DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: New York Department of Social Services DATE: May 23, 1980
Docket Nos. 78-66-NY-CS
78-162-NY-CS
79-36-NY-CS
79-234-NY-CS
Decision No. 101

DECISION

The New York Department of Social Services requested reconsideration pursuant to 45 CFR Part 16, Subpart C (1978), of four disallowances of Federal financial participation (FFP) claimed under Title IV-D of the Social Security Act (Act) for the provision of child support enforcement services to persons not eligible for the Aid to Families with Dependent Children (AFDC) program. The four cases have been considered jointly without objection by the parties. The principal issue presented is whether the State's claim, totalling $4,962,238, was properly disallowed on the ground that non-AFDC recipients who had previously applied for and received services under a wholly State-funded program did not file new applications for the services on or after the date on which the State began to participate in the Title IV-D program. The amount disallowed includes the cost of services provided to all non-AFDC recipients since the State did not identify the amount allocable to those non-AFDC recipients who had received child support services prior to the effective date of Title IV-D.

We have determined that there are no material facts in dispute and that an informal conference would not be helpful, and, accordingly, proceed to decision based on the written record and briefs. For the reasons stated below, we conclude that the disallowances should be upheld.

Background

Section 455(a)(1) of the Act authorizes reimbursement of 75 percent of the total amounts expended by a state for the operation of an approved state plan for child support. Section 454(6)(A) of the Act requires that a state plan for child support provide that--

> [t]he child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State....

Individuals "not otherwise eligible" are those not eligible for the AFDC program under Title IV-A of the Act. The dispute in this case focuses on the meaning of the requirement in this section for the filing of an application by such individuals.

The Title IV-D program became effective in the State of New York on July 1, 1975 (also the effective date of the statute establishing Title IV-D). Some child support services (including services to non-AFDC recipients) were provided by the State through local probation departments prior to that date, however. After it began to participate in the Title IV-D program, the State continued to provide those services through the probation departments, pursuant to purchase of service agreements with the Department of Social Services. The State maintains that applications filed when the program was wholly State-funded satisfy the requirement in Section 454(6)(A) for the filing of applications. The Agency, on the other hand, takes the position that the costs of continued services to non-AFDC recipients are not eligible for FFP because new applications for such services were not made on or after the effective date of the Title IV-D program.

The "applications" filed by non-AFDC recipients prior to the effective date of Title IV-D consisted of petitions initiating support proceedings signed by the person seeking support for the child and, in certain instances, a support agreement signed by the parties. The petitions and support agreements were required to be filed with the Family Court and therefore were not maintained in the records of the probation departments, although some mechanism apparently existed for referring the cases to the probation departments. (State response to Order to Show Cause, dated January 18, 1980, second unnumbered page.) In its briefing to this Board, the Agency asserted that "since the petition was not filed with the State IV-D agency [in this case, the Department of Social Services], it cannot be viewed as an adequate application for IV-D services." (Agency response to Order to Show Cause, dated February 21, 1980, p. 6.) The State, contending that a support petition constituted a proper application, submitted a copy of a letter from the Regional Representative to the State dated November 4, 1977, which stated that "...a non-AFDC individual applying for services beginning July 1, 1975 would probably meet the application criteria... on the basis of signing and filing a support petition...." (State response to Order to Show Cause, dated January 18, 1980, second unnumbered page, and State reply to Agency response to Order to Show Cause, dated March 21, 1980, p. 3.) There is no indication in the record as to whether the Agency has accepted support petitions filed by non-AFDC recipients on or after July 1, 1975 as applications, however. We do not decide here the issue of whether support petitions or support agreements filed with the Family Court constituted applications within the meaning of Section 454(6)(A) of the Act and the implementing regulations, since we find that the Agency's interpretation of the statute as requiring the filing of applications on or after the effective date of the Title IV-D program is valid.

