

**Department of Health and Human Services**  
**DEPARTMENTAL APPEALS BOARD**  
**Appellate Division**

Jefferson Comprehensive Care System, Inc.  
Docket No. A-10-90  
Decision No. 2377  
April 4, 2011

**DECISION**

Jefferson Comprehensive Care System, Inc. (JCCS) appealed the July 26, 2010 determination of the Administration for Children and Families (ACF) to terminate the grant awarded to JCCS for a Head Start program. ACF based the termination on its findings that JCCS failed to correct deficiencies identified in a triennial review of JCCS's programs conducted in December 2008. For the reasons discussed below, we conclude that JCCS did not meet its burden of showing that it corrected two deficiencies involving Program Design and Management, and we therefore uphold the termination.

**Legal Authority**

Head Start is a national program that provides comprehensive child development services, including health services. 42 U.S.C. § 9831; 57 Fed. Reg. 46,718 (Oct. 9, 1992). The Head Start program serves primarily low-income children, ages three to five, and their families. *Id.* Head Start grantees must comply with a range of requirements related to administrative and fiscal management and the provision of high quality services responsive to the needs of eligible children and their families. The Head Start performance standards codified in 45 C.F.R. Part 1304 cover the entire range of Head Start services and constitute the minimum requirements that a Head Start grantee must meet in three areas: Early Childhood Development and Health Services, Family and Community Partnerships, and Program Design and Management.

The definition of "deficiency" in section 1304.3(a)(6)(i) includes "[a]n area or areas of performance in which an Early Head Start or Head Start grantee agency is not in compliance with State or Federal requirements . . . and which involves: . . . (C) A failure to perform substantially the requirements related to . . . Program Design and Management" in section 1304.50 *et seq.* ACF concluded that the review findings at issue here were deficiencies under section 1304.3(a)(6)(i).

Under the Head Start Act, 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, she requires the

grantee to correct the deficiency immediately, or within ninety days, or by the date specified in a Quality Improvement Plan (but not later than one year after the grantee received notice of the deficiency). 42 U.S.C. § 9836a(e)(1)(B) and (e)(2)(A) (ii). The Secretary "shall . . . initiate proceedings to terminate" the Head Start grant "unless the [grantee] corrects the deficiency." 42 U.S.C. § 9836a(e)(1), (e)(1)(C) .

Section 1303.14(b)(4) of 45 C.F.R. provides that "[f]inancial assistance may be terminated" for reasons including that "[t]he grantee has failed to timely correct one or more deficiencies as defined in 45 C.F.R. Part 1304." Evidence that a grantee came into compliance with the applicable requirements after the time provided for correction ended does not establish that the grantee corrected its deficiencies. *Philadelphia Housing Authority*, DAB No. 1977, at 14-15 (2005) ("the regulations are clear that all deficiencies must be corrected by the end of the period for correction . . . 45 C.F.R. § 1304.60(c)").

A grantee always bears the burden to demonstrate that it has operated its federally-funded program in compliance with the terms and conditions of its grant and the applicable regulations. *Norwalk Economic Opportunity Now, Inc.*, DAB No. 2002, at 7 (2005), citing, *inter alia*, *Rural Day Care Association of Northeastern North Carolina*, DAB No. 1489, at 8, 16 (1994), *aff'd*, *Rural Day Care Ass'n of Northeastern N.C. v. Shalala*, No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995).

### **Case Background**

JCCS is a corporation located in Pine Bluff, Arkansas. Its operations include a Head Start program, for which JCCS has received grants since 1986. JCCS Br. dated 2/24/11, at 1. According to JCCS, its Head Start program has 105 employees "on average" and currently serves 517 children. *Id.*

From January 13-18, 2008, ACF conducted a triennial review of JCCS's Head Start program. In an October 2008 report on the triennial review (ACF Exhibit 7), ACF identified two deficiencies as defined in section 1304.3(a)(6)(i)(C), i.e., noncompliance with a federal requirement involving a failure to perform substantially requirements related to Program Design and Management. The deficiencies related specifically to the requirements at sections 1304.51(g) and 1304.51(i)(2). Section 1304.51(g) provides:

*Record-keeping systems.* Grantee and delegate 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.

Section 1304.51(i), captioned "*Program self-assessment and monitoring*," provides in subsection (2):

Grantees must establish and implement procedures for the ongoing monitoring of their own Early Head Start and Head Start operations, as well as those of each of their delegate agencies, to ensure that these effectively implement Federal regulations.

ACF stated that these deficiencies “must be corrected within 120 days of the receipt of” the report and directed JCCS to submit a Quality Improvement Plan (QIP) within 30 days. ACF Ex. 7, at 14 (internal numbering). JCCS submitted a QIP setting out steps for the correction of each deficiency and dates for the completion of each step. ACF Ex. 8.<sup>1</sup> (As noted later, JCCS does not dispute the existence of the deficiencies found at the triennial review.)

ACF conducted an onsite follow-up review from January 11-15, 2010 to determine whether JCCS had corrected the deficiencies found at the triennial review. The report on the follow-up review indicated that JCCS did not correct the two deficiencies identified in the triennial review report. ACF Ex. 2, at 24 (internal numbering). The report on the follow-up review also indicated that JCCS did not correct two additional deficiencies; however, these additional citations were identified in the triennial review report as areas of noncompliance rather than deficiencies. *Id.*

On July 26, 2010, ACF advised JCCS that it was terminating its Head Start grant pursuant to 45 C.F.R. § 1303.14(b)(4). The termination letter stated that the factual findings supporting the termination were in “the enclosed Review Report.” ACF Ex. 1, at 2.

