

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Away From Home, Inc.      DATE: March 21, 2008  
Docket No. A-07-116  
Decision No. 2162

DECISION

Away From Home, Inc. (AFH) appealed the June 25, 2007 decision of the Administration for Children and Families (ACF) terminating federal funding awarded to AFH for fiscal year (FY) 2007 to provide shelter care services under the Unaccompanied Alien Children Program. ACF found that AFH violated the terms of a Cooperative Agreement between AFH and the Office of Refugee Resettlement (ORR) within ACF by failing "to protect the children in its care from physical and sexual abuse" and "to report findings of abuse to ACF in a timely manner." ACF letter dated 6/25/07, at 1. The Cooperative Agreement required that AFH provide shelter care in accordance with applicable State child welfare statutes and licensing requirements and generally accepted child welfare standards, practices, principles, and procedures.

AFH disputes ACF's findings of physical abuse but not its findings of sexual abuse. AFH argues in any event that the termination was improper, contending principally that: ACF did not specify the generally accepted child welfare standards that were violated by AFH; ACF cited as a basis for the termination only three incidents of employee misconduct, including one that occurred before the FY 2007 award was made; and ACF did not allege that AFH caused or condoned the misconduct or failed to take appropriate measures after learning of the misconduct. See AFH Br. at 1-2.

In response to AFH's initial brief, which included a request for an evidentiary hearing, ACF moved for summary disposition affirming the termination. AFH did not oppose ACF's motion. Instead, AFH requested an "expedited appeal" and ultimately argued that the Board should grant "summary judgment" in its favor. 1/2/08 e-mail from Terral Smith to Board staff; AFH Reply Br. at 17. However, neither party framed its arguments in terms

of the standards for summary judgment, and neither sought further development of the record.<sup>1</sup> We have therefore determined that the parties were instead requesting disposition on the written record. Accordingly, the record for this decision consists solely of the parties' briefs and exhibits.<sup>2</sup>

Based on our de novo review of that record, we uphold the termination for the reasons explained in detail below. We find that the record fully supports ACF's findings that children in AFH's facility were physically as well as sexually abused. We further find that the documented abuse shows that AFH failed to follow State child welfare laws and generally accepted child welfare standards made applicable by the terms and conditions of the award. Finally, we conclude that AFH materially failed to comply with those terms and conditions.

### Background

The Unaccompanied Alien Children Program is authorized by the Homeland Security Act of 2002 (Act), Public Law No. 107-296, 6 U.S.C. § 101 et seq. Section 462(a) of the Act transferred the functions of the Immigration and Naturalization Service (INS) with respect to the care of unaccompanied alien children (UAC) to the Director of ORR. Section 462(g)(2) defines UAC as children under 18 who are in federal custody because they have no lawful immigration status in the United States and no parent or legal guardian in the United States available to provide care and physical custody. Among other things, the Director of ORR is responsible for "coordinating and implementing the care and placement of UAC," "identifying . . . qualified individuals, entities, and facilities to house" UAC, and "overseeing the

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<sup>1</sup> Summary judgment is generally appropriate when the record shows that there is no genuine issue as to any material fact and the moving party shows that it is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

<sup>2</sup> Under the applicable procedural regulations, an evidentiary hearing is discretionary. The Board will approve a request for a hearing "if it finds that there are complex issues or material facts in dispute the resolution of which would be significantly aided by a hearing, or if the Board determines that its decisionmaking otherwise would be enhanced by oral presentations and arguments in an adversary, evidentiary hearing." 45 C.F.R. § 16.11(a).

infrastructure and personnel of facilities in which [UAC] reside." Section 462(b)(F), (G).

AFH, previously known as Southwestern Initiatives Group, was licensed by the State of Texas as an emergency shelter in 2003. AFH Ex. 3. AFH asserts without contradiction that it received funding from ACF beginning in 2003 to operate a shelter care facility for UAC. AFH Br. at 6.<sup>3</sup> On October 1, 2006, ORR made a financial assistance award, No. 90ZU0040/01, to AFH under the UAC program for a one-year budget period ending September 30, 2007. AFH Ex. 7, at 1. The award document indicates that support was anticipated for a five-year project period ending September 30, 2011.<sup>4</sup> Id. at 2. The award document also identifies the type of assistance as a cooperative agreement.<sup>5</sup> Id. at 1. In addition, the award document states that the award is subject to the requirements of the HHS Grants Policy Statement and any applicable statutory and regulatory requirements, including 45 C.F.R. Part 74. AFH Ex. 7, at 2. Section 74.61(a)(1) of 45 C.F.R. provides that awards may be terminated in whole or in part

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<sup>3</sup> An internal ORR e-mail regarding AFH's bed capacity refers to "cooperative agreement/award #90XR0006" ended September 30, 2006. AFH Ex. 5.

<sup>4</sup> The amount awarded for the first 90 days of the budget period was \$1,309,140. AFH Ex. 7, at 1. According to AFH, the total funding for the five-year project period was to have been \$26 million. AFH Br. at 1, 7.

<sup>5</sup> The Federal Grant and Cooperative Agreement Act of 1977 defines a cooperative agreement as the legal instrument used by an executive agency of the U.S. government to provide assistance to a recipient "to carry out a public purpose of support or stimulation authorized by a law of the United States" where "substantial involvement is expected between the executive agency and the . . . recipient when carrying out the activity contemplated in the agreement." 31 U.S.C. §§ 6301, 6305. The parties in this case sometimes refer to the award in question as a "grant." A grant is distinguishable from a cooperative agreement because it does not contemplate substantial involvement by the executive agency; however, it is undisputed that the award was a cooperative agreement.

by the HHS awarding agency "if a recipient materially fails to comply with the terms and conditions of an award."<sup>6</sup>

The parties also entered into a Cooperative Agreement (a separate document from the award notice) that requires AFH to "provide shelter care and other child welfare related services in a state licensed residential shelter care program to UAC[.]" AFH Ex. 8, at 7 (section 2.a of the Agreement). This document was signed by the parties in March 2006 and is by its own terms "effective for a period of 12 months beginning 07/01/2005, for a project period of one year." Id. at 32, 34-35. AFH notes that "[i]t would appear that the agreement had expired before the grant was awarded [on October 1, 2006]" (AFH Br. at 16, n.7); however, AFH does not dispute ACF's assertion that, despite the fact that a cooperative agreement for FY 2007 had not been signed, "both parties operated with the understanding that AFH, while receiving funding from ORR, was bound by the terms of the cooperative agreement."<sup>7</sup> ACF Br. at 3, n.2.

