Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Appellate Division

SUBJECT: Georgia Department of Human Services
Docket No. A-10-5
Decision No. 2309

DATE: March 30, 2010

## DECISION

The Georgia Department of Human Services (Georgia) appealed a determination by the Administration for Children and Families (ACF) to withhold $805,369 in federal funds for fiscal year 2008 under titles IV-B and IV-E of the Social Security Act (Act). ACF conducted an initial Child and Family Services Review (CFSR) of Georgia's programs in 2001 and found that Georgia was not in substantial conformity with IV-B and IV-E requirements. Subsequently, ACF found that Georgia did not complete some of the action steps in its Program Improvement Plan (PIP) addressing three performance outcomes evaluated by the CFSR and continued to be out of substantial conformity. ACF conducted a second CFSR in 2007 and found based on the same three outcomes that Georgia's nonconformity continued. ACF thus withheld a portion of Georgia's IV-B and IV-E funding for fiscal years 2001 through 2008 pursuant to section 1123A of the Act.

Georgia appealed the withholding for fiscal year 2008 but not the prior years. Georgia challenges this withholding on the grounds that 1) ACF was not authorized to withhold funds for periods after the date for completing the 2002 PIP; 2) the amount of the withholding was not related to the extent of Georgia's nonconformity; 3) Georgia successfully completed its PIP with respect to one of the three outcomes for which funds were withheld; 4) the on-site review process was arbitrary and capricious; and 5) the withholding is contrary to the statutory purpose of improving child welfare.

For the reasons explained below, we reject Georgia's arguments and uphold in full the withholding for fiscal year 2008.

**Legal Background**

Part B of title IV of the Act establishes a program for Child Welfare Services.[1] Specifically, it authorizes federal funds to support services to, among other things, prevent abuse and neglect of children and to assure adequate foster care when children cannot be returned home or placed for adoption. Title IV-B funds may also be used to develop and operate coordinated programs of family support services, family preservation services, family reunification services, and adoption promotion and support services. To receive Part B funds, a state must develop, with ACF, a Child and Families Services Plan (CFSP).

Part E of title IV establishes the Foster Care and Adoption Assistance Program, providing for income maintenance payments for children in foster care meeting certain requirements and for adoption assistance payments. To receive Part E funds, a state must have an approved IV-E state plan.

Section 1123A of the Act provides in relevant part:

> (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—
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> (1) State plan requirements under such parts B and E,
> (2) implementing regulations promulgated by the Secretary, and
> (3) the relevant approved State plans.
>
> (b) ELEMENTS OF REVIEW SYSTEM.— The regulations referred to in subsection (a) shall—
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> (1) specify the timetable for conformity reviews of State programs . . . ;
> (2) 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;

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.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.

(3) specify the method to be used to determine the amount of any Federal matching funds to be withheld (subject to paragraph (4)) due to the State program's failure to so conform, that ensures that—

(A) such funds will not be withheld with respect to a program, unless it is determined that the program fails substantially to so conform;

* * *

(C) the amount of such funds withheld is related to the extent of the failure to conform; and

(4) require the Secretary, with respect to any State program found to have failed substantially to so conform—

(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;

* * * *

(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.

Subsection 1123A(c) of the Act provides for appeal to the Departmental Appeals Board of a final determination that a state's program is not in substantial conformity.

In January 2000, ACF promulgated final regulations establishing the CFSR process. 65 Fed. Reg. 4020 (Jan. 25, 2000). The regulations provide that—

> ACF will determine a State's substantial conformity with title IV-B and title IV-E State plan requirements based on the following:
> (1) Its ability to meet national standards, set by the Secretary, for statewide data indicators associated with specific outcomes for children and families;
> (2) Its ability to meet criteria related to outcomes for children and families; and
> (3) Its ability to meet criteria related to the State agency's capacity to deliver services leading to improved outcomes.

45 C.F.R. § 1355.34(a). The regulations list seven outcomes in the three areas of child safety, permanency for children, and child and family well-being. 45 C.F.R. § 1355.34(b)(1). The

regulations also list seven "systemic factors" related to state agency capacity to deliver services leading to improved outcomes for children and families. 45 C.F.R. § 1355.34(c).

The regulations provide in relevant part that a "State's level of achievement with regard to each outcome reflects the extent to which a State" has "[m]et the national standard(s) for the statewide data indicator(s) associated with that outcome, if applicable . . . ." 45 C.F.R. § 1355.34(b)(2). Further, the regulations provide:

> A State will be determined to be in substantial conformity if its performance on:
> (i) Each statewide data indicator developed pursuant to paragraph (b)(4) of this section meets the national standard described in paragraph (b)(5) of this section; and
> (ii) Each outcome listed in paragraph (b)(1) of this section is rated as "substantially achieved" in 95 percent of the cases examined during the on-site review (90 percent of the cases for a State's initial review). . . .

45 C.F.R. § 1355.34(b)(3). In addition, a state must have "all of the state plan requirements associated with the systemic factors" in place (and for the most part functioning) in order for the state to be considered in substantial conformity. 45 C.F.R. § 1355.34(c).

The review process includes a statewide assessment based on statewide aggregate data, followed by an on-site review. The on-site review involves reviews of selected case records and interviews. 45 C.F.R. § 1355.33(c)(4). A "sample" ranging from 30 to 50 foster care cases "must be drawn randomly . . . and include children who entered foster care during the year under review." 45 C.F.R. § 1355.33(c)(5). Any discrepancies between the statewide assessment and the findings of the on-site portion of the CFSR "will be resolved by either of the following means, at the State's option: (1) The submission of additional information by the State; or (2) ACF and the State will review additional cases . . . ." 45 C.F.R. § 1355.33(d).

