DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: New York State Department of Social Services
Docket No. 82-117-NY-HD
Decision No. 449

DATE: July 29, 1983

DECISION

The New York State Department of Social Services appealed a determination by the Office of Human Development Services (Agency), disallowing $8,556,082 in federal financial participation (FFP) claimed under Title IV-A of the Social Security Act. The State claimed, on its Quarterly Statement of Expenditures for the quarter ended March 31, 1979, costs associated with the Aid to Families with Dependent Children - Foster Care program (AFDC-FC) going back as far as October 1976. The claim represented costs incurred in connection with caseworker activities related to AFDC-FC, and did not differentiate costs for social services (which the Agency alleged were unallowable under Title IV-A) and costs which were not for social services; therefore, the Agency disallowed the entire amount claimed. 1/

The major issues raised by this appeal are (1) whether section 403(a)(3) of the Act precludes reimbursement under Title IV-A for the costs claimed here, i.e., foster care placement, development of plans of care, and provision of other services to the children and their families in connection with foster care; (2) whether the interpretation of section 403(a)(3) formally set out in a 1981 action transmittal applies to preclude reimbursement of these activities; and (3) whether the Agency should be estopped from taking this disallowance because of its actions prior to issuing the action transmittal.

1/ The Agency stated that it would reduce the amount of the disallowance by the amount which the State could document, using reasonable methodology, as costs related to income maintenance eligibility activities. Respondent's Brief, pp. 5-6. The Agency also stated that, should the disallowance be upheld, it would work with New York to determine a fair method of allocating the State's claim between unallowable and allowable costs and that the State had submitted to the Agency a list of activities which could be used as a basis for determining the nature of the costs.

For reasons discussed below, we conclude that section 403(a)(3) prohibited federal participation under Title IV-A in costs associated with foster care placement, plans of care, and provision of services to children and families in connection with foster care because the costs were for services covered by Title XX of the Act. In so doing, we affirm our previous decision raising the same issues that involved three other states. Joint Consideration: Reimbursement of Foster Care Services, Decision No. 337, June 30, 1982 (referred to as Joint Consideration). We also conclude that, because the statute did not permit payment of these costs under Title IV-A, the Agency can apply its 1981 action transmittal, which merely clarified the meaning of the statute, to disallow these costs. Finally, we conclude that the Agency is not estopped from taking the disallowance.

General Background

Title IV-A of the Act provides for grants to states for aid to families with dependent children (AFDC). In 1961 the AFDC-FC Program was instituted under Title IV-A, providing FFP for state expenditures for the costs of supporting certain foster care children who have been removed from their homes for their own best interest. (Section 408) Section 408(f) set forth certain services that must be included in a state's AFDC state plan: the development of a plan of care for each foster child that ensures that the child receives proper care and that services are provided to improve conditions in the child's home; and the use of specified employees to place children in foster homes or child-care institutions.

From at least 1972 until 1975 the services listed in section 408(f) were claimed by states generally as "social services" under Title IV-A. Social services to AFDC recipients were entitled to a higher level of federal participation than, for example, AFDC benefit payments also made under Title IV or AFDC administrative activities in general. Because it was concerned about the growth of social services, which included services for children in foster care, Congress in 1972 placed a $2.5 billion funding ceiling or "cap" on Title IV-A social services. (Revenue Sharing Act of 1972, Pub. L. 92-512)

Effective October 1, 1975, Pub. L. 93-647 established a new Title XX of the Act for financing social services for low-income children and families, including AFDC children. Title IV-A retained as its primary purpose the provision of maintenance payments for families with dependent children. Pub. L. 93-647 included a provision amending section 403(a)(3) (the authority for paying states for administrative

expenditures under IV-A) to prohibit FFP under Title IV-A for expenditures made in connection with any of the Title XX services described in the statutory provision defining the scope of the new Title XX program, section 2002(a)(1) of the Act. Pub. L. 93-647 also imposed a cap on the social services funding available to each state under Title XX. 2/

On June 24, 1981 the Agency issued SSA-AT-81-18 for the purpose of "clarify[ing] that . . . FFP is not available for social services administrative costs in support of . . . AFDC-FC under Title IV-A."

The action transmittal stated:

> FFP under title IV-A for AFDC-FC is limited to the provision of foster care maintenance payments and related activities, e.g., determining initial and continuing eligibility, rate setting, and maintaining the case in payment status. Section 403(a)(3), as amended by Pub. L. 93-647, prohibits FFP under title IV-A for any social services described in Section 408(f), including placing the child, the cost of developing, reviewing, supervising and monitoring a plan of care, as well as carrying out the services provided for in that plan of care . . . and recruitment of foster family homes and institutions.

The action transmittal directed the states to review their cost allocation plans to ensure that the costs of social services were not allocated to Title IV-A and stated that any cost allocation plan that allowed costs for these services under Title IV-A had been approved in error.

2/ Pub. L. 96-272, which was enacted on June 17, 1980, repealed section 408 and shifted AFDC-FC to a new Part E of Title IV effective at state option as early as October 1980, but no later than October 1982. The issues of statutory construction raised by this appeal do not have a practical effect on states beyond September 30, 1980, however, because funding ceilings would apply to both Title IV-A and Title IV-E beginning with fiscal year 1981. See Decision Memorandum to the Acting Commissioner of Social Security, February 24, 1981, p. 4 (State Exhibit L).

Facts

In early 1976 the State filed a claim under Title IV-A for time spent by New York City caseworkers on AFDC-FC children. The Regional Office, after deferring the claim, disallowed it in November 1976, because the State's cost allocation plan did not provide for allocation of costs between income maintenance and social services activities. (Exhibit C, p. 2) Subsequently, the State revised its cost allocation plan to allocate to Title IV-A claims for caseworkers' time spent making eligibility determinations. That plan was submitted in June 1977. The State also requested reconsideration of the 1976 disallowance. During the process of the reconsideration, the Regional Commissioner sent the State, for its information, a copy of the Regional Office's memorandum to the Associate Commissioner for Management, which recommended that the disallowance be withdrawn. That memorandum referred to, and included as attachments, copies of internal memoranda confirming the substance of telephone conversations between the Director of the Income Maintenance Policy Division and the Associate Regional Commissioner in San Francisco. The memoranda concerned several aspects of claiming costs related to AFDC-FC. (Exhibit F) The Region's memorandum recommending withdrawal of the disallowance referred to these internal memoranda as "a policy statement." The State did not allege, nor does the record show, that the Agency did, in fact, withdraw the disallowance, though the State did allege that the Agency paid similar claims.

