

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

Puerto Rico Department of the Family
Docket No. A-15-109
Decision No. 2751
December 8, 2016

DECISION

The Administration for Families and Children (ADFAN), part of the Commonwealth of Puerto Rico's Department of the Family, appealed an August 14, 2015 determination by the Administration for Children and Families (ACF) in the Department of Health and Human Services to withhold federal funds in the amount of \$1,934,415. In July 2010, ACF conducted a Child and Family Services Review (CFSR) of ADFAN's child and family services programs. The CFSR found that ADFAN was not operating these programs in substantial conformity with applicable federal requirements. ADFAN developed a Program Improvement Plan (PIP), but ACF found that, by the end of the period for implementing the PIP, ADFAN continued to be out of substantial conformity with four outcomes for children and families. Based on its determination that ADFAN failed to successfully complete the PIP, ACF withheld funds under title IV-B of the Social Security Act (Act) for federal fiscal year (FY) 2010 through FY 2015.¹

For the reasons explained below, we conclude that ADFAN failed to successfully complete the PIP and that ACF was required to withhold all of the funds at issue.

Legal Background

Titles IV-B and IV-E of the Act provide for payments to states under approved state plans for the purposes of promoting child welfare, preventing abuse and neglect of children, and assisting children in foster care or who require adoption assistance. Section 1123A of the Act provides in relevant part:

¹ The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc-htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

(a) IN GENERAL.— The Secretary, in consultation with State agencies administering the State programs under parts B and E of title IV, shall promulgate regulations for the review of such programs to determine whether such programs are in substantial conformity with—

- (1) State plan requirements under such parts B and E,
- (2) implementing regulations promulgated by the Secretary, and
- (3) the relevant approved State plans.

The regulations required by section 1123A must “specify the requirements subject to review . . . , and the criteria to be used to measure conformity with such requirements and to determine whether there is a substantial failure to so conform;” Act § 1123A(b)(2).

In addition, “with respect to any State program found to have failed substantially to so conform,” the regulations must require the Secretary—

- (A) to afford the State an opportunity to adopt and implement a corrective action plan, approved by the Secretary, designed to end the failure to so conform;
- (B) to make technical assistance available to the State to the extent feasible to enable the State to develop and implement such a corrective action plan;
- (C) to suspend the withholding of any Federal matching funds under this section while such a corrective action plan is in effect; and
- (D) to rescind any such withholding if the failure to so conform is ended by successful completion of such a corrective action plan.

Act § 1123A(b)(4).

The final regulations establishing the CFSR process provide in relevant part that—

ACF will determine a title IV-E agency’s substantial conformity . . . based on the following:

- (1) Its ability to meet national standards, set by the Secretary, for the statewide data indicators associated with specific outcomes for children and families;

45 C.F.R. § 1355.34(a)(1).² The regulations set out seven outcomes, of which four are at issue here: “Children are, first and foremost, protected from abuse and neglect;” “Children are safely maintained in their own homes whenever possible and appropriate;”

² We quote the regulations in effect in FY2010. The regulations were amended in 2012 to implement statutory provisions related to the Tribal title IV-E program. 77 Fed. Reg. 928 (2012).

“Children have permanency and stability in their living situations;” and “Families have enhanced capacity to provide for their children’s needs.” *Id.* § 1355.34(b)(i)(A), (b)(i)(B), (b)(ii)(A), and (b)(iii)(A). ACF referred to these outcomes as Safety Outcome 1, Safety Outcome 2, Permanency Outcome 1, and Well-Being Outcome 1, respectively.

The regulations further provide that the “initial national standards for the statewide data indicators . . . will be based on the 75th percentile of all State performance for that indicator as reported in” the Adoption and Foster Care Analysis and Reporting System (AFCARS) or the National Child Abuse and Neglect Data System (NCANDS) and may be adjusted by the Secretary if appropriate.³ 45 C.F.R. § 1355.34(b)(5).

A IV-E agency is determined to be in substantial conformity if: 1) its performance on each data indicator meets the national standard, and 2) each outcome is rated as “substantially achieved” in 95 percent of the cases examined during an on-site case review. 45 C.F.R. § 1355.34(b)(3)(i) and (ii). Whether an outcome is “substantially achieved” depends on the state’s performance on certain “items” included in the case review. ACF Ex. 2 (2010 CFSR final report) at 1-2.

