have been confusing, the October 2005 letter did make it clear that the 90-day time frame for correction applied to the three other deficiencies that were the basis for termination. Moreover, while the language in the December 22, 2005 letter approving the QIP and referring to November 2, 2006 as the deadline for correction could be read as applying to all of the deficiencies addressed in the QIP, it could not reasonably be read to refer to deficiencies that were not addressed in the QIP and clearly had been made subject to a shorter time frame in the prior letter. The lead-in to the statement in the letter that "all deficiencies must be corrected by November 2, 2006" was the phrase "[b]ased on the completion dates for all activities as indicated in the QIP." FF Ex. B. Thus, the statement was referring to the completion dates set in the QIP and all of the deficiencies addressed in the QIP. The December letter does not, however, refer to extending any deadline previously set for corrective actions not in the QIP.

Friendly Fuld alleges that it "is the Appellant's position that no confusion existed on [its] part" regarding the December 22 letter, because Friendly Fuld clearly "was notified by the responsible, authorized person that the deadline was extended to November 2 for all corrections to be completed." FF Supplemental Br. at 4th unnumbered page.¹⁴ However, Friendly Fuld's current position on what the December 22 letter means is irrelevant. Friendly Fuld has not specifically alleged nor proffered any

¹⁴ Friendly Fuld cites the Board's decision in Norwalk Economic Opportunity Now, DAB No. 2002 (2005) for the proposition that ACF may not terminate a grant for failure to correct deficiencies on a particular date if ACF has extended the time frame for correcting deficiencies beyond that date.

evidence that it was in fact misled by the December 22 letter into thinking that it had until November 2 to correct the three deficiencies on which ACF continues to rely. This is not surprising since it is undisputed that, by early December, ACF had already conducted a follow-up review of the deficiencies that were subject to a 30-day time frame for correction. Thus, by the time Friendly Fuld received the letter approving the QIP, Friendly Fuld should have been aware that ACF was not treating the deficiencies in all categories the same as the deficiencies addressed in the QIP. We also note that there is no evidence that Friendly Fuld had asked that the 90-day time frame for correcting the three deficiencies at issue be extended or that Friendly Fuld objected to the February follow-up review at the time on the basis that it thought it had until November 2 to correct the deficiencies at issue. See ACF Ex. 12 (email from Friendly Fuld's Head Start Director, stating she "will look forward to receiving written confirmation of the dates and expected procedures for the follow-up review" scheduled for February).

Accordingly, we deny summary disposition on this basis. ACF may not further rely on the alleged deficiencies under 45 C.F.R. §§ 1304.51(h)(1) and (h)(2) as a basis for termination of Friendly Fuld's Head Start grant.

_____/s/
Sheila Ann Hegy

_____/s/
Leslie A. Sussan

_____/s/
Judith A. Ballard
Presiding Board Member