Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Nebraska Health and Human Services System
Docket No. A-07-42
Decision No. 2110

DATE: August 28, 2007

DECISION

This case is again before the Board, after a remand to the Department of Health and Human Services (HHS) by the United States Court of Appeals for the District of Columbia. The issue before us now is whether the HHS Division of Cost Allocation (DCA) properly disapproved an amendment to the Public Assistance Cost Allocation Plan (CAP) of the Nebraska Health and Human Services System (Nebraska) under the standard for approval set forth in two issuances of the Administration for Children and Families (ACF) that the court found interpret the training provisions of title IV-E of the Social Security Act (Act). ACF administers the federal foster care and adoption assistance program under title IV-E. If approved, the amendment will allow Nebraska to allocate to title IV-E all of the costs of foster care training for child protection and safety workers who are employed by or preparing for employment with Nebraska, even though those workers also handle cases of foster care children who are not eligible for title IV-E maintenance payments.

Below, we first set out the history of this case and the relevant law and facts. We then explain why we conclude that DCA's arguments about the meaning of ACF's issuances are inconsistent with the wording of those issuances and with past practice on how this Department has applied those issuances and a similar standard. The undisputed facts here show that the CAP amendment met the terms of the ACF issuances and, contrary to DCA's determination on remand, is consistent with federal cost allocation principles. DCA's arguments are based on a narrow and unsupported view of the concept of program "benefit" inconsistent with past decisions and are inconsistent with this Department's policy for approval of states' proposed cost allocation procedures. OMB Circular A-87 may give DCA discretion to disapprove a state's proposal to charge costs to a program even if the program agency would allow it, but DCA must give an

adequate reason for why it is not deferring to the agency policy and did not do so here.

Accordingly, we reverse DCA's determination disapproving the CAP amendment.

General Legal Background

Title IV-E was originally enacted as part of the Adoption Assistance and Child Welfare Act of 1980, Public Law No. 96-272. This title authorizes appropriations to enable states "to provide, in appropriate cases, foster care . . . for children who otherwise would be eligible for assistance" under a state's former Aid to Families with Dependent Children (AFDC) program and "adoption assistance for children with special needs." Section 470 of the Act.[1] Concurrently with the enactment of title IV-E, Congress enacted a revised title IV-B (Child Welfare Services Program), which provides funding for a broad range of social services to families and may also be used for the same types of costs funded under title IV-E. However, title IV-B, unlike title IV-E, has a funding cap. Section 421 of the Act.

The primary purpose of title IV-E is to assist states with foster care maintenance payments and adoption assistance payments for eligible children. Sections 474(a)(1) and 474(a)(2) of the Act. In addition, the program provides for funding for expenditures "found necessary by the Secretary for the provision of child placement services and for the proper and efficient administration of the State plan." Section 474(a)(3) of the Act. The expenditures incurred in the administration of the state plan are divided into three categories: expenditures "for the training . . . of personnel employed or preparing for employment by the State agency or by the local agency administering the plan . . ." (section 474(a)(3)(A)); expenditures "(including travel and per diem expenses) . . . for the short-term training of current or prospective foster or adoptive parents and the members

[1] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law No. 104-193, repealed the AFDC program and amended title IV-E so that it refers to certain provisions of former title IV-A of the Act as they were in effect on June 1, 1995. The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

of the staff of State-licensed or State-approved child care institutions providing care to foster and adopted children receiving assistance under this part . . ." (section 474(a)(3)(B)); and other expenditures (section 474(a)(3)(C),(D) and (E)). Section 474 provides for federal financial participation (FFP) in training expenditures at the rate of 75% and reimbursement of the remaining administrative costs at the rate of 50% FFP. A state's title IV-B plan must include a training plan which covers training activities and costs funded under title IV-E. 45 C.F.R. §§ 1356.60(b)(2) and 1357.15(t)(1).

The title IV-E regulations require that a state's "cost allocation plan shall identify which costs are allocated and claimed under this program" (45 C.F.R. § 1356.60(c)) and make the regulations on cost allocation plans at 45 C.F.R. Part 95, subpart E, applicable to title IV-E (45 C.F.R. § 1356.30(c)). Section 95.505 of 45 C.F.R. defines a public assistance CAP as "a narrative description of the procedures that the State agency will use in identifying, measuring, and allocating all State agency costs incurred in support of all programs administered by the State agency." 45 C.F.R. § 95.505. A state is required to submit a CAP to DCA for approval. 45 C.F.R. § 95.507(a). In reviewing a proposed CAP or CAP amendment, DCA is directed to consult with the "affected Operating Divisions." 45 C.F.R. § 95.511(a). For the IV-E program, the Operating Division is ACF. A state may amend its CAP for various reasons, including the discovery of a material defect in the CAP or a change which makes the allocation basis or procedures in the approved CAP invalid. 45 C.F.R. § 95.509(a). A state may claim FFP "for costs associated with a program only in accordance with its approved cost allocation plan." 45 C.F.R. § 95.517. However, if a state has submitted a plan or plan amendment for a state agency, it may, at its option claim FFP based on the proposed plan or plan amendment, unless otherwise advised by the DCA." Id. The state must then "retroactively adjust its claims in accordance with the plan or amendment as subsequently approved . . . ." Id.