JCCS timely appealed the termination pursuant to 45 C.F.R. § 1303.14, which sets forth the procedures for such appeals and states in subsection 1303.14(c)(2) that “any grantee that requests a hearing shall be afforded one, as mandated by 42 U.S.C. 9841.” In its initial appeal submission, JCCS requested a hearing; however, JCCS later waived its right to an in-person hearing. *See* Agreed Motion for Disposition by Written Submission and Proposed Briefing, dated 12/1/10; Summary of Pre-Hearing Conference and Schedule of Further Proceedings, dated 12/1/10, at 2 (stating that the Presiding Board Member has granted the motion). Accordingly, we decide this case on the written record.<sup>2</sup> In

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<sup>1</sup> JCCS submitted as its Exhibit 2 a different document which is identified on its Exhibit List as its “2008 QIP.” However, that document is titled “Non-Compliance Corrective Action Plan” and does not address the deficiencies at issue here.

<sup>2</sup> After the case was extensively briefed by the parties, ACF moved for summary disposition. ACF’s Written Submission to Grantee’s Appeal or, in the Alternative, Motion and Brief in Support of Summary Disposition, dated 2/24/11. Summary disposition, referred to in the Federal Rules of Civil Procedure as summary judgment, is appropriate where the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment in its favor as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). We do not apply the standards for summary judgment in deciding this case since the parties previously agreed to disposition on the written record.

addition to JCCS's initial appeal and the submissions provided for in section 1303.14(d)(6), the record includes affidavits and rebuttal affidavits filed by both parties and simultaneous briefs and reply briefs filed by both parties. JCCS submitted affidavits from JCCS Executive Director Larnell W. Davis, JCCS Head Start Director Dorothy Young (both initial and rebuttal affidavits), JCCS Human Resources Director Barbara Akins, Administrative Assistant to the Executive Director Ethel Green, and others not cited in this decision. *See* JCCS letters dated 1/14/11 and 1/25/11, attachments. ACF submitted affidavits from Sharon Wien and Johanna I. Soto Aguilu, both consultants on the review team for the follow-up review, and Valerie Sudduth, a Program Analyst in ACF's Region VI Office of Head Start who was the review team leader for the follow-up review. *See* ACF letter dated 1/14/11, attachments.

## **Analysis**

### **I. Preliminary issues**

ACF maintained during the appeal proceedings that termination was warranted based on the four uncorrected deficiencies identified in the follow-up review report. *See* ACF letter dated 12/13/10, at 2-3; ACF's Written Submission to Grantee's Appeal or, in the Alternative, Motion and Brief in Support of Summary Disposition, dated 2/24/11, at 7, 15, 22, 24. The Presiding Board Member raised a question whether two of these alleged uncorrected deficiencies, relating to 45 C.F.R. §§ 1301.31(b)(1)(iii) and 1304.52(k)(1), were properly identified in the follow-up review report as uncorrected deficiencies since they were not identified as deficiencies in the triennial review report. *See* Summary of Pre-Hearing Conference and Schedule of Further Proceedings, dated 12/1/10, at 2, citing 45 C.F.R. § 1304.3(a)(6) and *The Council of the Southern Mountains*, DAB No. 2006, at 25 (2005) ("under section 1304.61, certain types of noncompliance do not constitute a deficiency until after the grantee has been given an opportunity to correct them"). We need not reach this question, however, since we conclude that there were uncorrected deficiencies relating to sections 1304.51(g) and 1304.51(i)(2), and termination is warranted on this basis alone.

ACF objected to the admission of certain exhibits submitted by JCCS. On December 20, 2010, ACF filed an objection to the admission of all exhibits JCCS filed with its undated submission received by the Board November 23, 2010 on the ground that the submission had not been served on ACF. ACF's Objections to Appellant's Exhibits, dated 12/20/10, at 1. Section 16.20(c) of 45 C.F.R. (made applicable to appeals of Head Start terminations by section 1303.14(c)(2)) states that each submission "must include a statement that one copy of the materials has been sent to the other party, identifying when and to whom the copy was sent." On January 7, 2011, the Presiding Board Member ordered JCCS to show good cause why, based on JCCS's failure to follow this procedural requirement, the Board should not deem that JCCS had waived its right to file the exhibits in the submission in question. In its response to the order, counsel for JCCS

indicated that the exhibits were ultimately served on ACF sometime after January 6, 2011, but provided an explanation for the untimely filing that we find does not constitute good cause. JCCS Response to ACF's Objections to Exhibits, dated 2/24/11. Nevertheless, to ensure a sound decision, and because there is no prejudice to ACF, we admit the exhibits (JCCS Exhibits 1-8). We note that, after receiving these exhibits, ACF did not renew its procedural objection to them, although it continues to dispute certain content.

ACF also objected to the admission of certain exhibits JCCS submitted with its initial appeal. ACF's Objections to Appellant's Exhibits, dated 12/20/10, at 1-3. ACF objected to the authenticity of statements signed by JCCS's Head Start Director and statements signed by JCCS's Human Resources Director based on "the remarkable similarity between" the two signatures. *Id.* at 2-3. Based on our own examination of the signatures, we see no reason to question the authenticity of these exhibits, and so we admit them.

In addition, ACF objected to the authenticity of the Head Start Employee Record Report submitted by JCCS as Documentation #1 and #6, as well as to an Employee Earnings History report dated August 25, 2010 that was submitted by JCCS as Documentation #10 on the ground that JCCS failed to show "that this evidence is competent to represent the evidence it purports to contain."<sup>3</sup> *Id.* Both Documentation #1 and #6 are incomplete versions of the report that JCCS later submitted as an attachment to the Rebuttal Testimony of Dorothy Young. ACF submitted the same Head Start Employee Record Report (but without the column showing employee positions) as its Exhibit 102. Moreover, ACF later acknowledged that the information on the Employee Earnings History report was accurate. ACF's Written Submission to Grantee's Appeals or, in the Alternative, Motion and Brief in Support of Summary Disposition, dated 2/24/11, at 19. Thus, we see no reason not to admit these exhibits.<sup>4</sup>

## II. Triennial review report findings

Below, we first describe the findings in the triennial review report based on which ACF concluded that there were deficiencies relating to 45 C.F.R. §§ 1304.51(g) and

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<sup>3</sup> Each "Documentation #" corresponds to one or more documents submitted with JCCS's initial appeal.