The Parties' Arguments

The State contends that neither the statute nor the implementing regulations contain any requirement for new applications. The Agency argues that the statute and implementing regulations contain an implied requirement for new applications. An action transmittal issued by the Agency on June 9, 1976 (OCSE-AT-76-9) states clearly that new applications are required for cases where non-AFDC recipients continue to receive child support services after the effective date of Title IV-D. The Agency's position, however, is that the action transmittal merely interprets the statute and implementing regulations, and it does not argue that the action transmittal was a legislative rule. (As a legislative rule, the action transmittal would be unenforceable since it was not published in accordance with the notice and comment rule-making procedures of the Administrative Procedure Act (5 U.S.C. 553) which the Secretary of HEW in 1971 made applicable to grant programs administered by the Department. (36 FR 2532, February 5, 1971.)) Nevertheless, the Agency allowed FFP in the cost of continued services even in the absence of new applications until August 1, 1976, thirteen months after the effective date of Title IV-D, on the ground that the action transmittal "was not promulgated until June 1976, and not received by the States until sometime thereafter...." (Docket No. 79-234-NY-CS, reconsideration record, memorandum from Deputy Regional Director, OCSE, to Region II Administrators of IV-D State Agencies, dated September 20, 1976.)

In support of its position that a requirement for new applications is implicit in the statute, the Agency asserts that the application required by Section 454(6)(A) is for "services established under the plan," and that "[i]t would be impossible for an individual to apply for the services provided under a IV-D plan prior to July 1, 1975 because...the legal basis for the plan, Title IV-D of the Act, was not effective until July 1, 1975." (Agency response to appeal, dated June 7, 1979, p. 4.) The Agency makes a similar argument with respect to language in 45 CFR 302.33(a) (a section of the regulations implementing the Act), which follows the language of Section 454(6)(A) except that it provides that the application is to be filed with the IV-D agency rather than with the State.

In an Order to Show Cause issued on December 21, 1979, the Board Chairman addressed the Agency's argument noted above, pointing out that Section 454(6)(A) does not literally require that an individual file an application for services established under the plan, but rather that services established under the plan be made available to an individual who files an application. The Order suggested that it could thus be argued that as long as an individual filed an application for the type of services provided under the Title IV-D plan, that application would be sufficient.

The State indicated in response to the Order that after the effective date of the Title IV-D program, non-AFDC recipients did not receive any services in addition to those previously requested. (State response to Order to Show Cause, dated January 18, 1980, first unnumbered page.)

The Order stated, however, that although it did not appear that new applications were clearly called for by the language of the statute or regulations, there might be some policy or administrative consideration not apparent from the record then before the Board which showed that the requirement for new applications was a reasonable one not inconsistent with the statute or regulations. The Order invited the Agency to brief this issue.

The Agency's response to the Order first cites the legislative history of Title IV-D in support of its position. It points out that, prior to the enactment of Title IV-D, there was a requirement in Title IV-A that the state agency charged with administering Title IV-A undertake an effort to establish paternity and secure support on behalf of individuals receiving AFDC. The Agency states that Congress found that most states had not successfully implemented this requirement and established a separate child support enforcement program which mandates more aggressive administration. The Agency argues that this history shows that the submission of applications to the Title IV-D agency (or to an agency operating under a cooperative agreement with the Title IV-D agency) is crucial, and the Agency contends that "[t]he grandfathering in of old applications would merely continue a system found lacking by Congress and would not in any way demonstrate increased program effectiveness." (Agency response to Order to Show Cause, dated February 21, 1980, pp. 3-5.)

The Agency also argues in response to the Order that submission of applications to the Title IV-D agency is necessary because that agency would otherwise be unable to determine if individuals receiving child support services either wanted such services or should be receiving them and would have no control over the adequacy of the services provided. (Agency response to Order to Show Cause, dated February 21, 1980, p. 5.)

The State, replying to the Agency's response to the Order, agrees with the Agency that Congress was concerned that some states were not fulfilling their obligations under Title IV-A in the area of child support enforcement and intended to require states to adopt a new, more aggressive approach to child support enforcement with the enactment of Title IV-D. The State notes further that Congress, in enacting Title IV-D, sought to expand child support services by adding the requirement not present in Title IV-A that such services be provided to non-AFDC recipients who have filed applications. The State argues, however, that if it were to "go back to people who have already applied for and are receiving services and ask them to reapply for the services[,] [u]nderstandably, a number of recipients will refuse to or fail to reapply," thus defeating the Congressional intent. (State reply to Agency response to Order to Show Cause, dated March 21, 1980, pp. 1-3.)

