Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Florida Department of Children and Families
Docket No. A-06-27
Decision No. 2080

DATE: May 3, 2007

DECISION

The Florida Department of Children and Families (Florida, DCF) appeals a determination by the Administration for Children and Families (ACF) disallowing $1,076,006 in federal financial participation (FFP) for the period January 1, 2002 though March 31, 2005. Florida claimed this FFP in the costs of training persons for employment as social workers with private agencies that deliver foster care services under contract with Florida. Florida claimed the costs as training expenses under the foster care program of title IV-E of the Social Security Act (Act), for which the Act provides 75% reimbursement. ACF disallowed Florida's claims at the 75% rate on the ground that funding for title IV-E training costs is not available for training persons for employment at private agencies.

For the reasons explained below, we sustain the disallowance in principle. At the parties' request, we address only the legal issue, and not issues raised by the parties regarding calculation of the amount of the disallowance. Upon receipt of this decision, ACF should consult with Florida to determine the amount of the claims that are at issue here. After such consultation, ACF should issue a written notice to Florida stating the amount of the disallowance and how that amount was determined. If Florida disputes ACF's determination of the disallowance amount, it may appeal that determination to the Board within 30 days of receiving it.

Applicable law and regulations

Title IV-E of the Act, "Federal Payments for Foster Care and Adoption Assistance," authorizes appropriations to enable states to provide, in appropriate cases, maintenance payments for foster care children who would otherwise have been eligible for

assistance under the former Aid to Families with Dependent Children program (AFDC) of title IV-A of the Act, and adoption assistance for children with special needs.

The AFDC program was repealed by Public Law No. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which replaced AFDC with the Temporary Assistance for Needy Families (TANF) block grant program. Whereas title IV-E had long applied the AFDC eligibility standards to determine eligibility for foster care and adoption assistance, PRWORA amended title IV-E to apply the former AFDC eligibility requirements as in effect on June 1, 1995, a date subsequently changed to July 16, 1996. Pub. L. No. 105-33, § 5513(b), 111 Stat. 251, 620 (1997).

A state may receive federal funding for IV-E expenditures if it has a plan approved by the Secretary of the Department of Health and Human Services that (among other requirements)--

> (1) provides for foster care maintenance payments in accordance with section 472 and for adoption assistance in accordance with section 473;
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> (2) provides that the State agency responsible for administering the program authorized by subpart 1 of part B of this title [child welfare services] shall administer, or supervise the administration of, the program authorized by this part; . . . .

Section 471(a) of the Act (42 U.S.C. § 671(a)).[1]

Section 472 provides for foster care maintenance payments with respect to an eligible child, where--

> such child's placement and care are the responsibility of (A) the State agency administering the State plan approved under section 471, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan

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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.

> approved under section 471 has made an agreement which is still in effect . . . .

Section 472(a)(2) of the Act.

Section 474 of the Act specifies the costs for which a state may receive federal funding and the rates of reimbursement. States may receive-

> 75 per centum of so much of such expenditures as are for the training (including both short-and long-term training at educational institutions through grants to such institutions or by direct financial assistance to students enrolled in such institutions) of personnel employed or preparing for employment by the State agency or by the local agency administering the plan in the political subdivision, ...

Section 474(a)(3)(A) of the Act.[2]

Section 1356.60(b) of 45 C.F.R. similarly authorizes FFP at the 75% rate in the costs of "[t]raining personnel employed or preparing for employment by the State or local agency administering" the IV-E plan. 45 C.F.R. § 1356.60(b)(1)(i). The regulation further provides that "[s]hort and long term training at educational institutions and in-service training may be provided in accordance with the provisions of §§ 235.63 - 235.66(a) of this title." 45 C.F.R. § 1356.60(b)(3). Section 235.63(a) of 45 C.F.R. states that "FFP is available only for training provided personnel employed in all classes of positions,

