

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: New Mexico Children, Youth and Families Department
DATE: July 19, 2007
Docket No. A-07-12
Decision No. 2100

DECISION

The New Mexico Children, Youth and Families Department (CYFD) appealed a determination by the Administration for Children and Families (ACF) disallowing \$552,374 in federal financial participation (FFP) claimed by New Mexico under section 1130 of the Social Security Act (Act) for the "assisted guardianship" component of a Child Welfare Waiver Demonstration Project.¹ This component allowed CYFD to use funds available under title IV-E of the Act to subsidize the cost of guardianships to facilitate permanency for children who might otherwise remain in foster care. Section 1130(g) requires that the total amount of federal funds expended by a state for a demonstration project not exceed the amount that would have been expended in the absence of the project. ACF disallowed the amount by which it found CYFD exceeded this "cost neutrality limit" over the five-and-one-half year project period. CYFD maintains that the formula used by ACF to calculate the cost neutrality limit does not make sense as applied to its project data. According to CYFD, the project was cost neutral since the payments made for children in assisted guardianships did not exceed the amount that would have been paid if these children had remained in foster care and continued to receive maintenance payments funded by title IV-E. As an additional ground for reversing the disallowance, CYFD asserts

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.

that the project ultimately saved the federal government money because, had the children not been placed in assisted guardianships, they would have continued to receive IV-E payments instead of CYFD assuming all responsibility for the assisted guardianship payments when the project ended.

As discussed in detail below, we conclude that ACF properly required CYFD to calculate the cost neutrality limit using the formula in the waiver terms and conditions. We further conclude that any cost savings to the federal government after the demonstration project ended were irrelevant. Accordingly, we uphold the disallowance in full.

General background on section 1130 demonstration projects

Title IV-E was originally enacted as part of the Adoption Assistance and Child Welfare Act of 1980, Public Law No. 96-262. The primary purpose of title IV-E is to assist states with foster care maintenance payments and adoption assistance payments for eligible children. See section 474(a)(1) and (a)(2) of the Social Security Act (Act), 42 U.S.C. § 674(a)(1) and (a)(2). In 1994, Public Law 103-432 added a provision to the Act authorizing the Secretary "to conduct demonstration projects . . . which the Secretary finds are likely to promote the objectives of part B or E of title IV."² Section 1130 of the Act, 42 U.S.C. § 11320a-9. Section 1130(d) provides that a demonstration project may be conducted for not more than five years unless the Secretary allows the project to continue beyond that period. Section 1130(e) provides that an application for a demonstration project must include, among other things:

a description of the proposed project, the geographic area in which the proposed project would be conducted, the children or families who would be served by the proposed project, and the services which would be provided by the proposed project (which shall provide, where appropriate, for random assignment of children and families to groups served under the project and to control groups)[.]

² Section 1130 originally provided that the Secretary "may authorize not more than 10 States to conduct demonstration projects[.]" The Adoption and Safe Families Act of 1997, Public Law No. 105-89, amended section 1130 to authorize the Secretary to approve up to ten new demonstration projects each year from 1998 through 2002 (extended by subsequent legislation to 2003).

Section 1130(f)(1) provides that each state authorized to conduct a demonstration project shall-

obtain an evaluation by an independent contractor of the effectiveness of the project, using an evaluation design approved by the Secretary which provides for-

(A) comparison of methods of service delivery under the project, and such methods under a State plan or plans, with respect to efficiency, economy, and any other appropriate measures of program management;

(B) comparison of outcomes for children and families (and groups of children and families) under the project, and such outcomes under a State plan or plans, for purposes of assessing the effectiveness of the project in achieving program goals; and

(C) any other information that the Secretary may require[.]

Finally, section 1130(g) provides:

COST NEUTRALITY.-The Secretary may not authorize a State to conduct a demonstrate project under this section unless the Secretary determines that the total amount of Federal funds that will be expended under (or by reason of) the project over its approved term (or such portion thereof or other period as the Secretary may find appropriate) will not exceed the amount of such funds that would be expended by the State under the State plans approved under parts B and E of title IV if the project were not conducted.³

In 1995, ACF published a notice announcing that it was seeking proposals for demonstration projects under section 1130, stating generally: "The Department desires to facilitate the testing of new approaches to the delivery of a broad range of child welfare services. Such demonstrations can provide valuable knowledge that will help lead to improvements in the delivery, effectiveness and efficiency of services." 60 Fed. Reg. 31,478

³ Title IV-B provides funding for a broad range of social services to families and may also be used for the same types of costs funded under title IV-E. See sections 423 and 425 of the Act. However, title IV-B, unlike title IV-E, has a funding cap. Section 421 of the Act. ACF does not allege that CYFD failed to take any IV-B services for IV-E-eligible children into account in determining cost neutrality.

(June 15, 1995) (ACF Ex. 2). In a section captioned "Evaluation," the notice reiterates the statutory requirement that the evaluation plan must provide for a comparison of methods of service delivery and outcomes under the project and under an existing state plan, and continues:

The Department encourages, where appropriate, that the proposal provide for random assignment of children and families to groups served under the project and control groups, but is open to various other evaluation techniques. For example, in a proposed demonstration effort that would necessarily affect 100% of the population to be served, a random assignment methodology would not be appropriate.

* * * * *

If the State proposes an alternative to random assignment, the proposal must include a justification explaining why random assignment is not appropriate and how the alternative methodology will meet evaluation needs.