In June 1977, several days after the Regional Commissioner recommended that the disallowance be withdrawn, the Associate Regional Commissioner for Assistance Payments requested that the State revise its recently submitted cost allocation plan to include all AFDC-FC administrative costs under Title IV-A. (Exhibit H) The Associate Regional Commissioner stated that the basis for this request was the internal memoranda previously referred to. After receiving the letter from the Associate Regional Commissioner, the State revised its cost allocation plan and the Agency approved the plan in December 1978 (Exhibit I).

The activities included in those allocated to Title IV-A by the State were:

- assessing the need, arranging, and providing for placement and services to individuals under 18 in a foster home or appropriate group care facility

- recruitment, licensing, and the study of foster care homes and facilities to determine their acceptability in providing foster care

- casework, therapeutic, and other services as contained in the State's Title XX plan for the child during the placement process

- special services provided to the foster family home

- termination of parental rights when in the best interest of the child

- after-care services

- arranging for other supportive services

(State's Brief, p. 11)

Despite the State's allocation of these activities to Title IV-A, it continued to claim these costs under Title XX, on a county-by-county basis, so long as a county's share of the Title XX allotment could accommodate the claims. Counties which had expenditures for services in excess of their Title XX allotments shifted the costs of the AFDC-FC activities to Title IV-A. (State's Brief, pp. 3-4) The State indicated that about three-fourths of the disallowed claims were incurred by New York City. (State's Brief, p. 4) The State referred to this process as the "AFDC-FC Shift," and, in a letter to the Regional Commissioner dated August 26, 1977, stated that Regional office staff had agreed to that procedure.

Pertinent IV-A Statutory Provisions

During the time period in question, section 403(a)(3) of the Act funded administrative expenditures:

> found necessary by the Secretary . . . for the proper and efficient administration of the State plan, . . . except that no payment shall be made with respect to amounts expended in connection with the provision of any services described in Section 2002(a)(1) of this Act. . . . 3/

3/ The omitted language at the end of this section permits reimbursement under Title IV-A for administrative costs in connection with certain "WIN" services required by section 402(a)(19) to be included in the state plan.

The exception in this provision is the statutory basis for the Agency's policy expressed in SSA-AT-81-18.

Section 408 of the Act requires that states provide in their state plans for placement and plan of care activities as part of the AFDC-FC program. Section 408(f)(1) requires the State to provide for development of a plan of care for foster care children, and section 408(f)(2) requires use of state public-welfare employees "to the maximum extent practicable" in placing children in foster care. Section 408(d) states that the services described in section 408(f)(2) are considered part of the administration of the State plan for purposes of section 403(a)(3).

Issue I: Effect of 403(a)(3) on reimbursement for these costs

The Board previously considered in its Joint Consideration the effect of the exception in section 403(a)(3) on foster care placement and on activities relating to provision of a plan of care involving three other States. New York's arguments concerning the Agency's application of the statute were made largely in response to that decision. Accordingly, before we address those arguments, we will review the findings in the Joint Consideration.

I. Summary of Joint Consideration

A. The meaning of the exception in 403(a)(3).

In determining the effect of the exception in 403(a)(3), we concluded in the Joint Consideration that the exception applied to costs that were both within the definition of an AFDC administrative expense and expended in connection with the provision of a social service described in section 2002(a)(1) of Title XX. This conclusion followed directly from the language and design of section 403(a)(3). Obviously if a cost could not meet the general rule, that it be necessary for administration of the AFDC plan, there would be no need to apply the exception to that rule even if the cost clearly was a social service. Since section 403(a)(3) applied to AFDC administrative activities, and the exception within section 403(a)(3) applied to social services described in section 2002(a)(1), it followed that the exception applied to activities that were both social services and AFDC administrative activities. We referred to the activities covered by the exception, which simultaneously must be a social service and an AFDC administrative expense, as a "dual" program expense.

We further concluded that the foster care placement and plan of care activities at issue in the Joint Consideration were unquestionably "dual" program activities. The States in the Joint Consideration claimed the activities as IV-A administrative costs and the Agency did not actively dispute this characterization. Further, the activities were also social services "described in section 2002(a)(1)" as required by the exception.

Section 2002(a)(1) refers to:

> services directed at the goal of --
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> * * *
>
> (C) preventing or remedying neglect, abuse, or exploitation of children . . . or preserving, rehabilitating, or reuniting families,
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> * * *
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> including expenditures for administration . . . . Services that are directed at these goals include, but are not limited to, . . . services for children . . . in foster care. . . .

The activities at issue in the Joint Consideration specifically could be viewed as having been provided in connection with the goal of paragraph (C) and the example, "services for children . . . in foster care."

We noted in the Joint Consideration that it would be difficult, if not impossible, for the States to deny that activities qualified under section 2002(a)(1) since all of the States had previously claimed the activities as "social services" both before and after the enactment of the Title XX social services program. Here, New York must concede that the activities claimed by it qualify as social services since under its "AFDC-FC Shift" policy it claims the activities in any given year first as social services which are reimbursed at 75% FFP under Title XX. When the social services funding ceiling is reached in Title XX, the State then claims the same activities as a IV-A administrative expense reimbursable at 50% FFP under Title IV-A, which does not have a funding ceiling.

