DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Michigan Department of Social Services
Docket No. 79-100-MI-SS
Decision No. 165

DATE: April 30, 1981

DECISION

The Michigan Department of Social Services (Grantee) filed an application for review of the April 26, 1979 decision by the Commissioner of the Social Security Administration (Agency). In that decision, the Commissioner affirmed the earlier decisions of the Acting SRS Regional Commissioners to disallow expenditures insofar as they relate to $3,259,590 claimed as Federal financial participation (FFP) under Titles I, X, and XIV of the Social Security Act (Act) for expenditures under dual payee warrants issued for special need items for the period from April 1, 1971 through December 31, 1973.

Our decision is based on the reconsideration record developed pursuant to 45 CFR 201.14, the Grantee's application for review, the Agency's response thereto, and an Order to Show Cause. The Grantee did not respond to the Order and has informed the Board that it does not intend to respond. The Agency was not required to respond to the Order and did not do so. For the reasons stated below, we conclude that the Agency's decision should be upheld.

Statement of the Case

In June 1971 the Grantee submitted a State plan amendment revising its Public Assistance Manual to implement a "dual payee" payment system. The dual payee system would allow the recipient to pay for specific goods, services, or items recognized by the State agency as a special need under the State plan in the form of checks drawn jointly to the order of the recipient and the provider and negotiable only upon endorsement by both the recipient and the provider. The use of such a payment system was based on the Grantee's interpretation of 45 CFR 233.20(a)(2)(v), that since the provision of special need items is optional with the state, the state could describe the circumstances under which such special need items would be provided, including the method of payment.

The plan amendment was disapproved by the SRS Administrator in a letter dated October 8, 1971 on the grounds that it provided for a restrictive payment system without the safeguards provided for the recipient under the provisions of 45 CFR 234.60 (Protective and vendor payments for dependent children) and 45 CFR 234.70 (Protective payments for the aged, blind, or disabled).

Despite the disapproval of its plan amendment, the Grantee operated its dual payee system and by the quarter ending September 30, 1973 had claims for FFP for the system totaling $9,183,203. This amount was disallowed on January 30, 1974 by the Acting SRS Regional Commissioner, Region V. For the period October 1, 1973 through December 31, 1973, the Grantee's claims under the dual payee system totalled $2,315,944 in FFP. This amount was disallowed on March 7, 1975 by another Acting SRS Regional Commissioner, Region V. The two disallowances totaled $11,499,147 in FFP, claimed under Titles I, IV-A, X, and XIV.

The Grantee requested reconsideration of the disallowances pursuant to 45 CFR 201.14 and accordingly received a conference with the SRS Administrator on April 27, 1976.

In his decision letter dated April 26, 1979, the Commissioner upheld the decision of the Acting SRS Regional Commissioners as to the $3,259,590 claimed for FFP under Titles I, X, and XIV, but determined that Section 3(b) of Public Law 95-171, passed subsequent to the disallowances, prohibited the affirmation of that part of the disallowance, amounting to $8,049,737, claimed as FFP under Title IV-A. The Commissioner also noted that the remainder of the original claim, $189,820, claimed under IV-A, was now being claimed by the Grantee under Title XIX and, therefore, not at issue before him.

By letter dated May 24, 1979, the Grantee elected to appeal the decision under the procedures at 45 CFR Part 16.

Discussion

Issue #1. Whether the Grantee's dual payee system of payment violated the "money payments" principle.

Under Titles I, X, and XIV of the Social Security Act, except as otherwise specifically provided for in Federal law, financial assistance for purposes of Federal matching means money payments to needy individuals. Sections 6(a), 1006, and 1405 of the Act. (emphasis added) These statutory provisions are reflected in regulations at 45 CFR 234.11 which interpret money payments eligible for FFP as:

> [P]ayments in cash, checks, or warrants immediately redeemable at par, made to the grantee or his legal representative with no restrictions imposed by the agency on the use of funds by the individual. (36 FR 22238, Nov. 23, 1971) (emphasis added)

This interpretation was previously reflected in Section 5120 of Part IV of the Handbook of Public Assistance Administration (HPA). Section 5120 states that assistance comes to the needy person as a right, and that this right includes the freedom to manage his affairs as other members of the community would. This includes, but is not limited to, the right to decide how, when, and whether each of his needs is to be met.

The Grantee argues that its dual payee system of payment, issuing checks jointly to the recipient and the provider, does not violate the money payments principle. The Grantee contends that although it was the intent of Congress for money payments "to be free of those restrictions which would prevent individuals receiving public assistance from the management of their regular monetary affairs," the reference of Congress in legislative history to money payments as "unrestricted" (see quotation on page 4) was not meant in an absolute sense. Part III, Grantee's Brief in Support of Conference Position. The Grantee therefore asserts that the language of 45 CFR 234.11(a) limiting money payments to those void of any restrictions is too strict an interpretation of the statute.

