Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Camden County Council on Economic Opportunity
Docket No. A-07-90
Decision No. 2116

DATE: September 25, 2007

DECISION

The Camden County Council on Economic Opportunity (CCC) appealed a determination by the Administration for Children and Families (ACF) to terminate funds for CCC's Head Start grant. With its appeal, CCC filed a Motion to Dismiss, arguing that "ACF's decision to terminate CCC's Head Start grant should be reversed ab initio for a number of procedural and substantive infirmities." CCC Revised Written Appeal at 6 (Revised Appeal). In response to CCC's appeal, ACF requested that the Board enter summary judgment against CCC on the ground that "CCC has not presented reliable or sufficient evidence that there is any genuine or material issue of fact with respect to ACF's [deficiency] findings." ACF Response to Respondent's Brief and In Support of Summary Judgment (ACF Response).

For the reasons stated below, we deny CCC's motion to dismiss this action and grant ACF's motion for entry of summary judgment and affirm ACF's decision to terminate funds for CCC's Head Start grant.

Legal Background

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

To ensure that eligible children and their families receive high quality services responsive to their needs, Head Start grantees must comply with the Head Start Program Performance Standards codified in 45 C.F.R. Part 1304. Head Start Performance Standards (final rule), 61 Fed. Reg. 57,186 (Nov. 5, 1996). These performance standards cover the entire range of Head Start services and constitute the minimum requirements that a Head Start grantee must meet in three areas: Early Childhood Development and Health Services; Family and Community Partnerships; and Program Design and Management.

A grantee's noncompliance with a program performance standard or other Head Start requirement constitutes a "deficiency" if it meets one of the definitions of that term in 45 C.F.R. § 1304.3(a)(6).

The Secretary is required to conduct a periodic review of each Head Start grantee at least once every three years. 42 U.S.C. § 9836a(c)(1)(A). If, as a result of a review, the Secretary finds a grantee to have a deficiency, he requires the grantee to correct the deficiency immediately, or within ninety days, or pursuant to a Quality Improvement Plan.[1] 42 U.S.C. § 9836A(d)(1)(B)(ii). The period for correcting deficiencies under an approved QIP may not exceed one year from the date the grantee is notified about them. 42 U.S.C. § 9836A(d)(2)(A); 45 C.F.R. § 1304.60(c).

Section 1303.14(b)(4) of 45 C.F.R. provides for ACF to terminate funding if a grantee "has failed to timely correct one or more deficiencies as defined in 45 C.F.R. Part 1304." This is one of nine grounds for termination set out in section 1303.14(b), which states that "[f]inancial assistance may be terminated for any or all of [these] reasons." ACF cited section 1303.14(b)(4) as the basis for this termination. CCC Ex. 1, at 1. To correct a deficiency, the grantee must fully comply with the performance standard at issue. Philadelphia Housing Authority, DAB No. 1977, at 11 (2005), aff'd Philadelphia Housing Authority v. Leavitt, No. 05-2390, 2006 WL 2990391 (E.D.Pa. Oct 17, 2006).[2] A single

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[1] This authority is exercised by a "responsible HHS official." 45 C.F.R. § 1304.60(b).

[2] In Philadelphia, the grantee argued that, to "correct a deficiency," it was not required to demonstrate that it fully complied with the program requirement, but only that it substantially performed that requirement. (CCC did not make this

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uncorrected deficiency is sufficient to warrant termination of funding. 45 C.F.R. § 1303.14(b)(4) (authorizing termination for failure to correct "one or more deficiencies"); The Human Development Corporation of Metropolitan St. Louis, DAB No. 1703, at 2 (1999).

The Board has held that, under appropriate circumstances, it may grant summary judgment in a Head Start termination case without violating a grantee's right to a hearing. Philadelphia Housing Authority, at 7; Campesinos Unidos, Inc., DAB No. 1518 (1995), citing Travers v. Shalala, 20 F.3d 993, 998 (9th Cir. 1994); DOP Consolidated Human Services Agency, Inc., DAB No. 1689, at 6-8 (1999). On the other hand, the Board may hold a hearing if the

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[2](...continued)
argument in this case.) Pursuant to the following considerations, the Board rejected the grantee's argument. While one part of the definition of a deficiency (42 C.F.R. § 1304.3(a)(6)(i)(C)) sets forth substantial performance as the applicable standard for an initial finding of a deficiency in the listed areas, that definition does not address the standard for correction of an identified deficiency in any area that is set forth as a basis for termination. Specifically, the provision at 45 C.F.R. § 1304.60(f) that requires correction of identified deficiencies does not incorporate a substantial performance standard; nor is there any mention of substantial performance in the termination provision for failure to timely correct deficiencies at 45 C.F.R. § 1303.14(b)(4). Furthermore, ACF's interpretation is reasonable since permitting grantees to only partially correct a deficiency to avoid termination would effectively result in grantees never fully complying with Head Start requirements. Finally, under section 1304.3(a)(iii) and 1304.61, ACF may require a grantee to come into full compliance in order to correct noncompliance that does not constitute a deficiency unless uncorrected. It is logical to read the regulations to accord ACF the same authority to require full compliance to correct a deficiency, which represents a significant failing, that is available for uncorrected noncompliance. The court agreed with the Board's reasoning.

Although we conclude that ACF could reasonably require full compliance to correct deficiencies under 45 C.F.R. § 1304.3(a)(6)(i)(C), the outcome in this case is not dependent on that conclusion. In our review of the facts below, we would conclude that CCC did not raise a material dispute of fact as to whether it was substantially performing in the relevant program areas.

Board determines its "decision making would be enhanced by oral presentations and arguments in an adversary, evidentiary hearing." 45 C.F.R. § 16.11(a); First State Community Action Agency, Docket No. A-02-122, Ruling on Summary Disposition, dated October 29, 2002.

In reviewing a motion for summary disposition in the nature of summary judgment, the Board has applied a standard similar to that applied in court. Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Union Township Community Action Organization, DAB No. 1976, at 6. The party moving for summary judgment bears the initial burden of showing the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine factual dispute. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on general denials in its pleadings or briefs, but must furnish evidence of a genuine dispute concerning a material fact--a fact that, if proven, would affect the outcome of the case under governing law. Id. at 586, n.11; Celotex, 477 U.S. at 322. In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence in that party's favor.

Background

From September 11, 2005 to September 16, 2005, ACF conducted a review of CCC's Head Start program, using the Program Review Instrument for Systems Monitoring (PRISM review). By letter dated January 27, 2006, ACF notified CCC that it had been designated a grantee with deficiencies. CCC Ex. 3. The notice and the attached report identified twelve deficiencies and specified correction periods of 30 days for some and 90 days for others.[3] CCC Ex. 3, at 42-43.

[3] The notice also identified 36 "areas of noncompliance not related to a deficiency" to be corrected in 90 days. CCC Ex. 3, at 44-45 (CCC has numbered the pages of its exhibits sequentially). Citing 45 C.F.R. § 1304.61(b), ACF informed CCC

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ACF conducted two follow-up reviews. The first took place during the week of March 20, 2006 and focused on the corrections required in 30 days (March review). The second review took place during the week of May 15, 2006 and focused on the corrections required in 90 days (May review).

By letter dated April 9, 2007, ACF notified CCC that, based on the reviews, it was terminating CCC's Head Start grant. CCC Ex. 1. As the basis for the termination, ACF cited four allegedly uncorrected deficiencies involving Child Health and Developmental Services; Facilities, Materials and Equipment; and Record-Keeping and Reporting.

On May 11, 2007, CCC filed a Written Appeal and Request for Hearing (CCC Written Appeal), which included a Motion to Dismiss and a Request for Documents. In its appeal, CCC stated that it could not fully identify the legal and factual issues in dispute prior to receiving additional documents, such as surveyors' notes and information as to the records reviewed by the surveyors. CCC Written Appeal at 11.

On May 29, 2007, the Presiding Board Member (PBM) conducted a conference call. After discussion with the parties, the PBM set a schedule for discovery, briefing, submission of written direct testimony, and an in-person hearing to begin on September 5. Pursuant to that schedule, ACF produced the documents requested and filed a Brief in Opposition to the Appellant's Motion to Dismiss (ACF Br. in Opposition). CCC filed a Revised Written Appeal and Request for Hearing (Revised Appeal) on July 9, 2007. After receiving a one-week extension, ACF filed a Response to Appellant's Brief and in Support of Summary Judgment (ACF Response) on August 3, 2007.

Immediately upon receiving ACF's submission, CCC requested an extension of time in which to file its response and the written direct testimony of its witnesses. As good cause for its

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that, if it was unable to correct the specified areas of noncompliance within the 90 days, it would "be judged to have a deficiency that must be corrected within the time frames specified by the responsible HHS official." Id. ACF reviewed these areas of noncompliance in the May review and determined that CCC had not corrected six of them. CCC Ex. 2, at 18-19, 34. ACF required CCC to submit a QIP as to these newly-identified deficiencies "detailing your six-month plan for corrective action . . . ." CCC Ex. 2, at 6.

request, CCC cited the extension ACF had received to file its response brief, the volume of information addressed in the brief and enclosures, and counsel's schedule, including travel and other client commitments. ACF did not object to the extension.

Section 1303.17(a) of 45 C.F.R. requires Head Start termination hearings to begin within 120 days of the Board's receipt of the grantee's appeal. In this case, that would be September 9. Section 1303.17(c)(2) provides this deadline may be extended if either party requests summary judgment. ACF has expressly requested summary judgment in its August 6th submission; CCC has requested a form of summary disposition by filing a Motion to Dismiss. Therefore, the PBM concluded that the Board has the authority to schedule a hearing beyond September 9 and granted CCC's request. After discussion with the parties, the PBM set a revised schedule, including an in-person hearing to begin October 29, 2007 in Camden, New Jersey.

Pursuant to that revised schedule, CCC filed its Reply and Opposition to [ACF's] Response to Appellant's Brief, and In Support of Summary Judgment (CCC Response).

CCC filed Exhibits 1 through 28, and ACF filed Exhibits A through T.

Ruling on CCC's Motion to Dismiss

CCC presents three grounds in support of its position that ACF's decision to terminate CCC's Head Start grant should be reversed. We discuss each ground and explain why we reject CCC's arguments.