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[2] States may also receive 75% FFP for the "short-term training of current or prospective foster or adoptive parents and the members of the staff of State-licensed or State-approved child care institutions providing care to foster and adopted children receiving assistance under this part . . . ." Section 474(a)(3)(B)). Florida described the training at issue here as long-term training for persons who were to be employed as social workers and did not cite this provision or argue that it applies. Fla. Brief (Br.) at 1. Additionally, states may receive 50% FFP for "administrative expenditures necessary for the proper and efficient administration of the title IV-E State plan." 45 C.F.R. § 1356.60(c); see also section 474(a)(3)(E) of the Act. As we explain below, ACF has determined to allow Florida's claims as title IV-E administrative costs at the 50% rate of FFP, and so that provision is not relevant to our analysis.

volunteers, and persons preparing for employment by the State or local agency administering the program." 45 C.F.R. § 235.63(a).

"Long-term training" is defined as training for eight consecutive work weeks or longer. 45 C.F.R. § 235.61(e). FFP in training costs, including long-term training, "is available for personnel employed and persons preparing for employment by the State or local agency provided the following conditions are met, and with the following limitations" (among others):

> (1) Employees in full-time, long-term training make a commitment to work in the agency for a period of time equal to the period for which financial assistance is granted. A State agency may exempt an employee from fulfilling this commitment only if failure to continue in employment is due to death, disability, employment in a financial assistance program in a public assistance agency in another State, or other emergent circumstances determined by the single State agency head to be valid for exemption;
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> (5) Persons preparing for employment are committed to work for the State or local agency for a period of time at least equal to the period for which financial assistance is granted if employment is offered within 2 months after training is completed;
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> (6) The State or local agency offers the individual preparing for employment a job upon completion of training unless precluded by merit system requirements, legislative budget cuts, position freezes, or other circumstances beyond the agency's control; and if unable to offer employment, releases the individual from his or her commitment; . . . .

45 C.F.R. § 235.63(b).

Factual background

Florida contracts with private, community-based agencies to provide foster care services. DCF oversees the delivery of services, is responsible for the quality of contracted services and programs, and is required to ensure that services are delivered in accordance with applicable federal and state statutes and regulations. At issue are Florida's claims for the costs of training persons preparing for employment at those private agencies.

Florida reports that following the passage of PRWORA, which replaced AFDC with the TANF block grant program, Florida "reformed its foster care system through outsourcing to local, private agencies . . . ." Fla. Br. at 3, citing Fla. Stat. Ann. § 409.1671 (West 1998, 2005). As a result, "Florida has adopted a statutory scheme that now requires that foster care services be delivered by private, local community-based care agencies [CBCs] (which contract with and are overseen by the Florida Department of Children & Families) rather than by employees of the State of Florida." Fla. Br. at 1-2. Florida reports that it "uses CBCs to deliver the State's foster care services." Fla. Reply Br. at 7. Under this system, "some DCF employees remain responsible for interfacing with CBCs to ensure that foster care services are appropriately delivered to children in Florida." Fla. Br. at 4, citing Fla. Stat. Ann. § 409.1671(l)(1)(2)(a) (West 2005).

Florida's title IV-E long-term training program provides funding, including a yearly living allowance, for full-time students pursuing Bachelor and Master of Social Work degrees at Florida schools of social work that contract with DCF. Fla. Br. at 4-5; Fla. Ex. 4, at Att. 1, Fla. App. File at 34. The training, which Florida must approve, is intended to provide "the skills necessary to deliver high-quality foster care case management services." Fla. Br. at 4-5. As a condition of receiving payments, students upon graduating "are contractually obligated to fulfill employment commitments with DCF or a CBC in the amount of one year for each stipend the student received." Id. at 5. Florida reports that as a result of its foster care outsourcing, "almost all students participating in DCF's title IV-E long-term training program ('Stipend Program') will be preparing for employment with CBCs, not with DCF itself." Id. at 4. Florida reports that the requirements for students preparing for employment with a CBC are the same as the requirements for students who would have otherwise been preparing for employment with DCF. Id. at 5.

