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Idaho Department of Health and Welfare, DAB No. 3110 (2023)

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Idaho Department of Health and Welfare

Docket No. A-23-23
Decision No. 3110
September 12, 2023

DECISION

The Idaho Department of Health and Welfare (Idaho) appealed a November 15, 2022 determination by the Administration for Children and Families (ACF) to withhold federal funds in the amount of \$935,712 under titles IV-B and IV-E of the Social Security Act (Act). From April 1 to September 30, 2016, ACF, in collaboration with Idaho's Family and Community Services Division, conducted a Child and Family Services Review (CFSR) of Idaho's child and family services programs. The CFSR found that Idaho was not operating these programs in substantial conformity with applicable federal requirements. Idaho developed a Program Improvement Plan (PIP), but ACF found that by the end of the period for implementing and evaluating the PIP, Idaho remained out of substantial conformity with respect to four regulatory outcomes for children and families. Based on its determination that Idaho failed to successfully complete the PIP, ACF withheld funds under titles IV-B and IV-E for federal fiscal year (FY) 2016 through the end of FY 2021.

We conclude that Idaho failed to successfully attain four outcomes required by the PIP, and we sustain in full ACF's determination to withhold all of the funds at issue.

Legal Background

Title IV-B of the Act establishes a program for Child Welfare Services, which authorizes federal funds for states to support services intended, among other things, to prevent abuse and neglect of children and assure adequate foster care when children cannot be returned home or placed for adoption. Act § 421 *et seq.* Title IV-B funds may also be used toward programs that provide family support and reunification services, and adoption promotion and support services. *Id.* To receive title IV-B funds, a state must develop a federally-approved plan, known under implementing regulations as a "Child and Families Services Plan" (CFSP). Act § 422(a); 45 C.F.R. §§ 1357.10(c), 1357.15(a), (b)(1).

Title IV-E authorizes the appropriation of federal funds for states to provide payments toward foster care and transitional independent living programs, adoption assistance for children with special needs, kinship guardianship assistance, and related prevention

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services or programs. Act § 470 *et seq.* To receive title IV-E funds, a state must develop a federally-approved title IV-E state plan. *Id.* § 471(a); see 45 C.F.R. § 1356.20(a).

The Governing Statute

Section 1123A(a) of the Act¹ provides, in relevant part:

(a) IN GENERAL.— The Secretary [of the U.S. Department of Health and Human Services], 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) State plan requirements under such parts B and E,
- (2) implementing regulations promulgated by the Secretary, and
- (3) the relevant approved State plans.

Section 1123A requires the promulgation of regulations that “specify the timetable for conformity reviews of State programs,” and “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)(1)-(2).

In addition, “with respect to any State program found to have failed substantially to so conform,” the regulations required by section 1123A 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;
- B. to make technical assistance available to the State to the extent feasible to enable the State to develop and implement such a corrective action plan;
- 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). Section 1123A(c)(2) of the Act provides for appeal to the Departmental Appeals Board of a final determination that a title IV-E agency’s program is not in substantial conformity. See *also* 45 C.F.R. § 1355.39(a) (allowing a title IV-E

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agency, “pursuant to 45 C.F.R. part 16,” to appeal a “final determination and any subsequent withholding of, or reduction in, funds” under section 1355.36(e)(1)).

CFSR Regulations

Under the authority of section 1123A, ACF established the Child and Family Services Review (CFSR) process. See 65 Fed. Reg. 4020 (Jan. 25, 2000). The regulations define a “title IV-E agency” as “the State or Tribal agency administering or supervising the administration of the title IV-B and title IV-E plans.” 45 C.F.R. § 1355.20(a).² A CFSR is to be conducted every five years by a team of Federal and State/Tribal reviewers, and consists “of a two-phase process that includes a statewide assessment and an on-site review.” *Id.* §§ 1355.32(b)(1)(i), 1355.33(a)(1), (b)-(c). ACF will determine a title IV-E agency’s substantial conformity with IV-B and IV-E plan requirements based on:

- (1) Its ability to meet national standards, set by the Secretary, for the statewide/Tribal service area data indicators associated with specific outcomes for children and families;
- (2) Its ability to meet criteria related to outcomes for children and families; and
- (3) Its ability to meet criteria related to the title IV-E agency’s capacity to deliver services leading to improved outcomes.

45 C.F.R. § 1355.34(a)(1)-(3). The above-referenced “national standards” for statewide “data indicators” are to 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).³ The Secretary “may adjust these national standards if appropriate.” *Id.* § 1355.34(b)(5).

Regarding the requirements at paragraphs (a)(2) and (a)(3), above, the regulations list seven “outcomes” in the broad areas of child safety, permanency for children, and child and family well-being; and they list seven “systemic factors” addressing title IV-E agencies’ “capacity” to deliver services leading to improved outcomes. 45 C.F.R. § 1355.34(b)(1), (c). The four outcomes at issue in this appeal are:

- Safety Outcome 1: “Children are, first and foremost, protected from abuse and neglect.”

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- Safety Outcome 2: “Children are safely maintained in their own homes whenever possible and appropriate.”
- Permanency Outcome 1: “Children have permanency and stability in their living situations.”
- Well-Being Outcome 1: “Families have enhanced capacity to provide for their children’s needs.”

Id. § 1355.34(b)(1)(i)(A), (i)(B), (ii)(A), (iii)(A).

