Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Indiana Family and Social Services Administration
Docket No. A-11-117
Decision No. 2453
April 4, 2012

DECISION

The Indiana Family and Social Services Administration (Indiana) appeals the August 17, 2011 determination by the Administration for Children and Families (ACF). ACF denied Indiana's Temporary Assistance for Needy Families (TANF) emergency contingency fund (ECF) application for nonrecurrent short-term benefits expenditures in the amount of $21,655,185 for hospital charity care, a community economic relief fund (CERF), and Township Assistance programs.[1] ACF determined that, for all three groups of benefits, the estimating methodologies that Indiana used to identify expenditures attributable to TANF-eligible users did not yield reasonable estimates. ACF also determined that hospital charity care is not a TANF maintenance-of-effort (MOE) expenditure under section 260.30 of the TANF regulations because it represents "foregone revenue."

Indiana argues that its estimating methodologies were reasonable and that the principles ACF applied to evaluate its estimated expenditures constituted an invalid legislative rule of which Indiana had no prior notice. Indiana also argues that ACF's determination was arbitrary and capricious because ACF granted ECF funds to other states that used similar methodologies. Indiana further contends that hospital charity care is a TANF MOE expenditure and not "foregone revenue" under the TANF regulations.

For the reasons explained below, we sustain ACF's August 17, 2011 determination.

Legal Background

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub.L. 104-193, created the TANF program under Title IV of the Social

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[1] Indiana asserts in its notice of appeal that the amount in dispute is $21,655,185. We note that both Indiana and ACF at times refer to $21,665,185, the amount conditionally approved by ACF in its September 29, 2010 notice. Indiana Ex. 5, at 91. The August 17, 2011 final determination does not specify the total amount denied, and the parties do not address the discrepancy. Our decision addresses only the amount disputed in Indiana's notice of appeal.

Security Act.[2] The purposes of the TANF program are to—

- provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- encourage the formation and maintenance of two-parent families.

Act § 401(a); *see also* 45 C.F.R. § 260.20. Assistance under the TANF program is available only for "needy families with (or expecting) children[.]" Act § 402(a)(1)(A)(i); *see also* Act § 408(a)(1).

To receive its full allocation of federal TANF funds, a state must expend a specified level of state funds (based on historic state welfare expenditure levels) to assist eligible families and/or expectant mothers. Act §§ 402(a)(1)(A)(i), 408(a)(1), 409(a)(7); 45 C.F.R. § 263.1.[3] These state expenditures are referred to as MOE expenditures. The Board has recognized historically that, in general, "maintenance of effort provisions are intended to prevent state and local governments from reducing expenditures of their own funds in federally assisted programs[.]" *California Dept. of Aging,* DAB No. 301, at 1 (1982).

The TANF regulations define the term "expenditure" as "any amount of Federal TANF or State MOE funds that a State expends, spends, pays out, or disburses . . ." but "does not include any amounts that merely represent avoided costs or foregone revenue." 45 C.F.R. § 260.30. The regulations distinguish "assistance" from "nonrecurrent, short-term benefits" that are "designed to deal with a specific crisis situation or episode of need; [a]re not intended to meet recurrent or ongoing needs; and [w]ill not extend beyond four months." 45 C.F.R. § 260.31(b).

[2] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.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. The regulations implementing the TANF legislation appear at 45 C.F.R. Parts 260-270. ACF published proposed and final regulations on November 20, 1997 (62 Fed. Reg. 62,124) and April 12, 1999 (64 Fed. Reg. 17,720) respectively, and technical and correcting amendments to the final rule on July 26, 1999 (64 Fed. Reg. 40,290).

[3] The Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat 4 (2006) included provisions that reauthorized and amended the TANF program. ACF published interim and final regulations implementing the DEFRA provisions on June 29, 2006 (71 Fed. Reg. 37,454) and February 5, 2008 (73 Fed. Reg. 6772) respectively.

Under the Act and implementing regulations, somewhat different rules and restrictions apply to federal TANF funds and MOE. The regulations at 45 C.F.R. Part 263, subpart A, set forth the rules that apply to MOE. Section 263.2 provides that "[e]xpenditures of State funds in TANF or separate State programs may count" toward meeting a State's basic MOE expenditure requirements if they are made for specified types of benefits or services that are reasonably calculated to accomplish a purpose of the TANF program. 45 C.F.R. § 263.2(a); 64 Fed. Reg. at 17,819-20. In general, benefits or services may count toward MOE only if they have been provided to or on behalf of an "eligible family." 45 C.F.R. § 263.2(b); Act § 409(a)(7)(b); 64 Fed. Reg. at 17,817-19. An "eligible family," as defined by each state, must:

> (1) Be comprised of citizens or non-citizens who:
> (i) Are eligible for TANF assistance;
> (ii) Would be eligible for TANF assistance, but for the time limit on the receipt of federally funded assistance; or
> (iii) Are lawfully present in the United States and would be eligible for assistance, but for the application of title IV of PRWORA;
> (2) Include a child living with a custodial parent or other adult caretaker relative (or consist of a pregnant individual); and
> (3) Be financially eligible according to the appropriate income and resource (when applicable) standards established by the State and contained in its TANF plan.

45 C.F.R. § 263.2(b). Under PRWORA, if a state uses separate state program funds to provide state or local public benefits, the state "may only claim for MOE purposes the qualified expenditures made with respect to eligible family members who are qualified aliens, nonimmigrants under the Immigration and Nationality Act, aliens paroled into this country under section 212(d)(5) of such Act for less than one year, and illegal aliens" if provided for under a particular type of state law inapplicable here. 64 Fed. Reg. 17,819.

Section 263.2(e) provides that MOE may include "allowable costs" borne by third parties and the value of third party in-kind contributions if:

> (1) The expenditure is verifiable and meets all applicable requirements in 45 C.F.R. §§ 92.3 [administrative requirements for grants to states and applicable definitions]; and 92.24 [cost sharing];
> (2) There is an agreement between the State and the other party allowing the State to count the expenditure toward its MOE requirement; and,
> (3) The State counts a cash donation only when it is actually spent.