The Cooperative Agreement identifies additional authorities applicable to the award, stating that "[t]he design and administration of the program will be in accordance with all applicable State licensing provisions, ORR/DUCS [Division of Unaccompanied Children's Services] policies and procedures and the minimum standards for licensed programs established by the *Flores v. Reno* Settlement Agreement[.]" AFH Ex. 8, at 7 (section 2.1 of the Agreement). It further states that "[s]helter care

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<sup>6</sup> The Cooperative Agreement states: "ORR reserves the right to suspend or to terminate the performance of work under this Agreement for cause, in whole or in part, whenever, for any reason the GO [Grants Officer] shall determine that the Recipient has failed to comply with the terms and conditions of the Agreement." AFH Ex. 8, at 30 (section 7.3.b of the Agreement). AFH argues that this language sets out an arbitrary and capricious standard for termination. AFH Br. at 16. This is a clear misreading of the language, which requires ORR to articulate a reason why the recipient has failed to comply with the terms and conditions of the award.

<sup>7</sup> It is unclear whether ACF means that AFH was bound by an unsigned cooperative agreement for FY 2007 or by the earlier Cooperative Agreement at AFH Exhibit 8. We assume that the terms of any unsigned agreement were the same as that of the earlier agreement, to which both parties cite.

shall be provided in accordance with applicable State child welfare statutes and licensing requirements, ORR/DUCS policies and procedures, and generally accepted child welfare standards, practices, principles, and procedures." Id. at 8 (section 2.a of the Agreement).

The Flores v. Reno settlement agreement referenced in the Cooperative Agreement was signed in 1997 to settle an action to enforce compliance with a 1987 settlement agreement requiring that minors in INS custody in INS's Western Region be housed in facilities meeting certain standards. Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).<sup>8</sup> The 1997 settlement agreement "sets out nationwide policy for the detention, release and treatment of minors in the custody of the INS[.]" ACF Ex. 2, at 6. The policy provides in part that the INS "treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors," and "[f]ollowing arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors." Id. at 7-8. Within three to five days, minors who remain in INS custody must be temporarily placed in a licensed program, a medium security facility, or a secure facility, as appropriate, until they are released or immigration proceedings are concluded. Id. at 12-15. Both a licensed program and a medium security facility must meet the minimum standards for licensed programs in Exhibit 1 of the settlement agreement. Id. at 4-6.<sup>9</sup> The lead-in language of paragraph A of the minimum standards states that "[l]icensed programs shall comply with all

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<sup>8</sup> In Reno v. Flores, 507 U.S. 292 (1993), the Supreme Court rejected statutory and constitutional challenges to INS regulations that provided for the release of unaccompanied minors detained by the INS only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances. The Court presumed for purposes of its decision that the conditions of detention met the minimum standards in the 1987 settlement agreement. 507 U.S. 301.

<sup>9</sup> It appears that AFH was a medium security facility, which is required to provide "24-hour awake supervision, custody, care, and treatment" and maintain stricter security measures than a facility operated by a licensed program "in order to control problem behavior and to prevent escape. . . ." ACF Ex. 2, at 6; AFH Ex. 8, at 10.

applicable state child welfare laws and regulations . . . .”  
Id., Ex. 1, at 1. The minimum standards also state that  
 “[m]inors shall not be subjected to corporal punishment,  
 humiliation, mental abuse . . . .” Id., Ex. 1, at 4.

The Cooperative Agreement also contains specific requirements applicable to the award. As relevant here, it requires AFH to report to ORR any changes in a child’s status or condition, including “any abuse or neglect incident handled under State law,” as specified in ORR’s Policies and Procedures Manual. AFH Ex. 8, at 24-25 (section 6.2 of the Agreement). That Manual states that “[t]he ORR policy is “to ensure that all incidents that affect or involve UAC are properly documented, reported and provided with appropriate follow-up.” ACF Ex. 1, at 2. To that end, the Manual requires that “[w]hen a significant incident occurs, the care provider shall **immediately** notify the ORR/DUCS Hotline” and shall electronically submit an ORR *Significant Incident Report* form no later than 24 hours after the incident to the designated ORR Project Officer, the Federal Field Specialist, and the local Field Coordinator. Id. at 3 (emphasis in original). The Manual also states:

Significant incidents are incidents that have a significant impact on the safety and welfare of UAC. The care provider shall have written policies and procedures, in accordance with State licensing, for the documentation of such incidents within their program. All care provider staff should be knowledgeable of such policies and procedures. Examples of significant incidents include:

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- o Any abuse or neglect described under State law
- o Incidents which resulted in the isolation or restraint of a child . . .

Id. at 2.

The Cooperative Agreement also addresses the use of restraints. It provides in part:

Recipient has capability to physically and safely restrain a violent child during an emergency (i.e.: self harm, harm to others) or escape attempt. Staff must be trained and competent in the use of behavioral management techniques and other alternatives to physical and soft restraint (which should only be used as a last

resort). Nonetheless, the use of physical and soft restraints is authorized in emergencies . . . . The Recipient practices a "zero tolerance" for escapes from a secure care facility or secure transport.

AFH Ex. 8, at 11.

The Cooperative Agreement states that "ORR may revise the shelter capacity any time based on its need and availability of funds." AFH Ex. 8, at 6. On December 12, 2006, ORR reduced the number of beds from 136 to 96. Between March 1 and March 7, 2007, ORR removed all children from the facility. AFH Br. at ii-iii (Timeline). A letter to AFH from the Director of ORR dated April 30, 2007 explained the latter action as follows:

As you are aware, ORR has been deeply concerned with the overall management of the shelter care facility due to the numerous allegations of sexual abuse and the use of excessive force by Away from Home staff. These allegations, combined with the Away From Home staff's failure to report these incidents in a timely manner to ORR, led me to suspend placements in the facility on February 14, 2007.

