Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Wyoming Department of Family Services
Docket No. A-06-75
Decision No. 2074

DATE: April 6, 2007

DECISION

The Wyoming Department of Family Services (Wyoming) appealed a determination by the Administration for Children and Families that Wyoming is subject to a financial penalty that would reduce its funds under title IV-A of the Social Security Act (Act) by one percent ($70,104). ACF determined that a penalty was authorized because Wyoming's child support enforcement program under title IV-D of the Act had failed, in two consecutive years, to achieve the required performance level for establishing paternity.

Wyoming concedes that it did not meet the required performance level for paternity establishment for two consecutive years, but sets out a number of reasons why it thinks the penalty should not be imposed.

For the reasons set out below, we uphold ACF's determination to impose the penalty.

Legal background

Title IV-A of the Act, "Block Grants to States for Temporary Assistance for Needy Families" (TANF), provides grants to eligible states that have approved programs for providing assistance to needy families with children, and for providing their parents with job preparation, work and support services to enable them to leave the program and become self-sufficient.[1] To

[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

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receive TANF funds, a state must operate a child support enforcement program consistent with title IV-D of the Act. Section 402(a)(2) of the Act. Title IV-D is a cooperative federal-state program that aims at increasing the effectiveness of child support collection by such measures as locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support is available to all children for whom such assistance is requested. States operate their child support enforcement programs subject to oversight by ACF's Office of Child Support Enforcement (OCSE). (The IV-D regulations refer only to OCSE, but we refer in this decision to ACF, since it is the respondent federal agency.)

Titles IV-A and IV-D of the Act impose various requirements on states and establish performance standards or measures that states must achieve in operating their TANF and Child Support Enforcement programs. Section 409 of the Act, "Penalties," provides for financial penalties against states, in the form of reductions in a state's federal TANF grant, called a State Family Assistance Grant (SFAG). Among other things, section 409(a)(8)(A) provides for a penalty if the Secretary finds, with respect to a state's Child Support Enforcement program under part D —

> (i)(I) on the basis of data submitted by a State pursuant to section 454(15)(B), or on the basis of the results of a review conducted under section 452(a)(4), that the State program failed to achieve the paternity establishment percentages (as defined in section 452(g)(2)), or to meet other performance measures that may be established by the Secretary;
> (II) on the basis of the results of an audit or audits conducted under section 452(a)(4)(C)(i) that the State data submitted pursuant to section 454(15)(B) is incomplete or unreliable; or
> (III) on the basis of the results of an audit or audits conducted under section 452(a)(4)(C) that a State failed to substantially comply with 1 or more of the requirements of part D (other than paragraph (24) or subparagraph (A) or (B)(i) of paragraph (27), of section 454); and
> (ii) that, with respect to the succeeding fiscal year—

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[1](...continued)
table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

> (I) the State failed to take sufficient corrective action to achieve the appropriate performance levels or compliance as described in subparagraph (A)(i); or
> (II) the data submitted by the State pursuant to section 454(15)(B) is incomplete or unreliable;
> the amounts otherwise payable to the State under this part for quarters following the end of such succeeding fiscal year, prior to quarters following the end of the first quarter throughout which the State program has achieved the paternity establishment percentages or other performance measures as described in subparagraph (A)(i)(I), or is in substantial compliance with 1 or more of the requirements of part D as described in subparagraph (A)(i)(III), as appropriate, shall be reduced by the percentage specified in subparagraph (B).

