

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Gulf Coast Community Action Agency, Inc.
Docket No. A-15-33
Decision No. 2670
December 16, 2015

DECISION

Gulf Coast Community Action Agency, Inc., (Gulf Coast) appeals the December 15, 2014 decision of the Administration for Children and Families (ACF), an agency of the Department of Health and Human Services (HHS), to terminate Gulf Coast's Head Start grant when Gulf Coast did not, within the timeframe ACF set for correction, correct a deficiency involving physical abuse and corporal punishment of Head Start children. ACF cited the deficiency under 45 C.F.R. § 1304.52(i)(1)(iv), which requires Head Start grantees to "ensure that all staff, consultants, and volunteers abide by the program's standards of conduct" which, among other things, must specify that these individuals "will use positive methods of child guidance and will not engage in corporal punishment, emotional or physical abuse, or humiliation." 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 the Secretary of HHS (Secretary) determines that 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." We uphold the termination for the reasons stated below and based on the evidence of record and the briefs of the parties following an in-person evidentiary hearing.

Legal Background

1. 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. §§ 9831 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

¹ The Head Start Act, Pub. L. No. 97-35, §§ 635-57 (1981), as amended, is codified at 42 U.S.C. §§ 9831 et seq. The current version of the Head Start Act is at <http://eclkc.ohs.acf.hhs.gov/hslc/standards/law>. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

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.” 42 U.S.C. § 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” or “(iii) a failure to comply with standards related to early childhood development and health services” 42 U.S.C. § 9832(2)(A).² The Secretary may require a grantee to correct a deficiency within the applicable time frame specified in the regulations or within the time frame stated in an approved quality improvement plan (QIP) where such a plan is allowed; 30 days is the correction period for a deficiency, like the one found here, that requires immediate correction because the deficiency threatens the health or safety of staff or program participants or poses a threat to the integrity of federal funds. 42 U.S.C. § 9836a(e)(1)(B)(i), (e)(2)(A); *see also* 45 C.F.R. § 1304.60(f) (HHS will terminate or deny refunding if a Head Start grantee “fails to correct a deficiency, either immediately, or within the timeframe specified in the approved [QIP]”). A single deficiency that is not timely corrected is sufficient to warrant termination of funding. 45 C.F.R. § 1303.14(b)(4) (authorizing termination for failure to timely correct “one or more deficiencies”); *Avoyelles Progress Action Comm., Inc.*, DAB No. 2559, at 8 (2014).

2. *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. Act § 646(a)(3), 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

² The Head Start regulations, which predate the definition of “deficiency” in the Head Start Act, 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).

regulations. 45 C.F.R. § 1303.14(c)(2). 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. 45 C.F.R. § 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.*, 563 F. Supp. 2d 262, (D.D.C. 2008), *aff'd*, 586 F.3d 992 (D.C. Cir. 2009).

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. *E.g.*, *Friendly Fuld Neighborhood Ctr., Inc.*, DAB No. 2121, at 3 (2007), citing *First State Cmty. Action Agency, Inc.*, DAB No. 1877, at 9 (2003), and *Rural Day Care Ass'n of Ne. N.C.*, DAB No. 1489, at 8 (1994), *aff'd*, *Rural Day Care Ass'n of Ne. N.C. v. Shalala*, No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995). If ACF makes this prima facie showing, the grantee must demonstrate by a preponderance of the evidence that it is in compliance with program standards. *E.g.*, *Friendly Fuld Neighborhood Ctr.* 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 grantee to show that it was in compliance with program standards. *Id.* at 3-4.

3. *Relevant laws of the State of Mississippi*

The Presiding Board Member notified Gulf Coast and ACF during the prehearing conference that the Board was taking judicial notice of two relevant Mississippi child abuse reporting laws. May 28, 2015 Pre-hearing Conference Results at 4. The first, Mississippi Code Annotated § 43-21-353(1), requires persons in specified occupations including child caregivers and school employees, or “any other person having reasonable cause to suspect that a child is a neglected child or an abused child,” to “cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing to the Department of Human Services [DHS].” Section 43-21-353(7) imposes a fine of up to \$5,000, or imprisonment of up to one year, on “Anyone who willfully violates” that requirement. The second requirement is in the Regulations of the Mississippi State Department of Health (MSDH) that govern licensure of child care facilities. Rule 1.7.1 in those regulations addresses “Serious Occurrences Involving Children” and requires child care facilities to “immediately report, orally to the child’s parent and either orally or in writing, via email or fax, to the licensing agency,”

which Rule 1.1.4 specifies is MSDH, “any serious occurrences involving children.” Rule 1.7.1 further provides, “Serious occurrences include accidents or injuries requiring extensive medical care, e.g., child is taken to the doctor or hospital or hospitalizations, alleged abuse and neglect, fire or other emergencies.”

