

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

Illinois Department of Children and Family Services
Docket No. A-15-108
Decision No. 2734
September 20, 2016

DECISION

The Illinois Department of Children and Family Services (DCFS) appealed a July 10, 2015 determination by the Administration for Children and Families (ACF) to withhold \$3,815,286 of federal funds for the period October 1, 2008 through March 31, 2013. ACF conducted a review of DCFS' child and family services programs, the Child and Family Services Review (CFSR), in 2009. The CFSR found that DCFS was not operating these programs in substantial conformity with applicable federal requirements. DCFS developed a Program Improvement Plan (PIP), but ACF found that DCFS did not meet two goals in the PIP by the end of the period for implementing it. ACF withheld funds under titles IV-B and IV-E of the Social Security Act (Act)¹ based on DCFS' failure to successfully complete the PIP.

For the reasons explained below, we conclude that DCFS failed to meet either of the PIP goals at issue, and we sustain in full ACF's determination to withhold funds.

Legal Background

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

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

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

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

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

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

(A) to afford the State an opportunity to adopt and implement a corrective action plan, approved by the Secretary, designed to end the failure to so conform;

* * *

(C) to suspend the withholding of any Federal matching funds under this section while such a corrective action plan is in effect; and

(D) to rescind any such withholding if the failure to so conform is ended by successful completion of such a corrective action plan.

Act § 1123A(b)(4). Subsection 1123A(c) of the Act provides for appeal to the Departmental Appeals Board of a final determination that a state’s program is not in substantial conformity.

The final regulations establishing the CFSR process, promulgated in January 2000, provide in relevant part that—

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

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

45 C.F.R. § 1355.34(a)(1). The criteria related to outcomes in the area of child safety are:

(A) Children are, first and foremost, protected from abuse and neglect; and,

(B) Children are safely maintained in their own homes whenever possible and appropriate.

45 C.F.R. § 1355.34(b)(1)(i).

The regulations further provide for the development of “statewide data indicators” for each of the outcomes and state that the “initial national standards for the statewide data indicators . . . will be based on the 75th percentile of all State performance for that indicator as reported in” the Adoption and Foster Care Analysis and Reporting System (AFCARS) or the National Child Abuse and Neglect Data System (NCANDS) and may be adjusted by the Secretary if appropriate. 45 C.F.R. § 1355.34(b)(4), (b)(5). “A title IV-E agency will be determined to be in substantial conformity if its performance on : (i) Each statewide . . . data indicator developed pursuant to paragraph (b)(4) of this section meets the national standard described in paragraph (b)(5) of this section. . . .” 45 C.F.R. § 1355.34(b)(3).

If a title IV-E agency does not demonstrate substantial conformity in the CFSR, it must “develop a program improvement plan” (PIP). 45 C.F.R. § 1355.35(a). The PIP must “[b]e developed jointly by title IV-E agency and Federal staff in consultation with the review team.” 45 C.F.R. § 1355.35(a)(1)(i). Among other things, the PIP must “[s]et forth the amount of progress the statewide . . . data will make toward meeting the national standards.” 45 C.F.R. § 1355.35(a)(1)(iv). The duration of a PIP is “not to exceed two years.” 45 C.F.R. § 1355.35(d)(1). However, the “Secretary may approve extensions of deadlines in a program improvement plan not to exceed one year.” 45 C.F.R. § 1355.35(d)(3).

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

ACF provided guidance about the PIP process in Amended Technical Bulletin #3, dated October 8, 2009. The technical bulletin states in relevant part:

States should use the most accurate and current submission of AFCARS and . . . NCANDS . . . data to establish baselines for implementing their PIPs. . . . If multiple file submissions are made to improve the data quality of a particular data profile period, the most recent and accurate data will be utilized for baselines. Once a PIP baseline is identified and approved by CB [Children’s Bureau (part of ACF)], it will remain as the baseline for the AAI [agreed-upon amount of improvement] through PIP implementation and any subsequent non-overlapping evaluative period.