A title IV-E agency is determined to be in “substantial conformity” with plan requirements if: (1) its performance on each statewide/Tribal data indicator meets the national standard, and (2) its performance on all seven outcomes is rated as “substantially achieved” in 95 percent of the cases examined during the on-site case review. 45 C.F.R. § 1355.34(b)(3)(i)-(ii). Whether the outcomes are “substantially achieved” depends, in turn, on the title IV-E agency’s performance on certain review “items” in the CFSR. See ACF Ex. 1 (CFSR Procedures Manual (2015)), at 52-53 & App. A (setting forth specified “items” to guide reviewers in assessing whether a title IV-E agency substantially achieved all outcomes).⁴ Title IV-E agencies must also implement all state “plan requirements associated with the systemic factor[s],” and “ACF will use a rating scale” to make determinations of substantial conformity regarding the systemic factors “[b]ased on information from the assessment and onsite review.” 45 C.F.R. § 1355.34(c).

The PIP

“A [child and family services] program found not to be operating in substantial conformity during an initial or subsequent review will . . . [b]e required to develop and implement a program improvement plan” (PIP). 45 C.F.R. § 1355.32(b)(2)(i). The PIP will be “developed jointly by [the] title IV-E agency and Federal staff in consultation with the [CFSR] team,” and must, among other things:

- Identify the areas in which the title IV-E agency’s program is not in substantial conformity;
- Set forth the goals, the action steps required to correct each identified weakness or deficiency, and dates by which each action step is to be completed in order to improve the specific areas;
- Set forth the amount of progress the statewide data will make toward meeting the national standards;
- Identify the technical assistance needs and sources of technical assistance, both Federal and non-Federal, which will be used to make the necessary improvements identified in the [PIP].

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45 C.F.R. § 1355.35(a)(1)(i)-(iv), (vii).

The title IV-E agency must submit a PIP for approval within 90 days of being notified it is not in substantial conformity. 45 C.F.R. § 1355.35(c)(1). If the PIP does not meet the requirements of section 1355.35(a), the title IV-E agency has 30 days to revise and resubmit the PIP. *Id.* § 1355.35(c)(3). If ACF and the title IV-E agency cannot reach consensus regarding a PIP’s content 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 [PIP].” *Id.* § 1355.35(a)(2); see CFSR Procedures Manual at 61-62. The regulations impose no deadline by which time ACF must approve a PIP or else “assign the contents of” a PIP.

The period for implementing the PIP is “not to exceed two years,” though the Secretary may approve extensions of up to a year. 45 C.F.R. § 1355.35(d)(1), (3). ACF guidance also provides title IV-E agencies with an additional, “non-overlapping evaluation period” of one year, to occur following the implementation period, at the end of which time the title IV-E agency “must meet the required measures of improvement” for ACF to determine successful PIP completion. CFSR Procedures Manual at 64.⁵ Further, in guidance in its CFSR “Technical Bulletin #9,” dated October 11, 2016, ACF informed title IV-E agency administrators that due to the discovery of “technical errors” related to the existing statewide data indicators, ACF would “suspend” use of the data indicators for CFSR “Round 3” (i.e., the CFSR at issue here), and that the data indicators would not be relied on “in determinations of substantial conformity” or as a basis for imposing monetary penalties. See Appellant’s Appeal File (AAF) at 364-375.^{6, 7} Technical Bulletin #9 also provides guidance for “determining and approving PIP item measurement methods and degrees of improvement,” including requirements that title IV-E agencies: “include quantifiable measurement in the PIP for all items . . . in need of improvement” (related to four regulatory outcomes); “develop a measurement plan for outcome items . . . identified as areas needing improvement” (related to the other three outcomes); and “provide indicators of improvement” with respect to the seven systemic factors, “including data measures where appropriate.” AAF at 370-71.

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The Withholding Process

ACF “will” withhold a portion of a title IV-E agency’s title IV-B and IV-E funds “for the year under review and for each succeeding year until the title IV-E agency either successfully completes a [PIP] or is found to be operating in substantial conformity.” 45 C.F.R. § 1355.36(b)(3); see also *id.* § 1355.36(e)(2)(ii) (“Funds related to goals and action steps that have not been achieved by the specified completion date will be withheld.”). ACF suspends the withholding of these funds, however, while the approved PIP is in effect, provided that the PIP complies with the requirements of section 1355.35 and “the title IV-E agency is actively implementing the PIP’s provisions.” *Id.* § 1355.36(c)(1). Furthermore, “ACF will terminate the withholding of the title IV-E agency’s title IV-B and title IV-E funds” arising from a finding of nonconformity, “upon determination . . . that the title IV-E agency has achieved substantial conformity or has successfully completed a [PIP],” and “will rescind the withholding of the portion of title IV-B and title IV-E funds related to specific goals or action steps as of the date at the end of the quarter in which they were determined to have been achieved.” *Id.* § 1355.36(d).

The total pool of funds from which a withholding may be drawn consists of “the title IV-E agency’s allotment of title IV-B funds for each of the years to which the withholding applies,” plus “10 percent of the title IV-E agency’s Federal claims for title IV-E foster care administrative costs for each of the years to which withholding applies.” 45 C.F.R. § 1355.36(b)(4)(i)-(ii). ACF withholds one percent of this pool “for each of the years to which withholding applies,” with respect to each outcome and each systemic factor that is found not to be in substantial conformity. *Id.* § 1355.36(b)(5)(i)-(ii).