Factual Background

1. The undisputed facts regarding Gulf Coast’s deficiency and failure to correct

On April 25, 2014, ACF sent Gulf Coast a Notice of Deficiency Requiring Immediate Correction. ACF Ex. 1. The notice and an attached Summary of Findings explained that during an off-site review conducted December 18, 2013 ACF identified a deficiency under section 1304.52(i)(1)(iv)(Human Resources) “that posed imminent harm or immediate danger to staff and/or children of the Head Start program” and must be corrected within 30 days. *Id.* at 1, 3. The deficiency determination was based on MDPH’s having substantiated five incidents of staff-to-child abuse or corporal punishment at Gulf Coast occurring between September 2013 and January 2014.³ *Id.* at 3-4 (describing the substantiated findings). The incidents occurred on September 9 and 25, 2013, November 19, 2013 and January 14, 2014⁴ and involved multiple teachers/assistant teachers engaging in conduct that included intentionally tossing a female child off a cot, hitting one child repeatedly with a ruler and spanking another, grabbing a child by her shirt and dragging her across the floor and shouting at her, pulling a child by the arm, hitting a child on the hand and bending back his fingers until they hurt and hitting another child on his face. *Id.*; Gulf Coast Community Action Agency Notice of Appeal and Request for Hearing Exhibits (NA Exs.) R21; S7, S11, S13-15; T7, T11, T13-14, T20; U7-8, U13, U15.⁵ Gulf Coast does not dispute that MSDH substantiated that five incidents of abuse occurred on the dates stated above. NA at 9-10; ACF Ex. 6, at 1; May 28, 2015 Pre-hearing Conference Results at 4; DAB July 1, 2015, Notice of Hearing on Termination of Head Start Funding at 4; *see generally* Gulf Coast Post-

³ Hereafter we use the term “abuse” as the shorthand reference to all of the substantiated and alleged acts taken by Gulf Coast Head Start staff against children that were the basis for ACF’s deficiency determination and termination actions.

⁴ In its Post-Hearing Brief, ACF lists January 16, 2014 as the date of the January abuse, but that is the date Gulf Coast reported the January 14, 2014 incidents to MSDH. ACF Ex. 1, at 4. Although the January 2014 incidents occurred after the date of ACF’s off-site review, Gulf Coast has not raised any issue about ACF’s including them in its deficiency determination. We see nothing improper in their inclusion since the incidents were substantiated by MSDH before ACF issued the Notice of Deficiency. In any event, they merely provide additional evidence of the abuse problem at Gulf Coast, of which there is already ample evidence.

⁵ With its Notice of Appeal Gulf Coast filed exhibits A through X, each with multiple unnumbered pages. We cite these exhibits as NA Ex. A1, A2, et seq. (using the alphabetical identifier of the exhibit and the counted page number within that exhibit).

hearing Brief (Post-hrg. Br.) (not disputing these facts). In its Post-hearing Brief, Gulf Coast also does not dispute that it did not report one of these incidents (the November 19, 2013 incident) to MSDH and was fined for that failure to report. *See* NA Ex. U15 (MSDH Child Care Encounter report dated January 21, 2014).⁶ ACF's Notice of Deficiency gave Gulf Coast 30 days from issuance of the notice to correct the deficiency. ACF Ex. 1, at 3-4.

On December 17, 2014, ACF sent Gulf Coast a Notice of Termination and Overview of Findings (Overview). Board Exhibit (Ex.) 1. The Notice informed Gulf Coast that based on a follow-up monitoring review in October 2014, ACF had determined that Gulf Coast had not timely corrected the deficiency of which it had been notified in April 2014; consequently, its Head Start grant was being terminated.⁷ *Id.* ACF based its determination on Gulf Coast's failure to report to the State of Mississippi a new allegation of abuse that occurred after the 30-day correction period had ended. *Id.* Gulf Coast does not dispute that on June 9, 2014, T.B., the Assistant Manager of the Harry C. Tartt Center, reported to D.C., the Center Manager, that in April 2014, an Assistant Teacher, M.S., told her (T.B.) that V.P., the lead teacher in her classroom, "hit [a] child on several occasions; one time spelling his name as she hit his hand (one time for each letter in his name) and other times just punched him, all due to his behavior." NA Ex. W3. T.B. and teacher F.E. also reported that V.P. told them in April 2014 that D.C. (the Center Manager) gave her permission to hit children as discipline. *Id.* at W3, W14. Gulf Coast also does not deny that although it conducted an internal investigation of these allegations, it never reported the alleged abuse to either of the Mississippi state agencies responsible for receiving and responding to allegations of abuse, the DHS and MSDH. *See* DAB May 28, 2015 Pre-hearing Conference Results at 4; DAB July 1, 2015 Notice of Hearing on Termination of Head Start Funding at 4; *cf.* Gulf Coast Post-hrg Br. at 5-7 (acknowledging the legal reporting obligations for abuse but arguing that the alleged April incidents did not rise to the level of alleged abuse requiring reporting). Nor does Gulf Coast dispute that the policies it had in place in June 2014 when it became aware of

⁶ In its Notice of Appeal, Gulf Coast stated that a center director said she had "notified the MS Department of Health in a timely manner." Notice of Appeal at 11 n.1. However, Gulf Coast cited no evidence to support this assertion and acknowledged that "there is no written record in the file regarding that issue." *Id.* We note that ACF cited to page 14 of NA Ex. U (called GCCAA Ex. U by ACF) for this failure to report. However, by our count of the unnumbered pages of the exhibit, the correct citation is to U15. The document at NA Ex. U14 addresses a different incident.