Procedural background

Florida has claimed some of its Stipend Program costs as IV-E training costs at the 75% rate of FFP, and others as IV-E administrative costs at the 50% rate. Before filing the instant appeal, Florida appealed a disallowance of $8,931 claimed as IV-E administrative costs at the 50% rate. Board Docket No. A-05-111. In its briefs in Docket No. A-05-111, however, Florida argued that its expenditures were entitled to 75% FFP as IV-E training costs, and the parties briefed that issue as well. After receipt of the parties' opening briefs in A-05-111 but before Florida submitted its reply brief, Florida filed the instant appeal,

which involved the disallowance of FFP claimed at both rates, and the Board with the parties' consent consolidated the two appeals. The Board also afforded the parties the opportunity to identify additional submissions they wished to make in the new appeal, if they believed that it raised new issues not presented in A-05-111 or that further briefing or development of the record was necessary. Neither party requested that opportunity.

Also after receipt of the parties' opening briefs in A-05-111 but before Florida submitted its reply brief, the Board stayed proceedings at the parties' request to permit them to negotiate. ACF subsequently determined to allow Florida's costs as title IV-E administrative costs at the 50% rate of FFP, and offered Florida the opportunity to withdraw its claims for IV-E training costs and resubmit them as claims for IV-E administrative costs. Florida elected to pursue its appeal of the disallowance of the costs that it claimed as IV-E training costs.[3] Florida thereafter submitted its reply brief in A-05-111, and the Board convened a telephone conference to discuss the status of the appeals in light of ACF's determination to allow Florida's claims at 50% FFP. After ordering the parties to brief the issue of what claims were still before the Board, the Board dismissed the appeal in A-05-111, on the basis that Florida had failed to demonstrate that A-05-111 involved any claims for funding at the 75% rate. With the consent of the parties, the Board placed into the record in this case the parties' substantive briefs in A-05-111.

In its notice of appeal in the instant case, Florida disputed ACF's calculation of the amount of the disallowance. The parties did not address the calculation issues in their briefs, but during the briefing jointly requested that the Board issue an opinion on the legal issue, after which the parties would propose a course of action with regard to resolving any remaining issues related to the calculation of the amounts subject to disallowance.

Accordingly, this decision addresses only the legal issue in this appeal, whether Florida's costs are eligible for reimbursement as title IV-E training costs at the 75% rate of FFP. As explained below, we uphold the disallowance in principle. Upon receipt of this decision, ACF should consult with Florida to determine the amount the claims that are at issue here. After such

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[3] It is not clear from the record whether Florida resubmitted its claims in this case as claims for administrative costs at 50% FFP.

consultation, ACF should issue a written notice to Florida stating the amount of the disallowance and how that amount was determined. If Florida disputes ACF's determination of the disallowance amount, it may appeal that determination to the Board within 30 days of receiving it.

Analysis

Florida argues that its costs of providing training to persons preparing for employment with private CBCs should be reimbursed as IV-E training costs at the 75% rate of FFP, for two principal reasons. Florida argues that the IV-E statute and regulations, by their terms, neither forbid funding for training persons for employment at private local agencies, nor require that persons for whom training costs are claimed be employed or preparing for employment at local government agencies. Florida further argues that, even if the IV-E statute and regulations could be interpreted as barring 75% FFP in the costs of training persons for employment with private agencies, its costs are allowable under PRWORA because that statute permits states to administer the IV-E foster care program through contracts with private agencies.

For the reasons discussed below, we conclude that Florida's payments for training persons for employment with private agencies are not entitled to reimbursement as title IV-E training costs at the 75% rate of FFP.

I. FFP at 75% is available only for training persons employed or preparing for employment with governmental agencies administering a state's IV-E plan and program.

