Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

New York State Office of Children & Family Services
Docket No. A-12-75
Decision No. 2483
November 7, 2012

DECISION

The New York State Office of Children & Family Services (New York) appeals a determination by the Administration for Children and Families (ACF) to impose a penalty in the amount of $289,649 under section 477 of the Social Security Act. ACF imposed the penalty based on New York's failure to submit any data to ACF on independent living services provided to youth through the John H. Chafee Foster Care Independence Program (CFCIP) during the second half of the 2011 federal fiscal year (FFY). A state receiving CFCIP funds is required to collect and submit data on each youth receiving independent living services paid for or provided by the state. 45 C.F.R. §§ 1356.81(a), 1356.82(a)(1). New York concedes that it failed to submit the required data. However, New York argues that, under the applicable regulations, it was subject to only a 1.25% penalty for violating "data standards" rather than the 2.5% penalty imposed by ACF for violating "file submission standards." We conclude that ACF's interpretation of the regulations is reasonable and that New York had adequate notice of ACF's interpretation. Accordingly, we uphold the penalty in full.

Law and Regulations

The Foster Care Act of 1999 (Act), P.L. 106-169, established CFCIP at section 477 of the Social Security Act. 42 U.S.C. § 677. CFCIP provides funding to states to identify children who are likely to remain in foster care until age 18 and assist them in making the "transition to self-sufficiency" by furnishing educational assistance, job skills training, preventative health activities, and other programming. *Id.* § 677(a)(1). The Act also directed the Secretary of Health and Human Services (Secretary) to develop a data collection system to track the independent living services provided by states pursuant to CFCIP and the characteristics of the youth receiving those services. *Id.* § 677(f).

Although CFCIP is flexible about the types of independent living services that states may provide with the funds they receive, the Act imposes strict data reporting requirements. If a state fails to comply with the reporting requirements, the Secretary is required to assess a penalty of between one and five percent of the state's annual allotment of CFCIP

funds. 42 U.S.C. § 677(e)(2). The Secretary has discretion to determine the exact penalty amount within the required range based on the "degree of [a state's] noncompliance." *Id.* § 677(e)(3).

In mid-2006 ACF published in the *Federal Register* a Notice of Proposed Rulemaking for a data collection system called the National Youth in Transition Database (NYTD). 71 Fed. Reg. 40,346 (2006). In early 2008 ACF published its final rule, which amended Part 1356 of Title 45 C.F.R. to add sections 1356.80 to 1356.86. 73 Fed. Reg. 10,338, 10,365 (2008). Those sections detail the scope and requirements of NYTD.

The regulations specify two six-month reporting periods during which states are to gather data each year, from October 1 to March 31 and April 1 to September 30. 45 C.F.R. § 1356.83(a). The regulations also identify a "reporting population" consisting of three groups of youth: (1) the "served population," consisting of every youth who receives independent living services paid for or provided by a state pursuant to CFCIP during the reporting period; (2) the "baseline population," consisting of every youth in foster care age 17 during FFY 2011 and every such youth who reaches age 17 in every third year thereafter; and (3) the "follow-up population," consisting of every youth who reaches age 19 or 21 during a FFY and "had participated in data collection as part of the baseline population." *Id.* § 1356.81.

Section 1356.83 of the regulations enumerates the data elements that states must report for each portion of the reporting population. States are required to report basic demographic information – date of birth, sex, race, etc. – for every youth in the reporting population. *See* 45 C.F.R. § 1356.83(b), (g)(1)-(13). For youth in the served population, states must report "the data elements described in paragraphs (g)(14) through (g)(33)" of section 1356.83. *Id.* §1356.83(c). Paragraphs (g)(14) through (g)(19) seek additional demographic information about youth in the served population. *See id.* § 1356.83(g)(14)-(19). Paragraphs (g)(20) through (g)(33) seek information about the types of independent living services that each youth in the served population received during the reporting period, such as "academic support," "career preparation," and "housing education and home management training." *See id.* §1356.83(g)(20)-(33). For youth in the baseline and follow-up populations, states are required to report various outcomes information about each youth, such as whether the youth was enrolled in school, received public financial assistance, experienced homelessness, or had a child during the reporting period. *See id.* § 1356.83(d), (e), (g)(34)-(58). Section 1356.83(a) also explains that states "must submit data files that include the information specified in this section to ACF on a semi-annual basis, within 45 days of the end of the reporting period (*i.e.*, by May 15 and November 14)."