Section 1355.36(b)(3) of 45 C.F.R. states that ACF will withhold a "portion" of a state's IV-B and IV-E funds "for the year under review and for each succeeding year until the State either successfully completes a program improvement plan or is found to be operating in substantial conformity."

We discuss additional statutory and regulatory provisions where appropriate below.

**Case Background**

The following facts shown by the record are undisputed. ACF conducted a CFSR in June 2001 which found that Georgia's child welfare program was not operating in substantial conformity with applicable federal requirements involving all seven outcome areas and three of the seven systemic factors. In October 2001, ACF issued the final report of its findings and informed Georgia that it was suspending the withholding of federal funds associated with these outcomes and systemic factors to allow Georgia to implement a PIP. The PIP, with some revisions, was approved by ACF on October 1, 2002. Georgia had until September 30, 2004 to implement the 2002 PIP and until September 30, 2005 to demonstrate to ACF that it met all the goals in this PIP.

ACF subsequently determined that Georgia had successfully completed the PIP with respect to four of the seven outcomes and all of the systemic factors based on which the 2001 CFSR found Georgia out of substantial conformity. In a letter to Georgia dated October 18, 2006, ACF stated that it was therefore rescinding the withholding for these outcomes and systemic factors.[2] ACF also gave notice to Georgia that it was withholding federal funds for fiscal years 2001 through 2006 in the amount of $4,264,784 based on Georgia's failure to successfully complete the PIP with respect to the remaining three outcomes. The outcomes in question are Permanency Outcome 1--"Children have permanency and stability in their living situations," Well-being Outcome 1--Families have enhanced capacity to provide for their children's needs," and Well-being Outcome 3--"Children receive adequate services to meet their physical and mental health needs."

ACF conducted a second CFSR in 2007 and determined that Georgia remained out of substantial conformity based on the same three outcomes which were the basis for the withholding for fiscal years 2001 through 2006. By letter dated January 10, 2008, ACF gave Georgia notice that it was withholding $724,218 FFP for these outcomes for fiscal year 2007. Georgia entered into a second PIP on September 1, 2008.[3]

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[2] The copy of the letter submitted as Georgia Exhibit 6 is undated; however, a later letter refers to the date of this letter as October 18, 2006. See GA Ex. 7, at 1.

[3] The last date to complete the 2008 PIP is August 31, 2010.

By letter dated September 1, 2009, ACF gave Georgia notice that it was withholding $805,369 FFP for these outcomes for fiscal year 2008.

Georgia timely appealed ACF's September 1, 2009 determination to the Board. Since that was the only withholding determination Georgia timely appealed, we do not consider any arguments that pertain solely to ACF's determination to withhold funds for other fiscal years.

**Analysis**

1. ACF was authorized to withhold IV-B and IV-E funds for periods after the date for completion of Georgia's 2002 PIP.

As noted, section 1355.36(b)(3) states that ACF will withhold a "portion" of the state's IV-B and IV-E funding "for the year under review and for each succeeding year until the State either successfully completes a program improvement plan or is found to be operating in substantial conformity." (Emphasis added.) Georgia did not successfully complete its 2002 PIP with respect to three outcomes, and the 2007 CFSR did not find that Georgia was operating in substantial conformity with respect to these outcomes.[4] Georgia does not dispute that, under these circumstances, ACF was authorized to withhold part of Georgia's IV-B and IV-E funds for the period ending September 30, 2004, the date for completing the implementation of its 2002 PIP. Georgia argues, however, that the withholding of funds for periods after that date, although authorized by the regulations, violates section 1123A of the Act. According to Georgia, the statute does not expressly or implicitly provide that additional funds will be withheld after the PIP period that follows the initial CFSR. See GA Br. at 18; GA Reply Br. at 6.

We agree with Georgia that nothing in the statute specifically requires that ACF withhold funds for periods after the PIP period where a state does not successfully complete its PIP. Section 1123A(b)(4) of the Act provides for regulations promulgated by the Secretary that require the Secretary to suspend any withholding while a PIP is in effect and to rescind any withholding if the state successfully completes the PIP. This clearly refers to a state's IV-B and IV-E funding for the

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[4] As discussed later, we reject Georgia's argument that it successfully completed its PIP with respect to one of the three outcomes in question, Permanency Outcome 1.

PIP period, i.e., the period for implementation of the PIP. Contrary to what Georgia suggests, however, nothing in the statute indicates that, where a state does not successfully complete its PIP, the withholding is limited to funds for the PIP period. Moreover, section 1123A(b)(4) gives the Secretary the authority to determine the amount of the withholding, which is to be "related to the extent of the failure to conform." "Extent" can reasonably be read to include the length of time that the failure continues.

Furthermore, in the preamble to the proposed rule implementing section 1123A of the Act, ACF explained its rationale for requiring withholding beyond the end of the PIP period, stating:

> The amount of funds subject to withholding that we are proposing is relatively modest for a single year. We therefore believe that for potential withholding to serve as an incentive for program improvements, it must be applied over the entire period of nonconformity.