After my visit to the facility with other senior ORR staff between February 28 and March 2, I placed an ORR staff person in charge of the facility, and ORR began moving children out of the facility for their safety. Away From Home and ORR agreed on a corrective action plan and began implementation of the plan with the hope that the facility would be re-opened in the future. **However, on April 2, 2007, ORR learned of a sexual abuse allegation that Away From Home had been aware of at the time it occurred, during ORR's February/March visit and during the negotiations concerning the corrective action plan, but that Away From Home never reported to ORR.** This failure to report, particularly in the midst of efforts to correct previous problems such as this at Away From Home, has cast doubt on Away From Home's ability to implement the corrective action plan or effectively manage this grant.

AFH Ex. 20, at 1 (emphasis in original). The April 30, 2007 letter describes the sexual abuse allegation of which ORR had only recently learned as follows:

**May 2006**

[A] female staff person allegedly became pregnant after having sex with a male child. DFPS was investigating this incident. Reportedly, this staff person was dismissed from the shelter when she became pregnant, but was later rehired.

The letter also lists several other incidents of sexual and physical abuse that had been either alleged or substantiated.<sup>10</sup> The letter continues:

Each of the incidents listed in this letter individually is a violation of Away From Home's cooperative agreement with ORR. Taken as a whole, this pattern of violations, compounded by Away From Home's complete failure to report the additional May 2006 incident during the period when ORR and Away From Home were working cooperatively to avoid such failures to report in the future, suggests that Away From Home may not be qualified to continue to carry out this grant.

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<sup>10</sup> By contrast, it appears that ACF's June 25, 2007 termination letter lists only those incidents in the April 30, 2007 letter that had been substantiated as of June 25 (set out in the text below). In particular, ACF did not cite failure to report the unsubstantiated allegation of sexual abuse in May 2006 (involving the staff member who allegedly was pregnant with a resident's child) as a basis for the termination.



Id. at 2.<sup>11</sup> The letter asks that AFH notify ORR if it "decides to voluntarily relinquish the grant" and states that ORR will notify AFH once it "makes a final decision on the treatment of this grant." Id.

In a letter to AFH dated June 25, 2007, the Director, Office of Grant Management, ACF, and the Director, ORR, advised AFH that, pursuant to 45 C.F.R. § 74.61(a)(1) and section 7.3(b) of the Cooperative Agreement, ACF--

will terminate HHS Grant #90ZU0040 for Fiscal Year 2007 and will not renew the grant for Fiscal Year 2008. We are discontinuing federal financial assistance because Away From Home failed to protect the children in its care from physical and sexual abuse and failed to report findings of abuse to ACF in a timely manner.

At 1. ACF cited as legal grounds for the termination 45 C.F.R. § 74.61(a)(1) and sections 2.2(a) and 6.2(d) of the Cooperative Agreement. In addition, ACF identified four "Findings Forming the Basis for Discontinuation." Those findings, ACF said,

show that Away From Home staff developed a pattern of not properly handling the care of a particularly vulnerable set of children - those without family and with no legal status in the United States, and the staff did not understand the urgency of reporting allegations of abuse.

Id. ACF continued:

Moreover, after the children were removed from Away From Home, the facility continued to attempt to minimize the serious incidents that occurred at the facility, highlighting a lack of commitment by Away From Home to

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<sup>11</sup> ACF refers to the allegation involving the AFH employee who became pregnant as "the additional May 2006 incident" (emphasis added) to distinguish it from another incident, involving a female employee who engaged in "sexual misconduct" with a boy in AFH's facility, that was incorrectly identified in both the April 30, 2007 letter and the June 25, 2007 termination letter as having occurred on May 10, 2006. ACF later stated that the latter incident occurred in April 2006 and AFH identified the date as April 28. ACF Br. at 8, n.4; AFH Br. at 7.

ensure that these types of incidents and lack of reporting do not occur in the future.

Id. ACF's "Findings Forming the Basis for Discontinuation" are:

**Child Welfare  
Cooperative Agreement, section 2.2(a)**

**[April 28, 2006<sup>12</sup>]**

A female employee engaged in sexual misconduct with a boy at the Away From Home facility. The Texas Department of Family and Protective Services (DFPS) investigated this incident and confirmed this allegation with a disposition of abuse. According to the DFPS report (Case #25879234), there was "a preponderance of evidence to suggest that [the Away From Home employee] was compelling and encouraging a child to engage in sexual conduct which meets that statutory definition of abuse as defined by the Texas Family Code 261.401(1)."

**November 6, 2006**

Three Away From Home employees used improper physical restraint techniques and excessive force in interacting with a boy at the Away From Home facility. According to the DFPS report (Investigation #454669), Away From Home was found deficient under Texas Family code 261.401 (Abuse/Neglect for Facilities) because "[s]taff threw child on floor and pushed child through a door . . . Intoxicated staff handed off child to another staff who was also intoxicated." DFPS also found the facility deficient under "42232 Monitoring Personal Restraints and Prohibited Restraints" because "improper restraints conducted on two children."

**February, 2007**

A female employee sexually abused four boys at the Away From Home facility. According to the DFPS report (Case # 26159693), there was "a preponderance of evidence that Sexual Abuse occurred as defined by the Texas Family Code, 261.401(a)(1)." Moreover, the report states that "[the Away From Home employee]

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<sup>12</sup> ACF incorrectly identified the date of this incident as May 10, 2006. See n.11 supra.

committed an abusive act by touching minor children in private areas of their body with her hand and mouth and allowing the children to touch her in her private areas of her body with the purpose of exciting the children and herself. These acts caused or may have caused substantial emotional harm.”

**Reporting  
Cooperative Agreement, section 6.2(d)**

. . . .  
Away From Home never reported the situation (described above at [April 28, 2006]) of the female employee who engaged in sexual misconduct with a boy at the Away From Home facility. ORR learned of the incident on September 14 [2006] through a phone call from DFPS.

