Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Central Mississippi, Inc.
Docket No. A-16-37
Decision No. 2757
December 29, 2016

DECISION

Central Mississippi, Inc. (CMI) appeals the December 11, 2015 decision of the Administration for Children and Families (ACF) to terminate CMI's Head Start grant. ACF based the termination on its finding that CMI failed to timely correct deficiencies ACF identified during an on-site review of CMI's Head Start and Early Head Start program as requiring immediate correction. ACF Ex. 2. ACF effected the termination under section 641a(e)(1)(C) of the Head Start Act (42 U.S.C. § 9836a(e)(1)(C)), which provides that if a grantee fails to meet Head Start standards, "the Secretary shall . . . initiate proceedings to terminate the designation of the [Head Start] agency unless the agency corrects the deficiency[,]" and 45 C.F.R. § 1303.14(b), which authorizes termination for failure to "timely correct one or more deficiencies as defined in 45 C.F.R. Part 1304[.]" (We cite herein to the version of the Head Start regulations in effect on the date of ACF's termination decision.)

ACF has filed a Motion for Summary Judgment (Motion) based on the following uncorrected deficiencies: CMI's alleged failure to ensure that its facilities, materials and equipment were safe, secure, maintained, repaired and free of undesirable and hazardous materials and conditions, as required by 45 C.F.R. § 1304.53(a)(7), (10) and (b)(1); and the failure of CMI's governing body to ensure compliance with Federal laws and regulations and applicable State and local laws, as required by section 642(c)(1)(E) of the Act (42 U.S.C. § 9837(c)(1)(E)). For the reasons explained below, we grant ACF's Motion with respect to the deficiency under sections 1304.53(a)(7), (10) and (b)(1) and affirm the termination of grant funds based on that deficiency. We need not address the alleged deficiency under section 642(c)(1)(E) of the Act since CMI's failure to timely correct a single deficiency is sufficient to uphold the termination.

I. LEGAL BACKGROUND

A. *Head Start Act program performance requirements and termination authority*

Head Start is a national program, established by Congress in the Head Start Act (Act), 42 U.S.C. § 9801 et seq., to promote school readiness of low-income children by providing the children and their families with health, educational, nutritional, social, and other services to enhance their cognitive, social, and emotional development.[1] Section 641a(a) of the Act, 42 U.S.C. § 9836a(a), directs the Secretary to publish regulations establishing performance standards and minimum requirements with respect to various Head Start services (e.g. health, education, nutrition) and program areas such as administrative and financial management. The Secretary must review each Head Start grantee's program at least once every three years to determine whether it meets program performance standards. 42 U.S.C. § 9836a(c)(1)(A). If a review finds that a grantee has a "deficiency," the Act requires the Secretary to "initiate proceedings to terminate the designation of the agency [as a Head Start agency] unless the agency corrects the deficiency." *Id.* § 9836a(e)(1)(C); *see also* 45 C.F.R. § 1303.14(b)(4) (grant may be terminated if the grantee "has failed to timely correct one or more deficiencies"). If a Head Start agency has one or more deficiencies, the Secretary conducts a follow-up review to determine if the grantee has corrected them. 42 U.S.C. § 9836a(c)(1)(C).

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 . . . (i) a threat to the health, safety, or civil rights of children or staff," 42 U.S.C. § 9832(2)(A), and a "systemic or material failure of the governing body of an agency to fully exercise its legal and fiduciary responsibilities," *id.* § 9832(2)(B).[2] Once found, deficiencies must be corrected within time frames specified in the statute and regulations. *Id.* § 9836a(e)(1)(B), (e)(2)(A); *see also* 45 C.F.R. § 1304.60(b). When a deficiency threatens the health or safety of staff or program participants or poses a threat to the integrity of federal funds, the Secretary must require a grantee to correct that deficiency immediately. 42 U.S.C. § 9836a(e)(1)(B)(i). If a grantee "fails to correct a deficiency either

[1] The current version of the Head Start Act is at http://eclkc.ohs.acf.hhs.gov/hslc/standards/law. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

[2] The Head Start regulations, which predate adoption of the statutory definition of "deficiency," similarly define deficiency as including "[a]n area or areas of performance in which an Early Head Start or Head Start grantee agency is not in compliance with State or Federal requirements, including but not limited to, the Head Start Act or one or more of the [Head Start] regulations . . . and which involves: (A) A threat to the health, safety, or civil rights of children or staff"; or "(C) A failure to perform substantially the requirements related to Early Childhood Development and Health Services . . . ." 45 C.F.R. § 1304.3(a)(6).

immediately, or within the timeframe specified in the approved Quality Improvement Plan [QIP]," HHS will issue a notice of termination or denial of refunding. 42 C.F.R. § 1304.60(f). A single deficiency not timely corrected is sufficient to warrant termination of funding. *Id.* § 1303.14(b)(4) (authorizing termination for failure to timely correct "one or more deficiencies"); *see also Avoyelles Progress Action Comm., Inc*., DAB No. 2559, at 8 (2014).

B. ***Appeal rights of terminated grantees***

Head Start grantees are entitled to an evidentiary hearing before the Board to contest the basis for ACF's termination decision. 42 U.S.C. § 9841(a)(3); 45 C.F.R. §§ 1303.14(c)(2), 1303.16, 1303.17. The proceedings are governed by the Board's regulations at 45 C.F.R. Part 16, except as otherwise provided in the Head Start appeals regulations. 45 C.F.R. § 1303.13(f). The Head Start regulations also permit resolution of appeals through summary disposition when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* § 1303.17(c)(2); *see also Camden Cnty. Council on Econ. Opportunity*, DAB No. 2116, at 3-4 (2007), *aff'd, Camden Cnty. Council on Econ. Opportunity v. U.S. Dep't of Health & Human Servs*., 586 F.3d 992 (D.C. Cir. 2009). 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, 322-23 (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 Corp.*, 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. *Matsushita*, 475 U.S. 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 Cnty. Council*, DAB No. 2116, at 4.

In deciding whether there is a material dispute of fact, we "view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby*, 477 U.S. 247, 254-55 (1986). The burdens of proof in a Head Start hearing 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 standards. *See, e.g., Friendly Fuld Neighborhood Ctr., Inc.*, DAB No. 2121, at 3 (2007), citing *First State Community Action Agency, Inc.*, DAB No. 1877, at 9 (2003) and *Rural Day Care Ass'n of Ne. N.C.*, DAB No. 1489, at 7-8 (1994), *aff'd, Rural Day Care Ass'n of Ne. N.C. v. Shalala*, No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995). If ACF makes this prima facie showing, the grantee must demonstrate by a preponderance of the evidence that it is in compliance with program standards. *See, e.g., Friendly Fuld* at 3. 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. *Id*. 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 Head Start grantee to show that it was in compliance with program standards. *Id*. at 3-4.

II. CASE BACKGROUND

ACF conducted an on-site review of CMI's Head Start and Early Head Start programs October 18-23, 2015 (October review) and identified multiple deficiencies, including five that "threaten[ed] the health and safety of the children and staff and pose[d] a threat to the integrity of federal funds" and, therefore, required immediate correction. ACF Ex. 1, at 1, 5. On November 13, 2015, ACF informed CMI of the review results and provided details of its findings in an Overview of Findings that also gave CMI until November 30, 2015 to correct the deficiencies requiring immediate correction. *Id*. at 1-25; ACF Ex. 2, at 2. ACF conducted another on-site review on December 1-2, 2015 (December review) and determined the immediate deficiencies had not been corrected. ACF Ex. 2, at 2. As indicated above, the uncorrected immediate deficiencies included those cited under 45 C.F.R. § 1304.53 (Facilities, Materials, and Equipment) and section 642(c)(1)(e) of the Act, 42 U.S.C. § 9837(c)(1)(E)(governing body responsibilities). ACF Ex. 2, at 2-4. In its Notice of Termination, ACF summarized these uncorrected deficiencies as follows:

> All centers were found to have maintenance and safety hazards inconsistent with the health, safety, and developmental needs of children. In addition, CMI's Board failed in its responsibility to manage the Head Start Grant . . .

