Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Ohio Department of Job and Family Services
Docket Nos. A-13-57, A-13-58 and A-13-79
Decision No. 2643
June 17, 2015

DECISION

The Ohio Department of Job and Family Services (ODJFS or Ohio) appealed three disallowances, totaling $29,965,545 in federal financial participation (FFP), all arising from claims which ODJFS submitted to the Administration for Children and Families (ACF) for the operation of child welfare programs in a single Ohio county – Hamilton County (the County). The costs were incurred by the county through various contracts during the period from July 1, 2000 through June 30, 2004.

Ohio concedes that $21,054,243 was properly disallowed.[1] Ohio furthermore acknowledges multiple problems with the County's tracking and reporting of costs, many of which were initially discovered by a state audit. Nevertheless, Ohio contends that the remaining disallowance amount should be reversed. Specifically, Ohio argues that $6,004,715 in costs are allowable under title IV-E of the Social Security Act (Act), that $735,959 in costs are allowable under title IV-B of the Act. Ohio argues that, even though these amounts were originally claimed by a method that violated the applicable Cost Allocation Plan (CAP), the State can now demonstrate that they can be directly charged as allowable expenditures to the federal programs. Ohio further asserts that $2,170,628 of costs claimed under the Child Care and Development Block Grant (CCDBG) have either already been repaid or were paid with nonfederal funds and therefore should not be subject to disallowance.

We find that Ohio has not carried its burden to identify and document allowable costs under titles IV-E or IV-B or to show that the CCDBG funds have either been repaid or offset with state funds. Ohio's main arguments amount to asserting that so many costs were incurred for legitimate child welfare services in the County and for the

[1] Ohio gives the total number as $21,054,242, but that is one dollar less than the specific amounts conceded later in the same brief, presumably a rounding difference. Ohio Br. at 1. Specifically, Ohio agrees to repay $18,167,759 of the disallowance appealed in docket number A-13-58. *Id*. at 17. Ohio previously indicated that it was withdrawing its appeal docketed as A-13-79 and stated that it "agrees to repay the $2,886,484 at issue." *Id*. at 12. We therefore uphold in full the disallowance in Docket No. A-13-79 without further discussion.

administrative costs of providing those services that the amounts Ohio now seeks to retain should surely be allowable. The problems with the County's financial management systems identified in the state's original audit, however, went well beyond the improper use of cost pools to allocate expenditures to federal programs based on which the Office of Inspector General (I.G.) calculated the disallowances here. Among other findings, the state audit concluded that the County's accounting records were inadequate to permit properly allocating costs or showing that costs were "necessary and reasonable for proper and efficient performance and administration of its federal awards." ACF Ex. 1, at 24 (state audit). Also, the County commingled local, state and federal funds in such a way that they became "untraceable" and prevented determining "whether these monies were expended only for allowable activities." *Id*. Those and related problems undercut the reliability of Ohio's assertions that it can identify allowable costs chargeable to the federal programs involved in the disallowances and show those costs were not charged already to other programs. The assertions are particularly weakened because Ohio seeks to rely on the County's agreements with its contractors and on summary information about expenditures extracted from County and State accounting records rather than producing source documentation.

For these and the reasons explained in more detail below, we uphold the disallowances in full.

Background

1. Federal child welfare programs

ACF operates a number of different grant programs which provide funding to states to improve child welfare and supplement the states' own programs to meet the needs of children and families. Some of the grant programs have overlapping objectives, but each program has specific guidance and limitations about how the money may be expended, which children or families are eligible, what services are provided, and how administrative costs of operating the programs are to be charged. The issues in this case involve funds that Ohio received under three of these programs: Title IV-E (foster care assistance); title IV-B (child welfare); and CCDBG (subsidies for day care costs).

Title IV-E is the most narrowly targeted of the three programs and mainly allows federal participation in income maintenance payments for certain foster care children who would have been eligible for welfare payments under the now-defunct Aid to Families with

Dependent Children program.[2] Act § 474.[3] The Board has held that IV-E's role in providing funding for administrative activities associated with child welfare is "limited." *Mo. Dep't of Soc. Servs*., DAB No. 1783, at 3 (2001). Even categories of administrative activities that may be permissible to charge to IV-E may only be claimed when they are "directly related" to administering the IV-E foster care program and are not claimable under any other federal program. *Id*. at 4, *citing* 45 C.F.R. § 1356.60(c). Allowable administrative costs under title IV-E must be incurred under an approved IV-E state plan and may include, when directly related only to the administration of the foster care program, service referrals, child placement, case plan development and case reviews, foster home recruitment and licensing, and a proportionate share of related agency overhead. 45 C.F.R. § 1356.60(c)(1) and (2). No administrative costs for social services provided to the child or family to ameliorate their problems may be charged to title IV-E grant funds. 42 C.F.R. § 1356.60(c)(3).

States may receive FFP in the costs of services covered under title IV-E at the same rate as their federal medical assistance percentage and in most allowable administrative costs at 50%. 45 C.F.R. § 1356.60.

Title IV-B more broadly authorizes federal funding for child welfare services, aimed at "promoting the safety, permanence, and well-being of children in foster care and adoptive families[.]" Act § 421. Title IV-B funds may be used to prevent abuse and neglect of children, to assure adequate foster care when children cannot be returned home or placed for adoption, to develop and operate coordinated programs of family support, preservation and reunification, and to offer adoption promotion and support services. 45 C.F.R. § 1357.10(c). To receive title IV-B funds for any of these purposes, a state must develop, jointly with ACF, a Child and Families Services Plan (CFSP) spelling out a coordinated, integrated services system. 45 C.F.R. § 1357.15.

Administrative costs under a CFSP are defined by statute as "costs for the following, but only to the extent incurred in administering the State plan developed pursuant to this subpart: procurement, payroll management, personnel functions (other than the portion of the salaries of supervisors attributable to time spent directly supervising the provision of services by caseworkers), management, maintenance and operation of space and

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[2] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law No. 104-193, repealed the AFDC program and amended title IV-E so that it refers to certain provisions as they were in effect on June 1, 1995.

[3] Title IV-E is codified at 42 U.S.C. § 670 et seq.; Title IV-B at 42 U.S.C. § 621 et seq.; and CCDBG at 42 U.S.C. § 9858 et seq. We cite to corresponding sections in the Social Security Act in the text. A current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm with cross-references to the U.S. Code.

property, data processing and computer services, accounting, budgeting, auditing, and travel expenses (except those related to the provision of services by caseworkers or the oversight of programs funded under this subpart)." Act § 422(c)(1).

The amount of funding available to a state under title IV-B (unlike title IV-E) is not open-ended but instead is subject to an annual cap. Act § 423. The funding cap on title IV-B creates a potential incentive for cost-shifting to other federal child welfare programs. States may receive FFP at 75% of allowable title IV-B child welfare costs. Act § 424(a).

CCDBG is a block grant program in which federal funds are provided to states which submit state plans for the purposes of subsidizing and improving child care for low-income families. 42 U.S.C. § 9858a et seq. The use of CCDBG funds is subject to a variety of statutory restrictions, such as minimum required use to improve the quality of child care and availability of child care. *See, e.g.*, 42 U.S.C. § 9858e. The regulations governing CCDBG grants are found at 45 C.F.R. Part 98.

2. Ohio's child welfare system

Ohio's child welfare programs are administered through the ODJFS which supervises county agencies administering both state and federally supported (ACF) programs. Ohio Br. at 4; Ohio Ex. 38, at 3-4 (Maynard Decl.); Ohio Ex. 13, at 1 (I.G. audit). These include "programs related to health care, cash assistance, food assistance, childcare, child support enforcement and administration, foster care, and employment and training assistance." Ohio Ex. 13, at 1. Counties are to report their costs to ODJFS which is responsible for seeking federal reimbursement. *Id*.

Ohio's system is described as "state-supervised, county-administered," in that the counties are to operate the programs with federal and state subgrants and the ODJFS on the state level is to provide guidance and monitor performance. ACF Ex. 1, at 8 (state audit report). Since 1997, Ohio has participated in a child welfare demonstration project under title IV-E known as ProtectOhio. ACF Ex. 1, at 10. ProtectOhio was to determine whether counties with additional flexibility in their use of title IV-E funding showed better management of their child welfare programs and better outcomes for children and families. *Id*. Hamilton County was one of the participating counties throughout the audit period. *Id*.

3. Cost principles, cost allocation and Ohio's CAP

The basic rules for financial management and documentation by states in effect at the time in question were at 45 C.F.R. Part 92. The basic cost principles applicable to grants to states at that time came from Office of Management and Budget Circular A-87,

codified at 2 C.F.R. Part 225.[4] The circular laid out general principles for determining "allowable costs" -- that is, costs eligible for funding under federal grants, contracts, and other awards. 2 C.F.R. Part 225, App. A, ¶ A.1. Under those cost principles, a cost is allowable (*i.e.*, eligible for funding) under a federal assistance program only if it is, among other things, "allocable" to that program. *Id.*, App. A, ¶ C.1.b. "A cost is allocable to a particular cost objective"-- a cost objective is a function, organization, or activity for which costs are incurred -- "if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received." 2 C.F.R. Part 225, App. A, ¶¶ C.3.a., B.11. This means that when a state incurs costs that support or benefit more than one public assistance program, the costs generally must be allocated to each program in proportion to the benefits that each derives from the activity that generated the costs. *Minn. Dep't of Human Servs.*, DAB No. 1869, at 4-5 (2003).

Because various programs providing services to families and children, both federally-funded and state-funded, may have common objectives or may benefit from some of the same activities and costs, HHS regulations require (and required at all relevant times) states to have public assistance CAPs approved by the Division of Cost Allocation of the United States Department of Health and Human Services. 45 C.F.R. §§ 95.507, 95.511, 1355.30(k); *see generally Kan. Dep't of Soc.& Rehab. Servs.*, DAB No. 2056, at 6-8 (2006). FFP in State agency costs in child welfare programs may only be claimed in accordance with the methods in the approved public assistance CAP. 45 C.F.R. Part 95, Subpart E.