If a IV-E agency does not demonstrate substantial conformity in the CFSR, it must “develop a program improvement plan” (PIP). 45 C.F.R. § 1355.35(a). The PIP must:

- (i) Be developed jointly by title IV-E agency and Federal staff in consultation with the review team;
 - (ii) Identify the areas in which the title IV-E agency’s program is not in substantial conformity;
 - (iii) Set forth the goals, the action steps required to correct each identified weakness or deficiency, and dates by which each action step is to be completed in order to improve the specific areas;
 - (iv) Set forth the amount of progress the statewide data will make toward meeting the national standards;
- * * *
- (vii) Identify the technical assistance needs and sources of technical assistance, both Federal and non-Federal, which will be used to make the necessary improvements identified in the program improvement plan.

³ Under 45 C.F.R. § 1355.40, each title IV-E agency must implement a system, known as AFCARS, to collect and electronically report to ACF certain data regarding all children in foster care for whom the agency has responsibility for placement, care, or supervision. NCANDS is a voluntary data collection system that gathers information from all 50 states, the District of Columbia, and Puerto Rico about reports of child abuse and neglect. See <http://www.acf.hhs.gov/cb/research-data-technology/reporting-systems>.

45 C.F.R. § 1355.35(a)(1). The duration of a PIP is “not to exceed two years.” 45 C.F.R. § 1355.35(d)(1). However, the “Secretary may approve extensions of deadlines in a program improvement plan not to exceed one year.” 45 C.F.R. § 1355.35(d)(3).

“In the event that ACF and the title IV-E agency cannot reach consensus regarding the content of a program improvement plan or the degree of program or data improvement to be achieved, ACF retains the final authority to assign the contents of the plan and/or the degree of improvement required for successful completion of the plan.” 45 C.F.R. § 1355.35(a)(2). The “title IV-E agency and ACF may jointly renegotiate the terms and conditions of the program improvement plan as needed, provided that: (i) The renegotiated plan is designed to correct the areas of the title IV-E agency’s program determined not to be in substantial conformity and/or achieve a standard for the statewide data indicators that is acceptable to ACF. . . and (iii) The terms of the renegotiated plan are approved by ACF.” 45 C.F.R. § 1355.35(e)(4).

ACF “will” withhold a portion of the IV-E agency’s title IV-B and IV-E funds “for the year under review and for each succeeding year until the title IV-E agency either successfully completes a [PIP] or is found to be operating in substantial conformity.” 45 C.F.R. § 1355.36(b)(3). The pool of funds subject to withholding consists of “the title IV-E agency’s allotment of title IV-B funds for each of the years to which the withholding applies” plus “[a]n amount equivalent to 10 percent of the title IV-E agency’s Federal claims for title IV-E foster care administrative costs for each of the years to which withholding applies.” *Id.* § 1355.36(b)(4). An amount equivalent to one percent of these funds “for each of the years to which withholding applies will be withheld” for each of the outcomes that is determined not to be in substantial conformity. *Id.* § 1355.36(b)(5)(i).⁴

Case Background

The 2010 CFSR found that ADFAN, Puerto Rico’s IV-E agency, “did not achieve substantial conformity with any of the seven CFSR outcomes.” ACF Ex. 2, at 3. ADFAN developed a PIP to improve its performance, and, following negotiations, ACF

⁴ Withholding is also required with respect to each of seven “systemic factors” that is determined not to be in substantial conformity. *Id.* § 1355.36(b)(5)(ii). ACF found that ADFAN substantially completed the PIP with respect to the six systemic factors found out of conformity in the 2010 CSFR. ACF Ex. 2, at 13-16; ADFAN Ex. 3 File 1, at 2.

approved the PIP effective January 1, 2012. ACF Ex. 3. The two-year period for implementing the PIP ended on December 31, 2013. ADFAN Ex. 3-2, at 1. ACF gave ADFAN until March 31, 2015 to successfully complete its PIP.⁵ *Id.*

As relevant here, the 2010 CFSR found that Puerto Rico's performance with respect to four data indicators for Permanency Outcome 1 and one data indicator for Safety Outcome 1 could not be assessed due to concerns about the "data quality" in Puerto Rico's child welfare data files. ACF Ex. 2 (2010 CFSR final report) at 3, 6, 8. Matrix A of the PIP included two "Action Steps" to address these findings. Action Step 4.2 states that "ADFAN will develop and implement an action plan to assure the timely submission of AFCARS data that produces valid results to include a valid baseline . . . for the four federal CFSR Permanency Composite National Data Indicators." ACF Ex. 4, Matrix A at 131 (internal numbering). ADFAN was to complete this action plan in Quarter 2 of the PIP and implement it in Quarters 2 and 3 of the PIP. *Id.* at 134, 138. In Quarters 3 and 4 of the PIP, ADFAN was to complete AFCARS data submissions, resulting in "valid data" for the Permanency data indicators, "as specified in the Data Profile for Puerto Rico."⁶ *Id.* at 141.