Case Background

On March 24, 2017, ACF issued its report regarding Idaho’s Round 3 CFSR. See “Child and Family Services Review Idaho Final Report” (Final Report), AAF at 81-119, 376. The report included findings from Idaho’s initial “statewide assessment” in 2016; an “on-site review” of 68 cases in regions of Idaho, conducted by Idaho’s Division of Family & Community Services from April 1 to September 30, 2016; and collaborative interviews of various state “stakeholders and partners.” *Id.* at 376. The CFSR found that Idaho was not operating in substantial conformity with six of seven outcomes and six of seven systemic factors, as outlined in section 1355.34. *Id.* at 87-105, 106-13 (App. A), 376. ACF noted that a PIP is required to address each outcome and systemic factor not in substantial conformity. *Id.* at 377. ACF added that a penalty “is applicable to this level of non-conformity,” but that ACF would suspend the withholding of funds associated with this penalty during the PIP implementation period and non-overlapping evaluation period, and “[i]f we determine that Idaho is successful in rectifying the areas that are in non-conformity[,] . . . we will rescind the withholding of federal funds.” *Id.*

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On June 23, 2017, Idaho submitted a PIP for ACF approval.⁸ AAF at 407-31. ACF returned the PIP with suggested revisions and, in a separate letter, provided detailed feedback and guidance for improvement. See *id.* at 407-31, 432-35. Over the next 18 months Idaho submitted almost a dozen PIP drafts, each of which ACF returned with suggested revisions that would need to be made before ACF would consider the PIP to be in compliance with applicable regulations and guidance. See, e.g., ACF Exs. 7-11, 17, 18, 20-23; AAF at 436-71, 509-719, 747-809. ACF and Idaho negotiated and conducted conference calls, and ACF representatives met on-site with Idaho representatives in April 2018 to discuss the approval process. See ACF Exs. 7, 11-13. As noted below, several months of this timeline, starting in July 2018, involved ACF's responses to PIP drafts that incorporated elements of Idaho's newly-implemented statewide Child Welfare Transformation (CWT) initiative, which, according to ACF, required substantial revisions because they did not comport with regulatory requirements. See ACF Exs. 14-21.

By letter dated March 4, 2019, ACF notified Idaho that it approved the latest submitted PIP draft, effective March 1, 2019. AAF at 907-08; see also *id.* at 876-906. The letter added that Idaho and ACF had agreed Idaho would provide semi-annual reports and participate in quarterly conference calls, the former intended to "support the monitoring and evaluation of the [PIP] completion per [section] 1355.35(e)(2)." *Id.* at 907. The letter further stated that in accordance with section 1355.36, "an estimated minimum penalty of \$1,409,389 for Fiscal Year 2016 is applicable to this level of nonconformity;" however, ACF was suspending the withholding of funds associated with this penalty during the implementation period and "non-overlapping" evaluation period, and if ACF determined that Idaho successfully completed its PIP and "rectified the areas of nonconformity," ACF would "rescind the withholding of federal funds associated with those respective areas." *Id.* Once ACF approved this negotiated PIP, Idaho became bound to its terms, including all agreed-upon strategies and action items as well as all "measurement goals" set forth in the approved PIP Measurement Plan. See *id.* at 881-905, 909-918.

The two-year implementation period for Idaho's PIP was from March 1, 2019 to February 28, 2021. AAF at 1247. ACF gave Idaho a 12-month non-overlapping evaluation period, see AAF at 1077, but later extended it to 18 months (March 1, 2021 to August 31, 2022) in accordance with its June 2020 notice to title IV-E agencies, *supra* n. 5, during which time, according to ACF's withholding letter, Idaho continued to monitor its progress in achieving the PIP measurement goals in the measurement plan developed by Idaho and ACF. *Id.* at 1737. The parties later renegotiated and revised aspects of the PIP at Idaho's request, effective March 17, 2020. See *id.* at 1145-46.

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Consistent with regulations and guidance, Idaho's PIP listed its goals and specified seven "strategies" and 53 "key activities" toward achieving the goals and attaining substantial conformity for the outcomes and systemic factors identified in the CFSR.⁹ AAF at 881-905; accord CFSR Procedures Manual at 62 (citing 45 C.F.R. § 1355.35(a)). The PIP also included a PIP Measurement Plan, which, among other things, set forth the approved measurement baselines, measurement goals, and methodologies that would allow ACF to determine whether Idaho successfully completed its PIP by the end of the implementation and evaluation periods.¹⁰ See AAF at 909-18. In accordance with the PIP, during the PIP implementation and non-overlapping evaluation periods Idaho provided ACF with quarterly updates via conference calls and semi-annual written progress reports demonstrating its progress on completing required strategies and activities and attaining measurement goals. See, e.g., AAF at 1264-66; ACF Exs. 26, 28-34, 36. ACF also met with Idaho representatives, virtually and in person, and provided regular written responses to Idaho's semi-annual progress reports. *Id.* Meanwhile, ACF provided feedback about the status of Idaho's progress regarding its required goals, strategies, and activities; it revised target completion dates for activities where necessary; it noted areas where Idaho needed to improve in order to successfully complete its PIP; and it offered and provided technical assistance to Idaho, along with suggestions for attaining its PIP goals where needed. See, e.g., ACF Exs. 25-29, 31-36, 39; AAF at 1145-47, 1247-50, 1593-95.