63 Fed. Reg. 50,058, 50,068 (Sept. 18, 1998) (emphasis added). This is a reasonable basis for continuing to withhold funds for periods beyond the PIP period until the state is determined to be in substantial conformity. We also note that ACF's interpretation of section 1123A as permitting the withholding to end when either the failure to substantially conform "is ended by successful completion of . . . a corrective action plan" (as that section expressly provides) or upon a finding of substantial conformity in a subsequent CFSR, operates to the benefit of the states.

Accordingly, we conclude that section 1355.36(b)(3) is consistent with the language of the statute, as well as its purpose to assure substantial conformity with IV-B and IV-E requirements, and, therefore, that the withholding for periods after the PIP period is authorized.

Notwithstanding the plain language of the regulation, Georgia also asserts that "ACF recognizes that only one penalty or withholding may be assessed against the state agency out of a single federal review and PIP[.]" GA Br. at 18. Georgia points to the fact that the chart attached to each of the letters giving notice of the withholding for fiscal years 2007 and 2008 refers to the "total penalty or withholding" owed by the state from fiscal year 2001 until the end of the fiscal year covered by the letter. Contrary to what Georgia suggests, however, viewing the cumulative amount over several years as one penalty or withholding is consistent with the regulation. The

regulation authorizes continued withholding based on a finding of nonconformity from a single CFSR as to which a PIP is not successfully completed, for "each succeeding year" the state remains out of substantial conformity.

2. The amount of withholding is related to the extent of the failure to conform with IV-B and IV-E requirements.

The $805,369 withholding at issue here was equal to one percent of the "penalty pool" for fiscal year 2008 for each of the three outcomes at issue here. The withholding was calculated pursuant to 45 C.F.R. § 1355.36(a)(5). Under that section, withholding was calculated as one percent of a pool of IV-B and IV-E funds for each outcome at issue.

Georgia argues that the amount ACF withheld is "not proportional to the failure of the agency to meet federal requirements" and thus violates section 1123A of the Act. GA Br. at 13. Georgia argues in particular that "[d]espite Georgia DHS' success in meeting all but a very few of the requirements" of the three outcomes in question, "the agency was penalized as though it had not met any of these requirements." Id. at 13-14. Georgia asserts without contradiction that it completed 93% of the 59 action steps and benchmarks in its 2002 PIP for Permanency Outcome 1. Id. at 14. In addition, Georgia maintains that it "met all incremental data improvements for this outcome measure negotiated with ACF." Id.[5] Moreover, according to Georgia, it completed 91% of the 33 action steps and benchmarks in the PIP for Well-being Outcome 1. Id. at 15. Finally, according to Georgia, it completed 80% of the 26 action steps and benchmarks in the PIP for Well-being Outcome 3. Id. at 16. Georgia argues that one percent of the penalty pool for each of the three outcomes "is not proportional to Georgia's significant success in completing its PIP and conforming to title IV-B and IV-E requirements." Id. Georgia argues that withholding the full one percent for each outcome is contrary to the regulations as well as the statute. Georgia relies on the references in sections 1355.36(d) and 1355.36(e)(2)(ii) to the withholding of IV-B and IV-E funds "related to specific goals or action steps." (The word "specific" is omitted in section 1355.36(e)(2).) According to Georgia, this provides for withholding based not

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[5] We discuss separately below Georgia's argument that it successfully completed the 2002 PIP with respect to Permanency Outcome 1 and thus was not subject to withholding for this outcome.

"upon whether all the goals or action steps of an Outcome of the CFSR are met, but upon which individual action steps or goals (benchmarks) are fulfilled." GA Reply Br. at 3.

Georgia's reliance on the wording of the regulations is misplaced. The preambles to the proposed and final rules clearly indicate that the references to "goals or action steps" are to all of the goals and action steps related to a particular area of nonconformity, i.e., a particular outcome or systemic factor. 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. at 50,068 (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. at 4045 (emphasis added). See also 65 Fed. Reg. 4045 ("an immediate penalty will be assessed for that area of nonconformity.") (emphasis added).

Moreover, there are several ways in which the amount of the withholding here is "related to the extent of the failure to conform" within the meaning of section 1123A. 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. There is also a direct relationship between the amount withheld and the length of time Georgia was out of substantial conformity with respect to an outcome. As ACF's September 1, 2009 letter states, and the regulations provide, if Georgia does not successfully complete the 2008 PIP with respect to the three outcomes at issue, the withholding amount will increase to two percent of the penalty pool. GA Ex. 8, at 2; see also 45 C.F.R. § 1355.36(b)(7). Further, the pool to which the applicable percentage for each outcome applies consists of the state's allotment of IV-B funds but only ten percent of the state's federal claims for the administrative costs of IV-E foster care. See 45 C.F.R. § 1355.36(b)(4); 63 Fed. Reg. at 50,068. Accordingly, the regulatory structure for withholding on its face satisfies the statutory requirement that the withholding be related to the extent of a state's failure to conform.

Georgia argues in essence that ACF should have based the withholding on the degree to which Georgia failed to complete incremental steps in its PIP for correcting its nonconformity

with respect to each of the three outcomes. As noted above, however, the regulations allow a state to avoid withholding for any individual outcomes or factors as to which the state successfully completes the relevant parts of the PIP. Georgia offered no persuasive reason why this was not sufficient to meet the statutory requirement that the withholding be related to the extent of the failure to substantially conform.