⁷ The letter states that the monitoring review (referred to later in the letter as the "Follow Up" review) was conducted December 18, 2014, but, as shown in the Overview enclosed with the letter, it was actually conducted in October 2014. Board Ex. 1, at 9; ACF Ex. 9, at 4-5. December 18 is the date in 2013 that the first review, the review that discovered the abuse resulting in the April 2014 deficiency citation, took place. *See* ACF Ex. 1, at 1; ACF Ex. 9, at 3.

the alleged April abuse required “the Center Manager and the reporting staff [to] contact the [DHS] and the [MSDH] District IX to report [any] *alleged* child abuse incident.” ACF Ex. 4, at 2 (policy dated 05/08/2014) (emphasis added).

2. Procedural history of this case before the Board

Gulf Coast filed its Notice of Appeal (NA) and accompanying exhibits on December 22, 2014. On March 6, 2015, ACF timely filed Respondent’s Response to Appellant’s Appeal (ACF Response), lists of ACF’s proposed exhibits and witnesses and ACF exhibits 1-12.⁸ On March 20, 2015, the Board issued an Order to Show Cause Why the Case Should Not Be Decided on Summary Judgment. On March 21, 2015, Gulf Coast filed Appellant’s Reply to Respondent’s Response to Appellant’s Notice of Appeal (Gulf Coast Reply), lists of proposed witnesses and exhibits and exhibits numbered 1 through 21.⁹ On April 1, 2015, Gulf Coast filed Appellant’s Response In Opposition to Order to Show Cause (Gulf Coast Opposition to Order) and eight exhibits denominated “Show Cause exhibits 1-8.” ACF then filed a Motion for Summary Judgment (Motion). In response to ACF’s Motion, Gulf Coast filed an opposition brief entitled GCCAA Reply to ACF Response to GCCAA Opposition to Show Cause and a supplemental affidavit of Board Chair P.F., marked as GCCAA Reply to ACF Response to GCCAA Opp to Show Cause Ex. 1.

After considering the parties’ submissions, the Presiding Board Member declined to rule on ACF’s motion and, instead, notified the parties that she anticipated the case would go to an evidentiary in-person hearing and scheduled a prehearing conference. At the prehearing conference, the Presiding Board Member discussed with the parties the issues remaining to be resolved and asked them to submit final witness and exhibit lists limited to those issues. May 28, 2015 Pre-hearing Conference Results at 2, 4-5. The Presiding Board Member also ordered each party to submit written direct testimony for its witnesses and to present those witnesses for cross-examination at the hearing to the

⁸ We cite these exhibits as ACF Ex. __, at __.

⁹ We cite these exhibits as Gulf Coast Reply Ex. 1, etc. followed by the internal page numbers affixed by Gulf Coast.

extent requested by the opposing party.¹⁰ *Id.* at 2. In a subsequent communication to the parties, the Presiding Board Member also ordered the parties to submit any objections to the other party's exhibits prior to the hearing. *Id.* at 2.

The Board held an in-person hearing on July 16, 2015. After noting that neither party had objected to any of the other party's exhibits, the Board admitted all of the exhibits to the record. Hearing Transcript (Tr.) at 9-11. Later in the hearing, to resolve confusion that had evolved from separation of parts of the document on DAB E-File, the Board marked and admitted to the record Board Exhibit 1, a copy of the Notice of Termination that became the official record copy of that notice, superceding any other purported copies of the Notice of Termination in the record. Tr. at 131-33.

Gulf Coast cross-examined two of ACF's witnesses and waived cross-examination of any other witnesses.¹¹ CMS did not ask to cross-examine any of Gulf Coast's witnesses. The hearing was transcribed, and each party received a copy and an opportunity to ask for correction of any material errors.¹²

¹⁰ The Head Start regulations require parties to use written direct testimony for each witness in lieu of oral testimony unless the Board grants a "substantial hardship" exemption. 45 C.F.R. § 1303.16(d). The regulations further require that any witness for whom written direct testimony is filed be presented for cross-examination. *Id.* Neither Gulf Coast nor ACF requested an exemption, and each party made all witnesses for whom written direct testimony was filed available for cross-examination. The Presiding Board Member directed the parties to submit prior to the hearing an identification chart for Head Start children and employees involved in the incidents at issue that would protect their identities. The chart submitted is titled "Pseudonym Identification Chart for GCCAA Appeal Hearing," (Identification Chart) and all references to Head Start children and employees in this decision use the pseudonyms in that chart, which correspond to the first initial of each individual's first and last name. For purposes of record clarity, we formally admit the Identification Chart to the record as Board Exhibit 2.

¹¹ Gulf Coast's revised witness list indicated it might call ACF's four listed witnesses and one other individual as adverse witnesses. Gulf Coast Revised List of Witnesses at 4-7. However, Gulf Coast subsequently clarified that it would not call the four ACF witnesses as adverse witnesses and receded from its proposal to call the fifth individual as an adverse witness when ACF clarified that it could not produce this individual without a subpoena. Notice of Hearing on Termination of Head Start Funding at 3; July 2, 2015 email from ACF to Board staff attorney and Gulf Coast counsel. The Board explained that it had no direct authority to order the witness to appear but that Gulf Coast could submit a subpoena request for the Board's consideration. Gulf Coast did not submit a subpoena request.

¹² The parties both notified the Board that the teacher identified on page 139 of the Transcript at line 12 actually is "F.E", not "F.P.". We agree and correct that particular error but find none of the other errors identified by Gulf Coast (ACF identified no other errors) to be prejudicial.