On May 17, 2021, ACF wrote to Idaho acknowledging the conclusion of the two-year PIP implementation period and Idaho's partial progress toward completing the PIP. AAF at 1439-42. ACF notified Idaho that it had successfully completed "all required PIP strategies during the PIP implementation period," and that ACF "is rescinding the withholding of funds for completion of PIP goals related to" two of the six outcomes and all six systemic factors that had been out of substantial conformity. *Id.* at 1440. ACF explained, however, that Idaho had still not met PIP measurement goals for Item 1 (Safety Outcome 1), Item 3 (Safety Outcome 2), Items 4-6 (Permanency Outcome 1), and Items 12-15 (Well-Being Outcome 1). *Id.* ACF advised that Idaho would have until the end of the non-overlapping evaluation period (August 31, 2022) to meet the PIP measurement goals for the remaining four outcomes. *Id.*

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In a letter to Idaho dated January 7, 2022 in response to Idaho's fifth progress report, ACF informed Idaho that according to the progress report "no PIP measurement goals [were] met during this quarterly period," and that Idaho "has until the end of the [non-overlapping evaluation period] to meet the remaining unmet PIP measurement goals related to items 1, 3, 4-6, and 12-15." AAF at 1593. Further, Idaho's sixth progress report, addressing a "reporting period" from October 1, 2021 to March 31, 2022, stated that Idaho remained below, and in many cases well below, the agreed-upon measurement goals for all nine of these items comprising the four outcomes at issue (items 1, 3, 4-6, 12-15), and that for all past reporting periods Idaho had fallen short of the measurement goals for these review items. See "Idaho Child and Family Services Review Round 3 Program Improvement Plan – Progress Report 6," AAF at 1699-1736; *accord* AAF at 1404-19 (Progress Report 4, addressing reporting period from March 1, 2020 to February 28, 2021, indicating Idaho's failure to attain measurement goals for the nine review items for any of the reporting periods since the start of the PIP).

By letter dated November 15, 2022, ACF notified Idaho that it failed to meet, by the end of the evaluation period, the PIP measurement goals for the remaining four outcomes – Safety Outcome 1 (Item 1), Safety Outcome 2 (Item 3), Permanency Outcome 1 (Items 4-6), and Well-Being Outcome 1 (Items 12-15). AAF at 1737-41. The letter stated that because Idaho did not meet these measurement goals, ACF was withholding \$935,712 in federal financial participation for the four outcomes, based on title IV-B and title IV-E expenditure data Idaho provided for the period beginning in FY 2016. *Id.* at 1738. The letter added that, pursuant to section 1355.36(b)(5)(i), "this amount represents one percent of the pool of funds subject to withholding for each outcome and systemic factor for which a penalty is applicable," and that "[t]his pool of funds includes the state allotment of title IV-B funds for each of the years to which the withholding applies and an amount equivalent to ten percent of the state's federal claims for title IV-E foster care administrative costs for each year funds are to be withheld," as required by section 1355.36(b)(4). *Id.*¹¹

Idaho timely appealed the withholding to the Board.

Page 10**Analysis**

On appeal, Idaho does not assert any factual or legal error in ACF's determination that Idaho remained out of substantial conformity and, therefore, was subject to a withholding of federal matching funds. In fact, as shown below, Idaho concedes that it failed to successfully complete all PIP-required goals related to four regulatory outcomes by the end of the PIP evaluation period. Idaho also does not dispute the legal basis for the \$935,712 withholding penalty, including the amount of the withholding or how it was calculated.

Idaho instead asks the Board to "set aside" ACF's withholding and requests that "ACF's finding of non-compliance be withdrawn," Appellant's Br. at 31, for three reasons. First, Idaho argues it was unable to successfully complete its PIP because the "program improvement goals were unattainable." *Id.* at 13. Idaho asserts that "excessive delay" between the date of the CFSR baseline measurements and the date the PIP was approved "led to unrealistic expectations in program improvement," caused target goals to be unfeasible, and made it "almost impossible to know if the strategies committed to in PIP development were still relevant, appropriate, or sufficient." *Id.* at 13-14. Second, and relatedly, Idaho argues that the onset of the COVID-19 pandemic during the PIP measurement periods severely affected its workforce staffing and overall capacity, contributing to its failure to successfully complete its PIP. *Id.* at 16-28. Third, Idaho argues that the \$935,712 withholding should be set aside because the loss of that federal funding "will result in a lack of resources" for Idaho's child and family services programs and a substantial reduction in workforce, and would "significantly impede program ability to meet future program performance requirements." *Id.* at 28-30.

As discussed below, we conclude that none of Idaho's arguments provides a basis for reversing, in whole or in part, ACF's determination to withhold \$935,712 in title IV-B and title IV-E federal funds.

A. Idaho failed to complete its PIP-required goals with respect to Safety Outcome 1, Safety Outcome 2, Permanency Outcome 1, and Well-Being Outcome 1.