The Act's IV-D penalty provisions are implemented by regulations at 45 C.F.R Part 305. Section 305.61 of 45 C.F.R provides, as relevant here:

> (a) A State will be subject to a financial penalty and the amounts otherwise payable to the State under title IV-A of the Act will be reduced in accordance with § 305.66:
> (1) If on the basis of:
> (i) Data submitted by the State or the results of an audit conducted under § 305.60 of this part, the State's program failed to achieve the paternity establishment percentages, as defined in section 452(g)(2) of the Act and § 305.40 of this part, . . . ; or
> (ii) The results of an audit under § 305.60 of this part, the State did not submit complete and reliable data, as defined in § 305.1 of the part; or
> (iii) The results of an audit under § 305.60 of this part, the State failed to substantially comply with one or more of the requirements of the IV-D program, as defined in § 305.63; and
> (2) With respect to the immediately succeeding fiscal year, the State failed to take sufficient corrective action to achieve the appropriate performance levels or compliance or the data submitted by the State are still incomplete and unreliable.
> (b) The reductions under paragraph (c) of this section will be made for quarters following the end of the corrective action year and will continue until the end of the first quarter throughout which the State, as appropriate:

> (1) Has achieved the paternity establishment percentages, . . . ;
> (2) Is in substantial compliance with IV-D requirements as defined in § 305.63 of this part; or
> (3) Has submitted data that are determined to be complete and reliable.

ACF refers to the first of the two consecutive years as the performance year. 65 Fed. Reg. 82,178, 82,186, 82,189 (Dec. 27, 2000). The second year is referred to as the corrective action year.

The funding reduction penalties range from one to two percent of a state's SFAG if the state is found in noncompliance for two consecutive years, and increase in subsequent years if ACF finds that the noncompliance still is not corrected. Section 409(a)(8)(B) of the Act; 45 C.F.R. § 305.61(c). A state must expend additional state funds to replace any reduction in the SFAG resulting from penalties. Section 409(a)(12) of the Act; 45 C.F.R. § 262.1(e).

The performance measure at issue in this appeal, the paternity establishment percentage, is essentially the percentage of children born out of wedlock for whom paternity has been established or acknowledged; it is "commonly known as the PEP." 45 C.F.R. § 305.2(a)(1).

Section 452(g)(2) of the Act defines two versions of the PEP – a "IV-D PEP" and a "Statewide PEP." The regulations define the two PEP measures as ratios. 45 C.F.R. § 305.2(a)(1). The IV-D PEP is the following ratio:

$$\frac{\text{Total \# of Children in IV-D Caseload in the Fiscal Year or, at the option of the State, as of the end of the Fiscal Year who were Born Out-of-Wedlock with Paternity Established or Acknowledged}}{\text{Total \# of Children in IV-D Caseload as of the end of the preceding Fiscal Year who were Born Out-of-Wedlock}}$$

The Statewide PEP is the following ratio:

$$\frac{\text{Total \# of Minor Children who have been Born Out-of-Wedlock and for Whom Paternity has been Established or Acknowledged During the Fiscal Year}}{\text{Total \# of Children Born Out-of-Wedlock During the Preceding Fiscal Year}}$$

States may select either one as the basis for calculating their PEPs and determining the reliability of their PEP data. Id.; section 452(g)(1) of the Act.

To avoid a penalty, a state must maintain a PEP of 90% or more. A PEP lower than 90% may lead to a penalty unless the state has increased its PEP over the previous year by the percentages specified in the following table from the regulation:

PEP	Increase required over previous year's PEP	Penalty FOR FIRST FAILURE if increase not met
90% or more	None	No Penalty.
75% to 89%	2%	1-2% TANF Funds.
50% to 74%	3%	1-2% TANF Funds.
45% to 49%	4%	1-2% TANF Funds.
40% to 44%	5%	1-2% TANF Funds.
39% or less	6%	1-2% TANF Funds.

45 C.F.R. § 305.40(a)(1), Table 4.

As discussed below, the statute and regulations also provide for certain incentives based on performance and for a waiver of a penalty for certain noncompliance of a technical nature.

Case background

The following facts are undisputed. Wyoming's Department of Family Services (DFS) contracts with outside entities for its local establishment of paternity and child support enforcement activities. In five of Wyoming's nine judicial districts, DFS contracts with a private-for-profit company, but in the remaining four, Wyoming contracts with local public entities. Although Wyoming has chosen to use the Statewide PEP measure for purposes of the penalties and incentives and reports the Statewide PEP on the form (called an OCSE-157) that it submits to ACF, DFS measures the performance of the local enforcement districts on a IV-D PEP basis. Wyoming explains that "DFS feels that the local districts have more direct control over the process of IV-D PEP, and should be measured on that basis rather than the Statewide

PEP basis for which they have little or no control." WY Br. at 9.