<sup>4</sup> In its final brief, JCCS raised an objection to "the authenticity" of the follow-up review report in ACF Exhibit 2. Appellant's Reply to ACF's Submission and Motion, dated 3/21/11, at 3. The objection appears to be based on the fact that the first page of the follow-up review report was signed by the Director of the Office of Head Start on July 29, 2010 while the report was sent to JCCS under cover of a letter dated July 26, 2010 (the notice of termination). We note in addition that pages 2-26 of the report show the date 7/30/10 in the lower left-hand corner. The reason for these discrepancies is not apparent. However, JCCS does not allege that the copy of the follow-up review report in ACF Exhibit 2 is not the same as the report it received. In addition, JCCS has not submitted another document it considers to be an authentic copy of the report. Thus, we conclude that ACF's Exhibit 2 is the report on which the termination was based.

1304.51(i)(2). We then discuss the findings on which ACF based its conclusion that JCCS failed to correct these deficiencies and explain why we conclude that JCCS failed to meet its burden to show that it corrected these deficiencies.

In the triennial review report, the reviewers set out the findings on which they based their conclusion that JCCS had a deficiency relating to section 1304.51(g) as follows:

[G]rantee staff attempting to verify implementation of personnel and human resources management requirements, such as criminal record checks and performance evaluations, had difficulty locating staff records and providing information in a timely manner. For example, the Quality Assurance Specialist stated criminal record checks, health examinations, and recent performance evaluations were at the grantee's Administrative and Records Office; however, the grantee Record Maintenance Clerks stated criminal record checks, health examinations, and recent performance evaluations were not in the Head Start staff files they maintained.

[T]he Employee Master Detail list and the Employee List by Position did not match. The Head Start Administrative Secretary stated she did not submit Employee Status reports to the Fiscal Office . . . . [T]here was no effective procedure to update critical employee data. State criminal record and background check records were not organized and maintained to ensure substitute and permanent staff background-check results were easily tracked, and the Head Start Administrative Secretary stated she did not have criminal record checks for all employees.

ACF Ex. 7, at 2-3.

In the triennial review report, the reviewers concluded that JCCS had a deficiency relating to section 1304.51(i)(2) based on the following findings:

- The grantee's 2007-08 Monitoring System Implementation Procedures did not include procedures for monitoring key areas of the program's management systems, such as financial management, internal controls, program governance, record-keeping, reporting, and human resources management. There were no procedures for ongoing monitoring of the fiscal management system to ensure effective implementation of Federal regulations. The grantee's Financial Operating System Procedures Manual did not provide for oversight and monitoring by the governing body with the exception of check-signing and travel for the Chief Executive Officer. The manual listed positions responsible for monitoring and approval of accounting functions (such as Director of Budgets and Operations) that the Chief Financial Officer stated were abolished four years earlier following a reorganization.

- Credit card transactions for the Head Start program were not monitored to ensure purchases were reasonable, necessary, allowable, and used for authorized purposes. Monitoring and checks and balances to ensure timely payment of invoices was inadequate, and, as a result of late payments, unallowable finance fees were charged to the grant. A Fiscal Year 2007 Audit Management letter noted lack of adequate monitoring as a problem.
- Staff records were inconsistent and not readily available. The grantee was unable to provide accurate records to verify criminal record checks on all employees because of inconsistencies in Employee Status reports and criminal record checks for employees hired within the past two years. The grantee did not ensure personnel policies covered all required policies, such as standards of conduct, initial health examinations for all staff, and criminal record checks.
- The grantee did not monitor to ensure all safety regulations were implemented. The program did not provide required transportation safety training for children or pedestrian safety training for parents and children within 30 days of the program's start. The grantee did not develop or implement ongoing monitoring procedures covering several key areas requiring adherence to Federal regulations.

*See* ACF Ex. 7, at 3-4.

As noted, JCCS does not dispute that these findings evidenced that there were deficiencies relating both to section 1304.51(g) and section 1304.51(i)(2) at the time of the triennial review. Accordingly, we need only address whether JCCS corrected these deficiencies by the time of the follow-up review.

### **III. Follow-up review findings**

At the follow-up review, the reviewers found a variety of record-keeping problems, based on which they concluded that the deficiency relating to section 1304.51(g) was uncorrected. ACF Ex. 2, at 19-21. Broadly stated, the findings are:

- Various types of documents for multiple Head Start employees were missing from the official personnel files maintained by JCCS.
- Various types of required health records for multiple Head Start children were missing from child files.
- The documentation regarding pay rates for Head Start employees did not consistently show that JCCS paid the new minimum wage of \$7.25 per hour effective July 25, 2009.

The reviewers also relied on the same evidence in finding that “[a]lthough a new monitoring system was in place, it was not fully implemented” and that the deficiency relating to section 1304.51(i)(2) was, therefore, uncorrected. *See* ACF Ex. 2, at 23.

We note that only one of the three follow-up review report findings described above involves precisely the same matter as a finding in the triennial review; however, we find no notice defects with respect to any of the findings. To support a determination that a grantee has failed to correct a deficiency, there need be only “sufficient similarity in the findings to provide notice that the grantee needed to come into compliance with the requirement at issue.” *Union Township Community Action Organization, Inc.*, DAB No. 1976, at 12, n.7 (2005). As the Board explained in *First State Community Action Agency, Inc.*, DAB No. 1877 (2009)—

[t]he mere fact that a deficiency was exhibited in a certain way in one review does not mean that different evidence may not be used to support a finding that a grantee continued to be deficient in meeting a requirement . . . . Where a requirement is clear and a QIP shows that the grantee understood what it was required to do, no notice question arises.

DAB No. 1877, at 17. JCCS does not specifically assert that any of the findings in the two reports were so dissimilar that it lacked notice that, to correct its record-keeping and monitoring problems, it would need to address the matters identified in the findings in the follow-up review report. JCCS argues only that it was not informed until the follow-up review report that its official personnel files needed to include documentation that criminal record checks were conducted for JCCS employees whose salaries were allocated only in part to the Head Start program. We discuss later why we conclude that this objection does not raise a valid notice issue.