Such a CAP is to be a "narrative description of the procedures that the State agency will use in identifying, measuring, and allocating *all State agency costs* incurred in support of *all* programs administered *or supervised* by the State agency." 45 C.F.R. § 95.505 (emphasis added).[5] Among other things, a public assistance CAP must "[d]escribe the procedures used to identify, measure, and allocate all costs to each of the programs operated by the State agency." 45 C.F.R. § 95.507(a)(1). The CAP must contain information that includes the procedures used to allocate costs to each "benefitting

[4] In 2005, after the audit period here, OMB Circular A-87 was codified in appendices to 2 C.F.R. Part 225. *See* 70 Fed. Reg. 51,910 (Aug. 31, 2005). The relevant provisions did not change from those in the circular as in effect throughout the relevant period. We cite to this codification, as it was the main version used in the audits and briefing. In 2013, OMB consolidated the content of OMB Circular A-87 and eight other OMB circulars into one streamlined set of uniform administrative requirements, cost principles, and audit requirements for federal awards, currently published in 2 C.F.R. Part 200. 78 Fed. Reg. 78,590 (Dec. 26, 2013); *see also* 79 Fed. Reg. 75,871, 75,875 (Dec. 19, 2014) (promulgating regulations in 45 C.F.R. Part 75 which make the cost principles and other requirements published in 2 C.F.R. Part 200 applicable, with certain amendments, to HHS programs).

[5] The contract costs at issue here were incurred by Hamilton County as a subgrantee of ODJFS under supervision of that state agency. Ohio concedes that the County did not follow the approved CAP in reporting and claiming the contract costs, but argues that ODJFS should nevertheless now be able to claim the costs itself as direct costs under the federal programs at issue. The state agency's direct claims would still have to comply with the CAP.

program and activity (including activities subject to different rates of FFP)." 45 C.F.R. § 95.507(b)(4). Where the state supervises local governmental agency implementation, the state CAP must include a cost allocation plan for the local agencies' costs. 45 C.F.R. § 95.507(b)(7). The CAP must also "[c]onform to the accounting principles and standards prescribed in Office of Management and Budget [OMB] Circular A-87, and other pertinent Department regulations and instructions[.]" 45 C.F.R. § 95.507(a)(2).

Ohio's federally-approved CAP requires Ohio to charge certain costs directly to each of the federal programs that fund the services and to allocate other costs through cost pools. Ohio Ex. 13, at 4.[6] Cost pools are intended to group costs that benefit multiple programs in a manner that allows them to be distributed fairly – different kinds of costs or activities may need to be grouped in different cost pools where they require different distribution methodologies. The state auditors report that counties in Ohio "have access to four cost pools: the Social Services (SS) Cost Pool, the Income Maintenance (IM) Cost Pool, and the PA [Public Assistance] Fund Shared (Shared) Cost Pool[,] and the Child Support Cost Pool." Ohio Ex. 11, at 63 (page numbering is discontinuous in Ohio's excerpts from the state audit; the full audit is in the record as ACF Ex. 1 – which we cite for pages not included in the Ohio excerpts). The Shared Cost Pool (PA Fund) is intended to "allocate indirect costs incurred for common purposes within the [county] agency," such as rent, insurance or personnel. *Id*. These shared indirect costs are then allocated in turn to the three other cost pools "according to the ratio of full-time equivalent employees who work in each cost center." *Id*.

The SS Cost Pool is intended to allocate costs related to social services provided under multiple state and federal programs, including title IV-E foster care, adult protective services, and social services block grant programs (title XX of the Act). *Id*. The IM Cost Pool allocates costs for administering such programs as Temporary Assistance to Needy Families (TANF), Food Stamps, and Medicaid. *Id*. The Child Support Cost Pool allocates child support enforcement and collections and other related program expenses. *Id*. at 64.

The Ohio CAP requires that "indirect costs" be assigned to the cost pools and "allocated to the benefiting local, State, and/or Federal programs based on the results of a random moment timestudy." Ohio Ex. 13, at 4. Under this "RMS" methodology, populations of county workers who perform functions that benefit multiple programs are sampled and

[6] We cite to descriptions of Ohio's approved CAP for SFYs 2001-04 (July 1, 2000 – June 30, 2004) in the I.G. audit report. Ohio provided only excerpts of the CAP itself and only for the period of July-September 2003. Ohio Ex. 8. However, Ohio did not dispute the accuracy of the descriptions in the I.G. audit report, those descriptions do not appear inconsistent with the excerpts in the record, and neither party represented that any material changes were made in the CAP during the audit period.

asked what they are working on at a given moment, and the indirect costs related to their work are distributed in proportion to the distribution of efforts shown by the study. *Id.*; *see also* Ohio Ex. 12 (excerpt of ODJFS RMS manual from April 2010).

Although the costs at issue here were incurred by Hamilton County's Job and Family Services agency (HCJFS), the State agency (ODJFS) was the grantee and remains accountable to the federal government for the use of program funds and for monitoring the local agencies which operate the programs to ensure compliance with applicable federal requirements. Ohio Ex. 13, at 5, citing 45 C.F.R. § 95.40(a).

4. Hamilton County and its contractors

Hamilton County operated a combined agency (HCJFS) which consolidated multiple functions including job and family services, child support enforcement, and public children services, as well as other programs "outside the normal duties of" a county department of job and family services. ACF Ex. 1, at 21 (state audit). HCJFS was, therefore, according to the state auditors, required to pay its shared costs initially from the PA Fund and then reimburse that cost pool from the other cost pools based on the RMS results. Ohio Ex. 11, at 65 (state audit excerpt).

HCJFS was part of a Multi-County System Agency (MCSA) that served as a managed care consortium to provide a "one-stop shop" for all services to "high-risk foster care children." *Id*. at 66. The "partners" in MCSA included not only HCJFS but also juvenile court, mental health, mental retardation and developmental disability, and alcohol and drug addiction components. *Id*. at 68.

HCJFS (acting in coordination with MCSA) provided child welfare services through a series of four contractors during the audit period: Magellan Public Solutions, Inc., later known as Magellan Behavioral Health, Inc. (both referred to here as Magellan); Beech Acres; Hamilton Choices, LLC; and Hillcrest Training School and Youth Center (Hillcrest). Ohio Br. at 5-7. Excerpts of each contract appear in the record as follows: Magellan – Ohio Exhibits 1 (1997 contract) and 7 (2003 renewal); Beech Acres – Ohio Exhibit 5 (2002); Hamilton Choices – Ohio Exhibit 6 (2002); and Hillcrest – Ohio Exhibits 3 (2000 contract) and 4 (2001 contract).[7]

[7] Ohio included 2-page excerpts from the Hillcrest contracts as listed and identified questioned costs reported for that contract under titles IV-B and IV-E. Ohio Br. at 9. Hillcrest operated a juvenile detention facility with the County court system. Ohio Ex. 4, at 1. Ohio makes no argument that any identifiable amounts questioned under the Hillcrest contracts constitute allowable costs properly allocable to either federal program. We therefore do not discuss these contracts further.

Payments made under these contracts were passed into the cost pools described above and then allocated through with other costs in the pools to state and federal programs based on the RMS. It is undisputed, however, that the staff working on these contracts did not participate in the RMS and did not perform the same range of activities as did the county staff on which the RMS was based. Ohio Br. at 7.

5. State and federal audits

ODJFS began a limited review of HCJFS in 2004 after questions were raised by the State auditor "about the county's handling of foster care costs and the county's practices in allocating costs to federally funded programs." Ohio Ex. 11, at 7. The limited review resulted in a draft report in September 2006 and in a final review report dated May 1, 2008 (state audit). *Id*. The state audit generally covered the period from July 1, 2001, through June 30, 2004.

The state audit found flaws in the practices of the Hamilton County MCSA including that the combined costs were allocated among the partners based on their financial resources (ability to pay), failing to reduce the allocated costs by associated revenues, and not tracking which children were being serviced by which partners. *Id*. at 69. Some activities performed by partners in the MCSA are not allowed to be charged to certain of the federal programs or funding streams, as for example Medicaid-reimburseable services may not be charged to ACF programs. *Id*. Thus, the auditors explained:

> The MCSA providers rendered a variety of services to children including foster care placement and maintenance, mental health services, drug and alcohol related services, and medical services.
>
> The funding streams available to the Hamilton CDJFS for meeting such costs did not necessarily allow all of the activities performed within the MCSA. Therefore, as the county did not isolate costs to children and the individual services they received, it is not possible to determine whether unallowable activities were charged to the federal funding streams.

Id. at 69-70. The MCSA thus allocated its costs among its partners by their contributions without regard for which services they were providing or the fact that they administered "different federal programs" with "differing rules on allowable activities." *Id*. at 71. The resulting confusion was "further complicated" by "making reimbursement claims for MCSA costs through the use of indirect cost pools, which allocated such costs to non-benefiting programs, contrary to OMB Circular A-87." *Id*. at 71-72.

HCJFS's use of the SS Cost Pool for claiming MCSA expenditures was found unallowable for two reasons: (1) the County should not have claimed reimbursement in title IV-E foster care placement and maintenance expenditures (which were included in

MCSA costs) because it was already paid for these expenditures through the ProtectOhio monies received on a capitated (per child served) basis and (2) foster care services in the MCSA expenditures should have been directly charged to the foster care programs and not allocated to other non-foster care programs which did not benefit from them. *Id*. at 75.

The auditors explained the first objection as follows:

> As a ProtectOhio waiver participant, [HCJFS] was already advanced monies for foster care placement and maintenance costs. MCSA providers were often paid flat fees for bundled services or direct services. These fees included foster care placement and maintenance costs that were not reimbursable under Title IV-E, as the agency had already been advanced federal monies under the ProtectOhio waiver to cover such costs. Claiming foster care placement and maintenance costs for Title IV-E reimbursement is unallowable in a ProtectOhio waiver county.
>
> We could not determine which MCSA costs were for placement and maintenance, as those costs were often included in a bundled rate for services . . . [HCJFS] employees indicated that they could not separately identify placement and maintenance costs.