Because Wyoming has chosen to use the Statewide PEP, when the OCSE Audit Division of ACF does its Data Reliability Audit (DRA) of the data reported by Wyoming, the audit determines an efficiency rating for the Statewide PEP calculation. DRAs of Wyoming's Statewide PEP calculation consistently show the data used for that calculation are complete and reliable. No DRAs are performed on Wyoming's IV-D PEP calculation.

By letter dated December 8, 2004, ACF informed Wyoming that it was subject to a financial penalty under TANF because Wyoming's PEP performance for federal fiscal year (FFY) 2003 was at 89% (less than the 90% performance level) and Wyoming failed to show a 2% improvement over its FFY 2002 performance level (which was at 98%). WY Ex. 2. The letter further said that the penalty would be imposed "if, for FFY 2004, the State fails to take sufficient corrective action to achieve the appropriate PEP performance level or if the PEP data submitted for FFY 2004 or used to calculate the FFY 2004 PEP fail to meet the data completeness and data reliability standards." Id. at 1.

For FFY 2004, the PEP data Wyoming submitted "met data completeness and data reliability standards" but "Wyoming did not meet the required 90% in FFY 2004 or show a 2% improvement, reaching a PEP performance level of 87%." WY Br. at 2. Indeed, Wyoming's Statewide PEP was actually one percent less in FFY 2004 (the corrective action year) than in FFY 2003 (the performance year).

By letter dated January 31, 2006 and signed by the Assistant Secretary for Children and Families, ACF informed Wyoming:

> Because Wyoming's FFY 2004 PEP was below 90 percent and did not improve by two percentage points over the FFY 2003 PEP, and because the FFY 2003 PEP performance also failed to meet the minimum acceptable level of performance, Wyoming has failed to take the necessary corrective action required by the statute to avoid the imposition of the penalty. FFY 2004 is the second year Wyoming has not met the minimum acceptable level of performance for the PEP. I have further determined that the State's failure to meet the required performance levels for the PEP did not constitute noncompliance of a technical nature which did not adversely affect the determination of the PEP performance measure.

WY Ex. 1, at 2. This letter further informed Wyoming that it would receive a penalty of $70,104 (one percent of the adjusted SFAG for FFY 2003), which would be imposed against the TANF program quarterly, beginning with the first quarter of FFY 2006, for the four quarters of FFY 2005.

Wyoming appealed this decision to the Board, in accordance with 45 C.F.R. § 262.7.

The issues

On appeal, Wyoming concedes that it "did not meet the required 90% in FFY 2004 or show a 2% improvement, reaching a PEP performance level of 87%." WY Br. at 2. Moreover, Wyoming does not challenge ACF's calculation of the amount of the penalty. Wyoming argues, however, that the penalty should not be imposed, for the following reasons:

- The causes of Wyoming's failure to meet the minimum performance measure for PEP "are based on two circumstances beyond the immediate control of the Wyoming Department of Family Services: 1) Wyoming's CSE computer system Parental Obligation System for Support Enforcement ("POSSE") was originally programmed incorrectly to measure PEP for Child Support Enforcement (IV-D) cases; and 2) Wyoming's statewide PEP performance relies on the performance of hospitals and birthing centers which are outside of the control of the Wyoming Department of Family Services." Id. at 3.

- Wyoming is "undergoing corrective action measures to increase its PEP performance" and the Wyoming legislature has approved funds for a consultant to assist Wyoming in this effort. Id.

- The legislature has also appropriated funds for an enhancement of the POSSE system, so that Wyoming can correctly calculate the IV-D PEP. Id.

Wyoming also argues that, since Wyoming is required to use its own funds to make up the shortfall caused by the penalty reduction, the penalty of $70,104 becomes an actual penalty of $140,208, which is "an unreasonably harmful result for the State of Wyoming." WY Br. at 16. Wyoming also points out that its PEP was over 80% and therefore high enough to qualify it for an incentive payment. Id. at 7.