States must comply with two sets of standards when reporting their data to ACF, "file submission standards" and "data standards." The standards are explained in section 1356.85(a) and (b). Section 1356.85(a) provides:

> *File submission standards*. A State agency must submit a data file in accordance with the following file submission standards:
> (1) *Timely data*. The data file must be received in accordance with the reporting period and timeline described in section 1356.83(a) of this part;
> (2) *Format*. The data file must be in a format that meets ACF's specifications; and
> (3) *Error-free information*. The file must contain data in the general and demographic elements described in section 1356.83(g)(1) through (g)(5), (g)(14), and (g)(36) of this part that is 100 percent error-free as defined in paragraph (c) of this section.

Section 1356.85(b) provides, in relevant part:

> *Data standards*. A State agency also must submit a file that meets the following data standards:
> (1) *Error-free*. The data for the applicable demographic, service and outcomes elements defined in section 1356.83(g)(6) through (13), (g)(15) through (35) and (g)(37) through (58) of this part must be 90 percent error-free as described and assessed according to paragraph (c) of this section.

Section 1356.85(b)(2) and (3) set out additional data standards for submitting outcome-related data for youth in the baseline and follow-up populations. Section 1356.85(c) defines different types of data errors and explains that the "amount of errors acceptable for each reporting period is described in paragraphs (a) and (b)."

ACF assesses states' data files first for compliance with the file submission standards. If a state's data file meets the file submission standards, then ACF assesses the file for compliance with the data standards. 45 C.F.R. § 1356.85(d)(i). If ACF determines that a state's data file fails to comply with the file submission standards set forth in section 1356.85(a), the regulations provide that ACF will assess a penalty of 2.5% of the CFCIP funds that the state received for the FFY that corresponds to the reporting period for which the state's data file is deficient (subject funds). *Id.* § 1356.86(a), (b)(1). If ACF determines that a state's data file fails to comply with the data standard for "90 percent error-free" data set forth in section 1356.85(b)(1), the regulations provide that ACF will assess a penalty of 1.25% of subject funds. *Id.* § 1356.86(b)(2)(i). The regulations also provide penalties for states that submit data files that do not comply with the outcome-related data standards in section 1356.85(b)(2) and (3). *Id.* § 1356.86(b)(2)(ii)-(iv).

ACF does not impose penalties for noncompliance right away. Instead, if a state submits a data file that fails the file submission standards or the data standards in section 1356.85, ACF gives the state "an opportunity to submit a corrected data file." 45 C.F.R. § 1356.85(e). In order to avoid a penalty, the state must submit the corrected data file "no later than the end of the subsequent reporting period." *Id.* § 1356.85(e)(1). If the state does not submit a corrected data file by this deadline that complies with the standards in section 1356.85, "ACF will make a final determination that the State is out of compliance, notify the State . . . , and apply penalties as defined in section 1356.86." *Id.* § 1356.85(e)(2).

Case Background

1. New York's contacts with ACF prior to the first NYTD reporting deadline

Although ACF published its final rule in 2008, it did not require states to begin implementing NYTD until October 1, 2010. 73 Fed. Reg. at 10,338. In the interim, ACF established a national training and technical assistance program to make sure that states were on track to meet the NYTD requirements. ACF Ex. E ¶ 4. New York initially participated in ACF's programming. *Id.* ¶ 5. But in a letter to ACF dated August 5, 2010, New York asserted that it had "no ability to support a new data reporting initiative" and asked ACF to extend the implementation deadline to October 1, 2012. ACF Ex. F at 1. New York also questioned the "potential utility" of the NYTD data and requested that ACF review the NYTD standards and penalties. *Id.* at 1-2.