Id. at 75-76. The 220-page state audit report makes numerous findings about the County's failure to separately account for federal, state, and local monies, its improper use of ProtectOhio monies, its misuse of cost pools, and its allocation of shared costs, among other concerns. ACF Ex. 1, at 12-13 (chart summarizing findings of state audit).[8]

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[8] The state auditors noted a limitation to the scope of their audit due to HCJFS's declining to make the following representation:

> We acknowledge our responsibility for compliance with laws and regulations applicable to [HCJFS]. Except as otherwise disclosed, **we have complied** with all aspects of laws, regulations and contractual agreements that would have a material effect on the monthly financial reports or on our federal programs. Except as otherwise disclosed, **only allowable costs have been paid and reported** on the monthly financial reports and **we have charged costs to federal awards in accordance with applicable cost principles.**

Instead, HCJFS would only make this representation:

> We acknowledge **our responsibility to comply** with laws and regulations applicable to [HCJFS] and contractual agreements that would have a material effect on the monthly financial reports or on our federal programs. We acknowledge that **only allowable costs can be paid and reported on the monthly financial reports and be charged to federal awards in accordance with applicable cost principles.**

ACF Ex. 1, at 20 (emphasis added).

Because the state audit did not resolve the amount of federal funds affected by its findings, ACF requested that the I.G. determine the ACF portion of unallowable costs identified in the state audit. Ohio Ex. 13, at i. The I.G. audit report (A-05-08-00098, dated January 2011) reviewed $203 million of the $216 million of Hamilton County child welfare contract services charged to indirect cost pools and allocated to ACF that the state audit identified as unallowable. *Id.* at 2. The I.G. audit did not look at the "overall internal controls for claiming costs for Federal reimbursement," beyond "gaining an understanding" of how the County reported ACF-related costs to the State and how the State claimed federal reimbursement for them. *Id*.

The I.G. concluded that the County "inappropriately allocated the child welfare organizations' costs through indirect cost pools" and the State "inappropriately claimed the costs because it relied on the County agency's reported costs and did not ensure that the County agency allocated the costs in accordance with the [CAP] and other Federal requirements." *Id*. at 3. The I.G. provided a chart of the federal share of costs inappropriately claims to ACF programs, including those involved in the three disallowances at issue.[9] Ohio Ex. 13, at 4.

The I.G. audit report noted that ODJFS "generally concurred with the findings and recommendations," which included that Ohio refund to the federal government "County agency costs inappropriately claimed through the cost pools," but "requested the right to negotiate the actual amount due . . . through the resolution process with ACF . . . ." Ohio Ex. 13, at ii and 5, and App. at 2.

6. Disallowances at issue

On March 21, 2013, ACF informed Ohio that its review of the CCDBG section of the federal audit report (A-05-08-00098) was complete. Ex. 2 to Ohio's April 22, 2013 notice of appeal in Docket No. A-13-57. Audit finding 303000017 determined that $2,170,628 was "inappropriately claimed through cost pools," that the Hamilton County "cost allocation system . . . did not maintain documentation identifying the source of costs accumulated in the cost pools," and that it was "not possible to verify that costs accumulated in this manner were allocated to the proper Federal awards." *Id.* at 1. ACF disallowed the entire amount. *Id*. at 1-2.

On March 27, 2013, ACF informed Ohio of further disallowances based on five other findings of the same federal audit. Ex. 2 to Ohio's April 23, 2013 notice of appeal in Docket No. A-13-58. Under title IV-E, the audit determined that $11,396,534 (finding

[9] The chart also includes amounts for TANF ($24,931,157) and title XX (social services block grants) ($3,461,053) that are, for various reasons, not part of the present appeals. Ohio Ex. 13, at 4.

303000101) relating to county adoption assistance costs, $12,180,485 (finding 303000015) relating to county foster care costs, and $595,455 (finding 303000112) relating to educational and training vouchers were inappropriately claimed for the same reasons set out in the CCDBG letter. *Id*. at 1-3. ACF stated that Hamilton County was required to allocate allowable costs in accordance with the applicable approved CAP. *Id*.

Analysis

1. Overarching observations-burden of proof

Before addressing the arguments presented by the parties as to each of the three programs at issue (titles IV-E and IV-B and CCDBG), we first discuss the legal posture of the State's claims and its impact on our analysis of the documentation. As ACF points out, Ohio has not contested the basis of the disallowance, i.e., that audits demonstrated that the contractual costs incurred by Hamilton County were not claimed in accordance with Ohio's CAP and were therefore not allowable. Thus, Ohio concedes that the I.G. audit findings were well-founded. *See, e.g.*, Ohio Br. at 1. The improper assignment of all Hamilton County's child welfare costs into cost pools without regard to the benefits to and restrictions on the various federal funding programs resulted in unallowable claims for FFP because the costs underlying the claims could not be shown to be allocable to particular federal programs.

The state audit recognized that the deficiencies which it identified in Hamilton's County's accounting, allocation, and financial management systems had caused improper claiming of FFP, but did not attempt to identify the amount of FFP affected. ACF Ex. 1, at 218. The I.G. audit served to calculate the FFP amounts. Ohio, in its response to the I.G. audit, did not dispute the methods used to calculate those amounts, but merely reserved the option of negotiating the final repayment. Ohio Ex. 13 App. at 2. Ohio thus does not dispute either the basis or the calculation of the disallowances.

Instead of challenging the basis of the disallowances, Ohio suggests that we should allow it to offset or retain some portion of the disallowed amounts on different bases. Ohio thus agrees to repay $21,054,242 of the costs disallowed for SFYs 2002-04, but argues that "regardless of the errors in the *County's* reports to the State, approximately $6.74 million of the *State's* claims to ACF represents allowable costs reimbursable under the Title IV-B and Title IV-E programs." Ohio Br. at 1 (italics in original). Further, Ohio contends that "approximately $2.1 million related to" CCDBG was "not ultimately paid with federal funds," and therefore should not be subject to disallowance. *Id*.

In evaluating the arguments and evidence concerning whether to permit Ohio to now offset some portion of the disallowances, we must therefore look at whether Ohio has now sufficiently documented an alternative basis to determine that specific costs are both allowable under specific federal programs and that they can be properly allocated to those

programs in accordance with the CAP. The Board has long emphasized that grantees have the responsibility of documenting fully the existence and allowability (including allocability) of costs for which they seek federal funding. *See, e.g., S.A.G.E. Commc'ms Servs.*, DAB No. 2481, at 5-6 (2012); *Touch of Love Ministries*, DAB No. 2393, at 3 (2011); *Benaroya Research Inst.*, DAB No. 2197, at 3 (2008). Here, Ohio recognizes its inability to meet this standard for the costs as claimed and seeks to substitute direct charging of certain costs to ACF programs, for the improper use of the cost pools for allocation.

To claim costs to offset the disallowance plainly requires even stronger documentation where the original documentation was admittedly inadequate, and the new basis asserted for the partial offsets has not been subjected to the normal review process. Ohio appears to have recognized this since it prefaces its reply brief by explaining that it had "always believed that a portion of the contract costs the County incorrectly reported through cost pools nevertheless represented allowable costs . . . ." Ohio Reply Br. at 1. Nevertheless, Ohio continues, it "knew that additional work would be needed to demonstrate the allowability of these costs, and, with the assistance of County personnel, the State has now completed this painstaking process in connection with these appeals." *Id*.

It is true, as Ohio asserts, that ACF has not denied that some portion of the contract payments may well represent allowable costs under one of the federal programs. *Id*. That is not the same as determining that any identifiable portion of the contract payments has been sufficiently shown to represent allowable costs meeting the requirements of one of the specific grant programs and properly allocable to that program (and not charged to any other funding source). Furthermore, we do not find reasonable Ohio's complaint that, after "relying heavily on the State's work to develop and support the disallowances," ACF was somehow bound to accept "the State's further work to identify and document" allowable claims. *Id*. at 1-2. In fact, ACF was <u>not</u> able to rely on the State's work in taking the disallowances because, even though the state auditors identified multiple failures in the county systems, the state audit did not attempt to determine how much FFP had been improperly claimed. Therefore, ACF ultimately relied on the I.G. audit to develop and support the disallowances. Moreover, in evaluating the offset amounts Ohio puts forward in the appeal, ACF could not simply rely on the I.G. audit findings because Ohio did not assert an intention of or provide documentation for directly claiming these amounts during that audit. Therefore, Ohio cannot reasonably complain that ACF does not simply defer to the State's assertions that these amounts are allowable. Moreover, many of the questions raised by ACF about their allowability are based on findings from the state audit itself about the county's handling of funds.

In addition, in weighing the adequacy of the documentation that Ohio now relies on, we must bear in mind the impact of the broad findings of the state audit on the reliability of the information generated ultimately from Hamilton County records. For example, after

discussing the various special revenue funds which support HCJFS, for which Hamilton County submits financial reports for the State to use to report of expenditures to the federal government, the state audit opined that:

> Because the different funding sources have very different legal restrictions, the county is required to establish accounting procedures to separately track and account for the financial activity and cash balances of each funding stream. [HCJFS] did not do so. This failure on the part of the county led to multiple issues . . ., including the commingling of federal and state monies with local cash, making them untraceable in the accounting records. This included the receipt of unauthorized reimbursements with federal monies, which were then commingled in the PA fund.

ACF Ex. 1, at 22. Among other resulting deficiencies in financial accounting, the audit concluded that the failure to distinguish funding with different restrictions and "some mutually exclusive purposes" makes it impossible "to determine whether these monies were expended only for allowable activities." *Id*. at 24.

Ohio's position, as discussed in more detail in relation to the specific disallowances, is that commingling and other accounting problems are not relevant in the present case. Ohio Reply Br. at 5. Ohio acknowledges that at the time of the audit "the State understandably had a more general concern about the County's failure to track the funding sources for its various accounts, in part because this raised questions about whether certain categories of state funds were being expended in accordance with state law." *Id.* at 6. Still, Ohio asserts, the commingling issue was limited to the use of federal title IV-E waiver (ProtectOhio) funds as a local match to draw down federal funds. Ohio claims that it has eliminated this concern for present purposes by calculating that the maximum amount of federal funds that could have been drawn down using unaccounted-for ProtectOhio monies was $18,737,517. *Id*. at 7. Ohio concludes that assigning all potentially improper match money to the portion of the disallowances that it has not contested eliminates any commingling problem. *Id*. at 8.