We also concluded in the Joint Consideration that the language of the exception made it clear that the exception did not give the States the option of claiming the costs under either Title IV-A or Title XX, but required the costs of the "dual" program activities be reimbursed only under Title XX. We discussed the meaning of a provision in

Title XX which, although it parallels the scope of the exception in section 403(a)(3), is significantly different in effect. That provision, section 2002(a)(8), states:

> No payment may be made under this section with respect to any expenditure if payment is made with respect to that expenditure under section 403 or 422 of this Act.

Section 2002(a)(8) permits payment under Title XX for costs allowable under both that title and IV-A as long as a state has not already been reimbursed for the same cost under Title IV-A (or IV-B). Hence, the language of 2002(a)(8) creates a prohibition on duplicate claims. Section 403(a)(3), however, does not contain equivalent references to "payment" or "claim," and cannot be said to have an equivalent effect. Instead, the exception prohibits payment under Title IV-A for costs incurred in connection with a social service described under Title XX. If anything, the existence of section 2002(a)(8) undermines the States' position since 2002(a)(8) serves as an example of the wording Congress would have used in the exception at issue if it wished to simply create a prohibition on duplicate payments.

B. The Legislative History

We also concluded in the Joint Consideration that, in addition to the statutory language, important elements of the legislative history of the exception and of the Title XX program support the Agency's position. We noted that the Agency's position was clearly consistent with the overall purposes of Congress in creating a separate social services program with a funding ceiling.

We quoted the following from the Agency brief which attempted to trace those purposes:

> Overall, Pub. L. 93-647 repealed most of the then existing provisions of the Social Security Act that provided for social services to welfare recipients and created instead a new Title XX. Pub. L. 93-647, section 3(a) and (b). In addition, section 403(a)(3) was substantially amended to include the language at issue in this case and to delete reference to the legislative cap on expenditures. Section 1130 itself [which for the prior 3 years had capped social services] was repealed by section 3(e)(1) of Pub. L. 93-647, and all references to it deleted by section 3(e)(2) of Pub. L. 93-647.

> What resulted then was enactment of a comprehensive (albeit "capped") program for social services funding to each State on an allocation basis in Title XX, simultaneous repeal of nearly all of the social services authorizations under Title IV-A, and simultaneous removal of the cap from Title IV-A to Title XX.
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> The only uncapped, open-ended funding provisions for social services remaining under Section 403(a)(3) [after operation of the exception] were specifically included by Congress and stated in legislative history: WIN and emergency assistance for needy families. At least one of those two programs was already effectively capped by appropriations limitations. There is no evidence that Congress intended to uncap Title IV-A and let foster care social services (previously capped under Title IV-A) explode as soon as the cap of the Title XX allocation was used up. Joint Consideration, pages 11-12 (footnote deleted), quoting Agency's Michigan Response.

We noted that the specific reference in the legislative history to the exception in section 403(a)(3) provides further evidence of purpose. The House Report stated the following:

> Section 3(a)(3) amends section 403(a)(3) of the Act to eliminate federal matching under part A of Title IV for expenditures for the provision of services other than services required to be included in the State's WIN program and services provided as emergency assistance to needy families. H.R. REP. No. 1490, 93rd Cong., 2nd Sess. 19 (1974)

This statement confirmed that activities relating to social services would no longer be reimbursable under Title IV-A following the amendment. To the extent that states previously had an option to claim these expenditures under either the AFDC-FC or the social services program, no such option would continue to exist, and hence, the possibility of transfer of Title XX costs to Title IV-A would be foreclosed.

Obviously, when Congress enacted the exception in 403(a)(3), it did not focus on the specific activities which, because of the exception, could only be reimbursed under the capped

Title XX program. It appears, from the language itself and its legislative history, that Congress wanted to eliminate a possible loophole in the Title XX cap by keeping social service activities that were also IV-A administrative activities under the Title XX cap. Without the exception to 403(a)(3), a state could make claims up to its cap for its "pure" Title XX services (i.e., services not also potentially reimbursable under Title IV-A). Then the state could claim "dual" IV-A and XX activities under Title IV-A where there would be unlimited potential for reimbursement, albeit at a 50% rate. To the extent that the state had a substantial amount of "dual" IV-A and XX activities, a loophole would be created in the Title XX cap, and the state could effectively expand its Title XX program beyond the cap. New York has claimed its costs in this fashion, and argued that the loophole exists. However, we believe that this is what Congress wanted to prevent when it enacted the exception. By the open-endedness of its language, it brought all "dual" activities under the exception. 4/

Furthermore, we noted in the Joint Consideration that if Congress had considered which activities would be affected by Pub. L. 93-647, Congress would likely have focused on these very activities since states claimed them as capped "social services" prior to enactment of Pub. L. 93-647. Indeed, New York and other states participating in the two programs claimed placement and plan of care activities as social services under Title XX after Pub. L. 93-647 went into effect.

C. The Significance of Section 408(d)

Finally, in response to State arguments made in the Joint Consideration but not directly by New York here, we concluded that the continued existence of a technical provision, section 408(d), following the enactment of 403(a)(3) did not indicate Congressional intent to continue payment of placement and preparation of plan of care costs under Title IV-A.

Section 408(d) provided that foster care placement services performed by child-welfare employees should be considered part of the administration of the IV-A state plan for purposes of 403(a)(3). We concluded that it follows from the

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4/ The same fiscal concerns, however, would not apply to shifts of costs from one capped program to another or from an uncapped program to a capped program and, hence, section 2002(a)(8) allows more flexibility.

plain meaning of the exception to 403(a)(3) the Congress believed that without the exception, authority might continue to exist in Title IV-A, under the general rule for administrative costs in section 403(a)(3), for the reimbursement of IV-A administrative activities that are also social services. It is undisputed that section 408(d) served only to clarify that the services of employees from the child-welfare program in placing foster care children could be reimbursed under the IV-A program using the general authority for administrative costs in 403(a)(3). Section 408(d) merely confirmed, for the services of these employees, what would require no confirmation for other plan of care and placement activities raised in this dispute: that they are potentially reimbursable under section 403(a)(3) since section 403(a)(3) without the exception provides the general authority for IV-A administrative costs. Thus, we did not find the continued existence of section 408(d) damaging to the Agency's position or inconsistent with the intent behind the exception to 403(a)(3). Congress could have provided a specific list of "dual" activities in section 403(a)(3) including the activities disputed here, and repealed section 408(d) as a conforming amendment. Instead it accomplished the same effect by guiding the Agency to these very "dual" activities by its reference in the exception to social services described in section 2002(a)(1).