Id. at 1. ACF also provided an Overview of Findings that discussed the findings regarding the uncorrected deficiencies in detail. *Id.* at 8.

On January 11, 2016, CMI filed a one-page Notice of Appeal and Request for a Hearing but acknowledged that this filing did not meet the content requirements of 45 C.F.R. § 1303.14(d) and requested "a waiver [under 45 C.F.R. § 1303.8] to submit all other requirements with this appeal . . . ." On January 12, 2016, the Presiding Board Member issued an Order to Show Cause (Order) which found that CMI had not provided information sufficient to support its waiver request and ordered CMI "to show cause why

the Board should not find that CMI has not demonstrated that there is good cause for a waiver of the 30-day deadline for filing an appeal that meets all the requirements of section 1304.14(d)." In response, CMI submitted additional information, and on January 21, 2016, the Board issued a Ruling on Request for Waiver and Extension of Time (Ruling) that found good cause under section 1303.8 to waive the regulatory 30-day deadline and provided 30 days from the date of the Ruling to file an appeal complying with section 1303.14(d). On February 22, 2016, in response to the Ruling, CMI filed a "Notice of Appeals and Request for a Hearing and Brief in Support of Appeal" (Appeal Brief). CMI also filed 55 exhibits.[3] On February 26, 2016, the Board issued an Acknowledgment of Appeal (Acknowledgment) that summarized the next procedural steps for the case.

On April 13, 2016, ACF filed a "Response to [CMI's] Appeal" (Response) and 61 exhibits. On May 9, 2016, CMI filed a "Reply to [ACF's] Response to [CMI's] Appeal" (Reply) and three additional exhibits. On June 1, 2016, ACF filed the Motion that is the subject of this Decision. On July 8, 2016, CMI filed a "Response Opposing [ACF's] [Motion] and a Motion to Compel Discovery and to Stay or Hold in Abeyance Ruling on [Motion] and to Allow CMI to Submit Any Additional Information or Documents in This Matter" (Response to Motion). On July 27, 2016, the Board issued a ruling denying the discovery motion and notifying the parties it would proceed to rule on ACF's Motion.

III. DISCUSSION

Undisputed material facts show that CMI did not timely correct the deficiency cited under 45 C.F.R. § 1304.53(a)(7), (10) and (b)(1) that threatened the health and safety of its Head Start staff and children; accordingly, the termination of CMI's Head Start grant is lawful.

In its Motion, ACF asserts that there is no dispute of material fact about CMI's failure to timely correct multiple findings of noncompliance with fire safety and maintenance requirements resulting in citation of a deficiency under 45 C.F.R. § 1304.53(a)(7), (10) and (b)(1) and multiple findings of noncompliance with Head Start governing body responsibility requirements resulting in citation of a deficiency under section 642(c)(1)(E) of the Act. However, as indicated above, to prevail on its Motion, ACF needs only to show the absence of a dispute of material fact with respect to CMI's failure

[3] The Acknowledgment directed the parties to number the pages of each exhibit, but CMI did not do so. Accordingly, when citing CMI's exhibits, the Board refers to "CMI Ex. __, at unnumbered __." Where the same exhibit was submitted by CMS, which did paginate its exhibits, the Board has cited to the CMS exhibit.

to timely correct one of those deficiencies. 45 C.F.R. § 1303.14(b)(4); *Avoyelles*, DAB No. 2559, at 8. We conclude for the reasons discussed that ACF has shown the absence of a dispute of material fact about CMI's failure to timely correct the deficiency cited under 45 C.F.R. § 1304.53(a)(7), (10) and (b)(1), and, therefore, we need not address ACF's assertions about the deficiency cited under section 642(c)(1)(E) of the Act.

Section 1304.53(a) provides requirements for Head Start physical environment and facilities. The specific requirements implicated by ACF's review findings in this case are in paragraphs (7) and (10) of section 1304.53(a), which provide as follows:

> (7) Grantee and delegate agencies must provide for the maintenance, repair, safety, and security of all Early Head Start and Head Start facilities, materials and equipment.
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> * * *
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> (10) Grantee and delegate agencies must conduct a safety inspection, at least annually, to ensure that each facility's space, light, ventilation, heat and other physical arrangements are consistent the health, safety and developmental needs of children. At a minimum, agencies must ensure that:
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> * * *
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> (iii) Flammable and other dangerous materials and potential poisons are stored in locked cabinets or storage facilities . . . and are accessible only to authorized persons. . . .;
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> * * *
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> (vi) An appropriate number of smoke detectors are installed and tested regularly;
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> (vii) Exits are clearly visible and evacuation routes are clearly marked and posted so that the path to safety is unmistakable (see 45 C.F.R. 1304.22 for additional emergency procedures);
>
> (viii) Indoor and outdoor premises are cleaned daily and kept free of hazardous materials and conditions;
>
> * * *

> (x) The selection, layout, and maintenance of playground equipment and surfaces minimize the possibility of injury to children;
>
> * * *
>
> (xiv) Toilets and handwashing facilities are adequate, clean, in good repair, and easily reached by children. . . .

42 C.F.R. § 1304.53(a). ACF also cited the deficiency for 1304.53 under subsection (b)(1) of that regulation which provides in relevant part:

> (b) *Head Start equipment, toys, materials, and furniture*. (1) Grantee and delegate agencies must provide and arrange sufficient equipment, toys, materials, and furniture to meet the needs and facilitate the participation of children and adults. Equipment, toys, materials, and furniture owned or operated by the grantee or delegate agency must be:
>
> * * *
>
> (vi) Safe, durable, and kept in good condition . . . .

ACF's Motion relies on multiple uncorrected failures to comply with these regulations found during the December 2015 on-site review. We address these findings, and CMI's responses, using, for the most part, the general headings used in ACF's motion.

In its four-page Response to Motion, CMI states that it "disagrees with ACF's argument that it did not present evidence that creates issues of material fact as to whether CMI's maintenance of its centers . . . w[as] deficient or whether it timely corrected those alleged deficiencies."[4] Response to Motion at 1. However, CMI does not identify in that brief any specific dispute about any of the evidence in the record on which ACF based its Motion or make any argument as to why that evidence does not support summary judgment for ACF. *Id*. at 1-4. Instead CMI states that it "rel[ies] upon its arguments and authorities in its request for hearing and its reply to ACF's response and all exhibits in support of CMI's request for this Board to deny the Motion for Summary Judgment." *Id.* at 3. CMI also submits two new affidavits, a Supplemental Affidavit of Pam Gary (Supp.

[4] CMI also disagrees with ACF on the second (governing body responsibilities) deficiency citation, but we have concluded we need not address that deficiency citation.

Gary Aff.),[5] CMI's Executive Director, and the Affidavit of Michael Williams, Chairman of CMI's Board of Directors. CMI should have identified and discussed the particular facts it purports to dispute and explained why they are material to our decision. It is not the duty of the tribunal "to sift through the record in search of evidence to support a party's opposition to summary judgment." *Crossly v. Georgia Pacific Corp.*, 355 F.3d 1112 (8th Cir. 2004); accord *Spear Marketing, Inc. v. Bancorp South*, 791 F.3d 586, 599 (5th Cir. 2015); *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). Nonetheless, we have reviewed the complete record, including the newly submitted supplemental Gary affidavit (the Michael Williams affidavit does not address the physical environment and facilities deficiency) and, for the reasons discussed below, find no dispute of material fact precluding summary judgment for ACF on the physical environment and facilities deficiency.