We disagree both with the narrow description of the problem and with the simplistic solution proposed by Ohio. The auditors rejected the County's claim that it could indeed track funding streams and support claimed expenditures as follows:

> The ability to trace revenues to funding streams has not been an issue in this report; the issue is the **continued inability of the agency [HCJFS] to demonstrate that its expenditures established a valid federal claim** or to account for federal money advanced to the agency. Reconciliation of total revenue and expenditure data to the county's unaudited financial statements is not relevant to the issue, **as the data is not at a sufficient level of confirm the legality of the expenditures, including their allowability**.

ACF Ex. 1, at 25 (emphasis added). While the mishandling of ProtectOhio funds and the improper interfund transfer of monies were important findings of the state audit, the problems of and the consequences for the inability to confirm that federal restrictions were not being avoided and that non-federal matches were in fact made went much further, as reflected in our earlier discussion of the state audit findings.

We are also not persuaded that, even assuming that Ohio's estimate of the extent to which federal funds could have been used as a match for claims for FFP is correct, the misuse can be resolved simply by applying the total estimate to the portion of the disallowance that Ohio has agreed to repay. Matching requirements vary for the different federal programs at issue here and different time periods were involved. It would be necessary to establish that, in every grant period of each of the federal programs involved, sufficient identifiable nonfederal funds were actually expended on allowable costs to match the total federal amount sought beyond the agreed repayment.

In the remainder of this decision, we review the arguments and documentation proffered by the State and consider whether the "painstaking process" in which it engaged after the disallowances indeed yielded an adequate demonstration of specific costs allowable under and allocable to any of the federal programs at issue.[10] We find that the State has not demonstrated that such costs can be reliably identified.

2. Title IV-E costs that ODJFS seeks to retain or offset

A. Parties' arguments on IV-E

The basic rule for claiming administrative costs under title IV-E is at 45 C.F.R. § 1356.60(c). That regulation makes 50% FFP available for "for administrative expenditures necessary for the proper and efficient administration of the title IV-E plan" and requires the state CAP to "identify which costs are allocated and claimed under this program."

Ohio asserts that it has now identified $12,009,430 in payments that Hamilton County made to three contractors (Magellan, Beech Acres, and Hamilton Choices) for administrative activities under title IV-E, representing a federal share of $6,004,715

[10] ACF also argues that we should reject Ohio's proposed offsetting of title IV-B and IV-E claims as violating the two-year timely claims requirements under section 1132(a) of the Act and 45 C.F.R. § 95.7. ACF Br. at 19-20, citing *N.J. Dep't of Human Servs.*, DAB No. 1655 (1998) and other Board cases cited therein. Ohio denies that the timely claims requirements are implicated because it contends that it is demonstrating that a portion of the claims previously filed for the County's contract payments should be allowable. Ohio Br. at 25; Ohio Reply Br. at 2, 17. We need not decide this issue because we conclude below that Ohio has failed to demonstrate adequately that any of its offsets are allowable.

which can be directly charged to title IV-E consistently with Ohio's CAP. Ohio Br. at 17. Ohio expressly recognizes that it cannot claim any direct service costs under title IV-E because all such costs were required to be treated as reimbursed by the capitated payment made under the federal ProtectOhio waiver. *Id*. at 17 n.13. Ohio contends, however, that the description of activities for which Hamilton County contracted included a variety of administrative and care management activities of the type "typically provided by county family services agencies and covered by Title IV-E." *Id*. at 19; Ohio Exs. 7 (Magellan contract) and 36 (Wolfe Decl. at 6-7). Ohio states that the total amount paid for "these administrative and care management services during the audit period" may be discerned by analyzing the total amount the county paid Magellan against purchase orders that distinguished direct services from administrative costs (for each of which Ohio submitted one sample purchase order) and then applying Hamilton County's IV-E penetration rate. Ohio Br. at 19-20; Ohio Exs. 9, 10 (purchase orders), 23 (spreadsheet calculating total administrative costs and applying penetration rates by quarter), and 37 (Miller Decl.). The penetration rate is defined in Ohio's CAP as "the ratio of Title IV-E children in Hamilton County to the total number of children in foster care and subsidized adoptions in the County." Ohio Br. at 20, n.14; Ohio Ex. 8, at 4-5. Ohio proceeds to a similar analysis for the two other contracts. Ohio Br. at 20-25. Based on this approach, Ohio concludes that the disallowance includes "at least $6,004,714 in FFP for allowable" IV-E administrative costs which should be used to reduce or offset the disallowed amount. *Id*. at 25.

ACF disputes that Ohio's documentation adequately supports its offset claims for title IV-E (or the other amounts discussed below). ACF Br. at 2. ACF points out that the state audit documented numerous failings in the Hamilton County accounting systems beyond the misuse of cost pools to allocate child welfare costs (on which the I.G. focused in determining the amounts to disallow in the first instance). *Id*. at 1-2. According to ACF, these accounting flaws made it impossible to track financial activities or determine which costs were funded from local, state, and federal sources and thus prevent Ohio from "establishing that the new claims it now seeks to assert to substitute for the disallowed amounts constitute allowable costs under Title IV-B and IV-E." *Id*. at 3. Specifically, as to the allegedly allowable IV-E costs, ACF argues that the failure to show the funding sources from which payments were made to the county contractors makes it impossible to discern from the total payments made for administrative costs whether the costs were allowable and met federal matching/cost-sharing requirements. *Id*. at 18.

In particular, ACF quotes state audit findings about the comingling of title IV-E ProtectOhio waiver funds with county accounts as follows:

> As a result, we could not determine whether ProtectOhio monies were expended only on child welfare activities, which was a waiver requirement. **Since the "local" monies included unidentified ProtectOhio monies,**

> **using them to match ProtectOhio could result in ProtectOhio money being used to match itself. This would violate OMB Circular A-87 cost principles and federal grant management rules for matching federal monies.**

Id. at 19, quoting ACF Ex. 1, at 46 (emphasis in ACF brief). ACF concludes that Ohio could not show how the contract costs were paid, with what funds or funding sources, and whether those funding sources met requirements for federal matching with non-federal funds. *Id*. at 18.

In reply, Ohio contends that the "commingling" of funds was not presented in the I.G. report and was "freshly minted" in ACF's brief. Ohio Reply Br. at 6. Moreover, according to Ohio, the county's failure to track funding sources does not affect the documentation of the offset claims. *Id.*

B. Discussion on title IV-E offset claims

Ohio's argument that the I.G. report did not review the other financial and accounting problems identified by the state audit is disingenuous. Ohio has not denied that the I.G. correctly identified improper allocation of costs to ACF's title IV-E in the full amounts disallowed. Therefore, the I.G. had no need to review other flaws identified in the state audit in order to resolve the question addressed in the audit – how much of the federal funds questioned by the state audit were attributable to which ACF programs. Ohio now seeks to reclaim a portion of the properly disallowed funds by asserting that it can document amounts that could be directly claimed as allowable under title IV-E. ACF therefore can reasonably question whether other flaws in the County's financial systems undermine the attempt to document these payments as direct costs and whether the direct charging is now being done in compliance with CAP allocation requirements.

The state audit findings raise serious questions about the reliability of cost information that go well beyond the improper assignment of child welfare costs to cost pools that resulted in the admitted improper allocations to title IV-E. The auditors report that, during an initial meeting, after acknowledging the improper recording of costs into the cost pools, the county administrator --

> stated that the agency could provide auditors with data that fully identified the problem, which would avoid the need for expanded audit work, and allow the county to claim administrative costs within the allowable federal time frame. Hamilton [County JFS] fiscal employees, however, indicated that they did not have the required records and data needed to claim administrative costs through the proper procedures.

Ohio Ex. 11, at 16. The auditors concluded that an expanded audit was required and noted that problems disclosed early in that audit expressly included "[c]ommingling of monies contrary to state and federal law" and "[n]oncompliant financial management of Title IV-E monies." *Id*. at 17. Other concerns expressed in the remainder of the state audit include, in addition to the "[i]nflated Title IV-E Administration and Training due to the charging of unallowable costs" through the social services cost pools (state finding F-2), the finding of "[u]nallowable direct charges to Title IV-E" (state findings D-13, D-14, and L-1). ACF Ex. 1, at 52. The auditors noted they were unable to determine based on available information what amount of IV-E administration and training funds the County was actually eligible to receive. *Id*. at 129.

In light of findings such as these (not disputed by Ohio), we would expect that any attempt to reconstruct accurate direct claims for administrative costs chargeable to title IV-E more than 10 years later would indeed require extensive and painstaking review of original source documentation. What Ohio proffers in this appeal in no way meets that description. Ohio relies on incomplete copies of the County's contracts with the three contract providers of child welfare services during the period at issue, exemplars of invoices, and an affidavit from the current contract services director who was previously employed by Hamilton County JFS (Ohio Ex. 36, Wolfe Decl.).

Ohio's reliance on the text of the contracts that Hamilton County entered into with providers, along with a sample purchase order for administrative services under such a contract, falls far short of providing assurance of what portion of the payments made by the County under such contracts were attributable to costs allowable under title IV-E. As discussed in the background, title IV-E is a limited program which does not cover all services provided to all children in need of child welfare services. While ProtectOhio expanded the population to which services could be provided with title IV-E waiver funds, it did so while capping the total amount of federal fund that could be claimed for such services and it did not apply to administrative expenses. Looking at the 2003 Magellan contract, for example, Ohio has not identified anything in the contract to assure that administrative costs benefiting title IV-E would be separately tracked. On the contrary, the contract provides for Magellan to receive compensation for administrative costs incurred up to a flat dollar amount cap ($2,597,630 for the contract from 5/1/03 through 2/29/04 on a total contract budget of up to $26,300,000 with potential for incentive payments) to be paid to it by the "Partnership Team" of the County Job and Family Services Department, the County's drug addiction board, and the County's mental health board (i.e., not only the child welfare services agency) according to preset percentages. Ohio Ex. 7, at 1, 5-8. This does not support an assumption that all of the administrative costs were of a kind chargeable to title IV-E.