We proceed to consider below JCCS’s challenges to the accuracy of the findings in the follow-up review report, as those findings were clarified in ACF’s submissions in the proceeding before us.

#### ***A. Documents missing from official personnel files***

ACF found that on January 11, 2010 (the first day of the follow-up review), personnel files for 20 of 110 Head Start employees were missing one or more documents. According to ACF, a total of 48 documents were missing from the 20 files as follows: seven files were missing criminal background checks; 11 files were missing TB (tuberculosis) screenings and two files had TB screenings that were not dated; 12 files were missing health examination records; two files were missing the Code of Conduct and one file had a Code of Conduct that was not dated; six files were missing the



addendum to the Code of Conduct; and seven files were missing annual appraisals.<sup>5</sup> ACF Ex. 2, at 19; Wien aff. at 2 (unnumbered); Sudduth aff. at 3-4. Twenty of the 48 missing documents were located at the Head Start program office. Sudduth aff. at 4. Information provided by ACF in response to JCCS's discovery request, and not disputed by JCCS, shows that, even taking into account the documents located in the Head Start program office, some documents were still missing for 12 of the 20 employees whose files were originally identified as missing documents. *See* ACF Exs. 3 and 4.

JCCS takes the position that all of the documents ACF determined were missing from the official personnel files 1) were in those files at the time of the follow-up review, 2) were not in those files at the time of the follow-up review but were or could have been located elsewhere at that time, or 3) were not in those files at the time of the follow-up review but were not required in the first instance. JCCS argues that ACF therefore erred in relying on these findings in concluding that JCCS failed to correct the deficiencies relating to sections 1304.51(g) and 1304.51(i)(2).

The documents that JCCS asserts were not required in the first instance include annual appraisals for 11 employees. ACF has not disputed JCCS's assertion that appraisals were not required for these 11 employees because three were temporary employees, one was on suspension, and seven were substitutes. *See* JCCS appeal dated 8/27/10, at 5; Akins aff. at 3. Except with respect to these documents and criminal record checks for two employees hired before such checks were required (discussed later), we conclude that JCCS has not shown any error in ACF's findings regarding documents missing from the official personnel files.

According to JCCS, the only required documents that were missing from the personnel files during the follow-up review are documents shown as missing on its Head Start Employee Record Report dated January 11, 2010 (the first day of the follow-up review). This report shows that one employee had a "pending" criminal record check;" one employee was missing a TB screening; two employees (including one "substitute") were missing a health examination record; and one employee was missing an addendum to the Code of Conduct. *See* ACF Ex. 102; Akins aff. at 2-3.

The Head Start Employee Record Report is not sufficient to establish that any of the missing documents were actually in JCCS's personnel files at the time of the follow-up review. According to one of the reviewers, JCCS's Human Resources Director stated in an interview that "Human Resources" provided an updated Head Start Employee Record Report to the Head Start Director and JCCS Executive Secretary on a monthly basis.

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<sup>5</sup> A copy of JCCS's Code of Conduct is not in the record. However, an "Addendum" to that code of conduct, which is in the record, includes the standards of conduct for Head Start employees and identifies actions that will be considered direct violations of the standards of conduct, subjecting an employee to disciplinary action. Young rebuttal aff., attachments at 13-16 (unnumbered).

Wien aff. at 4 (unnumbered). Even if the January 11 report was prepared as part of that process, its reliability is undercut by JCCS's failure to produce any other evidence that the documents ACF found were missing were actually in JCCS's personnel files on January 11. Merely because JCCS may have had a procedure in place for checking whether all required documents were in those files does not mean that its procedure yielded complete and accurate information.

JCCS also argues that the fact that some documents were located in the Head Start Director's office rather than in the personnel files maintained by the Human Resources Director undercuts ACF's deficiency findings. JCCS reasons that, given the size of its Head Start program, it was not necessary for every document that flows through the program to "instantly be contained in a master record for ACF to see in the office of one employee" as long as JCCS could assemble the necessary records as needed. JCCS Br. dated 2/24/11, at 5.

JCCS's argument is not persuasive. JCCS's approved QIP stated in part that, in order to correct the deficiency relating to section 1304.51(g), "[t]he grantee will maintain Head Start Personnel Files at the grantee's office." ACF Ex. 8, at 5 (unnumbered). As JCCS suggests, this does not necessarily mean that all documents that should be maintained in the personnel files must be placed in the files the moment they are received from the employee. During the time period at issue here JCCS's administrative and financial offices were located in buildings in the southeast section of Pine Bluff while the Head Start program central office and Head Start classrooms were located in a building in the northwest section of Pine Bluff. Young aff. at 1. Since the Human Resources Director, who maintained the personnel files, was located in JCCS's administrative office, it might have been reasonable for Head Start teachers (for example) to submit required documents to the Head Start program office and for the Head Start Director to then send (or bring) these documents to JCCS's administrative office. According to ACF, the Human Resources Director told a reviewer that "documents that were missing or expired from grantee personnel files were requested from the Head Start program through Transmittal Notices[.]" Wien aff. at 3. However, JCCS did not submit copies of any transmittal notices, put in any evidence regarding how missing documents were identified or the timelines (if any) for transferring them to JCCS's administrative office or point to any evidence showing when the documents that were found in the Head Start program office during the follow-up review were received by that office. The longer the documents were in the Head Start program office, the less plausible it is that the documents were simply temporarily residing there as part of the normal document flow.

JCCS also asserts that at the time of the follow-up review, some of the documents that were missing from the personnel files were in transit from the Head Start program office to JCCS's administrative office. Specifically, JCCS asserts that the TB screening and the two health examinations shown on the Head Start Employee Record Report as missing were sent by the Head Start program office to the Human Resources Director but had not

been received by her as of January 11, 2010. Akins aff. at 1-2, 5; Young rebuttal aff. at 3, 11.