Further, even if section 408(d) is viewed as conflicting with section 403(a)(3), we agreed with the Agency that Congress intended that section 408(d) not be given effect to provide reimbursement contrary to the exception in 403(a)(3). Section 403(a)(3) was the later Congressional statement, and section 408(d) was a technical provision which by 1975 included obsolete references to the "public-welfare agency" and to section 522(a), which in 1975 no longer existed as such.

We also added that section 408(d) was by no means dispositive of all activities disputed in the Joint Consideration. Section 408(d) did not cover plan of care activities or placement services performed by AFDC state agency employees and therefore could not in any event be viewed as an indication of Congressional intent for those activities.

II. New York's Arguments in response to the Joint Consideration

New York did not make extensive arguments challenging the correctness of our Joint Consideration decision. It alleged nevertheless two "basic flaws." The first flaw was that the decision elevated "logic over a realistic assessment of Congressional intent." State's response brief, p. 33.

According to New York,

> The exception clause itself reflected no major policy choice by Congress. Rather the policy action taken was to delete the requirement contained in former section 402(a)(14) that states undertake programs of family and children's services for AFDC recipients as part of their AFDC programs, and to replace it with the new discretionary Title XX. At the same time, section 403(a)(3) was amended to remove the special 75 percent funding provision for social services, contained in subsection (A). Since section 403(a)(3) covered funding for plan "administration" (which had included services prior to these amendments), the additional exception clause was necessary to avoid the technical assertion that deletion of the enhanced funding provision left social services generally eligible for 50 percent funding as "administration" costs.
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> But this did not mean that FFP for an activity otherwise funded under Title IV-A was to be affected. Nothing in the terms of Public Law 93-647 or its history demonstrates any intention to make Title XX the exclusive source of funding for activities that qualify both under that title and other titles of the Act. State's response brief, p. 33.

We agree with the State that logic and, indeed, basic rules of grammatical construction, played a role in our interpretation of the statute. We concluded that the exception clause of necessity must relate to the activities covered by the general rule, that is, to activities "found necessary by the Secretary . . . . for the proper and efficient administration of the [IV-A] State plan."

New York asks us to overlook the statutory language and not apply it to social services that could clearly qualify as IV-A administrative activities because of express reference to such activities elsewhere in Title IV-A. The State would have us apply the exception only to social services covered by former section 402(a)(14). The fact that an activity may be referenced outside of section 403(a)(3) merely verifies that it may appropriately be viewed as a IV-A activity. Without any such reference, a serious question might otherwise arise as to whether the activity has a sufficient nexus to the IV-A income maintenance program to be viewed as an administrative activity under that program. By deleting

section 402(a)(14) from Title IV-A in 1975, Congress eliminated all authority for states to provide these services under Title IV-A -- whether as administrative activities or as social services. The State's interpretation of the exception in 403(a)(3) effectively has Congress enacting a statutory redundancy, precluding reimbursement for activities which would already be outside the scope of the program by virtue of the deletion of section 402(a)(14). Moreover, if Congress indeed had not intended to reach activities otherwise funded under Title IV-A, it would not have needed to include the qualification to the exception in section 403(a)(3) to insure funding for plan services required by section 402(a)(19). Finally, we believe that New York has overlooked the most plausible explanation of Congressional intent. It is not unexpected for Congress to be concerned with activities that could be funded under more than one program. We discussed a provision similar in scope in Title XX (section 2002(a)(8)), and we noted that section 403(a)(3) is different in effect from that provision because it apparently was designed to prevent a loophole in the Title XX funding ceiling for activities fundable under either Title IV-A or XX.

The second "basic" flaw in the Board's analysis pointed to by the State was the Board's alleged failure to recognize that a given activity may be eligible for reimbursement under two separate provisions of the Act. Presumably the State referred to section 403(a)(3), which authorized funding for IV-A administrative expenses but which precluded funding for social services recognized by Title XX and to section 408(d) which referred to certain placement services as part of the administration of the IV-A state plan. This argument is wrong on several counts. The only basis for funding administrative activities under Title IV-A is through section 403(a)(3). Other provisions of Title IV-A may provide authority for viewing a particular activity as an appropriate administrative activity for purposes of Title IV-A, but the ultimate authority to fund that activity clearly exists only in section 403(a)(3). Thus, section 408 does not provide independent authority for funding placement activities, but merely indicates that such activities can be considered part of "plan administration" under section 403(a)(3). By cross-referencing section 403(a)(3), section 408(d) provides highly convincing evidence that the actual funding authority is section 403(a)(3).

It is noteworthy, here, that the State has not attempted to demonstrate how all of the services claimed by it are specifically covered by Title IV-A (section 408). Section 408 requires provision in the IV-A state plan for foster care placement and for the preparation of plans of service and care. Section 408 does not refer to direct social services

for foster care children and their families <u>such as therapy and other services required under a state's Title XX plan</u>. It appears to us that only a limited portion of the activities claimed by the State (e.g. part of item 1 of the list on pages 4-5 of this decision) are specifically contemplated by section 408 and that an alternative basis for the disallowance for the remaining categories of services would be that they are not expressly authorized by section 408 and are not appropriately funded under Title IV-A as part of an income maintenance program.

Finally, as an adjunct to its arguments concerning the flaws in the <u>Joint Consideration</u>, the State made two additional points. First, the State argued that where Congress wanted to preclude continued Title IV-A funding for an activity that would otherwise have remained eligible for it notwithstanding the enactment of Title XX, it specifically so provided. The State cited the provision in Title IV-A concerning family planning services, section 402(a)(15). Pub. L. 93-647 added a statement to section 402(a)(15) which caused the development of individual family planning programs described in the subsection to be provided as part of a state's Title XX program. As the Agency argued, however, the additional clause did not concern the question of funding for these or any other social services and instead merely mandated that the family planning services be included in a state's Title XX services plan. Thus, we do not believe that this amendment was duplicative of the exception to 403(a)(3) or that it was unnecessary because of the exception.