Any such presumption is further undermined by the definition of "administrative services" in that contract as basically a default category including "all goods and services, other than Covered Services, provided or arranged for by Magellan under this Agreement, including but not limited to Information System Services." *Id*. at 1. Magellan was expected to maintain and use an existing network of providers to deliver the direct "Covered Services" needed by "Consumers," and to assess the consumers' needs for services and make referrals, to provide claims processing and to perform utilization review. *Id*. at 8, 13-20. Such a broad definition of administrative services does not provide certainty that payments to Magellan for administrative services would only cover administrative costs allowable under title IV-E. Also the contract in the record is described as an "excerpt" and refers repeatedly to various exhibits to the contract which are not provided, further undermining our reliance on this contract to establish the allowability of the amounts now claimed.

It is not sufficient for Ohio to assert that some of the kinds of activities mentioned in the contract are the same as or similar to categories listed as administrative activities in the title IV-E regulations. Ohio Br. at 18, citing 45 C.F.R. § 1356.60(c). For example, referral to services is an allowable category for title IV-E agencies (and is one responsibility assigned to Magellan under the contract) but such costs are only allowable under title IV-E when they are shown to be "necessary for the proper and efficient administration of the title IV–E plan," when the referral activity does not include providing "social services . . . to the child, the child's family or foster family which provide counseling or treatment to ameliorate or remedy personal problems, behaviors or home conditions," and when they are claimed under a CAP that identifies which referral services are going to be charged to title IV-E. 45 C.F.R. § 1356.60(c) (these elements were required in the version in effect during the audit period as well as the current version of the regulation). Nor is the fact that activities performed under the contracts were eventually brought in house by HCJFS, as Ohio asserts, proof that all such activities were allowable in nature and directly chargeable to title IV-E. Ohio Br. at 19.` Had a county agency incurred the costs itself, it would still be necessary to establish that the specific administrative activities were necessary to administer the IV-E program (not simply important for other social or child welfare needs of the county), that they did not violate limits on IV-E administrative activities (such as that the referral costs did not include counseling as discussed above), and that the costs were identified in the CAP as chargeable to IV-E.

The last requirement needs comment. The original allocation of these administrative activities to title IV-E plainly, as Ohio recognizes, violated the CAP in multiple ways. That admission does not mean that Ohio is relieved of the requirement to show that its alternative method of identifying and claiming administrative costs is compliant with the CAP. Ohio, as previously mentioned, submitted only excerpts of one CAP, which was in effect for only part of the relevant period. Ohio Ex. 8 (Ohio JFS CAP for July-Sept. 2003). The only relevant reference we see to direct charges to title IV-E are for contract

costs "incurred solely for allowable IV-E activities" of recruitment and study of putative foster or adoptive parents (reduced by a factor to reflect the percentage of foster children who are covered by IV-E), for training county staff on title IV-E (allocated by a random moment study), and for transporting foster care children. *Id*. at 4-5 (discontinuous numbering in excerpt). Ohio has not established that the broad administrative activities provided for under the contracts met these limited categories, or to what extent.

In light of the broad scope of administrative activities the contractors could undertake for various purposes, it would be necessary to examine the actual invoices to determine whether they adequately identified what administrative costs were incurred and whether they could be directly attributed to title IV-E activities. Ohio submitted only one exemplar of such an invoice – the Magellan purchase order entitled "administrative invoice" for the month of February 2004.[11] Ohio Ex. 10. The line items raise far more questions than they answer. They include staff salaries and benefits with no way to determine what staff was treated as administrative or what activities they performed, as well as unexplained "professional and contracted services." They also include categories that, on their face, raise questions of allowability, such as "national fees," "taxes" (apparently not payroll taxes since those were listed as part of employee benefits), and "profit." In sum, this exemplar does not provide adequate documentation that the amounts Ohio now seeks to claim reflect only costs properly chargeable directly to title IV-E.

Ohio does recognize that not all "customers" are eligible for title IV-E services; and hence not all costs associated with providing services to customers, even if otherwise allowable, could be charged to title IV-E. To address that, Ohio proposes to simply apply the penetration rate set out in the CAP to the total administrative costs under the contracts for each quarter. Ohio Br. at 20; Ohio Ex. 23. The penetration rate is an appropriate factor for the purpose for which it is defined in the approved CAP, i.e, to allocate a fair share of the costs of recruiting and maintaining foster and adoptive homes between foster care/adoptive children covered by title IV-E and other foster/adoptive children in the County. Finding and keeping foster and adoptive homes is an activity that directly benefits current and prospective foster and adoptive children, rather than all child welfare activities. It therefore makes sense to distribute the costs of that activity to title IV-E in proportion to the percentage of such children who are IV-E eligibles or candidates for IV-E maintenance as opposed to state-funded children. The penetration rate is not necessarily an appropriate tool, however, to identify what share of administrative costs of managing all kinds of services to a range of "consumers" who are not limited to

[11] This invoice notes that it is an "initial" invoice for the period and that a final invoice for February 2004 will be submitted in the summer of 2004 (the initial invoice is dated June 2, 2004). Ohio Ex. 10. No updated invoice appears in the record.

foster/adoptive children can fairly be allocated to title IV-E. In short, we find Ohio's attempt to demonstrate the amount of allowable and allocable title IV-E costs by simply applying the penetration percentages to the total amounts paid by the County to its contractors for all administrative activities unacceptable.

The Wolfe declaration adds little to the documentation. Wolfe asserts that the contracts with Magellan, and the other contractors, were "entered into for the general purpose of promoting child welfare, including preventing child abuse and the separation of children from their families, promoting family reunification, assuring adequate placements for children, and ensuring the safety, permanency, and wellbeing of children and families." Ohio Ex. 36, at 5. She avers that the client population served by the contractors "consisted of children at risk of removal from their families due to abuse, neglect, or dependency, or in need of placement." *Id.* These goals are all admirable, but not all efforts that promote child welfare are thereby necessary to the effective administration of a title IV-E plan. This statement also confirms that the population being served was broader than foster care or adoptive children (including, for example, families receiving preventive services or general child welfare assistance and at-risk children who may never be candidates for foster care or adoption), so the application of the penetration rate is indeed not appropriate. As to Magellan, she explains that, based on her observations including monitoring the contract for purposes of evaluating whether Magellan would receive performance incentives, Magellan had "performed administrative services required to accomplish the objectives of the contract." *Id.* at 6. These included developing a network of service providers, assessing consumer needs, making referrals, and coordinating care, as well as providing "training" to Hamilton County JFS, other County entities, and employees of service providers "in order to educate and prepare them for turnkey transfer of the system of care" back to the County. *Id*. at 6-7. Nothing demonstrates the extent to which any such training addressed title IV-E topics or served title IV-E program needs. Again, the broad references to "training" costs included in payments to Magellan simply add more questions about the allowability of the costs which Ohio now seeks to charge to title IV-E.

In its reply, Ohio alludes to "[i]ntensive audit work," performed after the state audit discussed previously, which reviewed $83 million of a total of $97 million in payments made to Magellan from July 1, 2000 through February 28, 2004 for administrative services. Ohio Reply Br. at 13, citing Ohio Ex. 42 (excerpts of 2006 special audit report submitted with Reply Brief). The audit determined that the payments were for services actually performed, allowable, and in accordance with the contract. Ohio Ex. 42, at 34 (discontinuous numbering in excerpt). The state special audit report does not show whether any testing was done to determine allowability and allocability of the costs for federal programs, including title IV-E, and does not establish what funding source(s) HCJFS drew on to make the payments. *See id.* passim. The audit does not attempt to resolve other questions, for example, the auditors state that HCJFS "charged 59 of the 122 payments, totaling $45,353,853" to the SS cost pool, but because that "was not in the

scope of our audit, these charges were referred to" OS JFS "for determination of whether these charges were allocable cost pool charges." *Id*. at 34. At best, the special audit may establish that Magellan was an honest dealer with the County in providing services as billed and abiding by the contract terms. The problem is, as discussed above, the contract terms do not establish which administrative services are chargeable to title IV-E.

Nor do we agree with Ohio that, because ProtectOhio funds were only available for direct service delivery (and therefore could not have been used for payment of the administrative costs), the audit findings about commingling funds are irrelevant to the administrative costs Ohio now seeks to charge to title IV-E. Ohio Reply Br. at 16. It is true that the issue at this point is not so much how the payments were initially funded, since that was admittedly improper on many levels. The issue now is whether some allowable costs can be reliably identified as chargeable to a specific federal program with assurance they have not been charged to any other program and that sufficient non-federal participation has been documented. However, the commingling and the other financial flaws identified by the state audit continue to undermine any confidence that such an identification can be documented. The special audit on which Ohio now relies does not appear to have attempted to do this kind of tracing and, in any case, the excerpts submitted to us do not succeed in demonstrating it.

We need not discuss the payments under the Beech Acres and Hamilton Choices contracts for which Ohio seeks to charge title IV-E in as much detail since they suffer from most of the same shortcomings as we have explained in regard to Magellan. Nevertheless, we address some of the specific questions relating to these other two contractors.

Ohio asserts that it paid Beech Acres "at least $3,502,161 for Title IV-E eligible administrative and care management services." Ohio Reply Br. at 15.[12] Ohio again applies a penetration rate, but this use is again inappropriate. First, it would only be a meaningful rate if the population served by Beech Acres were limited to foster care and adoptive children. Instead, the contract reflects referrals to Beech Acres from the County mental retardation and developmental disabilities agency, mental health board, juvenile court and alcohol and drug addiction board. Ohio Ex. 2, at 1. We cannot assume that these referrals were all of foster care and adoptive children as opposed to a wide range of "troubled youth." *Id*. Second, applying a penetration rate to all payments for

[12] Ohio cites to the declaration of Mark Miller, Chief Financial Officer of HCJFS, which states that financial records show payments of $3,145,064 for this purpose from July 1, 2001 through June 30, 2002. Ohio Reply Br. at 15; Ohio Ex. 37, at 4 (Miller Decl.). To this, Ohio adds $357,097 based on a contract reconciliation document showing "administrative cost amount" per quarter from July through October 2002. Ohio Reply Br. at 15; Ohio Ex. 31, at 1.

administrative costs assumes that all the costs are allowable title IV-E costs to the extent they benefit title IV-E. Apart from the problems discussed earlier, the Beech Acres contract casts additional doubt on such an assumption. Beech Acres, unlike Magellan, contracted to provide direct service delivery itself rather than only through network providers. Care management services are a problematic category because the term may refer either to assessing needs and making referrals (which are administrative in nature) or to therapeutic management of care (which is not allowable under title IV-E). *See N.J. Dep't of Human Servs.*, DAB No. 1801 (2001). The definition in the 1998 Beech Acres contract makes amply clear that the services included the latter kind of care management, expressly including such activities as "face to face contact with Enrollees" and "development and maintenance of a therapeutic relationship with the Enrollee." Ohio Ex. 2, at 3.[13] We therefore have no assurance that the payments for administrative services reflected only services which would be allowable under title IV-E.