The documents in question, copies of which JCCS provided on appeal, are dated 4/29/09, 12/8/09 (as best we can discern), and 1/11/10 (TB screening certificate and two health examination records, respectively). Young rebuttal aff., attachments at 10-12 (unnumbered). Thus, the TB screening certificate could have been in the Head Start program office for more than eight months before it was sent to the Human Resources Director and one of the health examination records could have been in the Head Start program office for more than a month before it was sent to the Human Resources Director. Such lengthy delays are inconsistent with the assertion that the documents were “in transit.”

JCCS also provided on appeal a copy of the addendum to the Code of Conduct it admitted was missing from the personnel files at the time of the follow-up review. Young aff. at 11-12, and attachment at 13-16 (unnumbered). JCCS does not explain where and when that document, dated 5/7/09, was located at the time of the follow-up review. Thus, it is irrelevant that JCCS was able to produce that document on appeal.

JCCS also asserts that it had initiated a request for a criminal record check for the bookkeeper, whose criminal record check is shown on the Head Start Employee Record Report as “pending,” after its Human Resources Director, “[i]n the normal course of record review,” discovered that a criminal record check requested for the bookkeeper in 2003 was not in her personnel file. *See* JCCS appeal dated 8/27/10, at 2; Akins aff. at 1. JCCS does not state when the Human Resources Director made this discovery or when the new request for a criminal record check was initiated. In any event, we are not persuaded that a pending request for a criminal record check would suffice to meet the requirements of 45 C.F.R. § 1301.31(b)(1), which provides in part that “[b]efore an employee is hired, grantee or delegate agencies must conduct . . . (iii) a State or national criminal record check, as required by State law or administrative requirement.” The regulation further provides: “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.” 45 C.F.R. § 1301.31(b)(1)(iii). The bookkeeper was hired by JCCS in 2003 (*see* JCCS Br. dated 2/24/11, at 3), yet JCCS presented no evidence of a completed criminal record check. JCCS also argues that another employee found by the follow-up review to be missing a criminal record check had a criminal record check that “had not yet been processed[.]” Akins aff. at 2; Young rebuttal aff. at 8. JCCS does not state that this employee had only recently been hired or provide any other explanation for the lack of a completed criminal record check.

JCCS also argues that five JCCS employees—the Executive Director, Financial Accountant, Executive Secretary, Purchasing Clerk, and Chief Financial Officer—were included in ACF’s count of employees who were missing criminal record checks were

not required to have criminal record checks.<sup>6</sup> The salary of each of these employees, none of whom was listed on the Head Start Employee Record Report, was allocated in part to the Head Start program and in part to JCCS's other programs. *See* ACF Ex. 101, at 4 (unnumbered) (showing allocation of salaries for employees in these positions). JCCS argues that these "cost-allocated employees" were not required to have criminal record checks because, as administrative staff of JCCS, they are not "involved in every day contact with children" or "physically located with the children in any Head Start centers." JCCS appeal dated 8/27/10 at 1; Davis aff. at 2 (unnumbered).

The plain language of the Head Start regulation requiring criminal record checks makes no distinction between different types of employees, but simply applies to "an employee" of the "grantee". 45 C.F.R. § 1301.31(b). Section 1302.1 states that "*Head Start grantee* or *grantee* means a public or private nonprofit agency or organization whose application to operate a Head Start program pursuant to section 514 of the Act has been approved by the responsible HHS official." JCCS clearly was the grantee.<sup>7</sup> Thus, the regulation applied to all employees of JCCS, at least to the extent part of their time was allocated to Head Start.

JCCS also argues that two of the cost-allocated employees were exempt from the requirement for criminal record checks because they were hired in 1972 and 1988, before the Head Start regulations included a requirement for a criminal record check.<sup>8</sup> Young rebuttal aff. at 6. ACF did not address this argument. We therefore assume, for purposes of this decision only, that the two cost-allocated employees hired before the effective date of the current regulation were not required to have criminal record checks.

JCCS also appears to take the position that Arkansas law does not require the cost-allocated employees to have criminal record checks and that section 1301.31(b)(1)(iii) requires a criminal record check only to the extent required by state law. As explained below, even if we were to adopt JCCS's reading of section 1301.31(b)(1)(iii), we would

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<sup>6</sup> The follow-up review report indicated that the personnel file for one of these five employees included a checklist signed by the Human Resources Director showing that a criminal record check had been completed although there was no other evidence of a criminal record check. ACF Ex. 2, at 17-18. JCCS disputed that Human Resources Director had signed the checklist but did not dispute that this employee had no criminal record check. JCCS appeal, dated 8/27/10, at 3; Akins aff. at 2.

<sup>7</sup> Since JCCS is the Head Start grantee under federal law, it is irrelevant whether, as JCCS alleges, the "State of Arkansas considers the Head Start Director as the Owner/Operator of the grantee's child care program" (Appellant's Reply to ACF's Submission and Motion, dated 3/21/11, at 6).

<sup>8</sup> From 1988 until 1996, the Head Start regulations required only that a grantee have personnel policies requiring "that all prospective employees . . . sign a declaration prior to employment which lists . . . (1) All pending and prior criminal arrests and charges related to child sexual abuse and their disposition; (2) Convictions related to other forms of child abuse and/or neglect; and (3) All convictions of violent felonies" (with certain exceptions permitted, e.g., for a conviction which has been expunged). 45 C.F.R. § 1301.31(c) (1995).

conclude that, on the facts here, criminal record checks were required for at least the three cost-allocated employees who were hired after the effective date of the Head Start regulation requiring criminal record checks.