ACF sent New York a response letter in October 2010, in which ACF explained that it could "neither delay the implementation of NYTD nor suspend penalties for noncompliance with its data collection requirements." ACF Ex. G at 1. ACF also assured New York that it had "successfully worked" with other states that had expressed similar concerns about implementing NYTD. *Id.*

In late December 2010, New York informed ACF that it would "at best" be able to survey only half of its "baseline population" for FFY 2011. ACF Ex. H at 3. New York asked ACF whether it would be subject to the full penalty for its failure to comply with the reporting requirements or a lesser partial penalty, and whether it should delay reporting on a baseline population until 2014. *Id.* ACF explained that New York would be subject to the penalties set forth in section 1356.86 if New York failed to collect and report the required outcomes data on its baseline population for FFY 2011. *Id.* at 2. ACF further explained that New York could not avoid the penalties by collecting the data in another timeframe and encouraged New York to collect whatever data it could. *Id.* In response to additional questions, ACF clarified that New York would incur penalties based on its anticipated failure to report baseline outcomes data for the first reporting period of FFY 2011 (the "2011A" period). ACF Ex. I at 1. But, ACF explained, because the penalties for non-compliance are independently assessed for each six-month reporting

period, if New York began collecting outcomes data during the second reporting period (the "2011B" period) and otherwise met the NYTD requirements, it could avoid incurring penalties for that period. *Id.*

2. New York's 2011A data file

New York submitted its NYTD data file for the 2011A reporting period in May 2011. As expected, the data file did not contain any outcomes data for New York's baseline youth population. The data file also contained no data on the independent living services that New York was required to report for its served youth population and failed to include data on certain demographic characteristics that New York was required to report for its served youth.

In a letter to New York dated July 18, 2011, ACF observed that New York "failed to collect and report any outcomes data on youth in the baseline population as required by 45 CFR 1356.83(d)" and also "failed to collect and report any information on independent living services paid for or provided to youth in the served population as required by 45 CFR 1356.83(c) . . ." ACF Ex. J at 2. ACF explained that, as result of those omissions, it did "not consider the entire file to have been submitted timely as required by 45 CFR 1356.83(a)(1)," and so it had calculated a penalty of 2.5% of subject funds, or $289,649. ACF explained that, in accordance with section 1356.85(e)(1), the penalty would be suspended pending New York's submission of a corrected data file by September 30, 2011. *Id.* If New York submitted a corrected data file, ACF would reassess New York's compliance before issuing a final determination. *Id.* at 3. ACF warned that, if New York chose not to submit a corrected data file or submitted a corrected data file that did not meet the standards in section 1456.85 and "all other NYTD requirements," New York would be "subject to [the] penalties described in 45 CFR 1356.86." *Id.*

In response, New York sent ACF a letter in which New York recognized that it had submitted an incomplete data file for the 2011A reporting period and stated that it was unable to submit a "corrected 'complete' file." ACF Ex. K (letter dated Aug. 11, 2011) at 2. ACF subsequently made a final determination that New York was "out of compliance with the NYTD file submission standard for timely data (45 CFR 1356.83(a)(1))" for the 2011A reporting period and assessed a 2.5% penalty of subject funds. ACF Ex. L (letter dated Nov. 29, 2011) at 1. ACF also informed New York about its right to appeal to the Board, but New York did not file an appeal. *Id.* at 2-3; ACF Ex. E ¶ 20.

3. New York's 2011B data file

New York submitted its data file for the 2011B reporting period in November 2011. The data file contained baseline outcomes data, but again it did not contain any data on the independent living services that New York provided to its served youth, i.e., the data elements described in section 1356.83(g)(20)-(33), and omitted most of the data on the additional demographic characteristics that New York was required to report for the served youth population, i.e., the data elements described in section 1356.83(g)(16)-(19).[1] *See* ACF Ex. E ¶ 21; NY Ex. K. The following month, ACF sent New York a letter observing that New York had "failed to report any information on independent living services paid for or provided to youth in the served population in the 2011B data file submission." ACF explained that, because "data applicable to the served population were required to be reported in the 2011B data file submission by 45 CFR 1356.83(c)," ACF did "not consider the entire file to have been submitted timely as required by 45 CFR 1356.85(a)(1)." As it had done for the 2011A reporting period, ACF calculated a 2.5% penalty of subject funds, equaling $289,649, but delayed imposing the penalty to give New York the opportunity to submit a corrected data file. NY Ex. A (letter dated Dec. 20, 2011) at 2.

In response, New York sent ACF a letter in which New York disagreed with ACF's "current interpretation" of the regulations and asserted that a 1.25%, rather than 2.5%, penalty was appropriate. ACF Ex. N (letter dated April 2, 2012) at 1. New York did not deny that it had not submitted any data on independent living services provided to its served youth. However, New York challenged ACF's contention that this meant New York had violated the file submission standards in section 1356.85(a) by failing to "timely" submit its data file. *Id.* at 2-3. Instead, New York argued, it had violated the "90 percent error-free" data standard set forth in section 1356.85(b)(1), and was subject to a 1.25% penalty under section 1356.86(b)(2). *Id.* at 1, 3.