Hamilton Choices was paid by the County on a capitated basis per enrolled child/case, based on which Ohio asserts that it was "able to calculate" that HCJFS paid $4,006,702. Ohio Reply Br. at 15, citing Ohio Ex. 32. Those calculations consisted of multiplying the days in a contract period by the "daily volume" (the volume was apparently based not on actual numbers of enrollees served but on the target set in the contracts for daily volume). Ohio Ex. 32. The product was also multiplied by the sum of the daily "administrative rate" and the daily "care management rate," and then ultimately reduced by an "average penetration rate." *Id.*

This methodology does not, for several reasons, establish reliably what amount of the payments to Hamilton Choices constitutes allowable administrative services chargeable to title IV-E. The rate includes care management which is defined in the contract to include both "community support program" services and "administrative services monitoring," so it is not certain that all services included in this rate were properly included as administrative costs. Ohio Ex. 6, at 3 (contract excerpts with discontinuous pages). Multiplying the rate against a projected target of enrollees to be served rather than the actual number served means that we cannot discern who was benefitting from these services. The contract also provides that the County will ensure that Hamilton Choices' "budgeted Administrative and Care Coordination costs . . . are adequately reimbursed." *Id*. at 24. This assurance implies that the contractor may receive payments as administrative costs that exceed actual costs. The effect is that even were the penetration rate appropriately applied to the population served under the contract, it

[13] The 2002 contract with Beech Acres is in the record, but the definition of "Care Management Services" is contained in Exhibit B to that contract. Ohio Ex. 5, at 4 (discontinuous pages). However, Ohio omitted contract Exhibit B, despite providing Exhibits A and C. We therefore infer that a similar expansive understanding of care management services applied.

would not insure that title IV-E was only paying for a share of the actual costs attributable to actual IV-E children served. Moreover, in this contract, the penetration rate is not even the actual ratio of title IV-E eligible to all foster/adoptive children as discussed earlier but instead the rate is averaged across different quarters. Ohio Ex. 32.

The point here is not that any of the terms of these contracts are necessarily impermissible. We do not, and ACF did not, conclude that the child welfare activities performed for Hamilton County included no allowable services to title IV-E eligible children that might have been chargeable to federal funds if properly documented and allocated. We are not now making findings about the allowability of specific costs under these contracts, but rather finding that the record before us raises too many questions to allow us to do so without clear documentation of actual costs.

The point thus is that Ohio has failed to meet its burden to identify the allowable costs. It has failed on multiple levels, from the County's commingling of funds that muddied the waters of what local/state expenditures were and how they were paid, to financial management failures that did not trace costs incurred with sufficient precision to reconstruct the allowable portions, to submitting excerpts of contracts with terms that raise too many questions to guarantee what is included in billing for administrative services, to the lack of detailed invoices from which that information might have been extracted, and to the attempt to apply simple formulas to global payment amounts.

While adequately identifying allowable costs retrospectively long after the fact might well require painstaking effort, the need to do so was created by massive problems with Hamilton County's understanding and implementation of cost allocation and documentation requirements. Ohio has had considerable time since it discovered the problems to determine if it could develop adequate documentation. What it has submitted here is simply inadequate.

We therefore uphold the disallowance of title IV-E administrative costs in full.

3. Title IV-B costs that ODJFS seeks to retain or offset

A. Parties' arguments on title IV-B

Ohio's central argument for why it should retain $735,959 of the FFP under title IV-B that was erroneously charged through cost pools is that the County "paid far more than" the $981,279 required to draw down that amount of federal title IV-B funds "for child

welfare services provided under the contracts."[14] Ohio Br. at 12. Ohio notes that states may use title IV-B funds to provide direct services for child welfare programs. *Id*., citing 45 C.F.R. § 1357.10(c)(1)-(2). Ohio contends that Board precedents have established that a grantee may offset a proper disallowance by establishing that it has other allowable costs which have not been claimed to substitute. *Id*. at 16, and cases cited therein. Ohio reasons that, if a state may substitute allowable for unallowable costs, "it can surely substitute an accurate method of determining allowable costs for an inaccurate one." *Id*.

ACF again argues that flaws identified in the state audit going beyond the misuse of cost pools undercut Ohio's effort to recharacterize the County's payments to Magellan for direct child welfare services as expenditures that can now be directly charged to title IV-B grant funds. ACF Br. at 14-17. ACF points in particular to the finding that HCJFS's IV-B nonfederal match "was unallowable because the expenditures of [State child welfare and child protection] monies could not be identified in the PA fund, and therefore, cannot be traced to activities allowable with federal Title IV-E and Title IV-B monies." ACF Br. at 17, citing ACF Ex. 1, at 39.

ACF states that Ohio has offered only the Magellan contracts (Ohio Exhibits 1 and 7), with some information on its subcontractors, to show that Magellan provided services that met IV-B goals, and a spreadsheet showing the total direct services paid to Magellan throughout the audit period (Ohio Exhibit 22). ACF Br. at 16. ACF argues that these documents are not sufficient to document allowable expenditures, relying on state fiscal requirements for title IV-B set out in 45 C.F.R. § 1357.30(e). *Id.* at 16-17.

That regulation makes applicable the grant administration requirements of 45 C.F.R. Part 92, while adding caps on certain categories of costs including some child day care, foster care maintenance and adoption assistance expenditures. Section 92.20(a) requires that a state –

> must exp[e]nd and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—
>
> (1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

[14] Although Ohio contends that payments to Beech Acres and Hamilton Choices could satisfy the requirements to be charged to title IV-B, Ohio does not explain what portion of those payments might qualify. Instead, Ohio relies entirely on the payments to Magellan because it alleges that those alone "so far exceed the amount necessary to support the $735,959 disallowed," that Ohio "does not address in detail the direct services provided" under the two other contracts. Ohio Br. at 13, n.11. We therefore focus our discussion only on the Magellan contract.

> (2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

ACF argues that, even without considering the findings in the state audit, the evidence presented by Ohio in the record cannot show allowable IV-B expenditures because Ohio has not shown that it can trace the contract payments to Magellan. ACF Br. at 17.

B. Discussion on title IV-E offset claims

As noted, Ohio argues that Board precedents support offsetting disallowed costs by substituting "for unallowable costs, allowable costs for which it did not claim federal funding." Ohio Br. at 16, quoting *N.J. Dep't of Health*, DAB No. 2497, at 4 (2013), also quoting *Gila River Indian Cmty.*, DAB No. 264, at 7 (1982) (involving a disallowance of indirect costs offset by other costs "which Grantee demonstrates do not duplicate costs included in the grant award as direct costs"). Ohio also relies on *Campesinos Unidos, Inc*., DAB No. 1546, at 8 (1995) from which it extracts the following quote:

> [T]he mere fact that a grantee charged unallowable costs to a grant does not necessarily mean that it has not discharged its obligation to account for federal funds and must return the funds in the disallowed amount; if a grantee can demonstrate that it incurred additional allowable costs previously covered with its own funds, which it did not use to fulfill its non-federal share requirement, this could be an adequate accounting for part or all of the federal funds awarded.

Ohio Br. at 16 n.12.

We agree that part or all of a disallowance may sometimes be offset where the grantee is able to adequately account for federal funds by showing allowable expenditures, paid by nonfederal funds not otherwise used as matching, and not duplicating costs charged in any other way (such as to other federal programs). The language quoted by Ohio itself illustrates the hurdles to be overcome to make such an after-the-fact accounting. The grantee must show that the substitute costs (1) are indeed allowable, (2) have not been charged to any other federal program, (3) have been previously paid for with nonfederal funds (4) not used as matching for another grant, and (5) can be adequately accounted for.

The cases from which Ohio quotes make the difficulty of clearing those five hurdles evident. As ACF points out, the Board found that the grantees in the cases quoted by Ohio in fact failed to meet the burden. ACF Br. at 14-15, and cases cited therein. Ohio responds that it was not making direct comparisons to the facts of those cases but merely using them as a "predicate for its argument" that it could show allowable title IV-B

claims to offset the disallowance. Ohio Reply Br. at 10-11. We need not parse the factual distinctions among the cases discussed by the parties – their significance, as Ohio recognizes, is that they articulate the standards (the "predicate") for evaluating whether Ohio has met the burden of demonstrating the allowability of sufficient substitute title IV-B costs to offset the disallowance. We explain next why we conclude that it has not.

Ohio contends that the costs it now seeks to claim need not "be allocated pursuant to the CAP because they clearly are reimbursable under the Title IV-B program, and the CAP permitted the direct charging of costs that benefited a program, including Title IV-B." Ohio Br. at 16. This position misunderstands the cost principles on allocability and misstates the provisions of the Ohio CAP.

The cost principles applicable at the time (and this element has not changed in the various iterations of cost principles for state grantees) provided that a cost is allowable only if it is allocable, meaning that the cost is allocated "to a particular cost objective…in accordance with the relative benefits received." 2 C.F.R. Part 225, App. A, ¶¶ C.1.b and C.3.a. Furthermore, a cost that is allocable to a particular federal grant "may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by law or terms or the Federal awards, or for other reasons." *Id*. at ¶ C.3.c. Therefore, costs are not directly chargeable to title IV-B unless the expenditures benefit title IV-B entirely (that is to say, all the costs are of benefit to title IV-B programs). Further, if the expenditures all benefit title IV-B, but could also be charged to other cost objectives that may simultaneously receive some benefit, they may not be charged fully to title IV-B to avoid limitations on other funds or cost objectives.

