Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Illinois Department of Children & Family Services
Docket No. A-05-67
Decision No. 2062

DATE: January 24, 2007

DECISION

The Illinois Department of Children & Family Services (Illinois) appealed the February 3, 2005 determination of the Administration for Children and Families (ACF) imposing a penalty pursuant to 42 C.F.R. § 1355.32(d)(4). This regulation requires that ACF impose a penalty if it determines, based on a partial review, that a state is not in compliance with state plan requirements under title IV-E of the Social Security Act (Act) that are outside the scope of a child and family services review and the state remains out of compliance after entering into a program improvement plan designed to bring the state into compliance. ACF's February 3, 2005 determination advised Illinois that ACF was imposing an initial penalty of $2,302,428 in title IV-E adoption assistance federal financial participation (FFP) for the period October 2001 through December 2004. ACF subsequently advised Illinois that it was imposing an additional penalty of $179,484 FFP for each of the two additional quarters (ended March 31, 2005 and June 30, 2005) until Illinois came into compliance. Illinois Ex. 21 (letter dated 5/21/05).

According to ACF, during the period for which the penalty was imposed, Illinois was not operating its title IV-E adoption assistance program in accordance with section 473 of the Act. In particular, ACF found that Illinois improperly required a judicial determination that the child is abused, neglected or dependent in establishing eligibility for adoption assistance even where parental rights had been relinquished or terminated or were in the process of being terminated. ACF takes the position that this requirement created an unnecessary legal hurdle that precluded otherwise eligible children from receiving adoption assistance. Illinois argues, however, that ACF's interpretation of section 473 is not a permissible one and in any event is not

binding. In addition, Illinois asserts that it did not enter into a program improvement plan and argues that therefore no penalty may be imposed. Illinois also argues that imposition of a penalty beginning October 2001 was not warranted. Finally, Illinois argues that the methodology used to calculate the penalty was unreasonable.

As explained in detail below, we conclude that ACF's interpretation of section 473 is a permissible and reasonable interpretation. Since Illinois had notice of this interpretation, Illinois could not reasonably rely on a different interpretation of section 473 as permitting it to impose its judicial determination requirement. Moreover, Illinois failed to establish that an interpretation imposing such a requirement is a reasonable implementation of the statutory language. We also conclude that, while the penalty provisions in the applicable regulations would be triggered even if Illinois had not submitted a program improvement plan (PIP) to correct its noncompliance, Illinois did in fact submit a PIP, although it failed to meet the timeframes in the PIP for correcting its noncompliance. We further conclude that ACF was authorized to impose a penalty beginning in October 2001, following notice to Illinois that its judicial determination requirement might pose a title IV-E compliance issue, and continuing through June 30, 2005, when Illinois ultimately came into substantial compliance by completing the action items in its PIP. Finally, we conclude that the methodology used to calculate the penalty is reasonable. Accordingly, ACF properly imposed a penalty totalling $2,661,396 FFP for the full period in question.

The record for this decision consists of the parties' briefs and exhibits. Proceedings in this case were stayed or otherwise delayed for over nine months pending settlement negotiations.

I. Illinois was out of compliance with the IV-E state plan requirement for determining that a child "cannot or should not be returned to the home" for purposes of determining whether the child is a child with special needs.

A. Background

Section 473 of the Act (42 U.S.C. § 673) requires each state having a plan approved under title IV-E of the Act to "enter into adoption assistance agreements . . . with the adoptive parents of

children with special needs." Section 473(a)(1)(A).[1] Section 473(a)(1)(B)(ii) provides that "in any case where the child meets the requirements of paragraph (2)," the state may make adoption assistance payments in the amount specified in the agreement to the adoptive parents directly through the state agency or through another public or nonprofit private agency. "Paragraph (2)," i.e., section 473(a)(2), provides in relevant part:

> For purposes of paragraph (1)(B)(ii), a child meets the requirements of this paragraph if such child--
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> (A)(i) at the time adoption proceedings were initiated, met the requirements of section 406(a) or section 407 (as such sections were in effect on July 16, 1996)[2] or would have met such requirements except for his removal from the home of a relative (specified in section 406(a)(as so in effect)), either pursuant to a voluntary placement agreement with respect to which Federal payments are provided under section 474 (or 403 (as such section was in effect on July 16, 1996)) or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,
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> (ii) meets all of the requirements of title XVI with respect to eligibility for supplemental security income benefits, or
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> (iii) is a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent as provided in section 475(4)(B),
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> (B)(i) would have received aid under the State plan approved under section 402 (as in effect on July 16,

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[1] 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.

[2] Sections 406(a) and 407 of the Act defined the term "dependent child" for purposes of the Aid to Families with Dependent Children (AFDC) program, which was repealed by Public Law No. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The title IV-E adoption assistance program has continued to apply the eligibility requirements of the AFDC program, as in effect on July 16, 1996, as a basis for eligibility for benefits.

> 1996)[3] in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or
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> (ii)(I) would have received such aid in or for such month if application had been made therefor, or (II) had been living with a relative specified in section 406(a) (as in effect on July 16, 1996) within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made, or
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> (iii) is a child described in subparagraph (A)(ii) or (A)(iii), and
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> (C) **has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.**

(Emphasis added.)

"Subsection (c)," i.e., section 473(c), provides in relevant part as follows:

> For purposes of this section, **a child shall not be considered a child with special needs unless–**
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> **(1) the State has determined that the child cannot or should not be returned to the home of his parents**; and
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> (2) the State had first determined (A) that there exists with respect to the child a specific factor or condition . . . because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section . . . , and (B) that . . . a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section . . . .

(Emphasis added.) Thus, adoption assistance is available with respect to a child who meets the special needs requirement in section 473(c) and who satisfies one of the following:

> ○ section 473(A)(i) and either section 473(B)(i) or section 473(B)(ii), i.e., meets the former AFDC eligibility criteria (or would have met such criteria

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[3] Former section 402 of the Act contained the state plan requirements for the AFDC program.

> but for removal from the home) both at the time when adoption proceedings are initiated and when either a voluntary placement agreement was entered into or a proceeding to remove the child from the home was initiated; or
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> ○ section 473(A)(ii), i.e., meets the eligibility requirements for SSI under title XVI of the Act; or
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> ○ section 473(A)(iii), i.e., at the time adoption proceedings are initiated is the child of a minor parent who is in foster care and receives foster care maintenance payments that cover both the minor parent and the child.