Section 92.24(b)(6) provides that costs and third-party in-kind contributions "counting towards satisfying a cost-sharing or matching requirement must be verifiable" and "must show how the value placed on third party in-kind contributions was derived."

Section 2101 of the 2009 American Recovery and Reinvestment Act (ARRA), Pub.L. 111-5, added section 403(c) to the Act to create a $5 billion TANF Emergency Contingency Fund (ECF) to help states, territories and tribes in Fiscal Years ("FYs") 2009 and 2010 that had an increase in assistance caseloads and specified types of expenditures due to the economic downturn. Under the provision, a state could receive federal reimbursement for 80% of increased costs above those of the comparable quarter in FYs 2007 or 2008 for three types of expenditures: (1) basic assistance, (2) nonrecurrent short-term benefits, and (3) subsidized employment. Act § 403(c).

The 2009 legislation further provided:

> In determining the size of the caseload of a State and the expenditures of a State for . . . nonrecurrent, short-term benefits . . . , during any period for which the State requests funds under this subsection . . . the Secretary may make appropriate adjustments to the data, on a State-by-State basis, to ensure that the data are comparable with respect to the groups of families served and the types of aid provided. The Secretary may develop a mechanism for collecting expenditure data, including procedures which allow States to make reasonable estimates, and may set deadlines for making revisions to the data.

Act § 403(c)(4).

Case Background

In August 2010, Indiana submitted an ECF application in the amount of $26,762,466 for the following categories of expenditures, claimed as nonrecurrent short-term benefits:

1) Emergency "charity care" health care services to non-Medicaid/SCHIP-covered children and families below 250% of poverty provided through three major hospital groups.

2) United Way of Central Indiana's Community Economic Relief Fund (CERF) grants to nearly 50 community organizations to provide short-term direct assistance that stabilizes families, prevents homelessness or disruptions in employment, including food, housing, utilities, transportation, medical or child care or other interventions that keep families working and stable;

3) Feeding Indiana's Hungry, Inc. (FIsH) program, including the value of food and volunteer time of Indiana's food banks to distribute food through food pantries to families with children 18 years of age or younger; and

4) Township Assistance for emergency benefits provided by Indiana townships to help families with housing, utilities, food, health care, funerals, burials and

> other individualized supportive benefits, until regular TANF, SNAP, Medicaid and public housing benefits are provided.

Indiana Ex. 1, at 28. Indiana described all four categories of third-party expenditures as MOE expenditures. Indiana Ex. 4, at 51, 54, 56-57. The application described the actual data and the estimating methodologies that Indiana used to calculate the amounts of expenditures claimed under each program. Indiana Ex. 1. Specifically, Indiana stated:

> For "charity care" we have used the actual cost of uncompensated, emergency medical services provided by three hospital groups to Indiana's indigent population for FYs 2007, 2008 & 2009. These hospital costs were first reduced for CMS' Disproportionate Share Hospital Program (DSH) reimbursement for hospitals that serve a large proportion of Medicaid eligible and low-income population. For the one public hospital . . . we have claimed only the expenditures for eligible families in excess of 1995 costs. Using Census data, we then reduced the "population" amounts to derive the proportionate costs (48%) for each hospital for families with minor children, excluding non-qualified aliens. For FY 2010, costs were estimated based on FY 2009 costs with an assumed increase of 1.5% each quarter.
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> United Way CERF expenditures reflect actual expenditures for FY 2009 and total budgeted amounts for FY 2010, which are nearly depleted. The CERF program was newly created and funded primarily by foundations for FYs 2009 and 2010 to address the economic downturn, so no comparable expenditures were made in FYs 2007 or 2008. We eliminated expenditures for food because these costs were duplicated by the FIsH food bank expenditures. Based on the income data collected by United Way agencies and Census data, we reduced total expenditures by 52% to claim only costs for eligible families with minor children below 250% of poverty, excluding non-qualified aliens.
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> All non-recurrent, short-term township assistance is provided to needy households below 250% of poverty; therefore we have reduced total expenditures by 52% to ensure only costs for families with minor children, excluding non-qualified aliens, are claimed. Also, since townships are local agencies, we have claimed only annual expenditures for eligible families that exceed total costs for FY 1995.

Indiana Ex. 1, at 29.

By letter dated September 29, 2010, ACF notified Indiana that ACF had approved the portion of the application for emergency funds relating to FIsH. Indiana Ex. 5. The letter also stated that the charity care, CERF, and Township Assistance costs had not been approved because ACF had "not determined whether all of the reported expenditures are allowable expenditures for Emergency Fund reimbursement." *Id.* ACF further stated

that to ensure that emergency funds would be available to Indiana "if the application becomes approvable," ACF was "conditionally awarding funds in the amount of $21,665,185" pending approval of the remaining portions of the application. *Id.* ACF subsequently posed additional questions to Indiana regarding the application, and Indiana responded to those requests on October 8 and 25, 2010.

On August 17, 2011, ACF issued the determination that is the subject of this appeal. ACF determined that Indiana's methodologies to estimate the charity care, CERF and Township Assistance expenditures attributable to eligible family members did not yield reasonable estimates. Indiana Ex. 8. ACF explained that "TANF does permit reasonable estimates, in limited circumstances," where "requiring actual data would be infeasible or materially affect the ability to deliver the benefit or service." *Id.* at 150. Specifically, ACF stated, it permits reasonable estimates based on "the principles . . . that States: (1) use actual data if reasonably available; (2) demonstrate that actual data are not reasonably available, if the State reaches that conclusion; and (3) describe the methodology and explain why it is reasonable (both in estimating the share of families it claims and the associated expenses), if the State seeks to use an estimation methodology." *Id.*

Here, ACF stated, Indiana did not obtain actual data on whether the recipients of the charity care, CERF or Township Assistance services and benefits were members of eligible families (i.e., whether they lived in a family with a child) and whether they were either citizens or qualified aliens because the third-party providers either did not collect this information at the time the services were provided or did not provide it to Indiana. Consequently, ACF stated, Indiana did not determine the actual costs associated with the TANF-eligible recipients. ACF concluded, however, that Indiana did not demonstrate that the actual data were not reasonably available. "The fact that the providers . . . could have collected and/or provided the information to the State, yet simply did not, does not satisfy the 'not reasonably available' requirement and justify using an estimating methodology." *Id.* at 151.