General requirements for allocating costs incurred by state governments under federal grants are set out in Office of Management and Budget (OMB) Circular A-87. OMB Circular A-87 is currently made applicable to the title IV-E program by 45 C.F.R. §§ 92.4(a)(3) and 92.22(b), and was previously made applicable by 45 C.F.R. § 74.27(a) (for periods prior to the 2003 amendments to Part 92). See 68 Fed. Reg. 52,844 (Sept. 8, 2003). OMB Circular A-87 states that, in order to be allowable, a cost must "[b]e necessary and reasonable for proper and efficient performance and administration of Federal awards" and "[b]e allocable to Federal

awards . . . ." OMB Circular A-87, Attachment (Att.) A, ¶ C.1. The Circular further states: "A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received." Id., ¶ C.3.a.[2]

Case History

On September 30, 1999, Nebraska submitted to DCA several proposed amendments to its Public Assistance CAP. The proposed amendments included the following provision pertaining to training costs incurred by the State Service Management (SM) Office:

> *SM - Foster Care Training (023)* - There are approximately forty-five FTE's in the cost center. The direct and indirect costs of the cost center will be directly charged to the Foster Care 75% Program, Title IV-E.

NE Ex. 3 (AR 568).[3] In letters dated November 8, 1999 and

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[2] We quote here from the version of OMB Circular A-87 which was issued by OMB in 1995. 60 Fed. Reg. 26,484 (May 17, 1995). The previous version of the circular stated in part that a "cost is allocable to a particular cost objective to the extent of benefits received by such objective." Att. A, ¶ C.2.a. A 1997 amendment did not affect the provisions of ¶ C.3, nor did the codification of OMB Circular A-87 at 2 C.F.R. Chapter II in 2005.

On April 8, 1997, HHS issued its Implementation Guide for OMB Circular A-87, ASMB C-10. In the earlier proceedings, DCA stated in its brief that ASMB C-10 "is not the authority upon which DCA relied in [disapproving] Nebraska's CAP amendment." DCA Br. at 13. Accordingly, we did not in our earlier decision address Nebraska's arguments that this document was an invalid interpretation of OMB Circular A-87.

[3] Nebraska's approved CAP effective July 1, 1993 had explicitly stated that "[c]ost of new workers required to attend long term training provided by contract trainers and subsequent on-the-job training . . . are directly charged to IV-E training." NE Ex. 5 (AR 574-78). DCA approved a modification to this language effective October 1, 1997 that Nebraska says "effectively combined the specific wording of several provisions into one narrative: 'Where an activity can be associated with a specific program, it will be assigned to that program.'" NE Br.

(continued...)

February 7, 2000, DCA informed Nebraska that the cost center described above "must be allocated to all programs that benefit. Title IV-E can only be charged for a portion of these costs." NE Ex. 6, ¶ 12 (AR 580). Nebraska initially indicated that it would change its SM-Foster Care Training cost center provision to provide for allocation to title IV-E, title IV-B of the Act and the State Ward Program "based on an end of the quarter count of active cases in each program", but notified DCA on June 13, 2000 that it was withdrawing its agreement to amend this provision. NE Ex. 10 (AR 588). By letter dated July 12, 2000, DCA disapproved the SM-Foster Care Training portion of Nebraska's CAP. The disapproval letter stated that DCA had "been advised by our Department's Administration for Children and Families (ACF) [that] the assignment of those costs only to the Title IV-E 75% program is not acceptable." NE Ex. 2 (AR 564). The disapproval letter cited OMB Circular A-87 as authority for DCA's decision, referring to the provisions stating that a "cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received" and that, to be allowable, costs must "[b]e necessary and reasonable for proper and efficient performance" of a federal award. Id. The disapproval letter also cited three ACF policy transmittals (or announcements) –- ACYF-PA-87-05 (dated October 22, 1987), ACYF-PA-90-01 (dated June 14, 1990), and ACF-IM-91-14 (dated July 14, 1991) –- which the letter stated "all require allowable training costs be allocated to all programs that benefit." Id.

Nebraska appealed this determination, challenging the CAP disapproval primarily on the ground that the ACF announcements on which DCA relied represented a change in policy from earlier ACF issuances and therefore were not validly promulgated under the federal Administrative Procedure Act (APA). Specifically, Nebraska relied on two prior ACF issuances: an October 7, 1985 policy memorandum written by Dodie Livingston, then Commissioner of the Administration for Children, Youth, and Families (the Livingston Memorandum) and a 1984 letter to New York State written by Nicolas Cordasco, Director, Office of Fiscal Operations (the Cordasco Letter). Nebraska argued that these issuances interpreted the relevant provisions of law as permitting allocation of the costs at issue in their entirety to title IV-E training at the 75% rate (under what Nebraska called the "primary program" approach to cost allocation) and that the later announcements were a change in interpretation that, under

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[3](...continued)
at 3, citing NE Ex. 4, at 5 (AR 573).

the APA, should have been promulgated using notice and comment rulemaking.

On May 14, 2003 (after extensive discovery and other proceedings), the Board issued its decision upholding DCA's disapproval of the CAP amendment. Nebraska Health and Human Services System, DAB No. 1882 (2003). The Board concluded that the announcements were general statements of policy regarding what ACF's position would be in determining whether it should approve allocation methods for training costs and, therefore, were not subject to the notice and comment requirements of the APA. Nebraska appealed to court. The district court vacated ACF's announcements on the basis that they were not validly promulgated and determined that the CAP amendment should have been approved under the issuances previously in effect. Nebraska Dep't of Health and Human Services v. U.S. Dep't of Health and Human Services, 340 Fed. Supp.2d 1 (D.D.C. 2004). HHS appealed the district court decision.