The State's second point was that Congress in 1975 might have intended to continue to fund a broad array of social services for foster care children under Title IV-A because such services are designed "to preserve access to public assistance" through facilitating foster care status whereas social services generally are designed to move people from dependency to self-sufficiency.

We simply fail to find in section 403(a)(3) Congressional intent to fund as administrative activities a wide array of social services to foster care children and families (or indeed social services to any other subgroup of the AFDC population). Contrary to what the State has argued, the services claimed by it fulfill stated goals of the social services program in section 2001 and extended beyond merely preserving access to a child's assistance payments. While the services may complement the AFDC program, as indeed social services generally complement AFDC in many different respects, that factor alone cannot justify funding them under the program in view of the express limitation on funding social services under Title IV-A in section 403(a)(3).

Accordingly, on the basis of our prior Joint Consideration and our analysis here, we believe that the Agency's position is the only reasonable and legally supportable interpretation of section 403(a)(3).

Issue II: Retroactive application of the Agency's action transmittal, SSA-AT-81-18

The Agency's action transmittal, SSA-AT-81-18, limited payment of FFP for social services required by section 408(f) to Title XX funds, and was issued on June 24, 1981.

The State asserted that the action transmittal should not be retroactively applied to the claim involved in this disallowance, and that the Agency should allow the claim under Title IV-A. The State argued that the statute itself was ambiguous as to whether these costs should be paid under IV-A, and that the Agency, prior to the issuance of SSA-AT-81-18, had a clear official policy which allowed payment under IV-A for costs of services provided under section 408. Furthermore, the State argued that its rights to reimbursement were "vested" because the Agency had implemented its policy by asking the State to revise its cost allocation plan to conform to the policy and by approving the State's cost allocation plan. Finally, the State contended that its position was supported by previous Board decisions and case law concerning retroactive application of law by an administering agency.

Analysis

We disagree with the State that this is an instance where the Agency had discretion in applying an interpretation. The disallowance was mandated by the statute, which was in effect during the entire relevant period. Even if we had not concluded that the statute could be interpreted only one reasonable way, however, we still would not conclude that retroactive application of the interpretation in the action transmittal was precluded here.

A. The Agency Must Apply the Statute

We concluded in section I that the Agency's clarification of the exception in section 403(a)(3), as stated in SSA-AT-81-18, is the correct interpretation of the statute. The exception in section 403(a)(3) has been effective since October 1975. Even if the Agency was slow to indicate the impact of the exception on these

particular activities, the Agency must still give effect to the statutory exception. Thus, we believe that the Agency here is doing what it is legally bound to do -- apply what has been required by statute since October 1975. 5/

The statutory pattern of the relevant provisions in Title IV-A is complex; however, that fact alone does not mean that the statute is susceptible of multiple interpretations, or that it offers discretion to the Agency in its implementation. Thus, we do not think that there is a question about whether the Agency may retroactively apply the policy articulated in its action transmittal; the Agency must apply the statutory requirement to all time periods during which the

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5/ The State cited the following Board decisions as support for its argument that the Agency cannot retroactively apply interpretations which change earlier policy guidance: Utah Department of Social Services, Decision No. 130, October 31, 1980; South Dakota Department of Social Services, Decision No. 142, January 21, 1981; Pennsylvania Department of Public Welfare, Decision No. 277, March 31, 1982. These decisions, however, presented situations in which the Agency had considerable discretion about what policy to adopt and involved Agency interpretations of regulations rather than of a statute. In Decision No. 277 the Agency had promulgated an official interpretation. The Agency then changed its policy and applied the changed policy retroactively. In the other two decisions, the Board found that it would be unfair to apply a new interpretation retroactively when the parties had not had notice of that interpretation and where the States' interpretations were reasonable. Those decisions are not controlling here. A Board decision which we believe is on point concluded that the Agency could apply a policy retroactively where the statute mandated the result. California Department of Health Services, Decision No. 158, March 31, 1981.

statute was in effect. Summit Nursing Home, Inc. v. United States, 572 F.2d 737 (Ct. Cl. 1978). 6/ It is generally only where the authorizing statute is ambiguous or provides discretion to the administering agency that the courts will consider whether an agency's policy should be retroactively applied.

B. Application of the Action Transmittal Is Not Precluded

Even if the statute could be interpreted as the State proposed, however, we still would not conclude that application of the Agency's action transmittal is improper here. Mere retroactivity does not preclude application of a rule under relevant case law. The courts balance several factors, and the policy's reasonableness is a determining factor. They also consider whether the agency had previously taken an established position which the new rule would change, cf., National Labor Relations Board v. Majestic Weaving Co., Inc., 355 F.2d 854, 860 (2d Cir. 1966), and whether the individual's interest in any antecedent right outweighs the public interest manifest in the policy being retroactively applied. Springdale Convalescent Center v. Mathews, 545 F.2d 943, 956 (5th Cir. 1977).

We have previously concluded that the Agency's policy was not merely reasonable, but the only correct one. We also conclude, for the reasons stated below, that the Agency had not taken an official or established position on the allowability of these costs under Title IV-A prior to the issuance of SSA-AT-81-18, that the State had no "vested" right to claim these costs under Title IV-A, and that there would be no manifest injustice to the State if the policy were retroactively applied.