Similarly, Action Step 4.3 states that "ADFAN will develop an action plan for the timely submission of NCANDS data that produces a valid result (to include a valid baseline. . . .) for the federal CFSR National Data Indicator Safety [1]: Absence of Abuse/Neglect in Foster Care."⁷ *Id.* at 144. ADFAN was to complete this action plan in Quarter 2 of the PIP and implement it in Quarters 2 and 3 of the PIP. *Id.* at 146, 150. In Quarters 3 and 4 of the PIP, ADFAN was to complete NCANDS submissions, resulting in "valid data" for the Child Safety data indicator at issue, "as specified [in] the Data Profile for Puerto Rico." *Id.* at 152.

⁵ ACF stated: "This date is set pursuant to Technical Bulletin #3, Amended, and provides for a non-overlapping data year post-Program Improvement Plan implementation to allow for action steps to be evident in goal results." ACF Ex. 6, at 16. That bulletin stated that this non-overlapping period "will provide States with the full 2-year PIP period to implement all required program improvements, followed by an evaluative period after PIP implementation to determine whether they have met their degree of improvement goals for any item-specific measure." Child and Family Services Review Amended Technical Bulletin #3 (accessible at <http://www.acf.hhs.gov/cb/resource/cfsr-amended-technical-bulletin-3>).

⁶ The Data Profiles are compiled by ACF from the data in a IV-E agency's AFCARS and NCANDS submissions. *Id.*, Matrix A at 131-132, 144; November 2006 Child and Family Services Reviews Procedures Manual at 9 (available at www.acf.hhs.gov/sites/default/files/cb/cfsr_procedures_manual.pdf).

⁷ Action Step 4.3 incorrectly refers to "Absence of Abuse/Neglect in Foster Care" as "Safety 2" instead of "Safety Outcome 1."

After the end of the fourth quarter, the PIP was renegotiated at ADFAN's request. ACF Ex. 10. As relevant here, the due dates for Action Step 4.2 were changed to Quarter 5 for completion of the action plan, Quarter 7 for implementation of the action plan, and Quarter 8 for AFCARS submissions resulting in valid data for the indicators at issue. ACF Ex. 4, Matrix A at 134, 138, 141. The due dates for Action Step 4.3 were changed to Quarter 6 for completion of the action plan, Quarter 7 for implementation of the action plan, and Quarter 8 for NCANDS submissions resulting in valid data for the indicator at issue. *Id.* at 146, 150, 152.

In addition, the 2010 CFSR found that Puerto Rico was not in substantial conformity with Safety Outcome 2 because the outcome was substantially achieved in only 36.9% of cases reviewed, less than the 95% required for substantial conformity. ACF Ex. 2, at 6. The CFSR further found that Puerto Rico was not in substantial conformity with Well-Being Outcome 1 because the outcome was substantially achieved in only 23.1% of cases reviewed, less than the 95% required for substantial conformity. *Id.* at 10. Matrix C of the PIP specified the methodology for measuring improvement on certain items for several outcomes, including Items 3 and 4 of Safety Outcome 2 and Items 17, 18, 19 and 20 of Well-Being Outcome 1, based on case reviews. ACF Ex. 5, Matrix C at 2-3, 6-9. ADFAN was to develop a "prospective baseline" for each outcome using data from a sample of cases for the period January 1, 2012 through December 31, 2012, and to report the "final baseline and target goals" by the end of the fourth quarter of the PIP. *Id.*

On April 21, 2014, ACF advised ADFAN that a "valid FFY2010 CFSR Data Profile cannot be generated, based on Puerto Rico's December 31, 2013 submission of AFCARS FFY2010 files, due to data quality and completeness issues" and that as a result, valid baselines for the Permanency Outcome 1 and Safety Outcome 1 national indicators at issue "cannot be established." ADFAN Ex. 3.2, at 1-2. Thus, ACF stated, Action Steps 4.2 and 4.3 of the PIP "are not achieved."⁸ *Id.* at 2. In addition, ACF advised ADFAN that the "four quarters of post-baseline performance data" for the case review items at issue for Safety Outcome 2 and Well-Being Outcome 1 showed "performance at or below the baseline level," but stated that ADFAN had until March 31, 2015 "to achieve the targeted level of improvement in these goals." *Id.* at 3.

⁸ ADFAN does not challenge ACF's determination that ADFAN did not successfully complete its PIP with respect to these two outcomes because it was unable to provide data to generate a valid baseline for them by December 31, 2013, the end of the first two years of the PIP. It was apparent at that point that ADFAN would have no means of demonstrating that it had improved its performance with respect to these outcomes by March 31, 2015.