In the court of appeals, HHS did not challenge the district court's ruling that the announcements were not validly promulgated. Rather, HHS challenged the relief ordered by the court, arguing that the district court did not actually vacate the three policy announcements or, if it did, that it erred in vacating the announcements, and that the district court should have remanded the ultimate question of whether to approve Nebraska's CAP to HHS, rather than deciding that issue itself. On the last point, HHS argued that "the district court should have remanded to [HHS] the question whether Nebraska's proposed CAP could have been approved under its 'previous practice,' as set forth in the 1984 Letter and the 1985 Memorandum upon which the district court relied." Nebraska Dept. of Health and Human Services v. U.S. Dept. of Health and Human Services, 435 F.3d 326, 326 (D.C. Cir. 2006). The court of appeals found that the announcements had in fact been vacated by the district court, but that this was error since Nebraska had asked the court only to enjoin HHS from rejecting the proposed CAP (and from refusing to pay 75% of the costs Nebraska incurred training its protection and service workers), and had not requested that the announcements be vacated. The court of appeals also held that the district court erred when it ordered approval of Nebraska's CAP amendment. 435 F.3d at 331. The court stated:

> As the Supreme Court has explained, because "agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise."

Id., *quoting McKart v. United States*, 395 U.S. 185, 194 (1969). In explaining why remand was appropriate, the court of appeals pointed out that "[a]lthough the 1985 Memorandum allows training to be charged entirely to Title IV-E when at least 85% of that training is 'directed toward' a Title IV-E program, that crucial phrase may be susceptible to more than one interpretation" and that "it is for HHS to interpret its own policies in the first instance . . . ." Id. The court of appeals also stated: "The agency must be given the first opportunity to determine whether Nebraska's program meets the standard that was in place before the announcements were issued." Id.

Due to some confusion between the parties, the Board did not receive the district court's July 28, 2006 order remanding the case to "the agency" until September 2006. The Board promptly remanded the case to DCA to determine whether the CAP amendment could be approved under the standard that was in place prior to the issuance of the ACF announcements, that is, the Cordasco Letter and Livingston Memorandum. This remand followed a conference call in which the Board discussed with the parties the need for DCA to consult with ACF, whose policy issuances contain the standard applicable on remand. See Board Ltr. of Oct. 4, 2006 (Docket No. 06-127).

DCA's Determination on Remand

DCA issued its determination on December 7, 2006, again disapproving the CAP amendment, and Nebraska appealed that determination to the Board. Although DCA said that it had consulted with ACF, DCA's 2006 determination did not address whether the amendment met the standard in the ACF issuances. Instead, DCA based its new determination solely on OMB Circular A-87, as revised in 1995, and on the HHS regulations applying that Circular to title IV-E. Thus, the Board's letter acknowledging Nebraska's appeal asked DCA, among other things, to address the effect of the Livingston Memorandum and the Cordasco Letter on approval of the CAP amendment. In response, DCA took the position that the CAP amendment was not approvable under these policy issuances.

The ACF Issuances and Their Context

The Cordasco Letter, issued in 1984, states:

> This is in reply to your June 4, 1984 letter concerning claiming of Title IV-E Training funds. This was a follow-up to your September 21, 1983 letter requesting approval to fully charge to Title IV-E, costs that would otherwise be

> covered under the regulations, training related to foster care and adoption work, even though only two thirds of the State's children in foster care are eligible for coverage under the Title IV-E program.
>
> After consultation with our Central Office, we agree that where the training is of staff whose time is primarily spent on Title IV-E activities, the total training might be charged to Title IV-E if the training is related to foster care and adoption services. Training developed for and which directly benefits a program may be allocated entirely to the benefitting title, even if the employees attending the training are not fully supported by the program involved.

AR at 727.

The Livingston Memorandum, issued in 1985, states in pertinent part in response to a question about whether training for "preventive/reunification services" must be "pro-rated between title IV-E and non-title IV-E caseloads":

> As stated in the response to question 1 above, title IV-E funds may not be used for the costs of social services. Likewise, title IV-E funds may not be used for training staff to provide social services. Title IV-E funds for staff training may be used to train personnel employed or preparing for employment with the State agency only in relation to activities allowable in title IV-E (45 CFR 1356.60(c)).
>
> These training costs may be charged to the title IV-E program in relation to personnel identified in 45 CFR 1356.60(b)(1) who handle or will handle title IV-E caseloads or who have responsibilities specifically related to the title IV-E foster care program. If some of the trainees will not be involved in the title IV-E program, it would be necessary to allocate these training costs between title IV-E and non title IV-E. In addition, for training, part of which is related to title IV-E and part of which is related to other programs, the State must have a reasonable method of allocating costs between title IV-E Foster Care and the other programs. **If, however, at least 85 percent of the training is directed toward title IV-E Foster Care, all of the training for eligible trainees and for trainers may be charged to title IV-E Foster Care**.

AR at 730-731 (emphasis added).

The cited regulation at 45 C.F.R. § 1356.60(c) provides (and has provided throughout the relevant period):

> (c) *Federal matching funds for other State and local administrative expenditures for foster care and adoption assistance under title IV-E.* Federal financial participation is available at the rate of fifty percent (50%) for administrative expenditures necessary for the proper and efficient administration of the title IV-E State plan. The State's cost allocation plan shall identify which costs are allocated and claimed under this program.
> (1) The determination and redetermination of eligibility, fair hearings and appeals, rate setting and other costs directly related only to the administration of the foster care program under this part are deemed allowable administrative costs under this paragraph. They may not be claimed under any other section or Federal program.
> (2) The following are examples of allowable administrative costs necessary for the administration of the foster care program: (i) Referral to services; (ii) Preparation for and participation in judicial determinations; (iii) Placement of the child; (iv) Development of the case plan; (v) Case reviews; (vi) Case management and supervision; (vii) Recruitment and licensing of foster homes and institutions; (viii) Rate setting; and (ix) A proportionate share of related agency overhead. (x) Costs related to data collection and reporting.
> (3) Allowable administrative costs do not include the costs of social services provided to the child, the child's family or foster family which provide counseling or treatment to ameliorate or remedy personal problems, behaviors or home conditions.