The Arkansas Minimum Licensing Requirements required criminal record checks for employees “in a child care facility” within 10 days of hire and every five years thereafter. Arkansas Department of Health and Human Services, Division of Child Care and Early Childhood Education, Minimum Licensing Requirements, section 108 (2006 version accessible at <http://www.arkansas.gov/childcare/licensing/pdf/Center2-06rev.pdf>); *see also* JCCS Documentation #1, at 3-5 (unnumbered) (section 108). We see no reason why the employees in question should not be considered employees “in a child care facility” since their salaries were allocated in part to a program that operates child care facilities. Nothing in the Minimum Licensing Requirements indicates that only child care facility employees who have contact with children are required to have a criminal record checks. In any event, JCCS’s argument that cost-allocated employees do not have everyday contact with Head Start children does not deny that they had, or could have had, some contact with Head Start children. JCCS focuses on the fact that JCCS’s administrative offices were in a different location from the Head Start program office and Head Start classrooms. It does not necessarily follow that these employees were never present in the Head Start program office, or even in the Head Start classrooms. Indeed, JCCS’s Executive Director seems to admit that the cost-allocated employees could at times have been physically present in the Head Start program office or the Head Start classrooms. Davis aff. at 2 (their “duties . . . involve very little, if any, physical presence at the Head Start central office or any of the Head Start Program Centers”) (emphasis added).

JCCS also asserts that it had no notice until the follow-up review that ACF interpreted the regulation as requiring criminal record checks for cost-allocated employees since no prior reviews had cited the lack of criminal record checks for such employees. JCCS Br. dated 2/24/11, at 3-4; JCCS’s Reply to ACF’s Submission and Motion, dated 3/21/11/, at 2. ACF acknowledges that, at the triennial review, it did not identify cost-allocated employees as employees who were missing criminal record checks, but states that this was only because it was not given their personnel files to review. ACF Reply Br. dated 3/22/11, at 3. In any event, JCCS could not reasonably presume based on the absence of any specific reference by ACF to the cost-allocated employees that they were exempt from the criminal record check requirement. As discussed above, the regulation on its face applies to all employees of a Head Start grantee, at least to the extent part of their time was allocated to Head Start, and as a grantee, JCCS was charged with knowledge of the applicable regulations. At the very least, given the obligation of grantees to be familiar with Head Start requirements, the regulatory language put JCCS on notice to seek clarification from ACF if it was not sure of the scope of this plain language. JCCS does not allege that it sought clarification from ACF.

***B. Health information missing from child files***

During the follow-up review, ACF reviewed 83 “child files” and found that health information for 37 children was missing or incomplete. In particular, ACF found that 18 children were missing lead screenings, 10 children were missing TB screenings, six children were missing dental examinations, 16 children were missing hemoglobin/hematocrit testing, two children were missing health examinations, and 19 children had incomplete health examinations. *See* ACF Ex. 2, at 19, 25; ACF Ex. 5; ACF Ex. 16, at 1-3 (unnumbered); Sudduth aff. at 4. ACF also found that “[a]lthough parents were sent reminders, the [reminder] notices did not offer assistance in making arrangements for screenings and examinations.” ACF Ex. 2, at 25. In addition, ACF found that the “Child Monitoring Forms” in 59 of the 83 child files had “missing or incomplete data that had not been updated with current information[.]” Sudduth aff. at 4; *see also* ACF Ex. 2, at 19.

JCCS takes the position that 11 children had complete health information “within the 90 day timeframe.” Young rebuttal aff. at 14. This appears to be a reference to the regulatory requirement that “no later than 90 days . . . from the child’s entry into the program,” the grantee “[o]btain from a health professional a determination as to whether the child is up-to-date on a schedule or age appropriate preventive and primary health care,” and, for children who are not up-to-date, “must assist parents in making the necessary arrangements to bring the child up-to-date[.]” 45 C.F.R. §§ 1304.20(a)(1)(ii) and (ii)(A). JCCS does not clearly identify the 11 children to whom it refers. However, ACF identified four children (XC, KF, ML, and JP) as missing only a TB screening, which JCCS asserts was not required for Head Start children. JCCS Ex. 5, at 4 (unnumbered); Appellant’s Second Submission and Reply, last unnumbered page. In response to the Board’s inquiry, ACF cited no authority specifically requiring Head Start children to have a TB screening. Summary of Pre-Hearing Conference and Schedule of Further Proceedings, dated 12/1/10, at 4. Accordingly, we do not consider these four children as missing health information. On appeal, JCCS submitted what appears to be all of the health information for five other children (JB#1, JB#2, ZD#2, CG and TK) ACF identified as missing required health information *See* JCCS Ex. 5.<sup>9</sup> However, JCCS does not contend that this information was in the child files at the time of the follow-up review or offer any explanation why the information was missing from the child files at that time.

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<sup>9</sup> Another JCCS exhibit, Documentation #7, includes numerous letters signed by doctors stating that lead testing was done on 5-7-09 for the child named in the letter. However, the names of the children have been completely redacted, so there is no way to determine if any of these children are on ACF’s list of children whose files were missing lead screenings and if so, if this was the only required information missing from those files.

Moreover, JCCS admits that 13 children did not have lead screenings within 90 days; six children did not have dental examinations within 90 days (although JCCS says two of the six had dental examinations later); 13 children did not have hemoglobin/hematocrit testing within 90 days (although JCCS says one of the 13 had hemoglobin/hematocrit testing later); two children did not have medical (i.e., health) examinations within 90 days (although JCCS says they both had medical examinations later); and 16 children did not have complete health examinations. *See* JCCS Ex. 5 (“Analysis of Child Health Records Reviewed”). Thus, JCCS concedes not only that, of the 37 child files ACF found were missing health information, all but 11 were in fact missing such information, but also that more than one type of information was missing from some files.