ACF Ex. 8, at 7.²

Amended Technical Bulletin #3 also indicates that a state will have the full two-year PIP period and a one-year non-overlapping period to demonstrate that it met the goal for any data indicators measured by the PIP. ACF Ex. 8, at 7-8. States may submit “two consecutive 6-month periods of AFCARS data, four consecutive quarters (12 months) of NCANDS data, or other data approved by CB as evidence that the State has met the requirement for a particular data indicator earlier than the end of [the] non-overlapping 12-month period.” *Id.* Any “concerns . . . regarding the quality and accuracy of States’ data will be identified and resolved prior to the end of the non-overlapping 12-month period.” *Id.* at 8.

DCFS asserts, and ACF does not dispute, that a state successfully completes a PIP goal if it meets the goal “at least once during the PIP period” (including the non-overlapping period). DCFS Br. at 8; *see also id.* at 3.

Case Background

As relevant here, the 2009 CFSR found that DCFS, Illinois’ title IV-E agency, did not meet the national standard for two individual data measures used to assess a state’s substantial conformity with the child safety outcome “Children are, first and foremost, protected from abuse and neglect.” The two measures were:

- Recurrence of maltreatment. Of all children who were victims of substantiated or indicated abuse or neglect during the first 6 months of the reporting year, what percent did not experience another incident of substantiated or indicated abuse or neglect within a 6-month period?
- Maltreatment of children in foster care. Of all children in foster care during the reporting period, what percent were not victims of a substantiated or indicated maltreatment by foster parents or facility staff members?

ACF Ex. 4 (Corrected Federal Register Announcement) at 11.³ ACF established a national standard of 99.68% for the measure “Maltreatment of children in foster care” and a national standard of 94.6% for the measure “Recurrence of maltreatment.” *Id.* at 31.

² Amended Technical Bulletin #3 was issued after ACF completed the second round of CFSRs (including the 2009 CFSR for DCFS). Technical Bulletin #1, dated January 2005, was issued after ACF completed the initial round of CFSRs, and contains some similar language. *See* ACF Ex. 7.

³ ACF Exhibit 4 states that it shows the text of a Federal Register notice published on June 7, 2006 (71 Fed. Reg. 32,969), as corrected by a Federal Register notice published on January 23, 2007 (72 Fed. Reg. 2881). ACF Ex. 4, at 1.

The 2009 CFSR found that DCFS did not meet the national standard for either of these measures. ACF referred to the former measure as “Safety Outcome 1,” and also described it as “Absence of Child Abuse and/or Neglect in Foster Care.” ACF Ex. 1, at 2. The latter measure was assessed through two “items,” of which only Item 4, which “assesses efforts to manage safety and reduce risk of harm to children in their own homes and in their foster care placements,” is at issue here.⁴ ACF Ex. 6, at 6. ACF referred to this item as “Safety Outcome 2,” and also described it as “Risk Assessment and Safety Management.” ACF Exs. 1, at 2; 6, at 6; 19.

DCFS developed a PIP to improve its performance on these outcomes which, following negotiations, ACF approved effective January 1, 2011. ACF Ex. 12. Using DCFS’ fiscal year (FY) 2009 performance (99.40%) as a baseline, the PIP set 99.50% as the improvement goal for Safety Outcome 1. ACF Ex. 11, at 17. Using DCFS’ FY 2011 performance (80.3%) as a baseline, the PIP set 85% as the improvement goal for Safety Outcome 2. ACF Ex. 19.

The two-year period for implementing the PIP ended on December 31, 2012. ACF Ex. 1, at 2. ACF granted DCFS an additional non-overlapping period, ending on March 31, 2014, to achieve all of its PIP goals. *Id.*; ACF Ex. 13, at 1. ACF found that DCFS did not successfully complete the PIP with respect to Safety Outcomes 1 and 2 by the end of the PIP period, including the non-overlapping period. ACF Ex. 1, at 2.