The applicable regulations merely incorporate by reference the terms of the statute. See 45 C.F.R. §§ 1356.40(a) and 1356.60(a)(1)(ii). However, ACF addressed the statutory language in question in ACYF-PIQ-89-02, dated May 23, 1989, and Policy Announcement ACYF-CB-PA-01-01, dated January 23, 2001 (later incorporated into ACF's Child Welfare Policy Manual).

ACYF-PIQ-89-02 states in pertinent part:

> Section 473(c) of the Act sets forth the criteria that a State must apply in deciding whether or not the child is a child with special needs. The first criterion, "the State has determined that the child cannot or should not be returned to the home of his parents," means that the State must have reached that decision based on evidence by an order from a court of competent jurisdiction terminating parental rights (TPR), the existence of a petition for TPR, or a signed relinquishment by the parents.
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> * * * * *
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> [A] child cannot be considered a child with special needs unless the State has first determined that the child cannot or should not be returned to the home of his parents (section 473(c)(1)). As noted in the Background section of this PIQ, the State must make this determination. The State agency may verify this condition through a court ordered TPR, the existence of a petition for TPR, a signed relinquishment by the parents or, in the case of an orphaned child, verification of the death of the parents. The same verification documentation is required for all children, regardless of how they were placed in their adoptive homes.

ACF Ex. 1, at 3-4. ACYF-CB-PA-01-01 states in pertinent part:

> One of the criteria for establishing that a child has special needs is a determination by the State that the child cannot or should not be returned to the home of his or her parents. Previous guidance stated that this means that the State must have reached that decision based on evidence by an order from a court of competent jurisdiction terminating parental rights, the existence of a petition for a termination of parental rights (TPR), or a signed relinquishment by the parents. It has been brought to our attention that there are situations in which adoptions are legal without a TPR. Specifically, in some Tribes adoption is legal without a TPR or a relinquishment from the biological parent(s), and there is at least one State that allows relatives who have cared for a related child for a period of time to adopt without first obtaining a TPR.
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> After consideration, we believe that our earlier policy in ACYF-PIQ-89-02 (Q/A #1) is an unduly narrow interpretation of the statute and supersede that policy with this issuance. Consequently, if a child can be adopted in accordance with State or Tribal law without a TPR or relinquishment, the requirement of section 473(c)(1) of the Act will be satisfied, so long as the State or Tribe has documented the valid reason why the child cannot or should not be returned to the home of his or her parents.

ACF Ex. 2, at 10 (footnotes omitted).

By letter dated October 20, 2003, ACF advised Illinois that it had determined that Illinois was not in compliance with the title IV-E state plan requirements because it did not meet the requirements of section 473(c) of the Act. Illinois Ex. 1, at 1. According to ACF, "Illinois Title IV-E Plan Section 4.A.1.a. and DCFS [Department of Children and Family Services] Draft Rule Section 302.310(b)(1)(A) & (B), Special Needs Criteria B," first submitted to ACF in August 2001, "continue to require a judicial determination that the child is abused, neglected or dependent" in order to satisfy that part of the definition of special needs requiring a determination by the state that a child cannot or should not be returned to the home. Id. ACF stated that this requirement "contradicts Federal policy and eliminates an entire category of children from receipt of title IV-E [adoption assistance] - even if they meet the statutory eligibility criteria." ACF Ex. 1, at 2.

The record does not contain a copy of Illinois' IV-E plan. However, the "DCFS Rule" cited by ACF refers to children who are legally available for adoption and states in pertinent part as follows:

> [A] child shall not be considered a child with special needs unless the Department has first determined that:
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> 1) The child cannot or should not be returned to the home of his or her parents, as determined by:
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> A) a judicial determination, for which the Department has received prior notice, that the child is abused, neglected or dependent, as defined in the Juvenile Court Act; [or]
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> B) where a full hearing was conducted by the court and the court order states the factual basis supporting its findings or other judicial determinations that there is probable cause to believe that a child is abused, neglected or dependent, and there is a determination by the Department that the child is likely to suffer further abuse or neglect or will not be adequately cared for if returned to the parents; . . . .

Illinois Ex. 26, at 2.[4] While ACF's determination was based on a draft state rule attached to the state plan preprint, Illinois does not dispute that, as early as October 2001, its practice was to require a judicial determination as specified in the draft rule.

B. Analysis

1. Illinois did not have discretion to ignore ACF guidance on the circumstances under which a child "cannot or should not be returned to the home" within the meaning of section 473(c)(1).

On appeal, Illinois acknowledges that its state law required that there be a TPR or that the child be voluntarily relinquished by

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[4] Section 473(a)(2) as well as the Illinois Code also provide that certain children whose prior adoption was dissolved or whose adoptive parents have died may be eligible for adoption assistance in a subsequent adoption based on their earlier eligibility for adoption assistance.

the parents in order for a child to be free for adoption. See Ill. Reply Br. at 8, n.2. Illinois does not dispute that, under ACYF-PIQ-89-02 and ACYF-CB-PA-01-01, a child who satisfies that state law requirement "cannot or should not be returned to the home" within the meaning of section 473(c)(1). Illinois takes the position, however, that the statute gives it discretion to determine the circumstances under which this statutory test is met and that it properly imposed the additional requirement for a judicial determination that the child was neglected, abused or dependent pursuant to this discretion.

In general, the Board has held that, where a statute or regulation is subject to more than one interpretation, the HHS operating division's interpretation is entitled to deference as long as the interpretation is reasonable and the grantee had adequate notice of that interpretation (or, in the absence of notice, did not reasonably rely on its own contrary interpretation). See, e.g., Oklahoma Health Care Authority, DAB No. 1924, at 11 (2004) and cases cited therein. In addition, courts typically defer to a federal agency's interpretation even if the statute is ambiguous as long as the agency's interpretation is a permissible one. See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). We apply these tests here since there is a question as to what the language "the State has determined that the child cannot or should not be returned to the home" means in the context of the adoption assistance program.