In its final determination regarding New York's data file for the 2011B reporting period, ACF maintained that section 1356.83(a) "clearly specifies that States are required to 'submit data files that include the information specified in this section to ACF on a semi-annual basis, within 45 days of the end of the reporting period,' including data applicable

[1] As discussed above, states are required to provide data for the data elements described in section 1356.83(g)(14)-(33) for youth in the served population. 45 C.F.R. § 1356.83(c). Data elements (g)(14)-(19) seek additional demographic information about youth in the served population; data elements (g)(20)-(33) seek information about the specific types of independent living services provided to youth in the served population. *See id.* § 1356.83(g)(14)-(33). In its 2011B data file, New York did provide demographic data for data elements (g)(14) and (g)(15), but it did not report demographic data for data elements (g)(16)-(19) and it omitted *all* data on independent living services for data elements (g)(20)-(33). *See* ACF Ex. E ¶ 21; NY Ex. K. New York also failed to report any data for data element (g)(12), which states are supposed to report for all youth and which asks about whether each youth or his parent declined to provide the youth's race. *See id.*; 45 C.F.R. § 1356.83(b), (g)(12).

to the served population" that is "required to be reported in the 2011B data file submission" pursuant to section 1356.83(c). NY Ex. B (letter dated April 23, 2012) at 1. "Consequently," ACF explained, it did "not consider the entire 2011B file to have been submitted timely as required by 45 CFR 1356.85(a)(1)," and was assessing a 2.5% penalty. *Id.* at 1-2.

New York timely appealed ACF's final determination regarding the 2011B data file to the Board.

Analysis

ACF assessed a 2.5% penalty for New York's failure to submit any data on the independent living services provided to served youth, i.e., the data elements described in section 1356.83(g)(20)-(33), because ACF considered New York's omission to be a violation of the file submission standard for timely data in section 1356.85(a)(1). ACF contends that, because New York did not provide *any* data on the independent living services provided to its served youth population in its 2011B data file, its file was incomplete and untimely. In situations where an entire category of data is not reported, ACF argues, the data standards are not implicated because there is no data to assess for noncompliance. According to ACF, the widespread omission of data instead implicates the file submission standards.

New York argues that its complete omission of data about independent living services should have resulted in a 1.25% penalty because, it says, the omission is properly characterized as a violation of the 90 percent error-free data standard in section 1356.85(b)(1). That standard includes the data elements described in section 1356.83(g)(20)-(33) for which New York provided no information. New York contends that its failure to report any data for data elements (g)(20)-(33) means that those elements were "0 percent error-free" instead of "90 percent error-free." It maintains that the file submission standard for timely data only requires states to submit data in accordance with the reporting timeline – "within 45 days of the end of the reporting period" – set forth in section 1356.83(a).

Section 1356.85(a)(1) does not expressly state that failing to report any data for an entire category of data elements constitutes a failure to meet the timely data file submission standard. ACF argues that the section should be read in this manner, but New York reads it differently. Where a statute or regulation is subject to more than one interpretation, the Board has held that the Department of Health and Human Services operating division's interpretation "is entitled to deference as long as the interpretation is reasonable and the grantee had adequate notice of that interpretation, or, in the absence of notice, did not reasonably rely on its own contrary interpretation." *Alaska Dept. of Health & Social Servs.*, DAB No. 1919, at 14 (2004). Below, we discuss why we conclude that ACF's interpretation is entitled to deference.