The Grantee further argues that 45 CFR 234.11(a) must be read consistently with this construction of the Act. To do so, the Grantee looks to subsequent amendments of the Act and notes that Congress has provided for alternative methods of payments, i.e. protective or vendor payments. From this the Grantee concludes that if Congress is willing to allow third party payments in certain situations, it would allow a dual payee system of payment in the context that the Grantee has provided.

Under the Grantee's dual payee system, the public assistance recipient first determines that he has need of a particular item or service. The recipient then decides from what provider to obtain the item or service. After these initial decisions the recipient goes to the Grantee with his request and is issued a warrant made out to him and the provider for payment of the need. The face of the warrant contains a designation of the services for which the warrant was issued. After receipt of the warrant, the recipient proceeds to obtain the indicated services and pay the provider with the warrant, or withhold payment by refusing to sign the warrant because the goods or services are unsatisfactory.

The Grantee contends that this method of payment allows the recipient to exercise freely the personal money management choices envisioned by Congress within the term money payments. The Grantee states that it is only after the recipient has made his decision, the how, when, and whether about the need, that the warrant is issued. In this regard, the Grantee contends that the grant payment itself remains unencumbered.

The Board concludes that the Agency's interpretation of the term money payments as being only those totally without restrictions is a reasonable reading of the Act. The House and Senate committees in their reports on the original Social Security Act explained that the term "money payments" means that assistance shall be "confined to payments in cash." House Report 615 and Senate Report 628, 74th Congress, 1st Session, 1935. This explicit provision coupled with the Congressional intent, as set out below, to allow the recipients to manage their own monetary affairs supports the Agency interpretation as a reasonable one.

The Grantee further contends that to the extent the regulation is inconsistent with the Act, it should be made consistent, "and in this regard subsequent legislative action is a proper fact 'to take into consideration, in determining the meaning of a statute'." 73 Am Jur 2d Statutes §178, Part III of Grantee's Brief.

The Board finds that subsequent legislative action supports fully the Agency's interpretation of the Act. Congress in discussing the state of the law in 1950 said:

> At the present time only unrestricted cash payments to aged and blind persons and with respect to dependent children under the approved State plans are counted as expenditures with respect to which the Federal Government will make a contribution. 2 U.S. Code Congressional Service, p. 3474 (1950). (emphasis added)

As time passed Congress recognized that in certain limited situations there was a need to protect certain recipients of public assistance from their own inability to manage their funds. In legislating these protections, Congress consciously realized it was modifying the strict money payments principle, but such changes were made only in these special circumstances and replete with very specific restrictions.

Thus, in considering the "Public Welfare Amendments of 1962", to provide federal matching funds for the first time for protective payments under AFDC, the legislative history provides:

> The question the committee faced is how to deal with the instances of abuse and misuse of funds given for the benefit of the children without endangering the general principle that the large majority of aid to dependent children recipients, who give proper care to their children, should spend their assistance payment without direction. The committee concluded that certain modifications in the principle of a

> "money payment" were necessary. The money payment concept was included in the 1935 original Social Security Act, applicable to all the assistance titles, and has not, except for medical care and foster home care, been significantly modified since.
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> . . .
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> In modifying the money payment principle, your committee was motivated by a desire to give States much more flexibility in dealing with the difficult situations they face. The intention is not to change the basic nature of the aid to dependent children program. Your committee expects that, although States now will have the flexibility some of them have sought to make other than money payments with Federal participation, they will use this option sparingly, and will set forth criteria to assure that these safeguards are involved only in those instances where the need for them is clear.

House Report No. 1414, 87th Cong., 2nd Session, p. 17 (1962).

In such situations, Congress authorized for the first time the use of protective or vendor payments. However, in doing so Congress provided certain safeguards for the recipient. These safeguards are contained in Section 406(b) of the Act. They basically provide that the state agency must first make a determination that the recipient is unable to manage funds and such mismanagement endangers the recipient's welfare. The recipient must be provided an opportunity for a fair hearing on this question. In addition, the state agency must make efforts to improve the individual's ability to manage money and periodically review the need for the protective payment. Such safeguards reflect Congress's concern that recipients have a real choice in the use of their payments, except where their own inability to manage funds makes it impossible.

These same concerns were expressed by Congress when protective payments were extended to the adult categories, Title I, X, and XIV, in the Social Security Amendments of 1965. See, e.g., U.S. Code Cong. and Ad. News, p. 2099 (1965). Congress again addressed these concerns by providing specific safeguards for the benefit of the recipient to assure that protective payments will be used only in extraordinary situations. See, Sec. 6(a), 1006, and 1405 of the Act.