We conclude that ACF's interpretation of section 473 in ACYF-PIQ-89-02 and ACYF-CB-PA-01-01 governs here. First, there is no dispute that Illinois had timely notice of ACF's interpretation. (In addition, as discussed later in this decision, Illinois also had an opportunity to correct its noncompliance following receipt of notice regarding how ACF would apply its interpretation in Illinois.) Second, ACF's interpretation is a reasonable one. Taken together, ACF's two program issuances require a state to determine that a child cannot and should not be returned to the home under certain specified circumstances, i.e., where the state can document that parental rights have been terminated, that the state agency has petitioned for the termination of parental rights, that parental rights to the child have been voluntarily relinquished, that the child's parents have died, or that a child is legally free for adoption under state law on any other basis. This is a commonsense approach to ascertaining whether a child meets the statutory test. Section 473(c)(1) contemplates a situation where reunification with a parent is either no longer possible or would never be in the child's interest. This is clearly the case under the circumstances identified by ACF. In

addition, the issuances are reasonable in that they accept any other basis provided in state law for finding that a child is free for adoption.

Illinois maintains, however, that ACF has no authority to identify the circumstances under which a state must determine that a child cannot or should not be returned to the home because section 473 "clearly gives States the authority and the discretion to determine when a child cannot or should not be returned to his or her home." Ill. Br. at 15. In Illinois' view, ACF's program issuances are "plainly inconsistent" with section 473 because they limit states' exercise of this discretion. Id. at 15.

Illinois relies primarily on the language in section 473(a) authorizing a state to make adoption assistance payments to an otherwise eligible child who "has been determined by the State . . . to be a child with special needs," as well as the language in section 473(c) providing that "a child shall not be considered a child with special needs unless," among other things, "the State has determined that the child cannot or should not be returned to the home of his parents." See Ill. Br. at 15 (quoting statute with emphasis added). Illinois also cites the legislative history of the Adoption Assistance and Child Welfare Act, which states in pertinent part that "[u]nder the adoption assistance program, a State would be responsible for determining which children in the State would be eligible for adoption assistance because special needs would have discouraged their adoption." See Ill. Br. at 15-16, quoting S.Rep. 96-336, at 13 (1979) (emphasis added by Illinois).

Nothing in the statute or the legislative history, however, clearly indicates that Congress intended that each state have discretion to interpret the statutory language "cannot or should not be returned to the home" in any way it deems appropriate. Instead, the statute can be read as simply requiring states to determine whether this statutory test is met for a particular child. Moreover, the Senate report referring to the state "determining which children" are eligible on the basis of special needs suggests that Congress contemplated that states would apply the special needs test to individual children, not that states had discretion to determine what that test meant. Thus, ACF reasonably interpreted the statute as permitting it to identify the circumstances when a state may view a child as one who "cannot or should not be returned to the home" and giving states flexibility to determine whether any of those circumstances are present in a particular case, i.e., to determine whether, by operation of state law, parental rights have already been

extinguished so that the child cannot be returned to the home or whether the state itself has decided to initiate the process to terminate parental rights because the state has determined the child should not be returned to the home.

Illinois nevertheless points out that, in issuing proposed regulations to implement the Child Welfare and Adoption Assistance Act, ACF stated that the statute "clearly reflect[s] Congressional intent and make[s] further clarification or regulation unnecessary." See 47 Fed. Reg. 30932, 30934 (July 15, 1982)." Ill. Br. at 18. ACF did not state at that time what it believed Congress intended in enacting section 473, however. Merely because the regulations do not provide any guidance on the meaning of the statute does not mean ACF believed that Congress intended to give each state discretion to interpret the statutory language "cannot or should not be returned to the home" in any way it deems appropriate.

Illinois also suggests that Michigan Dept. of Social Services, DAB No. 1013 (1989), stands for the proposition that states have "broad discretion in making special needs determinations." Ill. Br. at 16. The Board there held that Michigan was not required to have written policies and procedures for determining whether there "exists with respect to the child a specific factor or condition" based on which the "child cannot be placed with adoptive parents without providing adoption assistance" within the meaning of section 473(c)(2)(A). While it is implicit in this holding that a state has some discretion in making the special needs determination, the Board did not address the scope of a state's discretion under section 473(c)(1). Moreover, this decision addressed a time period prior to ACF's issuance of its interpretation.

Thus, Illinois has not shown any basis for finding that ACF's interpretation of section 473(c)(1) is impermissible or unreasonable.

2. ACF's guidance was not required to be published pursuant to the notice and comment rulemaking procedures in the Administrative Procedure Act.

Illinois takes the position that even if section 473 permits ACF to identify the circumstances under which a state must determine that a child cannot or should not be returned to the home, ACF's program issuances are not binding because they were not published in accordance with the notice and comment rulemaking procedures in the Administrative Procedure Act (APA), 5 U.S.C. § 553. The APA sets out procedures for notice and comment rulemaking that

must be followed when a legislative rule (sometimes referred to as a substantive rule) is issued. Interpretative rules may generally be issued without complying with these procedures, however. See 5 U.S.C. § 553(b).[5] As discussed below, we conclude that the guidance in ACF's program issuances regarding when a child cannot or should not be returned to the home constituted an interpretative rule that was not required to be published pursuant to notice and comment procedures.

Illinois argues that the ACF issuances constitute a legislative rule since "ACF has mandated that the general language 'cannot or should not be returned to the home' can only be satisfied in three specific situations."[6] Ill. Reply Br. at 7-8. Illinois cites Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94, n.6 (D.C. Cir. 1997) for the proposition that "[i]f the statute to be interpreted is itself very general . . . and the 'interpretation' really provides all the guidance, then the latter will more likely be a substantive regulation." Id. (quoting Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997)). Illinois also argues that the ACF issuances constitute a legislative rule because they are "entirely new restrictions on States' discretion that are not in any way anticipated by the language or legislative history of Section 473(a)(1)[.]" Ill. Br. at 19, citing Batterton v. Francis, 432 U.S. 416, 425, n.9 (1977) for the proposition that "an interpretative rule cannot impose obligations on citizens that exceed those fairly attributable to Congress through the process of statutory interpretation."