For Safety Outcome 1, ACF’s notice of withholding identified a baseline of 99.60% and a goal of 99.68% instead of the 99.40% baseline and 99.50% goal established in the PIP. *Id.* ACF made the changes based on revised NCANDS data submitted by DCFS that corrected a coding error. Due to the coding error, abused children who were not in the state’s legal custody at the time the abuse occurred were incorrectly counted as children who were maltreated in care. DCFS notified ACF of the coding error in September 2014 and submitted revised data for FYs 2010-2014 in October 2014 and for FY 2009 in March 2015. ACF Ex. 18, at 4-9; DCFS Att. 3. Using the revised data, ACF determined that DCFS’ percentages for FYs 2010-2012 were 99.61%, 99.55%, and 99.57%, respectively. ACF Br. at 15. The revised goal based on DCFS’ performance in FY 2009 was 99.7% but ACF reduced the revised goal to the national standard of 99.68%. *Id.* DCFS failed to meet the 99.68% goal at any point during the PIP period.⁵ ACF Exs. 18, at 9-12; 1, at 2.

⁴ The Onsite Review Instrument and Instructions for the 2009 CFSR indicates that Item 4 must be rated as a “Strength” in order to meet the goal for Safety Outcome 2. ACF Ex. 3, at 21.

⁵ ACF states that it informally calculated DCFS’ percentage for FY 2013 as 99.32% and did not calculate a new percentage for the 12-month period ending on March 31, 2014 “due to the downward trend in the numbers, which revealed that DCFS could not meet its 99.68% PIP goal in that time period.” ACF Ex. 14 at ¶ 21; ACF Br. at 16. DCFS does not argue that it met the PIP goal after FY 2011.

For Safety Outcome 2, DCFS' percentage was 80.3% for FYs 2010-2012. DCFS Br. at 9; DCFS Att. 16.⁶ Thus, ACF determined that DCFS did not meet the 85% goal. DCFS Br. at 10; ACF Ex. 1, at 2.

Analysis

DCFS argues that it met the goals for both Safety Outcomes 1 and 2. Below we set out DCFS' arguments with respect to each outcome (including its two alternative arguments with respect to Safety Outcome 1) and explain why we conclude that they have no merit.

Safety Outcome 1

- a. *DCFS' argument that it met the 99.50% goal in the PIP using revised data submitted in October 2014 is unsupported.*

According to DCFS, the process for establishing a PIP in the regulations and Amended Technical Bulletin #3 "includes negotiation with the State and prohibits changing a PIP baseline after it is established." DCFS Br. at 5.⁷ DCFS argues that ACF violated its own rule by changing the PIP baseline and goal for Safety Outcome 1 after the PIP period ended and that ACF's finding that DCFS failed to meet the goal for Safety Outcome 1 should be reversed because DCFS met the original PIP goal of 99.50%. *Id.* at 6; *see also* DCFS Reply Br. at 2-3. In addition, DCFS alleges that in a September 2014 telephone conference to discuss the coding error, ACF advised DCFS that the baseline "could not be changed retroactively." DCFS Br. at 6, citing DCFS Att. 7; *see also* DCFS Reply Br. at 5. DCFS argues that "[b]ased on that call, [it] detrimentally and reasonably relied on the fact that a baseline could not and would not be changed" and "continued with ACF's permission, to submit additional updated data on multiple occasions." DCFS Reply Br. at 5. DCFS asserts that its performance should therefore be measured based on the 99.50% goal established by the PIP and that its percentages for three years during the PIP period (FYs 2010-2012) exceeded the 99.50% goal. DCFS Br. at 6; DCFS Reply Br. at 2, 6.

We conclude that it is immaterial whether ACF was prohibited from changing the PIP goal after the PIP period ended because DCFS has not disputed that it failed to meet the revised PIP goal of 99.68% nor has it shown that it met the original PIP goal of 99.50%. In essence, as ACF asserts, DCFS wants ACF to "compar[e] apples and oranges." ACF

⁶ Although not noted in DCFS' brief, the cited exhibit also shows the following percentages: March – June 2013, 78.8%, October-December 2013, 75.8%, and February 2014, 82.6%.

⁷ DCFS also states, somewhat inconsistently, that "the sole method to change the baseline and goal after it has been established is by joint renegotiation." DCFS Reply Br. at 2, citing 45 C.F.R. §§ 1355.35(e)(4)(iii), 1355.35(a)(1) and (2), and Amended Technical Bulletin #3. It is undisputed that there were no negotiations about revising the goal for Safety Outcome 1.

Br. at 21. DCFS proposes to use its revised data to measure its performance under the PIP (by counting in a way that puts its performance in the best light) without revising the data that was used to measure its performance in the baseline year (hence, continuing to count its earlier performance in a way that yields a lower goal for improvement). We next explain in more detail why this approach is unsupportable.