The State also disputes the Agency's argument that the Title IV-D agency exercised no control over the provision of child support enforcement services to non-AFDC recipients who had not submitted applications to it.

The State notes that the "IV-D agency exercised the same control over... cases for which applications were received before July 1, 1975 as it did over...cases for which applications were received after IV-D funding became available," the services having been provided at all times by the probation departments. (State reply to Agency response to Order to Show Cause, dated March 21, 1980, pp. 2-3.)

The State also contends that the nature of the documentation which the Agency had indicated that it was willing to accept as applications showed "[t]hat the policy of OCSE serves no programmatic function...." (State response to Order to Show Cause dated January 18, 1980, p. 6.) That documentation consists of the endorsement by non-AFDC recipients of a statement, stamped on the back of support checks issued by the Probation Department, that the endorser requests child support services. In the absence of any current support payments, a similar statement was to be mailed to a non-AFDC recipient for signature and returned.

The State formally proposed the use of this system based on discussions with the Agency, but did not implement it although it was approved by the Agency. (Docket No. 79-234-NY-CS, reconsideration record, letter from State to Regional Representative dated June 9, 1977, and letter from Regional Representative to State dated June 17, 1977.)

Discussion

We do not find persuasive either the State's argument that there is no basis in the statute for a requirement of new applications or the Agency's argument that new applications are clearly required by the statute. The Agency's argument is based primarily on a verbalistic analysis which, consistent with the tentative conclusion in the Order to Show Cause, we find to be flawed. Moreover, we find no support in the legislative history of Title IV-D for the proposition that Congress clearly intended that new applications be filed. Congress's recognition of the failure of the states generally to provide effective child support enforcement programs for AFDC recipients pursuant to Title IV-A does not appear to have any bearing on the treatment of non-AFDC recipients under the Title IV-D program. On the other hand, in the absence of an express reference in Title IV-D to services provided prior to the effective date of that title, it cannot clearly be inferred that new applications are not required in those cases. Thus, the Agency's interpretation of Section 454(6)(A) as requiring new applications is only one of two possible interpretations of an ambiguous provision.

The Board has indicated in previous decisions that, while it is not the Board's role to substitute its judgment for the judgment of those charged with administering the programs of this Department, the Board does not regard as controlling the interpretation of a statute or

regulation made by a constituent agency of the Department. Michigan Department of Social Services, DGAB Docket No. 78-15-MI-ME, Decision No. 64, August 16, 1979, pp. 5-6; Ohio Department of Public Welfare, DGAB Docket No. 78-50-OH-HC, Decision No. 66, October 10, 1979, pp. 6-9; New Mexico Department of Human Services, DGAB Docket Nos. 78-32-NM-HC, 79-33-NM-HC, and 79-37-NM-HC, Decision No. 70, December 11, 1979, p. 3; Michigan Department of Social Services, DGAB Docket Nos. 78-70-MI-CS and 79-159-MI-CS, Decision No. 76, January 31, 1980, p. 5. Indeed, in the instant case, the Agency argued only that its interpretation should be accorded substantial weight. (Agency response to appeal, dated June 7, 1979, p. 9.) The Board Chairman in the Order to Show Cause commented on this argument as follows:

> This Board does give deference to the interpretation given a statute by an agency, in accordance with principles established in the courts. It is not, however, bound by the agency's interpretation, but must balance an appropriate respect for clearly stated administrative construction with its own responsibility for independent decision. It is neither obligated nor permitted to stand aside and rubber-stamp affirmance of administrative decisions if they are inconsistent with a statutory mandate or frustrate the Congressional policy underlying the statute. [Citations omitted.]

Neither party has argued that this is an inappropriate standard to apply in this case. Accordingly, we must determine whether the Agency's interpretation of the statute as requiring new applications is inconsistent with the statute or frustrates Congressional intent. As indicated above, the language of Section 454(A)(6) is in our view ambiguous and does not preclude the interpretation adopted by the Agency. We find, moreover, that there has not been a sufficient showing that this interpretation in fact frustrates the intent of Congress in establishing the Title IV-D program.