The regulation at 45 C.F.R. § 1356.60(b)(1) provides:

> Federal financial participation is available at the rate of seventy-five percent (75%) in the costs of:
> (i) Training personnel **employed or preparing for employment** by the State or local agency administering the plan, and; (ii) Providing short-term training (including travel and per diem expenses) to current or prospective foster or adoptive parents and the members of the state licensed or approved child care institutions providing care to foster and adopted children receiving title IV-E assistance.

(Emphasis added.) Section 1356.60(b)(3) provides:

> Short and long term training at educational institutions and in-service training may be provided in accordance with the provisions of §§235.63 through 235.66(a) of this title.

The Issues on Remand

The key facts about the training costs at issue are not in dispute. DCA does not deny Nebraska's assertion that all of the trainees are child and protection safety workers (PSWs) employed by or preparing for employment in the State agency, nor raise any question about the allowability of the types of costs claimed. Also, there is no issue to resolve about the content of the training. In response to Nebraska's original appeal, DCA acknowledged that, in general, Nebraska's training program provided skills and knowledge that were directly relevant to the IV-E program. See DCA Br. (Docket No. A-2000-09) at 4 (AR 506).[4]

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[4] The one exception to which DCA pointed at the time was the "Juvenile Justice training block," which DCA then asserted "does not pertain to and is not allowable under Title IV-E." DCA Br. (Docket No. A-2000-99) at 5, n.1. Nebraska disagreed on the ground that "[i]t serves the purposes of Title IV-E for the relevant PSWs to be trained in some depth about the operations of the juvenile justice system in which their IV-E-eligible juvenile clients are involved." NE Reply Br. (Docket No. A-2000-99) at 13, n.11 (AR 550). In the prior decision, we noted that the fact that IV-E funding is not available for the cost of care in a juvenile detention facility (see section 472(c)(2) of the Act) is not dispositive of whether training in juvenile justice issues could ever be allowable under IV-E. Nebraska provided a copy of a General Accounting Office report noting that "[s]tatus offenders are juveniles who commit offenses that would not be crimes if they were older, for example, curfew violation, truancy, or running away from home," and "make up the segment of the juvenile justice population most likely to be placed in foster care and eligible to receive title IV-E funds." NE Ex. 48 (AR 931); see also 48 Fed. Reg. 23,104, 23,105. When asked about whether it was DCA's position that the juvenile justice training did not benefit title IV-E, DCA said that was not its position, but then went on to say that some juvenile justice activities are beyond the scope of the title IV-E program. DCA's Response to the Board's Order for an Initial Submission at 4. In any event, we need not resolve here whether all of Nebraska's training on juvenile justice matters is directed toward title IV-E, rather than to matters beyond the scope of title IV-E, because DCA does

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Thus, the Board's previous decision stated that "there is no question that the PSW training costs could properly be allocated in their entirety to title IV-E if Nebraska had no other programs that benefitted from the training." DAB No. 1882, at 8.

Here, Nebraska argues that all of the training at issue was "directed toward" title IV-E within the meaning of the Livingston Memorandum. Nebraska gives three reasons for this assertion: 1) the training was developed and is delivered based on title IV-E requirements; 2) it imparts skills and knowledge which directly benefit title IV-E, and 3) each trainee participates or is expected to participate in title IV-E. DCA says that it "challenges none of these assertions." DCA Br. at 11. Instead, DCA argues that these elements "are not sufficient, even in combination, to make 'primary program' allocation appropriate." DCA Br. at 11.

DCA argues here that it has "consistently maintained that even if it is not constrained by law to do so, it is within [DCA's] discretion to require Nebraska to allocate training costs equitably between all programs, federal and state[,] that benefit from the training" and that, even in the absence of the ACF policy transmittals cited in the original disapproval letter, DCA would have disapproved Nebraska's CAP amendment. DCA Br. at 4. According to DCA, "[a]ll that has occurred in the intervening years during the subsequent litigation, is that the policy transmittals were found invalid as binding rules." Id. DCA argues that the court of appeals recognized that "the agency must be given the first opportunity to determine whether Nebraska's program meets the standard that was in place before the announcements were issued" and remanded "to allow DCA that opportunity." Id. at 5. DCA asserts that what it did on remand – disapproving Nebraska's amendment "on the basis of OMB Circular A-87, HHS regulations, and the cost allocation policy in existence prior to the policy transmittals" – is exactly what DCA has consistently argued was appropriate. That action, DCA contends, is well-supported by the facts and the law.
In response to the Board's request that it address the effect of the ACF issuances, DCA takes the position that Nebraska's training does not meet the standard in either the Cordasco Letter or the Livingston Memorandum. DCA notes that the Cordasco Letter

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not assert that the juvenile justice training constitutes more than 15% of the total training at issue. Moreover, as discussed below, DCA concedes the facts on which Nebraska relied to show that all of the training was "directed toward" title IV-E.

was written in response to a letter from New York "requesting approval to charge to Title IV-E the full costs of training related to foster care and adoption work, even though only two-thirds of the state's children in foster care were eligible for coverage under Title IV-E." DCA Response to Board's Order (Docket No. A-07-42) at 2. DCA distinguishes Nebraska's situation on the ground that in Nebraska "Title IV-E cases constitute less than 30 percent" of the total cases and this is "less than half the percentage that supported a finding that the workers time was 'primarily spent' on IV-E activities" (66 percent in New York). DCA also notes that the Livingston Memorandum similarly "established a percentage standard, indicating that if '85 percent of training is directed toward title IV-E foster care,' all of the training for eligible trainees could be charged to title IV-E" if two conditions were met. Id. at 2. DCA describes the two conditions as follows:

> The personnel being trained must be involved in or preparing for involvement in administering the IV-E program, and the training itself must relate to activities allowable under title IV-E. Ms. Livingston clarified that if some of the trainees would not be involved in administering the title IV-E program, it would be necessary to allocate the training costs between title IV-E and non-title IV-E programs. Likewise, if some of the subject matter of the training related to activities that were not allowable under title IV-E, an allocation of costs would be necessary. Thus, the conclusion that if at least 85 percent of the training were **directed at IV-E allowable activities**, the costs of training **eligible workers** could be charged completely to IV-E.