In appeals governed by Part 16 regulations (such as Idaho's appeal), "the awarding federal agency must first articulate the basis for its decision to enable the non-federal party to understand and respond to the issues raised by the agency's decision." *Neb. Dep't of Health and Hum. Servs.*, DAB No. 3071, at 7 (2022); see also *Mass. Exec. Off. of Health & Hum. Servs.*, DAB No. 2218, at 11 (2008), *aff'd*, 701 F. Supp. 2d 182 (D. Mass. 2010); *Mo. Dep't of Soc. Servs.*, DAB No. 2994, at 6 (2020) (citing cases). If the federal agency meets that burden, which we have described as minimal, the non-federal party bears the burden to demonstrate that the federal agency's decision was wrong. See *Mass. Exec. Off.* at 11; see also *Gulf Coast Cmty. Action Agency, Inc.*, DAB No. 2670, at 3 (2015) (The non-federal party "always bears the burden to demonstrate that it has

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operated its federally funded program" consistent with applicable authorities and the award's terms and conditions.); *Targazyme, Inc.*, DAB No. 2939, at 4 (2019) ("[I]n the kind of cases that come before the Board under 45 C.F.R. Part 16, the appellant always bears a general burden of proof."). Importantly, Board review under Part 16 procedures is "generally limited to resolving disputes about material facts and deciding whether the appealed decision is consistent with applicable law and regulations." *Tex. Dep't of Health and Hum. Servs.*, DAB No. 3066, at 10 (2022). The Board must uphold a decision such as this withholding determination if it is authorized by law and the non-federal party has not disproven the factual basis for the decision. See 45 C.F.R. § 16.14 (stating that the Board is "bound by all applicable laws and regulations").

Here, the record on appeal makes clear that ACF has met its minimal burden and has provided sufficient evidence to demonstrate that, pursuant to 45 C.F.R. § 1355.36, Idaho was not operating in substantial conformity with respect to Safety Outcomes 1 and 2, Permanency Outcome 1, and Well-Being Outcome 1. Idaho does not dispute that it failed to achieve substantial conformity with these four regulatory outcomes and, as explained below, provided no factual or legal basis for reversing the withholding. As recounted above, Idaho provided ACF with ample evidence showing Idaho's ongoing failure to attain measurement goals for the nine review items comprising the four outcomes, and provided sufficient factual support for ACF's determination, in its notice of withholding, that Idaho failed, at any time in the PIP measurement periods, to complete all PIP requirements. Moreover, Idaho does not dispute ACF's determination of substantial nonconformity with respect to the four regulatory outcomes or its factual basis. In fact, Idaho concedes the validity of the findings underlying the withholding determination. See Appellant's Br. at 30 (stating Idaho "was unable to attain the program improvement goals through no fault of their own and not for lack of intention or effort"); see also Reply Br. at 4 (Idaho admitting it "did not achieve the required levels of improvement for CFSR Round 3 PIP measures for Safety Outcome 1 (Item 1), Safety Outcome 2 (Item 3), Permanency Outcome 1 (Items 4-6), and Well-Being Outcome 1 (Items 12-15) and continued to be out of substantial conformity with these remaining outcomes"). Idaho also makes no argument that in reaching this determination, ACF committed any legal error that might permit the Board to provide the remedy Idaho seeks. ACF's withholding determination is authorized by law and Idaho has not disproven the factual basis for that determination.

Accordingly, we uphold ACF's determination, pursuant to 45 C.F.R. § 1355.36, that Idaho was subject to withholding of federal funds because of its failure to successfully complete all of the requirements of its approved PIP.

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B. ACF correctly determined to withhold \$935,712 in title IV-B and title IV-E federal funds as a result of Idaho's failure to successfully complete its PIP.

Idaho also does not challenge any aspect of ACF's determination of the amount of federal funds it would withhold as a result of Idaho's failure to successfully complete its PIP, nor any aspect of how ACF calculated that amount. We find the record supports ACF's decision and we find no basis for reversing or reducing the amount of funds withheld.

The regulations authorized by section 1123A(b)(3) of the Act set forth a clear method for calculating the withholding of federal matching funds upon a determination of substantial nonconformity under 45 C.F.R. § 1355.36(e)(1). A "pool" of funds is established, consisting of "the title IV-E agency's allotment of title IV-B funds for each of the years to which the withholding applies," plus "[a]n amount equivalent to 10 percent of the title IV-E agency's Federal claims for title IV-E foster care administrative costs for each of the years to which withholding applies." 45 C.F.R. § 1355.36(b)(4)(i)-(ii). ACF will withhold one percent of this pool of funds "for each of the years to which withholding applies,"

with respect to each outcome and systemic factor found not to be in substantial conformity. *Id.* § 1355.36(b)(5)(i)-(ii); *accord Puerto Rico Dep't of the Family*, DAB No. 2751, at 8 (2016) (“The regulations mandate withholding with respect to each outcome (and systemic factor) determined not to be in substantial conformity.”).