1. The May review did not begin within the 90-day corrective action period.

ACF required CCC to correct nine of the deficiencies identified in the September 2005 PRISM review within 90 days of receipt of the January 27, 2006 notice of deficiencies. CCC Ex. 3, at 43. CCC asserts that ACF's May review is invalid because ACF began the May review prior to the expiration of the 90-day corrective action period. CCC Written Appeal at 6-9. CCC asserts it received the January 27 notice on February 14 and that the May review "took place during the week of May 14, 2006, only 89 days after notice of the Initial Determination." Id. at 3, citing CCC Exs. 4; 5.

In its Brief in Opposition filed June 15, 2007, ACF asserts that CCC is mistaken as to the number of days that elapsed between CCC's receipt of the notice and the May review. ACF represents

that CCC received the January 27 notice on February 13 and relies on a U.S. Postal certified mail receipt addressed to CCC with a signature indicating receipt on February 13. ACF Br. in Opposition at 11, citing ACF Exs. A, B. ACF represents also that the members of the review team met on Sunday, May 14, but that the team did not arrive at CCC's premises to begin the review until Monday, May 15. Id.

In its Revised Appeal filed July 9, 2007 and CCC Response filed August 27, 2007, CCC did not offer any argument or cite any evidence to dispute ACF's factual assertions. Therefore, we conclude the May review did not begin within the 90-day corrective action period.[4]

2. ACF has authority to require a grantee to correct, without a QIP, deficiencies within 90 days of the grantee's receipt of a notice of deficiencies.

The Head Start Act gives the Secretary authority, which he has delegated to ACF, to require a grantee to correct deficiencies immediately, or within 90 days, or pursuant to a QIP.[5] 42 U.S.C.

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[4] Because we find that the review did not begin within the corrective action period, we do not address whether the review would have been invalid if it had begun within the corrective action period.

[5] Section § 9836a(d)(1) of 42 U.S.C. provides in pertinent part:

> (d) Corrective action; termination
> (1) Determination
> If the Secretary determines . . . that a Head Start agency . . . fails to meet the [Head Start] standards, the Secretary shall —
> (A) inform the agency of the deficiencies that shall be corrected;
> (B) with respect to each identified deficiency, require the agency —
> (i) to correct the deficiency immediately, if the Secretary finds that the deficiency threatens the health or safety of staff or program participants or poses a threat to the integrity of Federal funds;
> (ii) to correct the deficiency not later than 90 days after the identification of the

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§ 9836a(d)(1)(B)(ii). CCC argues, however, that ACF restricted its own authority under the Act by promulgating 45 C.F.R. § 1304.60(b). Section 1304.60(b) provides –

> If a responsible HHS official . . . determines that the grantee has one or more deficiencies . . ., he or she will notify the grantee promptly, in writing, of the finding . . . and inform the grantee that it must correct the deficiency either immediately or pursuant to a Quality Improvement Plan.

CCC argues that the regulation "serves as a self-imposed constraint on ACF's discretionary authority under 42 U.S.C. § 9836(a)(d)(1)(B)(ii)" and that ACF does not have the authority to require a grantee to correct deficiencies within 90 days unless it also allows the grantee to use a QIP. Revised Appeal at 9. CCC argues further that ACF has "disregard[ed]" a regulation "binding its discretion" and therefore ACF has acted "arbitrarily and capriciously" in violation of the Administrative Procedure Act (see 5 U.S.C. § 706(2)(A)) and has "failed to follow the law" in violation of the "fundamental due process." Id. at 10.

The Board has previously rejected this argument on the ground that 42 U.S.C. § 9836a(d)(1)(B)(ii) gives ACF delegated statutory authority to require correction in 90 days without a QIP. See Ruling of September 22, 2005 in Economic Opportunity Board of Clark County (EOB Ruling), Board Docket No. A-05-41, at 3. When ACF published section 1304.60 in 1996, it described the notice to be given to grantees in accordance with the time frames for corrective action then described by 42 U.S.C. § 9836a(d)(1)(B). There was no indication that the regulation was intended to limit the options made available by the statute. In October 1998, months after section 1304.60(b)'s effective date of January 1, 1998, Congress amended section 9836a(d)(1)(B) and provided for

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> deficiency if the Secretary finds, in the discretion of the Secretary, that such a 90-day period is reasonable, in light of the nature and magnitude of the deficiency; or (iii) in the discretion of the Secretary (taking into consideration the seriousness of the deficiency and the time reasonably required to correct the deficiency), to comply with the requirements of paragraph (2) concerning a quality improvement plan . . .

correction in 90 days, in addition to immediately or pursuant to a QIP. See Pub. L. No. 105-285, § 108(d); 61 Fed. Reg. 57,186 (Nov. 5, 1996). It is therefore reasonable to presume, as we concluded in the EOB Ruling, that Congress intended the October 1998 amendment adding the present section 9836a(d)(1)(B)(ii) (section 641A(d)(1)(B)(ii) of the Head Start Act) to supplement the enforcement options described in 45 C.F.R. § 1304.60(b). Cf. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.")[6] Thus, in this case, ACF acted pursuant to self-implementing delegated statutory authority to require correction within 90 days without a QIP.

We reject CCC's argument that section 9836a(d)(1)(B)(ii) is not self-implementing. CCC argues that section 9836A(a)(1) "makes clear that in establishing quality standards and enforcement rules for Head Start programs, HHS shall do so by regulation." Revised Appeal at 10. Section 9836a(a)(1) requires the Secretary to "establish by regulation standards . . . applicable to Head Start agencies," including "performance standards with respect to services," "education performance standards," "administrative and financial management standards," "standards relating to the condition and location of facilities," and "other standards as the Secretary finds to be appropriate." Section 9836a(a)(1) addresses the Secretary's legislative rulemaking authority to promulgate regulatory standards for the Head Start programs, e.g., the standards at issue here involving health services, safety, record keeping. Section 9836(a)(1) does not require the Secretary to adopt enforcement procedures restating the requirements of the Act.

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[6] CCC cites Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988), for the proposition that "repeal by implication is disfavored in the law." Response at 5. This case is not persuasive here for at least two reasons. First, 42 U.S.C. § 9836a(d)(1)(B)(ii) does not effect a repeal by implication, rather it adds a third time frame (90 days) to the two previously existing time frames (immediately or pursuant to a QIP within a year) set out in the prior Head Start Act and the resulting regulation. Second, Hodel addresses the impact of subsequent legislation on prior legislation. Here we are dealing the impact of legislation on a regulation based on the prior version of the Head Start Act. The Secretary's authority to administer the Head Start program generally, and authority to require correction specifically, is based first on legislation. Absent some reason to conclude otherwise, this legislation modifies previously adopted regulations.

CCC also argues that ACF's reliance on 42 U.S.C. § 9836(a)(d)(1)(B)(ii), without amending 45 C.F.R. § 1304.60(b) through notice and comment rulemaking, violates section 553 of the APA.[7] Revised Appeal at 10-11. Section 553 sets out procedures for notice and comment rulemaking that must be followed when an agency issues a legislative rule (sometimes referred to as a substantive rule). CCC relies on National Family Planning and Reproductive Health Ass'n v.Sullivan, 979 F.2d 227, at 234, (D.C. Cir. 1992) in which the court stated:

> When an agency promulgates a legislative regulation by notice and comment . . . , whose meaning the agency announces as clear and definitive to the public and, on challenge, to the Supreme Court, it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule.

While CCC is correct that courts have held that agencies cannot change their interpretations of legislative rules without notice and comment, those cases, like National, are inapposite to the circumstances here. In National, the agency reversed its prior interpretation of a legislative regulation. Here, Congress expanded ACF's authority to require grantees to correct deficiencies. Congress is not subject to the APA. 5 U.S.C.

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[7] Section 553(b) provides in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . .
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> Except when notice or hearing is required by statute, this subsection does not apply—
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice
> . . . .

In addition, section 553(a)(2) provides an exception for matters relating to grants. However, the Department of Health and Human Services has chosen to abide generally by the provisions of section 553, notwithstanding this exception. 36 Fed. Reg. 2532 (Feb. 5, 1971).

§ 551(1)(a). ACF may act pursuant to this statutory grant of authority without violating section 553 the APA.[8]

CCC also asserts that ACF has violated the APA because its "policy statements and guidance" contained in the 2005 PRISM review instrument "reveal no intention to implement the "ninety-day authority" (CCC Written Appeal at 10-11) and make "no reference to any ninety day correction period" (CCC Response at 6). Section 552(a)(1) of the APA provides that a party may not be "adversely affected" by "statements of general policy or interpretations of general applicability" that have not been published in the Federal Register and of which the party had no "actual and timely notice."[9] Presumably, CCC is arguing that ACF

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[8] In discussing CCC's arguments, we do not necessarily accept its assumptions that section 1304.60(b) is a legislative rule, since it merely repeats the terms of the Head Start statute in existence when section 1304.60(b) was promulgated. Nor do we accept CCC's assumption that ACF's action here is equivalent to promulgating a legislative rule, since ACF is merely relying on the terms of the Head Start Act.

[9] Section 552(a)(1) provides in pertinent part --

> (a) Each agency shall make available to the public information as follows:
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> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
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> ***
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> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
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> (E) each amendment, revision, or repeal of the foregoing.
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> Except to the extent that a person has **actual and timely notice of the terms thereof, a person may not in any manner** be required to resort to, or **be adversely affected by, a matter required to be published in the Federal Register and not so published**. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

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should not be able to rely on section 9836(a)(d)(1)(B)(ii) because the PRISM Guide (or other ACF guidance) does not inform grantees that ACF may require grantees to correct within 90 days without a QIP.[10]

We reject this argument. CCC had constructive notice from the statute that ACF had authority to require correction within 90 days. Also, ACF's notice of January 27, 2005, instructing CCC to correct within 90 days, gave CCC actual and timely notice that ACF would apply its statutory authority to require grantees to correct deficiencies within 90 days without a QIP. Further, even if this notice were to be considered untimely, CCC has not alleged or shown that it was adversely affected by lack of prior notice. Specifically, CCC has not alleged or shown that it believed that ACF could not lawfully require it to correct the deficiencies within 90 days without a QIP and that its belief prejudiced its ability to correct the deficiencies at issue within 90 days even when ACF instructed it to do so. The mere fact that CCC allegedly failed to correct the cited deficiencies in the 90-day period is not proof of being adversely affected. Finally, if CCC was prejudicially surprised by ACF's imposition of a 90-day correction period in January 2006, it should have informed ACF at that time. By remaining silent, participating in the resulting follow-up review, and only now complaining that the process was invalid, CCC is seeking two chances for correction when the statute and regulations provide for only one.