1. Fire Safety Hazards

The parameters of our analysis

In its Motion, ACF relies on its findings regarding uncorrected fire safety hazards involving missing smoke detectors, failure to mark evacuation routes, fire exit hazards, unilluminated exit signs and the absence of a fire alarm system. Motion at 3-10. These hazards existed, according to ACF, at multiple Head Start/Early Head Start centers operated by CMI.[6] ACF argues that these hazards violated state licensure regulations as well as the Head Start statutes and regulations, correctly noting that the Head Start statute and regulations mandate compliance with applicable state licensing requirements as well as federal requirements. Motion at 2, citing 42 U.S.C. § 9836a(a)(1)(D)(i) and 45 C.F.R. §§ 1304.53(a)(6), 1306.30(c).[7] ACF presented evidence that Mississippi's childcare

[5] CMI submitted the original affidavit from Ms. Gary as Exhibit 45 to its Notice of Appeal. That affidavit identifies Ms. Gary as the Executive Director of CMI since January 3, 2012.

[6] The centers identified by ACF are the following: Ambrose, Goodman, Lexington, Ackerman, Durant, Reform, Mileston, Pickens, Duck Hill, and Vaiden.

[7] Section 1306.30(c) provides that "[i]n cases where [State or local] licensing standards are less comprehensive or less stringent than the Head Start regulations, or where no State or local licensing standards are applicable, grantee and delegate agencies are required to assure that their facilities are in compliance with the Head Start Program Performance Standards related to health and safety as found in 45 CFR 1304.53(a)(6). . . ."

licensing requirements include compliance with all applicable fire safety standards adopted by the state or local government. *Id*., citing Miss. Code R. 15-11-55:1.11.1(2); ACF Ex. 17, at 63; and CMI Ex. 25.[8] CMI does not dispute that it was required to comply with applicable state licensing requirements, including fire safety standards.

ACF also presented evidence that Mississippi adopted the 2012 edition of the International Fire Safety Code (IFC 2012). ACF Ex. 2, at 11, citing Miss. Code R. 19-7:7.02 and CMS Ex. 19 (the IFC 2012); *see also* ACF Ex. 18 (a document entitled Rules and Regulations for the Mississippi Fire Prevention Code, dated 11/1/2012, which states, "the Mississippi Fire Prevention Code shall be based upon the 2012 edition of the [IFC]). CMI argues that the IFC 2012 requirement for a specific type of fire alarm system – a system that includes a manual fire alarm system that is connected to smoke detectors and automatically generates an alarm – does not apply to child care centers in Mississippi, or at least not to rural centers. Reply at 6. CMI does not otherwise deny that Mississippi adopted the International Fire Code (IFC) 2012 as its fire prevention codes or that these codes apply generally to Head Start facilities in Mississippi. Nonetheless, the record is not fully developed as to the relationship between IFC 2012 and the Mississippi fire prevention standards as applied by the state inspectors to Head Start facilities such as CMI during the time period involved here.[9] Accordingly, our decision does not rely at all on the fire alarm portion of ACF's fire safety hazard findings, since the fire alarm portion appears to have been based only on the absence of fire alarm systems meeting the IFC 2012 standard. Furthermore, in deciding ACF's Motion with respect to the other fire safety hazards, which we discuss below, we rely only on the Head Start regulations and, where appropriate, Mississippi State licensure requirements, not the IFC 2012.

[8] Section 15-11-55:1.11.1(2) of the Code of Mississippi Rules (ACF Ex. 17, at 63) says, "All child care facility buildings shall meet all fire safety standards listed on the MSDH [Mississippi State Department of Health] Form #333 and all applicable local fire safety standards and/or ordinances." CMI Exhibit 25 contains MSDH Form 333s completed during inspections of some of CMI's centers during October 2015.

[9] We note, for example, that ACF Exhibit 21 contains an email exchange between ACF's counsel in this case and the Mississippi State Fire Marshal's Office confirming that the IFC 2012 requirements, including the requirements in IFC §§ 907.2.3 and 1103.7.1 for a manual alarm system that initiates the occupant notification signal, apply to child care facilities. This email exchange, however, occurred after ACF's termination decision, and CMI has objected to our considering this exhibit. While we do not necessarily agree that the exhibit could not be considered at all, we think it inappropriate, at least in this case, to consider it on summary judgment. We also note that the exhibit itself raises questions that would require further development of the record. The Fire Marshal's email states that child care centers would fall under category "E" in the IFC 2012 Code, but it appears from the Code itself that some child care centers fall alternatively, or additionally, under category I-4. We also note that while the MSDH fire safety inspection form, Form 333 ("Uniform Fire Safety Survey For All Child Care Centers"), a form that both parties cite, requires operational smoke detectors, it does not contain any reference to the type of alarm system required by IFC 2012.

Smoke Detectors

As stated above, section 1304.53(a)(10)(vi) of the Head Start regulations requires Head Start and Early Head Start facilities to have operational smoke detectors. During the October review, ACF found noncompliance with this requirement based on the absence of smoke detectors in Head Start Classroom G at the Ambrose Center, in the hallways of the Goodman Center, and in Mobile Infant Classroom E and Infant Classroom F at the Lexington Center. ACF Ex. 1, at 7, 8-9.[10] During the December review, ACF found smoke detectors still missing in the hallways at Goodman and the two previously identified classrooms at Lexington. ACF Ex. 2, at 17, 21. In other words, ACF found that CMI had not corrected this finding with respect to three of the four smoke detectors found missing in the October review.

CMI does not dispute ACF's finding that at the time of the December review, there were still no smoke detectors in the two previously identified classrooms at the Lexington Center. Reply at 5, 18; Supp. Gary Aff. at 3, ¶ 11. CMI also "admits there was only one smoke detector missing at the Goodman . . . Center on December 1, 2015." Supp. Gary Aff. at 3, ¶ 11; Reply at 5. Nonetheless, CMI, through Ms. Gary's affidavit, denies that these facts put it in noncompliance or constituted a deficiency. Ms. Gary states:

> According to performance standard 1304.53(a)(10)(vi), CMI was required to place smoke detectors throughout the facility, no more than 40 feet apart. The Head Start Class Room G at [Ambrose] was within 40 feet of a smoke detector; the hallways of Goodman, and Mobile Infant Classroom E and Infant Classroom F at Lexington were all within the 40 feet of other smoke detectors in the centers. I declare that the classrooms in these facilities were less than 40 feet apart.

Supp. Gary Aff. at 3, ¶ 11. Whether the undisputed facts constitute noncompliance or a "deficiency" under the Head Start regulations is a legal conclusion, not a factual dispute, and Ms. Gary's opinion on a legal issue does not preclude summary judgment for ACF.

Moreover, Ms. Gary provides no foundation for her statement as to the standard for the spacing of smoke detectors. Notably, the Head Start regulation requiring smoke detectors does not contain a spacing requirement; instead, it requires an "appropriate number of smoke detectors." 45 C.F.R. § 1304.53(a)(10)(vi). Although the regulation does not

[10] The document in ACF Exhibit 1, the review findings from the October review, is also in CMI Exhibit 10. ACF cites primarily to CMI Exhibit 10 when discussing the review findings, attributing numbers to pages that CMI left unnumbered. We cite to the ACF Exhibit containing the same document because it has numbered pages which makes for easier reference.

define what constitutes an "appropriate number of smoke detectors," Mississippi's fire safety standards (as stated on MSDH Form 333, "Uniform Fire Safety Survey for All Child Care Facilities") require that "smoke detectors be installed and operational in all areas used by children." CMI Ex. 25, at unnumbered 1; *see also* ACF Ex. 17, at 63 (Mississippi child care facility licensure rule stating, "All childcare facility buildings shall meet all fire safety standards listed on the MSDH Form #333 and all applicable local fire safety standards and/or ordinances."). At a minimum, we believe, a plain reading of "all areas used by children" would mean that each enclosed classroom needs its own smoke detector, and it is undisputed that there were no smoke detectors in two classrooms at the Lexington Center. This is enough, in our view, to conclude that CMI did not meet the Head Start requirement for operational smoke detectors.[11]

Our conclusion is not changed by Ms. Gary's declaration that the classrooms were all less than 40 feet apart. Ms. Gary did not establish a foundation for her statement. But even if we accepted Ms. Gary's description as true, that would not necessarily establish that the smoke detectors themselves were less than 40 feet apart, which she asserts (although without citing an authoritative source) is the standard under the regulations.