On August 14, 2015, ACF advised ADFAN of its determination that “Puerto Rico continued to be out of substantial conformity with Safety Outcome 1 and Permanency Outcome 1 as of December 31, 2013” because Action Steps 4.2 and 4.3 in the PIP were not completed. ADFAN Ex. 3, File 1, at 2. ACF further advised ADFAN that “Puerto Rico continued to be out of substantial conformity with Safety Outcome 2 and Well-Being Outcome 1 as of March 31, 2015” because it was “not able to achieve the required level of improvement for PIP measurement goals associated with CFSR Items 4, 18, 19, and 20, as measured through ADFAN’s case review process.” *Id.* ACF stated that it was therefore withholding “one percent of the pool of funds subject to withholding for each outcome” not in substantial conformity for FYs 2010 through 2015. *Id.* at 2 and attachment. The pool consisted only of Puerto Rico’s title IV-B allotments because Puerto Rico had no claims for IV-E administrative costs during the years in question. *Id.* at 3.

ADFAN timely appealed the withholding to the Board, as permitted by section 1123A(c)(2) of the Act (providing for an opportunity to appeal to the Board a determination that a state’s program is not in substantial conformity). The record for our decision consists of ADFAN’s notice of appeal with three exhibits identified as 1, 2, and 3-2, ADFAN’s appeal brief with three exhibits identified as 3 File 1, 3 File 2 and 3 File 3, and ACF’s response brief with exhibits 1-10. Under the Board’s procedures, ADFAN had an opportunity to reply to ACF’s response brief but chose not to do so.

Analysis

ADFAN takes the position on appeal that the withholding should be reversed in whole or in part and makes three principal arguments in support of this position. ADFAN Br., 3rd page. First, ADFAN argues that ACF erred in withholding the full amount of IV-B funds provided by regulation based on ADFAN’s failure to successfully complete its PIP with respect to Safety Outcome 1 and Permanency Outcome 1 because ADFAN made progress towards completing Action Steps 4.2 and 4.3 in Matrix A of its PIP. Second, ADFAN argues that ACF erred in determining that ADFAN did not successfully complete its PIP with respect to Safety Outcome 2 and Well-Being Outcome 1 because the case review methodology in Matrix C of the PIP was faulty. Third, ADFAN argues that any failure to successfully complete the PIP was due to what it characterizes as ACF’s failure to provide adequate technical assistance to ADFAN during the first year of the PIP.

As discussed below, we conclude that none of ADFAN's arguments provide a basis for reversing ACF's determination to withhold title IV-B funds in whole or in part.

1. ACF was required to withhold the full amount of funds provided by regulation with respect to Safety Outcome 1 and Permanency Outcome 1.

ADFAN admits on appeal that “the expected outcome” of Action Steps 4.2 and 4.3 of Matrix A of the PIP “was a valid baseline” for the data indicators for Safety Outcome 1 and Permanency Outcome 1 “and that it was not achieved.” ADFAN Br., 9th page. However, ADFAN asserts that it completed the data entry called for by these action steps and that “a portion, if not all, of the penalty should be abated, recognizing the completed data entry effort.” *Id.*, 10th page. Otherwise, ADFAN reasoned, had it “chosen to do nothing, or do just a minimal effort. . . ., the result would have been the same. . . .” *Id.*

This argument has no merit. The regulations mandate withholding with respect to each outcome (and systemic factor) that is determined not to be in substantial conformity. 45 C.F.R. § 1355.36. ADFAN points to no authority for a waiver of this requirement in the Act or regulations. We also note that in *Georgia Dep't of Human Services*, DAB No. 2309 (2010), the Board rejected Georgia's argument that a penalty of one percent of the penalty pool for each of the outcomes not in substantial conformity was not proportional to Georgia's “significant success in completing its PIP” because Georgia met nearly all of the requirements in the PIP related to the outcomes at issue. *Georgia* at 8. The Board concluded that the clear intent of the regulations was to require that a state meet “all of the goals and action steps [in the PIP] related to a particular area of nonconformity, i.e., a particular outcome or systemic factor.” *Id.* at 9 (emphasis in original). The Board relied on the regulatory history, stating:

The preamble to the proposed rule states in relevant part that “the amount of funds which will be withheld . . . is the amount identified in conjunction with those areas of nonconformity that remain uncorrected.” 63 Fed. Reg. [50,058], 50,068 [(1998)] (emphasis added). Similarly, the preamble to the final rule explains that “proposed penalties associated with a particular outcome or systemic area will be imposed” without waiting for the completion of the entire PIP if a state fails to complete an action step by the date specified in the PIP. 65 Fed. Reg. [4020], 4045 [(2000)] (emphasis added). See also 65 Fed. Reg. 4045 (“an immediate penalty will be assessed for that area of nonconformity.) (emphasis added).