In response to Wyoming's brief explaining these reasons, ACF argues that the Board should either dismiss the appeal or grant summary judgment to ACF on the ground that "Wyoming has simply failed to state a cause of action upon which relief may be granted" and "[e]ven if all of Wyoming's arguments were true, none of them provides a legal basis for the reversal or waiver of the penalty imposed by ACF." ACF Br. at 2. According to ACF, Wyoming's brief fails to cite any statutory, regulatory or other legal authority that would authorize the Board to reverse or to waive the penalty, and Wyoming's factual assertions are irrelevant and immaterial.

Wyoming had an opportunity to submit a reply brief, but chose not to do so.

Analysis

Based on our analysis, we conclude that ACF's penalty determination should be upheld.[2] Wyoming concedes the key facts relevant to determining whether a penalty is authorized and has been properly calculated. Contrary to what ACF's brief suggests, however, Wyoming's brief did cite to and quote from statutory authority for waiving a penalty, specifically, section 408(a)(8)(C) of the Act, which Wyoming says directs the Secretary to "disregard noncompliance which is of a 'technical nature.'" WY Br. at 6. Wyoming described this as an "important exception" in the statute to the provisions for a penalty. Id. Moreover, the Assistant Secretary's letter indicated that he had determined that Wyoming's noncompliance was not of a technical nature that would not adversely affect calculation of the performance measure, so Wyoming may have thought that this provision applies and could be a basis for disregarding its noncompliance. Thus, rather than summarily upholding the penalty, we briefly discuss below why we do not think the disregard provision applies in the circumstances here and why, even if the provision applies, we

[2] We note that, while the Board has held in some other types of Board cases that summary judgment is appropriate, we have not yet addressed whether it would be appropriate when we are reviewing a TANF penalty pursuant to section 410(b) of the Act. Since our decision here is based on the documentary record after the full procedures contemplated by the Act (and Wyoming has not requested an evidentiary hearing), we do not need to address whether summary judgment would be appropriate in a TANF penalty case (nor do we need to address whether we may grant ACF's alternative motion to dismiss the appeal).

would not conclude that Wyoming's failure was of a technical nature that warranted disregard of the noncompliance. We also briefly discuss why we do not find Wyoming's other arguments persuasive.

1. The disregard provision, as interpreted in the regulations, does not apply to a failure to meet a performance measure.

Section 409(a)(8)(A), which we set out above, authorizes a penalty where the Secretary makes one of the following findings in each of two consecutive years:

- the state failed to achieve the paternity establishment percentages (as defined in section 452(g)(2)), or to meet other performance measures that may be established by the Secretary;
- the state data submitted pursuant to section 454(15)(B) are incomplete or unreliable; or
- the state failed to substantially comply with 1 or more of the requirements of part D (other than paragraph (24) or subparagraph (A) or (B)(i) of paragraph (27), of section 454).

Section 409(a)(8)(C) of the Act provides:

> DISREGARD OF NONCOMPLIANCE WHICH IS OF A TECHNICAL NATURE. — For purposes of this section and section 452(a)(4), a State determined as a result of an audit—
> (i) to have failed to have substantially complied with 1 or more of the requirements of part D shall be determined to have achieved substantial compliance only if the Secretary determines that the extent of the noncompliance is of a technical nature which does not adversely affect the performance of the State's program under part D; or
> (ii) to have submitted incomplete or unreliable data pursuant to section 454(15)(B) shall be determined to have submitted adequate data only if the Secretary determines that the extent of the incompleteness or unreliability of the data is of a technical nature which does not adversely affect the determination of the level of the State's paternity establishment percentages (as defined under section 452(g)(2)) or other performance measures that may be established by the Secretary.