Here, the record makes clear that at several points throughout the PIP process, ACF advised Idaho of the regulatory basis for withholding of federal funds, provided a current estimate of withholding according to existing levels of nonconformity, and provided calculations explaining how the current total amount was reached. *See, e.g.*, AAF at 907 (March 4, 2019 letter approving the PIP and setting forth current estimated amount of withholding “applicable to this level of nonconformity”); AAF at 1265 (February 23, 2021 letter providing Idaho with annual withholding penalty estimate as required by regulation); AAF at 1593-96 (January 7, 2022 letter and attached worksheet, stating that four outcomes remained out of substantial conformity, that \$935,712 was the current withholding amount applicable to that level of nonconformity for the period of October 1, 2015 to September 30, 2021, and providing detailed calculations applying the regulatory formula to the pool of available funds with respect to each of the identified outcomes). Lastly, in its November 15, 2022 notice of withholding, ACF informed Idaho that based on the determination of nonconformity with respect to the same four outcomes, the final withholding amount remained \$935,712, that this amount was the result of applying the formula found at 45 C.F.R. § 1355.36(b)(4) and (b)(5), and that the amount was “based on final allotments through the end of FFY 2021 and reported claiming information submitted through the claiming quarter ended September 30, 2021.” *Id.* at 1738.

Thus, ACF’s decision to withhold \$935,712 in federal funds as a result of Idaho being out of substantial conformity with four outcomes is well-supported by the record and in accordance with governing regulations. Moreover, as stated, Idaho raises no argument

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challenging the amount of the withholding or the calculations behind that amount, and thus fails to carry its burden to disprove the factual basis for the withholding. We therefore affirm ACF’s withholding determination in its entirety.

C. *Idaho’s arguments provide no basis to reverse the withholding.*

1. *The length of time between Idaho’s development of PIP baseline measurements and implementation of the ACF-approved PIP provides no basis to reverse the withholding.*

Idaho argues that its PIP goals were rendered unattainable in part by the “excessive delay between the [development of the] baseline measure[ments] and the PIP implementation,” which “led to unrealistic expectations in program improvement.” Appellant’s Br. at 13. Idaho recites the PIP negotiation process detailed above, in which ACF issued the CFSR Final Report in March 2017 and approved the PIP and PIP measurement plan in March 2019, following the parties’ negotiations over the PIP’s contents. *Id.* at 13-14. Idaho asserts there was thus a lengthy gap between the PIP baseline measurements (which, according to the PIP, would be derived from the findings in the CFSR ending September 30, 2016) used to set the PIP goals and the start of PIP implementation in March 2019. *Id.* at 14. Idaho argues that this “excessive” delay “shifted the PIP measurement period so far from the development of PIP strategies that it was almost impossible to know if the strategies committed to in PIP development were still relevant, appropriate, or sufficient for the unprecedented and unforeseeable conditions the program experienced” during the PIP measurement period. *Id.* at 13, 14. Idaho adds that “[w]ithout a strong link between the conditions the PIP strategies were designed to address, and the conditions the program was experiencing,” the PIP measurement goals would not be “as feasible . . . to achieve under the unprecedented conditions experienced throughout the measurement period as they would be . . . had the baseline conditions observed during the [CFSR] persisted through the PIP measurement period.” *Id.* at 14.

Idaho, however, fails to articulate precisely how it was unable to attain its PIP measurement goals, or how those goals had become unattainable, purely based on its premise that there was a long passage of time between the Round 3 CFSR and final PIP approval. Idaho does not articulate in what way this length of time between baseline CFSR findings and the onset of PIP implementation amounted to “excessive delay,” and failed to show how the baseline measurements from 2016 were no longer relevant in 2019 and contributed to Idaho’s failure to meet the PIP measurement goals (which were developed based, in part, on the 2016 baseline). Idaho also does not explain how ACF was responsible for this alleged “excessive delay,” as its arguments clearly suggest. Idaho made no showing, for

example, that the revisions ACF requested in earlier drafts of the PIP were not required by applicable regulations. Moreover, as ACF notes, Idaho elected to use the 2016 baseline measurements, which ACF calls a “retrospective baseline,” instead of the option of using a “prospective baseline” derived from data

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collected during the PIP implementation period. See ACF Resp. Br. at 16-18 (citing AAF at 74); Appellant’s Br. at 13-16. Still further, Idaho acknowledges at least some of the “delays in finalizing the PIP” can be attributed to its “incorporation of the CWT into the PIP,” which it says “made Idaho’s CFS more robust and effective long term” but “ultimately resulted in disadvantages for the performance of the PIP.” Reply Br. at 2-3; see also ACF Resp. Br. at 15-16 (attributing delays in developing and finalizing the PIP to Idaho’s introduction of elements of its statewide CWT initiative into the revised PIP in July 2018).

In any event, Idaho cites no legal authority for the Board to reverse or otherwise disturb ACF’s determination of substantial nonconformity and resulting withholding based on the length of the PIP approval process. As we have stated, in appeals governed by 45 C.F.R. part 16, such as Idaho’s, the Board is “bound by all applicable laws and regulations,” *id.* § 16.14, and “must uphold a decision if it is authorized by law and the non-federal party . . . has not disproved the factual basis for the decision.” *Neb.*, DAB No. 3071, at 9; *accord S.A.G.E. Commc’ns Servs.*, DAB No. 2481, at 5-6 (2012). Here, Idaho admits that it failed to successfully complete the PIP and it has not disputed the factual basis behind that determination. Whether the PIP approval process involved delay, whether any delay was excessive or even longer than usual, or which party was ultimately responsible for any delay is of no consequence. The parties jointly developed and negotiated the PIP over the course of many months. Idaho submitted a final version of the PIP for ACF approval on or about February 22, 2019. ACF approved the PIP on March 4, 2019. Idaho’s contention that the goals and expectations set forth in the PIP were, in hindsight, unrealistic and unattainable provides no legal basis for the Board to excuse Idaho’s undisputed failure to successfully complete the PIP.