Furthermore, ACF stated, Indiana's use of general population surveys to identify the share of benefits attributable to eligible families was unreasonable. According to ACF, "[o]ther estimates that [it had] reviewed included specialized surveys of the target population, not just a general population survey, to determine the share of users that were TANF-eligible." *Id.* ACF stated that Indiana presented "no evidence to support an assumption that a general population survey would represent the characteristics of those who are recipients of charity care, CERF, or Township Assistance." *Id.* Because Indiana's estimate of program costs could be significantly different from actual costs, ACF concluded, it could not consider the estimates reasonable.

ACF also determined that the hospitals' "charity care under the Indiana application is not a TANF MOE expenditure." *Id.* at 150. The definition of "expenditure" at section 260.30, ACF stated, provides that an expenditure "does not include any amounts that

merely represent avoided costs or foregone revenue." *Id.* ACF noted, and Indiana has acknowledged, the "hospitals involved in Indiana's application normally charge patients for their services but make an exception for charity care cases and do not impose a charge on these patients." *Id.*; Indiana Ex. 3, at 40. According to ACF, the "decision to treat these services as charity care results in foregone revenue, which means that charity care is not a TANF MOE expenditure." *Id.*

Analysis

1. *We sustain ACF's determination that Indiana's estimating methodologies yielded unreasonable estimated expenditures.*

   A. *ACF's determination was not based on an invalid legislative rule.*

Indiana argues that ACF based its rejection of Indiana's estimating methodologies on the application of the three principles described in the August 2011 determination, that states must (1) use actual data if reasonably available; (2) demonstrate that actual data are not reasonably available, if the state reaches that conclusion; and (3) describe the methodology and explain why it is reasonable (both in estimating the share of families it claims and the associated expenses). According to Indiana, ACF's determination was invalid because the principles together "establish a new legislative rule of general applicability; and therefore was required to be promulgated pursuant to the Administrative Procedure Act (APA)." Indiana Br. at 13, citing 5 U.S.C. § 553. Indiana contends that the principles were not exempt from the APA notice and comment requirements as interpretive rules pursuant to 5 U.S.C. § 553(b) because they did not simply clarify or explain an existing rule or state what ACF interpreted a statute or regulation to mean. *Id.* at 13-14 (citing cases). Indiana argues that "there is no basis in law or regulation for these three 'principles' with respect to nonrecurrent, short-term benefits." Indiana Reply at 5. Even "if the principles were valid and binding," Indiana contends, "they were enumerated *ex post facto* in the decision letter and nearly one year after all costs for ECF claims had to be expended." Indiana Br. at 15.

Indiana mischaracterizes ACF's determination, fails to take into account the basic and longstanding requirements that third-party MOE expenditures must be supported by verifiable cost and caseload data, and ignores prior agency statements reflecting the principles. As noted, section 263.2(e) of the regulations provides that MOE may include "allowable costs" borne by third parties and the value of third party in-kind contributions, if the costs are "verifiable" and meet "all applicable requirements in 45 CFR §§ 92.3 [definitions, administrative requirements for grants to states]; and 92.24 [cost sharing]." Section 92.24(b)(6), in turn, provides that "[c]osts and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors." Furthermore, as noted above, benefits or services may count toward MOE only if they have been provided

to or on behalf of an "eligible family." 45 C.F.R. § 263.2(b); Act § 409(a)(7)(b). Thus, the regulations require claimed MOE expenditures, including those for nonrecurrent, short-term benefits, to be supported by reliable documentation and data demonstrating that the benefits were provided only to eligible families and that the amounts of expenditures attributable to those individuals are accurate.

In a December 2004 policy announcement, of which Indiana does not deny having notice, ACF provided additional guidance as to when third-party cash or in-kind donations may count toward a state's TANF MOE requirement. TANF-ACF-PA-2004-01.[4] ACF noted that the TANF MOE "cost-sharing requirement may be met through allowable State or local cash expenditures for goods and services, expenditures for allowable costs by other non-Federal third parties (e.g., a non-profit organization, corporation, or other private party), cash donations by non-Federal third parties, as well as the value of third party in-kind contributions. . . ." *Id.* ACF further reiterated that *"TANF MOE funds must be spent on eligible families"* and that, *"[r]egardless of the source of the expenditures, the State's records must show that all the costs are verifiable and meet all applicable requirements in 45 CFR 263.2 through 263.6 and 45 CFR 92.24 in order to count toward the State's MOE requirement. . . ."* *Id.* (emphasis added). Thus, ACF's 2004 policy announcement made clear that third-party MOE expenditures must be supported by verifiable cost and caseload data.

In light of these well-established requirements, we conclude that the principles described by ACF in the August 2011 determination merely articulated ACF's common sense approach under the Act, regulations and policy announcement for considering when to permit a state to use a particular estimating methodology to support an ECF application for reimbursement of third-party MOE expenditures in lieu of actual data. That is, under the requirements that all costs must be verifiable and that MOE funds may be spent only on eligible families, it is common sense to require states to "use actual data if reasonably available" and to "demonstrate that actual data are not reasonably available, if the State reaches that conclusion," given that actual cost and caseload data are most subject to accurate verification and are inherently more reliable than estimates. Indiana Ex. 8, at 150.