1. ACF's interpretation of the regulations is reasonable.

When interpreting a particular regulatory provision, the Board applies settled rules of statutory construction and looks to the regulation as a whole to determine the provision's meaning. *See, e.g., Breton Lee Morgan, M.D.*, DAB No. 2264, at 5 (2009) ("A cardinal rule of statutory interpretation is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers the statute's purposes.", *aff'd*, *Morgan v. Sebelius*, No. 3:09-1059, 2010 WL 3702608 (D. W.Va. Sept. 15, 2010), *aff`d*, 694 F.3d 535 (4th Cir. 2012)); *Georgia Dept. of Community Health*, DAB No. 1973, at 10 (2005) (noting that a "'fundamental principle of statutory construction' is that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). Examined as a whole, the regulations support ACF's interpretation of section 1356.85(a)(1). As ACF points out, section 1356.85(a)(1) provides: "The data file must be received in accordance with the reporting period and timeline described in section 1356.83(a) of this part." Section 1356.83(a), in turn, provides in relevant part that a state "must submit data files *that include the information specified in this section* to ACF on a semi-annual basis, within 45 days of the end of the reporting period . . . " (emphasis added). The "information specified" in section 1356.83 includes the data elements pertaining to the independent living services that the state provided to youth in its served population. *See* 45 C.F.R. § 1356.83(c), (g)(20)-(33). Read together, these provisions support ACF's position that New York's failure to submit a 2011B data file that included information about the independent living services that New York provided to served youth constituted a violation of the timely data file submission standard.

The preamble to the proposed rule also lends support to ACF's interpretation of the regulations and conflicts with New York's opposing interpretation. In the preamble, ACF explained that the file submission standards are "minimal standards for timeliness, formatting and quality information that the State must achieve in order for us to process the State's data appropriately." 71 Fed. Reg. at 40,362. ACF also stated that it chose to assess a 2.5% penalty per reporting period for states that fail the file submission standards because "we will not have useable information in a timely fashion for the reporting period." *Id.* at 40,365. In contrast, ACF said that the data standards "focus on the quality of the data that a State provides to us regarding a youth's demographic information, characteristics, services and outcomes." *Id.* at 40,362. In discussing its decision to assess a 1.25% penalty against states that violate the 90 percent error-free data standard, ACF theorized that states would fail to comply with the standard "because of simple data entry errors" that could be "avoided or overcome by thoroughly training State staff" or carefully reviewing data prior to submission. ACF explained that it chose the 1.25% penalty because it wanted to "encourage States to take all necessary steps to provide quality data." *Id.* at 40,366.

New York characterizes its absent data for the data elements described in section 1356.83(g)(20)-(33) as data elements that are "0 percent error-free" and argues that it therefore failed to meet the 90 percent error-free data standard in section 1356.85(b)(1), which refers to those data elements. New York's failure to report on the independent living services that it provided to served youth, however, was not the result of a "data entry error" such as ACF contemplated in the preamble when addressing the 90 percent error-free data standard. Instead, New York *failed to even collect* the data. We agree with ACF that a fundamental difference exists between failing to obtain data at all and reporting data that contains errors. ACF Surreply Br. at 4.

In addition, the absence of any independent living services data undeniably diluted the usability of the information that New York did report to ACF. New York appears to contest this conclusion, but we reject New York's arguments. New York emphasizes that the regulations require 100 percent error-free data for certain demographic data elements but do not impose the same error-free requirement or otherwise import additional significance to the data elements related to independent living services or other categories of data. NY Reply Br. at 2-3. New York also stresses that when it informed ACF it would not be able to survey all of its baseline youth in time for the first 2011A data reporting deadline, ACF still encouraged it to collect and report outcomes data. *Id.* at 8-9.

In the preamble to the proposed rule, ACF explained that NYTD was designed to track the independent living services that states provide to foster care youth pursuant to CFCIP and to measure states' performance in operating their independent living programs. 71 Fed. Reg. at 40,346. It is self-evident that without any data on the independent living services that New York provided to its served foster care youth, ACF cannot determine whether New York's independent living programs are achieving their purpose of aiding youth in successfully transitioning out of foster care. ACF's encouraging New York to submit whatever data it could with respect to outcomes has nothing to do with New York's obligation to collect and report data on independent living services and certainly does not justify its omitting that entire category of data. Given the impact of New York's omission on ACF's ability to utilize New York's data, it is consistent with the preamble to characterize New York's actions as a violation of the file submission standards rather than the data standards.

New York points out that ACF's responses to the comments on section 1356.83(a) in the preamble to the final rule did not touch on the text that is key to ACF's interpretation: "The State agency must submit data files *that include the information specified in this section* to ACF on a semi-annual basis, within 45 days of the end of the reporting period . . ." New York argues that ACF's failure to discuss the text shows ACF did not have or even contemplate its current interpretation of the regulations during rulemaking. NY Br. at 13-14. This argument is flawed. New York's argument overlooks the fact that, as discussed above, the text itself support ACF's position. In addition, while the preamble

to the final rule may not specifically indicate that ACF then had the interpretation it now advances, neither does it foreclose that interpretation. Moreover, as discussed above, the preamble to the proposed rule lends support to ACF's interpretation of the language in question. The fact that there was no discussion of the cited section 1356.83(a) in the preamble to the *final* rule does not diminish the fact that the preamble to the *proposed* rule supports ACF's interpretation.