The excerpt from its CAP that Ohio submits undercuts its claims that all child welfare services expenditures in contractual payments made to Magellan may be directly charged to title IV-B. The section on direct costs for county-run programs contains the following provisions:

> 6. Direct Child Welfare (CW) costs are those contract, purchased services, and maintenance costs that can be identified to a specific child welfare program. Child Welfare programs include Title IV-B, State Child Welfare Subsidy (SCWS), Independent Living (IL), TANF [Temporary Aid to Needy Families], Post Adoption Assistance, Title XX [Social Services Block Grants] related to children, and Post-Adoption Special Services Subsidies (PASSS).
>
> EXAMPLE: Maintenance payments for a child in IV-E foster care.

> 7. Direct Foster Care costs are defined as contractually purchased services excluded from the Social Services Administrative Cost Pool . . . These costs are for services incurred solely for allowable IV-E activities as follows:
>
> Contracts for the recruitment, study, inspection and certification of persons desiring to be foster parents. . . .
> Contracts for the recruitment, study, and supervision of persons desiring to be adoptive parents. . . .
> Contracts for the training of staff employed by the county public children services agency. . . .
> Contracts for the transportation of foster children. . . .

Ohio Ex. 8, Section V-B, at 4-5.

The CAP language establishes that title IV-B is only one of many state and federal programs to which child welfare services provided by contractors may be directly charged **when they can be specifically identified** to one of the programs. The items under direct foster care costs (as we have mentioned in relation to the title IV-E claim) must be allocated according to the penetration rate and, in the case of training expenses, by use of the RMS. Ohio acknowledges that a "portion of the County's payments to Magellan . . . were also allowable as direct services costs under Title IV-E," but stated that it believes that "any direct services costs the County wished to claim under IV-E were covered by the capitated payments under the waiver," so it only contests administrative costs in the IV-E disallowance. Ohio Br. at 17, n.13. This approach means that the disallowed costs that could be charged to title IV-E under the CAP (and which would then count against the IV-E waiver funding) might instead be fully charged to title IV-B as direct costs without being reduced by the penetration rate. That might effectively allow the County to retain excess ProtectOhio waiver funds as local cash without reducing it by all title IV-E service costs, while receiving reimbursement for those expenditures from another federal program, i.e. title IV-B, a prospect that may raise concerns about cost-shifting to avoid funding caps or other restrictions which is prohibited under 2 C.F.R. Part 225, App. A, ¶ C.3.c.

In light of the cost principles and the CAP provisions, we must look at the contractual provisions to which Ohio points as showing that Magellan contracted to perform services allowable under title IV-B and ask whether those costs can be **specifically identified** to title IV-B, as opposed to any of the other child welfare programs or foster care/adoption programs named in the CAP.

Ohio points to responsibilities undertaken by Magellan in its contract that align with general goals of title IV-B, such as protecting the welfare of children and helping families resolve problems and prevent removal of children. Ohio Br. at 13. For these and other purposes, Magellan was to develop a provider network to deliver authorized services based on Magellan's need assessments. Ohio Ex. 1, at 9-10, 16; Ohio Ex. 7, at 9, 14. Ohio names three "representative" providers from this network as illustrative of the services provided based on excerpts from their websites. Ohio Br. at 14-15, citing Ohio Exs. 26, 27, 28.

There is no doubt that some of these services would be of the kind that might be supported by title IV-B, but it is not clear that all of the services which might be delivered under the contract can be specifically identified with title IV-B alone. For example, the services identified by one provider, Child Focus, Inc., in the website excerpt provided by Ohio, include outpatient individual, family and group therapy, psychiatric services and partial hospitalization, which raises questions about whether any of the services which Magellan purchased were reimbursable by Medicaid. Ohio Ex. 26. These questions are made more apparent by the terms of Magellan contract representing that Magellan will achieve major cost savings (15%) over the County agencies' prior expenditure for "mental health and therapeutic placement services." Ohio Ex. 1, at 6-7. Also, Magellan was to coordinate its services and care plans with managed care entities **and Medicaid**. *Id.* at 19. Child Focus is also a Head Start provider, and it is not clear if Magellan arranged Head Start placements or services for Head Start children that might be chargeable to the Head Start program which is required to provide a variety of family and child support services. The other two providers, Focus on Youth, Inc. and Agape for Youth, Inc., both offer foster care placement and adoption services. Ohio Exs. 27, 28. The website excerpt provided for Focus on Youth is a recruitment document seeking new foster parents. Ohio Ex. 27. Under the CAP, costs for the recruitment, study, and maintenance of foster and adoptive parents are to be allocated to title IV-E in accordance with the penetration rate. Yet Ohio provides no evidence that it has determined which services procured by Magellan were subject to this allocation requirement.

In general, Ohio's attempt to direct charge to title IV-B some of the undifferentiated contract payments originally claimed through the cost pools under title IV-B (as well as under title IV-E discussed above) suffer from the flaw that we cannot identify exactly which charges for contract services Ohio is agreeing to repay and which it is seeking to claim as direct costs. Indeed, Ohio's analysis provides little explanation of how the $735,959 offset claim was arrived at or verified. Ohio Br. at 15, citing Ohio Ex. 37 (Miller Decl.). Mr. Miller indicates that he had a spreadsheet compiled calculating that Magellan was paid "over $60 million" for service delivery from 2001 to 2004, which appears in the record as Ohio Exhibit 22. Ohio Ex. 37, at 4. He avers that HCJFS's policy was only to pay providers when they satisfied the terms and conditions of their contracts and unsubstantiated invoices are denied. *Id.* at 4-5. Even assuming this policy

was applied to the payments to Magellan, we cannot assume from this assertion that any testing was performed to ensure that all the amounts included in the offset claim were allowable as direct charges to title IV-B, or even which specific service charges are included in the offset claim.

At heart, Ohio's argument is that payments for services to Magellan were so large, surely "far more . . . than the $981,279 need to support the $735,959 claimed in FFP," that the offset should be accepted as reasonable. Ohio Br. at 15. While this argument may be plausible at first glance, the cost principles do not permit simply saying that so much money was spent over four years on services including many that were chargeable to title IV-B that some percentage should be allowable. It is not enough to merely say that whatever payments to Magellan may have been unallowable or not chargeable directly to title IV-B, the County paid Magellan so much more than the current offset Ohio seeks that this amount must be allowable. The cost principles instead require documenting specifically which expenditures on which dates were made for services chargeable to title IV-B, were not chargeable or charged to any other cost objective, and were supported by identifiable nonfederal cost matching. Ohio's whole approach of identifying activities which would account for "more than enough" costs to justify the amounts it seeks to retain only highlights the lack of specificity about which actual costs are being identified as chargeable to particular programs and the inability to ensure that those costs have not been charged to any other source.

For these reasons, we cannot find that Ohio has carried its burden and we therefore uphold the disallowance of title IV-B funds in full.

4. CCDBG costs that ODJFS argues were not subject to disallowance

A. Parties' arguments on CCDBG

Ohio makes a somewhat different argument as to the CCDBG disallowance than for the title IV claims discussed above. Instead of seeking to offset part of the disallowance, Ohio argues that the disallowance should be reversed entirely even though Ohio acknowledges that $2.1 million was erroneously charged through cost pools. Ohio Br. at 29. According to Ohio, the amount Hamilton County reported for CCDBG "was not paid for with federal funds" but rather "was either paid out of County funds (and not charged to a federal program at all) or was erroneously charged to the TANF grant and later repaid." *Id*. at 25. Ohio asserts that it has analyzed the "complex way in which Ohio funded county expenditures" for social services to reach this conclusion, in particular the State practice of setting caps for each funding source for a county (including CCDBG) and then rolling over any costs over the cap to "other sources to draw on federal funding that was still available." *Id*. at 25-26. Specifically, Ohio states

that any CCDBG (and other child care) costs that exceeded the state-imposed cap were rolled over to the State's TANF grant. *Id*. at 26. Once the TANF funds were exhausted, the county had to use local funding. *Id*. at 27.

Ohio offers a declaration from John Maynard, Assistant Deputy Director of the Office of Fiscal and Monitoring Services in Ohio DJFS, to demonstrate that Hamilton County did exceed its caps during the relevant period and further that TANF funds were exhausted such that County funds had to cover the overflow back from TANF. Ohio Ex. 38 (Maynard Decl.). Mr. Maynard oversaw the preparation of a chart showing child care costs "rolled" to TANF in SYFs 2002-04 and the printouts on which it was based. Ohio Ex. 38, at 9-10; Ohio Ex. 34. He also provided a schematic to illustrate the flow of costs in SFY 2003. Ohio Ex. 33.

During the period at issue, Ohio admits it drew down $262 million in TANF dollars in excess of State's allotment "to cover overspending in various programs, including not only TANF, but also CCDBG and other social services programs for which claims had rolled up to the TANF grant." Ohio Br. at 27; Ohio Ex. 38, at 9. Ohio was required to pay back that amount in 2005-06. *Id*. According to Ohio, that repayment should be considered to have included the CCDBG funds because they would have rolled over into TANF. Ohio Br. at 29-30, citing correspondence from state officials making this argument to the U.S. Attorney's Office (Ohio Ex. 14) and ACF's Regional Office (Ohio Ex. 15).

Alternatively, Ohio argues, to the extent that the contract costs "erroneously allocated to the CCDBG block grant were not paid with TANF funds that were subsequently repaid, they should be viewed as having been paid entirely with county funds." Ohio Br. at 30. This theory is based on the assertion that substantial expenditures amounting to $43 million over the audit period were paid with County funds because they exceeded the State's TANF cap. *Id*.