Id. (emphasis in original).

DCA sums up its view of the two issuances, as follows: "The common thread between the two documents is an attempt to measure relative benefit to a program to assure that if a program is to be charged fully for training costs, that it receive the primary benefit." Id. at 2-3. DCA says that Nebraska's training does not meet this test because the trainees will not primarily be handling title IV-E cases. DCA also says that Nebraska had notice, from the three ACF policy transmittals on which DCA originally relied, that it should allocate the training costs on a pro-rata basis, using either case ratios or a time study.

In reply, Nebraska argues among other things that the narrow purpose of the court remand was to resolve the issue of how to interpret the phrase "directed toward" in the Livingston Memorandum and the impact of that interpretation on the

determination about whether to approve Nebraska's CAP. Nebraska maintains that "the only supportable interpretation of the Livingston memorandum is that 'directed towards' refers to the *training*, not to time or cases, and that Nebraska's proposed CAP easily meets this standard." NE Reply Br. at 6. Nebraska also challenges DCA's reliance on ACF's later announcements, arguing that treating the announcements as giving notice to Nebraska contravenes the court decision.

Analysis

We note at the outset that HHS has been charged with implementing OMB Circular A-87 and is the cognizant agency for approval of Nebraska's CAP and any amendments to that CAP and that DCA is the specific Department component with the authority to issue the initial determination about whether to approve a CAP amendment. HHS regulations also provide that any disapproval of a CAP is appealable to the Board. 45 C.F.R. Part 16, App. A, ¶ D. ACF is the Operating Division within HHS charged with administering the title IV-E program, including the provisions related to title IV-E training, and is the Operating Division that issued the two ACF issuances that the court said set the standard that HHS must apply in evaluating Nebraska's CAP amendment.

Most of DCA's argument on remand, however, goes to what discretion DCA has under OMB Circular A-87 or to why the allocation method DCA wants Nebraska to employ is equitable and appropriate. The remainder does go to DCA's interpretation of ACF's policy issuances, but DCA does not cite anything from ACF regulations or other policies to support its reading. Also, DCA does not provide any evidence about how either DCA or ACF in fact applied the ACF policy issuances in the past.

As we discuss below, DCA's arguments about the meaning of the issuances are inconsistent with the wording of those issuances and with past practice on how this Department has applied those issuances and a similar standard. Moreover, DCA's arguments about why its disapproval was a reasonable exercise of its discretion under OMB Circular A-87 are based on a narrow and unsupported view of the concept of program "benefit" inconsistent with past decisions and are inconsistent with this Department's policy for approval of states' proposed cost allocation procedures. DCA provides no valid reason not to defer to the policy regarding the appropriateness of charging training to title IV-E that was issued by the agency with authority to administer title IV-E and is applicable on remand.

Below, we first address DCA's arguments based on ACF's policy issuances. We then address DCA's arguments based on OMB Circular A-87.

The ACF issuances cannot reasonably be read as DCA reads them.

As indicated above, DCA reads the Livingston Memorandum as placing two conditions on allocation of costs in their entirety to title IV-E: the personnel being trained must be involved in or preparing for involvement in administering the IV-E program, and the training itself must relate to activities allowable under title IV-E. DCA then goes on to suggest that the 85% standard in the Livingston Memorandum follows from and is consistent with this reading. DCA also reads the 85% standard as permitting primary program allocation only if the activities of the workers after they are trained will be primarily directed toward title IV-E, a test DCA finds was not met here because less than 30% of the foster care caseload is IV-E eligible.

As Nebraska correctly points out, however, this reading is an unreasonable one, inconsistent with the plain language of the Livingston Memorandum. While the Livingston Memorandum does state that allocation will be required if either some of the personnel are not eligible or part of the training is not related to title IV-E, the Memorandum goes on to say: "If, however, at least 85 percent of the training is directed toward title IV-E Foster Care, all of the training for eligible trainees and for trainers may be charged to title IV-E Foster Care." AR at 730-731. The "however" indicates that ACF considered this situation different from the situation where it was saying that a state had to have a reasonable method of allocating costs among programs "for training, part of which is related to title IV-E and part of which is related to other programs . . . ." Thus, the 85% standard is an exception to the requirement for allocation in circumstances where part of the training is not related to title IV-E (although it applies only to charges for the training of eligible trainees, as described in the regulation and Memorandum, and for trainers).

Moreover, DCA's reading of the 85% standard as measured by the activities of the trainees once they are trained (that is, the nature of the cases on which they will ultimately work) is inconsistent with the wording of the Livingston Memorandum. The Memorandum permits charging all of training costs for eligible trainees to title IV-E if at least 85% of the training is "directed toward" title IV-E. The fact that this sentence follows after a reference to training that is in part "related

to" title IV-E and in part "related to" other programs, reinforces the conclusion that the nature of the training is what is being addressed. While the wording "directed toward" could be interpreted as meaning something more than just "related to," DCA does not dispute that the training in question here was "directed toward" title IV-E in all three ways identified by Nebraska, nor does DCA identify some other reasonable reading of that phrase that would support DCA's disapproval of the CAP amendment.[5] That the focus of ACF's policy was on the content of the training is further supported by the fact that the Office of Human Development Services (ACF's predecessor agency) published a policy for a different program (title XX) regarding what it meant for training to be directed toward that title, stating that "if a course is directly related to Title XX, the costs of the course can be charged entirely to Title XX as long as at least two Title XX eligible employees are enrolled." See New York State Department of Social Services, DAB No. 520 (1984). In cases applying that similar "primary program" policy, ACF based its determination on whether the first condition was met by examining the content of the training provided, not the activities of the trainees after they were trained. Id.; Wisconsin Dept. of Health and Social Services, DAB No. 379 (1983) (determining whether training was directed toward title XX of the Act required an examination of the nature of the training and its objectives).