(Emphasis added.) The implementing regulation at 45 C.F.R. § 305.62 provides–

> A State subject to a penalty under § 305.61(a)(1)(ii) or (iii) of this part may be determined, as appropriate, to have submitted adequate data or to have achieved substantial compliance with one or more IV-D requirements, as defined in § 305.63 of this part, if the Secretary determines that the incompleteness or unreliability of the data, or the noncompliance with one or more of the IV-D requirements, is of a technical nature which does not adversely affect the performance of the State's IV-D program or does not adversely affect the determination of the level of the State's paternity establishment or other performance measures percentages.

(Emphasis added.) This regulatory disregard provision does not refer to a state, like Wyoming, subject to a penalty under section 305.61(a)(1)(i) for failure to achieve the specified PEP performance level. Instead, it refers only to a state subject to a penalty under either section 305.61(a)(1)(ii) (failure to submit complete and reliable data) or section 305.61(a)(1)(iii) (failure to substantially comply with one or more IV-D requirements, as defined in 45 C.F.R. § 305.63).

We recognize that, for some purposes, a failure to achieve the specified PEP performance level may be treated as a failure to substantially comply with IV-D requirements. Section 452(g)(1) of the Act, which Wyoming cites in its brief, states that a "State's program under this part shall be found, for purposes of section 409(a)(8), not to have complied substantially with the requirements of this part unless . . . its paternity establishment percentage . . . is based on reliable data and (rounded to the nearest whole percentage point) equals or exceeds" the specified performance level. See WY Br. at 7 (stating that section 452(g)(1) provides that "in order to be found to be in substantial compliance with Title IV-D requirements, a State's child support enforcement program must meet" the specified PEP performance levels). The regulatory disregard provision, however, limits application of the disregard to either a data failure or a failure to comply substantially "as defined in section 305.63." That section, in turn, does not treat failure to meet the required PEP performance level as a failure to substantially comply with one or more IV-D requirements.[3]

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[3] Section 305.63 does include a standard for provision of required IV-D services such as establishment of paternity, but that substantial compliance standard is different from the

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Thus, the regulations appear to reflect ACF's interpretation that the disregard provision does not apply to a failure to meet PEP performance levels. In our view, this is a reasonable interpretation. First, the penalty provision at section 409(a)(8)(A) of the Act lists a failure to "substantially comply with 1 or more of the requirements of part D" separately from a data failure or a failure to meet performance measures, whereas the disregard provision at section 409(a)(8)(C) lists only data failures and "failures to substantially comply with 1 or more of the requirements of part D" when identifying bases for disregarding noncompliance of a technical nature. Second, the lead-in language to the statutory disregard provision refers to a determination "as a result of an audit," but a penalty for failure to meet a PEP performance level may be the result of either an audit or a state's own report of its PEP on the OCSE-157 form.

In any event, as we discuss next, even assuming that a failure to meet a PEP performance level is a failure to substantially comply with a IV-D requirement for purposes of the disregard provision, Wyoming has not shown that its failure should be disregarded.

2. Even if the disregard provision does apply, Wyoming did not show that its failure to meet the required PEP percentage, even after a corrective action period, was noncompliance of a technical nature, within the meaning of the provision.

Even if failure to meet a required PEP level could be treated as a failure to substantially comply with a program requirement (which it is not), we would conclude that Wyoming's failure was not noncompliance of a technical nature within the meaning of the

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performance levels established for the PEP and uses a measure different from either the IV-D PEP or the Statewide PEP. Specifically, section 305.63(c) contains a standard that requires provision of numerous types of IV-D services (including establishment of paternity) in 75% of the cases reviewed in an audit. The PEP, in contrast, measures only the program's success during the year in having paternity established or acknowledged for either all children born out-of-wedlock in the state (the Statewide PEP) or all title IV-D children born out-of-wedlock (the IV-D PEP). Moreover, the required PEP performance level is either 90% or a specified percentage increase, and a state's success in achieving the level may be determined on the basis of either a state's report or an audit.