According to ACF, data reviewed and validated by both an ACF contractor and ACF's Office of Data Analysis, Research and Evaluation show that DCFS' percentages based on the revised data for FYs 2009-2012 were lower than the revised goal of 99.68% (99.60%, 99.61%, 99.55%, and 99.57%, respectively) and that DCFS' percentages based on the original data for those fiscal years were lower than the original goal of 99.50% (99.40%, 99.43%, 99.37%, and 99.36%, respectively). ACF Ex. 14 at ¶¶ 17-19; ACF Exs. 16 and 17.⁸ Thus, when DCFS' percentages are calculated using the number of children who were not maltreated in care as shown in the original data validated by ACF, the 99.50% goal that was derived from that data is not met. According to ACF, DCFS attempts to show that it met the 99.50% goal in FYs 2010-2012 using percentages for those years from the revised data instead. ACF Br. at 21. ACF takes the position that comparing percentages based on the revised data to the 99.50% goal derived from the original data is not "statistically valid." *Id.* In ACF's view, "[t]o allow for a statistically valid comparison, the same types of data must be considered for all years, including the baseline year of FY 2009." *Id.* Here, however, the revised and original data pertain to two different populations of children.

Illinois does not deny that its position that it met the 99.50% goal relies on comparing percentages during the PIP period based on the revised data to the 99.50% goal derived from the original data. Moreover, Illinois does not comment on ACF's argument that this is not a statistically valid comparison, and ACF's position is persuasive on its face. The measure of Illinois' performance on Safety Outcome 1 is the percentage of children in care who were not maltreated, which is calculated by dividing the number of children in care by the number of children who were not maltreated. The number of children in care is the same in both the original data and the revised data. *Compare* ACF Exs. 16 and 17 (both showing the number of children in care as 22,920 in FY 2009, 22,473 in FY 2010, 22,439 in FY 2011, and 22,486 in FY 2012). However, the number of children who were not maltreated in each year is lower in the original data than in the revised data. *Compare* ACF Ex. 16 (original data showing the number of children who were not maltreated in FYs 2009-2012 as 22,782, 22,344, 22,297 and 22,343) and ACF Ex. 17 (revised data showing the number of children who were not maltreated in FYs 2009-2012

⁸ The two pages comprising ACF Exhibit 17 were also submitted by DCFS as pages 2 and 3 of DCFS Attachment 8.

as 22,828, 22,386, 22,339, and 22,390). The percentage of children who were not maltreated is higher when the revised data are used because the number of children who were not maltreated is higher. This is due to the change in how abused children who were not in care when they were abused were counted, which would not reflect any actual improvement in the treatment of children.

DCFS suggests that ACF is required to use the best data available and therefore should accept its revised performance data (despite its claim that ACF was barred from revising the baseline data). *See* DCFS Br. at 5, quoting statement in Amended Technical Bulletin #3 that “[i]f multiple file submissions are made to improve the data quality of a particular data profile period, the most recent and accurate data will be utilized for baselines” (ACF Ex. 8, at 7 (our emphasis)). However, this statement does not require ACF to accept revised data for later periods while ignoring the most accurate data available for the baseline. While a state may submit revised data to measure its performance during the PIP period, ACF may reasonably insist, before accepting that data, that corresponding revisions be made to the data used to determine the state’s performance in the baseline year to ensure that the most accurate data is used for both.

We conclude that DCFS has not shown that it met the goal for this outcome since that can properly be determined only by using the original goal and measuring performance using the original method for counting abused children, or by using the revised goal and measuring performance based on the revised data.

DCFS also appears to be making an equitable argument that ACF should be estopped from changing the PIP baseline and goal based on a statement made by an ACF representative in a telephone conference. According to a DCFS contractor who was present during the conference, in response to DCFS’ question whether it was possible to change the baseline, the ACF representative “stated that they can’t go back and change the baseline.” DCFS Att. 7 at ¶ 6. Even assuming the representative made this statement, we find no basis for estoppel here. In addressing claims of estoppel in prior cases, the Board has stated:

[I]t is well-established that “the government cannot be estopped absent, at a minimum, a showing that the traditional requirements for estoppel are present (i.e., a factual misrepresentation by the government, reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance) and that the government’s employees or agents engaged in ‘affirmative misconduct.’” *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 31 (2011), citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990), and *Pacific Islander Council of Leaders*, DAB No. 2091, at 12 (2007) (“equitable estoppel does not lie against the federal government, if indeed it is available at all, absent at least a showing of affirmative misconduct.”).