1. Official Agency Policy

The State asserted that an Agency policy had been "officially issued after careful consideration, and was fully implemented at both the Regional and Central Office

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6/ Accord, Alabama Nursing Home Assoc. v. Califano, 433 F. Supp. 1325 (D.Ala. 1977), aff'd other grounds, Alabama Nursing Home Assoc. v. Harris, 617 F.2d 385 (5th Cir. 1980). See, Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936): "A regulation . . . out of harmony with the statute is a mere nullity . . . ."; accord, United States v. Larionoff, 431 U.S. 864, 873 (1977).

levels." (State's Brief, p. 5) The State alleged that a "high-level review of the AFDC-FC shift issue" was made in the Central Office (State's Brief, p. 8), and that the result of the review was a policy decision in favor of the State. The State asserted that a legal memorandum written in the Office of General Counsel in February 1977 (Exhibit E) was evidence of the high-level review, and that the internal Agency memoranda (Exhibit F), which confirmed telephone conversations between the Director of the Agency's Division of Income Maintenance Policy (Central Office) and the Associate Regional Commissioner for Assistance and Public Services in San Francisco, were statements of the official policy. The State further alleged that this "Central Office policy" was confirmed by "an official Agency memorandum" (Hurwitz letter) sent in response to an inquiry from the Seattle Regional Office (State's Brief, p. 9)(Exhibit G). Finally, the State alleged that the Regional Office's June 1977 request that the State revise its cost allocation plan (Exhibit H), and the Agency's approval of the State's plan based on a revision of its allocation plan for AFDC-FC costs (Exhibit I) were evidence of the Agency's implementation of an official policy. The State argued,

> The fact that the policy decision was not memorialized in an Action Transmittal or a PIQ, or not simultaneously distributed to all states, is immaterial. The crucial fact is that the decision was acted on by the Department. That was far more important to New York, and far more indicative of its "official" status, than the form or the heading of the document announcing the policy.

(State's Reply Brief, p. 3)

We think that the Office of General Counsel memoranda included in the appeal file indicate that the Agency was reviewing the question presented in this appeal, specifically, the legal effect of section 403(a)(3). There is no evidence, however, that the Agency had adopted an official policy on that question prior to SSA-AT-81-18. The internal memoranda which confirmed telephone conversations were nothing more than records of informal conversations, and they did not purport to set forth the legal basis for any Agency policy. Furthermore, we do not think that those memoranda were intended to address the specific question we are faced with here. The statements made in the two confirmations of telephone conversations relate to whether the classification of the person providing services affects

the payment of those services under a specific title of the Act. There is no mention of section 403(a)(3). None of these memoranda were ever distributed consistently to all states in the manner normally used by the Agency to communicate official policy statements (e.g., policy interpretation questions (PIQs), action transmittals (ATs), or other program instructions; see SSA-AT-78-28 regarding the form of policy issuances to states). Nor did they have any other indicia of being official policy documents, such as a statement of the statutory or regulatory basis for a position. In fact, if the confirmations are read as the State proposed, they directly contradict the position taken by the Office of General Counsel, in the memoranda written in 1977 and 1980 (Exhibits E and K). Therefore, we do not think that these documents can be considered as anything more than informal communications, which the authors did not intend to distribute outside the Agency, and which were not authoritative for purposes of binding the Agency.

An official at the Regional level did refer to these documents as a "policy statement" when he recommended to the Central Office that a prior disallowance against the State be withdrawn, but the Agency stated that this reference was erroneous. Furthermore, the Agency sent copies of these documents to the State only to inform the State about the status of that prior disallowance, which was taken by the Agency on a more narrow basis related to how the State claimed the costs. This disallowance did not involve the significance of section 403(a)(3) at all. The Agency's letter transmitting to the State the memoranda and its recommendation shows no intent to identify federal policy on a more general basis. Furthermore, there is no evidence in the record that the Agency approved the recommendation or that the Central Office adopted a formal policy based on the recommendation and underlying memoranda.

We recognize that states often seek advice from Agency personnel and acknowledge that it is reasonable for states to do so. 7/ Such advice does not necessarily constitute official agency-wide policy, however. We conclude that the Agency had not adopted an official policy about the statute prior to SSA-AT-81-18.

2. "Vested" rights

The State argued that it had a "vested" right to reimbursement for these costs under Title IV-A because the

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7/ St. Francis Memorial Hospital v. United States, 648 F.2d 1305 (Ct. Cl. 1981)

Agency requested the State to revise its cost allocation plan and because Regional officials had approved the State's cost allocation plan as revised, including the State's method referred to as the "AFDC-FC Shift." The Joint Consideration discussed the effect of cost allocation plan approvals and concluded that cost allocation plans function primarily to delineate proper cost allocation methods and procedures and do not address the full range of substantive issues raised by the Agency's programs. The plans cannot be viewed as policy judgments on the part of the Agency about cost allowability and cannot bind the Agency where the plans are contrary to a controlling statute. Joint Consideration, p. 19. Furthermore, the approvals are specifically limited and do not purport to be approval of the allowability of particular costs. (Exhibit I, p. 2)

The fact that an Agency official requested the State to revise its plan can have no further significance where the plan approval itself does not provide a "vested" right. The Court of Appeals for the Fifth Circuit considered an Agency regulation which changed the claiming practices for depreciation, under the Medicare program's reimbursement of providers for their "reasonable" costs. The new policy was more restrictive than the prior policy, although both were discretionary within the language of the statute. The court reasoned that the earlier, more liberal policy was not a right to which the providers were entitled. The court said,

> 'Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the [Secretary] is not prevented from curing the defect in administration.'

Springdale Convalescent Center, supra, at 956, quoting cases cited therein.

Here, the State argued for an interpretation of the exception to section 403(a)(3) which is the most advantageous to it financially, but which the language of the statute and the legislative history do not support. Clearly, the case law allows the Agency to correct defects in its administration by applying the statute, and no "vested" right or substantial equity was otherwise created.

3. "Manifest injustice"

The State has argued that it will suffer hardship if it cannot receive reimbursement for the costs it incurred because, on the basis of Agency statements, it believed that it would receive reimbursement under Title IV-A, and planned its social service activities on that basis. The State

pointed to the language used by the Supreme Court in Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981), in which the Court indicated that states are entitled to know the limits of federal funding at the time they incur program expenditures.