Discussion

1. *Gulf Coast has not shown that it timely corrected the deficiency cited under 45 C.F.R. 1304.52(i)(1)(iv); accordingly, the termination of its Head Start Grant is lawful.*

A. *ACF had a legal and factual basis for citing the abuse deficiency.*

Under federal law, Head Start grantees “must ensure that all staff, consultants, and volunteers abide by the program’s standards of conduct,” which “must specify that . . . [t]hey will use positive methods of child guidance and will not engage in corporal punishment, emotional or physical abuse, or humiliation.” 45 C.F.R. 1304.52(i)(1)(iv). A determination by ACF that a grantee has failed to meet this requirement is a determination of an immediate deficiency, that is, a deficiency requiring immediate correction because failure to comply with this requirement threatens the health and safety of Head Start children. ACF determined that Gulf Coast had such a deficiency based on the five allegations of staff abusing or using corporal punishment on Head Start children that, as Gulf Coast admits, were substantiated by MSDH following investigation. Thus, as a matter of law ACF was required to initiate a termination action and to terminate Gulf Coast’s Head Start grant if Gulf Coast did not timely correct the deficiency.

Gulf Coast does not dispute that the Act and regulations authorize ACF to terminate a Head Start grant for deficiencies involving abuse that are not timely corrected; Gulf Coast also does not dispute the material facts found by ACF during its review that provided the basis for its determination that Gulf Coast had a deficiency involving multiple instances of abuse. Gulf Coast argues, however, that ACF could not initiate a termination action based on its findings of multiple substantiated instances of abuse because by the time ACF issued the Notice of Deficiency on April 25, 2014, Gulf Coast had already corrected the deficiency. Gulf Coast Post-hrg. Br. at 7-10.

Gulf Coast cites testimony by two ACF witnesses – Jeffrey Fredericks, Regional Program manager, Office of Head Start, and Daphne Dabrow, Program Specialist Office of Head Start. Both witnesses submitted written direct testimony and were cross-examined at the hearing. ACF Exs. 13 (Fredericks Declaration) and 14 (Dabrow Declaration); Tr. at 19-138 (Fredericks cross-examination), 142-84 (Dabrow cross-examination). Gulf Coast cites cross-examination testimony by Ms. Dabrow and Mr. Fredericks acknowledging that they encouraged Gulf Coast to begin correcting the abuse situation even before the deficiency notice was issued and were aware that Gulf Coast had taken some actions in that direction. Gulf Coast Post-hrg. Br. at 8-10. Gulf Coast cites in particular testimony by Ms. Dabrow that she and Mr. Fredericks had a phone call with Gulf Coast on January 27, 2014 during which they “discussed [Gulf Coast’s] issue with corporal punishment and the need to rectify the situation with haste.” *Id.* at 8-9 (transcript citations omitted).

Gulf Coast also cites Mr. Fredericks' testimony that he discussed the "child abuse situation and other matters" with Gulf Coast during February 2014 and that he "acknowledge[d] that the policies and procedures were revised." *Id.* at 9 (transcript citations omitted). Gulf Coast concludes, "The fact that ACF staff admits that [Gulf Coast's] corrective actions began prior to the issuance of the Notice of Deficiency at ACF's direction, the Appeals Board must consider these pre-notice actions by [Gulf Coast] as further proof that [Gulf Coast] corrected the deficiency in a timely manner." *Id.* at 10.

We find no basis for this argument. As a factual matter, beginning to correct a child abuse problem does not mean the problem does not exist. From a legal standpoint, furthermore, Gulf Coast's argument fails to distinguish between the facts showing deficient practices found by ACF during a review that ACF considers and cites as a basis for the deficiency determination stated in a Notice of Deficiency and the legally effective deficiency determination itself. The deficiency determination does not exist legally, that is, does not authorize initiation of a termination action or trigger a corrective action period, until ACF actually issues the Notice of Deficiency. That distinction is one Ms. Dabrow was trying to make when she testified that although grantees are expected to begin correcting deficient practices immediately after becoming aware of them, the "deficiency comes the date of the notification." Tr. at 180; *see also* Tr. at 162 (stating that a grantee "is compliant until they receive official notification from the Office of Head Start that they either – have an area of non-compliance, a deficiency or immediate deficiency"); Tr. at 163 (stating that "the time period started for their non-compliance or deficiency, it started once they received their notification").

Thus, Gulf Coast's attempt to depict Ms. Dabrow's testimony as an admission that Gulf Coast corrected its deficiency prior to receiving the Notice of Deficiency, Gulf Coast Post-hrg. Br. at 10, is not supported by her testimony and certainly is not supported in law. In the interim between a program review and the issuance of a Notice of Deficiency, ACF personnel, quite sensibly, may engage in ongoing discussions with the grantee about the review findings and encourage or assist a grantee's efforts to initiate corrective action. However, these activities do not alter the fact that the review findings take legal effect once ACF makes the deficiency determination communicated to the grantee in that notice. It is the Notice of Deficiency that initiates ACF's termination action and provides the grantee with an opportunity to correct that, if timely and successful, avoids termination. Consequently, the fact that ACF shares with a grantee information about problems found during a review that might lead ACF to determine a deficiency exists and encourages the grantee to take immediate steps to remediate those problems does not in any way diminish ACF's authority to issue a Notice of Deficiency based on the review findings and to terminate the grant if ACF subsequently finds the grantee has not corrected the deficiency within the time frame set out in the Notice. Putting it another

way, Head Start grantees are expected to be aware of problem areas and to immediately take steps to correct them rather than waiting to see if ACF issues a Notice of Deficiency, but the fact that a grantee takes such steps does not insulate it from a deficiency citation or termination for failure to timely correct that cited deficiency.