Florida argues that it is entitled to 75% FFP in stipends paid to students training for employment with private, non-governmental CBCs that provide foster care services in Florida because the regulations authorize funding at that rate for the costs of training personnel employed or preparing for employment by "the State or local agency administering the plan, ..." 45 C.F.R. § 1356.60(b)(1)(i); see also section 474(a)(3) of the Act (75% FFP in the costs of training personnel employed or preparing for employment "by the State agency or by the local agency administering the plan in the political subdivision, ..."), 45 C.F.R. § 235.63(a) (funding available for persons employed or preparing for employment by "the State or local agency administering the program"). Florida argues that ACF improperly reads the term "local agency" as used in these provisions as meaning "local government agency." Florida argues that neither the Act nor the IV-E regulations define "local agency," and that

ACF has cited no legislative history suggesting that "local agency" means a local governmental agency.

ACF argues that current and former provisions governing the foster care program have always required that the local agency administering the plan be a government agency. We agree with ACF's reading of the governing provisions, for the reasons explained below.

Florida's reading of the term "local agency" fails to consider the context in which it appears in the statute. The Act and regulations limit FFP at the rate of 75% in IV-E training costs to the costs of training personnel employed or preparing for employment by the state or local agency "administering" the state's approved IV-E plan or its program. The governing provisions authorize only governmental entities to administer the state's IV-E plan or program. Under section 471(a)(2) of the Act, "the State agency responsible for administering the program authorized" by title IV-B, subpart I (child welfare services) "shall administer, or supervise the administration of" the state's program under title IV-E. The regulations require the establishment or designation of "a single State agency with authority to administer or supervise the administration of the plan." 45 C.F.R. § 205.100(a)(1)(ii), made applicable to title IV-E by 45 C.F.R. § 1355.30(p)(4). Section 472(a)(2) of the Act requires that placement and care of a child in foster care be the responsibility of "(A) the <u>State agency</u> administering the State plan approved under section 471, or (B) <u>any other public agency</u> with whom the State agency administering or supervising the administration of the State plan" has an agreement. (emphasis added) Thus, only the costs of training persons for employment with the government agency administering the IV-E program are allowable IV-E training expenses eligible for reimbursement at 75% FFP.

As only a governmental entity may administer a state's IV-E program, the only reasonable reading of the provision authorizing 75% FFP in the costs of training persons for employment with the state or "local agency administering" the plan is that the local agency be a governmental agency. Section 474(a)(3)(A) of the Act; 45 C.F.R. § 1356.60(b)(1)(i). This reading, as ACF argues, also is consistent with current and prior statutory and regulatory provisions governing the foster care program, for the following reasons:

- Prior to the establishment of title IV-E by the Adoption Assistance and Child Welfare Act of 1980, Public Law No. 96-272, the foster care program was part of the former title

IV-A of the Act. Former section 408(a) of the Act authorized foster care payments on behalf of eligible children whose placement and care were the responsibility of "(A) the State or local agency administering the State plan . . . or (B) any other public agency" with whom the state agency administering or supervising the administration of the state plan had made an agreement. Section 408(a) of Act (Dec. 1978 ed.) (emphasis added). Under this language, the "local" agency is clearly a public agency. Identical language in the legislative history of the original Act in 1935 that ACF cites shows that Congress contemplated that state plans would be administered by states or by counties, stating that if the plan "is to be administered by the counties, it must not be optional within each county . . . but rather must be mandatory upon all the counties." ACF Br. at 17, citing ACF Ex. 3, at 2, 6 (H. Rep. No. 74-615, at 23 (1935); S. Rep. No. 74-628, at 35 (1935)). This indicates that the local agencies eligible to participate in the administration of a state's foster care plan were local government agencies.

This is consistent with language in the current statute requiring that a state plan provide "that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them . . . ." Section 471(a)(3) of the Act (emphasis added). When title IV-E and section 472 were enacted by Public Law No. 96-272, former section 408(a) was changed so that it no longer referred to the "local agency," and instead stated, as it does currently, that the placement and care of eligible children be the responsibility of "(A) the State agency administering the State plan . . . or (B) any other public agency" with whom the state agency administering or supervising the administration of the state plan has made an agreement. Pub. L. No. 96-272, § 101(a)(1) (1980); section 472(a)(2)(B) of the Act. There is no indication that removal of the reference to "local agency" as one of the bodies responsible for care and placement of IV-E eligible children altered the prior understanding that local agencies were units of government. Indeed, the replacement language establishes even more precisely that the state agency administering or supervising the administration of the state plan must be a public agency.

