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DEPARTMENT OF HEALTH AND HUMAN SERVICES

IN THE MATTER OF)
THE DISAPPROVAL OF THE)
PROPOSED PLAN AMENDMENT)
TO OHIO'S IV-D PLAN)

Docket No. 83-258

RECOMMENDED FINDINGS
AND
PROPOSED DECISION

The Ohio Department of Public Welfare requested reconsideration of the decision of the Director of the Office of Child Support Enforcement (OCSE, Agency) disapproving a proposed amendment to Ohio's IV-D plan. Title IV-D is the authorizing statute for the Child Support Enforcement Program. The proposed amendment provided for a cooperative agreement between the Ohio IV-D agency and the Office of the Ohio Public Defender for the purpose of securing federal financial participation (FFP) in costs of representing indigent individuals in contempt proceedings brought by local IV-D agencies.

In accordance with 45 CFR 213.21, the Acting Director of OCSE designated me as the presiding officer for the reconsideration. Following notice in the Federal Register (48 FR 54128, November 30, 1983), I conducted a hearing on January 13, 1984 in Columbus, Ohio pursuant to the procedures of 45 CFR Part 213. The parties submitted pre-hearing and post-hearing briefs including stipulated testimony and stipulations of law. This proposed decision is based on the entire record including the briefs and hearing transcript.

For the reasons discussed below, I recommend that the Director's decision disapproving the plan amendment be upheld.

Background

In their stipulations of law, the parties agreed that recent federal district court decisions have required the appointment of counsel for indigent individuals in Ohio who are accused of contempt of court for violating child support orders. See Mastin v. Fellerhoff, 526 F. Supp. 969 (1981);

Young v. Whitworth, 522 F. Supp. 759 (1981). 1/ In each case the court reasoned that when an indigent is summoned to court for failure to make child support payments ordered by court, the threatened loss of liberty by incarceration creates a right to appointed counsel under the Fourteenth Amendment of the U.S. Constitution.

On April 6, 1983 the Ohio Department of Public Welfare submitted to the Agency a proposed amendment to Ohio's IV-D plan. This amendment was designed to provide IV-D funding at the rate of 70% FFP for the activities of the public defenders in contempt proceedings brought by the State IV-D Agency. The State argued that enforcement of support obligations through contempt proceedings is an important program function recognized by the regulations and that the right to appointed counsel arises when the contempt action is initiated by the State through the IV-D Agency. The State concluded that the costs associated with the appointed counsel are reasonable and necessary administrative expenses of the program and as such should be reimbursed in accordance with the terms of the proposed plan amendment.

There are no disputed factual issues in this appeal. The legal issues posed are 1) whether the Agency is required by the program statute and regulations to provide FFP for the subject activities; 2) whether, in the absence of any express authorization to fund the activities in the statute or regulations, the Agency is acting within its policymaking discretion by not funding; and (3) whether providing FFP for the activities would violate the cost principles applicable to the OCSE program.

I. Is the proposed plan amendment required by statute and regulation?

The Child Support Enforcement Statute

The authorizing statute for the child support enforcement program does not provide any express authority for the public defender activities contemplated by the proposed plan amendment. The designee of the Secretary (Director of OCSE)

1/ These cases did not address the funding issue raised here and did not involve the federal OCSE Agency as a party. Indeed, the cases did not even consider the role as such of the IV-D program or the State IV-D Agency in the initiation of the contempt proceedings.

has the responsibility to "review and approve" state plans for administration of the program. The statute specifies a single and separate organization unit within the state to administer the state plan. Section 454(3) of the Social Security Act. The statute authorizes a state to enter into cooperative arrangements with "courts and law enforcement officials" to assist the agency administering the plan. Section 454(7) of the Act. Public defenders, however, are neither "courts" nor "law enforcement officials" as those terms are ordinarily used. No other provision of the statute authorizes use of public defenders through any arrangement with the single state agency. Finally, the statute gives the Director discretion for setting standards for state programs as determined "to be necessary to assure that such programs will be effective." Section 452(a)(1) of the Act. The Agency here argued that it rejected the proposed plan amendment because it would not promote program effectiveness. 2/

The Regulations

Like the statute, program regulations fail to authorize the proposed plan amendment. The regulations make no reference to the use of public defenders in the program or to cooperative agreements between the single state agency and public defenders. The only reference is to FFP for agreements with "law enforcement officials" who are defined as "district attorneys, attorneys general, and similar public attorneys and prosecutors and their staff." (45 CFR 304.21(a)) The State argued that public defenders qualified as "similar public attorneys." While it is conceivable that "public attorney" might encompass public defenders in other contexts, the term clearly does not merit so broad a construction in the restrictive context of the term being defined, "law enforcement official." Further, the regulation specifies only those public attorneys "similar" to district attorneys and attorneys general. Public defenders function solely in defending individuals and do not have functions relating to prosecution as do district

2/ The basis for the Agency's assessment of program effectiveness is discussed in a subsequent section.

attorneys and attorneys general. 3/ Accordingly, the Agency's interpretation of the scope of the cooperative agreements recognized by regulations is reasonable and is consistent with the plain meaning of the regulation.