Furthermore, it logically follows that, if requiring actual cost and/or caseload data would "be infeasible or materially affect the ability to deliver the benefit or service" and ACF were to permit a state to use an estimating methodology in such circumstances, the state would be required to "describe the methodology and explain why it is reasonable (both in estimating the share of families it claims and the associated expenses)." *Id.* Only with a clear understanding of a state's estimating methodologies can ACF determine whether estimated expenditures are rationally related to the targeted population, and thereby

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[4] Available at http://www.acf.hhs.gov/programs/ofa/policy/pa-ofa/2004/pa200401.htm.

ensure that the state has met its statutory cost-sharing responsibility. We therefore find no merit in Indiana's contention that the principles applied by ACF to evaluate Indiana's ECF application created new substantive legal requirements subject to notice and comment rulemaking.

In addition, we reject Indiana's claim that the ECF statute, application instructions or ACF guidance on the ECF do not "elaborate [on] the three principles ostensibly used by ACF . . . ." Indiana Br. at 15-16; Indiana Reply at 6. As noted above, the legislation provided:

> In determining the size of the caseload of a State and the expenditures of a State for . . . nonrecurrent, short-term benefits . . . , during any period for which the State requests funds under this subsection . . . the Secretary may make appropriate adjustments to the data, on a State-by-State basis, to ensure that the data are comparable with respect to the groups of families served and the types of aid provided. The Secretary may develop a mechanism for collecting expenditure data, including procedures which allow States to make reasonable estimates, and may set deadlines for making revisions to the data.

Act § 403(c)(4). Pursuant to the Secretary's authority under section 403(c)(4), ACF explained in an April 3, 2009 policy announcement providing "initial guidance regarding the newly established Emergency Fund" that, "[t]o facilitate the awarding of funds as quickly as possible, we anticipate that we will accept reasonable estimates for caseload and expenditure data." TANF-ACF-PA-2009-01.[5] ACF further explained, however, that it "expect[ed] to allow a jurisdiction to submit such estimated data up to one month before the beginning of a quarter. A jurisdiction would then revise these estimates on subsequent quarterly submissions *until it has submitted final caseload and expenditure figures.*" *Id.* (emphasis added). ACF also advised states that the information submitted in support of a request for emergency funds would be "tested for reliability and accuracy." *Id.* Accordingly, ACF stated, *"jurisdictions are expected, as required by the Federal regulations at 45 CFR 92.20 and 45 CFR 92.42, to maintain pertinent documentation related to caseload and expenditure data used to support the request for funds, be able to link the information to the relevant reporting and accounting system, and make such information available in a clear and understandable form that can be validated by an auditor."* *Id.* (emphasis added).

Similarly, ACF's March 3, 2010 final instructions and form for requesting ECF grants noted: "A jurisdiction can apply for funds before the start of a fiscal quarter, therefore financial and caseload data may contain estimates. . . . *Expenditures for a*

[5] Available at http://www.acf.hhs.gov/programs/ofa/policy/pa-ofa/2009/pa200901.htm.

quarter should reflect the amount actually expended for that particular quarter (or estimated to be expended for that quarter, if data include projections for the upcoming quarter or are otherwise not final), irrespective of when the jurisdiction reports them on a TANF financial report." Indiana Ex. 14, at 276 (TANF-ACF-PI-2010-01 (emphasis added)).

The ECF statute and ACF's guidance on the emergency fund thus plainly notified states that they were expected to provide actual cost and caseload data to support applications for reimbursement of nonrecurrent, short-term benefits. The guidance also made clear that ACF would permit states to use "reasonable estimates" to support requests for prospective awards, only where actual data would not be available at the time an application was submitted. Consequently, states could only logically conclude that in the event they were not able to provide actual cost and caseload data, they would, at a minimum, be required to explain why actual data were not available and to show that any estimating methodologies on which they relied to support final claimed expenditures were reasonable.

In addition to ACF's general instructions and policy announcements relating to the ECF, ACF notified Indiana shortly after Indiana had submitted its ECF application that ACF was concerned that Indiana's reliance on Census Bureau data for estimating final expenditures was "not an appropriate source for estimation." Indiana Ex. 4, at 43-44. ACF provided Indiana an opportunity to respond to this concern. Following its receipt of Indiana's initial responses, ACF posed a series of follow-up questions in September 2010 in which it specifically advised Indiana: "ACF requires the use of actual data rather than estimates unless the State demonstrates that actual data cannot reasonably be provided. . . . The state should either provide actual data or offer an explanation of why use of actual data is not reasonably feasible." Indiana Ex. 4, at 63-64, 69-70.

Moreover, in the September 29, 2010 determination advising Indiana that ACF had approved the portion of Indiana's application relating to the food bank/FIsH program, ACF reminded Indiana that, "[t]ypically, TANF expenditures for benefits or services are based on making individual determinations of need and family composition." Indiana Ex. 5, at 91. Consistent with ACF's "Questions and Answers on the ARRA TANF Program Emergency Fund," ACF reiterated that only in "special circumstances," would a state be permitted to claim expenditures without making

individual determinations of need and family composition. *Id.*; Indiana Ex. 14, at 312.[6] For example:

> The provision of emergency food assistance in the context of a food bank presents special circumstances under which such individualized determinations may be difficult or impossible, because food assistance is provided without making individualized income determinations or taking individual applications, with a food bank largely relying on the fact that only individuals and families in substantial need are likely to seek food bank assistance.

Id. "Accordingly," ACF stated, "in such circumstances, it is reasonable for a jurisdiction to make use of a reasonable estimation methodology to determine the share of overall expenditures attributable to needy families" and that the jurisdiction would "be accountable to auditors for the estimation methodology used . . . ." Indiana Ex. 5, at 91.

In light of ACF's general guidance relating to the ARRA TANF emergency fund and ACF's direct communications with Indiana pending ACF's review of Indiana's ECF application, we reject Indiana's contention that it was not until it received the August 2011 disallowance letter that Indiana was made aware of the principles described in the notice.