Finally, in its Response, CCC challenged the validity of the January notice on the ground that ACF "failed to satisfy even the minimal precondition imposed by statute for the exercise" of its 90-day authority. CCC Response at 6. Section 9836a(d)(1)(B)(ii) authorizes ACF to require a grantee to correct within 90 days "if the Secretary finds, in the discretion of the Secretary, that

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[9](...continued)
(Emphasis added.)

[10] We note that the PRISM Guide contains the following statement prior to its Table of Contents –

> Every effort has been made to ensure the accuracy of the material in this guide; however, if any discrepancy exists between the language in this guide and in any applicable statute or regulation, the language of the statute or regulation is controlling.

ACF Ex. U, at ii.

such a 90-day period is reasonable, in light of the nature and magnitude of the deficiency." CCC asserts that ACF admits that it made no such determination, and therefore, the notice was invalid. CCC Response at 6, citing CCC Ex. 28, at 758 (ACF response to CCC's request for discovery).

We reject this argument. CCC has not shown that ACF "admits" that it did not make the required determination. In its discovery request, CCC sought ––

> 7. Any HHS guidance, memoranda, directives or other documents describing or relating to the process or procedures for making a determination about how much time to provide a Head Start grantee to correct deficiencies under any provision of 42 U.S.C. § 9836A.
>
> 8. Any studies, analysis or other documentation supporting the January 27, 2006 determination that the 90 day period of time provided to CCC to correct its deficiencies was reasonable in light of the nature and magnitude of the deficiency.

CCC Ex. 22, at 523.

ACF responded ––

> 7. Aside from the statute itself, and the regulations, and material on the ACF website (which site you cited in your memoranda with your Motion to Dismiss), we have only used opinions of the courts and the DAB.
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> 8. Please see p. 7. [Since there is no p. 7 in this document, we infer ACF is referring to answer 7.]

CCC Ex. 28, at 758-759.

This exchange does not constitute an admission by ACF that it made no determination as to the reasonableness of the 90-day correction period. The exchange merely establishes that ACF did not rely on "any studies, analysis or other documentation" other than those mentioned in the response in support of the determination. It certainly does not establish that ACF did not make an appropriate determination before selecting the 90-day period.

Finally, as to the imposition of the 90-day correction period, CCC argues that "[i]t is ACF's obligation as a matter of law to present sufficient reasons for its actions and decisions to allow

a reviewing tribunal (like the DAB) to pass on the propriety of those actions and decisions." Id. citing Armstrong v. Executive Office of the President, 810 F.Supp. 335 (D.D.C. 1993).

We reject this argument. CCC has cited no basis (nor do we see any) for concluding that ACF is required, as part of its prima facie case for termination, to prove or even explain its basis for requiring a grantee to correct under one or another of the three time frames prescribed by section 9836a(d)(1).[11] See EOB Ruling at 5. In any event, since ACF's January notice referred to the relevant statutory provision and to the review findings, we presume that ACF did make a finding that the 90-day period was reasonable in light of the nature and magnitude of the deficiencies found. We also presume that ACF could have articulated the reasons for that finding had CCC questioned it at the time.

3. CCC failed to show that it had inadequate notice as to what actions were required to correct the deficiency cited under 45 C.F.R. § 1304.53(a)(10)(viii).

Section 1304.53(a)(10)(viii) of 45 C.F.R. provides:

> (10) . . . At a minimum, agencies must ensure that:
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> ***
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> (viii) Indoor and outdoor premises are cleaned daily and kept free of undesirable and hazardous materials and conditions.

In the PRISM review, the reviewers concluded CCC was deficient under this performance standard because the conditions at two of CCC's playgrounds (the Hayes and Charleston locations) allegedly threatened the health and safety of the children. CCC Ex. 2, at 16. Those conditions included the presence of vines with

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[11] Armstrong is inapposite here. Armstrong involved an action by private parties, under the Federal Records Act, to prohibit the destruction of materials stored on the National Security Council's computer system. After considering the parties' evidence, the court held that the defendants' record-keeping procedures and guidelines were arbitrary and capricious because, inter alia, of the lack of guidance to staff as to which documents were records that were required to be preserved. Nothing in Armstrong supports CCC's position here that, in order to defeat CCC's Motion to Dismiss, ACF must first explain the basis of its decision to require CCC to correct in 90 days.

berries, cluttered trash and leaves, and a play structure with splinters and rusty nails. CCC was given 30 days to correct the deficiency.

In the March 2006 review, the reviewers found that the deficient conditions at the two cited playgrounds had been corrected but that conditions a different location (Lois I) threatened the health and safety of the children.[12] Id. at 16-17. Those conditions included trash and leaves, grills (one with an attached gas tank), sunken metal tent poles, and a fallen tree. The review also stated that "several tools were developed to assist in the monitoring of classroom and playground environments" but that the tools "have not been implemented." Id. at 17.

CCC argues that the PRISM review did not provide adequate notice that the March review team would, in evaluating whether CCC had corrected this deficiency, consider conditions at other playgrounds or CCC's system for monitoring playgrounds. Revised Appeal at 6-8. CCC relies on prior Board cases which held that there must be "sufficient similarity between a finding supporting a 'repeat deficiency' and the original deficiency finding related to performance standards where the lack of such similarity might raise a legitimate notice question." Revised Appeal at 7, citing First State Community Action Agency, Inc., DAB No. 1877, at 17 (2003), see also Norwalk Economic Opportunity Now, Inc. (NEON), DAB No. 2002 (2005). CCC argues that the PRISM review cited specific conditions at Hayes and Charleston but did not find "a systemic or wide-spread failure on the part of CCC to monitor its playgrounds." Revised Appeal at 8. Hence, CCC asserts that "[t]here is nothing in ACF's finding that would put CCC on notice that it was required to revamp its entire system of safety inspections or daily cleaning or that there was a dangerous condition at the Lois I site requiring immediate action." Id. CCC concludes that the deficiency citation "was specific to the two identified sites, Hayes and Charleston, and not to the entire operation of CCC" and argues that ACF may not rely on the March conditions at the Lois I center or its failure to implement the monitoring tools. Id.

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[12] CCC disputes ACF's finding that the conditions at the Lois I playground, at the time of the March review, posed a threat to children's health and safety. Revised Appeal at 18. The question of whether the conditions at Lois I were unsafe involves a dispute of material fact. Given that we grant summary judgment on other grounds, we do not make any factual findings on the issue.

In the context of a Motion to Dismiss and for the following reasons, we reject CCC's argument that ACF may not rely on the March conditions at the Lois I center:

- The cited regulation clearly sets out the expectation that all outdoor premises will be cleaned daily and kept free of undesirable and hazardous materials and conditions.

- The conditions cited as deficient (such as trash and unsafe objects) are the same or similar in both reviews, even though they were found at different locations. Therefore, CCC had notice of the type of conditions that the surveyors regarded as violating the performance standard.

- CCC has not shown that it believed that the deficiency citation was limited to the conditions at the Hayes and Charleston locations. CCC relies on CCC Board materials submitted to ACF in March 2006 describing CCC's actions to address the 30-day citations. Revised Appeal at 8, n.5, citing CCC Exhibit 5. In these materials, the CCC Board describes not only the actions taken to correct the Hayes and Charleston locations but also CCC's staff training on safety issues and its newly modified system for reporting needed repairs. CCC Ex. 5, at 80. This material supports a reasonable inference that CCC understood that correction of this deficiency required it to ensure that all its premises were safely maintained.

- Even if CCC could show that it believed correction of this deficiency required safe conditions to be achieved and maintained only at the Hayes and Charleston locations, it must also show that such a belief was reasonable. CCC relies on the fact that the PRISM review does not cite CCC for "systemic or widespread failure . . . to monitor its playgrounds." Revised Appeal at 8. This fact alone does not make CCC's alleged belief reasonable. A Head Start review necessarily involves inspection of a portion, or a sample, of a grantee's program. Problems that are identified in that sample are assumed to be representative of problems that may exist elsewhere in the program and that must be addressed in order to fully correct the deficiency citation. The Head Start review, notice, and correction process is designed to give grantees an opportunity to correct deficiencies and

> noncompliances. The process is not intended to be an opportunity to play cat and mouse with ACF by correcting one premise while allowing other premises to be or become noncompliant or by correcting one set of hazards while allowing similar hazards to exist. See Philadelphia Housing Authority, DAB No. 1977, at 18, n.14.

CCC complains that, by not allowing CCC to use a QIP to correct this deficiency, CCC was deprived of "an opportunity . . . to clarify what exactly were the alleged problems . . . . Instead, ACF left CCC on its own to interpret the finding" of the PRISM review. Revised Appeal at 8, n.5. Here, CCC has not shown any lack of clarity in the PRISM findings. Also, while we agree with CCC that the QIP process may provide a grantee with additional guidance as to how to correct a deficiency, a QIP is not the only means of obtaining guidance if a grantee is genuinely confused. For example, ACF provides a variety of guides and information on performance standards and review process on its website. Furthermore, CCC cites to no evidence showing that CCC consulted (or fruitlessly tried to consult) ACF about how to correct this deficiency citation. Moreover, here the regulatory standard is unambiguous with respect to the requirements for daily cleaning of the premises and, as a Head Start grantee, CCC can be charged with some knowledge of what conditions might be undesirable or hazardous for the children within its care, even in the absence of explicit guidance from ACF.

Ruling on ACF's Motion for Summary Judgment

ACF moves for summary judgment as to the three deficiency findings that are based on the presence or absence of records: 45 C.F.R. § 1304.20(a)(1)(ii)(A) (obtaining a determination from a health care professional that a child's health care is up-to-date and assisting parents to obtain care), § 1304.20(b)(1) (obtaining visual, hearing, and developmental screenings), and § 1304.51(g) (establishing and maintaining efficient and effective record-keeping systems).