Id.<sup>13</sup>

AFH appealed ACF’s termination of the award pursuant to 45 C.F.R. Part 16.

Discussion

Below, we first discuss our finding that the incident that occurred in November 2006 involved physical abuse (which we treat as including improper restraints). We proceed to discuss why we conclude that the sexual and physical abuse of children in AFH’s facility by AFH employees shows that AFH was not complying with the terms and conditions of the award, including State child welfare statutes and generally accepted child welfare standards, practices, principles, and procedures made applicable by the Cooperative Agreement and by the Flores v. Reno settlement agreement incorporated in the Cooperative Agreement. Finally, we explain why we find AFH’s additional arguments about the termination without merit.

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<sup>13</sup> The allegation of sexual misconduct on April 28, 2006, as well as the allegation of sexual abuse in May 2006 mentioned in the April 30, 2007 letter, were made directly to DFPS by the same anonymous person. See AFH Br. at 8; ACF Ex. 5, at 7-8.

**The record fully supports ACF's finding that AFH employees physically abused children in AFH's facility on November 6, 2006.**

In its termination letter, quoted above, ACF found that on November 6, 2006, three AFH employees "used improper physical restraint techniques and excessive force in interacting with a boy" at the AFH facility. ACF expressly relied on a report made by DFPS based on its investigation of this incident. The report includes a finding that one child was abused and neglected when "[s]taff threw child on floor and pushed child through a door," "[s]taff did not [properly] intervene," and "[i]ntoxicated staff handed off child to another staff who was also intoxicated." ACF Ex. 8, at 18 (12/14/06 letter from DFPS licensing investigator to AFH). The report includes a second finding that "[improper] restraints [were] conducted on two children." *Id.* (According to the DFPS intake report, one child was "thrown face down on the ground" and the other child "was held with his face up against a wall." ACF Ex. 8, at 4. DFPS's second finding did not include these details, however.) It is not clear whether the child who was found to have been abused and neglected was also one of the two children found to have been subjected to improper restraints or whether a third child was involved. DFPS sent a letter advising each of the three employees identified in its report of the finding against him and that his "name will be placed in DFPS' Central Registry" unless he disagrees with the finding and requests an administrative review. ACF Exs. 9 and 10.<sup>14</sup>

AFH does not specifically dispute the description of its employees' actions in the termination letter or the DFPS findings. AFH appears to argue, however, that those actions did not constitute physical abuse because they occurred in the context of attempts by some children to escape from the facility. According to AFH, "several residents, about to be deported, escaped while others attempting to escape were detained. A riot broke out and some of the personnel at the facility put out an SOS call for assistance," to which the employees in question responded. AFH Reply Br. at 11; see also ACF Br. at 9. AFH states that "[t]hanks to them, the uprising was quelled" and "[i]nnocent children were protected" and also that AFH's CEO

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<sup>14</sup> There is no indication in the record that any of the three employees sought administrative review. Thus, the DFPS findings were final regardless of the fact noted by AFH (at AFH Br. at 10) that misdemeanor charges against one of these individuals (AFH's training coordinator) are still pending.

"believes that everything those employees did that night was necessary and proper[.]" Id. at 11-12.

The Cooperative Agreement, quoted above, provides that a "violent child" may be physically restrained in an emergency or during an escape attempt as a "last resort." AFH Ex. 8, at 11 (emphasis added). AFH states that the two children whom ACF found were subjected to "improper physical restraint techniques" were "cursing and yelling" while they were in the all purpose room where AFH had assembled all of the children. AFH Br. at 9. AFH further states that when its training coordinator removed the two children from the room, they "began physically resisting" that individual, who "wrestled one of the young men to the floor and restrained him in a manner he believed was appropriate and necessary." Id. Nothing in this description clearly indicates that the training coordinator took these actions as a last resort, the only circumstance in which the Cooperative Agreement allows use of physical restraint. Neither does this description indicate that the two children were acting violently or were trying to escape from the facility at the time they were restrained.<sup>15</sup> Thus, it is not clear that any physical restraint was authorized.<sup>16</sup> Moreover, even assuming some physical restraint was authorized, AFH has not explained why the degree of force used (according to the intake report, throwing one child face down on the ground and holding the other child with his face up against a wall) was appropriate. AFH acknowledges, moreover, that "[o]ne [child] complained that he had a cut lip and a skinned forehead[.]" AFH Br. at 10. In addition, according to the DFPS intake report, one of the children was "slammed into" a door with such force "that wood and hasp on the door frame were completely broken away[.]" ACF Ex. 8, at 4. Even if neither child sustained serious physical injuries, the restraints posed a potential for serious physical harm and, in any event, could have inflicted psychological harm. The Flores v. Reno settlement agreement, we have noted, prohibits the use of corporal punishment, humiliation and mental abuse and also indicates that

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<sup>15</sup> The description in AFH's brief is consistent with its incident report, which indicates that the children who were subjected to the restraints were removed from the room by AFH employees and were not at that time trying to escape. See ACF Ex. 6, at 2, 4.

<sup>16</sup> The DFPS finding of "improper physical restraint techniques" could reasonably be read as meaning either that the physical force used was excessive or that it was entirely unwarranted.

minors are to be treated with dignity and respect. Clearly, the techniques used by the AFH employees in this situation did not comport with standards that both the Cooperative Agreement and the Flores v. Reno settlement agreement set for dealing with behavioral issues, whether as punishment or attempts to maintain order.

AFH also appears to take the position that the undisputed fact that the three employees in question were "drinking beer while watching Sunday afternoon football" on their day off (AFH Reply Br. at 11) when they were called to the facility somehow invalidates the finding that a child was abused and neglected by these employees. These circumstances are irrelevant, however. AFH was obligated to provide shelter care 24 hours a day, seven days a week. Cf. Cooperative Agreement, section 2.2a ("Recipient must be able to admit and discharge children on a 24-hour per day, seven (7) days a week basis"). AFH Ex. 8, at 7. Thus, AFH should have ensured that there were adequate staff at the facility or on call who were able to respond appropriately to this type of emergency.<sup>17</sup>

Accordingly, we find that the record fully supports the findings that physical abuse occurred on November 6, 2006.