B. Indiana did not show that the missing data were not reasonably available.

Indiana argues that, even if the three principles applied by ACF were valid, Indiana demonstrated that the missing data showing the benefit expenditures attributable to eligible family members were not reasonably available. Indiana contends that for "all three programs [it] claimed only actual expenditures for households with income below 250% of poverty." Indiana Br. at 18. However, Indiana asserts, "primarily because [these] programs all pre-dated the ARRA legislation," the third-party agencies either did not "collect relationship data" or "did not include such data . . . in a retrievable, automated database." Indiana Reply at 9. Specifically, Indiana states that it "was not able to use actual data to determine the number or percentage of families that included a child 18 years of age or under for the three programs, because such information is only available in hard-copy case records in the case of charity care and Township Assistance and is not included in any extractable, electronic data base." Indiana Br. at 16. Indiana

[6] The questions and answers document was posted on ACF's website along with background information on the TANF Emergency Fund. Indiana Ex. 14, at 292-315. Indiana does not deny that it had timely notice of this ACF guidance and elsewhere expressly states that it relied on these questions and answers as "ACF's primary method of providing guidance and direction," along with the reporting form and its instructions. Indiana Br. at 15-16.

also alleges that it could not retroactively extract household composition information for the charity care expenditures "primarily due to the strict HIPAA [Health Insurance Portability and Accountability Act] confidentiality and release of patient information requirements." Indiana Br. at 17. "For the CERF program," Indiana states, "household composition was not a condition of eligibility and the data was not collected at all for CERF clients . . . ." *Id.* To require Indiana to retroactively obtain the missing data for the three programs, Indiana now argues, would be excessively burdensome and "wholly unreasonable." Indiana Reply at 10.

Under the applicable regulations and guidelines, we find no error in ACF's conclusion that Indiana failed to show that the missing data were not reasonably available. ACF's Questions and Answers on the ARRA ECF explicitly advised states that they would be permitted to "count expenditures by a third party as State spending for purposes of the Emergency Fund" only as provided for under the existing regulations. Indiana Ex. 14, at 302-303. Specifically, ACF explained, a "State that has appropriate agreements in place and otherwise follows Federal requirements [may] count third-party expenditures as MOE if the expenditures are for eligible families and meet a TANF purpose." *Id.* at 302. Moreover, ACF "remind[ed] states that the regulations at 45 CFR 263.2(e) specify the requirements for counting third-party expenditures as MOE," and advised states to follow Policy Announcement TANF-ACF-PA-2004-01. *Id.* As set out above, those provisions require states to provide verifiable expenditure and caseload data to support MOE expenditures and to have agreements with the third parties allowing the states to count the expenditures toward their MOE requirements. In addition, ACF's Questions and Answers reminded states that estimating expenditures attributable to eligible families would be permitted only in "special circumstances," where individualized income and family composition determinations "may be difficult or impossible" to obtain because the type of assistance is provided without making such individualized income determinations or taking individual applications. Indiana Ex. 14, at 312.

Here, Indiana does not allege that it would have been difficult or impossible for the third-party entities that provided the CERF, Township Assistance, and charity care benefits to make individualized income, family composition and citizenship/alienage determinations at the time the benefits were provided. Indeed, Indiana acknowledges that income and family composition determinations were in fact made for some recipients of charity care and that the United Way agencies and townships were capable of collecting and reporting such information. Indiana Ex. 4, at 72-74. Instead, Indiana essentially argues that it should be excused from the data collection and reporting requirements because it could not foresee, at the time the benefits were provided, that it might subsequently obtain emergency fund reimbursement for a portion of the third-party expenditures. This argument merely highlights that, as of the time the benefits were provided, Indiana did not have "appropriate agreements in place" requiring the third parties to collect and report the necessary financial, family composition and citizenship data. This failure to meet one of the preconditions for obtaining reimbursement for third-party MOE

expenditures is hardly a reasonable basis to excuse Indiana from its responsibility to provide verifiable expenditure and caseload data to substantiate the MOE expenditures. Accordingly, we find no error in ACF's determination that under the applicable guidelines for requesting reimbursement of third-party expenditures, Indiana failed to show that the missing data were not reasonably available. In sum, the missing data could have been collected in retrievable formats at the time the benefits were provided, and for TANF ECF reimbursement, should have been collected, but simply were not.

We additionally note that Indiana's explanation as to why the missing demographic data relating to the charity care expenditures could not be retroactively retrieved has no merit. While demographic data is included in protected "individually identifiable health information" under the HIPAA privacy rule, there are no restrictions on the use or disclosure of de-identified health information, which neither identifies nor provides a reasonable basis to identify an individual. 45 C.F.R. §§ 160.103, 164.514; *see also Summary of the HIPAA Privacy Rule, DHHS OGC,* available at *http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf.* In this case, the missing demographic data need not have been identified with any particular individuals to support Indiana's request for reimbursement of the charity care expenditures. Yet, Indiana failed to show that it even asked the hospitals for de-identified data regarding the family composition and citizenship or alienage status of the patients who received the benefits. We therefore conclude that Indiana has not shown that the missing charity care data were not reasonably available.