The State also argued that the regulations should be interpreted to allow FFP because the cost of providing counsel to indigents is not in the regulation (45 CFR 304.23) that identifies items for which FFP is not available. It is clear, however, from the limited number of items included in section 304.23 that the section does not pretend to cover every conceivable cost that would not be reimbursable. Furthermore, there is no language in that section or elsewhere in the regulations that creates a presumption in favor of reimbursement for items not mentioned. Rather, if a type of activity is not expressly identified in the regulations as "reimbursable," its reimbursement status is at best questionable. In any event, the absence of any reference in section 304.23 to the questioned activities can not be used as affirmative authority for the proposed plan amendment.

Finally, the State argued that references to contempt proceedings in the regulations provide necessary authority

3/ Firm distinctions between prosecutors and public defenders exist elsewhere in federal law. In Ferri v. Ackerman, 444 U.S. 193 (1979), the Supreme Court held that an attorney appointed by a federal judge to represent an indigent in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client. The Court noted that the primary rationale for granting immunity to judges, prosecutors and other public officials--namely, the societal interest in providing such officials with the maximum ability to deal fearlessly and impartially with the public at large--does not apply to court-appointed defense counsel. See also, Polk County v. Dodson, 454 U.S. 312 (1981).

for the proposed plan amendment. 45 CFR 304.20(b)(3)(iv) provides FFP for:

> activities . . . made pursuant to the approved title IV-D State plan which are determined by the Secretary to be necessary expenditures properly attributable to the child support enforcement program including . . . enforcing of court-ordered support through civil or criminal proceedings . . . .

Section 304.20(b), however, only provides authority for those enforcement activities that are made pursuant to an approved State plan. The Agency clearly has discretion under this regulation to determine which enforcement activities should be included under plans as reimbursable because they are "necessary" and "properly attributable to the program." If the Agency reasonably exercises this discretion and determines that particular activities are not "necessary" and refuses to approve a plan covering that type of activity, the regulation cannot serve as authority for reimbursing the activities.

Further, the Agency may reasonably interpret the "enforcing" activities contemplated by the regulations as being direct enforcement activities such as those performed by law enforcement officials. This is consistent with the program's focus on enforcement not defense, and the absence of any provision elsewhere in the regulations providing for cooperative arrangements between the single state agency and a public defender's office. Indeed, there is no reference whatsoever in the regulations to public defender activities.

The State further argued that 45 CFR 303.6 of the regulations requires it to bring contempt proceedings and that it should as a consequence be reimbursed for additional costs that arise solely as a result of those proceedings. Section 303.6 provides:

> For all cases under the State plan in which the obligation to support and the amount of the obligation have been established, the IV-D agency must maintain an effective system for identifying, within 30 days, those cases in which there is a failure to comply with the support obligation and to contact such delinquent

> individuals as soon as possible in order to enforce the obligation and obtain the current support obligation and any arrearages. Such attempts to collect support must include the institution of the following procedures as applicable and necessary:
>
> (a) Contempt proceedings to enforce an extant court order; . . . .

The Agency, however, is correct in stating that this section does not require the State to prosecute indigent individuals who have failed to comply with court support orders. A state might reasonably conclude that such proceedings would not be "applicable and necessary" under 45 CFR 303.6 once the individual had been determined to be indigent. The state may take one of five other types of actions listed in section 303.6 or no further action "as applicable and necessary." Further, section 303.6 does not specify which activities are reimbursable under the program. The regulation sections previously discussed cover that issue. In any event, the Agency currently funds the institution of contempt proceedings even against indigent individuals by reimbursing for "prosecutorial" costs. The Agency draws the line only with costs, such as those related to public defenders, that arise as a consequence of prosecuting indigents.

Accordingly, the Agency's disapproval of the proposed plan amendment here is consistent with the Agency's program regulations. The regulations do not require the Agency to reimburse the questioned activities specifically, and permit the Agency to consider how "necessary" a particular enforcement activity might be and whether it is properly attributed to the program. Since the statute and regulations clearly do not require the Agency to adopt the proposed amendment, the only remaining question is whether, by disapproving the proposed plan amendment, the Agency has acted within its policymaking discretion under the statute and regulations.