Id. The Board also noted that the regulatory provisions for calculating the amount of withholding ensure that “the amount of the withholding is ‘related to the extent of the failure to conform’ within the meaning of section 1123A” of the Act. *Id.* Referring to the requirement in 45 C.F.R. § 1355.36(b)(5)(i) that one percent of the specified pool of

funds is to be withheld for each outcome not in substantial conformity, the Board stated: “There is a direct relationship between the amount withheld and the number of outcomes that were the basis for the finding of nonconformity in the initial CFSR and for which the goals and/or action steps in Georgia’s 2002 PIP were not successfully completed.” *Id.* The rationale in *Georgia* is equally applicable here.

Accordingly, we conclude that ACF was required to withhold the full amount of funds provided by regulation with respect to Safety Outcome 1 and Permanency Outcome 1.

2. ADFAN has not shown that the case review methodology in Matrix C of the PIP is faulty.

On appeal, ADFAN does not dispute that it failed to improve its performance as required by the PIP with respect to Safety Outcome 2 and Well-Being Outcome 1. However, ADFAN asserts that the methodology in Matrix C of the PIP for measuring its performance was faulty. ADFAN Br., 7th page. ADFAN notes that the case review methodology for all of the items in Matrix C requires that a sample of cases be drawn from two of seven regions each quarter, with cases from one of those regions (San Juan, Puerto Rico’s largest metropolitan area) selected twice in a 12-month period. *Id.*, 8th page; *see also* ACF Ex. 5.⁹ According to ADFAN, this methodology –

yielded a drastic fluctuation in *overall* performance throughout the year. For example, in Item 1, a drastic drop is observed when quarters 8 and 9 are compared. However, San Juan, the only region which was measured twice once in quarter 1 and again in quarter 8 showed a substantial improvement within *a year* of the first measurement.

ADFAN Br., 8th page (*italics in original; underscoring added*).

ADFAN also asserts that “according to matrix results, in March 2015 Puerto Rico’s performance [on Item 1] was worse than in 2012,” when the PIP went into effect, but Puerto Rico’s performance in fact improved from 2012 to 2015. *Id.*, 9th page. In support of this assertion, ADFAN states:

⁹ Although the case selection methodology for each item is the same, the minimum sample size for each item for each 12-month period differs: 23 “applicable cases” for Item 1, 64 “applicable cases for Item 18, and 65 “applicable cases” for Items 4, 17 and 19. ACF Ex. 5, at 1, 3, 6-8.

[W]hen the base line of 60% of the cases reviewed was established in 2012 for Item 1 [Timeliness of Initiating Investigations], Puerto Rico had a backlog of over 42,000 referrals pending investigation. In 2013, the incoming administration developed a work plan to investigate all pending referrals from 2012, which was successfully completed in January 2014, while still keeping up with [the] influx of referrals received during the current year. . . . Currently, 77% of referrals received in 2015 have had the initial contact, and 71% have been completed. This is our best performance to date. However, the monitoring results do not reflect our continued improvement in performance.

Id., 8th and 9th pages (emphasis added).

In response, ACF points out that it did not rely on ADFAN’s failure to substantially achieve Item 1 as the basis for the withholding with respect to Safety Outcome 2 and Well-Being Outcome 1 and argues that “none of the facts” noted by ADFAN with respect to Item 1 “establishes or even suggests that the PIP’s measurement of” Item 4 for Safety Outcome 2 and Items 18, 19 and 20 for Well-Being Outcome 1 is based on a “methodology [that] is flawed.”¹⁰ ACF Br. at 20. ACF explains that—

[w]hile Item 1 measures the timeliness of ADFAN’s response to child maltreatment reports, the items at issue in the appeal measure very different things. Item 4 measures efforts to reduce risks to the child at home or in foster care; Item 18 measures efforts to involve parents in case planning; and Items 19 and 20 measure caseworker contacts with children and their parents. ADFAN does not demonstrate or even suggest that these very different measures were affected by the backlog in handling child maltreatment reports.

Id.

We conclude that ADFAN has not shown any reason to conclude that the results of the case reviews conducted in accordance with the methodology in Matrix C of the PIP are not valid. Even if the methodology yielded results contrary to what ADFAN expected for Item 1, it does not necessarily follow that the methodology was flawed. ADFAN does not provide any evidence that a different methodology, such as selecting cases from all

¹⁰ Matrix C shows Item 1 as a measure of performance for Safety Outcome 1, not Safety Outcome 2. ACF Ex. 5, at 1. ACF found ADFAN out of substantial conformity with Safety Outcome 1 based on its failure to substantially complete Action Step 4.3 of the PIP, not based on its performance as measured by the case reviews addressed in Matrix C.

seven regions every quarter, would have yielded different results for Item 1, much less for the four items that are actually in dispute here. Moreover, ADFAN has not pointed to any evidence that its performance on any of these four items was better than the case reviews indicated.