C. Indiana failed to demonstrate that its estimating methodologies were reasonable.

We further conclude that, regardless of whether the missing data were or were not reasonably available, ACF properly determined that Indiana's estimating methodologies were not reasonable. As noted, Indiana asserts that, for all three programs, it "claimed only actual expenditures for households with income below 250% of poverty." Indiana Br. at 18. According to Indiana, the "hospitals and townships took steps to verify that the income was actually below 250% of poverty," and CERF agencies generally "accepted the client's declaration that they were needy with income below 250% of poverty." *Id.* To determine the percentage of expenditures attributable to members of those families living with a child, Indiana used the U.S. Census, American Community Survey for Indiana for households with a child 17 or under, below 250% of poverty. Indiana also asserts that its use of the Census data was "similar to the methodologies used by several States to calculate the proportion of expenditures those States claimed as Food Bank Expenditures." *Id.*

To estimate the expenditures attributable to unauthorized immigrants, Indiana relied on two separate studies: (1) The Department of Homeland Security, Office of Immigration Statistics, "Estimates of Unauthorized Immigrant Population Residing in the United

States," 2008; and (2) the Pew Hispanic Center, "A Portrait of Unauthorized Immigrants in the United States," April 14, 2009. Indiana Exs. 15-16. According to Indiana, the studies "show consistent data that in Indiana approximately 1.9% of the population consists of unauthorized immigrants." Indiana Br. at 18. Indiana states that it was aware of arguments that unauthorized immigrants are undercounted and that a higher proportion are low income. However, Indiana asserts, the literature is replete with conflicting arguments about whether they account for a higher or lower proportion of people receiving benefits. Indiana Reply at 12. Consequently, Indiana argues, its use of the Department of Homeland Security statistics was "as reasonable as any other method." *Id.*

Indiana's estimating methodology also assumed that the costs for TANF eligible families below 250% of poverty "would not be more than expenditures for other individuals." Indiana Br. at 19. Indiana believed this assumption was reasonable because "families with children are larger than individuals or couples without children," and, consequently, Township Assistance and CERF expenditures for eligible family members "would automatically be larger due to household size." *Id.* Second, ACF states, the Census data reports families with a child 17 or younger, and ACF permits states to claim expenditures for children 18 years of age or younger (and in certain circumstances 24 years of age or younger). Therefore, Indiana states that, "if anything," its methodology understated the costs attributable to TANF-eligible families. *Id.*

Indiana's arguments fail to demonstrate that its estimating methodologies were reasonable. On initial review of Indiana's application, ACF instructed Indiana to explain why the methodologies were reasonable, "both in estimating the share of families that can be claimed and the estimates for their expenses." Indiana Ex. 6, at 99-101, 105-106, 108. ACF noted that Indiana was limiting its claim to families with minor children below 250% of poverty and excluding non-qualified aliens. "However," ACF stated, "simply identifying the percentage of households with minor children does not in itself provide information as to whether their average costs are greater or lesser than for other households." *Id.* ACF directed Indiana to "either demonstrate" that the average costs of TANF eligible families were comparable to other households "or otherwise provide evidence that the amount being claimed for these families is reasonable." *Id.* Further, ACF stated, in "excluding costs for households that do not meet citizenship/alienage requirements," the estimates did not provide supporting evidence that the distribution of unauthorized residents using the programs was similar to the distribution of unauthorized residents in the State generally. *Id.* If Indiana considered this to be a reasonable assumption, ACF stated, Indiana needed to explain its basis and provide supporting evidence that the average expenditures on behalf of unauthorized residents were the same as the average expenditures for citizens and authorized immigrants in TANF-eligible families.

ACF's instructions to Indiana were entirely consistent with its prior guidance on the use of estimating methodologies. For example in a May 2000 policy announcement, ACF

explained that states would be permitted to develop methodologies to yield reasonable estimates of transportation project expenditures for purposes of TANF and other federal funding. TANF-ACF-PA-00-2.[7] ACF explained that, to determine expenditures attributable to "TANF-eligibles benefitting from the project," the state might use "ridership," that is, a survey of actual riders showing the percentage who are TANF-eligible. *Id.* Further, the policy announcement provided: "After the start-up period, the estimate would have to be re-evaluated at least annually," and "[a]ny TANF funds used in a project after the start-up period . . . must be based on a current estimate." *Id.* Thus, ACF has at times accepted as reasonable estimation methodologies based on "specialized surveys of the target population," that is, surveys tailored to reflect the population actually using or benefitting from a particular program. Indiana Ex. 8, at 151. ACF has not approved the use of general population surveys to estimate expenditures relating to specific TANF-related programs. ACF Surreply at 5.

In this case, notwithstanding ACF's instructions to Indiana to provide evidence to support the assumptions underlying its estimating methodologies, Indiana failed to provide evidence to demonstrate that a general population survey of Indiana families below 250% of poverty would accurately represent the characteristics of those who were recipients of charity care, CERF, or Township Assistance. Similarly, Indiana provided no evidence that the percentage of illegal aliens that benefitted from the programs was equal to the percentage of illegal aliens estimated in the Department of Homeland Security study to reside in Indiana. Moreover, Indiana failed to present evidence to show that it was reasonable to assume that the expenses attributable to TANF-eligibles were in effect equal to the expenditures attributable to non-TANF-eligibles. As ACF stated in its August 2011 determination, "program expenditures attributable to any given individual are highly variable, and there may be significant differences across demographic groups, i.e., TANF-eligible recipients vs. non-TANF-eligible recipients." Indiana Ex. 8, at 151. ACF stated that this is the case particularly for medical services expenditures. Thus, without additional evidence to support Indiana's assumptions, ACF logically concluded that Indiana's methodologies did not produce reasonable estimates.

Furthermore, ACF points to a 2004 Congressional Budget Office report concluding that unauthorized or illegal immigrants "tend to be undercounted in the census and other surveys of the population." ACF Br. at 20, citing Congressional Budget Office, A Description of the Immigrant Population. Similarly, ACF argues, a Bear Stearns Asset Management study of illegal immigration in the United States found that census estimates "may capture as little as half of the undocumented population." ACF Br. at 20, citing Brad Knickerbocker, *Illegal Immigrants in the US: How Many Are There?* Christian Science Monitor (May 16, 2006). Moreover, Indiana's assumption that the expenditures

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[7] The Program Announcement is available at http://www.acf.hhs.gov/programs/ofa/policy/pa-ofa/2000/pa002.htm.

attributable to unauthorized aliens would be the same as those attributable to other recipients is belied by studies suggesting that illegal aliens may use these types of programs at a disproportionately higher rate than the rest of the population because, according to ACF, "they tend to be the poorest of the poor and are more adversely affected by the recent economic downturn." ACF Br. at 21, citing Center for Immigration Studies, *Poverty and Income*. In light of this evidence, we cannot agree with Indiana that the simple application of the Department of Homeland Security estimate of the percentage of unauthorized immigrants in the United States to derive the percentage of expenditures attributable to illegal aliens was "as reasonable as any other method."