We see no basis for finding that the language of section 473(c) is so general that it provides no guidance. As our discussion in the previous section indicates, in the context of the IV-E adoption assistance program as a whole, the statutory wording that a state must determine that a child "cannot or should not be

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[5] In addition, section 553(a)(2) provides an exception for matters relating to grants. However, the Department of Health and Human Services has chosen to abide generally by the provisions of section 553, notwithstanding this exception. 36 Fed. Reg. 2532 (Feb. 5, 1971).

[6] Illinois incorrectly indicates that the ACF issuances specify only three situations as a basis for finding that a child cannot or should not be returned home. In ACYF-CB-PA-01-01, ACF modified the rule stated in ACYF-PIQ-89-02 to permit such a finding in any case where it is documented that adoption is legal under state law.

returned to the home" reasonably suggests the circumstances set out in ACF's program issuances in which there is a physical impossibility of returning the child home or other indications it would never be in the child's interest. Moreover, Illinois itself required that the same circumstances as described in ACF's guidance be present in order to find a child eligible for adoption assistance. (As discussed below, although it also required a judicial determination that the child was neglected, abused or dependent, Illinois failed to establish that this additional requirement, on top of what ACF requires, would implement the statutory test that the child "cannot or should not be returned to the home.")

Illinois also relies on American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993), which it appears to read as holding that a rule is interpretative only if the agency would have a sufficient "legislative basis" on which to pursue an enforcement action in the absence of the interpretation. Ill. Reply Br. at 8. According to Illinois, ACF would not have a basis on which to pursue an enforcement action against Illinois in the absence of the ACF issuances because "Illinois' judicial determination requirement satisfied the literal language of Section 473(c)(1) that the State must determine that a child cannot or should not be returned to his home[.]" Id. However, Illinois misreads American Mining, which states that a rule is legislative if it has the force of law, and that this is the case "only if Congress has delegated legislative power to the agency and if the agency has indicated an intent to exercise that power in promulgating the rule." 995 F.2d at 1109. The decision goes on to state that "there are a substantial number of instances where such 'intent' can be found with some confidence," including "where, in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate." Id. at 1110. Here, however, ACF neither relied on the authority to make legislative rules nor indicated that the statute had not adequately addressed the issue. Instead, ACF's issuances state what ACF thinks the statutory test means in the context of the adoption assistance program.

ACF therefore properly found Illinois out of compliance with the IV-E state plan requirements based on ACF's interpretation of section 473(c)(1) in ACYF-PIQ-89-02 and ACYF-CB-PA-01-01.

3. Even in the absence of ACF's guidance, Illinois would be out of compliance with state plan requirements.

Even if ACF had not interpreted section 473 as authorizing it to identify the circumstances under which a child cannot or should

not return home, Illinois' judicial determination requirement would not comply with section 473(c)(1). To determine that a child is abused, neglected or dependent, a court need find only that the child is presently unsafe in the home, not that reunification with a parent is no longer possible or would never be in the child's interest. (Indeed, the IV-E foster care program requires a state to make reasonable efforts to reunify families even after a child has been removed from the home based on a judicial finding of abuse or neglect. See section 471(a)(15)(B)(ii) of the Act.) Illinois' judicial determination requirement therefore does not address whether parental rights have been or should be permanently terminated and, accordingly, does not address the statutory test of whether the child cannot or should not be returned to the home. Nor does Illinois make a convincing case that its judicial determination requirement furthers any purpose of the title IV-E adoption assistance program. On appeal, the only purpose of this requirement identified by Illinois is to safeguard against adoptions in instances where "greedy private adoption agencies or attorneys" entice "unwitting parents into relinquishing custody of their children, perhaps through financial inducements derived from the Adoption Assistance payments." Ill. Reply Br. at 5-6. We do not find this argument convincing. A state could address this situation directly by providing additional safeguards in its process for voluntary relinquishment or by taking other steps to ensure that a relinquishment was truly voluntary before designating a child as an eligible special needs child. Thus, the judicial determination required by Illinois is not necessary to ensure that a child who is legally free for adoption cannot or should not be returned to the home.

Moreover, even in the absence of ACF's interpretation on the issue addressed in the first section of this decision, Illinois' judicial determination requirement would be inconsistent with the statute and its purpose in another respect. Illinois acknowledges that, of the categories of children who are potentially eligible for adoption assistance under section 473, only children who were removed from home pursuant to a judicial determination to the effect that continuation therein would be contrary to their welfare would ordinarily have been the subject of a judicial determination that satisfied Illinois' judicial determination requirement. By requiring such a judicial determination for every child who was legally free for adoption under Illinois law and met the other eligibility requirements in section 473, Illinois potentially excluded the other categories of children from adoption assistance payments. Even assuming that the statute gives states discretion to exclude entire categories of children from adoption assistance payments (and

that is by no means clear), a state would have to exercise such discretion consistent with the provisions of its approved IV-E state plan.[7] See section 1123A(a)(3) (requiring state's IV-E program to be in substantial conformity with its approved state plan). Since Illinois does not allege that its approved state plan restricted adoption assistance payments to any category of children, Illinois' judicial determination requirement violated its own approved plan as well as the authorizing statutory provisions.

Furthermore, Illinois'noncompliance would not have been cured by the asserted fact that all children who qualified as children with special needs under ACF's interpretation could have obtained the judicial determination required by Illinois. According to Illinois--

> an SSI child who was removed from her home by a voluntary relinquishment of parental rights or through the death of her parents (or an AFDC child who was removed from the home by a voluntary placement agreement) could still meet the special needs criteria by going to court and obtaining, prior to the adoption, a judicial determination or court order that she cannot or should not be returned to her home.

Ill. Reply Br. at 4.[8] Illinois asserts that "[t]his in fact happened with some regularity" while Illinois' requirement for a judicial determination was in force, and that the legal costs of doing so were defrayed by the $1,500 one-time subsidy for nonrecurring expenses that Illinois provides to adoption

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[7] Even if states have discretion to refrain from making a special needs determinations or entering into adoption assistance agreements for any category of children, it would not necessarily follow that Congress intended to give a state "full authority to set its special needs criteria," as Illinois argues. See Ill. Br. at 15, citing section 473(a)(1) and 473(a)(1)(B)(ii).