disregard provision. Neither the disregard provision in the statute nor the disregard provision in the regulations authorizes disregard of all failures of a technical nature. When read together, they authorize a disregard of a failure to substantially comply with a program requirement only if the noncompliance is of a technical nature which does not adversely affect the performance of a state's IV-D program.[4]

Wyoming's problem with its POSSE computer system may have been a "technical" problem in one sense of that word since the system had a programming error that caused the wrong denominator to be used to calculate a IV-D PEP for each of Wyoming's enforcement districts. WY Br. at 11-12.[5] Wyoming says this problem contributed to Wyoming's inability to ensure that its contractors were performing sufficiently well in establishing paternity to meet the required performance level. This problem does not, however, provide a basis for disregarding Wyoming's failure to achieve the required PEP level (90% or 2% improvement over the prior year's PEP). Regardless of the nature of the cause of the failure, Wyoming's failure to achieve the required PEP performance level did adversely affect program performance. Had Wyoming performed at a higher level, paternity would have been

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[4] The other type of noncompliance of a technical nature that may be disregarded relates only to a state submitting incomplete or unreliable data since this is the type of failure that might adversely affect calculation of the percentages used to measure performance. While the implementing regulation at section 305.62 does not clearly relate the alternative types of adverse effect to the different types of noncompliance, this is clear on the face of section 409(a)(8)(C) of the Act, which addresses substantial compliance failures in subparagraph (i) and data reliability in subparagraph (ii). As the Board said in its decision in Alabama Dept. of Human Resources, et al., subparagraph (ii) is "limited to data reliability failures that have no substantive effect on whether penalties are imposed (or incentives are awarded) based on state performance in meeting IV-D goals." DAB No. 1989, at 32, *aff'd* State of Alabama Dep't of Human Resources, et al. v. U.S. Dep't of Health and Human Services, __ F. Supp.2d __ , 2007 WL 896351 (D.D.C., March 23, 2007).

[5] The denominator should be children in IV-D cases open at the end of the previous fiscal year, who were born out-of-wedlock. Instead, POSSE was counting only those children whose paternity had been established, rather than all children born out-of-wedlock. This inflated the IV-D PEP percentage.

established for more children born out of wedlock, increasing the likelihood of obtaining child support for those children – the ultimate program goal. Conversely, Wyoming's performance at a lower PEP level adversely affected achievement of that goal.

Accordingly, we conclude that Wyoming's noncompliance is not the type of noncompliance that may be disregarded.

3. Wyoming's other arguments about why the penalty should not be imposed have no merit.

We also reject Wyoming's other arguments about why the penalty should be reversed. Wyoming first asserts that the Statewide PEP measure does not really reflect the performance of its DFS and suggests that DFS should not be held accountable for the failure to achieve the required performance level. Specifically, Wyoming asserts that the problem with how its POSSE system was calculating the IV-D PEP was outside the immediate control of DFS. Wyoming suggests that it might have caught the system error sooner but for the fact that ACF's data reliability audits reviewed only the completeness and reliability of the data used for the Statewide PEP. Wyoming also says that Statewide PEP performance relies on the performance of hospitals and birthing centers which are outside of DFS control. These arguments have no merit. As ACF points out, it was Wyoming that chose to have its performance measured using the Statewide PEP, but to nonetheless use the IV-D PEP data to monitor its districts. Also, the preamble to the regulations implementing the penalty provision made it clear that states have the responsibility to continually monitor their progress toward meeting the performance standards during the course of the year and to take action to improve performance. 65 Fed. Reg, 82,178, 82,189 (Dec. 27, 2000). Wyoming assumed the risk of relying on the IV-D PEP data to monitor the districts' performance and cannot fairly seek to avoid a penalty on this basis, nor can it fairly fault ACF for auditing only the Statewide PEP data when Wyoming itself chose to rely on that data for purposes of determining whether a penalty would be imposed.