In any event, ACF alleges, and ADFAN does not dispute, that the methodology in Matrix C of the approved PIP was proposed by ADFAN. ACF Br. at 20. The record does not show that ADFAN sought to renegotiate this methodology as permitted by 45 C.F.R. § 1355.35(e)(4). Thus, even if ADFAN had valid reasons for questioning the methodology, it is too late to raise them now.

Accordingly, we conclude that ACF properly relied on the results of the case reviews performed in accordance with the methodology in Matrix C in finding that ADFAN failed to successfully complete the PIP with respect to Safety Outcome 2 and Well-Being Outcome 1.

3. ADFAN has not shown that ACF failed to provide technical assistance to ADFAN as required by the applicable regulations or that this would be a basis for precluding ACF from withholding funds.

ADFAN appears to take the position that any failure to successfully complete the PIP should be excused because ACF failed to provide adequate technical assistance to ADFAN during the first year of the PIP. ADFAN asserts:

We beli[e]ve that the actions, or lack thereof, taken by the CB [Children’s Bureau, part of ACF] during the first year of PIP affected our ability to address the jurisdiction’s difficulty in fully complying with the action steps required in the PIP to the CB’s satisfaction. The CB has an obligation to approve a plan that can be implemented successfully and provide technical assistance when quarterly assessments do not present expected results. Approving the rollover of uncompleted PIP activities quarter after quarter compromised [ADFAN’s] ability to fully execute the PIP during the second year, especially as it relates to achieving a valid baseline. . . .

Quarter after quarter during the first year of implementation, Puerto Rico was evidencing great difficulty in meeting the action steps and benchmarks established. Instead of reevaluating the proposed strategies, [ACF] authorized Puerto Rico to roll over each incomplete action step to the next quarter for an entire year. This had essentially the effect of squeezing two years’ worth of work into one. While Site visits and technical assistance provided henceforth were valuable to [ADFAN], they resulted to be insufficient in changing the negative course set during the first year. (See . . . PIP Matrix A)

* * *

It is our position that during the first year of implementa[t]ion, Puerto Rico should have received feedback that created a realistic scenario for subsequent years, so that the Department would not have had to undergo such a massive effort during the second year to complete all the action steps that had been moved [to] this year, in addition to correcting the action steps that had to be readdressed[.]

ADFAN Br., 6th and 7th pages.¹¹ ADFAN’s chief complaint appears to be that ACF did not intervene during the first year of the PIP to help ADFAN meet the timeframes for completing and implementing the action plans in Action Steps 4.2 and 4.3 in Matrix A so that in the following year ADFAN could generate the data necessary to establish a valid baseline for the data indicators for Permanency Outcome 1 and Safety Outcome 1.¹²

We note preliminarily that ADFAN’s argument suggests that ACF is obligated to ensure that a PIP can be successfully completed. However, ADFAN points to nothing in the language of the Act or regulations to support that view. The implementing regulations provide that the PIP must “[b]e developed jointly by title IV-E agency and Federal staff.” 45 C.F.R. § 1355.35(a)(1)(i). The regulations further provide that if “ACF and the title IV-E agency cannot reach consensus regarding the content of a [PIP] or the degree of program or data improvement to be achieved, ACF retains the final authority to assign the contents of the plan and/or the degree of improvement required for successful completion of the plan” (*id.* at § 1355.35(a)(2)); however, there is no indication in the record that ACF exercised such authority here. ADFAN can hardly complain that ACF approved a PIP that could not be successfully completed when it shared responsibility with ACF for the content of the PIP.

¹¹ ADFAN asserts that it completed 80% of the 167 Action Steps in the PIP (including some previously completed Action Steps that had to be “readdressed”) only when there was a “change of administration” after its general elections in November 2012. ADFAN Notice of Appeal at 2-4. These circumstances do not detract from ADFAN’s responsibility as the IV-E agency to bring its child and family services programs into substantial conformity with the applicable requirements. Moreover, notwithstanding any shortcomings of the former administration, ADFAN was able to satisfactorily complete the PIP with respect to outcomes other than the four at issue in this appeal, as well as the systemic factors, and ACF rescinded the withholding as to those outcomes and the systemic factors. ADFAN Ex. 2, and Ex. 3, File 1, at 2. ADFAN also describes numerous “strategies” it “implemented and continued to maintain” after December 31, 2013, in order to improve its performance in several areas addressed in the PIP, as well as strategies “to be implemented to generate further change[.]” ADFAN Notice of Appeal at 7-11. However, even if these strategies enable ADFAN to achieve substantial conformity in the future, they do not excuse its failure to do so by the end of the period at issue here.