Fire Exit Hazards

In its Motion, ACF cites failure to correct by the time of the December review multiple exit door safety issues affecting multiple centers that were cited during the October review. Motion at 4-6. The issues involved door locking systems employed by CMI that precluded opening the doors swiftly in a fire emergency. On the October survey, ACF found that all but the main entrance doors at the Goodman Center had double locks (locking door knobs and slide bolts) that were kept locked at all times. ACF Ex. 1, at 8.[12]

[11] Moreover, we note that CMI has not explained why the hallways at its centers (such as Goodman) would not also be considered "areas used by children" since children presumably use the hallways to access the classrooms and otherwise move around the facility. We make no finding for purposes of summary judgment, however, as to which additional areas might require smoke detector placement or at what frequency.

[12] We note a photo in ACF Exhibit 8, at 3 that ACF purports to have taken during the October review and that is labeled "Goodman Center – Double lock on main entrance" and shows locking door knobs on two doors and what appears to be a deadbolt lock above one of the knobs. However, since the October review report stated the double lock findings only with respect to all except the main door at the Goodman Center, we disregard this particular photo in reaching our decision.

ACF made essentially the same finding at the Durant Center during the October review.[13] ACF Ex. 1, at 8; ACF Ex. 6, at 12, 13. During the December review, ACF found that the double locks cited during the October review on all but the main entrance door at the Goodman Center remained in place. ACF Ex. 2, at 17; ACF Ex. 8, at 5. ACF also found that the back exit door at the Durant Center continued to have the double locks cited on the October review plus an additional chain lock which "was placed too high for normal reach." ACF Ex. 2, at 20; ACF Ex. 6, at 22, 23. Section 1304.53(a)(6) does not specifically discuss door locking mechanisms, but Mississippi's child care facility licensure standards do. Those standards require that "[a]ny latch or other fastening device on an exit door shall be provided with a knob, handle, panic bar, or other simple type of releasing device." ACF Ex. 17, at 69 (Miss. Code R. 15-11-55:1.11.7(6)). They further provide that "[d]ual action door fasteners are not permitted." *Id.*

In its Reply, CMI stated that it disputed the fire exits hazard findings. Reply at 6. However, as ACF notes, CMI did not point to any fact that would evidence a genuine dispute. Motion at 5. CMI's Response to Motion does not repeat the bare assertion of disagreement made in its Reply, but in her supplemental affidavit, Ms. Gary asserts "CMI disputes ACF's findings that exit door alleged deficiencies at the centers of Ackerman, Durant and Goodman remained uncorrected at the time of the December review." Supp. Gary Aff. at 3, ¶ 12. As we stated in footnote 13, we assume for purposes of summary judgment that the fire exit safety hazard ACF found at the Ackerman Center did not exist. However, with respect to the fire exit safety hazards found uncorrected at the Durant and Goodman Centers, we do not find Ms. Gary's bare statement that CMI disputes ACF's findings, without any explanation or discussion as to why those findings are not

[13] ACF states in its motion that it also found "double latches/locks" on the back exit door at the Ackerman Center during the October review. Motion at 4, citing CMI Ex. 10, at 11; and ACF Ex. 3, at 2-6. The picture on page 6 of ACF Exhibit 3 does show double latches or locks on what is described as the back exit door at that Center, but the review report for the October survey does not cite these locks; it only discusses how multiple pieces of furniture in the hallway impeded access to that exit. ACF Ex. 2, at 11; *see also* ACF Ex. 3, at 2-5 (pictures of the furniture). Accordingly, we have not considered this additional finding in upholding the deficiency citation. During the October review, ACF also found that "the exterior exit door in Reform's Classroom B had a locking mechanism that was not part of panic hardware," and ACF found this uncorrected during the December review. ACF Ex. 1, at 10, ACF Ex. 2, at 19. We also do not consider this finding in upholding the deficiency citation since our decision that there is no genuine dispute that not all of the fire exit safety issues had been corrected on time is based on ACF's findings regarding the presence of dual action door fasteners, not on the absence of panic bars.

supported, adequate to raise a material dispute of fact regarding those findings.[14] Instead of offering any specific challenge to ACF's findings regarding the fire exit safety issues at those two Centers, Ms. Gary offers an explanation for CMI's failure to correct these issues: "CMI did not own these facilities and informed ACF that the owner/landlord refused to allow CMI to change to panic doors." *Id*. An explanation of why CMI did not correct these noncompliance issues does not raise a factual dispute about their existence, and the explanation offered by Ms. Gary is not, in any event, a valid defense. The issue is whether the grantee's program facilities were in compliance with the requirements developed by ACF to protect the safety of Head Start children and staff involved in programs in those facilities. If the grantee's landlord would not allow modifications necessary to comply with those safety regulations, the grantee could not continue to use that property in its Head Start program as a child care facility.[15]

Ms. Gary also asserts that CMI discussed the exit door safety issues with a Head Start reviewer "who agreed with CMI's corrective action plan that the doors would remain un-locked during business hours." Supp. Gary Aff. at 3, ¶ 12. The only "corrective action plan" in the record (although Ms. Gary does not cite it or any other document of record) is the one-page document titled "Corrective Action Plan" in CMI Exhibit 26 that CMI sent ACF by email on December 1, 2015. CMI Ex. 26, at unnumbered 1 and 2. CMI sent that document to ACF after November 30, 2015, the date by which the deficiencies had to be corrected. ACF Ex. 2, at 2. Since the corrective action plan was sent after the time for correction had expired, as a matter of law it was incapable of removing the deficiency even if the plan was implemented (of which there is no evidence). *E.g.*, *Pinebelt Ass'n for Community Enhancement*, DAB No. 2611, at 11-12 (2014); *see also Babyland Family Servs., Inc.*, DAB No. 2109, at 20 (2007) ("As a matter of law, later

[14] Although Ms. Gary did not cite them, we have considered the Form 333 reports completed by State inspectors on October 15, 2015 for the Durant, Goodman and Reform centers that CMI put into evidence. *See* CMI Ex. 25. On each of these forms, there is a check mark in the "yes" box next to a question asking whether all exit doors were "equipped with a knob, handle, panic bar or other single-action releasing device." We conclude that even construed in the light most favorable to CMI, these reports do not raise a genuine dispute of material fact on the issue of the safety of these exit doors. We so conclude because while the forms, construed in that manner, indicate the presence of a knob, handle, panic bar or other single-action release device, they do not indicate whether there were additional "dual action door fasteners" on the doors such as the chain locks ACF found on them during its October review 3-8 days later. Even assuming these additional fasteners were not on the doors when the State inspectors were there, the nature of the fasteners found by ACF is such that they could have been placed on the doors after the State inspections.

[15] We also note that Ms. Gary's excuse suggests that the doors at these centers were not equipped with panic bars, which, in turn, suggests that the State inspectors did not check the "yes" boxes on the Form 333s based on the presence of panic bars.