In this proceeding, CCC submitted many types of documents, such as children's health records and employee records, to prove that it had corrected these deficiencies. See, e.g.,CCC Exs. 24, 25. ACF argues that these records do not constitute "reliable or sufficient evidence that there is any genuine or material issue

of fact with respect to ACF's findings." ACF Response at 2.[13] As explained below, we conclude that, viewing the entire record in the light most favorable to CCC and drawing all reasonable inferences from the evidence in CCC's favor, CCC has failed to raise a dispute of material fact as to whether it fully corrected the deficiencies cited under 45 C.F.R. §§ 1304.20(a)(1)(ii)(A), 1304.20(b)(1), and 1304.51(g).

Subsections 1304.20(a) and (b) require specific tasks to be accomplished within specific timelines (90 and 45 days respectively) after a child enters the program. The May review asserted that the children at issue entered the program more than 90 days prior to the review. The parties dispute whether ACF could fairly continue to cite noncompliance where the original timeline passed if the task was accomplished and documented after that timeline but before the corrective action period expired. For purposes of this decision, we do not resolve that general issue but instead review CCC's documentation to determine whether the required tasks were at least accomplished prior to the end of the corrective action period, i.e., prior to May 15, 2006.[14]

The performance standards for which ACF sought and we grant summary judgment require CCC to make certain determinations as to individual children and staff. By their nature, these deficiencies require documentation that CCC performed those requirements. CCC has proffered no testimonial evidence to otherwise directly show that it did perform the tasks but that documentation of its efforts was lost or is otherwise

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[13] ACF also asserted that "the records in the [CCC] Appeal file were not available to the reviewers." ACF Response at 18, see also 27. ACF filed no declaration in support of this assertion. CCC disputes ACF's assertion that the records were not available to the reviewers but also filed no declaration in support of its position. CCC Reply at 10. For purposes of this decision, we accept CCC's position that the documents on which it relies were provided to or were available to the reviewers, except for documents, or notations on documents, dated after the review.

[14] Our treatment of this issue for purposes of summary judgment here is in no way intended to restrict ACF from reviewing grantees using the 45/90 day timelines. In any event, the reviewers do not appear to have cited children where the record at issue was in the file prior to the review even if it did not satisfy the regulatory timelines in section 1304.20. See e.g. ACF Ex. O, at 1 (reviewer notes for D.M.B. and K.S).

unavailable. We explain below what CCC did proffer as to each deficiency.

1. 45 C.F.R. § 1304.20(a)(1)(ii)(A) (lead screening and dental determinations)

Section 1304.20(a)(1)(ii)(A) (emphasis added) requires:

> (a) Determining child health status.
> (1) In collaboration with the parents and as quickly as possible, but no later than 90 calendar days (with the exception noted in paragraph (a)(2) of this section) from the child's entry into the program (for the purposes of 45 CFR 1304.20(a)(1), 45 CFR 1304.20(a)(2), and 45 CFR 1304.20(b)(1), "entry" means the first day that Early Head Start or Head Start services are provided to the child), grantee and delegate agencies must:
> (i) Make a determination as to whether or not each child has an ongoing source of continuous, accessible health care. If a child does not have a source of ongoing health care, grantee and delegate agencies must assist the parents in accessing a source of care;
> (ii) **Obtain from a health care professional a determination as to whether the child is up-to-date on a schedule of age appropriate preventive and primary health care** which includes medical, dental and mental health. Such a schedule must incorporate the requirements for a schedule of well child care utilized by the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program of the Medicaid agency of the State in which they operate, and the latest immunization recommendations issued by the Centers for Disease Control and Prevention, as well as any additional recommendations from the local Health Services Advisory Committee that are based on prevalent community health problems:
> (A) **For children who are not up-to-date on an age-appropriate schedule of well child care, grantee and delegate agencies must assist parents in making the necessary arrangements to bring the child up-to-date . . . .**

The PRISM review found:

> The grantee did not ensure that all children were up-to-date on their medical and dental care within the 90 day requirements. A review of 56 returning children's files lacked the following information: five (5) did not contain signed medical exams; seven (7) did not contain dental screenings and eight (8) had no lead screenings. Due to the grantee's program operations that started the 2nd week in September newly enrolled children's files did not capture all of the required health care information. There was no indication in the children's files as to when services started for the children and families in order for the review team to determine if the grantee met the 90 day requirements. In an interview with the Health Manager and Family and Community Partnership Coordinator both confirmed that the missing screenings were not completed for the returning children. It was also stated by the Health Manager that they worked with the parents to make sure the health care information for the children was received in a timely manner. Form letters were sent home with the children to inform parents of medical information needed by the program.

CCC Ex. 2, at 10.

The May 2006 review found:

> The grantee did not ensure that all children were up-to-date on their medical and dental care within the 90-day requirement. A review of fifty-one (51) files revealed that although all fifty-one (51) contained a signed medical exam there was still required information missing: seven (7) had no lead screening [14%] and two (2) did not contain dental screening [4%]. This lack of information was verified by a review of the grantee's health tracking records. It was stated by the Family and Community Partnership Administrator that the information was not available if it was not in the files at the center or on the health services tracking sheets. All the records with missing information pertained to children enrolled in the program for more than 90 days.

(a) CCC's general arguments

CCC asserts that "all" section 1304.20(a)(ii)(A) requires is that CCC "exercise[] due diligence to ensure that the individual children referenced in each file had the appropriate examination, tests, and assessments necessary to develop an accurate picture of the child's developmental status and progress." CCC Reply at 9.

CCC cites no authority for its statement, and it is contrary to the express language of section 1304.20(a)(ii)(A). That section requires grantees, within 90 days of the child's entry into the program, to "[o]btain from a health care professional a determination as to whether the child is up-to-date on a schedule of age appropriate preventive and primary health care," and, if a child is not current, to "assist parents in making the necessary arrangements to bring the child up-to-date." While the language is not conclusive as to whether a child has to actually be brought up-to-date within the 90 days, it does require that a grantee obtain this determination and, for children who are not up-to-date, assist parents to make necessary arrangements within 90 days. There is nothing in the language of the regulation that suggests a grantee's "due diligence" extends this 90-day requirement.[15] In another case in which ACF stipulated that a grantee had done everything possible to work with parents to obtain the records of health status, the Presiding Board Member preliminarily concluded, after a review of the regulatory history of section 1304.20(a)(ii), that such evidence was nevertheless insufficient to demonstrate compliance with these requirements. Preliminary Analysis and Order to Develop the Record in West Las Vegas School Board, Board Docket No. A-06-11 (attached); see also 45 C.F.R. § 1304.3 (1995); 61 Fed. Reg. 17,754, 17,762 (April 22, 1996); 61 Fed. Reg. 57,186, 57,192 (Nov. 5, 1996). Similarly here, we conclude that claims of due diligence do not suffice where CCC has not also shown that it obtained the required determinations or took steps to assist parents.

CCC asserts that it would "provide testimony in addition to the attached documentary evidence showing that CCC has an ongoing system to ensure that children newly entering the program are up-to-date on their schedule of well child care." Revised Appeal at 13. CCC also proffers testimony that it "had a system in place to follow-up with parents who are not up-to-date and facilitate needed appointments, and documented those efforts in the

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[15] While we do not agree that "due diligence" excuses a grantee's failure to make obtain the required determinations or effectively assist parents, we question whether the evidence CCC cited would demonstrate "due diligence." Further, CCC does not dispute ACF's assertion that, by the expiration of the corrective action period, all of the children at issue had been enrolled for more than 90 days (CCC Ex. 2, at 10), yet CCC is unable to show it complied with section 1304.20(a)(1)(ii)(A) even by the end of the correction period.

records." Id. citing CCC Exs. 9-12.[16] Even if CCC were able to show at a hearing that it had a system for performing such tasks, that evidence would not rebut documentary evidence establishing that the system did not result in correction of this deficiency. CCC proffered nothing to support any inferences that its system was implemented effectively on the identified cases. In order to fully correct, CCC must also have actually obtained the required determinations and assisted the parents in making the necessary arrangements to bring the child up-to-date. Even viewing the evidence in a light most favorable to CCC, we conclude, for the reasons explained below, that CCC has failed to raise a dispute of material fact as to whether it failed, as ACF alleges, to perform these tasks for some of the children addressed in the May review by the time of the review.

(b) Lead screening

As a preliminary argument on lead screenings, CCC asserts that the reviewers were mistaken in assuming that documentation of a "current lead screening and blood test" for each child was required. CCC asserts that New Jersey Medicaid requirements, under N.J. Admin. Code § 8:51A-2.2, do not "require screenings for 3 to 5 year-olds unless the [medical] provider believes that such a screening is medically indicated." Revised Appeal at 12. CCC concludes that the absence of "a full lead screening record is not, in and of itself, evidence of a deficiency on CCC's part unless the child's health care provider has determined that the child is in a risk group warranting further screening." Id.

We reject this argument because it misstates the New Jersey standards that a provider must use in determining whether a child

[16] CCC Exhibit 9 is a "Plan for Child Health and Development Assessment" that addresses how CCC will implement the requirements of section 1304.20. CCC does not proffer testimony to show that its plan was effective to ensure that the required determinations and screenings were obtained. The plan itself requires that the determinations and screenings be documented (CCC Ex. 9, at cite), so had they been obtained, they should have been available in CCC's records. CCC does not proffer any testimony purporting to show in any other manner that these determinations and screenings were obtained, even if not documented in the records. CCC does not explain the relevance of CCC Exhibits 10-12. Exhibits 10 and 11 contain general references to health records and reports. Exhibit 12 does not appear to be relevant.

is up-to-date for lead screening. The relevant sections of the New Jersey Administrative Code provide as follows:

> 8:51A-2.1 Periodic Environmental Assessment and anticipatory guidance
>
> (a) Every physician, registered professional nurse, as appropriate, or health care facility that provides health care services to a child who is at least six months of age, but **under six years of age**, shall:
>
> 1. Inquire if the child has been appropriately assessed and screened for elevated blood lead levels in accordance with this chapter;
>
> 2. **If a Periodic Environmental Assessment (PEA) has not been performed within the 12 months prior to the provision of services, perform a PEA** and place the written notes from such assessment in the child's medical record. The PEA shall include, at a minimum, questions to determine:
>
> i. Whether the child resides in, or frequently visits, a house built before 1960 in which the paint is peeling, chipping, or otherwise deteriorated, or where renovation work has recently been performed that involved the removal or disturbance of paint; and
>
> ii. Whether the child resides with an adult who is engaged in an occupation or hobby where lead or material containing lead is used;
>
> * * *
>
> 8:51A-2.2 Lead screening schedule
>
> (a) Every physician, registered professional nurse, as appropriate, or health care facility, unless exempt pursuant to N.J.A.C. 8:51A-2.3, shall perform lead screening on each patient who is between six months and six years of age according to the following schedule:
>
> 1. Lead screening shall be performed on each child:
>
> i. Between nine and 18 months of age, preferably at, or as close as possible to, 12 months of age; and
>
> ii. Between 18 and 26 months of age, preferably at, or as close as possible to, 24 months of age. The second test shall be performed no sooner than six months following the first test.
>
> 2. **For children found to be at high risk** for lead exposure, as determined by the risk assessment performed pursuant to N.J.A.C. 8:51A-2.1:

i. Each child between six and 24 months of age shall be screened, unless he or she has been screened within the previous six months; and

ii. **Each child between six months and six years of age shall be screened when the risk assessment indicates exposure to a new high dose source of lead since the last time that he or she was screened.** Examples of a new high dose source include, but are not limited to, a recent renovation of the child's residence (if built before 1960 or if lead-based paint is known to be present), deterioration of the paint in the child's residence, moving into a house built prior to 1960 that has peeling, chipping, or deteriorated paint, or an adult living in the household undertaking a new job or hobby that involves exposure to lead.