¹² ADFAN does not explain in what respect it believes ACF failed to provide adequate technical assistance with respect to Permanency Outcome 2 and Well-Being Outcome 1, which were addressed in Matrix C of the PIP.

Moreover, as discussed below, the record shows that, during the first year of the PIP, ACF actively sought to understand the nature of the difficulties ADFAN was having with completing and implementing the action plans called for by Action Steps 4.2 and 4.3, suggested approaches, and made offers of technical assistance to which ADFAN did not respond, initially asking ADFAN to identify the technical assistance it needed and later noting that its technical assistance service, the National Resource Center for Child Welfare Data and Technology (NRCCWDT), was available to provide technical assistance.

After receiving ADFAN's second quarterly report,¹³ ACF had two "WebEx discussions" with ADFAN in August 2012, and included the NRCCWDT in the second discussion. ACF Ex. 6, at 4-5. In October 2012, ACF sent ADFAN a written response to its quarterly report in which it noted that: 1) ADFAN originally planned to enter foster care placement information in its "legacy ACCESS database," which could then be used to submit an AFCARS report from which a data profile and valid baseline could be generated; 2) "because of issues preventing planned 'fixes'" to that database, ADFAN determined instead to use an "ADFAN application named SICStA as the system of record from which to submit AFCARS data;" and 3) ADFAN was unable to enter sufficient data into SICStA "to generate an acceptable Data Profile with valid results for the Safety and Permanency National Data Indicators" by the end of the quarter (September 30, 2012). *Id.* at 5. ACF then stated:

Given the potential for these Strategy 4 issues to affect Puerto Rico's ability to make satisfactory progress toward achieving goals under Outcomes Safety 1 and Permanency 1, the CB is requesting, by October 31, 2012, Puerto Rico's proposed updated action plans, at benchmarks 4.2.2 and 4.3.2, to complete Action Items 4.2 and 4.3 and to develop timely baseline data for the safety indicator, Absence of Maltreatment in Foster Care, and for the four Permanency Composite measures. Please also include explicit timelines, and outline specific technical assistance or support the Department seeks in this matter.

If Puerto Rico believes it cannot provide data to generate valid data profiles pursuant to benchmarks 4.2.4 and 4.3.4, the CB is willing to discuss and review any renegotiation proposals Puerto Rico may offer. . . .

Id. (emphasis added). There is no indication in the record that in response to this letter ADFAN notified ACF that it required any additional technical assistance.

¹³ Section 1355.35(d)(4) requires IV-E agencies to provide quarterly status reports to ACF that "must inform ACF of progress in implementing the measures of the [PIP]." ADF's letter responding to ADFAN's first quarterly report noted that ADFAN had made "acceptable progress" in establishing "an expert workgroup," the only part of Action Step 4.2 with a due date in the first quarter. ACF Ex. 6, at 1; ADFAN Ex. 3, File 2, at 132.

In its letter responding to ADFAN's third quarterly report, ACF stated in relevant part:

Based on our data calls with representatives of Puerto Rico, the CB understands that challenges have delayed progress in populating the SICStA system sufficiently to achieve AFCARS reporting from that system. As a result, the recent ... AFCARS file submission was made using the legacy ACCESS database. The resulting file was of insufficient data quality to generate a valid data profile. In the November 27, 2012 call, Puerto Rico specifically confirmed that [using that database], whether understood to be for the purposes of creating a valid AFCARS submission or to validate data entered into SICStA, is in fact not a viable approach to achieving the PIP commitments at benchmarks 4.2.4 and 4.3.4. Another option discussed in our conference call of October 9, 2012 involved the use of contractor staff to support the accelerated data entry plan. Our understanding at this time is that those contractors have not yet been secured, and it is unclear whether this option remains available.

We further understand that Puerto Rico projects the earliest completion date for entry of . . . case data into SICStA to be March 2013, and that this date may be pushed back further to assure that complete historical placement information is entered for each child in the file. Even if that March 2013 date were achieved, the development of a data profile including calculation of National Data Indicator results requires multiple-year files, which will not be available in SICStA by that time. Thus, it has become clear, as your staff confirmed in the November 27, 2012 call, that Puerto Rico will be unable to complete PIP benchmarks 4.2.4 and 4.3.4 by December 31, 2012.

In response to this situation, as stated in prior conversations, the CB must receive a plan from Puerto Rico specifying what it can do and will do to address this situation. This plan might be best addressed in the form of a Program Improvement Plan renegotiation request. . . .