We think that the situation in Pennhurst is distinguishable from the situation here. In Pennhurst, the Court found that the statute was ambiguous and that there was no specific language which mandated the state to provide treatment which had not previously been required. Pennhurst, at 15. The Court found that "Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with . . ." another statutory provision. Pennhurst, supra, at 21. Here, the statute can be interpreted in only one reasonable way, and there was no question but that the State must provide at least some of the foster care services claimed here. Furthermore, here the statute provided for payment, albeit under Title XX. Although the State alleged that it had planned its social service activities based on a belief that the costs here were allowable under IV-A, the State provided no evidence to support this allegation. Indeed, the State planned to shift the costs to Title IV-A only if the Title XX cap were exceeded. Even if the State did formulate its program based on what it thought was the Agency's position, however, we cannot consider this a manifest injustice in view of the statutory mandate precluding reimbursement. 8/

8/ The State referred to two cases concerning retroactive application of regulations concerning individual benefits, in which the courts found that retroactive application of a change in previously settled law (a previous regulation) would result in manifest injustice. Coe v. Secretary of HEW, 502 F.2d 1337 (4th Cit. 1974); Johnson v. Finch, 328 F. Supp. 1169 (E.D. La. 1971). These cases involved three factors which distinguish them from the facts presented in this appeal: the statute did not require a specific action, a previous regulation had existed which set out the law, and the cases involved the issue of individual benefits, which the courts have generally found to invoke a higher standard of due process because the individual's property rights are at stake.

The courts have previously held that retroactive application of regulations or Agency policy adopted pursuant to congressional legislation does not necessarily result in manifest injustice:

> Congressional legislation or regulations adopted pursuant thereto, whether prospective or retrospective in application, often have economic consequences which may be inconsistent with a party's reasonable expectations. Such inconsistencies are not equivalent to unconstitutionality as to prospective or retrospective enactments.

Springdale Convalescent Center v. Mathews, supra, at 955; see also, Hazelwood Chronic & Convalescent Hospital v. Weinberger, 543 F.2d 703, 709 (9th Cir. 1976), vacated on other grounds, 430 U.S. 952 (1977). 9/

In summary, we do not think that this is an instance where the Agency had discretion in applying an interpretation, and, even if it did, we do not think that application of the action transmittal would be precluded here.

9/ The parties referred to a number of appellate court decisions which they argued were applicable. These cases involved retroactive application of regulations promulgated by the Department of Health, Education, and Welfare (now Health and Human Services) (the Department). Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077 (1st Cir. 1977), and other cases cited by the parties. In all of those cases, the Department was exercising its discretion in interpreting the meaning of the statutory term "reasonable cost," and the regulations were the Department's interpretation of a broad statutory term. Most of these cases upheld retroactive application, and, of the three cases which denied retroactive application of the regulations, two contained very narrow holdings based on the specific facts of the case (which differ from those here), and the third case was reversed because the court did not have jurisdiction. Daughter of Miriam Center for the Aged v. Mathews, 590 F.2d 1250 (3d Cir. 1978); South Windsor Convalescent Home, Inc. v. Weinberger, 403 F. Supp. 515 (D. Ct. 1975), rev'd for lack of jurisdiction, 541 F.2d 910 (2d Cir. 1976); Columbia Heights Nursing Home, Inc. v. Weinberger, 380 F. Supp. 1066 (M.D. La. 1974). Moreover, we do not think these cases on retroactive application of regulations control this appeal, since we have previously concluded that the exception in section 403(a)(3) can be interpreted in only one reasonable way.

Issue III: The application of the doctrine of equitable estoppel to the Agency's actions

The doctrine of equitable estoppel precludes a party from establishing an essential element of its claim because of that party's misrepresentations, on which the opposing party relied to its detriment. 10/ Here, the State asserted that the Agency must be estopped from disallowing these costs under Title IV-A because the State relied in good faith on (1) the internal Agency memoranda discussed above; (2) the Agency's request that the State revise its cost allocation plan, and the Agency's subsequent approval of the State's cost allocation plan and of the State's "AFDC-FC shift" procedure; and (3) the Agency's initial reimbursement of the State's claims for three quarters in 1977 and 1978 (State's Exhibits, Meister Affidavit), and reimbursement of other claims after initially deferring them.

The State alleged specifically that it relied to its detriment on the above actions of the Agency. The State alleged that the level of social service spending in the State was directly affected by the State's actions as a result of the Agency's approval of the State's cost allocation plan. The State also indicated that its financial problems under Title XX were largely the result of New York City's financial crisis. The new cost allocation system and the State's procedure for its "AFDC-FC Shift" "relieved the pressure on the City's social services budget." (State's Brief, p. 19)

Analysis

The federal courts have never unanimously agreed that the doctrine of equitable estoppel may be invoked against the federal government. State of New Jersey v. DHHS, 670 F.2d 1284 (3d Cir. 1982). Although the Supreme Court has not yet explicitly decided that there is anything sufficient to support estoppel against the government, INS v. Miranda, 103 S.Ct. 281 (1982); Schweiker v. Hansen, 450 U.S. 785 (1981),

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10/ The party asserting estoppel has the burden to show that the following elements of estoppel are present: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. See Montana Department of Social and Rehabilitation Services, Decision No. 171, April 30, 1980, and cases cited therein.

some of the lower courts have held that at the very least affirmative misconduct is necessary to invoke estoppel against the government. United States v. Harvey, 661 F.2d 767, 773 (9th Cir. 1981); New Jersey v. DHHS, supra, at 1298. These courts have not provided a conclusive definition of affirmative misconduct; however, they have said that there must be intentional misrepresentation or wrongful concealment of a material fact, New Jersey v. DHHS, supra, at 1297, and that negligence will not suffice. INS v. Miranda, supra, at 283. 11/

Furthermore, it is a fundamental principle that no agency official has the authority to act contrary to a federal statute. Federal Crop Insurance v. Merrill, 332 U.S. 380 (1947). "The rationale is that a single official cannot override a statute or regulation . . . ." Molten, Allen and Williams, Inc. v. Harris, 613 F.2d 1176, 1178 (D.C. Cir. 1980).