Moreover, the regulations governing the PIP approval process do not require that PIP approval be completed within a specific timeframe, as implied by Idaho’s argument. In contrast to the timeframes in the regulations for a state’s title IV-E agency to submit its initial proposed PIP (90 days, 45 C.F.R. § 1355.35(c)(1)) and a “revised” PIP if ACF does not approve the initial PIP (30 days, *id.* § 1355.35(c)(3)), the regulations provide no corresponding timeframe within which ACF must approve the PIP following its negotiation with the title IV-E agency over the PIP’s terms and requirements. The regulations also contemplate that there may be a lack of “consensus” regarding the PIP contents, and that ACF has “final authority,” as necessary, to unilaterally “assign the contents of the plan and/or the degree of improvement required for successful completion of the plan.” *Id.* § 1355.35(a)(2). (That did not happen here as the PIP’s terms and requirements were jointly developed.) The regulations also do not set any limit on how many times a title IV-E agency may submit revised PIP proposals (Idaho submitted nearly a dozen drafts). More importantly, as stated above, Idaho has pointed to no legal authority, including any decision from this Board, to support its theory that the length of a PIP approval process may provide a valid legal basis for reversing a determination of substantial nonconformity or the withholding of federal funds.

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2. The Board has no authority to reverse ACF’s withholding determination based on Idaho’s equitable arguments.

Idaho argues that the Board should reverse the ACF withholding based on essentially equitable grounds. First, Idaho argues that the PIP goals were further rendered unattainable by “significant staff turnovers” caused by the COVID-19 pandemic, “resulting in [among other effects] significant increase of child to staff ratios” among its child and family services programs, which limited the programs’ capacity to provide needed services. Appellant’s Br. at 11; see also *id.* at 15, 22, 23, 25, 28. Idaho cites an article in a publication of the U.S. Bureau of Labor Statistics discussing the “great resignation” that Idaho describes as “higher levels of quits during the pandemic . . . for the whole economy.”¹² *Id.* at 16-19, 25, 27. Idaho asserts that this “unprecedented shift in workforce unpredictably, uncontrollably, and unfairly upended efforts to meet the identified improvement percentages in the PIP and likely masked or diluted the improvements that would have otherwise been observable.” *Id.* at 16, 31. Second, Idaho argues that the Board should set aside the withholding because the “substantial federal penalty will result in a lack of resources” and would “significantly impede program ability to meet future program performance requirements, likely for multiple performance evaluation periods to come,” which would cause “a cycle Idaho may never recover from.” *Id.* at 28, 30.

ACF contends that the Board may not consider these arguments because it “is not empowered to provide equitable relief.” ACF Resp. Br. at 18 (citing *Wash. State Health Care Auth.*, DAB No. 3037, at 28 (2021)). ACF also argues, with respect to COVID-19, that Idaho’s assertion that the pandemic caused it to fail to meet its PIP measurement goals is belied by the record, which, ACF says, shows that Idaho was already falling short of its PIP measurement goals from the start of the PIP implementation period, well before the pandemic’s onset. *Id.* at 19.

We agree with ACF. Idaho’s arguments, while distinct, both amount to equitable arguments that cannot serve as a basis for the Board to disturb ACF’s withholding determination. “[T]he Board, being ‘bound by applicable laws and regulations,’ . . . is not authorized to grant equitable remedies.” *Mich. Dep’t of Health and Hum. Servs., Off. of Child Support*, DAB No. 2868, at 8 (2018) (quoting 45 C.F.R. § 16.14); *see also Puerto Rico Dep’t of Health*, DAB No. 2385, at 29 (2011) (citing cases); *Mental Health Ass’n of Or.*, DAB No. 2590, at 9 (2014) (“The Board has no authority to waive a disallowance on the basis of equitable principles.”); *Ga. Dep’t of Hum. Servs.*, DAB No. 2309, at 22 (2010) (“[T]he Board has no authority to reverse an agency’s determination on equitable grounds.”). Importantly, Idaho points to no legal authority, from section

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1123A of the Act, its implementing regulations, or any other source that excuses a title IV-E agency’s failure to successfully complete its PIP and attain substantial conformity or which permits the Board to waive a withholding of federal funds arising from a determination of nonconformity under 45 C.F.R. § 1355.36, because of a national emergency or because of the alleged financial hardship a withholding would cause for the title IV-E agency. *Cf. Kanawha Institute for Social Research & Action, Inc.*, DAB No. 3041, at 9 (2021) (holding that financial hardship and other equitable contentions provide no legal basis for the Board to overturn a disallowance authorized by law). On this ground alone, we find these two equitable arguments unavailing and not a valid basis to disturb the withholding determination.

