DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: New Jersey Department of Human Services DATE: November 28, 1980
Docket Nos. 80-43-NJ-CS
80-48-NJ-CS
80-56-NJ-CS
Decision No. 135

DECISION

The New Jersey Department of Human Services (State) requested reconsideration pursuant to 45 CFR Part 16, Subpart C (1978), of 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 issue presented is whether the State's claim, totalling $1,571,364, 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 same issue was presented, in the context of similar facts, in New York Department of Social Services, DGAB Docket Nos. 78-66-NY-CS, 78-162-NY-CS, 79-36-NY-CS, 79-234-NY-CS, Decision No. 101, May 23, 1980. Noting that the Board in Decision No. 101 upheld the disallowances, the Board Chairman issued an Order in the instant cases directing the State to show cause why its appeal should not be denied based on the earlier decision. We do not find the arguments in the State's response to the Order persuasive, and conclude that the disallowances should be upheld.

Title IV-D of the Act makes available Federal funding for the operation of an approved state plan for child support. Under Title IV-D, a state must furnish child support enforcement services to AFDC recipients, whose rights to support must be assigned to the state in order to receive AFDC benefits under Title IV-A. Title IV-D further requires that a state plan 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.... (Section 454(6)(A)).

The dispute in this case focuses specifically on the meaning of the requirement in this section for the filing of an application by non-AFDC recipients, who are "not otherwise eligible" for child support enforcement services.

Title IV-D funding became available effective July 1, 1975. Child support enforcement 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 Human 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.

In Decision No. 101, the Board found that Section 454(6)(A) was ambiguous with respect to how a state's pre-existing child support enforcement caseload was to be handled. The Board rejected the Agency's argument that the application required by Section 454(6)(A) is for "services established under the plan," and thus could only be submitted after the effective date of Title IV-D, which provided a legal basis for the plan. The Board also found no support in the legislative history of Title IV-D for the proposition that Congress clearly intended that new applications be filed. The Board stated, however, that in the absence of an express reference in Title IV-D to services provided prior to the effective date of that title, it could not clearly be inferred that new applications are not required in those cases. The Board further stated that it will defer to the Agency's interpretation of a statutory provision unless it is inconsistent with the statute or frustrates the Congressional policy underlying the statute. Finding that the State did not make a sufficient showing that either of these conditions pertained in its case, the Board sustained the disallowances.

In its response to the Order in the instant case, the State disputes the Board's conclusion in Decision No. 101 that Section 454(6)(A) is ambiguous and that the Agency's requirement for new applications is merely interpretive of the statute. The State argues instead that the requirement for new applications constitutes a legislative rule creating new law which is invalid because it was not properly promulgated as well as because it is inconsistent with the statute and frustrates Congressional intent.

In support of its position that the requirement for new applications is a legislative rule, the State asserts that Section 454(6)(A) "manifestly does not specify that the applicant have filed her request for aid subsequent to July 1, 1975 or that the application be filed with any particular agency of the State." (Response to Order, p. 4.) It also asserts, in a similar vein, that neither Title IV-D nor the implementing regulations "purport to limit the type of document or the date by which it must be filed...." (Response to Order, p. 5.) We do not find this approach persuasive. The July 1, 1975 date is not plucked out of thin air. It is the effective date of Title IV-D and is the date beginning on which all applications would clearly have to be filed if there were no pre-existing caseload. Since the Act does not deal separately with the pre-existing caseload, it is arguable that Section 454(6)(A) requires that applications be filed on or after July 1, 1975, in those cases as well as in all others. While we agree with the State that Section 454(6)(A) does not specify the nature of the application, we note that the Agency has not based its disallowance on a finding that the documents offered by the State as applications would not have been acceptable even if filed after July 1, 1975. Furthermore, although Section 454(6)(A) provides only that the application is to be filed "with the State," the implementing regulations, the validity of which is not challenged by the State, specifically provide that the application is to be filed with the IV-D agency. 45 CFR 302.33(a). Accordingly, we reaffirm our conclusion in Decision No. 101 that the requirement for new applications is merely an interpretive rule.

This conclusion renders nugatory the State's argument that in order to be enforceable, the requirement for new applications would have to have been published in proposed form in the Federal Register for public comment prior to its adoption by the Agency, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553(b). This section of the APA is not applicable to interpretive rules. The State also argues that even if the requirement for new applications is deemed to be only an interpretive rule, it must still be published in the Federal Register under 5 U.S.C. 552(a)(1)(D), although it need not be preceded by notice and comment rulemaking. The State appears to have overlooked, however, the further provision that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. 552(a)(1)(E). In the instant case, the State concedes that it received actual notice of the Agency's requirement for new applications on July 19, 1976. The State's contention that the notice was not timely is addressed later in this decision. We note here, however, that any defect as to timeliness can be cured by delaying the date as of which the requirement was enforceable.

In view of our conclusion that the requirement for new applications was an interpretive and not a legislative rule, we also find the State's reliance on Reser v. Califano, 467 F.Supp. 446 (W.D. Mo. 1979), misplaced. In its response to the Order, the State cited Reser in support of its contentions that Congress "chose not to restrict the manner of compliance [with the application requirement] given the anticipated diversity of program administration in the various states," and that the Agency "here has imposed an absolute and unreasonable pre-condition to receipt of federal funding for costs Title IV-D was enacted to provide...." (Response, p. 4)

In Reser, the court held invalid a regulation prohibiting FFP in administrative costs incurred by courts providing child support enforcement services on the ground that the regulation conflicted with the legislative intent that monies be expended for Title IV-D activities. The court stated that the concerns which the Agency alleged in support of the regulation, including that courts would be unable to allocate administrative costs between Title IV-D and non-Title IV-D activities, would justify a strict approach to auditing State requests for FFP, but not a blanket prohibition on FFP in administrative costs. Reser can be distinguished from the instant case, however, since the Agency in Reser did not purport to derive the prohibition on administrative costs from any specific language in the Act.