Finally, while Georgia identified the percentage of action steps and benchmarks in its 2002 PIP it completed for each of the three outcomes still at issue, we are not persuaded that it was unfair for ACF not to take this percentage into account in calculating the withholding amount for each outcome. Georgia does not explain why benchmarks, which measure a state's progress in completing action steps, should be considered in addition to action steps. In addition, the percentage of PIP action steps completed by a state does not necessarily represent the degree of progress a state has made toward achieving an outcome. The number and nature of action steps may vary depending on the nature of the weaknesses and deficiencies identified in the CFSR. The number of action steps also may vary depending on the level of detail in which a state describes what is necessary to address the weaknesses and deficiencies. Thus, any calculation which gives each action step equal weight might itself be unfair.

<u>3. Georgia did not successfully complete its 2002 PIP with respect to Permanency Outcome 1.</u>

Georgia argues that it successfully completed its 2002 PIP with respect to Permanency Outcome 1, "Children have permanency and stability in their living situations," even though it failed to complete all of the action steps and benchmarks, because it met all "incremental data improvements," or percentage goals, in place for this outcome. GA Br. at 15. These goals were 1) "improvement of foster placement stability by 3% by September 30, 2002 and another 3% by September 30, 2003"; 2) "increase the number of minority foster parents by 15% by November, 2002, by 20% by September, 2003 and by 25% in September 2004 and increase the number of children reunified with their parents in 12 months to 76% by federal fiscal year 2004"; and 3) "increase the number of children moving to adoption in 24 months to 25% by June, 2004, reduce the time from TPR [termination of parental rights] to life history registry from 10 to 6 months by June, 2004, and reduce the time from adoptive placement to adoption finalization from 7.56 to 6 months by June, 2004." <u>Id.</u> at 14-15, citing GA Ex. 5 (2002 PIP) at 11, 13, and 16.

ACF takes the position that meeting these percentage goals was not sufficient to successfully complete the PIP with respect to Permanency Outcome 1. According to ACF, the regulations put Georgia on notice that it had to meet the percentage goals and complete the action steps in the PIP. ACF Br. at 18, 20.

The action steps not completed here consisted of the following: C18-"Recommend additional training and policy changes" and "Identify additional factors that may contribute to the stability of children in foster care"; D2--"Maintain accurate documentation of every placement of a child in foster care"; D6--"Conduct annual cross training for judges, case managers, SAAGs, GALs, parent attorneys, CASAs, and Citizen Panel volunteers on acceptable permanency goals"; and E25--"Monitor new pilot project taking place in Fulton County where Superior Court Judges have delegated adoption jurisdiction to Juvenile Court Judges for adoption cases where the deprivation petition originated in the juvenile court."[6] See GA Br. at 14; ACF Br. at 19; GA Ex. 6, at 7-10; GA Ex. 5, at C-2, C-3, D-1, E-6.

We conclude that meeting the goals but not the action steps in the PIP for Permanency Outcome 1 was not sufficient to successfully complete the PIP with respect to this outcome. The regulations clearly indicate that whether funds are to be withheld following a PIP depends on whether the state has completed the action steps, as well as met the percentage goals. Section 1355.35(a)(1)(iii) requires that states found not to be operating in substantial conformity develop a PIP which must, among other things, "[s]et 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[.]" Section 1355.36(d) provides that ACF will rescind the withholding of the part of the pool "related to specific goals or action steps" as of the end of the quarter in which they were determined to have been achieved.

[6] Georgia also states that "[i]t is important to note that . . . ACF refused to find that the agency met the action step--providing training on permanency hearings to judicial participants--because the state could not demonstrate that all children had had timely permanency hearings." GA Br. at 14, citing GA Ex. 6, at 8-9. The latter was a benchmark for action step D-6. Since it is undisputed that Georgia failed to meet three other action steps under Permanency Outcome 1, we need not resolve any dispute regarding whether Georgia completed action step D-6.

Similarly, section 1355.3(e)(2)(ii) provides that "[f]unds related to goals and action steps that have not been achieved by the specified completion date will be withheld . . . ."

ACF reasonably based the determination of whether a PIP was successfully completed on the completion of action steps in addition to goals since one purpose of the PIP is to ensure that the state continues in substantial conformity once achieved. See, e.g., GA Ex. 1, at 56, ACF's August 2000 CFSR Procedures Manual (stating that "both short-term and long-term goals and strategies should be included in the PIP in order to address immediate needs and plans for lasting reforms."). Here, the action steps in Georgia's PIP had been identified as the steps needed to correct weaknesses or deficiencies leading to Georgia's failure to substantially achieve particular outcomes. Georgia's failure to take those steps has potential long-term negative effects for the children and families it serves and could jeopardize Georgia's ability to continue to meet the goals in the PIP .

4. The on-site review process was not arbitrary and capricious.

Georgia does not dispute ACF's determination that substantial conformity with IV-B and IV-E requirements is reasonably tied to the outcomes required to be evaluated in the on-site review. See 63 Fed. Reg. at 50,066 (stating that ACF is "in effect" proposing that conformity with "those requirements related specifically to outcomes . . . constitutes 'substantial conformity,' rather than reviewing for and requiring some percentage of compliance with all of the title IV-B and IV-E State plan requirements."). Georgia argues, however, that the process used for the on-site review part of the 2001 CFSR was arbitrary and capricious in several respects, thus invalidating ACF's conclusion that Georgia was not in substantial conformity with respect to three outcomes. We discuss each aspect of the on-site review process challenged by Georgia in turn below. We note as a general matter, however, that Georgia for the most part challenges requirements for the on-site review that are clearly set out in the regulations. Thus, Georgia was on notice that these were conditions for its receipt of IV-B and IV-E grant funds.