3. **Each child older than 26 months of age but less than six years of age shall be screened if the child has never previously been screened for lead poisoning.**

N.J. Admin. Code §§ 8:51A-2.1, 8:51A-2.2 (2005) (emphasis added.)

Under New Jersey law, therefore, in order to make a determination that a child between six months and six years is up-to-date on lead screening, the person making the determination must know whether the child has been previously screened for lead poisoning. If not, the child is not up-to-date. If so, the person making the determination would than have to know whether the child also has had a PEA within the last twelve months. If not, a PEA must have been performed for the child in order to determine if screening tests are required before the child would be considered up-to-date. For children whose PEA showed them to be at high risk and indicated exposure to a new high dose source of lead, the child would need to be screened again in order to be up-to-date. See also CCC Ex. 8, at 128 (Blue Cross Blue Shield "Childhood Lead Screening Requirements").

Therefore, at a minimum under N.J. Admin. Code § 8:51A-2.2(a) for Head Start children (who are three, four, and five year-olds), CCC should have had some form of documentation from a health care professional stating that the child was up-to-date as defined above, or should have had other documentation directly showing that the child had been tested previously for lead and had a PEA performed within the last year that did not indicate the child

needed a new lead screening test or that a screening test was performed in the current year.

The May review alleged that "[a] review of fifty-one (51) files revealed that although all fifty-one (51) contained a signed medical exam, there was still required information missing: seven (7) had no lead screening [14%] . . . ." CCC Ex. 2, at 10. ACF provided CCC with a list of the seven children at issue. CCC Ex. 23, at 525.

ACF presented evidence showing, if not rebutted, that CCC had failed to correct the deficiency cited pursuant to section 1304.20(a)(ii)(A) relating to lead screenings. CCC Ex. 2, at 10; CCC Ex. 23, at 525; ACF Exs. D, at 2; L; M; N, at 1-1; and O, at 1-2. In response, CCC cited no evidence for two children (D.K. and D.M.B.) and pointed to some evidence for five children (A.A., D.R., K.S., T.J, and D.B.).[17] Revised Appeal at 13; CCC Reply 9. CCC thus failed to raise any dispute of material fact about the absence of adequate documentation for D.K. and D.M.B.

CCC does not dispute that a number of children's files lack certain required documentation. Apparently, CCC simply relies on the relatively small absolute number of the children involved. We do not find this to be a reason to disregard the failure to properly document all children in the sample. CCC has proffered no reason to conclude that the sample used for the review was not, at least, roughly representative of the larger population of children attending CCC's Head Start program. Absent such evidence, we have no basis to draw any inference other than that these 51 files are representative of problems in unreviewed files.[18] Thus, the missing determinations in the 51 reviewed

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[17] CCC asserts that it was unable to identify one of these children because ACF provided only his/her initials and there are other children in the program with these initials. Revised Appeal at 12. The only child identified in CCC Exhibit 23 by initials alone is "D.B." However, CCC cited records for a D.B. in response to ACF's allegation on this issue. Id. at 13, citing CCC Ex. 24, at 533-535. We therefore review these records below.

[18] In fact, on the contrary, ACF submitted multiple CCC health control sheets, collected during the May 2006 review, that provide a classroom by classroom list of children attending CCC. ACF Response at 19, citing ACF Exs. P-T. For each child, the forms identify the date of a physical exam, of dental screening, of lead screening, of hearing and vision screenings, among other

(continued...)

files, like the other missing documents identified in the May review, demonstrate a significant failure to provide Head Start families with services and protection to which they are entitled under the Head Start performance standards. For example, we conclude that six out of 51 reviewed files, or over 11 percent, were missing lead screening determinations. Assuming that this rate of failure was repeated across CCC's funded enrollment of 1183 children (CCC Ex. 2, at 18), CCC would have failed to obtain lead screening determinations or assist parents to obtain necessary lead screening for over 100 children.[19]

After reviewing the evidence presented as to the other children and drawing all reasonable inferences in favor of CCC, we conclude that, as to four of the remaining five children, the evidence cited does not show a material dispute of fact about ACF's basis for finding that CCC failed to perform the required steps in regard to their lead screening status. We discuss below the evidence relating to each child.

- **A.A.** CCC cites CCC Exhibit 24, at 528-531.[20] Revised Appeal at 13. Only pages 529-531 of CCC Exhibit 24 actually concern A.A.[21] Page 529 is a CCC form titled "Child Health

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[18](...continued)
data. CCC records policy indicates that these forms are to be used to track children's health information which requires follow-up. CCC Ex. 9, at 136. Even a cursory review of these forms indicates that many children were missing lead screenings, dental determinations, and/or hearing and vision screenings even as of May 2006.

[19] To be clear, our conclusion that CCC remained noncompliant with the cited areas does not depend on this extrapolation. The number of sampled children and staff who had missing or inadequate records suffices in itself to support our conclusion that CCC failed to fully correct the deficiencies at issue in the summary judgment motion.

[20] CCC failed identify the portions of CCC Exhibits 24 and 25 on which it was relying to establish that each child or staff person's records were adequately documented. We have, nevertheless, reviewed all the pages cited by CCC to locate any references to children or staff persons at issue.

[21] CCC Exhibit 24 at 528 concerns "R.A." R.A. is not identified on CCC Exhibit 23 a child lacking lead screening
(continued...)

Assessment" dated October 16, 2006 stating that a lead test is "pending." Thus, the form not only is well after the corrective action period, but also indicates A.A. needs a lead test. CCC does not show A.A. had a lead test prior to the end of the corrective action period. Page 530 is a document titled "Mass Screening Sheet" that concerns hearing and vision screening, not lead screening. Page 531 is an undated "Lead Risk Assessment Questionnaire." While this form solicits information required under N.J. Admin. Code 8:51A-2.1, CCC did not allege (much less offer proof) that it was completed prior to May 15, 2006.[22] Given the absence of any affirmative allegation or proffer as to the date this form was prepared and the fact that the Child Health Assessment submitted for A.A is dated five months after the end of the corrective action period and indicates a lead test was still pending at the time, we are unable to reasonably infer that the Questionnaire was executed prior to May 15, 2006 or that it provides a basis for concluding that A.A. did not need a lead test. Further, none of the documents show any indication that CCC was taking steps to assist parents to obtain the required lead test.

- **D.B.** CCC cites CCC Exhibit 24, at 532-535. Revised Appeal at 13. CCC Exhibit 24 at 533-535 concerns D.B.[23] Page 533 is a letter dated August 5, 2004 to the parent/guardian asking him/her to return a "physical exam form" which includes information about (among other things) a "lead test with **Date and Numeric Lab Value**." (Emphasis in original.) Page 534 is the same letter dated March 9, 2005, seven months later. Page 535 is a "Mass Screen Sheet" that contains no reference to lead screening. These documents show two widely spaced attempts to obtain records from D.B.'s parent or guardian, but no determination about

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[21](...continued)
documentation. R.A. is cited as lacking vison and hearing screenings.

[22] The form is designed to be used for four successive lead assessments and has a specific box in which to enter the date for each assessment.

[23] CCC Exhibit 24, at 532, is a CCC form titled "Child Health Assessment" and concerns "D.A." It indicates that D.A. had been screened for lead. ACF did not identify D.A. as a child who lacked lead screening documentation. CCC Ex. 23, at 1. ACF cited D.A. as lacking vison and hearing screenings. Id.

whether the child was up-to-date, no documentation that the child was up-to-date, and no showing that CCC provided assistance to the parents to ensure that D.B.'s lead screening was up-to-date. The regulation requires more.

- **D.R.** CCC cites CCC Exhibit 24, at 599-600. Page 600 is a laboratory report dated June 15, 2005 stating that lead testing was not performed because the blood "spotting on filter paper is insufficient for testing." Page 599 is an undated "Lead Risk Assessment Questionnaire." CCC did not allege (much less offer proof) that the assessment was completed prior to May 15, 2006. Moreover, the fact that D.R. was unsuccessfully tested for lead at three years (see CCC Ex. 24, at 600) indicates that she needed a test as of June 2005 because either she had not been previously tested or a prior assessment had determined that she needed to be tested again. Since there is no indication that she was successfully tested after June 2005, CCC could not reasonably rely solely on the assessment, even if performed between June 2005 and May 15, 2006, to establish D.R. was up-to-date on lead screening. Yet, CCC documents no efforts to assist D.R.'s parents or guardian in obtaining a valid lead screening.

- **K.S.** CCC cites CCC Exhibit 24, at 601-603. Page 601 is a CCC form titled "Child Health Assessment" for K.S. dated February 2006 and completed by a health care professional, apparently not by CCC staff. The professional's entry as to the lead "mandatory screening test" states "lab slip given to mom," indicating that, as of February 2006, K.S. needed to be screened for lead. Page 603 is an undated "Lead Risk Assessment Questionnaire." Since there is no evidence that would tend to show that K.S. was successfully tested for lead after February 2006, CCC could not reasonably rely solely on the assessment, even if performed prior to May 15, 2006, to establish that K.S. was up-to-date on lead screening. Page 602 is titled "Document of Refusal." It was signed by K.S.'s parent/guardian on April 30, 2007 (over a year after the May 2006 review) and states that the family "does not wish to provide or participate in . . . lead update . . . ." Its date, at a minimum, makes it irrelevant here.