- The title IV-E provisions at other places distinguish between public and private entities and specify that some IV-E functions may be performed by private agencies. Section 471(a)(22) requires state plans to provide that the

state will "develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children . . . ." (emphasis added) Section 473(a)(1)(B) permits adoption assistance payments in connection with the adoption of a child with special needs "through the State agency or through another public or nonprofit private agency . . . ." (emphasis added) Section 472(c)(2) defines the term "child-care institution" in which a IV-E-eligible child may be placed as "a private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State . . . ."

We agree with ACF that Congress's explicit references to private agencies in other sections of the title IV-E statute, but not in section 474(a)(3)(A) addressing IV-E training expenses, suggests that Congress did not intend for the training costs of persons preparing for employment with private agencies to be allowable at a rate of 75% FFP. ACF cited Washington Dept. of Social and Health Services, DAB No. 280 (1982), which involved the eligibility for federal foster care assistance of a child whose placement and care were the responsibility of a private, non-profit organization under former section 408(a) of the Act. That section, as discussed above, authorized foster care payments on behalf of eligible children whose placement and care were the responsibility of "(A) the State or local agency administering the State plan . . . or (B) any other public agency" with whom the State agency administering or supervising the administration of the state plan had made an agreement. The Board noted that private, non-profit agencies were not mentioned in this context, although there were references to such agencies elsewhere in section 408. "The absence of any reference in section 408(a) to private, non-profit agencies" the Board wrote, "suggests that Congress did not intend that the IV-A agency's role could be carried out through a contractual or regulatory relationship with a private, non-profit agency." Id. at 5. That principle applies here as well. When Congress determined that IV-E functions could be performed by private agencies, it so stated in the statute.

- The IV-E regulations indicate that local agencies are governmental entities. Section 235.66(a) of 45 C.F.R., made applicable to IV-E training by 45 C.F.R. § 1356.60(b)(3), states that "[p]ublic funds may be considered as the State's share in claiming Federal reimbursement where the funds:

(1) Are appropriated directly to the State or local agency, or transferred from another public agency (including Indian tribes) to the State or local agency and under its administrative control, or certified by the contributing public agency as representing expenditures eligible for FFP under §§ 235.60-235.66; . . . ." Appendices to 45 C.F.R. Part 1355 require the collection of data on the children in a state's IV-E program; one of the data elements is "Local Agency (County or Equivalent Jurisdiction)." Part 1355, App. A, Section I. The instructions for Appendix A define local agency as "the county or equivalent unit which has responsibility for the case," and the data standards at Appendix E define local agency as "the county or a county equivalent unit which has responsibility for the case." App. A, Section II; App. E, ¶ A.2.a(1).

- The requirement that a single state (i.e., governmental) agency administer or supervise the administration of the program is "central to most mandatory grant programs under various titles of the Act" and "provides federal funding sources with a degree of accountability that is especially important where IV-E administrative costs are at issue, because of the distinctly limited nature of the activities for which IV-E administrative funding is available." Missouri Dept. of Social Services, DAB No. 1899, at 9, 11 (2003), aff'd, Missouri Dep't of Social Servs. v. Leavitt, 448 F.3d 997 (8th Cir. 2006).[4] As the Board noted in Missouri, as early as 1983 ACF emphasized the requirement that the state agency administer the state's foster care program. ACF stated in the preamble to rules implementing title IV-E that the responsibility for assuring that the plan is administered in accordance with the Act rests with the title IV-E/IV-B State agency. Id. at 9, citing 48 Fed. Reg. 23,104, 23,105 (May 23, 1983). "A result of the limited nature of the IV-E program and the requirement that the single state agency administer or supervise the administration of the program is that federal funding is not available for the activities that a number of people from different agencies and disciplines may provide in foster care cases." Id. at 12. Requiring that persons receiving federally-reimbursed training be employed or preparing for

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[4] We realize that Missouri involved the allowability of costs as title IV-E administrative costs, not as training costs; however, we cite it here for the principle that the single state agency is responsible for administering a state's title IV-E plan and program.

employment with the state agency administering the IV-E plan is consistent with the limited nature of the title IV-E foster care program.