*a. The requirement that each outcome be rated as substantially achieved in 90% of the cases reviewed*

Georgia argues that the "90% threshold" in section 1355.34(b)(3)(ii) "was arbitrarily chosen." GA Br. at 20. That section provides that one of the two requirements for a state to

be found in substantial conformity with respect to an outcome is that the outcome be rated as "substantially achieved" in 90% of the cases examined in the on-site review. The other requirement is that each statewide data indicator meet the national standard. Section 1355.34(b)(3)(i). Georgia argues that there is no explanation of how ACF developed the 90% threshold in the proposed or final rule implementing the statutory requirement for CFSRs. According to Georgia, in the absence of "a statistical analysis, empirical data, or any other factor[] that explains how [ACF] determined that 90% would be an appropriate measure of substantial conformity . . ., one can only conclude that ACF had no reasonable basis for" this standard. GA Br. at 21. Georgia argues further that "ACF abused its discretion in setting an unreasonably high standard," asserting that "[t]his is illustrated by the fact that no state passed round 1 of the [initial] CFSR." Id.

We note first that Georgia's argument relies on Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983), and cases cited therein, for the proposition that ACF should have to provide some empirical basis for the 90% standard. GA Br. at 20. Those cases are distinguishable. The 90% standard is one of several provisions in the regulation reflecting ACF's interpretation of what Congress meant by the term "substantial conformity" in section 1123A of the Act. That section provides that the criteria for determining substantial conformity would be specified in regulations developed "in consultation with the State agencies administering the State programs under parts B and E of title IV[.]" Act § 1123A(a). ACF followed this process in developing the 90% standard. 63 Fed. Reg. at 50,058-59 (describing "extensive consultation" used to develop the review process). In addition, ACF conducted numerous "pilot reviews" of child and family services programs using the proposed review process. Id. Although the preambles to the proposed and final rules do not specifically explain the basis for the 90% standard, the preamble to the proposed rule refers to such consultation as well as the pilot reviews in discussing this standard. Id. at 50,066.

In contrast, the cases on which Georgia relies did not involve interpretation of a statutory term through rulemaking, but rather, for the most part, a statute that required the federal agency to set standards ab initio based on certain data or on facts developed through a hearing. Moreover, in Motor Vehicle Mfrs., the Court stated that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an

explanation for its decision that runs counter the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." 463 U.S. at 43. Georgia does not point to any basis for finding that ACF's determination to establish the 90% standard was defective in any of these respects.

Second, the 90% standard is reasonable in light of the nature of the reviews. The preamble to the proposed regulations adopting this standard stated that, in order to "determine that child welfare practices, procedures and requirements are achieving desired outcomes for children and families," CFSRs "will focus on the results" that child and family services programs achieve, instead of "the accuracy and completeness of case files and other records[.]" 63 Fed. Reg. at 50,059. A standard below 90% might be appropriate for reviews that focus on a state's compliance with documentation requirements since a state could arguably fail to comply with such requirements in a significant number of cases and still be achieving, or substantially achieving, the desired outcomes. However, a state that fails to substantially achieve the desired outcome in any significant number of cases can hardly be said to be in substantial conformity with IV-B and IV-E requirements.[7]

In any event, the 90% standard at issue here is not as stringent as Georgia suggests. Section 1355.34(b)(3)(ii) does not require perfect compliance with a particular outcome or factor in 90% of the cases reviewed, but only that it be "substantially achieved" in 90% of those cases, i.e., "achieved at a satisfactory level." 63 Fed. Reg. at 50,066. In addition, the outcomes and factors reflect only key IV-B and IV-E requirements, not all of the requirements. See, e.g., 63 Fed. Reg. 50,066 (stating that ACF "limited the State plan requirements subject to review to those requirements related specifically to outcomes and the delivery of improved services."). In addition, since this standard

[7] We also note that in 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003), the court suggested that any standard less than 100% was an acceptable measure of "substantial conformity," stating that section 1123A requires the Secretary to review compliance with state plan requirements "only for substantial compliance, not for compliance in every individual case." 329 F.3d at 1273. In addition, Congress itself set a 90% standard to determine substantial compliance in another program. See Act §§ 409(a)(8)(A)(i)(III), 452(g)(1)(A).

applies separately to each outcome and factor for which the sample cases are reviewed, a state is subject to a PIP only with respect to any outcome or factor for which it fails to meet the 90% standard and can avoid withholding with respect to any such outcome or factor for which it successfully completes a PIP. See 45 C.F.R. §§ 1355.34(b)(3)(ii), 1355.36(b)(3), (5); see also 63 Fed. Reg. at 50,068-69.

Finally, even if no state met the 90% standard in the initial CFSR, that does not demonstrate that this standard was too high since the goal of the CFSRs was to promote quality of outcomes, not to ratify the status quo. See 63 Fed. Reg. at 50,066.

In sum, the 90% standard is reasonable (and was reasonably supported) when viewed in the context of the statutory language ("substantial conformity") and the regulations and preambles as a whole.