See, e.g., *Southeastern Michigan Health Ass'n*, DAB No. 2682, at 16 (2016), quoting *Bright Beginnings for Kittitas Cty.*, DAB No. 2623, at 8 (2015). Here, DCFS did not show that it relied on the ACF representative's statement to its detriment. DCFS suggests that it would not have submitted the revised data to ACF had it been advised that ACF could change the PIP baseline and goal. While the revised data resulted in a higher goal that DCFS did not meet, DCFS was not prejudiced because it did not meet the original PIP goal of 99.50% using either the revised data or the original data. In any event, DCFS does not allege that the representative's statement in any way constituted the kind of affirmative misconduct required to estop the federal government.

b. DCFS' argument that it met the 99.68% goal using another set of revised data submitted in December 2015 also lacks merit.

DCFS argues in the alternative that, even if ACF were permitted to change the PIP baseline, resulting in a goal of 99.68% instead of 99.50%, DCFS met that goal in FYs 2009-2011 based on certain revised NCANDS data it submitted in December 2015 (after filing its appeal with the Board). DCFS Br. at 7. DCFS proposed this further data revision based on a 2013 Illinois Supreme Court decision, *Julie Q. v. Department of Children and Family Services*, 2013 IL 113783 (March 21, 2013), and a January 8, 2015 settlement in a class action lawsuit, *Ashley M. v. Department of Children and Family Services*, 2013 CH 20278 (Circuit Court of Cook County). *Id.* In *Julie Q.*, the court found that DCFS' allegation of child neglect against Julie Q. was void because it was based on a definition of neglect (placing a child in an environment that is injurious to the child's health and welfare) that the State legislature had "explicitly removed" from the Abused and Neglected Child Reporting Act in 1980 and had not reinserted until 2012. DCFS Att. 9, at 48-59. DCFS asserts that this decision "ultimately resulted in IDCFS expunging all . . . findings [based on this definition of neglect] from the Illinois State Central Register through July 12, 2012." DCFS Br. at 7. In the *Ashley M.* settlement agreement, DCFS agreed to expunge findings of neglect based on the reinserted definition "for any and all persons located in the State of Illinois who were investigated or indicated as perpetrators of child neglect . . . between July 13, 2012 and December 31, 2013" and "for any and all persons located in the State of Illinois who were indicated as perpetrators of child neglect . . . between May 31, 2014 through June 11, 2014" and to promulgate a clarification of the reinserted definition effective June 12, 2014. DCFS Att. 9, at 62-63. DCFS asserts that this "case resulted in the further expungement of [such findings] for the time periods July 13, 2012 through December 31, 2013 and May 31, 2014 through June 11, 2014." DCFS Br. at 7. Using this revised data, DCFS'

percentages for FYs 2009-2011 were 99.68%, 99.73%, and 99.68%, respectively, meeting the 99.68% goal.⁹ *Id.* at 8; DCFS Att. 8, 1st page.¹⁰ DCFS argues that if the Board “finds that the most recent and accurate data must be used when establishing a PIP goal, then surely, the most recent and accurate data should also be used when determining if IDCFS met those revised goals.” DCFS Br. at 7. However, ACF declined to reconsider its determination that DCFS did not meet its PIP goal for Safety Outcome 2 based on DCFS’ further data revision.¹¹