- As ACF notes, the regulations impose on students receiving training post-training employment obligations that are not compatible with employment at non-governmental entities, as opposed to employment with the state agency administering the IV-E plan and program. "Employees in full-time, long-term training make a commitment to work in the agency for a period of time equal to the period for which financial assistance is granted" and "[p]ersons preparing for employment are committed to work for the state or local agency for a period of time at least equal to the period for which financial assistance is granted," if employment is offered within 2 months after training is completed. 45 C.F.R. § 235.63(b)(1),(5). Florida, however, may terminate its contract with a CBC that does not perform to Florida's satisfaction, or a CBC could go out of business, potentially leaving ACF with no return on its training investment. By contrast, a state will have to maintain its single state agency as a condition of receiving federal funding under title IV-E.

Thus, Florida's reading of the term "local agency" in the IV-E training provisions as encompassing private, non-governmental agencies is not reasonable.

Even if the title IV-E statute and regulations could be read as not requiring that the agency administering the state plan and program be a government agency, the CBCs still do not qualify as agencies administering Florida's IV-E plan and program. The record shows that the CBCs do not "administer" Florida's IV-E plan, but instead provide IV-E services under the supervision of DCF, which retains responsibility for the administration of the plan. Although Florida initially described the CBCs as "local agencies administering the foster care program" for purposes of the IV-E training costs provisions, Fla. Br. at 8, Florida elsewhere clarifies that it "only uses CBCs to deliver the State's foster care services" and that "the federal government still deals exclusively with DCF, which is obligated to ensure that the services are delivered in accordance with applicable federal regulations," Fla. Reply Br. at 7, 8. DCF moreover "retains responsibility for the quality of contracted services and programs . . . ." Id. at 7. Thus, Florida "has moved the delivery of its foster care services to the private sector." Fla. Br. at 16, Reply Br. at 9 (emphasis added). Notwithstanding this change in the means by which Florida provides foster care

services, DCF, Florida's designated IV-E state agency, continues to administer Florida's IV-E state plan and its foster care program.

Florida law and legislative materials confirm Florida's description of the CBCs as merely service providers. Florida law in effect in 2002, which Florida cites as directing the transfer of foster care functions to CBCs, states that the intent of the legislature is that DCF "privatize the provision of foster care and related services statewide." Fla. Br. at 3-4; Fla. Stat. Ann. § 409.1671 (2002). (The current version of the statute states the intent that DCF "*outsource* the provision of foster care and related services statewide." Id. (2006) (emphasis added)).[5] The legislative history of that provision refers to the use of CBCs "to provide foster care and related services" and to "privatizing these services . . . ." Fla. Ex. 3, Fla. App. File at 15 ("Final bill research & economic impact statement," Bill No. HB 3217 (May 28, 1998)).

Florida also asserts that its training program is not unique and that "most states have similar training programs with stipends that receive reimbursement from HHS." Fla. Br. at 5. Florida cited a national survey of IV-E training stipend programs. Fla. Ex. 5, Fla. App. File at 57-74. However, that survey does not indicate that private agencies administer IV-E programs in other states. The survey also does not indicate, and Florida does not allege, that other states' stipends for students employed after training at private agencies have been funded as IV-E training costs at 75% FFP, or even that students in other states may fulfill post-training work obligations at private, non-governmental agencies. As ACF points out, where the survey does provide information about the employment obligations of students receiving stipends, it typically refers to a public child welfare agency. As we discussed above, the distinction between governmental and private entities is crucial to a state's ability to receive FFP in its expenditures under title IV-E. The basic requirement that a single agency administer or supervise the administration of a state's IV-E program may not be disregarded on the ground that the students in Florida may have been training

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[5] Both versions of the Florida law state that the term "related services" "includes, but is not limited to, family preservation, independent living, emergency shelter, residential group care, foster care, therapeutic foster care, intensive residential treatment, foster care supervision, case management, postplacement supervision, permanent foster care, and family reunification."

to perform activities that in other states would have been the responsibility of a state agency. See Missouri at 14 (FFP for administrative costs not available for activities related to foster care cases performed by court employees who were not supervised by the state IV-E agency, even though in other states those activities would have been the responsibility of the state executive branch).