- **T.J.** CCC cited CCC Exhibit 24, at 564-567. Page 564 is a "Lead Risk Assessment Questionnaire," dated August 25, 2005, stating that T.J. had no high risk factors. Pages 565-566 are hand-written sheets apparently documenting "Hemoglobin & Lead Screenings" values at 0.8 and 1.8 respectively for

> October 19, 2005. Page 567 is a New Jersey Department of Health and Social Services form titled "Request for Blood Lead Analysis" indicating that a specimen was taken on October 19, 2005. This documentation tends to show that CCC, prior to the May 2006 review, had obtained a determination from a health care professional that T.J. was up-to-date on lead screening and thus would create a material dispute of fact about ACF's reliance on this instance to show that CCC failed to correct this deficiency.

Therefore, even drawing all reasonable inferences in favor of CCC for the five children from whom it presented evidence, we conclude that, for four of the children, the evidence relied on by CCC does not show a material dispute of fact about ACF's basis for finding that CCC failed to obtain a health care professional's determination as to whether these children were up-to-date for lead screening and, if the child was determined not to be up-to-date, to assist the child's parents in making the necessary arrangements to bring the children up-to-date. In summary, as to the seven children at issue for lead screening, CCC cited no evidence for two children (D.K. and D.M.B.) and provided inadequate evidence for four children (A.A., D.R., K.S. and D.B.).

(c) Dental records

The May review alleged that "[a] review of fifty-one (51) files revealed that . . . two (2) did not contain dental screenings [4%]." CCC Ex. 2, at 10.

As to these two children (E.I. and T.P), CCC argued "the parent of both children either failed to submit requested documentation or failed to make/attend dental appointments." Revised Appeal at 13. Neither of these allegations creates a dispute of material fact. While grantees are directed to obtain determinations "in collaboration with each child's parents," CCC points to nothing in the regulation, regulatory preambles or ACF guidance suggesting that a parent's failure to submit requested documentation is an excuse for not obtaining the determination within the 90-day period, or that a parent's failure to make/attend a dental appointment is an excuse for not taking further steps to assist the parent. CCC did not proffer evidence of any further steps taken.

CCC cited the following evidence for E.I. and T.P.:

> **E.I.** CCC cites CCC Exhibit 24, at 563, which is a "Missing Information Notice" dated January 26, 2006 requesting, among

other things, information on "dental exam." Revised Appeal at 13. Obviously, this notice does not tend to show that CCC had obtained a determination from a health care professional that E.J. was up-to-date on dental care. Nor does it establish that CCC followed up to assist the parents to obtain the determination.

T.P. CCC cited CCC Exhibit 24, at 592, which is a "1st Reminder" letter from CCC to the parent/guardian dated April 29, 2005 requesting a "Dental Exam Form." Revised Appeal at 13. Again, such a notice does not tend to show that CCC had obtained a determination from a health care professional that T.P. was up-to-date on dental care or assisted the parent in bringing the child up-to-date. Page 593 is a copy of a "Dental Appointment" card reflecting that T.P. had an appointment "Dec. 17" of an unknown year. Even if we infer from the parents' failure to supply a dental exam form in April 2005 that CCC concluded T.P. was not up to date on dental care and assisted the parents to make a December 2005 appointment, there is no evidence showing that T.P. went to the December appointment, or, if not, that CCC staff were aware of that failure and followed up between December 2005 and May 2006 (five months) to assist the parents in making another appointment.

In conclusion, for the deficiency citation pursuant to section 1304.20(a)(1)(ii)(A), we therefore conclude that, as to six of the seven children cited for lead determinations and the two children cited for dental determinations, the evidence on which CCC relies does not show a material dispute of fact about ACF's basis for finding that CCC failed to obtain the required determinations of whether these children were up-to-date or, if a child was determined not to be up-to-date, assisted the parents in making the necessary arrangements to bring the child up-to-date. Nor did CCC argue or proffer evidence that it had any affirmative defense that would undercut this finding. Therefore, ACF is entitled to summary judgment on its finding that CCC has failed to correct this deficiency because it has not fully complied with the requirements of 45 C.F.R. § 1304.20(a)(1)(ii)(A).

2. 45 C.F.R. § 1304.20(b)(1) (vision, hearing and developmental screenings)

Section 1304.20(b)(1) of 45 C.F.R. provides in pertinent part –

(b) Screening for developmental, sensory, and behavioral concerns.

> (1) In collaboration with each child's parent, and within 45 calendar days of the child's entry into the program, grantee and delegate agencies must perform or obtain linguistically and age appropriate screening procedures to identify concerns regarding a child's developmental, sensory (visual and auditory), behavioral, motor, language, social, cognitive, perceptual, and emotional skills (see 45 CFR 1308.6(b)(3) for additional information).

The PRISM review found:

> In collaboration with each child's parent, and within 45 calendar days of the child's entry into the program, the grantee did not ensure that all children enrolled in the program were up-to-date on a schedule of age appropriate preventive and primary health care. A review of 56 returned children's files did not contain the following screenings: seven (7) files had no vision screenings, eleven (11) had no hearing screenings; and 22 did not contain any child development screenings. In an interview with the Health Manager she confirmed that these screenings were missing from the files and could not be located by the program.

CCC Ex. 2, at 10-11.

The May 2006 review found:

> In collaboration with each child's parent, and within 45 calendar days of the child's entry into the program, the grantee did not ensure that all children enrolled in the program were screened for developmental, sensory, and behavioral concerns. A review of fifty-one (51) children's files showed missing screenings: twelve (12) had no vision screening [24%]; ten (10) had no hearing screening [20%]; and three (3) had no developmental screening [6%]. A review of the grantee's health tracking records also showed these screenings to be missing. The Family and Community Partnership Administrator stated that evidence of these screenings was not available if they were not in the files at the center or indicated on the health services tracking sheets. The records with missing information pertained to children enrolled in the program for more than 45 days.

Id. at 11.

> (a) Vision and Hearing Screenings

ACF provided CCC with a list of the children at issue. Ten of the children were found to be missing documentation of vision and hearing screenings and an additional two were found to be missing documentation of vision screenings only. CCC Ex. 23, at 525-526.

CCC asserts that it is unable to identify one of these children because ACF provided only his/her initials and there are other children in the program with these initials. Revised Appeal at 14. The child identified by initials only is "D.B."[24] He/she is alleged to be missing vision screening. CCC Ex. 23, at 525. There is another child with the initials "D.B.," who is cited as missing both hearing and vision screenings, but for that child, ACF provided a name. We refer to the initials-only child as D.B.(1) and the second child as D.B.(2). For purposes of this decision, we treat D.B.(1) as adequately documented.

CCC cites no evidence as to four of the children: D.K., E.U., E.I., and L.S (vision only). We therefore conclude that no issue of material fact has been raised as to those four files and that screenings for these children are not adequately documented.

Below we discuss the evidence CCC cites pertaining to the remaining seven children who were identified as lacking both vision and hearing screenings.[25] Even drawing all reasonable inferences in favor of CCC, we conclude for the reasons below that, as to five of the children, the evidence CCC cites does not show a material dispute of fact about ACF's basis for finding that CCC failed to "perform or obtain . . . screening procedures to identify concerns regarding a child's sensory (visual and

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[24] For purposes of the summary judgment motion, we have accepted as true CCC's representations that it was unable to locate records for children identified by initials when multiple children in program had the same initials. We note that ACF identified children by center and that even where two children with same initials had been at same center, it is not clear why CCC could not have checked multiple files. Nevertheless we have treated those children whom CCC said it could not identify as adequately documented.

[25] CCC cites CCC Exhibit 24, at 602, as relevant to the children who were cited as lacking vision screening. Revised Appeal at 14. Page 602 is a "Document of Refusal" dated April 2007, after the corrective action period expired. It concerns "K.S.", or perhaps "S.K", neither of whom were cited as lacking vision screening.

auditory) . . . skills" prior to the end of the corrective action period. 45 C.F.R. § 1304.20(b)(1).

- **A.A.** CCC cites Exhibit 24, at 529-530. Revised Appeal at 14. Page 529 is a "Child Health Assessment" dated October 16, 2006 that states A.A.'s hearing and vision was screened "10/16/2006," five months after the May review. Page 530 is a "Mass Screen Sheet" that appears to reflect that A.A. passed a hearing screening on October 1, 2006. This document also is dated well after the May review.

- **D.A.** CCC cites CCC Exhibit 24, at 532. Revised Appeal at 14. Page 532 is a "Child Health Assessment" dated September 2005 on which, as to vision and hearing "screening tests," someone has written "unable to obtain."[26] While this assessment form may show an attempt to screen D.A. in September 2005, the form does not show that D.A. was actually screened, or any other follow-up was done, prior to the expiration of the corrective action period – some seven months later.

- **I.F.** CCC cites CCC Exhibit 24, at 559, 561-562. Revised Appeal at 14. Page 559 is a "Mass Screening Sheet" dated June 20, 2006. While it states that I.F. passed a hearing screening and was uncooperative with a vision screening, the screening postdates the May 2006 review. Page 561 is an undated notice to I.F.'s parents requesting information "to complete your child's registration" including a "Physical (completed, signed by physician)." Beside that printed entry is a handwritten entry which appears to read "Hearing & Vision rst." Page 562 is a "Child Health Assessment" stating I.F. had an examination on March 1, 2005, but the "MANDATORY SCREENING TEST" section of this form for "HEARING" and "VISION" is blank. CCC did not proffer testimony about any of these documents. Even viewing these documents in a light most favorable to CCC, neither of them tend to show that I.F.'s vision and hearing was screened prior to May 15, 2006.

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[26] ACF incorrectly asserts that this document postdates the May review. ACF Response at 20. While the handwritten entry in "Date of Exam" is not clearly legible, it could be read to be "9/27/05." ACF appears to be relying on the clearly legible entry of "9/06" at the bottom of the form, but that entry is for "Next Appointment: Month/Year." A next appointment date of September 2006 is consistent with a date of exam entry of September 2005.