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").[16]

Even assuming an ACF employee agreed with Ms. Gary before the end of the corrective action period that keeping the doors unlocked would be an adequate correction, Ms. Gary does not assert that the doors in question were, in fact, unlocked (and remained so) during this period. We also note that the review report for the December review expressly states with respect to the Goodman Center that the "[e]xit doors other than the main entrance doors still had locking doorknobs and slide bolts, which were kept locked at all times." CMS Ex. 2, at 17. Accordingly, we conclude that CMI did not meet requirements for avoiding fire exit hazards.

Failure to Mark Evacuation Routes

Section 1304.53(a)(10)(vii) requires that exits be "clearly visible and evacuation routes [be] clearly marked and posted so that the path to safety is unmistakable[.]" 45 C.F.R. § 1304.53(a)(10)(vii). The regulation refers to 45 C.F.R. § 1304.22 for additional emergency procedures which include having "[p]osted emergency evacuation routes . . . ." *Id.* § 1304.22(a)(3). In addition, CMI's Head Start grant award for the period at issue included a requirement, among others, that CMI conduct a screening of the health and safety environment of each center within 45 calendar days of the start of the five year project period identified in the award. ACF Ex. 54, at 7-13. The review form includes the following requirement:

> Exits are clearly marked, and emergency evacuation routes and other safety procedures are posted in the classroom and in appropriate locations throughout the site.

Id. at 11.[17]

[16] ACF argues that even if there was evidence that CMI had timely implemented a plan to keep the doors unlocked, this would pose a security threat to the children, and a grantee may not correct one deficiency by creating another. We need not address this since CMI has not raised a genuine dispute of material fact regarding the existence of the cited exit door safety deficiency.

[17] ACF cited the CMI Board's uncorrected failure to complete this certification as noncompliance under the Governing Body deficiency citation. ACF Ex. 2, at 21, 22; Motion at 16-17. CMI does not dispute that it did not complete the certification but argues that the fire safety inspections by the State are an adequate substitute and that the screening required by the regulations was not due until 2017. Appeal Br. at 24; Reply at 14. Since we conclude that the uncorrected health and safety issues are sufficient to support summary judgment for ACF, we need not decide whether CMI's response is sufficient to raise a genuine dispute of material fact on the certification issue.

The October review found that in each classroom at the Ambrose, Durant, Goodman, Lexington, Mileston and Pickens centers, CMI had posted floorplan diagrams that were labeled "evacuation plans" but did not have an evacuation route or exit marked. ACF Ex. 2, at 11-14; ACF Ex. 4, at 3 (Ambrose photo); ACF Ex. 6, at 9 (Durant photo); ACF Ex. 10, at 2 (Lexington photo); ACF Ex. 11, at 6 (Mileston photo). The December review found that CMI had corrected the defective evacuation plan at Durant but not the defective plans at the other five centers. ACF Ex. 2, at 16, 17, 20, 21; ACF Ex. 4, at 8 (Ambrose photo); ACF Ex. 8, at 6 (Goodman photo); ACF Ex. 10, at 9 (Lexington); ACF Ex. 11, at 16 (Mileston photo); ACF Ex. 12, at 8 (Pickens photo).

With respect to the plans at Mileston and Pickens, CMI admitted in its Appeal Brief that the "[e]vacuation plans were not clear." Appeal Br. at 14, 15. CMI also stated that the evacuation plans at Ambrose "were upside down" and that the ink on the evacuation plan at Goodman "was done; however the ink was very light." Appeal Brief at 13-14. Ms. Gary acknowledges CMI's admission to the evacuation plans at the Mileston and Pickens Center being unclear but goes on to state that this admission "is not to be treated as an admission to any alleged deficiencies." Supp. Gary Aff. at 4, ¶ 14. She also states that the evacuation plans at the Ambrose Center were corrected but "were just posted upside down" and that the evacuation plans at Goodman "were marked but were marked with light ink." *Id*..

CMI has not raised a genuine dispute of fact material to our decision. The legal requirement at issue, section 1304.53(a)(10)(vii), requires that "evacuation routes . . . [be] clearly marked and posted so that the path to safety is unmistakable . . . ." With respect to the issues regarding the evacuation plans at the Ambrose and Goodman Centers, we will assume, for purposes of summary judgment, that the evacuation routes were not unclearly marked just because the evacuation plans were posted upside down and marked in light ink, respectively. Nonetheless, we conclude that CMI failed to meet this Head Start requirement with respect to the evacuation plans at the Mileston and Pickens Centers which ACF found, and CMI has admitted, were not clear at the time of the December review.[18]

Unilluminated Exit Signs

Section 1304.53(a)(10)(vi) requires grantees to assure that "[e]xits are clearly visible." During the October review, ACF found that the exit signs in three of Durant's Head Start classrooms were not illuminated. ACF Ex. 2, at 12. ACF also found the exit signs in two Vaiden Early Head Start classrooms were unlit. *Id*. at 15. During the December review,

[18] In light of this conclusion, we need not address Ms. Gary's assertion that the evacuation plan problem at the Lexington Center had been corrected before the December review. See Supp. Gary Aff. at 4, ¶ 14.

ACF found this defect corrected at Vaiden but not at Durant. *Id*. at 18, 20; ACF Ex. 6, at 24. In its Appeal Brief, CMI did not challenge these findings and, in fact, admitted that the exit signs at Durant were "not lit or illuminated due to failure to replace batteries." Appeal Brief at 17. Ms. Gary makes a similar admission in her affidavit but asserts without any explanation that CMI "does not consider this to be a deficiency." Supp. Gary Aff. at 4, ¶ 15. Whether the continuing presence of unlit or unilluminated exit signs in the classrooms was a violation of Head Start regulations is a legal issue, not a factual issue; accordingly, Ms. Gary's testimony, even without her admissions, could not raise a dispute of fact, material or otherwise. CMI's admitted failure to correct the unilluminated exit signs in the Durant classrooms is a violation of Head Start regulations because CMI did not assure that its exit signs "are clearly visible" as that regulation requires.[19]

CMI submitted State fire safety inspection reports (each on MSDH Form 333) for nine centers: Reform, Vaiden, Mileston, Durant, Ambrose, Europa, Kosciusko, Pickens and Goodman. CMI Ex. 25. The line for entry of the date of inspection is empty on the Vaiden report, but the others state that they were completed on various dates in October 2015.[20] CMI claimed in its Appeal Brief that these reports show that the State inspectors found that "eight of them were found to comply with local fire safety codes and procedures." Appeal Brief at 12. Thus, CMI could be viewed as admitting that this evidence does not raise a dispute of fact that it did not meet State fire safety standards with respect to at least one of the centers for which it submitted State reports. However, Ms. Gary states that "CMI stands firm behind documentary evidence regarding all of its centers were in compliance with local fire safety codes." Supp. Gary Aff. at 4, ¶ 16. Although Ms. Gary, herself, cites no particular document, we have noted that the Pickens Center form is ambiguous. The report has a check mark in the "No" box next to the statement "This facility complies with local fire safety codes and standards" whereas all of the other reports have a check mark in the "Yes" box next to that statement. CMI Ex. 25, at unnumbered 7. On the other hand, the Pickens form shows check marks next to all of the individual compliance items, a check mark showing no corrections are required,

[19] ACF says that rooms with more than one exit must have illuminated exit signs. Although ACF does not indicate its source for that standard, CMI does not dispute that it is the standard.