New York also argues that, under ACF's interpretation, a data file must contain all of the data elements that are required for a particular reporting period in order to meet the file submission standard for timely data in section 1356.85(a)(1). New York contends that ACF's "all-or-nothing" interpretation is inconsistent with the text of section 1356.85(a)(3) – which sets a 100 percent error-free standard for the data elements described in section 1356.83(g)(1)-(5), (g)(14) and (g)(36) – and section 1356.85(b)(1) – which sets a 90 percent error-free standard for the data elements described in section 1356.83(g)(6)-(13), (g)(15)-(35), and (g)(37)-(58). New York appears to argue that ACF's interpretation requires a 100 percent error-free standard for *all* data elements that renders superfluous the different error-free percentage standards set out in sections 1356.85(a)(3) and (b)(1). NY Br. at 13-15.

New York mischaracterizes ACF's position. ACF does not argue that the omission of a single data element constitutes a violation of the timely data file submission standard. Instead, ACF contends that the failure to report an *entire category* of data violates the file submission standards. In contrast, ACF says, the 90 percent error-free data standard in section 1356.85(b)(1) is designed to address scenarios "whereby individual instances of inappropriately missing, inconsistent or out-of-range data cumulatively result in less than 90% error-free data." ACF Surreply Br. at 7.

In a further attempt to establish that ACF's position is unreasonable, New York contends that under ACF's interpretation ACF could decide on a case-by-case basis that, although a data file meets the "published" file submission standards but not the data standards, "some combination of the number of noncompliant" data elements and "degree of noncompliance" of those elements means that the file also fails the file submission standards. NY Reply Br. at 10, 16. In this way, New York argues, ACF has reserved the right to decide acceptable error-free percentages that were not provided for in the regulations. *Id.* at 9-10, 16-17.

New York's hypothetical is predicated on a completely different situation from the one presented here, where New York did not provide *any* data on its independent living programming. Consequently, the hypothetical is misleading and irrelevant to the issue under consideration. In addition, New York again misconstrues ACF's position. ACF argues that, where a state fails to report a *whole category* of data, the omitted data cannot

be analyzed under the data submission standards in section 1356.85(b) because there is no data to evaluate for errors. According to ACF, categorical data omissions necessarily implicate the file submission standards in section 1356.85(a) because there is no data to analyze under the data standards.

New York also maintains that ACF's position "does not make sense from a policy perspective" because ACF's interpretation led it to impose the maximum potential penalty for noncompliance on New York. NY Br. at 21. ACF imposed a 2.5% penalty for both the 2011A and 2011B reporting periods, and under the Act the Secretary or her delegate can impose penalties of no more than five percent of a state's annual allotment of CFCIP funds each fiscal year. 42 U.S.C. § 677(e)(2). New York asserts that because it would have incurred the same (5%) penalty for FFY 2011 if it had not collected and submitted *any* data at all, ACF's position creates an illogical disincentive against undertaking the burden of collecting and submitting data.

As discussed above, although New York submitted outcomes data in its 2011B data file, its failure to provide any information on the independent living services that it provided to youth hinders ACF from evaluating whether New York's programming was effective at aiding youth in their transition out of foster care, which is the major goal of CFCIP. Thus, it is not necessarily unreasonable for ACF to decide as a policy matter to impose the maximum sanction on states that fail to report this entire category of data for a whole fiscal year. New York's interpretation, on the other hand, raises questions of incentives inconsistent with the purposes of CFCIP. States have less incentive to undertake NYTD's data collection and reporting requirements if they can omit entire essential categories of required data and face no more than a 1.25% penalty each reporting period, the same as a state that strove to collect all required data but showed an error rate of 10% or more under the data standards.