[8] Illinois appears to suggest that the court could have found the child "dependent." Illinois's Juvenile Courts Act defines the term "dependent" broadly to mean a minor who is without a parent, guardian, or legal custodian; whose parents are physically or mentally disabled; who is without proper care through no fault of the parent; or whose parent wishes with good cause to be relieved of all parental rights. Ill. Reply Br. at 4, n.1, citing 705 Ill.Comp.State. 405/2-4.

assistance recipients. Id. at 4-5, citing Ill. Ex. A (Declaration of Christina Schneider). Clearly, however, the additional requirement for a judicial determination could have the effect of discouraging prospective adoptive parents from pursuing an adoption, even if funds are provided to defray the legal costs. Moreover, as discussed in a later section of this decision, Illinois has not established that the small number of applications it received accounts for all children who might have been found eligible for adoption assistance but for Illinois' judicial determination requirement.

Accordingly, ACF could have found Illinois out of compliance based either on Illinois' failure to comply with ACF guidance or on one of the grounds identified in this section.

II. While the penalty provisions in the applicable regulations would be triggered even if Illinois had not submitted a program improvement plan (PIP) to correct its noncompliance, Illinois did in fact submit a PIP (although it failed to meet the timeframes in the PIP for correcting its noncompliance).

Background

Section 1123A(a) of the Act (42 U.S.C. § 1320a-1a) provides in relevant part that the Secretary shall promulgate regulations for the review of the title IV-E adoption assistance programs administered by state agencies "to determine whether such programs are in substantial conformity with . . . State plan requirements under [title IV-E] . . . and . . . approved State plans." Section 1123A(b)(4)(A) provides that the regulations promulgated by the Secretary shall "afford the State an opportunity to adopt and implement a corrective action plan, approved by the Secretary, designed to end the failure to so conform[.]"

Pursuant to this statutory authority, ACF issued regulations setting up a system of child and family service reviews providing for reviews of adoption assistance programs administered by states under title IV-E. 65 Fed. Reg. 4076 (Jan. 25, 2000), as amended by 66 Fed. Reg. 58,672 (Nov. 23, 2001). The regulations provide for periodic "full reviews" of adoption assistance programs administered by states under title IV-E. 45 C.F.R. §§ 1355.31 and 1355.32(a)-(c). In addition, the regulations provide as follows with respect to title IV-E state plan requirements not addressed by full reviews:

> (d) *Partial reviews based on noncompliance with State plan requirements that are outside the scope of a child and*

> *family services review.* When ACF becomes aware of a title IV-B or title IV-E compliance issue that is outside the scope of the child and family services review process, we will:
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> (1) Conduct an inquiry and require the State to submit additional data.
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> (2) If the additional information and inquiry indicates to ACF's satisfaction that the State is in compliance, we will not proceed with any further review of the issue addressed by the inquiry.
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> (3) ACF will institute a partial review, appropriate to the nature of the concern, if the State does not provide the additional information as requested, or the additional information confirms that the State may not be in compliance.
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> (4) If the partial review determines that the State is not in compliance with the applicable State plan requirement, the State must enter into a program improvement plan designed to bring the State into compliance, if the provisions for such a plan are applicable. The terms, action steps and time-frames of the program improvement plan will be developed on a case-by-case basis by ACF and the State. The program improvement plan must take into consideration the extent of noncompliance and the impact of the noncompliance on the safety, permanency or well-being of children and families served through the State's title IV-B or IV-E allocation. If the State remains out of compliance, the State will be subject to a penalty related to the extent of the noncompliance.

45 C.F.R. § 1355.32(d).[9]

As noted earlier, ACF advised Illinois by letter dated October 20, 2003 that it had determined that Illinois was not in compliance with the title IV-E state plan requirements because it did not meet the requirements of section 473(c) of the Act. ACF's letter also states that since ACF had "become aware of this title IV-E compliance issue that is outside the scope of the child and family services review process, . . . the Program Improvement Plan (PIP) provisions of 45 CFR 1355.32(d)(4) are applicable." Ill. Ex. 1, at 2. The letter continues:

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[9] The preamble to the January 25, 2000 regulations indicates that this section was issued pursuant to the authority in section 1123A of the Act. 65 Fed. Reg. 4076, 4037-4038.

"Therefore, we expect that Illinois will enter into a PIP and modify its laws and policies to be consistent with the Act. The PIP should include the action steps and timeframes to make the necessary modifications." Id. The letter also directs Illinois to "submit the PIP to our office for approval within 90 calendar days from the date this letter is received." Id. After requesting and receiving several extensions of time to submit a PIP, Illinois advised ACF by letter dated July 21, 2004 that it was "propos[ing] to amend Rule and Procedures 302.310, Adoption Assistance, to clarify the State's Special Needs Criteria" in order to allow a child who meets the requirements for SSI benefits "to be a child with special needs without the need for an additional judicial determination beyond a Termination of Parental Rights." Ill. Ex. 11, at 1. By letter dated August 26, 2004, ACF stated that the proposed change was not sufficient to bring Illinois into compliance because it would "only provide title IV-E adoption assistance to those otherwise SSI-eligible children whose parental rights have been terminated, when in fact the problem also extends to other special needs children who are not necessarily SSI-eligible." ACF's letter continues:

> Accordingly, we are requesting that the State develop a Program Improvement Plan (PIP) in conjunction with the ACF Regional Office that reflects the State's intention to modify its laws and policies to be consistent with the Social Security Act provisions and ACF policy guidance. The PIP should include the action steps and timeframes to make the necessary modifications.