**The incidents of sexual and physical abuse show that AFH failed to comply with the terms and conditions of the award in operating its shelter care facility.**

AFH does not dispute ACF's findings that AFH employees sexually abused children in AFH's facility on April 28, 2006 (female employee and one boy) and in February 2007 (female employee and four boys).<sup>18</sup> In addition, we concluded above that the record

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<sup>17</sup> It is unclear from the record whether any AFH personnel at the facility knew before the incident occurred that the employees in question had been drinking; nevertheless, these employees should have known not to report to the facility since AFH had a "'zero tolerance' policy about drinking at the facility or entering the facility if you have been drinking." AFH Reply Br. at 11.

<sup>18</sup> In its initial brief, AFH asserts that ACF "uses as an evidentiary basis only the unsubstantiated DFPS investigation reports of each incident." AFH Br. at 17.

(continued...)

fully supports ACF's finding that AFH employees physically abused children in the facility on November 6, 2006. We conclude here that the incidents of sexual and physical abuse show that AFH was not operating its shelter care facility in compliance with the terms and conditions of the award. Clearly, the basic objective of the UAC program for which the award was made was to ensure the safety of UAC in temporary placements. The Flores v. Reno settlement agreement made applicable to the award by the Cooperative Agreement requires that even in the initial days of their detention, UAC be held "in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors." ACF Ex. 2, at 8. The continuing concern for the safety of UAC is reflected in the requirement, in both the settlement agreement and in the Cooperative Agreement, that shelter care be provided in accordance with applicable State child welfare laws and generally applicable child welfare standards, which would include provisions designed to protect minors from abuse and neglect.<sup>19</sup> AFH Ex. 2, Ex. 1, at 1; ACF Ex. 8, at 7-8. Moreover, AFH's funding application for FY 2007 expressly recognized this obligation to ensure the safety of children in the facility. See, e.g., AFH Ex. 6, at 5, 9, 10. The incidents of sexual and physical abuse show that children at AFH's facility were not safe and, thus, that AFH failed to comply with the terms and conditions of the award intended to ensure that the basic objective of the UAC program was achieved.

AFH argues that there is insufficient evidence to show that it was not complying with the terms and conditions of the award because ACF's termination letter cites "three incidences" of physical and sexual abuse as the "only evidence" of this noncompliance. AFH Br. at 2. This argument has no merit. ACF's letter lists abuse occurring on three dates: April 28, 2006,

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<sup>18</sup> (...continued)

However, the DFPS reports at issue substantiate the abuse and improper physical restraint allegations. AFH does not offer any reason why we should not rely on these reports. Indeed, AFH itself relies on one DFPS report that it mistakenly identifies as relating to the February 2007 incident. See AFH Br. at 17-18, n.8, citing AFH Ex. 22; ACF Br. at 18-19.

<sup>19</sup> AFH concedes that the sexual abuse in the February 2007 incident (involving a female employee and four boys) "violated generally accepted child welfare practices and procedures." AFH Reply Br. at 2.

November 6, 2006, and February 2007. The termination letter indicates, however, that the sexual abuse that occurred in February 2007 involved four children abused by the same AFH employee. In addition, the DFPS report issued after investigation of this matter indicates that the employee admitted sexually abusing each of the four children on several occasions. ACF Ex. 11, at 2-3. Moreover, as indicated in the preceding discussion, the November 6, 2006 incident involved three AFH employees who physically abused or improperly restrained at least two children. Only the April 28, 2006 incident of sexual abuse involved a single employee and a single child. Thus, the abuse cited in the termination letter involved a total of five AFH employees and at least seven children, some of whom were abused on multiple occasions. In any event, we see no reason--nor did AFH proffer one--why any particular number of substantiated abuse incidents would be needed to justify termination of the award. (Indeed, depending on the circumstances, even one incident involving a single employee and child might justify such action.)

AFH further argues that ACF improperly relied on the April 28, 2006 incident (sexual abuse of one child by female employee) and AFC's failure to report it. Under the ORR Policies and Procedures Manual, AFH should have called the ORR hotline immediately and submitted a written incident report within 24 hours. Although AFH concedes that its failure to report this incident would have been a basis for termination if it had occurred after the FY 2007 award was made, AFH contends that the failure to report was irrelevant since the abuse occurred five months before that award was made.

We conclude that ACF properly considered this incident in determining whether AFH failed to comply with the terms and conditions of the FY 2007 award. As indicated previously, providing a safe environment for UAC was the basic objective of the UAC program. Thus, the award was made subject to State child welfare laws and generally accepted child welfare standards designed to prevent abuse and neglect. The April 28, 2006 incident put AFH on notice that the UAC in its facility were not safe from abuse from AFH's own staff. However, the only actions AFH said it took in response to this incident were "talking to the witnesses and parties to the incident" and obtaining the resignation of the employee who abused the child, effective May 1, 2006. AFH Br. at 8, AFH Ex. 9. Even if AFH could have reasonably assumed that the April 28, 2006 incident was an isolated incident of abuse that would not recur because the employee who perpetrated the abuse was gone, such an assumption was surely no longer reasonable once the second incident



occurred. At that point, it was incumbent on AFH to examine its operations to identify steps that could be taken to prevent such abuse in the future. As discussed later, however, there is no evidence that AFH identified or took any such steps even after the second incident.

Contrary to AFH's suggestion, moreover, the fact that ACF proceeded to make the FY 2007 award notwithstanding its knowledge of the April 28, 2006 incident and AFH's failure to report it does not show that ACF regarded that incident as insignificant. Even if ACF believed that there was a material breach of the terms and conditions of the earlier award, it was within ACF's discretion to award further funding. According to ACF, after learning of the incident from DFPS on September 14, 2006, it proceeded to make the award for the period beginning October 1, 2006 based on the belief that the problem would be rectified if it provided technical assistance to AFH staff on reporting child abuse to AFH (which ACF did on October 18, 2006). ACF Br. at 8.<sup>20</sup> The fact that ACF immediately provided the technical assistance indicates that ACF viewed the April 28, 2006 incident as quite serious.