In determining whether training is in fact "directed toward" title IV-E, of course, the title IV-E statute and regulations, including the provisions quoted above regarding what activities have been found necessary for child placement or proper and efficient administration of a title IV-E plan (and what activities are not allowable), are relevant. See Illinois Dept. of Children and Family Services, DAB No. 1530 (1995). Indeed, the question about cost allocation in the Livingston Memorandum follows an explanation of what administrative costs may be charged to title IV-E under section 1356.60 of the program regulations. But, here, DCA is not relying on any finding that

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[5] DCA says that it interprets "directed toward" to mean "of benefit to." DCA Br. (Docket No. A-07-42), at 11. This is not an unreasonable reading absent any qualification, but DCA then goes on to say that, in its view, "courses which train workers in skills relevant to a number of programs, provide a benefit to a particular program when, and only to the extent that, the worker actually applies his/her skills to that program." Id. That limited view of when training is "directed toward" title IV-E is inconsistent with the Livingston Memorandum, read as a whole, as well as how a similar policy has been applied in the past.

the subject matter of the training was not directed toward IV-E allowable activities.

Moreover, as Nebraska points out, reading the Livingston Memorandum (as DCA apparently does) to mean that 85% of the activities on which the trainees will ultimately spend their time must be title IV-E cases is not supported by any analysis of the wording of the Livingston Memorandum and would not make sense in context. Nothing in the Livingston Memorandum purports to change the policy in the Cordasco Letter that allocation of training in its entirety to title IV-E is also permitted if 66 percent of the trainees' workload will be IV-E cases (and the trainees are eligible for the training). While DCA is correct that both of these issuances set a percentage standard, one is met if the cases on which the eligible trainees will work are primarily IV-E cases, and the other is met if the content of the training is primarily directed towards IV-E allowable activities and the trainees qualify. To effectively interpret the two issuances as setting a percentage standard for the same thing - the activities on which the trainees will work - would render them inconsistent with each other. Yet, in the long history of this litigation, ACF has not disavowed either policy as its own.

Finally, the Livingston Memorandum states that training costs may be charged to the title IV-E program "in relation to personnel identified in 45 C.F.R. § 1356.60(b)(1)" (that is, personnel preparing for or employed by the state agency) "who handle or will handle title IV-E caseloads or who have responsibilities specifically related to the title IV-E foster care program." AR at 730-731. Nothing in this statement makes the charging conditional on the title IV-E percentage of the workers' total expected or actual caseload, and the statement recognizes that some training may be of persons who have responsibilities other than caseloads, such as ensuring that federal requirements are met. Once the trainees meet this condition, the Livingston Memorandum focuses on the content of the training.

DCA provided no evidence of how either DCA or ACF in fact applied the Livingston Memorandum after it was issued. It is undisputed, however, that after that policy was issued, DCA had approved a Nebraska CAP provision permitting Nebraska to charge its foster care training entirely to title IV-E. Since DCA does not allege any relevant change in the content of that training or in the caseloads of the trainees from the time when the prior plan was approved until now, that past approval is evidence that DCA's current disapproval is in fact inconsistent with its past practice.

We also note that the district court, in discussing ACF's issuances, did not view them as an interpretation of the cost allocation principles in OMB Circular A-87, but as ACF's fair and reasoned judgment on what title IV-E permitted. The district court noted that the 1985 "policy memorandum from ACF Commissioner Livingston . . . contains citations to ACF's Title IV-E regulation found at 45 C.F.R. § 1356.60." 340 F.Supp. at 22. The district court noted that "the Commissioner's 1985 interpretation is not inconsistent with the interpretation embodied in the agency regulation." Id. While the district court did not elaborate on what it meant by this, Nebraska points out that the subsection of section 1356.60 that addresses training of personnel employed or preparing for employment by the state or local agency administering the title IV-E state plan does not contain any specific limitation related to the cases on which they will work, whereas the subsection regarding training of current or prospective foster or adoptive families and the members of the state licensed or approved child care institutions is limited to those providing care to eligible IV-E children. Nebraska also presents arguments based on the legislative history of the IV-E program, which includes a reference to a report finding that the "foster care system is . . . often unprepared professionally to handle many of the complex family and personal problems of children and their families." See NE Br. (Docket No. A-07-42) at 25, quoting 125 Cong. Rec. 23, 182 (1979).[6] While this legislative history is not definitive, it is consistent with Nebraska's position regarding the reading of the Livingston Memorandum.

We further agree with Nebraska that DCA's reliance on the later policy announcements as providing notice to Nebraska of a different interpretation is misplaced. The key issue already litigated was not whether or not Nebraska knew of that different interpretation, but whether this Department could properly rely on that change in ACF's interpretation of the IV-E requirements, without following notice and comment procedures. The district court determined that those announcements represented a change in

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[6] Nebraska points out that it is not contending that Congress intended to fund all foster care training (a contention that we have rejected in other cases), but is arguing that "Congress intended to fund the training required by the IV-E program" and that any "ancillary benefit" to state foster care programs is not contrary to congressional intent since the "legislative history demonstrates that Congress was concerned not only about federally-supported foster care, but about foster care in the nation generally." NE Br. (Docket No. A-07-42) at 25.

policy that should have been promulgated through notice and comment rulemaking, and this Department did not appeal that part of the district court's ruling. Thus, the mere fact that Nebraska had notice of the change does not mean that this Department can fairly rely on those announcements on remand as a basis for disapproving Nebraska's plan amendment.