Ill. Ex. 12, at 1. By letter dated September 30, 2004, Illinois advised ACF that it was willing to amend its special needs criteria to make title IV-E adoption assistance available to all otherwise-eligible children whose parental rights have been terminated without the need for an additional judicial determination. The letter states, however, that "[b]ecause we think it is preferable to proceed as proposed rather than through a PIP . . . , we submitted this proposal in draft form to Robert Keith [HHS Associate General Counsel, Children, Families and Aging Division] for his comments." Ill. Ex. 13, at 2. This precipitated a telephone conference call whose participants included the ACF Regional Administrator, the State agency director and others on October 15, 2004. As discussed later, there is some dispute about what transpired during this call. However, on November 1, 2004, Illinois wrote to ACF stating that "[t]his letter is intended to finalize a proposal by the Illinois Department of Children and Family Services (IDCFS) to modify its laws and policies to clarify the criteria under which a child with special needs is eligible for adoption assistance under the

State's title IV-E plan." Ill. Ex. 14, at 1. The letter identifies three actions that Illinois planned to initiate in the month of November and states: "We believe these proposed actions by IDCFS are fully responsive to the concerns raised by" ACF. Id. at 2.[10] By letter dated November 12, 2004, ACF advised Illinois that it was approving its "November 1, 2004 proposal" and requested Illinois to "submit copies of all of the documents referenced in the plan for review as each step of the plan is implemented to ensure the Program Improvement Plan provisions of 45 CFR 1355.32(d)(4) are fully implemented." Ill. Ex. 15, at 1. ACF subsequently notified Illinois on February 3, 2005 that it was imposing a penalty "due to (1) Illinois' not making satisfactory progress toward achieving the PIP's goals and actions steps and (2) the goals and the actions steps having not been achieved by the specified PIP completion dates." Ill. Ex. 19, at 1.

Analysis

According to Illinois, although it "eventually acceded to ACF's demand to eliminate the judicial determination requirement, the State always made clear that it did not intend to implement a PIP in order to make this change." Ill Br. at 20. Illinois argues that "because Illinois never entered into a [PIP], such that the penalty provisions of the PIP regulations could be triggered," a penalty is improper here. Id. As discussed below, we conclude that the penalty provisions in section 1355.32(d)(4) were triggered whether or not Illinois submitted a PIP, but that Illinois did in fact submit a PIP.

Illinois was notified by ACF on October 20, 2003 that "the Program Improvement Plan (PIP) provisions of 45 CFR 1355.32(d)(4) are applicable" and that ACF "expects that Illinois will enter

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[10] The actions specified were the following:

○ By November 19, 2004, Illinois will file a proposed amendment to the State's Rule and Procedure 302.310 with the Secretary of State's Index Division for publication in the Illinois Register;
○ Effective November 19, 2004, an amended application form and interim procedures will be used with all non-ward applicants for title IV-E adoption assistance; and
○ By November 26, 2004, the State will conduct outreach to the largest non-ward adoption agencies and IDCFS adoption liaisons to advise them of the changes to the application form and interim procedures.

into a PIP[.]" Ill. Ex. 1, at 1-2. Illinois does not dispute that the procedures in section 1355.32(d)(4) applied if Illinois was out of compliance with the State plan requirements in section 473. Section 1355.32(d)(4) provides that "[i]f the partial review determines that the State is not in compliance with the applicable State plan requirement, the State must enter into a program improvement plan designed to bring the State into compliance" and that "if the State remains out of compliance, the State will be subject to a penalty[.]" As ACF correctly states, although section 1355.32(b)(4) "affords the State an opportunity to enter into and carry out a PIP before a penalty is imposed, the regulation may not reasonably be read to permit the State to forever refuse to enter into a PIP and thereby forestall indefinitely any corrective action or imposition of a penalty." ACF Br. at 33-34. That is precisely the reading Illinois advocates here, however. The original due date for Illinois' PIP was 90 days from its receipt of ACF's October 20, 2003 letter, or January 18, 2004. Ill. Ex. 1, at 3; Ill. Ex. 3, at 1. Illinois made numerous requests for extensions which ACF granted, extending the time for submission of the PIP by several months. Illinois cannot reasonably claim that it should not be subject to a penalty if it never submitted a PIP after requesting several extensions to do so and failed to correct its noncompliance by the time for submitting a PIP.

In any event, we find that Illinois' November 1, 2004 letter constituted a PIP. Illinois does not dispute that this letter met the regulatory requirements for a PIP in that it set out "action steps" and "time-frames" for correcting Illinois' noncompliance with state plan requirements. Furthermore, the letter met the substantive requirements for a PIP set out in ACF's letters, i.e., that it provide for changing the state's laws and policies to make title IV-E adoption assistance available to all otherwise-eligible children whose parental rights have been terminated without the need for an additional judicial determination. Merely because Illinois labelled its November 1, 2004 letter and its prior submission a "proposal" rather than a PIP does not mean that what it submitted was not a PIP.

Illinois further argues that its November 1, 2004 letter was not a PIP because ACF failed to comply with the requirement in section 1355.32(d)(4) that "[t]he terms, action steps and time-frames of the program improvement plan will be developed on a case-by-case basis by ACF and the State." Illinois asserts that "ACF cannot unilaterally take a proposal offered by the State and turn it into a PIP, without giving the State any input into the action steps and timeframes that are to be included in the PIP."

Ill. Br. at 21-22. Illinois provides no basis, however, for reading the statute to require ACF to give the state further input on the action steps and timeframes when a state's proposal already meets the requirements for an approvable PIP.

Illinois also asserts that the ACF Regional Administrator indicated in an October 15, 2004 conference call that "ACF was not treating the proposal as a PIP[.]" Ill. Ex. 23 (Declaration of State agency director Bryan Samuels), ¶ 4 (cited in Ill. Br. at 22). ACF denies that the Regional Administrator or any other ACF staff participating in the call made any such representation to Illinois. ACF Ex. 4 (Declaration of Joyce A. Thomas); ACF Ex. 5 (Declaration of Kent Wilcox); and ACF Ex. 6 (Declaration of Constance Miller) (cited in ACF Br. at 11). Even without ACF's declarations, Illinois' assertion would not persuade us that it had no PIP. The State agency director acknowledges that during the conference call, ACF demanded that Illinois delete language indicating that the document being submitted was not a PIP. In view of that demand, ACF's prior demands for a PIP, and the unequivocal language in the regulation requiring a PIP, Illinois could not reasonably believe that ACF had agreed to accept something other than a PIP, even if someone had made the alleged statement. Moreover, the alleged statement could have been intended to mean only that Illinois' initial proposal did not satisfy the requirements for a PIP, not that ACF would not treat Illinois' subsequent submission as a PIP. In any event, as discussed above, even if ACF was no longer requiring a PIP, Illinois could not avoid a penalty since it still had to correct its noncompliance within the time afforded by ACF, which it indisputedly failed to do.