In any event, Gulf Coast’s statement that “corrective actions *began* prior to the issuance of the Notice of Deficiency . . . ,” *id.* (emphasis added), falls far short of a statement, much less proof, that Gulf Coast, in fact, completed correction of the abuse deficiency prior to issuance of the notice of deficiency. Because this statement does not even allege full correction during that interim period, we need not engage in an extended discussion of the record facts that would undercut such an assertion. However, it is worth noting that the evidence regarding changes Gulf Coast made to its Child Abuse, Neglect and Isolation policy during the interim period, changes to which Gulf Coast refers (Gulf Coast Post-hrg. Br. at 9), would not support a finding of full correction by April 28, 2014. The record shows that the policy change made during the interim period – on January 14, 2014 – merely changed the pay consequences related to suspensions of employees who were being investigated in connection with abuse allegations, changing suspension with pay to suspension without pay. *Compare* ACF Ex. 2, at 2 with ACF Ex. 3, at 2. While this may have been a meritorious policy change, it did not address the policy’s instructions for reporting abuse, which were critically significant, especially in light of Gulf Coast’s subsequent failure to report the June 2014 allegation of neglect that had allegedly occurred in April 2014. The January 14, 2014 policy revision still required reports of suspected abuse to go only to DHS, not to both DHS and MSDH. However, MSDH was the agency charged with investigating the type of abuse allegations at issue here and, in fact, was the agency that investigated and substantiated the five incidents cited in ACF’s review. *See* ACF Ex. 1, at 3-4; ACF Ex. 8; NA Exs. R26-27; S14-16; U15-16; V15-16.¹³ The addition of a duty to report such allegations to MSDH, as well as to DHS, was not approved by the Gulf Coast Board and did not appear in its policy until May 15, 2014. ACF Ex. 4, at 2.

We conclude that ACF was authorized to issue the Notice of Deficiency in this case and to inform Gulf Coast that its Head Start grant would be terminated if it did not timely correct the deficiency cited in that notice and the accompanying Summary of Findings.

¹³ MSDH investigated the allegations here pursuant to rules governing licensure of child care facilities. Rule 1.7.1 addresses “Serious Occurrences Involving Children” and requires child care facilities to “immediately report” the type of occurrences described in the rule, which include, among others, “alleged abuse and neglect” The DHS statute providing for reporting of child abuse and neglect, Mississippi Code Annotated 43-21-353(1), mandates reporting by designated individuals (e.g. teachers, doctors, ministers, psychologists, social workers) who have “reasonable cause to suspect that a child is a neglected child or an abused child”

B. Since Gulf Coast did not correct its deficiency under 45 C.F.R. 1304.52(i)(1)(iv) by the end of the 30-day correction period, the termination was lawful.

(i) Gulf Coast's failure to report allegations of abuse its management staff received in June 2014, as required by its revised policy and Mississippi law, is sufficient, without more, to uphold the termination.

As stated above, ACF's Notice of Deficiency, dated April 25, 2014, gave Gulf Coast 30 days to correct the abuse deficiency cited under section 1304.52(i)(1)(iv). ACF states that the 30-day correction period ended May 28, 2015, a date it apparently cites as the 30th day based on its further statement that Gulf Coast received the Notice of Deficiency on April 28, 2014. Gulf Coast does not dispute that the 30-day period for correction began April 28, 2014 and ended on May 28, 2014.¹⁴

ACF sent the Notice of Termination to Gulf Coast on December 17, 2014, and Gulf Coast received it on December 18, 2014. Board Ex. 1. The Notice informed Gulf Coast that based on a monitoring review, ACF had determined that Gulf Coast had not corrected its deficiency within the 30-day time period allotted. *Id.* ACF enclosed with the Notice a Follow-up Review Report Overview of Findings (Follow-up Overview) that explained the specific findings underlying its determination. *Id.* at 5-14. As described at pages 8-10 in the Overview, ACF based its determination that Gulf Coast had not timely corrected the deficiency on Gulf Coast's flawed response in June 2014 to additional allegations of abuse alleged to have occurred in April 2014. In June 2014, T.B., the Assistant Manager of the Harry C. Tart Center, informed Gulf Coast management staff that assistant teacher M.S. had told her in April 2014 that V.P., the lead teacher in her classroom, "hit [a] child on several occasions: one time spelling his name as she hit his hand (one time for each letter in his name) and other times just punched him, all due to his behavior." NA Ex. W3. In addition, T.B. and teacher F.E. reported that V.P. told them in April 2014 that D.C., the Center Manager of the Harry C. Tart Center, had given V.P. permission to hit children as discipline. *Id.* at W3, W14. A principal reason for ACF's finding that Gulf Coast's response to these allegations of abuse evidenced a failure to correct was Gulf Coast's admitted failure to report the allegations to either DHS

¹⁴ The Notice of Termination states that the Notice of Deficiency "was issued" to Gulf Coast on April 28, 2014, but the date on the notice is April 25, 2014, and that is the notice date referred to by Gulf Coast. *See* Board Ex. 1, at 1; ACF Ex. 1, at 1; Gulf Coast Post-hrg. Br. at 1. Since Gulf Coast does not dispute ACF's assertion that the 30-day correction period ended on May 28, 2014, and since that date gives Gulf Coast the benefit of any doubt, we need not resolve this minor discrepancy in dates.

or MSDH in June 2014 when management staff were informed of them.¹⁵ Board Ex. 1, at 9-10; ACF Post-hrg. Br. at 5-8; Gulf Coast Post-hrg. Br. at 4 (referring to the “fact that [Gulf Coast] did not report TB’s accusations to Mississippi authorities”); Notice of Hearing on Termination of Head Start Funding at 4.