As we concluded previously, section 403(a)(3) can be interpreted in only one reasonable manner, and that interpretation prevents the State from claiming under Title IV-A the administrative costs of services provided for foster care children. The Agency has no choice but to implement that mandate, and thus cannot be estopped from so doing based on the actions of Regional officials. Furthermore, if the Agency could be estopped from taking this disallowance, there would have to be a showing that the Agency's actions amounted to "affirmative misconduct," as it has thus far been identified by the courts, and that the other elements of estoppel are present. Below, we discuss the Agency's actions and conclude that the Agency's actions cannot be deemed "affirmative misconduct," and that, in any event, the State has not shown that all elements of estoppel are present.

1) Internal memoranda

The State alleged that it relied on the internal Agency memoranda which confirmed conversations between two Agency

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11/ Although the Ninth Circuit has twice said that unexplained delay could be sufficient to estop the federal government, Miranda v. INS, 673 F.2d 1105 (9th Cir. 1982), and earlier opinion, 638 F.2d 83 (9th Cir. 1980), the Supreme Court summarily reversed that decision, saying that the Ninth Circuit erred in determining that the case established affirmative misconduct. INS v. Miranda, supra, at 283.

officials in Washington and San Francisco. We discussed these memoranda fully in section II, concluding that --

- The memoranda do not directly or clearly address the problem before us in this appeal, since they do not refer to section 403(a)(3) and were made in the context of whether the classification of a worker providing services affects whether the services may be paid under Title IV-A.

- The memoranda were sent to the State only to inform the State about the status of another disallowance that did not involve section 403(a)(3).

- The Agency did not intend these documents to be statements of official policy, nor did it ever officially adopt a policy which supports the State's position.

The memorandum written by an Agency official to the Seattle Regional Office (Hurwitz letter) does not support the State's position because there is no evidence that the State knew about that memorandum prior to the appeals brought before this Board or that the State relied on that memorandum in making expenditures.

2. Agency's actions about State's cost allocation plan

As discussed above, approval of a cost allocation plan does not constitute approval of the allowability of particular costs because cost allocation plans function primarily to delineate proper cost allocation methods and procedures rather than to sanction the allowability of claims. The plans cannot be viewed as policy judgments on the part of the Agency about the allowability of costs under a statute and cannot bind the Agency where the plans are contrary to a controlling statute.

Further, the fact that an Agency official at the Regional level requested the State to revise its plan cannot overcome the meaning of the statute itself and the limited effect of a plan approval. As we stated in section II above, no agency official has authority to act contrary to a federal statute, and a cost allocation plan approval is not to be taken as a guarantee of allowability. Furthermore, at that time no

formal adoption of a policy or thorough high level review had occurred on the precise issue raised here. The Regional official was therefore acting in a policy vacuum, and the plan approval took place before the full implications of the exception in section 403(a)(3) had been analysed and resolved.

3. Agency's initial reimbursement of claims

The Agency's payment of claims on the basis of as yet unsubstantiated expenditure forms submitted by a state does not necessarily mean that the claims paid are allowable. The nature of the fiscal relationship between the federal government and the states has resulted in an advance payment system under which the states are paid on the basis of cost estimates (in gross figures), and later adjustments are made to those estimates based upon actual expenditures, as claimed by the states. 45 CFR 201.5. The process does not lend itself to close examination of individual items included in the gross claims made each quarter. Furthermore, even if the Agency does not disallow a claim after deferring it under 45 CFR 201.15, it is not prevented from taking a disallowance later. _See_ 45 CFR 201.15(c)(6). This Board has held that the Agency properly used disallowance rather than deferral procedures where the unallowability stemmed from the questionable legality of the claims. _Joint Consideration_, pp. 20-22. We have also previously held that deferral procedures are not a condition precedent to taking a disallowance. Massachusetts Department of Public Welfare, Decision No. 345, September 20, 1982, p. 6. Nor is there any particular time limit within which the Agency must take disallowances, even though claims are initially paid within a few quarters of the one in which the claim was made, unless they have been deferred. Therefore, no conclusions about allowability may be drawn from the Agency's initial reimbursement of similar claims and payment of those claims cannot provide a basis for estopping the Agency. 12/

We conclude, therefore, that these Agency actions do not form a basis for applying estoppel here. The State did not provide any evidence to show that any of the Agency's actions deliberately or recklessly misled the State. Thus, we cannot find that these actions constituted affirmative misconduct. Further, the State has not met its burden of showing that the Agency intended that its actions be relied on as establishing

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12/ Indeed, the Agency stated that, if the disallowance here is upheld, the Agency would prepare notices of disallowance for the remainder of the State's claims. (Respondent's brief, p. 17).

the allowability of the State's claims for the specific social services costs involved here. Under the circumstances, in light of the statutory exception and the absence of any official Agency guidance stating that the claims were allowable, we do not think the State could reasonably rely on the Agency's actions here.

Finally, even if the other elements of estoppel had been demonstrated, the State has not shown that it was injured as a result of relying on Agency actions. The State alleged that it would suffer if it had to repay funds which it spent on Title XX services, but provided no concrete evidence that it would have foregone services in the event that it knew that funding for these services was limited to Title XX alone.

In summary, the statute requires that the Agency take the position it has and equitable estoppel does not apply. Even if it did, we do not think that the Agency actions pointed to by the State constitute "affirmative misconduct" or that the state has shown that every element of estoppel is present.

Conclusion

As discussed above, we conclude that the only reasonable and legally supportable interpretation of section 403(a)(3) is that the State may not claim under Title IV-A for administrative costs of social services to foster care children that are not related to eligibility determinations. Furthermore, we conclude that the Agency must implement this interpretation for periods during which section 403(a)(3) was in effect. Finally, we conclude that the Agency's actions with regard to the State as argued in this appeal cannot estop the Agency from taking this disallowance. Therefore, we sustain the disallowance in the amount of $8,556,082.

Cecilia Sparks Ford

Norval D. (John) Settle

Donald F. Garrett
Presiding Board Member