*b. The requirement for a sample of 30 to 50 cases*

Section 1355.33(c)(5) states that the sample for the initial on-site review "will range from 30-50 cases," although "the sample size may be increased" in order "to ensure that all program areas are represented." Fifty sample cases were reviewed in Georgia's 2001 CFSR. GA Ex. 2, at 1. Georgia argues that this sample was too small to evaluate its conformity with IV-B and IV-E requirements. Georgia notes that the preamble to the final rule states that a "number of commenters questioned how such a small sample could be statistically valid and expressed concern over imposing penalties based on a small sample of cases" and that "[s]ome respondents indicated a fear that we would be basing decisions about substantial conformity on 'anecdotal' information in the absence of a much larger sample."[8] GA Br. at 23, quoting 65 Fed. Reg. at 4027. Georgia contends that ACF failed to adequately address these concerns in the final rule.

In support of its position, Georgia submitted the affidavit of John Roach, a Ph.D. psychologist employed by the Georgia System of Personnel Administration who has experience in the use of statistical methodology. Dr. Roach stated that it is his

[8] The text of the proposed rule did not specify the sample size. However, the preamble proposed "to select a relatively small sample, that is, 30-50 cases . . . ." 63 Fed Reg. at 50,065.

"professional and expert opinion" that "the sample size was too small to make confident generalizations[.]" GA Ex. 3, at 7-8. According to Dr. Roach, "the minimum sized sample" – which he deemed to be 65 cases – "is only appropriate where there are no reliability or measurement issues in determining the status of each case," and the "problem of reliability looms very large in the CFSR process" since the "ratings involve both complex professional judgments and interviews with individuals involved in the case[.]" Id. at 6. Dr. Roach further opined that, under these circumstances, "a sample size of 394 would be required to establish confidence limits of +/- 5% for 95% of samples." Id. at 5. In other words, Dr. Roach determined that to have a statistically valid sample from which one could estimate, with a 95% degree of confidence, whether the state substantially achieved the outcome in 90% of the cases in the universe of cases within the state, 394 cases would have to be reviewed.

The premises of Dr. Roach's opinion that the sample size was too small are erroneous. Nothing in the statute requires either use of a valid statistical sample or a particular degree of certainty in determining whether a state is in substantial conformity with IV-B and IV-E requirements. Furthermore, ACF never indicated in the regulations or elsewhere that it expected the sample of 30 to 50 cases to be a statistically valid sample. In contrast, ACF stated in the preamble to the final rule that, where additional sample cases are reviewed to resolve a discrepancy, the total number of cases reviewed "will represent a statistically significant sample with a 90 percent (or 95 percent in subsequent reviews) compliance rate, a tolerable sampling error of 5 percent and a confidence coefficient of 95 percent." 65 Fed. Reg. at 4026; see also 45 C.F.R. § 1355.33(c)(6).[9] Nor do we see any reason why a statistically valid sample was required here.

First, the purpose of the on-site review is not, as Dr. Roach presumes, to estimate whether the state substantially achieved the relevant outcome (or factor) in 90% of the cases in the universe of child welfare cases in the state. Under the regulations, the 90% standard applies to "the cases examined during the [initial] on-site review". 45 C.F.R.

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[9] Similarly, the regulations describing the sample to be drawn for the foster care eligibility reviews (issued in the same rulemaking as the CFSR regulations) make very clear that a statistically valid is required. See 45 C.F.R. § 1356.71(c) (providing "Sampling guidance").

§ 1355.34(b)(3)(ii). This situation is distinguishable from situations where an agency is using a sampling method as an auditing tool and extrapolating the results of the sample to a universe of claims (for example, to calculate the total amount of provider overpayments made by a state during an audit period). In those situations, a certain degree of precision is required in order for the sample results to be considered reliable evidence supporting a determination regarding the universe (for example, the total amount of overpayments that must be disallowed). See, e.g., Maryland Dept. of Health and Mental Hygiene, DAB No. 2090 (2007). Here, the degree of precision is less important since the on-site review is not itself the basis for determining the amount of a disallowance or penalty but is instead intended to provide information to help a state improve its outcomes for children and families through a PIP. See 63 Fed. Reg. at 50,059 ("States that do not achieve expected results in areas related to child safety, permanency and well-being may have a portion of their Federal funds withheld, but only if the State's program improvement plan does not effectively correct the identified problem(s).").

Moreover, in response to comments that a sample size of 30 to 50 cases is too small, ACF explained that it "cannot make accurate decisions in a results-focused review by only reviewing documentation in records." 65 Fed. Reg. at 4027. ACF stated further that the intensive review of cases (including interviews) that is necessary to obtain "reliable . . . information on outcomes and conformity with applicable requirements . . . requires a large number of staff resources and is an extremely time-consuming process." Id. ACF thus reasonably concluded that reviewing a sample larger than 30 to 50 cases "does not constitute a cost effective approach to the reviews." Id. at 4028.

At the same time, ACF indicated that it made changes in the proposed rule to compensate for any imprecision in the results of the sample. These changes included providing that the sample size could be increased in certain circumstances to ensure that "all program areas are adequately represented."[10] 65 Fed. Reg. at 4028; 45 C.F.R. § 1355.33(c)(5). ACF also required states to meet national standards for "statewide data indicators" for some

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[10] This provision appears to refer to the situation where the sample drawn includes an insufficient number of either foster care cases or in-home cases. See 65 Fed. Reg. at 4028. Georgia does not allege that this situation existed here.

of the outcomes and gave states the option of either an on-site review of additional cases reviewed or submission of additional information where a state does not substantially achieve an outcome in 90% of the cases reviewed but its statewide data indicators meet the national standard for that outcome. 65 Fed. Reg. at 4027-4028; 45 C.F.R. §§ 1355.33(d), 1355.34(a)(1). Using a 90% standard instead of a higher standard and requiring only that an outcome in a reviewed case be substantially achieved could also be viewed as compensating for some degree of imprecision in the results of the sample.