Yet even assuming there was a legal basis for the Board to reverse this withholding of funds, Idaho provides no evidence that the COVID-19 pandemic played a causative role in Idaho’s failure to complete its PIP. Idaho’s own semi-annual progress reports show that as far back as its first reporting periods, well before the start of the pandemic, Idaho failed to meet its measurement goals for the nine items comprising the four outcomes at issue, and in some cases had already fallen well short of the *original baseline measurement*. *See* “Progress Report 6,” AAF at 1699-1736, and “Progress Report 4,” AAF at 1404-19 (demonstrating Idaho’s failure to attain measurement goals for the nine review items for any reporting period since the start of PIP implementation). There is also scant evidence that Idaho’s performance on these review items dropped after March 2020, when the COVID-19 pandemic in the United States began. Idaho’s performance fluctuated with respect to some of these items and improved for some others, while the pandemic was ongoing. *See id.* at 1699-1736. Accordingly, while we do not doubt that the COVID-19 pandemic caused serious disruptions to the workforce in Idaho’s child and family services programs, Idaho’s argument that the pandemic was to blame for its failure to meet its PIP measurement goals, even if this sufficed as a legal basis to “set aside” ACF’s withholding determination, is not factually supported and based on speculation.

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Conclusion

We conclude that Idaho was not operating its child and family services programs in substantial conformity with federal requirements with respect to four regulatory outcomes. We therefore uphold ACF’s determination to withhold \$935,712 in title IV-B and title IV-E funds.

Endnotes

¹ Section 1123A of the Act is titled, “Reviews of Child and Family Services Programs, and of Foster Care and Adoption Assistance Programs, for Conformity with State Plan Requirements.”

² We quote the regulations currently in effect. The regulations were amended in 2012 under the authority of new statutory provisions related to the Tribal title IV-E program. *See generally* 77 Fed. Reg. 928 (Jan. 6, 2012).

³ Under 45 C.F.R. § 1355.41, each title IV-E agency is required to implement a system, known as AFCARS, to collect and electronically report to ACF certain data regarding all children in foster care for whom the title IV-E agency has responsibility for placement, care, or supervision. NCANDS is a voluntary data collection system that gathers information from all 50 states, the District of Columbia, and Puerto Rico about reports of child abuse and neglect. *Id.* § 1355.20(a); see <http://www.acf.hhs.gov/cb/research-data-technology/reporting-systems> <<http://www.acf.hhs.gov/cb/research-data-technology/reporting-systems>>.

⁴ Available at https://www.acf.hhs.gov/sites/default/files/documents/cb/round3_procedures_manual.pdf - PDF <https://www.acf.hhs.gov/sites/default/files/documents/cb/round3_procedures_manual.pdf>.

⁵ By letter dated June 4, 2020, ACF offered all title IV-E agency administrators an extended, 18-month non-overlapping evaluation period following the two-year implementation period, “to ensure all states have the same amount of time to measure progress from implementing their PIP and other . . . implementation activities.” ACF Ex. 30.

⁶ CFSR Technical Bulletin #9 is available at <https://www.acf.hhs.gov/sites/default/files/documents/cb/> - PDF <https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr_tb9.pdf> cfsr_tb9.pdf - PDF <https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr_tb9.pdf>.

⁷ We cite to the page numbers that appear at the bottom right-hand corner of each page in Idaho’s Appeal File, which comprises a single PDF document of 1,744 pages, the first three of which are the index or exhibit list.

⁸ Idaho’s brief and some communications from ACF in the record (including its PIP approval letter of March 4, 2019) refer to an initial PIP submission date of November 3, 2017. However, several versions of the PIP in the record show an initial submission date of June 23, 2017, and none of the versions indicate an initial PIP submission date of November 3, 2017. In any case, the date when Idaho submitted its initial PIP draft to ACF is not relevant to the Board’s analysis of the issues on appeal and does not affect the appeal’s outcome.

⁹ The three approved PIP goals were: “(1) Improve safety, permanency, and well-being outcomes by ensuring quality casework practice and collaboration with courts; (2) Improve permanency and well-being outcomes through enhanced support of resource families; and (3) Improve system accountability and organizational supports.” AAF at 879.

¹⁰ By letter to Idaho dated August 9, 2019, ACF approved an updated PIP measurement plan. AAF at 1015-16. The letter stated that ACF had endorsed an updated PIP measurement plan because of “changes to the review process in Idaho,” and stated that among the PIP changes was “[c]onfirmation that the first measurement period” begins April 1, 2019, and concludes March 31, 2020, and “[a]fter the first 12 months of reviews are completed, the state will roll the results every six months for reporting purposes (full 12 months of results will be reported).” *Id.* at 1015.

¹¹ ACF added that the penalty was “based on final allotments through the end of FFY [Federal Fiscal Year] 2021 and reported claiming information submitted through the claiming quarter end[ing] September 30, 2021,” and that an “updated penalty amount will be calculated for FFY 2022 after the fourth quarter title IV-E financial report is submitted and finalized.” AAF at 1738. However, by letter dated March 27, 2023, ACF notified Idaho of its “decision to revise the approach to withholding for Round 3 of the CFSR” for all states that did not complete PIP requirements. ACF Ex. 40, at 1. Departing from rules for the ongoing calculation of penalties, as set forth in 45 C.F.R. § 1355.36(e)(2), ACF advised that it would not continue to withhold penalties “for additional periods until the state is found to be in substantial conformity in its Round 4 CFSR or successfully completes a Round 4 PIP.” *Id.*

¹² Available at <https://www.bls.gov/opub/mlr/2022/article/empirical-evidence-for-the-great-resignation.htm> <<https://www.bls.gov/opub/mlr/2022/article/empirical-evidence-for-the-great-resignation.htm>>.

/s/

Michael Cunningham
Board Member

/s/

Karen E. Mayberry
Board Member

/s/

Jeffrey Sacks
Presiding Board Member