Similarly, Wyoming's assertion that one of its methods of establishing paternity – having hospitals or birthing centers obtain affidavits acknowledging paternity signed by the unmarried birth parents – is outside of the control of DFS does not avail Wyoming here. Wyoming concedes that it has other methods of establishing paternity that are within its control. WY Br. at 13-15. Moreover, Wyoming implicitly acknowledges that it can improve performance of hospitals and birthing centers in obtaining affidavits by providing training, since it says it has

provided information to hospital staff about the affidavits in the past and has now hired a consultant to develop a hospital training program. Id. at 14-15.

Wyoming also points to its current efforts to correct the problem with its POSSE system and to improve its performance as reasons for not imposing a penalty. As ACF points out, however, actions taken after the end of the corrective action year are irrelevant. Wyoming knew when it reported its FFY 2003 PEP that it might be subject to a penalty if it did not take corrective action in FFY 2004 to improve its performance. Wyoming asserts that it did not identify the problem with its POSSE system until "the past year" when a unit within DFS began to note that the IV-D PEP was increasing even though the Statewide PEP was decreasing (whereas logically they should increase together) and that Wyoming then hired a consultant who uncovered the programming error. WY Br. at 11. Wyoming acknowledges that its POSSE system was built in 1995, however, and does not explain why the error could not have been identified sooner. Wyoming also does not explain why the Statewide PEP would not have been an accurate measure that, if monitored on an ongoing basis, would have let Wyoming know it needed to improve performance overall, even if the IV-D PEP as reported by the POSSE system did not accurately reflect each district's performance.

Wyoming further suggests (albeit obliquely) that its failure should be excused because Wyoming's PEP levels in the FFYs 2003 and 2004 were sufficiently high (89% in FFY 2003 and 87% in FFY 2004) to make Wyoming eligible for incentive payments. We disagree. Under section 458 of the Act, an incentive payment is available to a state with a PEP performance level of 80% or higher. The preamble to the penalty regulations responded to a comment pointing out that a state could receive an incentive and a penalty "on the same measure at the same time," stating:

> This statement is potentially true for performance only in paternity establishment. An incentive could be earned for the high performance level while the State's lack of improvement at a significant level would cause a penalty to be incurred. Congress was aware of this possible interaction when the incentive structure was built upon the preexisting penalty structure. The corrective action period of a year not only delays the penalty for one year but also allows the State to avoid the penalty by improved performance.

65 Fed. Reg. at 82,205. Since Congress was aware of this situation, we doubt Congress intended that the mere fact that a state qualified for an incentive would be a reason for disregarding the fact that the state had not improved its performance during a corrective action period, as generally is required to avoid a penalty when the PEP is below 90%.

Finally, Wyoming asserts that the penalty will unreasonably harm its TANF program. Wyoming argues that the requirement to replace federal IV-A penalty funding reductions with state funds doubles the fiscal impact of the penalties. The preamble to the regulation implementing the penalty provisions responded as follows to a comment questioning the fairness of assessing a penalty against a state's TANF program that would reduce resources needed to achieve desired results:

> Section 409(a)(8) of the Act clearly requires that penalties for lack of compliance, incomplete or unreliable data reporting or poor performance in the child support program are to be taken against the State's title IV-A payment. Congress has traditionally linked these two programs in many areas and has continued this statutory linkage with performance and other penalties in the child support program. The consequences of a penalty reducing financial resources and affecting services of a program are real. This reality strengthens the deterrent effect on States to avoid the penalty initially and to improve performance the year following a penalty to avoid repetition of negative consequences.

65 Fed. Reg. at 82,205-06. Whether the provision requiring Wyoming to cover the reduction amount with its own funds does actually double the effect of the penalty as Wyoming alleges is unclear, but, in any event, any such effect arises from the statute, by which we are bound, not from ACF's determination in this particular case.

In sum, Wyoming's arguments are not persuasive and, even if the facts asserted by Wyoming are true, they do not provide a basis for overturning the penalty or disregarding Wyoming's failure to achieve the required PEP level in two consecutive years.

Conclusion

For the reasons stated above, we uphold ACF's determination imposing a penalty on Wyoming of $70,104 for failure to achieve the required PEP performance level in FFYs 2003 and 2004.

/s/
Donald F. Garrett

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member