II. Is the Agency acting within its policymaking discretion?

Title IV-D gives the Director of the program discretion for setting standards for state programs as determined "to be necessary to assure that such programs will be

effective." The regulations when referring to enforcing of court-ordered support through criminal proceedings limit FFP to "necessary" expenditures, "properly attributable" to the program and "made pursuant to the approved title IV-D State plan." From the foregoing it appears that the Agency has broad discretion to weigh the effectiveness and necessity of the policies considered by it. This discretion extends not only to issuance of policy transmittals or promulgation of regulations but also to consideration of questions of first impression raised by proposed plan amendments. 4/

The State argued that the plan amendment covering costs of defense counsel is both effective and necessary because individuals who are indigent for purposes of appointment of counsel may nevertheless have enough resources to provide some child support, or if pressed with the threat of incarceration, may be able to raise funds from other sources. Tr., p. 45. The State argued that initiation of contempt proceedings has a symbolic effect and causes others who might otherwise ignore support orders to pay up. The State suggested that defense counsel might indirectly facilitate the enforcement and collection function. The State noted:

> While counsel obviously has a duty to defend his client from unwarranted contempt actions, he also has an obligation to keep him from going to jail in those circumstances where the contempt is warranted. In such circumstances counsel is likely to work with his client to help him pay the past due amount and to establish a schedule of further payments. State's Post-Hearing Brief, pp. 5-6.

4/ The State implied in its briefs that the Agency may have the discretion not to fund these costs but cannot refuse to do so "in the absence of contractual documents telling the State in advance." State's Brief, p. 6. This plan disapproval, however, is an appropriate vehicle for notifying the State of the Agency's policy decision. Ohio is apparently the first state to request reimbursement for public defender activities in contempt proceedings, and indeed the federal district court cases requiring apppointment of counsel in such proceedings are relatively recent. Further, the Agency argued that its regulations currently preclude funding for the

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Finally, the State argued that costs of counsel are necessary and effective because they are a direct consequence of prosecution for contempt, which in turn is an essential part of an enforcement system under the program generally and under Agency regulations. 5/

The Agency argued in response that it is self-evident that the enforcement activities would not be cost effective since they apply only to indigents. The Agency also questioned whether the activities would serve other program purposes:

> OCSE does not encourage or condone the jailing of absent parents for purely punitive purposes. What good is served by removing a debtor from the workforce, forcing him into deeper personal debt, and denying him an opportunity to seek the means to satisfy his support obligation? Appointment of counsel for the sole purpose of enabling the State to incarcerate contemnors adds a needless additional expense to a proceeding which (from the IV-D perspective) generally should be terminated after the judicial finding of indigency. Agency's Post-Hearing Brief, p. 2.

4/ (continued from previous page) activities, and that by disapproving the plan amendment, it is implementing what is already required by the language and intent of its regulations. The Agency also argued that its position here is consistent with its position concerning appointed counsel in paternity hearings, and that this position has been made known to the states for a number of years. Agency's Brief, pp. 3-4.

5/ In conjunction with this argument the State cited Reser v. Califano, 467 F. Supp. 446 (W.D. Mo. 1979). That case, however, dealt with court costs, a type of cost that is expressly recognized by statute as reimbursable. Further, the court in Reser concluded that the Agency's reason for not funding the particular administrative costs was not sufficiently related to the purposes of the enabling statute. Id., 451-52. Here, the costs at issue are not mandated by the statute, do not directly fulfill an enforcement function, and arise only as a consequence of covered enforcement activities. Further, the Agency validly questions the effectiveness of funding the activities.

The Agency argued that the subject activities do not coincide with the primary purpose of the program, which centers on the enforcement of support, not the defense of those not providing support. The Agency added that the State has an inherent interest in punishing contempt which is totally unrelated to the enforcement of child support obligations, that is, preserving the integrity of the court's judgment. Agency Brief, p. 7.

Finally, the Agency argued that the direct funding of defense attorneys by the IV-D program would pose an inherent conflict of interest problem. Agency's Post-Hearing Brief, p. 4. The Agency suggested, for example, that questions may arise as to the independence of defense counsel since they would be funded by the same program that is funding prosecution and since defense counsel would be required to maintain records subject to audit by IV-D officials. The Agency noted that it historically has limited reimbursement of court expenses because funding the costs of judicial decision-making could raise questions concerning the impartiality of the judical process. Id.