2. <u>New York had adequate notice of ACF's interpretation.</u>

New York does not argue that it lacked notice of ACF's interpretation of the regulations, nor could it advance such an argument. The undisputed facts establish that, at the latest, New York was aware of ACF's interpretation of section 1356.85(a)(1) in July 2011 when it received ACF's initial letter regarding New York's 2011A data file. As discussed above, ACF articulated the same interpretation in that letter that it advances here – that New York's failure to collect and report any information on the independent living services provided to served youth meant that New York had not timely submitted its data file as required by section 1356.83(a)(1). *See* ACF Ex. J at 2.

Instead, New York attempts to sidestep its awareness of ACF's position by arguing that ACF "changed" its position when it received New York's 2011A data file. NY Reply Br. at 6. In support of this argument, New York relies on printouts from ACF's online

NYTD data processing system (the NYTD Portal) reflecting the system's processing of New York's 2011B data file and on a technical bulletin issued by ACF in November 2010.

New York points out that the NYTD Portal computed a "system-generated potential penalty" of 0% for the file submission standards and 1.25% for the error-free information data standard when New York submitted its 2011B data file. NY Br. at 20, quoting NY Ex. J (printout from NYTD Portal). New York maintains that it "was entitled to, and did, rely upon" these computations. NY Br. at 21. But ACF never indicated that states could or should rely on such computer-generated penalties, which the NYTD Portal specifically terms "potential" penalties. To the contrary, the NYTD Portal contains a number of disclaimers, including one explaining that the potential penalties are "based on the system's assessment of the data file's compliance with NYTD standards." If ACF "makes a final determination that a State's data file is out of compliance after a State has an opportunity to enter into corrective action," the disclaimer provides, "then ACF will notify the State of any penalties that will be assessed through official correspondence." NY Ex. J. The disclaimer draws a distinction between the NYTD Portal's calculation of "potential" penalties and ACF's final calculation, and it indicates that ACF could assess penalties differently from the NYTD Portal under any circumstances.

Moreover, New York has not shown that it relied on the "system-generated potential penalties" calculated by the NYTD Portal. New York has not introduced any evidence that it could or would have collected the data in question were it not for the NYTD Portal's calculations. In addition, at the time that New York received the calculations for its 2011B data file, New York already knew about ACF's interpretation of section 1356.85(a)(1) based on ACF's initial letter regarding the 2011A reporting period. New York was not entitled to rely on the NYTD Portal and ignore the interpretation unambiguously articulated in ACF's official correspondence.

New York also cites to a technical bulletin titled "National Youth in Transition Database (NYTD) Compliance Standards" that was issued by ACF on November 24, 2010. In that bulletin ACF stated, consistent with the regulations, that a state's data file is assessed first for compliance with the file submission standards. 45 C.F.R. § 1356.85(d)(i). If the file meets those standards, ACF explained, it will then determine whether the file meets the data standards. NY Reply Br. at 12-13, citing NY Ex. L at 9. New York reads this bulletin to suggest that, since the NYTD Portal automatically assessed New York's 2011B data file for compliance with the data standards, ACF must have found that New York complied with the file submission standards. New York also asserts that ACF is putting forward a novel interpretation because the technical bulletin does not state that omitting a subset of data violates the file submission standards or triggers a 2.5% penalty. NY Reply Br. at 13-14.

We find no basis to conclude that provision of automated system-generated estimates of potential penalties by the NYTD Portal somehow implies that ACF found New York's data file to be in compliance with the file submission standards. Moreover, contrary to what New York asserts, ACF is not precluded from adopting an interpretation of the regulations on a question it did not previously contemplate. ACF says that it "did not imagine that a State's information system would fall so short of CFCIP requirements," and so the NYTD Portal "was not designed to anticipate New York's noncompliance." ACF Surreply at 4. New York does not point to, nor are we aware of, any authority that prohibits an agency from interpreting its regulations in response to a previously unanticipated circumstance where the agency's interpretation is reasonable and the agency provides timely notice of its interpretation. Indeed, the Supreme Court has rejected the idea that agencies must promulgate regulations that definitively resolve every potential issue that might arise. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995) (noting that there is no "basis for suggesting that the Secretary has a statutory duty to promulgate regulations that, either by default rule or by specification, address every conceivable question in the process of determining equitable reimbursement" and that the Administrative Procedure Act "does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication"). New York simply cannot escape the fact that it was specifically notified of ACF's reasonable interpretation of the regulations during its communications with ACF about the 2011A data file.

Conclusion

For the reasons explained in detail above, we uphold the penalty in full.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member