Georgia does not explain why the changes ACF made to the proposed regulation in response to comments about the sample size were not adequate. In particular, Georgia can hardly complain that the small sample size prejudiced it with respect to the determination that it was out of conformity with respect to Permanency Outcome 1. Although there was a discrepancy between the results of the statewide assessment and the on-site review with respect to this outcome, Georgia did not request the opportunity to have a larger sample reviewed (or to provide additional information) to determine whether it met the 90% standard. GA Ex. 2, at 4. The findings of the on-site review that the other two outcomes at issue here were not substantially achieved were substantiated by the results of the statewide assessment. See GA Ex. 4 (July 2001 CFSR Final Report), at 26-28, 31-33 (identifying areas needing improvement for Well-being Outcomes 1 and 3). Furthermore, as we discuss in the last part of this section, ACF took steps to reduce the measurement error that Dr. Roach claimed was inherent in the CFSR process and precluded the use of a small sample.

c. *The counties from which the sample cases were selected*

Section 1355.33(c)(2) provides that "[t]he on-site review may be concentrated in several specific political subdivisions of the State, as agreed upon by the ACF and the State; however, the State's largest metropolitan subdivision must be one of the locations selected." In the preamble to the proposed rule, ACF explained that it was proposing that "each State's largest metropolitan area be one of the locations selected for an on-site review" because "the nation's large metropolitan areas are often characterized by complex social and organizational issues that affect large numbers of children and families." 63 Fed. Reg. at 50,065; see also 65 Fed. Reg. at 4039 ("Urban areas often provide a disproportionate number of families who have contact with the child welfare system.").

The sample for Georgia's 2001 CFSR was drawn from three of the State's 159 counties, including Fulton County, the county containing the largest metropolitan area. GA Br. at 24. Georgia argues that the sample "was not randomly selected; therefore the results obtained from the on-site case review were not a true reflection of the casework practice across the state." Id. Georgia cites to the opinion of its expert, Dr. Roach, who calculated that 87-90% of the universe of cases were in the counties from which no cases were drawn and concluded that "the sample can tell us nothing" about those cases. Id.; GA Ex. 3, at 5. Dr. Roach's affidavit also states that "it is known that the 3 counties sampled are very dissimilar to the other counties that were unmeasured." GA Ex. 3, at 5.

Georgia's argument has no merit. We note preliminarily that Georgia does not appear to be arguing that the sample cases within each county were not randomly selected but rather that the sample cases were not representative of the universe of cases in the State. However, Georgia does not explain why ACF's rationale for requiring that a state's largest metropolitan area be selected was unreasonable. Moreover, Georgia does not dispute the assertion of ACF's Regional Program Manager that Georgia selected the two counties in addition to Fulton County from which the sample cases were drawn and that ACF "concurred with that selection[.]"[11] ACF Ex. 10 (Declaration of Ruth Walker), at 2-3. ACF's approval pursuant to section 1355.33(c)(3) does not diminish the significance of the fact that Georgia made the initial selection. Nor does Georgia claim that it asked to select more than three counties.[12] Thus, Georgia may not reasonably object if the sample cases drawn from the three counties were not representative of the entire State.

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[11] Georgia notes that ACF rejected its initial proposal to use two other counties; however, Georgia does not argue that the reason for ACF's rejection – that the counties did not have large enough caseloads from which a sample could be selected – was unsound. See GA Reply Br. at 11.

[12] According to Georgia, "ACF's procedures manual limited Georgia to three locations[.]" GA Reply Br. at 10, citing GA Ex. 1, at page 5. However, the more detailed instructions in the manual state that the "onsite review activities are conducted in at least three locations in the State." GA Ex. 1, at page 17 (emphasis added).

In any event, neither Dr. Roach nor Georgia provided any specifics as to how the counties it selected were dissimilar from the remaining counties. Even assuming there were some differences among the counties, that does not necessarily mean that any outcome was more likely to have been rated as substantially achieved if cases from the remaining counties had been reviewed. Georgia provides no reason why those remaining counties would be more apt to have cases in which the outcome was substantially achieved than the three counties included in the review.

d. *The reliance on ratings by reviewers*

Section 1355.33(a) states that the reviews will be "conducted by a team of Federal and State reviewers that includes . . . [s]taff of the State child and family services agency . . . ; [r]epresentatives selected by the State, in collaboration with the ACF Regional Office, from those with whom the State was required to consult in developing its [child and family services plan] . . .; Federal staff of HHS; and . . . [o]ther individuals, as deemed appropriate and agreed upon by the State and ACF." Georgia argues that the on-site review process was arbitrary and capricious because it relied on "a limited number of subjective opinions[.]" GA Br. at 25. Georgia acknowledges that ACF implemented some "strategies to assist reviewers in making objective determinations," but argues that these strategies "failed to address the inherent problems associated with using individuals from various backgrounds to conduct assessments utilizing tools that contain highly subjective criteria."[13] Id. at 26. Georgia takes the position that ACF should have "conducted a rater (reviewer) reliability study" to assess "the reliability of judgments in the same review or across reviews or states." Id. at 26; GA Ex. 3, at 6. According to Georgia, "[i]n the absence of data regarding the reliability of the review process, one can only conclude that the subjective nature of the process will yield arbitrary