ACF responds that Ohio has failed to provide any concrete documentation to show that TANF funds were actually used to pay for excess CCDBG expenditures as required by applicable regulations. ACF Br. at 21, citing 45 C.F.R. § 98.67(c)(2) ("Fiscal control and accounting procedures shall be sufficient to permit . . . [t]he tracing of funds to a level of expenditure adequate to establish that such funds have not been used in violation of provisions of this part."). ACF points to *Pennsylvania Department of Public Welfare*, DAB No, 2332 (2010), in which the Board rejected that state's effort to substitute expenditures for child care for those found unallowable. ACF Br. at 23. ACF views the summary documents proffered by Ohio here as similarly unreliable. *Id*.

B. Discussion on CCDBG claims

In concluding its argument on its CCDBG claims, Ohio suggests that that disallowance should be withdrawn because ACF had to make a showing not only of "internal accounting errors" but that those errors in fact "resulted in an erroneous claim of federal funds." Ohio Br. at 30. Ohio asserts that the "County error in using indirect cost pools to allocate costs to CCDBG was irrelevant," because the various caps and overflow mechanisms "meant that either federal funds were never claimed or, at most, the costs were claimed against the TANF program and repaid when the State later restored funds to the TANF grant." *Id*. Therefore, Ohio concludes that ACF has not made the required showing to support this disallowance. This contention turns the burden of proof discussed at the start of our analysis on its head.

The federal agency issuing a disallowance must identify costs which it questions and articulate the basis sufficiently to allow the grantee to respond but, ultimately, the grantee always retains the burden of documenting that federal funds were claimed only in accordance with applicable program requirements and cost principles. *See, e.g.*, *Mass. Exec. Office of Health & Human Servs.*, DAB No. 2218, at 11 (2008), *aff'd, Commonwealth of Mass. v. Sebelius*, 701 F. Supp. 2d 182 (D. Mass. 2010); *Md. Dep't of Health & Mental Hygiene*, DAB No. 2090, at 4 (2007); *N.Y. State Dep't of Soc. Servs.*, DAB No. 433, at 9 (1983). Costs claimed in violation of an applicable CAP are unallowable, as we have explained. In disallowing the CCDBG costs as unallowable, ACF provided adequate notice of which costs were questioned and on what basis.

Here, Ohio admits that contract costs assigned to CCDBG through the cost pools were claimed in violation of the CAP requirements but argues that its internal policies on channeling of costs means that CCDBG costs were either actually charged to County funds in the first instance or charged to federal TANF funds and repaid as part of another penalty. Ohio Br. at 25-30. Not only must Ohio, as grantee, bear the burden of documenting that these defenses are factually correct (and, as discussed earlier, the more so where its own audits establish the questionable reliability of the financial systems involved to track the flow of funds accurately), but these particular arguments clearly depend on information and documentation far more likely to be accessible to Ohio than to ACF. Furthermore, the alternative nature of the contentions now made in relation to CCDBG claims inherently generates more questions about how accurately Ohio can account for CCDBG funds and insure that the claimed expenditures have not been charged to other federal sources. We must therefore examine the documentation produced by Ohio in light of these standards and questions.

In the *Pennsylvania* case cited by ACF and mentioned above, some similar questions were raised by the state there which argued that it had spent more than enough funds to establish sufficient allowable expenditures and that its documentation should be accepted. The Board explained the situation as follows:

> The fundamental issue raised is whether, in the face of that undisputed evidence showing the funds were spent for nonqualifying purposes, Pennsylvania's evidence is adequate to show it had sufficient other allowable costs, qualifying for the earmark, which were not charged to other grant funds and which therefore may be used as substitute expenditures to avoid Pennsylvania having to repay the earmark funds.
>
> Essentially, Pennsylvania contends that since the documentation it submitted to the Board shows it incurred substantial expenditures to improve the quality of care for infants and toddlers, we should reverse the disallowance or, if we find ACF has raised legitimate concerns, remand the case to ACF to give Pennsylvania another opportunity to show it is entitled to the funds. . . . Despite ample opportunity to address those concerns, Pennsylvania still has left significant issues unanswered. The fundamental problem is that Pennsylvania still has not addressed the concern that Pennsylvania and its grantees had not fully implemented sufficient internal controls, such as monitoring and auditing consistent with federal and state law, to assure the accuracy of data in its systems . . . . More important, although Pennsylvania says its accounting system codes funding sources to expenditures, Pennsylvania presented no evidence to address ACF's concern that the actual expenditures Pennsylvania now wants to use . . . were not already charged to other federal funds.

DAB No. 2332, at 8 (emphasis in original). The Board went on to reject mere summary statements as inadequate and unreliable substitutes for source documentation, for the following reasons:

> *A. Spreadsheets or charts from a state database are not per se adequate documentation.*
>
> Pennsylvania points to [federal accounting standards that list] spreadsheets as one type of documentary evidence an auditor may consider. The section goes on, however, to explain what process auditors use "to analyze any evidence to determine whether it is sufficient and appropriate" and that the "strength and weakness of each form depends on the facts and circumstances associated with the evidence and professional judgment in the context of the audit objectives." As ACF argues, this cannot reasonably be read as requiring ACF to accept such summary documentation as sufficient to support a specific claim without considering the circumstances.
>
> Pennsylvania also argues that the databases from which the spreadsheets and summary charts were derived are used by it as a basis for payment to the subgrantees and therefore should be acceptable as records kept in the

> regular course of business. Pennsylvania submitted no evidence that the undated summary charts were kept in the regular course of business as a basis for payment of I/T [infant/toddler] earmark funds, however, and Pennsylvania's evidence shows the spreadsheets were created for these proceedings. Moreover, even if we considered them to be business records, that would at most mean they were admissible under normal rules of evidence, despite the hearsay rule. It would not by itself establish that the evidence is reliable. . . .
>
> Perhaps in recognition of this, Pennsylvania now argues that the spreadsheets and summary charts should be considered source documentation. We disagree. The spreadsheets and summary chart clearly are not the type of documentation that evidences the transactions recorded in the state systems such as payments to child care providers, but are merely printouts of data compilations derived from information entered into the system, supposedly based on the original source documents….*cf.* 45 C.F.R. § 92.20(a)(5)(referring to "such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subaward award documents, etc.").

DAB No. 2332, at 11-12.

We find the analysis from *Pennsylvania* instructive to our evaluation of the documentation proffered by Ohio in support of its CCDBG claims. As with the spreadsheets offered in *Pennsylvania*, the chart, illustration and printouts Ohio offers to support the claim that the disallowed CCDBG costs were not charged to federal funds do not appear to be documents used in the ordinary course of business but rather were created for purposes of litigation. While they may be admitted as summary evidence, they cannot substitute for reliable source documentation. *Id*. Such summaries are particularly problematic when the recordkeeping system from which they are derived is itself not shown to be reliable, a problem in this case as it was in *Pennsylvania*. *Id*. at 12.

Ohio complains that ACF "attempts to place an impossible burden" on it to "show simultaneously…that TANF funds were *actually* used to pay for [the County's] excess child care expenditures" and that "County funds were *actually* used to pay for these same expenditures." Ohio Reply Br. at 17 (emphasis in original). The impossibility of this showing arises not from ACF's demands on Ohio but from Ohio's own argument that CCDBG costs were alternatively paid from one or the other source, but not from the CCDBG federal grant. The burden on Ohio is to show *how* the costs were *actually* paid. That burden is not satisfied by the unsupported claim that "[s]imple calculations using information from the State's accounting system make this self-evident." *Id.* at 18.

The simple calculations referred to start with the assertion that the County "charged $19,574,056 to child care codes" during the audit period. *Id*., citing Ohio Ex. 34. The summary chart at Ohio Exhibit 34 shows two "codes" – 1615 (County) and 1650 (Quality) – with totals for each for "direct, allocated, and manually charged expenditures" for SFYs 2002, 2003, and 2004 adding up to the total in Ohio's reply brief. Ohio Ex. 34, at 1 (unnumbered). The four pages attached as support for these totals are excerpts of data reports, apparently from data in the accounting system for the PA fund on "over/under draws." Code 1650 is labeled as "quality child care" and code 1615 as "county child care," with subcategories of child care, child care transition, and state day care. *Id*. at 2-5. They contain no further explanation of what is included in these codes, how the amounts have been derived, or whether the expenditures were chargeable only to CCDBG or were or should have been directly charged any other sources of child care funding. *Id*. Ohio gives the budget caps for the County for each year, totaling $7,268,024, and concludes that the excess costs in each code for each year was rolled over into TANF. *Id*.; Ohio Reply Br. at 18. Ohio assures us that because the State capped the County's child care allocation, "there was no way for the County to charge any of the excess over the cap to federal child care streams," so the excess must have rolled through the State's consolidated systems and flowed into TANF or County funding. *Id*. at 18-19. These five pages do not suffice for us to trace the expenditures and claims with any detail or certainty. These printouts are derived from the same problematic State system that caused the original erroneous TANF drawdowns, and the data on County expenditures is taken from County financial records with multiple issues, as already discussed. *See* Ohio Ex. 38, at 9-10 (Maynard Decl. explaining sources of data in the summary). We find it difficult to place any reliance on the summary printouts under the circumstances.

Ohio then asserts that where a state "incurred more costs than it actually claimed due to a funding cap, it would be inappropriate to assume that *unallowable* costs were the ones claimed to a federal program, rather than *allowable* costs." *Id.* at 19 (emphasis in original). But that is not what occurred here. Ohio has not identified a federal funding cap on the State that caused it to withhold claims it might have otherwise submitted and now wishes to substitute for submitted claims that have proven unallowable. The cap here, as Ohio describes it, was one that the State itself imposed on its counties as a way of maximizing federal reimbursement by ensuring that any costs that might exceed available funds statewide for a particular federal program were passed through TANF before local funds were used. And what Ohio asks us to assume is that all the costs that were claimed were allowable and any unallowable costs were contained in the excesses that rolled over and were either paid in the TANF penalty or by the County. We do not find sufficient basis in the documentation provided by Ohio to make that assumption.

In short, similar to the other disallowances, it is possible that some or all of the child care expenditures included in the disallowance were improperly charged to TANF and repaid in the penalty or eventually paid from some County funds that did not include commingled federal funds. Ohio has not, however, made the case, as it must, that it can document which expenditures are allowable.

We therefore uphold this disallowance as well.

Conclusion

For the reasons explained above, we uphold in full the disallowances in the three appeals at issue.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member