In its response to the appeal, ACF takes the position that it “reasonably exercised its programmatic discretion and expert judgment, and did not err in declining to consider the December 2015 revised data in connection with ACF’s determination that DCFS did not meet its PIP measurement goal on the maltreatment data indicator.” ACF Br. at 25. ACF asserts that neither the court decision in *Julie Q.* nor the settlement agreement in *Ashley M.* “requires a wholesale deletion of cases from several years’ worth of NCANDS data that is used for federal determinations regarding compliance with federal regulations.” *Id.* at 22. ACF points out that, “[b]y its terms, the [*Julie Q.*] decision is limited to a single individual, Julie Q.” and that “only two relatively brief time periods were at issue in *Ashley M.*,” one of which involved “post-PIP dates.” *Id.* at 23. ACF also argues that “[j]ust because DCFS agreed [in *Ashley M.*] not to pursue certain foster parents for neglect does not mean that the findings were invalid for purposes of evaluating DCFS’ performance under its federally mandated PIP.” *Id.* at 24. “Indeed,” says ACF, DCFS “denied in the *Ashley M.* settlement agreement that it committed any violations of law.” *Id.*, citing ACF Ex. 21 (also submitted as DCFS Att. 9, at 60-66), at 2 (stating in relevant part that defendants “deny any statutory, common law, constitutional or regulatory violations”). Additionally, ACF argues as follows:

⁹ DCFS also states that, using the revised data, it met the 99.50% goal “throughout the 2009-2014 PIP reporting period.” DCFS Br. at 8. However, it appears that DCFS is comparing its percentages for the PIP period based on the revised data to the 99.50% goal. As already discussed, this is not a statistically valid comparison.

¹⁰ The first page of DCFS Attachment 8 is a chart in the text of a DCFS e-mail dated January 14, 2016 that shows the percentage of children for whom there was “[n]o [m]altreatment in [c]are” for each year during FYs 2009-2014 based on “[o]ld” and “[n]ew” data. DCFS’ brief (at page 8) mistakenly cites the e-mail as DCFS Attachment 12. (DCFS submitted another version of this chart, not in the text of an e-mail, as “Corrected pg. 44,” which shows percentages for FYs 2009-2011 that are obscured in the chart in DCFS Attachment 8.)

¹¹ DCFS asserts that ACF’s representative “encouraged IDCFS to submit new data based on the [court] cases.” DCFS Br. at 7, citing DCFS Att. 10 (11/20/15 e-mail from ACF representative who had been notified about the data stating in part: “We always encourage states to resubmit data when they make corrections or changes. Please go ahead and resubmit the data. . . at any time.”). However, DCFS does not dispute the representative’s allegation in an affidavit submitted by ACF that neither she nor, to her knowledge, anyone else at ACF ever agreed to reconsider whether DCFS met the PIP goal using the revised data (ACF Ex. 14 at ¶¶ 24-25)).

DCFS does not dispute that the substantiated incidents of maltreatment (removed from the December 2015 data) occurred during the PIP and non-overlapping periods. The removed incidents relate directly to DCFS' PIP performance on the maltreatment data indicator; that is why they were included in the original data submission. The federal regulations do not contemplate that data can be manipulated post-PIP to show performance "improvement" that did not actually occur during the PIP. *See generally*, 45 C.F.R. §§ 1355.31-1355.37. . . . DCFS was on notice that its performance would be measured based on data collected during the PIP period and non-overlapping periods. . . .

Id. at 25. In its reply brief, DCFS does not elaborate on its argument that it complied with Safety Outcome 1 based on the revised data submitted in December 2015 but simply asserts that it did not "'manipulate' the data." DCFS Reply Br. at 7.

We conclude that ACF had discretion not to consider the revised data submitted in December 2015. The applicable regulations provide a two-year period for implementation of a PIP, which ACF may extend by one year. 45 C.F.R. § 1355.35(d)(1) and (3). The regulations do not require that states submit the data regarding their performance under the PIP by the end of this period. However, ACF advised states in Amended Technical Guidance #3 that, although they may make "multiple file submissions . . . to improve the data quality of a particular data profile period," "concerns . . . regarding the quality and accuracy of States' data will be identified and resolved prior to the end of the non-overlapping 12-month period." ACF Ex. 8, at 7-8. Otherwise, ACF's determination of whether a state has achieved substantial conformity might be delayed indefinitely, undercutting the statutory and regulatory scheme for withholding funds from states that fail to do so by the end of the PIP period. Thus, it is not unreasonable for ACF to impose the restriction of which it gave notice in the guidelines.