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[13] Georgia also asserts that "ACF does not have a mechanism for ensuring the veracity or accurateness of the observations or opinions proffered by local stakeholders." GA Br. at 26. The regulations provide that whether a state meets the criteria for systemic factors will be determined in part based on interviews with "key stakeholders[.]" 45 C.F.R. § 1355.33(c)(4) (emphasis added). Georgia's criticism of this process is irrelevant, however, since the withholding here was based only on Georgia's failure to achieve outcomes.

results." GA Br. at 26. As noted above, Dr. Roach opined that a larger sample size would have been required to account for the measurement error introduced by such subjectivity.

Georgia's position that the reviewers' ratings were unreliable is unfounded. The preamble to the final rule recognized concerns raised about "reviewers making subjective judgments on outcome achievement" but noted that ACF had "strengthened the provisions for objectivity in the reviews by adding a number of measures to the final rule and the CFSR procedures manual." 65 Fed. Reg. at 4026-4027. Some of the measures in the August 2000 manual are that at least half of the review team -- which under section 1355.33(a) must include both state and federal staff -- be State representatives (Georgia Exhibit 1, at 7), and that the review team utilize an Onsite Review Instrument that includes checklists and the use of quantitative data (id., Appendix C). The Onsite Review Instrument is accompanied by instructions to reviewers that require daily briefings during the on-site review where individual reviewers discuss their cases and their rationale for assigning particular ratings. GA Ex. 1, at 35. Moreover, according to ACF's Regional Program Manager, Ruth Walker, at the end of each week during Georgia's 2001 on-site review, all Onsite Review Instruments were reviewed by federal and State team leaders to ensure accuracy and consistency. ACF Ex. 10, at 3. Ms. Walker also averred that "[a]t both the local sites and at the State level, State team leaders were invited to review all instruments and raise questions about ratings or completion of the instruments." Id.

Georgia does not dispute that these steps were followed during its 2001 CFSR. Nor does Georgia provide a persuasive explanation of why it believes these steps were insufficient to ensure that the reviewers' ratings were reliable. Dr. Roach observed that "[m]uch of the ACF protocol seems to rely on procedures for developing consensus as a solution to the reliability issues," but asserts that "such procedures can serve to introduce or strengthen polarization effects or other types of group dynamics that bias ratings." GA Ex. 3, at 7. Dr. Roach does not state any basis for concluding that this polarization effect occurred here, however. We think it unlikely for two reasons. First, the review teams included both federal and state reviewers. Second, and more important, Georgia could have challenged these ratings at the time of the on-site review or on appeal if it had reason to suspect that they were biased, but failed to do so.

In sum, we do not accept Georgia's position that the results of the on-site review were unreliable. Even if the process could

lead to measurement error because of the subjective nature of the judgments to be made and the potential for bias, Georgia has not shown that, in fact, any such error occurred here.

5. Georgia's argument that the withholding is contrary to the statutory purpose of improving child welfare is not a basis for reversing ACF's determination.

Georgia argues that the regulatory scheme for withholding is contrary to the statutory purpose "because imposition of the penalties substantial[ly] hinders Georgia DHS in its efforts to meet the requirements of the IV-B and IV-E federal programs and improve its child welfare programs." GA Br. at 27. According to a state agency official, the current economic downturn and the resulting decline in state revenues have led to severe reductions in the budget for the state agency operating these programs. Id., citing GA Ex. 11 (Affidavit of James H. Sanregret). Georgia argues that requiring it to "absorb an additional reduction of revenues in the form of a penalty is contrary to the purpose of" the Act since the penalty "will inevitably adversely affect Georgia's child welfare programs and prevent the State's use of these funds to improve the Georgia child welfare system." Id. at 28.

Georgia's argument is not persuasive. Congress intended the title IV-B and IV-E programs to "mitigate the need for the placement of children into foster care and encourage greater efforts by State agencies to find permanent homes for children—either by making it possible for them to return to their own families or by placing them in adoptive homes." 63 Fed. Reg. at 50,060. Congress mandated the Secretary to promulgate regulations for reviews of state child and family services programs because these goals had "not yet been fully realized[.]" Id. In developing the regulations, ACF sought to "promote practice improvements through the review process" and to "establish penalties in amounts that create significant motivators" for states that do not correct areas of nonconformity identified in the reviews "to improve programs while not denying services to needy children that are critical to their safety, permanency, and well-being." 65 Fed. Reg. at 4044. Thus, contrary to what Georgia argues, the withholding furthers the statutory purpose. In any event, the statute does not provide any exception to the requirement for withholding, and the Board has no authority to reverse an agency's determination on equitable grounds. See 45 C.F.R. § 16.14 ("The Board shall be bound by all applicable laws and regulations.").

Finally, we note that Georgia could have avoided any withholding by completing all of the action steps in the PIP by September 30, 2004 (the end of the PIP period), and could have avoided the withholding for fiscal year 2008 if the 2007 CFSR had found that Georgia was in substantial conformity.

Conclusion

Based on the foregoing analysis, we uphold in full ACF's determination to withhold $805,369 for fiscal year 2008.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member