Accordingly, we conclude that under the title IV-E statute and regulations, Florida is not entitled to FFP at the rate of 75% in its costs of training persons for employment with CBCs.

II. The PRWORA does not authorize private entities to administer Florida's IV-E plan and program, and does not require ACF to provide 75% FFP in the training costs at issue here.

Florida argues that even if the term "local agency" in the IV-E training statute and regulation could be read as authorizing 75% FFP only for training for employment with a local government agency, it should not be so read following enactment of PRWORA in 1996. Florida asserts that the following language in title I of PRWORA made clear "that private organizations are among the group of entities that can and should be used to deliver foster care and other social services under the Social Security Act." Fla. Br. at 9.

> (1) State options.--A State may--
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> (A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations;
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> * * *
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> (2) Programs described.--The programs described in this paragraph are the following programs:
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> (A) A State program funded under part A of title IV of the Social Security Act (as amended by section 103(a) of this Act).
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> (B) Any other program established or modified under title I or II of this Act, that--
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> (i) permits contracts with organizations; or
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> (ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

Pub. L. No. 104-193, § 104(a), 110 Stat. 2105, 2161-62 (1996), codified at 42 U.S.C. § 604a(a) (emphasis added).[6] The parties referred to section 104 as the Charitable Choice provision.

Florida argues that title I of PRWORA clearly "modified" title IV-E because section 108 of PRWORA, "[c]onforming amendments to the Social Security Act," amended title IV-E to provide that eligibility for IV-E assistance would be based on the eligibility standards of the former AFDC program, as in effect prior to PRWORA's repeal of the AFDC program. Pub. L. No. 104-193, §§ 108(d)(1),(3),(5). Florida asserts that as a result of PRWORA, eligibility requirements for title IV-E assistance became "frozen in time" and that HHS and the states are no longer able to adjust or modify the IV-E eligibility standards. Fla. Br. at 12. Florida argues that ACF acknowledged that PRWORA modified title IV-E because ACF issued a policy announcement stating that PRWORA "amended" title IV-E to refer to the former AFDC eligibility standards. ACYF-PIQ-96-01 (Oct. 8, 1996) (Fla. Ex. 7, Fla. App. File 81-83). Florida argues that because title IV-E is a program modified under PRWORA, PRWORA permits Florida to "administer and provide services" under title IV-E through contracts with private organizations such as the CBCs.

Florida also argues that the legislative history of PRWORA demonstrates that the Charitable Choice provision at section 104 was meant to apply to the title IV-E foster care program. Florida cites language in a House of Representatives conference report stating that section 104 "authorizes States to administer and provide family assistance services (and services under SSI, the child protection block grant program, <u>foster care</u>, adoption assistance, and independent living programs) through contracts with charitable, religious, or private organizations." H.R. Conf. Rep. No. 104-725, at 316-17 (1996) (Fla. Ex. 2, Fla. App. File 5-13) (emphasis added).

Florida's arguments are unavailing, for the following reasons:

- Even assuming that Florida's argument that PRWORA "modified" title IV-E is correct, the plain language of the Charitable Choice provision does not support Florida's position. The statute provides that states may "administer and provide services" under the specified programs "<u>through</u> contracts with charitable, religious, or private organizations . . . ." Pub. L. No. 104-193, § 104(a) (emphasis added).

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[6] 42 U.S.C. § 604a does not appear in the Social Security Act.