Two principal arguments are advanced by the State to the effect that a requirement of new applications frustrates the Congressional policy underlying Title IV-D. First, as noted previously, the State argues that such a requirement would frustrate Congressional intent because individuals who applied for the services prior to the effective date of Title IV-D would not be willing to reapply for them even though they would otherwise have wished to continue to receive the services. The State, however, has provided no proof to that effect. A finding that the Agency's interpretation frustrates Congressional intent must rest on more than mere conjecture. Furthermore, the effort involved in filing a new application is so minimal that a failure to do so might arguably reflect the absence of any serious desire for continued services in which case the provision of services would frustrate Congressional intent.

As also noted previously, the State argues, in addition, that the endorsement of a statement on the back of a support check to the effect that the endorser requests child support services, which the Agency was willing to accept as an application, would serve no programmatic function. If in fact the endorsement served no purpose, this might arguably show that the requirement of new applications frustrates Congressional intent, since any costs associated with obtaining such endorsements would needlessly reduce the amount of funds available for providing the services themselves. We note at the outset that this is too tenuous a connection on which to find invalid the Agency's interpretation, there being no indication that the cost of obtaining endorsements would be significant. The Agency argues that the receipt of new applications would in effect allow the Title IV-D agency to exercise better control over the non-AFDC caseload. The system of endorsements, however, would not provide any information which could be used to evaluate the adequacy of the services provided. The Agency also argues that new applications are necessary in order to permit the Title IV-D agency to make eligibility determinations. The only criterion for eligibility under the statute, however, is that the person file an application for the services, so that the endorsements would not be any better an indicator of eligibility than would applications filed before the effective date of Title IV-D. Nevertheless, the record shows that the Agency's approval of the system of endorsements came only after a long period of discussions with the State regarding the requirement of new applications. This indicates that the Agency may have approved the system simply in the spirit of maximum cooperation with the State, while it might ordinarily have accepted only applications designed to serve bona fide program purposes. A finding that Congressional intent was frustrated by the requirement of new applications should not be predicated on an attempt by the Agency to accommodate the State.

We note that there has been no contention by the State that it was treated unfairly by the Agency. As indicated previously, the Agency did not disallow IFP on the basis that no new applications were filed until such time as it believed that all states had actual notice of the action transmittal which expressly stated that new applications were required. This can be taken as further evidence of the Agency's desire to accommodate the states, and is not necessarily inconsistent with the Agency's position that the requirement for new applications is implicit in the statute. The record suggests, however, that the State did not receive notice of the action transmittal until September 20, 1976. (Agency response to appeal, dated June 7, 1979, p. 2, footnote 3.) The Agency is therefore directed to ascertain the date on which the State in fact received notice of the action transmittal. If it is found that the State did not receive notice of the action transmittal before September 20, 1976, as the record appears to indicate, then the part of the disallowance pertaining to August and September, 1976 should be withdrawn.

As indicated previously, the amount disallowed included the cost of services provided to all non-AFDC recipients, not only those who had received child support services prior to the effective date of Title IV-D but also new recipients of services as well. The Agency stated that the State had failed to separately identify the costs allocable to the latter group although given ample opportunity to do so. The Agency also stated that it was willing to "work with the State to establish that the actual disallowance should be lower." (Agency response to Order, dated February 21, 1980, p. 8.) Accordingly, the Agency is further directed to receive and consider any documentation provided by the State regarding allocation of the costs and to reduce the amount of the disallowance in an appropriate amount if it determines that such documentation is satisfactory.

Conclusion

We find that the Agency's interpretation of Section 454(6)(A) of the Act as requiring the filing of new applications by non-AFDC recipients who received services prior to the effective date of Title IV-D is neither inconsistent with the language of the statute nor frustrates the underlying Congressional policy in establishing the Title IV-D program. We therefore conclude that the disallowances should be upheld, although it may be necessary for the Agency to reduce the amount disallowed in accordance with the instructions given above.

/s/ Donald G. Przybylinski

/s/ Robert R. Woodruff

/s/ Frank L. Dell'Acqua, Panel Chairman