OMB Circular A-87 may give DCA discretion to disapprove allocation of costs to a program, even if the program agency would allow it, but DCA must give an adequate reason for why it is disregarding the agency policy and did not do so here.

This Board has consistently recognized that DCA has expertise in matters of what allocation methodologies are appropriate for particular types of cost and has deferred to that expertise when applied to central services costs a state charges to federal programs. Here, however, DCA effectively takes the position that it has discretion to require Nebraska to allocate its foster care training costs using a pro rata caseload or time study method, despite the ACF policy issuances interpreting title IV-E requirements to allow a state to charge all training costs to IV-E under certain circumstances. DCA also continues to rely on the wording of OMB Circular A-87 that refers to allocation of costs "in accordance with the relative benefits received."

The decision of the district court in this case, however, also rejected an argument by HHS, based on the district court decision in Arizona v. Shalala, 121 F. Supp.2d 40, 51 (D.D.C. 2000), that notice and comment was not required for the later ACF announcements because "requiring states to use the benefitting program method of allocation was neither a 'drastic change' nor a 'radical departure' from the agency's prior position of allowing the primary program method in a limited context." 340 F.Supp.2d at 22, n. 9. The court noted that the district court decision in Arizona was reversed on appeal "because the D.C. Circuit found that in the years prior to the 1998 issuance involved in the [Arizona] case, HHS had interpreted OMB Circular A-87 as not independently constraining the agency to require allocation to all benefitting programs if a program's governing statute permitted a primary program approach." Id., citing Arizona v. Thompson, 281 F.3d 248, 258-59 (D.C. Cir. 2002). The court of appeals in Arizona pointed to a statement in the 1998 Action Transmittal at issue there (which amended the HHS Grants Administration Manual), which the court said "reflects HHS' underlying view that Circular A-87 does not independently constrain the Department if a statute allows an alternative allocation method." 281 F.3d 248, 258-59. The court went on to say: "That view is also reflected in HHS' Implementation Guide

for OMB Circular A-87, ASMB C-10, which states that, while Circular A-87 requires the use of benefiting program allocation, primary program allocation may be used 'where the head of an awarding agency determines that the agency's enabling legislation permits' it." Id., citing ASMB C-10, ¶ 2.11 at 2-13.

The cited provision from ASMB C-10 says that the notion of "primary programs" is contrary to the allocability provisions of A-87, but goes on to say:

> As noted in the answer to Q&A 2-12 above, where the head of an awarding agency determines that the agency's enabling legislation permits reimbursement of unallocable costs, such costs may be allowed by the cognizant official for cost allocation . . . , when notified by the awarding agency head. Absent such notification, the primary program concept may not be used.

The answer to Q&A 2-12 in ASMB C-10 explains that exceptions to the underlying principle that costs must be allocated in accordance with the relative benefits received are permissible in certain circumstances, specifically --

> If an awarding agency determines that costs allocable to another program or cost objective are allowable under their program, then the unallocable costs may be borne by their program. This shifting of unallocable costs is permitted only when the head of the awarding agency advises the cognizant agency that under its enabling legislation, such cost shifting is allowed and expected.

The Board asked DCA to address whether either the Cordasco Letter or the Livingston Memorandum could be viewed as an exercise of the program agency's discretion, recognized in ASMB C-10, to grant an exception to the general allocation principle in OMB Circular A-87. DCA responded as follows:

> On the one hand, the Cordasco letter and the Livingston memorandum are precisely an exercise of the program agency's discretion to grant an exception to the relative benefit allocation requirement. . . . On the other hand, it cannot be said that the documents constitute such an exception within the meaning of ASMB C-10, both because they predate ASMB C-10 and because they do not adhere to the requirements established by ASMB C-10 for granting such exception.

DCA's Response to Board's Order (Docket No. A-07-42) at 3-4. DCA does not explain, however, why it is significant that ACF's

issuances here predate the issuance of ASMB C-10. In our view, that fact is irrelevant, since DCA agreed in this case that the wording change to the allocation principle that was made in the 1995 version of the Circular did not constitute a substantive change. See DAB No. 1882, at 8.

DCA says that the requirements established by ASMB C-10 for granting an exception are not met because exceptions are permissible "only where an agency determines that costs allocable to another program or cost objective are allowable under their program and only when the head of the agency advises that under its enabling legislation, such cost shifting is allowed and expected." DCA's Response to the Board's Order for an Initial Submission at 4. The Livingston Memorandum was such a determination, however, by the head of the ACF component responsible for IV-E, that gave DCA notice (albeit in different words) that charging to title IV-E was allowed and expected under that program if 85% of the training of eligible personnel was directed toward that program. Moreover, this Department in the court litigation did not disavow the Livingston Memorandum as its program policy, instead acknowledging that issuance as representing its past practice regarding allocation of training costs to IV-E.

DCA says that the wording of ASMB C-10 indicates that the granting of an exception to the benefitting program allocation policy is discretionary and that DCA, in its discretion, chose not to afford Nebraska such an exception "because Nebraska did not meet the standards elucidated in either the Cordasco letter or the Livingston memorandum, and because the purpose of those standards, *viz*., assuring that a program be charged only to the extent of the relative benefit derived, would not be served in the circumstances presented by Nebraska." Id. As explained above, however, DCA's reading of the Livingston Memorandum and of the purpose of the ACF issuances is not consistent with the language and context of those issuances.