[20] The Vaiden report indicates that it was signed by the center director and the fire department inspector on October 30, 2015, but that does not necessarily mean the inspection occurred on that date. ACF notes that the inspector who signed this form is a volunteer firefighter and, as such, is not certified to conduct fire inspections. Motion at 10; *see also* ACF Ex. 23 (statement by the firefighter that he is "not qualified to inspect building"). CMI argues that the fact this firefighter signed MSDH Form 333 means that he was qualified to do the inspection notwithstanding his own statement to the contrary. Reply at 7. For purposes of summary judgment, we accept as true that the volunteer firefighter made the observations recorded on the form, without resolving whether he acted within the scope of his authority.

and a check mark indicating that the center passed the inspection. Given these inconsistencies, we do not find that CMI has conceded that State inspectors (as opposed to Federal reviewers) found State standards unmet at one of the centers for which CMI submitted State fire safety reports.

However, the State reports, contrary to what CMI suggests, are not dispositive of the issue of whether CMI met Head Start fire safety requirements. The applicable Head Start requirements include but are not limited to compliance with State and local fire codes. As we have discussed throughout our decision, the Head Start regulations themselves contain specific requirements that must be met. Furthermore, section 1306.30(c) provides that "[i]n cases where [State or local] licensing standards are less comprehensive or less stringent than the Head Start regulations, or where no State or local licensing standards are applicable, grantee and delegate agencies are required to assure that their facilities are in compliance with the Head Start Program Performance Standards related to health and safety as found in 45 CFR 1304.53(a)(6). . . ." *See also* ACF Ex. 54, at 9 (requiring as a condition of the grant award "ongoing compliance with local, state, and federal health and safety requirements"). We note, in this regard, that the MSDH Form 333 reports in CMI Exhibit 25 list no specific requirement addressing exit signs and the posting of clearly marked evacuation routes. Moreover, the State reports are all based on inspections that occurred in October 2015 and, thus, may not be assumed to reflect, even for State inspection purposes, conditions at the centers on December 1, 2015 when the second Head Start review took place.

In addition, CMI presented no State fire safety inspection reports for the Ackerman and Lexington Centers. Accordingly, CMI may not rely on State licensure reports to raise a dispute about the multiple uncorrected fire safety issues found at the Lexington Center (two missing smoke detectors) or the fire safety issue presented by the "double lock" on the rear exit door at the Ackerman Center, all of which we discussed earlier.

For the reasons discussed above, we conclude that CMI has not raised a dispute of material fact about ACF's determination that CMI failed to timely correct multiple findings of noncompliance with the fire safety requirements of section 1304.53(a)(7) and (a)(10) which put the health and safety of staff and children at risk. Arguably, ACF would be entitled to summary judgment upholding the deficiency it cited under that regulation based on the uncorrected fire safety issues alone. However, ACF cited additional maintenance and safety violations in making its determination of a deficiency under section 1304.53(a). We discuss those additional findings below and conclude that even if the uncorrected fire safety issues alone would not be sufficient to uphold the deficiency finding (although we make no finding to that effect), those noncompliance issues together with those uncorrected maintenance and other hazardous condition findings about which we find no material dispute of fact amply support ACF's deficiency determination.

2. Maintenance and other hazardous conditions

Head Start grantees "must . . . ensure that each facility's . . . physical arrangements are consistent with the health, safety, and developmental needs of children." 45 C.F.R. § 1304.53(a)(10). The minimum requirements specified under section 1304.53(a)(10) include – in addition to the fire safety requirements discussed above – storing "[f]lammable and other dangerous materials and potential poisons . . . in locked cabinets or storage facilities . . . accessible only to authorized persons" (*id.* § 1304.53(a)(10)(iii)); making sure indoor and outdoor premises are cleaned daily and kept free of hazardous materials and conditions (*id.* § 1304.53(a)(10)(viii)); assuring that the selection, layout, and maintenance of playground equipment and surfaces minimize the possibility of injury to children (*id.* § 1304.53(a)(10)(x)); and having "toilets and handwashing facilities" that are kept "clean[ ]" and "in good repair and easily reached by children" (*id.* § 1304.53(a)(10) (xiv)). In addition, grantees must "provide and arrange sufficient equipment, toys, materials, and furniture to meet the needs of and facilitate the participation of children and adults," and these items "must be . . . [s]afe, durable, and kept in good condition[.]" *Id.* § 1304.53(b)(1)(vi). ACF found multiple failures to comply with these regulations during the October review and found many of them uncorrected during the December review.

Below, we discuss the multiple instances of maintenance and other hazardous conditions noncompliance found uncorrected at each of multiple Head Start centers, but before doing so, we note CMI's overarching argument that the safety and maintenance issues found at the October review had not yet ripened into a deficiency and that ACF should have given it more time to correct. There is no basis for that argument. The statute and regulations authorize, indeed require, ACF to cite an immediate deficiency and to require immediate correction when it finds that the grantee's failures to comply with Head Start requirements threaten the health or safety of Head Start staff or children. 42 U.S.C. § 9832(2)(A); 45 C.F.R. § 1304.3(a)(6)(i)(A). ACF, based on the October review, found such an immediate deficiency and ordered immediate correction, setting November 30, 2015 as the date by which all corrections must be completed. Accordingly, absent any genuine and material dispute about the review findings related to health and safety on the October review, CMI had an immediate deficiency as of the October review and was required to show full correction of that deficiency by November 30, 2015.

CMI has not raised a genuine dispute about any of the findings of noncompliance on the October review that are material to ACF's determining that the noncompliance posed a risk to the health and safety of staff or children that necessitated citing an immediate deficiency. ACF needed seven pages in the Overview of Findings for that review to list the numerous findings of unsafe conditions caused by noncompliance with fire safety and maintenance requirements found at twelve of CMI's Head Start Centers. CMI specifies

only six findings it purports to dispute, asserting about those findings, "At best, these would be allegations of noncompliance and never matured to the stage of being categorized as deficiencies." Appeal Brief at 8. It provides no argument and points to no evidence to support even this limited statement.

Vaiden Center

ACF cited as uncorrected at the Vaiden Center the staff practice of using hand-washing sinks in the bathrooms of Early Head Start units for disposal of potty waste, a practice the reviewers found posed a risk of contamination.[21] ACF Ex. 2, at 18. In its hearing request, CMI suggested that there was no risk of contamination because "[t]he sinks in the bathroom were for potty waste only. The children did not enter the bathroom as there are bathrooms in the classroom." Appeal Brief at 15-16. Ms. Gary stated in her affidavit that "[t]he sink in the bathroom labeled 'girls' was used for potty waste" but disputes that the sink was used to wash the hands of toddlers, suggesting this was unnecessary because there were hand-washing sinks in the classrooms. Supp. Gary Aff. at 5, ¶ 21. CMI cites no evidence other than Ms. Gary's affidavit statement to support its contention that the bathroom sinks where potty waste was being emptied were not used by the children for washing hands. However, assuming for purposes of summary judgment that Ms. Gary's statement to that effect is true, we still find no genuine dispute that disposing of potty waste in hand washing sinks, a practice CMI admits, posed a risk of contamination. The sinks were in bathrooms which Ms. Gary acknowledges were identified as such. Even if toddlers never used those bathrooms, other persons, including staff or parents, might well do so and presumably would wash their hands in the bathroom sinks where potty waste was being disposed. We do not see how any reasonable person could conclude that using sinks provided in bathrooms for washing hands as vehicles for toilet waste disposal is not a violation of the regulatory requirement that grantees have "[t]oilets and handwashing facilities [that] are adequate [and, among other things,] clean . . . ." 42 C.F.R. § 1304.53(a)(10)(xiv).