Administering or providing services "through" a private entity under contract does not mean ceding to the private entity the single state agency's administrative authority and responsibilities. The state remains the program administrator but is permitted to use contracts with private organizations to administer or provide services. This is the only reading of section 104 of PRWORA that is consistent with title IV-E of the Act.

- The language of the Charitable Choice provision indicates that the law's effect on programs other than those that PRWORA created (i.e., TANF) is more limited than Florida argues. The Charitable Choice provision permits states to administer and provide services through contracts with charitable, religious, or private organizations under any "other program" that "permits contracts with organizations . . . [or] permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance." (emphasis added) Additionally, PRWORA further states that the purpose of section 104--

> is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2), on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

Pub. L. No. 104-193, § 104(b) (emphasis added). Thus, with respect to "other programs," the effect of PRWORA was to permit religious organizations to compete on an equal footing with other private organizations for contracts, to the extent that those organizations could receive contracts, or to receive payments on behalf of program beneficiaries in order to provide services to them. There is no indication in the legislative history or wording that it was intended to permit religious organizations to perform functions that no private organizations were previously eligible to perform or only governmental agencies were authorized to perform. As we discussed above, title IV-E does not permit contracts with private organizations for the purpose of administering a state's federal foster care program under title IV-E of the Act and requires that the program be administered through a state government agency.

- The legislative history of PRWORA indicates that the law's effect on title IV-E did not extend to changing the way that states are required to administer their foster care programs, or to permitting program administration to be performed by private organizations. As noted above, one of the three ways the law changed title IV-E was to permit placement of children in private for-profit foster care facilities.[7] The House conference report that Florida cites explains that "States should be allowed to use private child care organizations because they are fully capable of providing quality services." H.R. Conf. Rep. No. 104-725, at 403 (emphasis added). An earlier House report discusses an unenacted proposal that "deletes a current law provision requiring that a single State agency administer both Title IV-B and Title IV-E" by changing statutory references to "State agency" to "State" in title IV-E. H.R. Rep. No. 104-651, at 1466 (1996), reprinted at 1996 U.S.C.C.A.N. 2183, 2525. This history shows that Congress, in enacting PRWORA, considered changing how states may administer their title IV-E foster care programs but decided not to do so, and merely broadened the means by which states may provide foster care services. Had Congress wished to make a significant change to the longstanding requirement that a state agency administer a state's IV-E plan and program, it could have done so. That Congress neither considered nor enacted an amendment to title IV-E permitting private entities to administer a state's foster care plan and program indicates that it did not intend such a result.

Thus, we conclude that the Charitable Choice provision at section 104 of PRWORA did not alter the clear requirement, discussed in section I of this analysis, that a state's IV-E plan and program be administered by a state agency. The title IV-E statute and regulations imposing that requirement were not amended and continue in effect, and we are bound to apply them. See 45 C.F.R. § 16.14 (the Board is bound by all applicable laws and regulations). Additionally, as we discussed in section I, 75% FFP for training costs is available only with respect to

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[7] PRWORA thus removed the word "nonprofit" from the former definition of "child care institution" at section 472(c)(2) of the Act (a state-licensed nonprofit private child care institution or a public child care institution which accommodates no more than 25 children, but not detention facilities, forestry camps, training schools, or centers for delinquent children). H.R. Conf. Rep. No. 104-725, at 402; Pub. L. No. 104-193, § 501.

employment with the agency administering the IV-E plan and program. As the CBCs in Florida are private agencies that provide services but do not administer its IV-E plan and program, Florida's costs of training persons for employment with CBCs are not eligible for 75% FFP.

Conclusion

For the reasons discussed above, we uphold in principle the disallowance of the costs of training persons for employment with private agencies that Florida claimed as title IV-E training costs at 75% FFP. Upon receipt of this decision, ACF should consult with Florida to determine the amount the claims that are at issue here. After such consultation, ACF should issue a written notice to Florida stating the amount of the disallowance and how that amount was determined. If Florida disputes ACF's determination of the disallowance amount, it may appeal that determination to the Board pursuant to 45 C.F.R. Part 16 within 30 days of receiving it.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member