In our view, Gulf Coast’s admitted failure to report the allegations of abuse it received from staff in June 2014 is, without more, sufficient to uphold the termination. Gulf Coast violated state child abuse reporting laws as well as Gulf Coast’s revised Child Abuse Policy, all of which required that allegations of abuse be reported to two state agencies. ACF Ex. 4, at 2-4; MSDH Rule 1.7.1. Reporting allegations of child abuse to the applicable authorities so that they can be thoroughly investigated and children protected from the alleged abuser is fundamental to meeting the federal requirement that grantees “ensure that all staff, consultants, and volunteers abide by the program’s standards of conduct” which, among other things, must specify that these individuals “will use positive methods of child guidance and will not engage in corporal punishment, emotional or physical abuse, or humiliation.” If such allegations are not reported, child abuse may go undetected and be repeated. In addition, the victim of the abuse may not be provided with protective or other necessary services. Gulf Coast recognized that reporting is fundamental by revising its policy in May 2014 to clarify that reporting must be done and must include reports to both state agencies. Yet, Gulf Coast did not report the abuse allegations made in June 2014 to either state agency.

Gulf Coast does not dispute either the existence of a legal duty to report alleged abuse or that it did not report the allegations of abuse received by its management staff in June 2014. Instead, Gulf Coast argues that the duty to report did not apply here. Gulf Coast argues that the duty did not apply because, in Gulf Coast’s view, Gulf Coast did not have “*reasonable* cause to suspect that a child is . . . an abused child” as stated in the DHS statute. Gulf Coast Post-hrg. Br. at 6 (emphasis added by Gulf Coast). Gulf Coast states,

¹⁵ ACF also cited the follow-up review findings that T.B. waited approximately two months before telling management of the allegations of abuse she received in April 2014; that Gulf Coast did not immediately suspend V.P., D.C. and T.B. for failure to follow its abuse policy; that Gulf Coast failed to contact the alleged victim’s family; and Gulf Coast’s failed to complete its own child abuse and neglect form and “reporting checklist.” Board Ex. 1, at 9-10; ACF Post-hrg. Br. at 3, 6, 9 (record citations omitted). We need not determine whether these findings provide further support for the termination since we have concluded that Gulf Coast’s failure to report the abuse allegations that management staff received in June 2014 to DHS and MDPH is sufficient to support the termination. However, we note that in its Post-hearing Brief, Gulf Coast disputes only one of ACF’s stated additional bases for the termination: Gulf Coast admits it had a duty to suspend staff accused of abuse pending investigation but says it had no way to suspend V.P. or T.B. because the allegations were made during the summer break and resolved before school resumed. Gulf Coast Post-hrg. Br. at 6.

Given T.B.'s refusal to fill out a full report form, the hearsay nature of her testimony, and her status as a disgruntled employee, [Gulf Coast] did not have reasonable suspicion that abuse actually occurred in April 2014. Because [Gulf Coast] did not have a reasonable suspicion that TB's statements showed a genuine likelihood of abuse, [Gulf Coast] had no reporting obligation under the applicable Mississippi regulations. Likewise, after the internal investigation and the investigation conducted by Christopher Smith, reasonable cause, as contemplated by the regulations, was not evident to justify filing a written or oral report of child abuse to either [DHS or MSDH].

Id. at 6-7. This argument fails for several reasons. First, it fails to recognize the distinct reporting duties in each of the state reporting laws of which the Board has taken judicial notice. The DHS statute states the duty of specified individual mandatory reporters (such as teachers, doctors and social workers) having contact with children in any environment to report when they have "reasonable cause to suspect" that a child has been abused. The MSDH regulations, on the other hand, are licensing regulations specifically applicable to child care facilities and impose a duty on the facility to "immediately" report "alleged abuse or neglect." The duty to report under the MSDH regulations applies unqualifiedly to any "allegation" of abuse or neglect, as the quoted language plainly shows. Thus, even assuming Gulf Coast is correct that the circumstances surrounding T.B.'s allegations did not give them "reasonable cause to suspect" that triggered the reporting requirement under the DHS statute (although we make no finding to that effect), the state's licensing rules clearly required Gulf Coast to report the allegations per se to MDPH. The regulations did not give Gulf Coast discretion to delay a decision to report the allegations pending an internal investigation. Since Gulf Coast admits it did not report the allegations to MDPH, it clearly was in violation of its own revised policy as well as state law.