III. ACF was authorized to impose a penalty for the period October 2001 through June 2005.

As indicated above, ACF imposed a penalty for the period October 2001 through June 30, 2005. In a February 3, 2005 letter, ACF stated:

> Since ACF first notified DCFS of the Section 4.A.1.a. State plan compliance concern in October 2001, the initial penalty of $2,302,428 in title IV-E AA FFP is calculated for the period that extends from October 2001 through December 2004. Accordingly, there will be an ongoing Illinois quarterly penalty of $179,484 in title IV-E AA FFP until the affected PIP goals and actions steps are completed. When ACF determines that Illinois has successfully completed the PIP, no additional penalty will be assessed, but the amount of

> funds to be withheld will be computed to the end of the quarter in which Illinois successfully completed the PIP.

Illinois Ex. 19, at 2.

Illinois takes the position that ACF was not justified in imposing a penalty for any part of the period in question even if Illinois' judicial determination requirement was not in compliance with the state plan requirements in section 473 and Illinois entered into but did not carry out a PIP. Illinois acknowledges that "ACF first informed Illinois of its conclusion that the judicial determination requirement may violate the Title IV-E requirements in 2001[.]" Ill. Br. at 23. However, Illinois contends that a penalty could not properly be imposed for the two-year period before October 2003, when Illinois was informed of ACF's decision that the PIP provisions of section 1355.32(d)(4) were applicable. Moreover, according to Illinois, ACF could not properly impose a penalty beginning at that point because, until November 2004, "the parties negotiated whether it was possible to reach a compromise short of totally eliminating [] the judicial determination requirement" and "[a]t no time during these negotiations . . . did ACF suggest that DCFS could be eligible for a penalty dating back to 2001." Id. at 23-24. Illinois also argues that no penalty should be imposed for the period following the negotiations "because DCFS quickly achieved full compliance following the submission of its November 1, 2004 letter, even if it did not act by the precise deadlines set forth in its proposal" (all of which fell in November 2004). Id. at 24. Illinois notes that section 1355.35(d) gives ACF authority to impose timeframes up to two years for a PIP to correct noncompliance identified in a full review. Id.

Contrary to what Illinois argues, we conclude that there was a valid basis for imposing a penalty beginning in October 2001. Section 1355.32(d)(4) authorizes imposition of a penalty "related to the extent of the noncompliance." Illinois does not dispute that ACF notified it prior to October 2001 that its judicial determination requirement might pose a title IV-E compliance issue. This set in motion the process described in section 1355.32(d)(1)-(4), which provides that ACF will conduct an inquiry and require the state to submit additional data, institute a partial review if the state does not provide the additional information requested or the additional information confirms that the state may not be in compliance, and require the state to enter into a PIP if the partial review determines that the state is not in compliance. The penalty that may be imposed if the state remains out of compliance after entering into the PIP logically relates back to the noncompliance identified in

ACF's initial notice to the state. Moreover, the regulations for full reviews at section 1355.36(b)(3) provide that "funds will be withheld by ACF for the year under review and for each succeeding year" until the state achieves compliance. Since section 1355.32(d) is derived from the same statutory authority as section 1355.36(b)(3)– section 1123A of the Act, it seems clear that ACF intended a penalty imposed pursuant to section 1355.32(d) to operate in a similar fashion to a withholding pursuant to section 1355.36(b)(3).

In addition, ACF properly continued the penalty through June 30, 2005. Even if the terms of the PIP were being negotiated after ACF's October 20, 2003 letter, that letter gave Illinois clear notice that a PIP was required. Imposition of a penalty must necessarily be deferred to give the state an opportunity to enter into a PIP and to implement the PIP. However, once a state fails to enter into a PIP or fails to implement the PIP, section 1355.32(d) authorizes imposition of a penalty "related to the extent of the noncompliance." Thus, when the penalty is finally imposed, it may go back to the beginning of the noncompliance. Here, Illinois was not in compliance with section 473(c)(1) as far back as October 2001.

Furthermore, section 1355.32(d) clearly contemplates that a state must carry out the action steps in its PIP within the timeframes specified in the PIP in order to avoid a penalty. Thus, a penalty is warranted regardless of ACF's finding that Illinois completed most of its action steps only a few months after the timeframes in its PIP. The two-year timeframe authorized by section 1355.35(d) for a PIP to correct noncompliance identified in a full review is not necessarily appropriate for the noncompliance identified in a partial review, which may be more limited. In any event, Illinois itself set the timeframes for the action steps in its PIP. Thus, Illinois can hardly complain that the timeframes were unreasonable. Indeed, Illinois actually had well over a year to correct its noncompliance since it could have started to take corrective action when ACF requested the PIP in October 2003.

IV. The methodology used to calculate the penalty was reasonable.

Section 1355.32(d)(4) authorizes imposition of a penalty "related to the extent of the noncompliance." According to ACF, Illinois' judicial determination requirement affected children in all but

one of the categories in section 473(a)(2).[11] To calculate the penalty here, however, ACF looked only at the amount of adoption assistance payments that would have been made to SSI children but for the judicial determination requirement.

ACF first estimated the number of SSI children who would have received adoption assistance but for the judicial determination requirement. ACF used actual 2003 data provided by Illinois where available. ACF started with the total number of SSI recipients under age 18 (42,555), then subtracted the number of SSI children who received foster care (677) and the estimated number of SSI children who received adoption assistance (718) to get the number of SSI children who received neither foster care nor adoption assistance (41,160). The number of SSI children who received adoption assistance was estimated since Illinois did not provide actual data. ACF obtained the figure 718 by multiplying the total number of children who received adoption assistance (30,288) by the percentage of all foster care children who received SSI (677 of 28,607, or 2.37%). Next, ACF estimated that 654 of the 41,160 SSI children who received neither foster care nor adoption assistance were in need of adoption and would have been found eligible for adoption assistance but for Illinois' judicial determination requirement. ACF produced this estimate by multiplying 41,160 by the percentage of all SSI children who received foster care (677 of 42,555, or 1.59%). ACF then projected that the 654 children would on average have been eligible for six months of adoption assistance during fiscal year 2003 at an average monthly FFP payment of $182.96, for a total of $717,935 in federal payments improperly denied. To determine the penalty through December 31, 2004, ACF multiplied this number by 3.207 years of noncompliance, for a total penalty amount of $2,302.428. The penalty for each of the two succeeding quarters was calculated by dividing $717,935 by 4. See ACF Ex. 7 (Declaration of John Gaudiosi).