Accordingly, the findings in ACF's termination letter are sufficient to support its conclusion that AFH failed to operate its facility in accordance with State child welfare laws and generally accepted child welfare standards incorporated in the terms and conditions of the award. We conclude, moreover, that AFH's failure to comply with the terms and conditions of the award was material, particularly given the egregious nature of the employees' misconduct, the number of employees and children involved, and the fact that the abuse recurred over a period of months.

AFH nevertheless argues that ACF's findings do not support the termination because ACF "has presented no evidence" or "even allege[d]" that AFH caused or condoned its employees' misconduct or failed to take appropriate measures when it learned of the misconduct. AFH Reply Br. at 1-2; see also AFH Br. at 18. The suggestion that ACF cannot terminate AFH's award based on well-documented abuse absent such evidence misapprehends the burden of proof. AFH points to no authority for the proposition that ACF had to make a showing that AFH caused or condoned its employees' misconduct or failed to take appropriate measures when it learned

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<sup>20</sup> In context, it is clear that ACF's brief mistakenly identifies the year of the training as 2007 instead of 2006.

of the misconduct. As the Board has previously stated, 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, Lake County Economic Opportunity Council, Inc., DAB No. 1580, at 5 (1996) and 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. 20, 1995). Moreover, the Board has stated that "a grantee is clearly in a better position to establish that it did comply with applicable requirements than ACF is to establish that it did not. Therefore, the Board has held that the ultimate burden of persuasion is on the grantee to show that it was in compliance with program standards." Norwalk at 7, citing DOP Consolidated Human Services Agency, Inc., DAB No. 1689, at 6-7 (1999).<sup>21</sup> Accordingly, AFH bears the burden of establishing that it complied with terms and conditions of the award.

AFH also argues that the incidents of abuse did not necessarily reflect any mismanagement of the facility, stating that a large number of incidents of abuse at a shelter could be due to "a spate of bad luck" or "[a]n especially violent or disruptive group of UAC . . . brought to the shelter at one time." AFH Reply Br. at 6. However, AFH may not meet its burden to show that it was complying with the terms and conditions of the award by engaging in speculation that unusual circumstances might have made it impossible to properly manage the facility.

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<sup>21</sup> AFH cites DAB No. 2002 for the proposition that "ORR must make a prima facie case that a recipient materially failed to comply with the terms and conditions of an award" which AFH must then rebut. AFH Br. at 17. (According to AFH, there is no prima facie case to rebut because ORR did not specifically identify the generally accepted child welfare standards that were allegedly violated.) We note, however, that the conclusion in DAB No. 2002 that ACF was required to make a prima case relied specifically on the Head Start regulations at 45 C.F.R. § 1303.14, which are not applicable here. Even if the prima facie case analysis did apply here, ACF clearly identified the applicable standards, as we discuss below, and made out a prima facie case that AFH violated these standards when its employees abused children in AFH's facility, and AFH did not rebut that case.

AFH argues further that it was prevented from mounting an adequate defense since the termination letter "broadly claims" that AFH failed to comply with generally accepted child welfare standards "but does not state the specific standard(s) violated." AFH Br. at 1; see also id. at 17 (contending that ACF's allegation to this effect does not "meet[] the specificity requirement of the CFR or case law"). AFH's claim that it lacks sufficient information to respond to the grounds for the termination is not supported by the record. The ORR Director's April 30, 2007 letter to AFH stated that ORR's concern was with the "overall management of the shelter care program," but also specifically identified the basis for that concern as the incidents of child abuse and failure to report incidents of abuse. AFH Ex. 20, at 1. The termination letter also listed specific incidents of such abuse and the failure to report one incident. As we previously discussed, prevention of abuse (and reporting of any abuse that does occur) are required by the State child welfare laws and generally accepted child welfare standards made applicable by the Cooperative Agreement. Moreover, ACF provided technical assistance to AFH regarding these requirements in October 2006, thus reinforcing the importance of meeting these requirements in carrying out the FY 2007 award.

AFH argues further that termination was not warranted because AFH took appropriate action in response to each of the incidents (except for failing to report the April 28, 2006 incident to ORR). As indicated above, the three incidents of abuse and the failure to report one incident were a more than adequate basis for concluding that AFH materially failed to comply with the terms and conditions of the award. AFH points to nothing in the regulations at 45 C.F.R. Part 74 (made applicable by the award notice), the Cooperative Agreement or any other authority that gives AFH a right to an opportunity to correct such a failure before ACF can terminate its award. Cf. Renaissance III, Inc., DAB No. 2034, at 11-12 (2006) ("Having determined that Renaissance materially failed to comply with the terms and conditions of its cooperative agreements, CDC [the Centers for Disease Control] acted within its legal authority to terminate those agreements immediately. Although an awarding agency may, as a matter of policy or prudence, give an award recipient the opportunity to correct noncompliance before imposing termination, nothing in the applicable regulations [45 C.F.R. Part 74] required CDC to do so in this case."). While in this case ACF exercised its discretion to continue funding AFH after each of these incidents, we see no reason why it should be precluded from terminating the award at a later date on the same basis on which it could have previously terminated the award.