The Regional Office has forwarded to Puerto Rico, from the National Resource Center for Child Welfare Data and Technology (NRCCWDT), technical documentation on AFCRS foster care data elements, including those elements used to generate the data profile, as well as discussion points to consider regarding the conversion of data elements when changing systems. This information should be carefully reviewed as Puerto Rico considers its renegotiation request with an emphasis on what it can do. The NRCCWDT is available to assist Puerto Rico in reviewing its plan, understanding the technical information provided, and in moving forward toward full implementation of SICStA.

Id. at 10-11 (emphasis added). There is no indication in the record that ADFAN thereafter sought technical assistance from NRCCWDT.

ACF's letter responding to ADFAN's fourth quarterly report states that in a December 12, 2012 conference call with ADFAN, ACF discussed "work plan documents" submitted by ADFAN which called for "the use of contracted staff to assist with the entry of relevant case information into SICStA and linking the safety data of SIRCSe with SICStA in order to develop the valid CFSR Data Profile[.]" *Id.* at 16. ACF stated that "[i]t is our understanding that . . . any related data entry activities will include all complete and relevant data from FFY 2009 forward[.]" *Id.* ACF's letter "remind[ed] Puerto Rico of two effects of" this plan:

First, entering data beginning with 2009 instead of 2007 will result in fewer data points for baseline selection purposes. Second, pushing back baseline development until Q7 results in less time to achieve the Program Improvement Plan target goals once determined. Puerto Rico will have no later [than] March 31, 2015, to demonstrate goal achievement. . . .

Id.

As previously noted, ACF approved ADFAN's request to delay the due dates for collecting the data needed to generate valid baselines for measuring Puerto Rico's performance on the data indicators for Permanency Outcome 1 and Safety Outcome 1. However, contrary to what ADFAN alleges, ACF did not simply "[a]pprov[e] the rollover of uncompleted PIP activities quarter after quarter" (ADFAN Br. at 6th page). As ACF's responses to ADFAN's quarterly reports show, ACF repeatedly offered assistance to address the difficulties ADFAN was experiencing in completing and implementing its action plans. ADFAN does not explain what more ACF could have done to facilitate ADFAN's successful completion of the PIP.

Furthermore, we could not conclude based on the record that ACF was required to expend any further resources or funds to assist ADFAN in this case. The Act requires that the Secretary make technical assistance available to the state only "to the extent feasible to enable the State to develop and implement" the PIP. Act § 1123A(b)(4) (emphasis added). The preamble to the proposed rule explains this requirement as follows: "To the extent that ACF has the resources and funds available, it shall make technical assistance available to improve outcomes or other factors that are outlined in a State's [PIP]." 63 Fed. Reg. 50,068.

In any event, ADFAN points to nothing to support its view that lack of adequate technical assistance would be a basis for precluding ACF from withholding funds. Indeed, in other grant cases, the Board has found no basis for excusing a grantee's failure to comply with the terms and conditions of its grant on the grounds of the inadequacy of any technical

assistance provided to it by the federal agency. *See, e.g., Rural Day Care Ass'n of NE. N. Carolina*, DAB No. 1489, at 105 (1994) (RDCA never clearly articulated what assistance from ACF would have sufficed to bring RDCA into compliance and did not point to any specific request for technical assistance services that was refused, and the record contains many offers from ACF to RDCA of technical assistance); *Commonwealth of Puerto Rico Dep't of Soc. Servs.*, DAB No. 1253, at 10-11 (1991) (Puerto Rico did not allege that it had requested technical assistance which had been refused, and the Office of Child Support Enforcement provided un rebutted evidence that it had provided Puerto Rico with technical assistance throughout the relevant time period by telephone, written correspondence, and on-site technical assistance). As in those cases, ADFAN does not allege that it made a request for technical assistance that was refused. Moreover, the record shows that ACF expressly invited ADFAN to identify any technical assistance it needed, gave ADFAN "technical documentation" from NRCCWDT, advised ADFAN that NRCCWDT was available to provide further assistance, and itself provided feedback to ADFAN in numerous conference calls and in writing.

Accordingly, we conclude that ADFAN has not shown that ACF did not provide adequate technical assistance to ADFAN or that lack of such assistance would be a basis for precluding ACF from withholding funds.

Conclusion

For the foregoing reasons, we conclude that ADFAN was not operating its child and family services programs in substantial conformity with federal requirements with respect to four CFSR outcomes. We therefore uphold ACF's determination to withhold IV-B funds in the amount of \$1,934,415.

_____/s/
Sheila Ann Hegy

_____/s/
Susan S. Yim

_____/s/
Leslie A. Sussan
Presiding Board Member