DCA also asserts that the training costs here should be allocated among all of Nebraska's foster care programs because DCA measures the benefit to each of the programs by the relative amount of effort the trainees will actually expend on each program and the caseload statistics indicate that title IV-E is not the primary benefitting program. DCA Br. (Docket No. A-07-42) at 11-12. While caseload statistics may in some circumstances be an appropriate means of measuring relative effort, however, they are not the only means of measuring the relative amount of effort (which could also be shown by time reporting or a random moment study), nor is relative effort the only means of measuring

benefit. This Department has in other instances considered the nature of the training in determining benefit, such as in the title XX context mentioned above. Moreover, DCA's assertion does not reasonably explain why DCA would not defer to a program agency's policy measuring benefit to its program and deciding when its program funding is available.[7] While DCA has expertise on what methodologies are appropriate for various types of cost that must be allocated, the issue here is the threshold issue of whether any allocation is required in the first instance - an issue on which the role of the program agency is recognized in this Department's regulations and in ASMB C-10.

In promulgating the requirements at 45 C.F.R. Part 95, subpart E for public assistance cost allocation plans, this Department stated in response to a comment that "we agree that the acceptance of a proposed cost allocation procedure should be governed primarily by the equity of the procedure, ..." 47 Fed. Reg. 17,506, 17,508 (Apr. 23, 1982). DCA argues that allocation by case count is "equitable" here.[8] DCA does not, however, specifically assert that the allocation procedure that Nebraska proposes would be inequitable to the Federal Government, nor does DCA directly respond to Nebraska's assertions about why

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[7] Contrary to DCA's suggestion that "benefit" is measured solely by workers' activities, the concept of benefit in OMB Circular A-87 has been interpreted more broadly to recognize the relationship of costs to a program on other bases, particularly in circumstances where a statute requires a state to incur those costs and the costs may be considered fully assignable to the program. See, e.g., Washington State Dept. of Social and Health Services, DAB No. 1214 (1990), quoting New York State Dept. of Social Services, DAB No. 1102 (1989), at 8 ("the concept of 'benefit' requires that there be an equitable relationship between the cost and the program or programs to which it is charged").

[8] DCA's assertion that its method is an equitable one is based solely on the relatively low percentage of Nebraska foster care children who were title IV-E eligibles. ACF policy, however, recognizes that some activities (for example, case planning and referrals to service) performed on behalf of candidates for title IV-E funds are reasonable and necessary for title IV-E, even if the candidate is not ultimately placed in title IV-E foster care, and that eligibility determinations benefit title IV-E, even when a child is determined ineligible. See 45 C.F.R. § 1356.60; ACYF-PA-87-05 (Oct. 22, 1987).

a pro rata allocation would be inequitable to it. Nebraska presents evidence, which DCA does not dispute, that, as a rural state, Nebraska cannot afford to assign only some of its state agency personnel to handle title IV-E cases.[9] DCA also does not challenge Nebraska's assertions, supported by evidence, that the training is directed at title IV-E requirements and that its "Foster care worker training program was designed to satisfy the HHS Title IV-E policy mandate that training must be provided to state agency workers administering the foster care program." NE Br. (Docket No. A-07-42) at 16. Nebraska also asserts, without contradiction, that "given the legal requirements of Title IV-E, Nebraska would be required to provide the same or substantially the same training program even [if] its IV-B and State Ward programs did not exist. In these circumstances, Nebraska argues, it is unfair to require Nebraska to bear the majority of these costs, as pro rata allocation would. Thus, the undisputed facts support a conclusion that the method Nebraska proposed was an equitable one that should therefore have been accepted, even if it was not the only equitable method.

In sum, even assuming that the court remand here permitted DCA to again disapprove Nebraska's CAP amendment based on a standard other than the standard in the ACF issuances, we would conclude that the disapproval should be reversed.

The effect of the Board's decision is limited.

The effect of the Board's decision here is to approve Nebraska's CAP amendment, effective July 1, 1999. In view of the unique circumstances of this case, however, this decision should not be considered a precedent with respect to other states' allocation

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[9] We recognize that DCA may have a legitimate concern, especially since IV-E training costs are reimbursed at an enhanced 75% rate of federal financial participation, that a state might assign a few IV-E cases to all of its state agency personnel in order to get federal reimbursement for the training. But, if it was not necessary for a state to train all of its workers in title IV-E requirements, that might be a separate basis for disallowing the costs. Here, however, neither DCA nor ACF made such a finding, and DCA did not dispute Nebraska's assertion that its structure of assigning all of its PSW workers some IV-E cases is dictated by its nature as a rural state. Since there are no factual findings in dispute here, we do not need to apply the higher burden of proof this Board has said states must meet when seeking to claim costs at an enhanced rate of funding.

of training costs to title IV-E. Nor would it preclude DCA from requiring Nebraska to amend its CAP for any period for which DCA finds that Nebraska has changed or changes the nature of the training so that less than 85 percent of the training is directed towards title IV-E, or if ACF publishes a new policy, after following notice and comment procedures, requiring a pro rata allocation of foster care training costs. We also note that this decision would not preclude a disallowance of some of the training costs allocated to title IV-E based on a finding that those particular cost items fail to meet other requirements of the IV-E training regulation or are otherwise not allowable types of costs.

With respect to the training costs that Nebraska claimed under title IV-E that were disallowed on the basis that this CAP amendment was not approved (and that were separately appealed to the Board and stayed pending final resolution of this case), the Board will shortly issue an order giving the parties an opportunity to comment on what effect this decision should have on those disallowances.

Conclusion

For the reasons stated above, we reverse DCA's determination on remand to disapprove Nebraska's amendment to its CAP.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member