JCCS argues that it sent “reminder notices informing the parent/guardian of the status of their child’s physical[.]” JCCS Ex. 5, at 4 (unnumbered). According to JCCS, “1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> notices were sent to give parents an opportunity to get their child’s complete physical exams with the assistance of Head Start Staff. . . .” *Id.*<sup>10</sup> The record includes copies of reminder notices sent by JCCS to parents of one child (JT) identified by ACF as missing a medical examination, one child (CJ) identified by ACF as missing a dental examination, and one child (DR) identified by ACF as having an incomplete health examination. ACF Ex. 5; ACF Ex. 17, at 11, 13, 15 (unnumbered). The three notices simply advise the child’s parents/guardians of the past due date for the health examination or screening in question and request that the documentation be turned into the central office or that a copy of any scheduled appointment be provided. *Id.* The notices do not establish that JCCS “assist[ed] parents in making the necessary arrangements to bring the child up-to-date” on an age-appropriate schedule of preventive and primary health care within the meaning of section 1304.20(a)(1)(ii)(A). Even if these notices were sufficient to show compliance with section 1304.20(a)(1)(ii), JCCS’s record-keeping and monitoring would still be deficient if, as appears to have been the case, copies of these notices were not in the child files JCCS provided at the follow-up review. The record also includes permission slips JCCS sent to parents of two children (JK and QS) identified by ACF as missing lead testing authorizing JCCS to transport the child for lead screening (JK) or comprehensive screening (QS). JCCS Ex. 5, at 11-12 (unnumbered). However, the permission slip for JK was not sent until after September 2010, long after the follow-up review, and the permission slip for QS was sent in

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<sup>10</sup> JCCS further states that “[a]s a last resort, parents were asked to sign denial notices refusing to get or allow services to be attained [sic] for their children.” JCCS Ex. 5, at 4 (unnumbered). We can find no documentation in the record showing that parents of any of the children in question declined to have their children receive any health screening or services.

December 2008, yet QS was still missing the lead screening at the time of the follow-up review.<sup>11</sup> *Id.*

JCCS also asserts that it followed its procedures for monitoring child health services and provided copies of some weekly and monthly monitoring reports. JCCS appeal dated 8/27/10, at 8; JCCS Documentation #7. However, JCCS does not dispute the finding in the follow-up review report that the Child Monitoring Forms in 59 of 83 child files sampled did not contain up-to-date information. Moreover, any monitoring that was done was clearly ineffective, given the extent of the health information missing from the child files themselves.

### ***C. Inconsistent Payroll Records***

On July 25, 2009, the federal minimum wage increased from \$6.55 to \$7.25 per hour. *See* ACF Ex. 2, at 20. The Head Start Act requires that the Secretary ensure that persons employed in the Head Start program receive compensation not less than the federal minimum wage. *See* 42 U.S.C. § 9848. The following documents pertaining to salaries for JCCS's Head Start program were provided to the reviewers during the follow-up review:

- a June 1, 2009 Employee Pay History Report-U.S. Payroll After COLA and Stimulus showing that all employees were paid at least \$7.25 per hour;<sup>12</sup>
- a chart captioned Head Start COLA & Stimulus showing pay rates of at least \$7.25 per hour after a 4.336% cost of living adjustment (COLA) and other unspecified increases (ACF Exhibit 9);
- a chart captioned Head Start Salary Scale Including Quality and Cost of Living Increase showing pay rates of at least \$7.25 per hour after a COLA (ACF Exhibit 15); and
- a chart captioned Head Start Salaries 2009-2010 COLA showing a pay rate for some employees of \$6.83 per hour after a 4.336% COLA (ACF Exhibit 101).

The follow-up review report also stated that a review of individual employee payroll reports dated August 26, 2009 showed a pay rate for 51 employees of less than \$7.25 per hour. *See* ACF Ex. 2, at 20; Soto Aguilu aff. at 2; Sudduth aff. at 5.

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<sup>11</sup> JCCS also submitted voluminous field trip rosters for children transported on various dates for health services such as lead screening and dental care. JCCS Ex. 5. There is no indication that the field trip rosters were in any child files at the time of the follow-up review. In any event, we question whether merely transporting the child would suffice to meet the requirements of section 1304.20(a)(1)(ii) in the absence of evidence that the child actually received the screening or care.

<sup>12</sup> Neither party indicated that this document is part of the record for this appeal.



The follow-up review report concluded that JCCS's compliance with the minimum wage law could not be determined due to the inconsistencies among these documents and that these inconsistencies demonstrated that JCCS had not corrected its record-keeping and monitoring deficiencies. ACF Ex. 2, at 20, 23. In briefing before the Board, ACF also questioned whether JCCS could be considered in compliance with the minimum wage law if, as ACF said was the case, JCCS used COLA funds to bring pay rates up to \$7.25 per hour. ACF's Written Submission to Grantee's Appeal or, in the Alternative, Motion and Brief in Support of Summary Disposition, dated 2/24/11, at 19, citing *Soto Aguilu* aff. at 2.

JCCS asserts that it paid all employees at least the minimum wage as of July 13, 2009 and that it was permissible to use COLA funds to bring pay rates up to the minimum wage. JCCS Br. dated 2/24/11, at 6; Appellant's Reply to ACF's Submission and Motion, dated 3/21/11, at 4. According to JCCS, one of the documents provided to the reviewers that showed some employees receiving less than the minimum wage was updated only at the beginning of each fiscal year (July 1) and thus did not reflect the increase in the minimum wage that went into effect after July 1, 2009. JCCS Br. dated 2/24/11, at 6; *Davis* aff. at 3 (unnumbered) (referring to "salary schedule"); *Green* aff. at 1 (unnumbered) ("referring to "Head Start Salary COLA report"). JCCS asserts that "more up to date charts were available and the employee records themselves clearly showed compliance with minimum wage requirements." JCCS Br. dated 2/24/11, at 6.

We are not persuaded that the records produced by JCCS at the follow-up review evidence deficient record-keeping and monitoring with respect to employee pay. ACF does not dispute that the chart showing pay rates of less than the minimum wage was outdated. Moreover, while our review of the individual employee payroll reports submitted by ACF (which we presume are the same reports reviewed at the follow-up review) found a few reports that do not affirmatively show that the employee was paid at least \$7.25 per hour as of July 25, 2009, we found no reports showing that the employee was not paid at least \$7.25 per hour as of that date. *See* ACF Exs. 40 *et seq.* Since even ACF does not dispute that other records were available that affirmatively showed that all employees were paid at least \$7.25 per hour as of that date, we conclude that the evidence on which ACF relies here is not sufficient to support the deficiency findings.