The Grantee argues that such legislation providing for protective and vendor payments and the attendant safeguard regulations refer to third party payments and cannot be the basis for prohibiting the dual payee system which the Grantee contends is a non-third party payment.

The Grantee is correct insofar as Congress had not specifically addressed a dual payee system at the times covered by the disallowances. However, Congress did so when on November 12, 1977 it passed Public Law 95-171. Section 3(a)(2) of Public Law 95-171 amended Section 406(b)(2)(E) of the Act to allow for payments in the form of joint checks in the same manner as the Grantee's dual payee system. Congress recognized joint checks as a form of vendor payment and, therefore, subject to the previously established safeguards. See, Senate Report No. 95-456, p. 3584 (1977). Although enacted after the period of the disallowance and therefore not controlling on this point, P.L. 95-171 is important to demonstrate that Congress recognized the dual payee system as a non-money payment, and as such, subject to the safeguards enacted to protect the recipients from the abuses of such a system.

Public Law 95-171 also authorized FFP under Title IV-A for the period January 1, 1968 through April 1, 1977 even though: (1) the State exceeded the previous 10 percent limitation on protective payments; (2) it provided assistance in the form of joint checks; or (3) it did not comply with the provisions limiting the circumstances under which such payments could be made. Congress expressly recognized that joint checks were not an acceptable method of payment but added this "forgiveness" provision after hearing testimony that New York City might be penalized two-thirds of $1 billion over an 8 1/2 - year period. It is important to note that Congress authorized FFP under Title IV-A where it had previously been prohibited, but did not authorize identical expenditures under Titles I, X, XIV which were also similarly prohibited.

Issue #2. Whether the Michigan system of dual payee warrants, for "special needs", which are optional with the state, under 45 CFR 233.20 (a)(2)(v), must meet the statutory and regulatory requirements for money payments.

The regulations at 45 CFR 233.20(a)(2)(v) provide that:

> If the State agency includes special need items in its standard, (a) describe those that will be recognized, and the circumstances under which they will be included, and (b) provide that they will be considered in the need determination for all applicants and recipients requiring them. (This regulation has remained unchanged since 1969).

The Grantee's position is that the items for which payment was disallowed were "special needs" within the meaning of the regulation and the method of joint payment instituted comes under "the circumstances under which they will be included." 45 CFR 233.20(a)(2)(v).

We find the Grantee's argument to be without merit. The Grantee, in taking the position it does on the meaning of the words "and the circumstances under which they will be included", loses sight of the location of those words in the regulations. The heading of Part 233 of 45 CFR is "Coverage and Conditions of Eligibility in Financial Assistance Programs." It has nothing to do with the method of payment of assistance or with Federal matching of payments. Section 233.20 is headed "Need and amount of assistance"; and section 233.20(a)(2) is "Standards of assistance." Thus the language on which the Grantee relies in (v) comes under these headings. Nowhere is there any mention of how payments are to be made to recipients or how and when Federal matching will be available.

It should be made clear what is not at issue here. The Agency has not contended that the particular items or services for which FFP was disallowed were not "special needs." The inclusion of these special needs items in the standard of need has not been questioned, but rather the method of their payment. */

There must be a statewide standard of assistance, expressed in money amounts, to be used in determining the need of applicants and recipients and the amount of assistance to be paid to them. 45 CFR 233.20(a)(2)(i). All that 45 CFR 233.20(a)(2)(v) does is recognize that special needs may be included in the state standard. It is the Grantee's method of payment which does not meet the requirements of the statute and regulations for "money payments."

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*/ In its Memorandum Brief in Support of Conference Position the Grantee distinguished financial assistance provided in the form of money payments made "at regular intervals," and the "optional irregular" payments to meet a "special need." (Section II of Grantee's Brief.) The Supreme Court has pointed out in Quern v. Mandley, 436 U.S. 725, 737 (1978), that special need items may frequently be a "regular or recurring expense." In any event, the decision of the Commissioner of Social Security does not question the authority of the Grantee to include special need items as part of the standard of need, in addition to the "regular, recurring items of need," but only the method of payment. (Commissioner's Decision, Conclusions of Law A and B.)

Conclusion

Federal financial participation for special needs must be authorized under the provisions of 45 CFR 234.11(a) as money payments or 234.70(b) as protective payments. The Grantee has failed to show that its dual payee method of payment complies with either of these provisions. Therefore, the decision of the Commissioner of the Social Security Administration is upheld.

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle

/s/ Alexander G. Teitz, Panel Chair