Gulf Coast suggests that it should be released from the duty to report because in July "at the advice of ACF's Jeffrey Fredericks, [Gulf Coast] engaged special investigative Counsel to perform an independent review of TB's allegations and to advise the Board on its legal obligations regarding TB and also a set of anonymous letters received by [Gulf Coast]." Gulf Coast Post-hrg. Br. at 5, citing Tr. at 107:4-20. Gulf Coast states that this investigation concluded that "TB's allegations were a ruse . . . [and a]t this point, no one has ever found any evidence substantiating any claim of abuse by TB." *Id.* at 6. We first note that Gulf Coast's statement as to Mr. Fredericks' "advice" does not accurately reflect Mr. Fredericks' testimony. When counsel for Gulf Coast asked Mr. Fredericks whether he "suggested . . . Gulf Coast hire an investigator to look at the child abuse allegation of T.B.," Mr. Fredericks replied that that was "partially true." Tr. at 106-07. He explained that his "suggestion was for a much broader examination of the overall turmoil, the overall situation at Gulf Coast" but that the Gulf Coast Board narrowed the

internal review “to a single very specific incident . . .” Tr. at 107. Mr. Fredericks also testified that he never told Gulf Coast they did not have to report the allegations to DHS and MSDH, and that in his opinion, they “absolutely” had an obligation to do so. Tr. at 139.

We find in the record no evidence that Mr. Fredericks or anyone else at ACF ever told Gulf Coast there was no duty to report to the State the allegations of abuse that management staff received in June 2014. But even assuming Gulf Coast received such advice from ACF, it would not change Gulf Coast’s legal obligation under Mississippi law, or at the very least, under the child care facility licensing regulations, to “immediately report . . . any serious occurrences involving children[,] . . . includ[ing] [defining “serious occurrences”] . . . alleged abuse and neglect . . .” MSDH Child Care Facility Licensing Rule 1.7.1. This rule clearly requires reporting of all allegations of child abuse to the state. That duty obtains regardless of whether the grantee chooses to conduct a separate investigation. Gulf Coast points to no legal authority allowing a child care facility to substitute for this clear duty to report alleged abuse to the appropriate state agencies an internal investigation of those allegations by a private third party engaged by the facility.

In summary, Gulf Coast had a clear legal obligation to report to MDH and MSDH the allegations of abuse that management staff received in June 2014, but admittedly did not do so. This was enough to support ACF’s determination that Gulf Coast did not timely correct its deficiency but, rather, that the deficiency cited under 45 C.F.R.

§ 1304.52(i)(1)(iv) continued and still threatened the health and safety of the children in Gulf Coast’s Head Start program. Accordingly, ACF had a basis for terminating Gulf Coast’s Head Start grant.

(ii) Gulf Coast’s alleged efforts to correct are immaterial since the recurrence of abuse that went unreported shows that any such efforts failed; moreover, apart from this recurrence, Gulf Coast has not shown that its corrective action plans were adequate to achieve full correction.

Gulf Coast notes that it submitted to ACF a three-page document described as an “Action Plan and Extra Supports” (action plan) in January 2014 and a self-denominated “Revised Corrective Action Plan” in May 2014 containing approximately 600 pages. Gulf Coast Post-hrg. Br. at 3, 8; ACF Ex. 6; *see also* List of Exhibits in Support of Appellant [Gulf Coast’s] Reply Brief #1 and Gulf Coast Reply Ex. 1, at 1-3. Gulf Coast asserts that the latter submission was merely a revision of the action plan it submitted in January and

allegedly implemented.¹⁶ See Gulf Coast Reply Ex. 1, at 1-3. Gulf Coast states, “Contrary to ACF’s assertion that the plan was inadequate and not actually implemented, the corrective action plan . . . shows significant, implemented actions aimed at controlling and preventing corporal punishment.” Gulf Coast Post-hrg. Br. at 3.

We find no merit to this argument.¹⁷ We note at the outset that Gulf Coast’s statement falls short of contending that either plan (singly or together) was adequate and implemented in a manner to accomplish full correction. Moreover, as we discuss later, even assuming we were to conclude that either or both plans constituted meaningful plans and, together with other evidence, showed some steps toward implementing the plans, that would not change our decision. What Gulf Coast fails to acknowledge is that the incidents of unreported abuse that occurred after the 30-day correction period ended show that whatever steps toward correction it took, no matter how well intended or how fully implemented, were not, in fact, adequate to correct the deficiency. See *Pinebelt Ass’n for Cmty Enhancement*, DAB No. 2611, at 12 (2014) (finding corrective actions alleged to have been taken during the corrective action period “ultimately irrelevant in light of the undisputed facts that establish that the deficiency [involving allegations of teacher sexual abuse of a child] remained uncorrected”). As Dr. Fredericks aptly testified,

whatever plans were in place to have gotten the job done . . . did, in fact, fall short. And the first instance coming out of the gate right after the corrective action period was mishandled by an agency with a record of substantiated claims of abuse.

Tr. at 40. Given the child welfare interests reflected in the Head Start regulations, it is entirely reasonable for ACF to consider events after a corrective action period has ended in determining whether a deficiency has been corrected. This is especially true, where, as here, ACF has cited a deficiency that threatens the health and safety of children.