Analysis of Agency Discretion

The Agency here is acting within the discretion afforded it by statute and regulations in disapproving the proposed plan amendment. Although the State suggested that indigent individuals who qualify for court-appointed counsel may nevertheless be able to provide some level of child support, it failed to provide any evidence of how much support, if any, has been or could be generated through such prosecutions. It is therefore unclear whether the support would even exceed the additional program costs of prosecuting and defending indigent individuals. Clearly, the State can prosecute for symbolic effect those individuals in violation of court orders who have the means to comply. Further, the Agency is correct in suggesting that the State may have interests outside the program in seeing that its court orders are obeyed and that individuals subject to incarceration in contempt proceedings are defended.

The State has a variety of enforcement tools available to it when a person has not complied with support orders, and the person's indigency clearly may have a bearing on which tool is selected. The Agency here might reasonably conclude that

while the State may retain the option under the program of prosecuting an indigent individual, it will not fund attendant activities, not part of the prosecution per se, so that the State will more carefully weigh the necessity for a full-scale prosecution and so the Agency will not unduly subsidize an activity of questionable efficacy. Simply because the program provides funding for specific enforcement activities, there is no reason why it must also fund other activities that are triggered by the funded activity when the other activities are not specified as fundable in the regulations and do not directly fulfill the program's primary purpose.

Finally, while the Agency's conflict of interest concerns may not necessarily pose insuperable problems for the State's proposal, they can be considered by the Agency along with the other factors in determining the proposal's effectiveness and soundness.

Conclusion

In summary, the Agency's refusal to approve the State plan amendment here is consistent with the statute and regulations. The statute and regulations do not provide any express authorization for the questioned activities and reasonably may be interpreted to limit reimbursement to direct "enforcement" activities such as those performed by law enforcement officials. Further, the Agency has broad discretion in developing program policies in the child support enforcement program, whether in promulgating regulations or in considering issues of first impression in proposed plan amendments. The factors identified by the Agency in questioning the effectiveness and necessity of the plan amendment here provide a reasonable basis for the exercise of that discretion.

III. Would the proposed plan amendment also violate the cost principles?

The Agency also based its disapproval of the proposed plan amendment on the cost principles, section C. 1. a. of Attachment A of Office of Management and Budget Circular No. A-87. The Agency alleged that costs claimed under the proposed amendment would neither be necessary nor reasonable for proper and efficient administration of the grant program and would be a general expense required to carry out the

overall responsibilities of State and local government. Since disapproval of the plan amendment clearly may be sustained on the basis of the program statute and regulations and the broad discretion afforded the Director in setting program standards, it is not necessary to reach the question of whether the amendment would also be in violation of the cost principles. 6/ It is also apparent that the Departmental Grant Appeals Board decision that considered the allowability of jailing costs for individuals adjudged in contempt of support orders is distinguishable from the appeal considered here. Oregon Department of Human Resources, Decision No. 493, December 30, 1983. That decision rested on the joint effect of program regulations, a policy transmittal and the cost principles. This decision rests on the statute and regulations alone and concludes that the activities considered are not expressly authorized and properly may be excluded from reimbursement under the broad discretion of the Director in determining what is necessary and effective for the program. Further, the factors bearing on necessity and effectiveness are more compelling here in favor of disapproving the amendment.

Accordingly, I recommend that the decision disapproving the proposed plan amendment be upheld.

Proposed Conclusions of Law

1. The IV-D statute does not provide funding for public defender activities as part of the program's enforcement activities.

2. The IV-D statute gives the Director discretion for setting standards for state programs as determined "to be necessary to assure that such programs will be effective."

6/ Indeed, as the Agency suggested in its brief at p. 12, it would be difficult to determine the effect of the cost principles on the questioned public defender activities without looking once again at the scope and effect of the program statute and regulations.

3. It is well within the Director's policymaking discretion to conclude that reimbursing public defender activities is not necessary to assure program effectiveness.

4. Current program regulations do not provide for reimbursing public defender activities.

° The reference to "public attorneys" in section 304.21(a) may not reasonably be interpreted to include "public defenders."

° The absence of any reference to public defender activities in section 304.23 does not serve as authority for funding the activities.

° Section 304.20(b)(3)(iv) may be interpreted to provide reimbursement for direct enforcement activities (e.g., the costs of prosecution) and in any event only authorizes funding of "necessary" activities made pursuant to the State's IV-D plan.

° Section 303.6 does not address reimbursing for public defender activities and requires prosecution for contempt only "as applicable and necessary."

5. The Agency would be acting well within the discretion afforded it under its regulations in disapproving the proposed plan amendment.

CERTIFICATION

The time for submission of post-hearing briefs having expired, the entire record, including the foregoing rcommended findings and proposed decision, is CERTIFIED to the Acting Director of the Office of Child Support Enforcement, as directed in 45 CFR 213.32(b)(1).

April 6, 1984

Donald F. Garrett
Presiding Officer

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