We further conclude that ACF did not abuse its discretion in declining to consider DCFS' December 2015 data submission for purposes of determining whether DCFS met Safety Outcome 1. We note preliminarily that we are not persuaded that DCFS necessarily "manipulated" the data improperly, as ACF implies. Safety Outcome 1 measured the percentage of foster care cases in which there was no finding of neglect. State law governs what constitutes neglect for purposes of title IV-B and IV-E. *See, e.g.*, Children's Bureau website, "What is child abuse and neglect? How does my State define child abuse and neglect?" ("within the minimum standards set by [federal legislation], each State is responsible for providing its own definitions of child abuse and neglect.") (at <http://www.acf.hhs.gov/cb/faq/can1>). DCFS may have revised its data in good faith to fairly reflect its definition of neglect during the time period at issue based on the court decision and settlement agreement. However, as ACF points out, the *Julie Q.* decision required DCFS to expunge only the finding of neglect against Julie Q. Thus, although it may have been equitable for DCFS to treat other foster parents like Julie Q. by expunging all other findings of neglect that were based on a definition of neglect not authorized by

State law when the findings were made, DCFS has not alleged, much less shown, that it was legally required to do so. In addition, the findings of neglect that DCFS expunged pursuant to the *Ashley M.* settlement agreement were based on a definition of neglect that had been reinserted in State law before the findings were made. That DCFS voluntarily entered into an agreement to expunge the findings it made before it promulgated a clarification of the definition does not mean that those findings were void as a matter of state law. DCFS thus has not established that there was any actual error in the data used by ACF to determine that DCFS did not meet the 99.68% goal. We conclude that ACF reasonably declined to consider DCFS' belated revised data.¹²

Accordingly, ACF properly determined that DCFS did not meet the goal for Safety Outcome 1.

Safety Outcome 2

DCFS admits that it did not meet the 85% goal for Safety Outcome 2 at any time during the PIP period based on the data it originally submitted to ACF. As noted above, only one of the items used to assess DCFS' performance on this safety outcome is at issue here—Item 4, “Risk Assessment and Safety Management.” DCFS' PIP provided that data from the “Illinois Outcome Enhancement Review” (OER) would be used to assess Illinois' performance with respect to Item 4. *See* ACF Ex. 19 (PIP Measurement Matrix for Item 4). A September 2014 Addendum to DCFS' PIP close-out report states that the OER evaluated several “basic processes . . . in Item 4,” including initial and ongoing “assessments of risk and safety;” “[a]ssessments of the home and caregiver(s) (including frequency of [caseworker] visits with the substitute caregiver);” “[if] safety concerns were identified[,] whether safety plans were developed, implemented and monitored;” and “[e]vidence of supervisory involvement in the assessment of risk/safety and guiding caseworker efforts to ensure safety for all children in the home.” ACF Ex. 20, at 1. The Addendum further states that these processes were “evaluated for two environments: the substitute care setting (for the child in care being reviewed), and for any children who might remain the home of origin,” and that “[o]ngoing assessment of risk and safety of children remaining in the home of origin is contingent on the procedural expectation that caseworkers visit these children once per month, not based on whether or not risk

¹² ACF did not act inconsistently in agreeing to consider revised data for Safety Outcome 1 after the end of the PIP period. ACF notes that in that situation, unlike the situation here, DCFS “represented that its . . . revised data was designed to correct a technical error, and DCFS brought the error to ACF's attention . . . while ACF was still evaluating the data it had received from DCFS in July 2014 for the non-overlapping period that ended on March 31, 2014. . . Also, ACF had not yet issued a final determination.” ACF Br. at 19.

actually exists.” *Id.* at 1-2. In addition, the Addendum acknowledges that DCFS “has not yet met the overall Item 4 goal of 85%,” stating that “the main reason for why cases were rated a Weakness for the Item overall” was “the lack of [caseworker] visits to the home.” *Id.* at 9, 4.

It thus appears that DCFS failed to meet the PIP goal of 85% for Item 4 because of the number of cases in which the requisite number of caseworker visits did not occur. However, DCFS requested that ACF also consider the “additional data analysis” in that report “in making a determination of DCFS’ achievement of its Item 4 PIP goal, as it represents a more qualitative summation of DCFS practice related to Risk Assessment and Safety Management.” *Id.* ACF subsequently determined that DCFS did not meet the 85% goal.¹³ ACF Ex. 1, at 2.