The State's argument that the requirement for new applications frustrates the Congressional policy underlying Title IV-D was also considered in Decision No. 101. In that case, the State contended in support of its position that individuals who applied for child support enforcement 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, thus frustrating the Congressional intent that the scope of the services be expanded. (Decision, p. 4.) The Board found, however, that the State had provided no proof to that effect, and further, that "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." (Decision, p. 6.) Here, the State makes the same contention that individuals would not reapply for the services, supported by an affidavit of Fred Fant, Assistant Director for Probation of the New Jersey Administrative Office of the Courts, dated March 15, 1978. (Reconsideration record, attachment to Brief in Support of Petitioner's Application for Reconsideration, submitted under cover of letter dated March 16, 1978.)

The affidavit states in pertinent part:

> In monitoring the success of the probation departments' efforts to comply with the HEW directives, this office's auditors have reported the departments' difficulties in obtaining signed applications from all non-AFDC recipients on an expedited basis due to a variety of factors: inordinate numbers of applicants to contact; changes in addresses noted in probation department files and; recipient refusal to sign the applications based upon advice of counsel.

We do not find this documentation sufficient to warrant a finding that the requirement for new applications acted to frustrate Congressional intent. The record indicates that, as of March 31, 1977, the State had obtained new applications for 65 percent of its non-AFDC caseload. (Notification of disallowance dated February 19, 1980, p. 3.) The percentage of non-AFDC cases still without new applications decreased to 10 percent in the quarter ended September 30, 1979. (Notification of disallowance dated March 10, 1980, p. 2.) There is no indication of the extent to which recipient refusal was responsible for the State's failure to obtain new applications in the remaining cases. Even if recipient refusal was responsible in most of the remaining cases, we are not prepared to say that Congressional intent was frustrated if less than one-tenth of the pre-existing caseload was lost.

Moreover, if, as the affidavit indicates, non-AFDC recipients refused to sign new applications on the advice of counsel, an informed decision to forgo further services was made. Since the Act provides for the furnishing of services to non-AFDC recipients only upon request, the continued provision of services under such circumstances would appear to be improper. It is not our duty to inquire into the reasons why such advice was given by counsel.

The State also argues that the requirement for new applications frustrates Congressional intent because ample documentation of the need for services was available and obtaining new applications therefore needlessly reduced the amount of funds available for providing the services themselves. The Board stated in Decision No. 101, however, that since there was no indication that the cost of obtaining new applications would be significant, this was "too tenuous a connection on which to find invalid the Agency's interpretation...." (Decision, p. 7.) Moreover, the State's assertion that need is shown not by the existence of an application, which the State argues reflects only the applicant's situation at the time it was filed, but rather by current reviews of the services provided, proves too much. The Act clearly requires that an application be made; the issue here is simply whether an application made before July 1, 1975 is acceptable.

The State also argues that affirmance of the disallowance for the period August 1, 1976 to January 1, 1977 would be contrary to 42 U.S.C. 603(h) and 652(a)(4), which the State characterizes as providing that a "failure to comply substantially with a State plan requirement... should not be a basis for fiscal sanction prior to January 1, 1977." (Response to Order, p. 7.) We read those sections, however, as providing for a penalty reduction in the amount payable to a state under Title IV-A, not Title IV-D, where the state has failed to implement an effective child support enforcement program. (See Section 603(h)--"the amount payable to any State under this part"--and S. REP. No. 93-1356, 93d Cong., 2nd Sess. 2 (1974).) The penalty provision appears, moreover, to operate independently of the disallowance process.

The State argues, finally, that even if the Board determines that the Agency's interpretation is binding, some portions of the disallowances, which covered the period August 1, 1976 through September 30, 1979, should be reversed on the ground that the State did not receive timely notice of that interpretation. The requirement for new applications was clearly set out in an action transmittal issued by the Agency on June 9, 1976 (OCSE-AT-76-9). Despite its position that the action transmittal was merely interpretive in nature, 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." (See citation to record on p. 3 of Decision No. 101.) The State in the instant case claims that it did not receive the action transmittal until July 19, 1976 and asserts that it was impossible to get 55,000 (the estimated non-AFDC caseload as of August 1976) new applications by August 1, 1976. The State also argues that it was not notified until September 20, 1976 that the deadline for new applications was August 1, 1976.

The record shows that the State made a good faith effort to comply with the requirement for new applications beginning July 19, 1976. (Affidavit of Fred Fant, cited supra.) Its argument that it was unable to obtain all of the necessary applications by August 1, 1976 thus appears to have some merit. The State does not indicate, however, the date as of which it would agree that the disallowance was properly taken, assuming that the Agency's interpretation is binding. It argues only that "the unique circumstances of this case warrant [the Agency's] reimbursement of services provided non-AFDC families for a reasonable period of time following August 1, 1976." (Response to Order, p. 7.)

On this state of the record, it is difficult to make any finding regarding the date as of which the disallowance was properly taken. Under the circumstances of this case, we suggest that 30 days from July 19, 1976, the date of the State's receipt of the action transmittal, was a reasonable period of time within which to require the State to obtain new applications; however, the Agency may, after discussions with the State, set another time and reduce the amount of the disallowance to the extent that it determines appropriate.

Conclusion

For the reasons set forth above, we conclude that the State's failure to obtain new applications was an appropriate ground for disallowance, but that the amount disallowed should be reduced by the Agency in accordance with the instructions given above.

/s/ Clarence M. Coster

/s/ Donald G. Przybylinski

/s/ Norval D. (John) Settle, Panel Chair