We note that, as with the charts JCCS provided to the reviewers, some of the individual employee payroll reports show that the \$7.25 per hour included a COLA. Whether JCCS was permitted to use COLA funds to bring pay rates up to the minimum wage might have a bearing on whether JCCS properly expended Head Start funds. However, no deficiency was found on that basis and JCCS's use of a COLA has no bearing on whether JCCS's record-keeping and monitoring satisfied the Head Start requirements.

Accordingly, we conclude that, in determining that JCCS failed to correct the record-keeping and monitoring deficiencies, ACF properly relied on its findings regarding

documents missing from official personnel files and health information missing from child files, but not on its findings of inconsistent payroll records.

#### **IV. The standard for termination**

JCCS maintains that the applicable standard for termination in this case is set out in *Babyland Family Services, Inc.*, DAB No. 2109 (2005). According to JCCS, “There the Board identified the issue as ‘whether the allegations were significant enough to constitute substantial performance failure or misuse of grant funds.’” JCCS Br. dated 2/24/11, at 9 (quoting DAB No. 2109, at 15). According to JCCS, ACF has not demonstrated “any deficiency significant enough to constitute substantial performance failure.” *Id.* at 10; *see also* JCCS Preliminary Issues, undated (received 11/23/10) at 6 (stating that the “facts [ACF] asserted” to justify its decision to terminate “fall short of demonstrating a substantial failure on the part of JCCS.”).

JCCS’s reliance on *Babyland* is misplaced. The statement quoted by JCCS related to Babyland’s argument “that the violations cited as deficiencies under 45 C.F.R. § 1304.3(a)(6)(i)(C) did not rise to the level of substantial performance failure in program design and management and did not involve a misuse of grant funds.” DAB No. 2109, at 14-15. In other words, the statement was made in the context of the issue of whether, as ACF found, Babyland had deficiencies in the first instance. Here, JCCS does not take the position that the violations found in the triennial review did not constitute deficiencies. Instead, JCCS argues that it had corrected those deficiencies and that any remaining inadequacies were not evidence of uncorrected deficiencies. As explained below, the standard that applies in determining whether a grantee has corrected its deficiencies, thereby avoiding termination, is not the same standard that applies in determining whether the grantee had deficiencies in the first instance.

The Board has previously rejected the argument that a grantee's substantial performance is sufficient to correct a deficiency and avoid termination. In *Philadelphia Housing Authority*, the Board stated, in part, as follows:

While the definition of a deficiency 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 explained a reasonable basis for the interpretation that correction requires full compliance; to permit grantees to only partially correct a deficiency to avoid termination would

effectively result in grantees never fully complying with Head Start requirements . . . .

DAB No. 1977, at 10-11; *accord*, *Municipality of Santa Isabel*, DAB No. 2330 (2009); *The Council of the Southern Mountains*; *DOP Consolidated Human Services Agency, Inc.*, DAB No. 1689 (1999). Thus, JCCS would have had to fully correct its noncompliance with sections 1304.51(g) and 1304.51(i) by the time of the follow-up review in order to avoid termination.

As we have discussed, however, JCCS has succeeded in demonstrating that only a few of the factual findings made by ACF in support of the termination were in error. The remaining findings are more than sufficient to establish that JCCS's record-keeping systems did not provide accurate and timely information regarding children and staff and that its monitoring procedures did not ensure that it effectively implemented federal regulations. Accordingly, JCCS failed to fully correct its deficiencies.

JCCS nevertheless argues that termination is improper since “[n]owhere does the ACF indicate any failure of services delivered to the children or any consequence of alleged deficiencies to the program.” JCCS Preliminary Issues at 4. The impact of the deficiencies on JCCS's Head Start program is self-evident, however. JCCS's failure to ensure that all required documents were in its personnel files could have resulted in the employment of Head Start staff who had criminal records, had communicable diseases, or were unaware of the applicable standards of conduct, putting the health and safety of Head Start children in jeopardy. Moreover, as a result of JCCS's failure to ensure that all required health information was in its child files, some children might not have received necessary health services, the provision of which is a core purpose of the Head Start program. *See* 42 U.S.C. § 9831. Even if no children were in fact adversely affected by the deficiencies (and JCCS did not show that), it was merely fortuitous and does not undercut the deficiency findings.

JCCS also argues that termination is not warranted because it “completed the requirements of the 2008 [Q]IP,” which required JCCS to develop and implement certain record-keeping and monitoring procedures. JCCS Br. dated 2/24/11, at 10. The report on the follow-up review acknowledges that new record-keeping and monitoring systems were “in place.”<sup>13</sup> ACF Ex. 2, at 20, 22. However, based on the factual findings we have discussed, and largely upheld, ACF reasonably determined that those systems had not been fully implemented. *Id.* at 20, 23.

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<sup>13</sup> Although ACF did not make a finding that these systems met the requirements of JCCS's 2008 QIP, ACF nowhere stated that they did not.

ACF therefore correctly concluded that JCCS continued to have deficiencies within the meaning of section 1304.3(a)(6)(i)(C). As indicated above, a single uncorrected deficiency is sufficient to warrant termination of funding. 45 C.F.R. § 1303.14(b)(4) (authorizing termination for failure to correct "one or more deficiencies"); *The Human Development Corporation of Metropolitan St. Louis*, DAB No. 1703, at 2 (1999). Accordingly, termination was warranted here.

### **Conclusion**

For the reasons discussed above, we uphold ACF's termination of JCCS's Head Start grant.

\_\_\_\_\_/s/\_\_\_\_\_  
Stephen M. Godek

\_\_\_\_\_/s/\_\_\_\_\_  
Leslie A. Sussan

\_\_\_\_\_/s/\_\_\_\_\_  
Sheila Ann Hegy  
Presiding Board Member