Reform Center

During the October review at the Reform Center, ACF found mold issues and a bleach odor throughout the facility that was strong enough to cause the reviewer and Center Manager to cough during the observations; the Center Manager attributed the mold issues to water damage from flooding. ACF Ex. 2, at 14-15; ACF Ex. 13, at 3, 8. ACF found

[21] ACF also cited as uncorrected at the Vaiden Center an issue involving a sink cabinet that was allegedly unlocked and contained poisonous cleaning products within reach of children. *See* ACF Ex. 2, at 18. We find that CMI raised a material dispute of fact regarding that particular issue that precludes our considering it to be one of the bases for our conclusion to uphold ACF's determination of a deficiency.

that, although the bleach odor issue had been corrected, the mold issues found in the boys' bathrooms for Classrooms B and C/D (the latter caused by leaking sinks) remained uncorrected at the time of the December review. ACF Ex. 2, at 20; ACF Ex. 13, at 28. CMI claims that the mold issue at the Reform Center was corrected by the time of the December review but cites no evidence to support that assertion. Reply at 8. In her Supplemental Affidavit, Ms. Gary simply echoes this claim. Supp. Gary Aff. at 5, ¶ 22. Ms. Gary provides no explanation of her basis for determining that the mold problem had been effectively corrected. In any event, even if we credited Ms. Gary's bare assertion about the mold, ACF cited additional maintenance issues at Reform that it found uncorrected during the December review. These issues included unrepaired water damage and missing molding in the girls' restroom for Classroom C/D that reviewers found posed a risk of further deterioration. ACF Ex. 2, at 20; ACF Ex. 13, at 12. CMI does not claim that either the water damage or the molding was repaired at the time of the December review. *See* Appeal Brief at 18-20; Reply at 8-9. In her supplemental affidavit, Ms. Gary says only that CMI disputes this was a deficiency. Supp. Gary Aff. at 5, ¶ 23. As we stated earlier, that is a legal conclusion not a factual dispute. ACF also found that peeling paint, which it found to be a choking hazard for children, remained on a wall in Classroom B. ACF Ex. 2, at 20; ACF Ex. 13, at 6; *see also* ACF Ex. 17, at 64 (State licensure regulation stating that "[w]alls shall be kept clean and free of . . . chipped paint"). Rotting wood on the floor in Classroom B had been repaired but the cracked tiles over that wood had not yet been replaced. ACF Ex. 2, at 20; ACF Ex. 13, at 4, 31.[22] One cot still had a shredded corner and posed a choking hazard. ACF Ex. 2, at 20; ACF Ex. 13, at 33.[23]

In its briefs, CMI does not dispute any of these additional maintenance findings at the Reform Center. *See* Appeal Brief at 18-20; Reply at 8-9. ACF asserts that CMI even seems to have acknowledged the defects when it stated that "'[t]here were too many items to correct [at] that center.'" Motion at 12 (quoting Appeal Brief at 18). In her affidavit, Ms. Gary states that CMI "disputes the findings . . . at page 12 of ACF's Motion [the additional Reform Center deficiencies] and asserts that they were timely corrected." Supp. Gary Aff. at 5, ¶ 23. However, her very general statement that the

[22] The Overview of Findings states that CMI had replaced rotting wood under one tile, but apparently there was still rotting wood under the other tiles. ACF Ex. 2, at 20.

[23] During the October review, ACF also made findings about an improper refrigerator temperature and a non-functioning stove pilot light. ACF Ex. 2, at 15. ACF stated that it was not possible to confirm that these issues had been corrected during the December review because the refrigerator was locked and although the pilot light was lit, the reviewer's attempts to turn on the stove were unsuccessful. *Id*. at 20. Since ACF could not confirm lack of correction, we do not rely on these particular findings of noncompliance.

issues were timely corrected does not sufficiently identify which findings were allegedly corrected, and she does not dispute all of the factual findings. These shortcomings in her testimony are significant in light of her simultaneous assertion, discussed in the next paragraph of our decision, that there were too many items to correct.[24]

Ms. Gary states that ACF took the acknowledgment of "too many items to correct" out of context, that the acknowledgment "has nothing to do with [the] alleged deficiencies stated at page 12 of the [M]otion." Supp. Gary Aff. at 5, ¶ 23. Ms. Gary does not attempt to describe what CMI deems the proper context, and the statement appears in a discussion of the continuing repair issues at the Reform Center and the intersection of those issues with unsuccessful attempts to obtain funding from ACF to renovate another building. For example, the discussion states:

> On May 14, 2015, CMI submitted to [ACF's] Regional Program Manager . . . a request for approval of an amendment to the 2014-2015 application for funding in the amount of $817,230.00, including an amount of $241,600.00 for necessary repairs and renovation at the Ackerman (Reform Center).

Appeal Brief at 18-19; *see also* Reply at 8-9. This context on its face seems to support ACF's statement that CMI has admitted to at least some of the multiple uncorrected maintenance findings ACF cited at Reform. But even assuming the statement does not constitute such an admission, CMI has not come forward with evidence capable of raising a genuine dispute that CMI failed to correct specific maintenance deficits at the Reform Center.

CMI suggests that ACF's rejection of CMI's requests to carry over funding or to grant supplemental funding are to blame for its failure to correct these maintenance problems at the Reform Center and that this provides a basis for reversing the termination. However, as the Board has held, a Head Start grantee's purported adverse financial circumstances

[24] Ms. Gary denies there was peeling paint in a classroom at this Center. However, she does not deny that there was, in fact, uncorrected water damage and missing molding. She only disputes ACF's conclusion that the uncorrected water damage and missing molding were part of a deficiency which is a legal issue, not a factual issue. Ms. Gary asserts that replacement of the rotten floor boards in Classroom B "resolved any alleged structural safety issue." Supp. Gary Aff. at 5, ¶ 23. This assertion is not wholly responsive to ACF's findings. As we indicated earlier, *see infra* footnote 22, ACF found that the rotting wood had been replaced under only one tile and that the tile over that new flooring had not been replaced. Nor does Ms. Gary explain why any structural safety concerns or the "risk of further deterioration," cited by ACF, would be resolved by only partially replacing rotting floor boards and leaving the replacement boards untiled, thus leaving the wood vulnerable to water damage. Ms. Gary denies that the pilot light and refrigerator issue were not corrected, but we need not discuss that further since we are not relying on the alleged noncompliance involving those two issues.

do not provide a basis for reversing a termination of its Head Start grant. *Municipality of Santa Isabel*, DAB No. 2230, at 10-11 (2009) (rejecting argument that grantee's operating deficit and alleged delays in reimbursement by ACF, circumstances the grantee said prevented timely correction of deficiencies, provided a basis for reversing termination decision). Moreover, as ACF points out, CMI has not explained why the annual and supplemental grants CMI did receive were not sufficient to maintain a safe environment in its facilities. *See* Motion at 14-16. Accordingly, we reject CMI's attempt to shift the blame for its inaction to ACF.

Lexington Center

During the October review at Lexington, ACF found an "active [ceiling] leak" in the breastfeeding room and water damage on the ceiling in Infant Room F. ACF Ex. 2, at 13. During the December review, ACF found that, although the ceiling leak had been repaired, the water-damaged ceiling tiles in Infant Room F had not been replaced. *Id.* at 21. CMI did not dispute these maintenance findings in its briefs. *See* Appeal Brief at 18; Reply at 9. Indeed, CMI admits that the ceiling tiles had not been replaced, once again blaming funding issues. Reply at 9. We conclude, therefore, that CMI has raised no dispute of material fact with respect to the maintenance noncompliance found at Lexington.