As discussed below, we conclude that ACF was entitled to rely on its methodology as a basis for the penalty. Since Illinois is the party that has access to information that might produce a better estimate, it cannot avoid imposition of the penalty calculated by ACF merely by pointing to possible shortcomings in ACF's methodology. While Illinois offers an alternative

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[11] As previously indicated, the exception was children meeting the AFDC eligibility criteria who were removed from their home pursuant to a judicial contrary-to-the-welfare determination, since that determination would have satisfied Illinois' judicial determination requirement.

calculation that it claims is superior to ACF's estimate because it is based on actual data, that calculation is fundamentally flawed.

Illinois challenges ACF's methodology primary on two grounds. First, Illinois argues that ACF is unjustified in using the percentage of foster care children who received SSI as the basis for calculating the number of SSI children who received adoption assistance. According to Illinois, it would be more logical to assume that the percentage of children receiving adoption assistance who received SSI was higher than the percentage of children in foster care who received SSI because eligibility for adoption assistance is based on the existence of a special needs factor which may involve the same sort of disability that could qualify a child for SSI. Illinois' assumption appears on its face to have some validity; however, Illinois does not provide any basis for determining how much higher the percentage should have been. Moreover, as ACF points out, if the number of SSI children who received adoption assistance should have been higher for the reason stated by Illinois, then the number of SSI children who were in need of and eligible for adoption assistance should also have been higher. Second, Illinois states that ACF's reliance on 2003 data to calculate a penalty for later years is unjustified, especially since Illinois has dramatically reduced the number of children in foster care since 2003. See Ill. Br. at 26. However, ACF asserts, and Illinois does not dispute, that when the penalty is calculated using the data for later years provided by Illinois in response to ACF's discovery request, the penalty for each year is higher. See ACF Br. at 40, citing ACF Ex. 11, at 2, and ACF Ex. 9.

Illinois also challenges ACF's use of the entire universe of SSI children as a starting point on the ground that "it was only eligible non-ward children who were affected by the judicial determination requirement." Ill. Reply Br. at 16 (emphasis in original). Non-ward children are children whose placement and care are not the responsibility of the State agency. However, ACF subtracted the number of SSI children in foster care, for whose placement and care the State agency would have been responsible, from the universe of SSI children at the outset of its calculation. This excluded at least some state wards from ACF's subsequent estimate of the number of SSI children who received neither foster care nor adoption assistance. Since Illinois has not identified any other types of state wards, it cannot reasonably object to ACF's estimate on the basis that it was not limited to non-ward children. ACF then estimated the number of these children who were in need of adoption and eligible for adoption assistance. While ACF calculated this by

multiplying the number of SSI children who received neither foster care nor adoption assistance by the percentage of all SSI children who received foster care, this does not mean that the resulting number included other than non-ward children.

Illinois also questions whether adoptive parents could have been found for all of the SSI children that ACF determined were in need of and eligible for adoption assistance. Ill. Reply Br. at 16. However, Illinois does not provide any basis for determining the number of such children for whom adoptive parents could not have been found. Moreover, even if some of the 654 children in question would not have been adopted even in the absence of Illinois' judicial determination requirement due to the lack of adoptive parents, any reduction in the number of children would likely be offset by the otherwise conservative nature of ACF's estimate. As indicated above, ACF looked only at the effect on SSI children and assumed that each of the children in need of and eligible for adoption assistance would have received adoption assistance for only six months of each year.

Finally, Illinois argues that the Board should reject ACF's estimate of the number of SSI children affected by the judicial determination requirement because "the State has come forward with evidence of the actual number[.]" Ill. Br. at 27, citing Arkansas Dept. of Information Services, DAB No. 2010, at 3 (2006) (stating that "it would be more accurate to determine a disallowance amount by examining the actual charges to federal programs"). Illinois proposes an alternative calculation based on "the actual numbers of non-ward children (for whom prospective adoptive parents had been found) whose applications for Adoption Assistance benefits were denied as a result of the judicial determination requirement or whose applications have been accepted since the requirement has been lifted." Ill. Reply Br. at 17. According to Illinois, "only a total of thirteen SSI and AFDC children were actually affected by the judicial determination requirement during the entire penalty period" starting in 2001. Id. at 18 (emphasis in original). This number includes 12 non-ward children who applied for adoption assistance in 2005 and one non-ward child whose application for adoption assistance in a previous year was denied because of failure to meet the judicial determination requirement. Id., Attachment C.

Illinois' reliance on the number of non-ward children who applied for adoption assistance in 2005 is unreasonable, however. As ACF points out, that number is not likely to be representative of the number of such children who would have applied if Illinois had not enforced its judicial determination requirement for the entire year since "the initial outreach and training about the

new procedures were not provided until March 9, 2005, with follow-up activities continuing until April 11, 2005[.]" ACF Br. at 44, citing Ill. Exs. 17 and 20. According to ACF, moreover, "it may easily take up to two years for the effect of eligibility rule changes to be accurately reflected, because of the lag time that occurs in fully implementing the rule change, in adequately educating and notifying all potential beneficiaries about the new procedures and how to utilize them, and in processing and making determinations under the new rules." Id., citing ACF Ex. 7 (Gaudiosi Declaration), ¶ 16. While Illinois questions whether there is an adequate basis for the two-year lag time posited by ACF, Illinois does not deny that some lag time was inevitable. See Ill. Reply Br. at 19-20. Thus, we conclude that Illinois' alternative calculation was fundamentally flawed.[12]

Accordingly, we conclude that ACF's methodology was reasonable and was a proper basis for the penalty imposed here.[13]

IV. Conclusion

For all of the reasons discussed above, we conclude that ACF properly imposed a penalty totalling $2,661,396 FFP for the period October 2001 through June 30, 2005.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Donald F. Garrett
Presiding Board Member

[12] ACF also raises other questions about Illinois' alternative calculation which we need not address here.

[13] However, ACF is not precluded by our decision from revising its calculation or changing its methodology based on additional information that Illinois may provide.