Accordingly, we sustain ACF's determination that Indiana's methodologies for estimating the amounts of nonrecurrent, short-term benefit expenditures attributable to TANF-eligible family members failed to yield reasonable estimates.

D. ACF's rejection of Indiana's estimating methodologies was not arbitrary and capricious.

According to Indiana, "ACF failed to apply the same three 'principles' and criteria to other States in approving their ECF claims." Indiana Br. at 20. Specifically, Indiana contends, ACF approved ECF requests by "many States which utilized estimation to quantify the amount of expenditures and the eligible population that received the services or benefits provided." *Id.* To support this argument, Indiana provided a synopsis of several states' applications for ECF funding and methods for estimating expenditures which, Indiana states, ACF approved. In particular, Indiana points to Connecticut's application dated March 31, 2011 for basic assistance expenditures that, according to Indiana, "used estimates in determining the portion of actual expenditures to claim for ARRA." Indiana Reply at 17, citing Indiana Ex. 3. Indiana argues that denying Indiana "ECF funding based upon randomly applied legislative rules is arbitrary and capricious" and that, therefore, the Board should set aside the agency action of disallowance." Indiana Br. at 23.

Indiana's contentions confuse estimates that were provided by states to support applications for prospective expenditures with estimates provided by states to support final expenditure claims. As noted above, the ARRA ECF legislation and ACF guidance explicitly provided for states to submit the former type of estimated caseload and expenditure data prior to the quarter in which the expenditures were to be made. The estimates, however, were to be updated subsequently with actual caseload and expenditure data. In contrast, Indiana did not show that ACF accepted estimates to support final expenditure claims where a state failed to demonstrate that the data were not reasonably available or that its estimating methodologies produced reasonable estimates. As ACF explained in response to Indiana's contentions, the states claimed by Indiana to have used estimation techniques similar to Indiana's

methodologies either provided actual data to support final claimed expenditures, used estimates only for MOE food bank costs (for which estimation methods are expressly permitted by ACF guidance), or, in the case of Connecticut, reasonably revised estimates based on actual data obtained in subsequent periods for the same nonrecurrent short-term benefit expenditures. ACF Br. at 30-34; ACF Exs. 1-8.

We therefore find no merit in Indiana's contention that ACF arbitrarily rejected its estimating methodologies and accepted other states' applications supported by similar methodologies.

2. *We sustain ACF's determination that the hospital charity care expenditures at issue constituted foregone revenue not properly included as MOE.*

Indiana contends that charity care provided by hospitals is "an allowable TANF MOE expenditure." Notice of Appeal at 1. In support of this position, Indiana argues that the restriction on counting foregone revenue as MOE relates only to state loss of tax revenues. Indiana further asserts that the costs incurred by hospitals in providing uncompensated care are "real" and "valid," that hospitals are required to incur those costs by state and/or federal law, and that expenditures for medical services are barred from TANF only when federal rather than state funds are used. Indiana Br. at 9-10. Hence, according to Indiana, the costs should be allowed as state MOE. Finally, Indiana argues that uncompensated care provided by hospitals is analogous to food programs that ACF has not treated as foregone revenue.

In arguing that third-party charity care should not be considered foregone revenue, Indiana refers to the regulation which defines "expenditure" as --

> any amount of Federal TANF or State MOE funds that a State expends, spends, pays out, or disburses consistent with the requirements of [other parts of the regulation]. It may include expenditures on the refundable portions of State or local tax credits, if they are consistent with the provisions [of another subsection]. It does not include any amounts that merely represent avoided costs or foregone revenue. Avoided costs include such items as contractor penalty payments for poor performance and purchase price discounts, rebates, and credits that a State receives. **Foregone revenue includes State tax provisions – such as waivers, deductions, exemptions, or nonrefundable tax credits – that reduce a State's tax revenue.**

Indiana Br. at 8-9, quoting 45 C.F.R. § 260.30 (bold in Indiana Brief). Indiana concludes that this definition establishes that charity care "is neither avoided costs nor foregone revenue," since the hospitals incur costs for medical services which they are required to

provide and since the definition references only state revenue reductions. Indiana Br. at 9.

The plain language of section 260.30 is broader than Indiana acknowledges, prohibiting "any amounts" that represent foregone revenue. The last sentence instructs the states that any tax provisions that merely reduce state revenues must be *included* as foregone revenue, but nowhere suggests that foregone revenue is limited to only those revenues foregone by the state itself. "Qualified State expenditures," as required by the statute and defined in the MOE provisions of the regulations, may include not only expenditures of state programs that serve "eligible families," but also certain expenditures of local governments and of third parties (e.g. non-profit organizations). *See generally* Act § 409(a)(7); 45 C.F.R. Part 263. Section 260.30 does not exempt revenue foregone by such local governments or third parties from the prohibition against counting foregone revenue as state MOE expenditures.

In guidance on the use of third-party expenditures as state spending for MOE, ACF expressly addressed the question of how the foregone revenue restriction applies to organizations like the hospitals at issue here:

> **Treatment of Foregone Revenue or Debt Forgiveness as a TANF Expenditure**
>
> Q1: If a State partners with a third-party organization to provide a service to TANF-eligible individual at a discounted price, may the State count the third party's foregone revenue as a qualified State expenditure? Similarly, if the State or a partnering third-party organization will forgive some or all of a TANF-eligible client's outstanding debt, may the State count the forgiven debt as a qualified State expenditure?
>
> A1: No, a State may not count foregone revenue or forgiven debt as a qualifying State expenditure. The TANF definition of "Expenditure" at 45 CFR 260.30 states that an expenditure " . . . does not include any amounts that merely represent avoided costs or foregone revenue."