Ms. Gary asserts that because CMI repaired the ceiling leak, it "substantially complied with the concern at this center and disputes ACF's allegation to the contrary." Supp. Gary Aff. at 5, ¶ 24. Pointing to and relying on partial correction of the October deficiencies is a recurrent theme in CMI's briefs. *See, e.g.*, Appeal Brief at 14 ("[s]ome [metal] skirting [around the Mileston Center] was repaired") (underscoring added); *id.* at 16 ("[a]ll other items were corrected for Vaiden . . . ."). CMI misapprehends the standard for determining whether correction of deficiencies has occurred. Once a deficiency has been established, the standard for determining whether the deficiency has been corrected is "full compliance." *Jefferson Comprehensive Care System, Inc.*, DAB No. 2377, at 18-19 (2011); *Municipality of Santa Isabel* at 9-10. As the Board stated in *Jefferson Comprehensive Care*, "to permit grantees to only partially correct a deficiency to avoid termination would effectively result in grantees never fully complying with Head Start requirements." DAB No. 2377, at 1977, at 18-19 (*quoting Philadelphia Housing Authority*, DAB No. 1977, 10-11 (2005)).

Mileston Center

ACF found that CMI did not timely correct multiple maintenance issues found at the Mileston Center. These included broken, gapped tiles on the bathroom floor, disintegrating paint on the wall along the bathroom counter and chipped or rusted enamel on the sinks and a toilet seat. Motion at 13 (record citations omitted). ACF found that

these "conditions made the bathroom surfaces absorbent of unsanitary substances and difficult to clean." *Id*. Ms. Gary says that CMI disputes these conditions constituted a deficiency (which is a legal conclusion not a factual dispute) but does not dispute that the unsanitary conditions found by ACF (the facts) existed. Supp. Gary Aff. at 5, ¶ 25. She states that a reviewer opined that the only possible fix for the sinks and toilet would be to replace the fixtures and that CMI did not have sufficient non-federal funds to do so within the required correction period. *Id*. Even assuming this statement to be true, as we have explained, inadequate financial resources is not a basis for overlooking CMI's admitted failure to make required repairs to correct the conditions that created the deficiency. Accordingly, we conclude that there is no genuine dispute that these uncorrected Mileston conditions existed during both reviews.

Hazardous conditions on multiple playgrounds

During the October review, ACF found that eight of CMI's centers did not have sufficient shock absorbing agents (9 inches of natural loose-fill materials, e.g., mulch, or 6 inches of shredded/recycled rubber) on the playgrounds. ACF Ex. 1, at 7-11. During the December review, ACF found this deficiency uncorrected at one of these centers (Duck Hill), which had added shredded rubber mulch but not enough to meet the depth requirement. ACF Ex. 2, at 19. In this proceeding, CMI first stated that this deficiency at Duck Hill "had not been completed for lack of manpower." Appeal Brief at 17. CMI later stated that the facilities director had reported that the mulch spreading had been completed. Reply at 10. ACF pointed out in its Motion that the second response did not expressly state that the "mulch" spreading was completed before the December review and concluded, taking this shortcoming together with the earlier statement that the spreading had not been completed due to lack of manpower, that CMI had not raised a dispute of material fact about its failure to correct this playground hazard. Motion at 14. In an apparent effort to cure the evidentiary defect cited by ACF, Ms. Gary now states in her affidavit, "Prior to the December 1, 2015 follow-up review the facilities manager informed CMI that the mulch spreading had been completed." Supp. Gary Aff. at 6, ¶ 26. Even if we credit this hearsay statement, which we do for purposes of summary judgment in this case, it does not raise a material dispute of fact regarding the finding because a statement that mulch had been spread is not the same as a statement that it had been spread to the proper depth. CMI does not dispute that the 6-inch minimum depth requirement for shredded rubber cited by ACF is, in fact, the requirement.

ACF also found uncorrected large gaps in the metal skirting all around the modular unit at Mileston, with skirting gaps in the playground area exposing sharp metal edges within reach of children. ACF Ex. 2, at 17; Motion at 14; ACF Ex. 11, at 8, 11; ACF Ex. 11, at 14, 15. CMI acknowledged in its hearing request that not all of the skirting had been repaired, that "additional skirting had to be ordered," and that repairs "could not be completed without funds or staff." Appeal Brief at 14. Thus, CMI did not raise any

dispute about the facts underlying this finding of an uncorrected hazard to children but has merely offered excuses for not completing the repairs, which is not a basis for overturning the termination. In her affidavit, Ms. Gary does not deny the skirting had sharp metal edges but denies this was a laceration hazard because, she says, CMI agreed in its December 1, 2015 corrective action plan not to utilize this playground. Supp. Gary Aff. at 6, ¶ 27. Ms. Gary and CMI's hearing request also rely on the corrective action plan defense for another undisputed deficiency found uncorrected by ACF – the presence of deep holes resembling animal burrows found on the Ambrose Center playground that posed a tripping or entrapment hazard. *Id*.; Appeal Brief at 13. As we have previously stated, plans to correct, or even accomplished correction, after the time for correction has expired, as it did here, is not a basis for reversing a termination.

CMI asserts that State licensure reports for some of its centers "fail to support ACF's finding of health and safety violations." Reply at 3-4, citing CMI Exhibit 15 (State Licensure Reports on annual inspections conducted during the period September – October 2015). CMI asserts that while these reports show "a few minor non-compliances," they do not reveal "any . . . harm or safety issue to the children as contended by ACF." *Id*. at 4. We question this characterization inasmuch as the reports show, among other things, failure to comply with State licensure requirements for playground surfacing (mulch depth) at the Goodman, Mileston, Durant, Kosciusko, Pickens, Duck Hill, and Reform Centers. CMI Ex. 15, at unnumbered 4, 20, 24, 28, 43-44, 50, 68-69, 77-78, 82. As discussed above, ACF found the same problems at the Ambrose, Duck Hill, Durant, Europa, Kosciusko, Milestone, Pickens and Reform Centers during the October review and found these problems uncorrected at the Duck Hill Center during the December review. ACF Ex. 1, at 7-11; ACF Ex. 2, at 19. Indeed, ACF cited the State licensure report on this issue during the October review. ACF Ex. 1, at 8. We also note that CMI Exhibit 15 does not include reports for all of the centers at which ACF found uncorrected deficiencies (no report for Lexington or Ackerman) and that based on the dates listed for the inspections, the reports do not necessarily reflect conditions at any of the centers at the time of the December review. Nor do they show any follow-up inspections by the State to determine if the deficiencies found by the State inspectors were corrected. Thus, the reports, as a factual matter, would not suffice to raise a dispute about all of the findings of noncompliance made by ACF as the basis for its citation of the deficiency and CMI's failure to timely correct that deficiency.

As we stated earlier, the Head Start regulations require grantees to comply with state licensure laws, and when conducting reviews for compliance with the Head Start statute and regulations, ACF may review State reports assessing that compliance. However, nothing in the Head Start statute or regulations requires ACF to retain in the Head Start program grantees found to have deficiencies under federal law simply because they may

pass State licensure inspections. Our review, moreover, is a de novo review of ACF's deficiency determinations, not the State's licensure decisions. Accordingly, the mere fact that some of the centers at issue here passed their annual licensure inspections is not in itself material to our decision.

As we concluded with respect to ACF's findings of noncompliance with fire safety requirements, we conclude that ACF's findings of noncompliance involving maintenance and other hazardous conditions are undisputed in any material respect and either alone or in combination with the fire safety noncompliance support citation of a deficiency that was not timely corrected and, therefore, provided a basis for termination of CMI's Head Start grant.

Conclusion

For the reasons stated above, we conclude that CMI has not raised a dispute of fact material to ACF's determination that CMI had a deficiency under 45 C.F.R. § 1304.53(a)(7), (10) and (b)(1) – multiple failures to ensure that its facilities, materials and equipment were safe, secure, maintained, repaired and free of undesirable and hazardous materials and conditions – that required immediate correction because it threatened the health and safety of CMI's Head Start staff and children and that the deficiency remained uncorrected after expiration of the correction period ACF established. Accordingly, we grant summary judgment upholding ACF's decision to terminate CMI's Head Start grant program.

/s/
Christopher S. Randolph

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member