- **K.P.** CCC cites CCC Exhibit 24, at 594-595. Revised Appeal at 14. Page 594 is a "Child Health Assessment" form that states that on September 1, 2006, K.P.'s vision and hearing were screened and found to be normal. Page 595 is a "Mass Screening Sheet" stating that on October 20, 2006, K.P. passed a hearing screening. Both these documents post-date the May 2006 review.

- **S.M.** In its Reply, CCC asserts that S.M.'s "records do, in fact, report results of vision and hearing screenings, as the 'early screening inventories' included at pages 571 through 591 encompass vision and hearing assessments along with other developmental assessments." CCC Reply at 9-10. This assertion is not persuasive because, in viewing these inventories ("Early Screening Inventory - Revised" and "Devereux Early Childhood Assessment") in a light most favorable to CCC, they do not involve testing the child's visual or aural acuity. See CCC Ex. 9, at 133 (describing the methods used for testing vision and hearing acuity by the "Camden Optometrist" or "health staff"), 134 (stating that "Developmental Assessments" are conducted by the "Education staff"), and 143 (stating that CCC uses an "ESI-R" (Early Screening Inventory) for developmental screening). Again CCC proffered no testimony to explain how an ESI-R could constitute the vision or hearing screening required by section 1304.20(b)(1).

CCC cited evidence related to hearing and vision screenings that, viewed in a light most favorable to CCC, does support a finding that CCC has raised a dispute of material fact as to screenings received by D.B.(2) and R.A.

- **D.B.(2)** CCC cites CCC Exhibit 24, at 535. Revised Appeal at 14. Page 535 is a "Mass Screening Sheet" dated November 2005. It states that D.B. passed a vision and hearing screening on that date, which is prior to May 2006.[27]

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[27] As to this evidence, ACF argued that there was "no indication of enrollment date." ACF Response at 20. Evidently, ACF is referring to the lack of an enrollment date because 45 C.F.R. § 1304.20(b)(1) requires these screenings to be conducted within 45 calendar days of "the child's entry into the program." Elsewhere, ACF also raises the lack of an enrollment date in the health files or other forms as evidence of failure to correct this deficiency. ACF Response at 19, 20, 22. We need not reach

(continued...)

- **R.A.** CCC cites Exhibit 24, at 527 (CCC Reply at 9) and 528 (Revised Appeal at 13). Page 527 is a "Health Summary (Child) - Condensed With Enrollment Calculation)" for R.A. It appears to be a computer report that was run on "5/2/2007." It states that R.A. passed vision and hearing screenings on November 9, 2004. Drawing all reasonable inferences in favor of CCC for purposes of this decision, we infer that the person who entered the date of November 2004 into the computer system relied on source documentation showing vision and screenings in November 2004.

Therefore, even drawing all reasonable inferences in favor of CCC, we conclude that, as to nine of the 12 children cited as lacking vision screening (A.A., D.K., D.A., E.U., E.I., I.F., K.P, L.S., and S.M.), and eight of the ten children cited for lacking hearing screening (A.A., D.K., D.A., E.U., E.I., I.F., K.P., and S.M), the evidence on which CCC relies does not show a material dispute of fact about ACF's basis for finding that CCC failed to "perform or obtain . . . screening procedures to identify concerns regarding a child's sensory (visual and auditory) . . . skills" prior to the end of the corrective action period.

(b) Developmental Screening

ACF cited three children (D.B., L.S., and S.M.) as lacking developmental screening. CCC asserts it is unable to identify one of these children (L.S.) because ACF provided only his/her initials and there are other children in the program with these

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[27](...continued)
here the question how grantees must document enrollment dates or whether this child was screened within 45 days of entry. As discussed supra, for purposes of this decision, we treat as noncompliant only those files that do not contain required documentation even as of the review date. Even on that basis, ACF has supported its determination that CCC failed to correct this deficiency with more than enough children who still had not been screened.

Although CCC is correct in asserting that the May 2006 review did not "[make] mention" of missing enrollment dates (CCC Reply at 8), it is incorrect in asserting that the PRISM review did not identify missing enrollment dates as a problem. See CCC Ex. 2, at 10, 12.

initials. Revised Appeal at 15. For purposes of the decision, we treat L.S. as adequately documented.

As to the two children CCC can identify, it cites the following evidence.

- **D.B.** CCC cites CCC Exhibit 24, at 536-558. Revised Appeal at 15. Among other screening instruments, these pages include a "Devereux Early Childhood Assessment (for children ages 2 through 5 years)" dated October 2005 (at 557-558), an "Early Screening Inventory-Revised", or ESI-R, for years 3-4½ dated November 2005 (at 536-542) and an "Early Screening Inventory-Revised" for years 4 1/2-6 dated April 2006 (543-549).

- **S.M.** CCC cites CCC Exhibit 24, at 571-591. Similarly to the documents cited for D.B., these pages contain multiple Early Screening Inventories and Devereux Early Childhood Assessments for S.M. All of these assessments were administered prior to the May 2006 review.

ACF does not dispute that these instruments are developmental screening tools used to screen D.B. or S.M. ACF Response at 20, 21, 22; see also CCC Ex. 9, at 143 (stating that CCC uses the ESI-R for developmental screening). Drawing all reasonable inferences in favor of CCC, the evidence for D.B. and S.M. shows a material dispute of fact about ACF's basis for finding that CCC failed to perform or obtain developmental screenings for these children.

In conclusion, for the deficiency citation pursuant to section 1304.20(b)((1), we find that, for nine of the 12 children cited for lacking vision screening and for eight of the ten children cited for lacking hearing screening, the evidence relied on by CCC does not show a material dispute of fact about ACF's basis for finding that CCC failed to obtain hearing and vision screenings for these children prior to the expiration of the corrective action period. Nor did CCC argue or proffer evidence that it had any affirmative defense that would undercut this finding. Therefore, ACF is entitled to summary judgment on its finding that CCC has failed to correct this deficiency because it has not fully complied with the requirements of 45 C.F.R. § 1304.20(b)(1).

3. 45 C.F.R. § 1304.51(g)

Section 1304.51(g) provides –

> *Record-keeping systems.* Grantee . . . agencies must establish and maintain efficient and effective record-keeping systems to provide accurate and timely information regarding children, families, and staff and must ensure appropriate confidentiality of this information.

The PRISM review found in pertinent part:

> The Grantee did not establish and maintain efficient and effective record-keeping systems to provide accurate and timely information regarding children, families and staff. The record-keeping systems reviewed and found to be non-compliant included those for human resources, family partnerships, supervision and management, enrollment, and disabilities services.
>
> * * *
>
> The system of record-keeping for human resources was found to be non-compliant by review of 17 employee files, both hard copy and a computer print-out, and interviews with the Human Resources Manager . . . . Fifteen (15) of (17) files did not contain the required Criminal History and 17 of 17 files did not contain required Child Abuse Clearances. Eleven (11) of 17 files did not contain results of TB screenings. Ten (10) of ten files did not contain the record of initial medical exam. Two (2) of 17 files did not contain references. Eight (8) of 17 files did not contain the 2004 employee job performance evaluation. Five (5) of 17 files had no records of training for year 2004.
>
> * * *
>
> Fifty-six (56) of fifty-six (56) child files had one or more required data entries missing. Examples of missing documentation included: missing enrollment dates in 56 children’s files; 33 files had no nutrition assessments; seven (7) files were missing signed medical exams; seven (7) had no vision screenings; eleven (11) contained no hearing screenings. There were no Individual Education Plans (IEPs), no documentation of progress, no signatures on IEPs, and no documentation of parent involvement in the referral process in files of children with disabilities. A review of family files revealed that 77 of 87 family files did not have completed Family Partnership Agreements addressing family goals. Also, 121 files did not have a statement of verification of eligibility.

CCC Ex. 2, at 11-12.

The May 2006 review found in pertinent part:

> A review of 16 personnel files revealed that 10 of 16 files did not contain the required Policy Council approval; 11 of 16 files did not contain the fingerprint/background check; 12 of 16 files did not contain CPR/First Aid Training Certificates; 6 of 16 files did not contain either a job description or one relevant to the present job.
>
> * * *
>
> In the area of health, review of 51 children's files found that 12 files did not have vision screenings, 10 files did not have hearing screenings, two files did not have dental examinations, seven files had no lead screenings, seven files did not have nutritional assessments, and three files did not have child development screenings.

Id. at 13.

(a) Children's screening records

The May review found a failure to correct this deficiency based on the absence of records related to lead determinations, dental determinations, vision screenings, hearing screenings, developmental screenings, and nutritional assessments. CCC's own policies required that its determinations of whether the children were up-to-date on health screening requirements be documented. CCC Exs. 10, at 156; 11, at 162-163. Therefore, the failure to have such documentation would establish that CCC did not have effective record keeping systems with accurate and timely information as required by section 1304.51(g).

The preceding discussion of the absence of documentation that required lead determinations, dental determinations, vision screening, and hearing screening were performed or parents were being assisted as required establishes that CCC did not have or maintain the documentation required by its policy. If CCC had had an effective system of records to provide accurate and timely information about the children, it would have been prompted to obtain the missing documents. Given this repeated failure to produce required documentation, we conclude that CCC failed to show a material dispute of fact about ACF's basis for finding, as to those records, that CCC failed to "establish and maintain efficient and effective record-keeping systems to provide

accurate and timely information regarding children . . . .” as required by section 1304.51(g).

(b) Nutritional assessments

The May review also alleged as a record-keeping failure that CCC did not have records for nutritional assessments for seven of the 51 children surveyed. CCC Ex. 2, at 13. The reviewer’s forms cited 45 C.F.R. §§ 1304.23(a)(1) as the basis for requiring records of nutritional assessments.[28] ACF Ex. L, at 1. ACF identified the affected children at CCC Exhibit 23, at 526.

CCC asserts that it could not respond to the allegations as to two of the cited children (A.B. and K.J.) because “they are listed only by first initial and last name, and there are multiple CCC children with those same first initials and last names.” Revised Appeal at 15. For purposes of this decision, we treat A.B. and K.J. as adequately documented.

CCC cited no information for J.L or N.H. See Revised Appeal at 15-16. We treat J.L. and N.H. as not adequately documented. We conclude that the evidence cited by CCC for two of the three remaining children (T.J. and K.P.), viewed in the most favorable light to CCC, shows a material dispute of fact about ACF’s basis for finding that these children’s records of nutritional assessment did not comply with section 1304.51(g).