Indiana Ex. 14, at 310 (from ACF Questions and Answers on TANF ECF).[8] This explanation is on point for the situation of hospitals offering medical services to the uninsured or unable to pay at reduced rates or forgiving or writing off the unpaid services. We find ACF's interpretation of foregone revenue in the context of third-party organizations reasonable and entirely consistent with the regulatory language. Nothing in

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[8] As noted previously, this document was posted on ACF's website, and Indiana does not deny that it had timely notice of this ACF guidance.

the guidance suggests that ACF believed that third-party organizational partners provided the discounted or forgiven services without incurring any costs in the process.

Ignoring this directly applicable guidance, Indiana asserts that the "only additional clarification ACF has issued regarding foregone costs" consists of another regulatory provision (45 C.F.R. § 260.33) and a program instruction (TANF-ACF-PI-01-01). Indiana Br. at 11; Indiana Ex. 11 (program instruction). Both of these sources are on the specific subject of how states are expected to handle issues about tax credits, addressing detailed questions about, for example, sales and property tax credits and locally collected revenues. Thus, section 260.33 is entitled "When are expenditures on State or local tax credits allowable expenditures for TANF-related purposes?" while the subject of the cited program instruction is "Treatment of Tax Credits for Federal TANF and State 'Maintenance of Effort' (MOE)." We find no support for the idea that these sources are intended to exhaust the types of foregone revenue covered by section 260.33.

Indiana argues that the "examples of 'foregone revenue'" in the preamble to the TANF final rule also involve only tax credits where a state reduces taxes but has no "direct outlay of state funds to provide a service or benefit to eligible families." Indiana Br. at 11, citing 64 Fed. Reg. 17,220, at 17,828 (April 22, 1999). The cited location in the preamble does not set out "examples" of foregone revenue but rather responds to a specific comment about whether state earned income tax credits may be treated as TANF MOE. 64 Fed. Reg. 17,828-29. The response clarifies that only those earned income payments to eligible families that exceed the income tax for which they would otherwise be liable may count as MOE because only such payments would not constitute foregone revenue by the state. This response is consistent with ACF's interpretation of foregone revenue elsewhere and in no way undermines application of the concept of foregone revenue to third-party discounts or bad debt forgiveness. Indiana does not identify, and we do not find, any other discussion in the preamble inconsistent with such application here.

Indiana points out that the prohibition against using federal TANF funds for medical services expenditures set out in section 408(a)(6) of the Act does not prevent states from expending state MOE funds on medical expenses. Indiana Br. at 10; Indiana Reply at 15, citing 64 Fed. Reg. 17,831. Therefore, Indiana argues, it would have been allowed to claim as MOE the entire costs of medical services provided to eligible families had the State used general funds to provide them. Indiana Br. at 10. While this may be true (ACF Br. at 24), it is also irrelevant. If the State chose to directly spend its funds on providing medical services to eligible families, it would not be foregoing revenue (nor would any third party be involved). ACF did not assert that Indiana was prohibited from using state MOE funds on medical services for eligible families, but pointed out that Indiana did not do so. ACF Br. at 25. Instead, Indiana seeks to credit as state MOE medical services that hospitals, which are in the business of providing health care, provided to indigent patients without seeking the usual payment. ACF could reasonably

distinguish the two situations for purposes of determining MOE, and Indiana did not deny that ACF guidance provided notice of the treatment of third-party discounts and forgiven debts.

ACF further disputes Indiana's claim that hospitals are under legal compulsion to provide the charity care at issue. The only federal law cited by Indiana is the Emergency Medical Treatment and Labor Act, at 42 U.S.C. § 1395dd, which speaks to the requirement that hospitals offering emergency services not transfer patients until their condition is stabilized without regard to the ability to pay. Indiana did not respond to ACF's contention that Indiana made no showing that the charity care at issue consisted of such stabilization services. ACF Br. at 23-24. ACF further argues that the state law to which Indiana cited (IC 16-21-9) contains neither a requirement for non-profit hospitals to provide charity care to all indigent patients nor a bar against such hospitals seeking to obtain payment from indigent patients. ACF Br. at 24. Instead, the state law calls only for such hospitals to have a plan for community service that includes charity care and governmental benefits for indigents and to disclose the amount of charity care provided under the plan. *Id.,* citing IC 16-21-9-6 and -7. Indiana does not take issue with this characterization of state law, and we find it consistent with a review of the cited provisions. Furthermore, the decision to provide some charity care under such a community service plan is a necessity for a non-profit hospital seeking to be held exempt from state taxes, so that the foregone revenue may result in significant benefit to the hospitals. IC 16-21-9-3.

Finally, Indiana suggests that ACF has been inconsistent because it permitted states to include costs of summer food programs as allowable MOE. Indiana Br. at 10-11. The relevant question on which Indiana relies asked about whether a state partnering with a community-based organization that would offer meals to "TANF eligible school children during the summer when they are unable to get their free/reduced Price school lunches" would "qualify as a non-recurrent short-term benefit." ACF Questions and Answers on TANF ECF, Indiana Ex. 14, at 308. The description stated that the "funding would go to the third party agency doing meal prep." *Id.* ACF's response was that TANF funds could be used as a nonrecurrent short-term benefit in meeting nutritional needs during summer recess to the extent other Federal sources (United States Department of Agriculture (USDA) programs) do not meet the need. *Id.* ACF also notes that states may use TANF funds to transport children to summer feeding program sites. *Id.* The funding in such food programs thus runs from the state to the third party feeding program to cover shortfalls in other funding sources such as USDA. As ACF points out, Indiana is not reimbursing the hospitals for the costs of providing medical services but rather seeking to claim as state MOE the medical services which the hospitals have provided without obtaining payment. ACF Br. at 25. Indiana has not shown that ACF was unreasonable in treating these dissimilar situations differently for purposes of determining whether the third party costs constituted foregone revenue.

Conclusion

Based on the foregoing analysis, we sustain ACF's determination.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member