In any event, putting aside the fact that the unreported recurrence of alleged abuse evidences failure to correct, the record before us does not support Gulf Coast’s claims that its corrective action plans or other documents of record (such as Board minutes) show that it corrected its deficiency. ACF presented substantial, persuasive testimony that neither plan was adequate. Mr. Fredericks testified on cross-examination that he did

¹⁶ The assertion that the approximately 600-page plan submitted in May was merely a revision of the three-page plan submitted in January seems incongruous on its face. Mr. Fredericks testified on cross-examination that he did not consider the January 2014 submission a “plan” but, rather “some ideas” and “some information,” explaining that a plan would describe “people responsible, timeframes, accountability, evaluation.” Tr. at 39.

¹⁷ For essentially the same reasons discussed below, we also find no support for Gulf Coast’s assertion that certain statements in Board of Directors’ minutes are evidence that Gulf Coast timely corrected the deficiency. See Gulf Coast Post-hrg. Br. at 3-4.

not consider the action plan (the January 2014 submission) a “plan” but, rather “some ideas” and “some information,” explaining that a plan would describe “people responsible, timeframes, accountability, evaluation.” Tr. at 39. Mr. Fredericks also testified that the Revised Corrective Action Plan, which he reviewed in preparation for his written direct testimony, contained nothing that “demonstrate[s] that Gulf Coast implemented an effective plan to ensure that staff used only positive methods of child guidance instead of engaging in corporal punishment and abuse.” ACF Ex. 13, at 2-3.

Catherine Kuker, a Head Start Process Reliability Specialist on the follow-up review survey, testified that the plan, which she says Gulf Coast provided to her in multiple binders during that survey, “lacked specific and measurable goals, objectives and how to specifically accomplish the stated goals. There was also no evidence that a plan to correct its abuse and corporal punishment problems was implemented.” ACF Ex. 16, at 1. Similarly, Teresa Collins, the team leader on the follow-up survey, testified that “there was nothing in the hundreds of documents (it was mostly trainings prior to the corrective period) that demonstrated Gulf Coast implemented a cohesive plan to correct its abuse and corporal punishment issues, even as late as October 2014, months after the corrective period ended.” ACF Ex. 15, at 2.

Gulf Coast chose not to cross-examine Ms. Collins or Ms. Kuker, and its cross-examination of Mr. Fredericks did not undercut his direct testimony. Gulf Coast asserts that it “did not need to cross-examine additional witnesses because Mr. Fredericks and [Dr. Dabrow] provided testimony before the Appeals Board that proved that [Gulf Coast] corrected, within the allotted time period, the issues with corporal punishment that prompted the issuance of the Notice of Termination.” Gulf Coast Post-hrg. Br. at 7-8. None of the testimony cited by Gulf Coast constitutes such proof. Gulf Coast cites the sworn declarations of Pamela Fairley, its Board Chairwoman, and Lakisha McClendon that “[Dr. Dabrow] met with [Gulf Coast] on June 9, 2014 and said that [Gulf Coast] corrected the deficiency.” *Id.* at 3 (record citations omitted). However, Dr. Dabrow denied that in her sworn declaration. She acknowledged meeting with Gulf Coast on that date to “provide technical and training support to Gulf Coast and encourage[] Gulf Coast to come up with a plan to fix its systemic issues for the benefit of the children.” ACF Ex. 14, at 2. However, she denied saying they were in compliance.

I never told anyone at Gulf Coast that the grantee had corrected its pervasive abuse and corporal punishment issues. I never stated Gulf Coast was in compliance with federal regulations.

Id. at 2. Gulf Coast’s cross-examination did not undercut Ms. Dabrow’s statement. Moreover, as ACF notes, the minutes of Gulf Coast’s July 10, 2014 Board of Directors meeting “belie [Gulf Coast’s] contention” ACF Post-hrg. Br. at 12, citing Gulf Coast Trial Affidavit of Mary Bowser at 11. ACF’s citation is to Board minutes that were attached to Board Member Bowser’s Trial Affidavit, and the minutes state that Dr.

Dabrow discussed “next step[s]” Gulf Coast should take which, in context, clearly are prospective steps, steps toward correcting the deficiency; i.e. “Making sure every Child is Safe,” having “No maltreatment . . .,” and “to finish the investigations” (presumably a reference to the internal investigation). *Id.* Furthermore, Gulf Coast did not directly challenge Dr. Dabrow’s statement in her declaration that she “do[es] not have the authority to make such statements on behalf of ACF. ACF’s Office of Head Start Central Office in Washington D.C. determines whether a grantee has corrected its deficiencies.” ACF Ex. 14, at 2. Thus, even if Dr. Dabrow had made the alleged statement, it would not be binding on ACF. Indeed, Gulf Coast knew that, because the Notice of Deficiency stated that ACF would “conduct a follow-up review to validate your compliance with this regulation[]” and that any notice of failure to correct would be communicated in “a letter stating our intent to terminate the Head Start designation of your agency.” ACF Ex. 1, at 1. ACF did do the follow-up review, concluded that Gulf Coast had not corrected the abuse deficiency and issued the Notice of Termination.

For the reasons discussed, we conclude that Gulf Coast’s efforts to correct its deficiency are not material, most importantly, but not exclusively, because those efforts did not correct the abuse problems that led to ACF’s deficiency determination and ultimately to termination of Gulf Coast’s Head Start grant.

Conclusion

For the reasons stated above, we conclude that ACF lawfully terminated Gulf Coast’s Head Start grant.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Sheila Ann Hegy
Presiding Board Member