In any event, AFH points to no evidence that, as late as several weeks after the February 2007 incident, it had completed any action designed to prevent further abuse of the children in its facility beyond investigating each incident and removing some of the perpetrators of the abuse. As already stated, AFH admits that its response to the April 28, 2006 incident of sexual abuse consisted only of interviewing the parties and witnesses to the incident and obtaining the resignation of the staff member who abused the child. With respect to the November 6, 2006 incident of physical abuse, AFH alleges that it responded by suspending the AFH training coordinator found to have abused one of the children from his duties "pending the outcome of the investigation," submitting an incident report dated 11/6/06 (ACF Exhibit 6) the day after the incident,<sup>22</sup> forwarding a proposed "Corrective Action Plan" dated 11/18/06 (AFH Exhibit 12) to ACF, and submitting a draft of a "Management Plan" dated 11/30/06 (AFH Exhibit 13) to ACF. See AFH Br. at 10. However, AFH initially removed only one of the three staff members who physically abused the children.<sup>23</sup> In addition, the 11/18/06 "Corrective Action Plan" was for the express purpose of preventing "runaways," not abuse.<sup>24</sup> While there appears to be no dispute that the abuse on November 6 occurred after some children had run away from the facility, AFH's description of the incident does not indicate that the minors subjected to the abuse were trying to run away at the time the abuse occurred. Even if there were evidence to this effect, the 11/18/06 "Corrective Action Plan" needed to address how a "runaway" situation could be handled without the use of improper restraints or other abusive techniques. The plan did not do so and, thus, was clearly inadequate to prevent further

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<sup>22</sup> AFH does not specifically state that it called the ORR hotline immediately after this incident; however, it asserts that it complied with the applicable reporting requirements for all incidents cited in the termination letter except the April 28, 2006 incident. AFH Reply Br. at 10-11.

<sup>23</sup> According to AFH, all three individuals were dismissed at ORR's behest sometime after November 29, 2006. See AFH Br. at 19; AFH Ex. 1, at 3.

<sup>24</sup> The 11/18/06 "Corrective Action Plan" consisted of removing the doors on the children's rooms, adding at least two extra staff persons on each shift, taking only two children at a time from one building to the next, and closing window openings. AFH Ex. 12.

abuse. Moreover, the actions set out in the 11/30/06 "Management Plan," other than dismissing the three individuals involved in the November 5, 2006 incident, on their face suggest, at best, no more than a tangential relationship to abuse prevention, and AFH provides no explanation that would lead us to conclude otherwise.<sup>25</sup>

AFH also alleges that in response to the February 2007 incident it immediately removed the staff member who abused the four children from the schedule and fired her two days later, called the ORR and DFPS hotlines, ORR's field specialist and the local sheriff's office, and developed the "Texas Shelter Care Corrective Action Plan" (AFH Exhibit 17), a draft of which was forwarded to ACF on February 19, 2007. See AFH Br. at 11-12; AFH Ex. 16. This plan, which ACF approved based on its belief that implementing the plan would prevent further abuse, includes a series of steps to be taken to improve supervision of direct care staff, quality of staff hired, reporting of significant incidents, staff training, and direct care staff accountability for time spent. These steps address factors that AFH concedes could contribute to abuse in a shelter care facility: the failure to properly screen, train, supervise or discipline employees. See AFH Reply Br. at 2, 5-6. However, AFH offered no evidence that it took any of the corrective actions contemplated by the plan, even though the target dates set by the plan (mostly in the latter half of March or early April 2007) preceded ACF's April 30, 2008 letter advising AFH that it was considering terminating the award.

Thus, even if its corrective actions were material to ACF's termination authority (which we conclude they were not), AFH failed to show that it took adequate steps to prevent further abuse following any of the three incidents of abuse cited in the termination letter. This failure provides a further ground for

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<sup>25</sup> The other actions in the 11/30/06 "Management Plan" included advertising for key staff positions, dividing the facility into three different areas in the evenings to make these areas "more controlled," establishing an "on call system" to improve lines of communication between staff and the facility administrator, increasing the ratio of staff to individual children to 1 to 8 to allow more interaction between the direct care staff and the children, modifying the fence in the recreational area, and having other staff provide training after the suspension of the training coordinator. AFH Ex. 13.

concluding that AFH materially failed to comply with the terms and conditions of the award.

**AFH's additional arguments have no merit.**<sup>26</sup>

AFH argues that the central issue in this appeal is whether AFH should be held "strictly liable" for the "unauthorized acts" of its employees. AFH Reply Br. at 1. This is not the legal basis for our conclusion that AFH failed to comply with the terms and conditions of the award, however. Instead, as explained above, we conclude that AFH failed to establish that it was operating its facility in such a way as to provide a safe, abuse-free environment for the UAC in its care, as required by the State child welfare laws and generally accepted child welfare standards made applicable by the Cooperative Agreement. This conclusion is consistent with prior Board decisions holding a grantee "responsible for the proper administration of its grant program, despite any problem it asserted it had with staff or with its Board." Action for Youth Christian Council, Inc., DAB No. 1651, at 18 (1998); see also Renaissance III, Inc., at 11, and cases cited therein.<sup>27</sup>

AFH also argues that termination is not appropriate here because the "actual reason" ORR terminated the award was AFH's failure to report an allegation of sexual abuse which was later proven false. AFH Reply Br. at 13-15, citing AFH Exs. 16 and 1 (affidavits of AFH's Deputy Director and AFH's CEO).<sup>28</sup> The

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<sup>26</sup> We note that we have considered each and every argument presented by AFH although particular arguments may not be specifically addressed.

<sup>27</sup> AFH attempts to distinguish its situation from the situation in Renaissance III on the ground that the awarding agency there identified the respects in which the grantee had failed to properly oversee the grant. See AFH Reply Br. at 5. As our earlier discussion indicates, however, ACF identified the incidents of sexual and physical abuse that show that AFH failed to properly oversee the operations of its facility.

<sup>28</sup> According to the Deputy Director, the ORR Director stated in an April 13, 2007 conference call with her and AFH's CEO that ORR would not be reopening the facility because of this allegation. AFH Ex. 16, at 4. Similarly, the CEO states that the ORR Director called

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allegation in question was that, in May 2006, a "female staff person allegedly became pregnant after having sex with a male child" and "[r]eportedly . . . was dismissed from the shelter when she became pregnant, but was later rehired." AFH Ex. 20, at 2. According to AFH, the allegation was made two weeks after the April 28, 2006 incident by an anonymous person in a phone call to the DFPS hotline, and AFH did not know about the allegation until the ORR Director brought it up in an April 13, 2007 conference call with AFH's CEO and Deputy Director.<sup>29</sup> AFH Br. at 8, 14; AFH Ex. 1 (Rains Affidavit), at 4. It is undisputed that DFPS investigated this allegation and determined that it was baseless. ACF's June 25, 2007 termination letter does not include any mention of this allegation.