On appeal, DCFS asserts that it met the 85% goal based on all of the OER data pertinent to Item 4. DCFS Br. at 8-11. With its brief, DCFS submitted for the first time revised data (DCFS Attachments 18 and 19) that allegedly shows it “reached the PIP goal of 85% three times during the PIP period: 87.8% in March-June 2012, 86.3% in Sept-Dec 2012, and 88.6% in February 2014.” DCFS Br. at 3. DCFS argues that since “the most recent and accurate data reflects that IDCFS met the PIP measurement goal,” this data should be used to determine whether DCFS was in substantial compliance with respect to Safety Outcome 2. DCFS Br. at 2.

In its response to the appeal, ACF takes the position that it “reasonably exercised its discretion when it denied DCFS the opportunity to revise its methodology for measuring Item 4, given that DCFS first raised the issue after the PIP had ended.” ACF Br. at 25-26. ACF asserts that DCFS “did not raise any concerns with [the OER] methodology for measuring Item 4 at any time during the PIP years or non-overlapping period.” *Id.* at 26, citing ACF Ex. 14 at ¶ 7 and ACF Ex. 10, at 25 (DCFS2011 PIP narrative). ACF also asserts that it did not receive DCFS’ “documents applying the new methodology to its data on Item 4” until DCFS filed them in this appeal and has not reviewed or validated the data. ACF Br. at 17, 27.

DCFS disputes ACF’s assertion that it applied a “new methodology” to establish that it met the PIP goal. DCFS Reply Br. at 7. In particular, DCFS states:

¹³ ACF did not address DCFS’ request in its July 10, 2015 notice of withholding. However, according to ACF, it informed DCFS in a September 9, 2014 conference call “that it would not accept a belated methodology change on Item 4.” ACF Br. at 17, citing ACF Ex. 14 at ¶11. DCFS does not deny this.

IDCFS' understanding of what ACF means in their brief when they reference methodology is the tool and process used for collecting data, and the practices assessed within the tool. In producing new data for consideration in the reassessment of Item 4, IDCFS used the same methodology that was always used, the [OER] tool, which had been approved by ACF for use beginning in the spring of 2011.

No new cases were assessed, no new data was collected. The re-assessment of the data was based on existing data, and suggested that IDCFS had passed the PIP goal. The initially *reported* data was improperly based on very strict state caseworker visit requirements around a very short window of time, as opposed to the presence of actual safety and risk concerns and efforts to assess them (informally or formally) and address them (through appropriate service provision).

DCFS Reply Br. at 7-8 (emphasis in original).

We conclude that ACF reasonably declined to consider the data submitted by DCFS in this appeal for purposes of determining whether DCFS met Safety Outcome 2. DCFS originally did not count a case toward meeting the PIP goal if caseworker visits did not occur with the requisite frequency. DCFS now claims that the lack of caseworker visits should be disregarded and that it met the PIP goal based on the OER's assessment of additional processes under Item 4. Thus, ACF reasonably concluded that the data DCFS submitted with its appeal reflects a change in the methodology DCFS had agreed to use when its PIP was established.

As already noted, the "title IV-E agency and ACF may jointly renegotiate the terms and conditions of the program improvement plan as needed, provided that . . . (i) [t]he renegotiated plan is designed to correct the areas of the title IV-E agency's program determined not to be in substantial conformity and/or achieve a standard for the statewide. . . data indicators that is acceptable to ACF. . . and (iii) [t]he terms of the renegotiated plan are approved by ACF." 45 C.F.R. § 1355.35(e)(4). Nothing in this language requires that ACF agree to renegotiate how a state measures whether it meets a particular goal during the PIP period, much less long after the PIP period has ended. Thus, although DCFS in effect requests that ACF renegotiate the measure for Item 4, DCFS does not point to any authority that requires ACF to do so.

Accordingly, ACF properly determined that DCFS did not meet the PIP goal for Safety Outcome 2.

Conclusion

For the foregoing reasons, we conclude that DCFS was not in substantial compliance with IV-B and IV-E requirements and sustain the withholding in the amount of \$3,815,286.

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim

_____/s/
Leslie A. Sussan
Presiding Board Member