- **K.P.** CCC cites CCC Exhibit 24, at 597-598. Revised Appeal at 16. Page 597 is a printed form with questions about food, referred to hereafter as a “nutrition form.” There is no indication on this particular nutrition form when it was completed or the child for whom it was completed. However, page 596 is a “Family Member Application” for K.P. (see bottom third of page under “Child Name”) dated July 8, 2005. A Family Member Application form also precedes the two other nutrition forms cited by CCC. See CCC Ex. 24, at 568-569 and 604-605. For purposes of this decision and viewing this

[28] Section 1304.23(a)(1) provides:

> (a) Identification of nutritional needs. Staff and families must work together to identify each child's nutritional needs, taking into account staff and family discussions concerning:
>
> (1) Any relevant nutrition-related assessment data (height, weight, hemoglobin/hematocrit) obtained under 45 CFR 1304.20(a).

pattern in the light most favorable to CCC, we infer that, when CCC provides an undated nutrition form in association with a dated application, the nutrition form was prepared around the same time as the application. Viewing the nutrition form itself in a light most favorable to CCC, we accept for purposes of this decision that the information recorded on the form constitutes an identification of nutritional needs required by section 1304.23. Additionally, Page 598 is a completed "Child Health Record Form 6, Nutrition" for K.P. with a handwritten note on it stating "received 3-16-2006." Viewing both documents in a light most favorable to CCC, we find that CCC proffered evidence tending to show that it had conducted nutritional assessments for K.P. prior to May 15, 2006.

- **T.J.** CCC cites CCC Exhibit 24, at 569-570.[29] Revised Appeal at 16. Page 569 is an undated nutrition form with no indication of the child for whom it was completed. Since page 568 is a Family Member Application for T.J dated August 2005, we infer that page 569 concerns T.J. and was completed in August 2005. Viewed in a light most favorable to CCC, these documents tend to show that CCC had a record showing that it had conducted a nutritional assessment for T.J. prior to the expiration of the corrective action period.

For the following reasons, we conclude CCC has not shown a dispute of material fact as to one child.

- **X.W.** CCC cited CCC Exhibit 24, at 605. Revised Appeal at 16. Page 605 is a nutrition form with no date and no name. Page 604 is a Family Member Application for X.W. dated November 14, 2006. These two documents postdate the May review and, therefore, do not show that, as of the May review, CCC could document that it had conducted a nutritional assessment for X.W.

We conclude that evidence cited by CCC, even when viewed in a light most favorable to CCC, fails to show a material dispute of

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[29] Page 570 is an undated "Child Health Record Form 6, Nutrition" for T.J. CCC did not allege that this questionnaire was completed prior to May 15, 2006, even after ACF pointed out that form is undated. See ACF Response at 9 and CCC Reply at 9, 10. Because we conclude the nutrition form completed with the application constituted adequate evidence to at least raise a dispute of material fact, we need not determine the significance of page 570.

fact about ACF's basis for finding that CCC's records of nutritional assessments did not comply with section 1304.51(g) as to the three of the seven children's records cited: the two for whom CCC cited no evidence, J.L. and N.H., and for X.W.

(c) Personnel files

In the May review, ACF relied on the absence of different types of records in CCC personnel files. Below, we discuss only the records related to the absence of "fingerprint/background checks." We limit our discussion because the other types of records cited in the May review (Policy Council hiring approval; CPR/First Aid Training Certificates; and job descriptions) were not cited as a basis for the deficiency finding in the PRISM review. While this fact alone does not preclude ACF from relying on the absence these records, it does raise questions of notice. Therefore, for purposes of summary judgment, we limit our review to records for which there is no notice issue.[30]

The May report alleged that 11 of the 16 personnel files did not have required fingerprint/background checks. CCC Ex. 2, at 13. The form the reviewers used to survey personnel records identified 45 C.F.R. § 1301.31(1)(b)(iii) as the basis for this requirement. We infer that the reference was actually to section 1301.31(b)(1)(iii), which provides:

> (b) Staff recruitment and selection procedures.
>
> (1) Before an employee is hired, grantee or delegate agencies must conduct:
>
> * * *

[30] Additionally, our review of the personnel files was hampered by the fact that the record as to which employee files are being cited as deficient is not always clear. The parties rely on CCC Exhibit 26, at 753-756. These pages appear to be two sets of the same ACF review form, each listing the same 16 employees. Pages 753 and 756 appear to be one set of the form; pages 754 and 755 the other set. Pages 754/755 seems to be partially completed while pages 753/756 has data on all employees. The legibility of the reviewers' notations on the forms is poor. Additionally, one or more reviewers' notations on the forms are not uniform and the meanings are therefore unclear. On 753/756, there are check marks, "x" marks, forward slashes, backward slashes, and some grid boxes left blank.

> (iii) A State or national criminal record check, as required by State law or administrative requirement. If it is not feasible to obtain a criminal record check prior to hiring, an employee must not be considered permanent until such a check has been completed

Neither party discusses New Jersey requirements for criminal record checks. However, CCC filed as an exhibit the chapter of the New Jersey Administrative Code governing child care centers. CCC Exhibit 14. New Jersey Administrative Code 10:122-4-1(b) requires child care centers to have documentation of "completion of a Child Abuse Record Information background check, as specified in N.J.A.C. 10-122-4.9, and a Criminal History Record Information fingerprint background check as specified in N.J.A.C. 10-122-4.10." Id. at 248. These checks are referred to as a CARI check (N.J.A.C. 10-122-4.9) and a CHRI check (N.J.A.C. 10-122-4.10.) Id. at 267-272. CCC's records policy provided that CARI and CHRI records were to be maintained at the "Human Resources Office." CCC Ex. 10, at 155.

CCC asserts that nine of the 11 the files did contain required checks. Revised Appeal at 17. Construed in a light most favorable to CCC, we conclude the evidence CCC cites shows a material dispute of fact about ACF's basis for finding that CCC did not have records of CARI and CHRI checks for six of the cited employees prior to the expiration of the corrective action period: D.B. - CCC Exhibit 25, at 621 (CHRI check), at 623 (CARI check); P.B. – CCC Exhibit 25, at 629-630 (CHRI check), at 631-632 (CARI check); R.C. - CCC Exhibit 25, at 638 (CHRI check), at 639-640 (CARI check); P.M. - CCC Exhibit 25, at 698 (CHRI check), at 699-700 (CARI check); A.N. - CCC Ex. 25, at 718 (CHRI check), at 719-720 (CARI check); R.W. - CCC Exhibit 25, at 744 (CHRI check), at 745-746 (CARI check).

Even construed in a light most favorable to CCC, however, the following evidence cited by CCC does not show a material dispute of fact about ACF's basis for finding that CCC did not have records of CARI and CHRI checks for three of the cited employees prior to the expiration of the corrective action period. Such checks are plainly vital to assuring the safety and security of children. These failures of documentation are in themselves sufficient to show that CCC did not have a record keeping system effective to ensure accurate and timely records were maintained for its staff.

- **A.L.** CCC cites CCC Exhibit 25, at 611-614. Revised Appeal at 17. Pages 610-11 is a CARI consent form completed by

A.L. on October 19, 2006, after the May 2006 review. Page 611 indicates that "no record" was found for A.L. Pages 612-614 are documents related to obtaining fingerprints for A.L. These documents support a reasonable inference that A.L. was fingerprinted on September 10, 2005. Page 613 states that, "UPON COMPLETION OF THE FINGERPRINTING PROCESS, A PCN NUMBER WILL BE RECORDED IN THE DESIGNATED BOX." While a PCN Number is not recorded in the box on that page, Page 612 is a "receipt" on which a "PCN #" was recorded. However, there is no indication in the record that this fingerprinting led to a CHRI check, or what the result of the CHRI check was.

- **R.G.** CCC cites CCC Exhibit 25, at 660-663. Revised Appeal at 17. Pages 660 and 662-663 are CHRI and CARI forms dated March and April 2007, after the May 2006 review. Page 661 is a criminal background check on R.G. conducted in 2000 by the New Jersey Department of Education for school bus drivers. That document does not demonstrate that fingerprint/background checks were completed for his/her employment at CCC.

- **S.M.** CCC cites CCC Exhibit 25, at 707-709. Revised Appeal at 17. Page 707 is a letter dated October 17, 2002 from the New Jersey Department of Human Services stating that S.M. has passed the CHRI check and is qualified for employment at a child care center. However, pages 708-709 are a CARI form signed on January 23, 2007, i.e., after the May 2006 review.

CCC also admits that files for two other employees did not contain the required checks but alleges that the employees were terminated by CCC. Revised Appeal at 17, citing CCC Ex. 25, at 648 (for A.D.), 651 (for N.F.). CCC does not explain why the fact these employees were ultimately terminated excuses it from having sought and maintained a record of the required checks. While section 1301.31(b)(1)(iii) allows a grantee to hire, on a probationary basis, individuals who have not had the checks "if it is not feasible to obtain a criminal record check prior to hiring," it does not authorize not obtaining a check. Indeed, the evidence CCC cites for A.D. states that she was terminated after her 60-day evaluation – certainly time enough in which to have instituted a checks for her.

Therefore, even drawing all reasonable inferences in favor of CCC, we find the evidence cited by CCC does not show a material dispute of fact about ACF's basis for finding that CCC did not have records of CARI and CHRI checks for five of the cited

employees (A.L., R.G., S.M., A.D., and N.F.) prior to the expiration of the corrective action period.

In conclusion, for the deficiency citation pursuant to section 1304.51(g), we therefore conclude that the evidence on which CCC relies does not show a material dispute of fact about ACF's basis for finding that CCC failed to "establish and maintain efficient and effective record-keeping systems to provide accurate and timely information regarding children, families . . . ." We base this conclusion on the lack of records related to lead screening determinations, dental determinations, hearing screenings, vision screenings, nutritional assessments, and criminal and child abuse background checks. Nothing that CCC argued or proffered provided any basis to undercut the finding. Therefore, ACF is entitled to summary judgment on its finding that CCC has failed to correct this deficiency because it has not fully complied with the requirements of 45 C.F.R. § 1304.51(g).

Conclusion

For the reasons explained above, we deny CCC's motion to dismiss and grant ACF's motion for summary judgment and affirm ACF's decision to terminate funds for CCC's Head Start grant

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member