Even if the allegation played a role in ACF's decision not to reopen the facility and to terminate the award instead, we would not reverse the termination for that reason. The grounds which ACF cited are sufficient for termination without a finding that AFH had failed to report an additional incident of alleged abuse. As discussed above, the incidents of abuse on April 28, 2006, November 10, 2006 and in February 2007 show that AFH was not complying with State child welfare laws and generally accepted child welfare standards. No additional evidence is needed to support the conclusion that AFH materially failed to comply with the terms and conditions of the award.<sup>30</sup>

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<sup>28</sup> (...continued)

him about this allegation just before the facility was to reopen. AFH Ex. 1, at 4.

<sup>29</sup> AFH's position that it was unaware of the allegation until the April 13, 2007 conference call is contradicted by ACF's April 30, 2007 letter stating that AFH was aware of this allegation "at the time it occurred, during ORR's February/March [2007] visit and during the negotiations concerning the corrective action plan[.]" AFH Ex. 20, at 1 (emphasis omitted). In view of our conclusion below, however, we need not determine whether AFH knew of the allegation soon enough to trigger any duty to report it to ORR.

<sup>30</sup> AFH's CEO also asserts that when the ORR Director visited AFH's facility (sometime between February 28 and March 2, 2007, according to her April 30, 2007 letter), she told him that "If I had a gotcha, I would tell you, but I don't." AFH Ex. 1, at 4. AFH

(continued...)

AFH also argues that the three incidents of abuse were not a basis for finding a failure to comply with the terms and conditions of the award since ORR itself anticipated that abuse would occur, setting forth procedures for reporting abuse in both the Cooperative Agreement and its Policies and Procedures Manual. See AFH Br. at 18. This argument is completely disingenuous. The requirement to report alleged abuse clearly does not mean that ACF would not view reports of abuse that are substantiated as evidence of a failure to follow State child welfare laws and generally accepted child welfare standards or that ACF would be precluded from taking appropriate action based on such reports. The reporting procedures exist precisely so that ACF can take steps to protect minors, and one such step presumably would be to evaluate, based on a report of abuse, whether the recipient of a UAC program award is capable of providing a safe environment.

AFH argues in addition that there is no "supporting evidence" for the statement in the termination letter that "after the children were removed from Away From Home, the facility continued to attempt to minimize the serious incidents that occurred at the facility[.]" AFH Br. at 20. It is true that, in response to AFH's request for "[a]ny and all written memos or documents that support" this statement, ACF stated "ORR has no responsive, non-privileged documents in its possession." AFH Ex. 23, at 2. The lack of non-privileged documentation is immaterial, however. As discussed above, ACF waited until after three incidents of abuse (some involving multiple employees and/or children) had been substantiated before terminating the award. Thus, regardless of whether or not AFH continued to minimize the seriousness of those incidents, we find the incidents a more than adequate basis for terminating the award.

AFH argues further that termination was not justified because "ORR mismanaged this grant in numerous ways" and "treated AFH employees in an unfair, unwarranted and discriminatory manner[.]" AFH Br. at 2. In essence, AFH takes the position that ACF acted

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<sup>30</sup> (...continued)  
 apparently views this as an admission that ORR did not have sufficient grounds for termination at that point. That is reading a great deal into a very ambiguous statement. In any event, the ORR Director's meaning is irrelevant since the ORR Director and/or ACF were entitled to change their minds about whether to terminate the award. Furthermore, we have concluded that there was an adequate legal and factual basis for the termination.



improperly in making certain decisions about the operation of AFH's facility, particularly personnel decisions. This position has no merit. Section 462(b)(G) of the Homeland Security Act expressly makes the Director of ORR responsible for "overseeing the infrastructure and personnel of facilities in which [UAC] reside." Moreover, ACF's participation in such matters is consistent with the nature of a cooperative agreement, which contemplates substantial federal involvement.

AFH specifically argues that the February 2007 incident of abuse resulted from ACF's operational decisions. See AFH Br. at 18. We find that argument without merit. According to AFH, the employee who abused the children was a part-time employee hired by AFH after ORR demanded that AFH hire part-time workers in order to save money. In AFH's view, "people willing to work part time for \$7.00 per hour are typically not as high a quality person as the person who can demand full time work and employee benefits." AFH Reply Br. at 4. This is an unsupported generalization. Even if it were true, however, that does not mean that part-time workers as a class are any more likely to be child abusers than full-time workers. Moreover, regardless of ACF's role in determining the staffing mix, AFH was ultimately responsible for ensuring that its employees were properly screened, trained and supervised. AFH asserts that "[a]t all times," it complied with the requirements of State and federal law that "staff hired by AFH must undergo a criminal history and DFPS review background check, reference check and pass a drug screening test." AFH Br. at 8, n.4. AFH does not assert or demonstrate, however, that it provided the type of training or supervision that was designed to bring it into compliance with State child welfare laws and generally accepted child welfare standards.

Finally, AFH argues that ACF may have acted in an arbitrary and capricious manner in terminating the award since other facilities with similar problems may not have been terminated. AFH Reply Br. at 6. AFH states that it is unable to determine whether it was "being treated fairly compared to others" since ORR failed to respond to its request for information about problems at other facilities. Id. at 7.<sup>31</sup> Such evidence would not in any event be material. The Board has held that "allegations of disparate treatment, even if true, do not prohibit an agency of this

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<sup>31</sup> We note that, while the parties engaged in a voluntary document exchange, neither party moved to compel production of any documents not received in that exchange.

Department from exercising its responsibility to enforce statutory requirements." National Behavioral Center, Inc., DAB No. 1760, at 4 (2001), citing Edison Medical Laboratories, Inc., DAB No. 1713 (1999), aff'd, Edison Medical Lab. v. Thompson, 250 F.3d 735 (3rd Cir. 2001); and Rural Day Care Association of Northeastern North Carolina.

Conclusion

For the foregoing reasons, we uphold ACF's termination of AFH's FY 2007 award.

\_\_\_\_\_/s/  
Judith A. Ballard

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

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