60 Fed. Reg. 31,478, 31,480.

The notice also addresses the topic of "Cost Neutrality" in part as follows:

Section 1130(g) requires that the waiver demonstration project be cost-neutral, that is, the total amount of federal funds used to support the demonstration project, over the approved project period, will not exceed the amount of federal funds that would have been expended by the State under the State plans approved under Parts B and E of title IV if the waiver demonstration project were not conducted. . . .

* * * * *

The Department encourages, where appropriate, the use of random assignment of individuals for evaluation and as a method for determining the fiscal effects of the demonstration project but recognizes that this method may not be appropriate for certain demonstration projects. In randomly assigning individuals to experimental and control groups, the costs associated with the control group (foster care rates and administrative costs) become the baseline for cost neutrality (i.e., the average cost for a control group case is assumed to be the amount that would have been spent on each experimental case). If an alternative

method is proposed, then other methods of measuring cost neutrality should be used.

* * * * *

The Department recognizes the difficulty of projecting and measuring title IV-E and title IV-B expenditures, and is open to methodology(ies) the State(s) may propose. However, the Department favors random assignment, where appropriate, as the methodology for the evaluation component, and as a method for determining the fiscal effects of a demonstration as well. . . .

60 Fed. Reg. 31,478, 31,480-81.⁴

In 1998, ACF issued an information memorandum to the states that made essentially the same points as the 1995 Federal Register notice regarding the design and evaluation of the projects. ACYF-CB-IM-98-01, dated 2/13/98 (CYFD Ex. 6), at 11-13. The information memorandum also stated that "[t]he Department will devise a cost neutrality formula, for quarterly (typically) payments to the States, that will calculate an amount the State would otherwise have received for that period for the children in the demonstration, in the absence of a demonstration." Id. at 13.

In 1999, ACF informed states that they were to immediately begin using Form ACF-IV-E-1 for reporting expenditures for IV-E foster care and adoption assistance. ACYF-OC-PI-99-01, dated 9/22/99 (ACF Ex. 6), at 1. Part 4 of the form is specifically designed for reporting expenditures for demonstration projects. Id. at 8.

CYFD's demonstration project

In February 1999, CYFD submitted its proposal for a demonstration project under section 1130 of the Act. ACF Ex. 5. The waiver

⁴ The notice also states that the cost of the evaluation of a state's demonstration project will be excluded from the cost-neutrality calculation. 60 Fed. Reg. 31,478, 31,480. It further states that the costs of the development of the proposal, the evaluation design and the evaluation itself may be allocated entirely to title IV-E as administrative costs. Id. Thus, even if the project did not exceed the cost neutrality limit, the federal government would bear extra costs.

terms and conditions for New Mexico's demonstration project were approved by ACF in June 1999 and accepted by CYFD in July 1999. CYFD Ex. 3. The terms and conditions provided for "a three-component demonstration," of which only the third component is at issue. The third component is described as follows:

Under the third component of the demonstration, the State will be able to use title IV-E funds to establish assisted guardianships, in amounts not greater than amounts provided under subsidized adoption for children in foster care under State custody, and for such children for whom reunification with the biological family or adoption are not options.

CYFD Ex. 3, at 3 (section 2.0).⁵ The terms and conditions further describe the third component as follows:

Under the State-custody guardianship component, the State may establish an assisted guardianship program for children who meet the minimum criteria stated below. This will be a statewide guardianship program, the evaluation of which will be based on a random assignment methodology.

Prior to implementation of [this component], the State must submit to the Department, for review and approval, a plan specifying the criteria for determining eligibility At a minimum, the selection criteria will provide that no child may participate in the guardianship component unless it has been determined: that the child cannot be reunited with her

or his parent(s); and that adoption is not possible . . . or is not in the best interests of the child. . .

CYFD Ex. 3, at 5 (section 2.1.c.).

⁵ The second component of the demonstration project was an assisted guardianship component for Native American children in tribal custody. ACF ultimately agreed that any eligible child in tribal custody could be placed in an assisted guardianship and did not require that component to use the cost neutrality formula at issue in the case of the third component. CYFD Ex. 8, at 1; CYFD Br. at 10. According to CYFD, tribes objected to the initial proposal for a control group that would not be eligible for assisted guardianship. Id.

A section captioned "Evaluation" states in pertinent part that "[f]or the State guardianship component, eligible children will be randomly assigned to a control and experimental group and compared on process, outcomes, and costs." Id. at 8 (section 3.0). The section also states as follows:

The sampling plan will also describe the procedures by which children in the State-custody subsidized guardianship component (component No. 3) will be screened for eligibility for this demonstration, and randomly assigned to a control group or experimental group at the point of eligibility determination.

Id. at 10 (section 3.3). In addition, the terms and conditions contain a list of "outcomes" that will be measured "for both the experimental and comparison groups" in the State guardianship component. Id. at 12 (section 3.5). The terms and conditions further state that, as part of the evaluation, "[c]osts for the experimental group will be compared to costs of the control group for foster care payments, adoption subsidies, services, case worker time, and other factors." Id. at 14 (section 3.7).

With respect to cost neutrality, the terms and conditions require generally that-

[p]rojects conducted under this waiver authority shall . . . [b]e cost neutral to the Federal government over the life of the project period. That is, the cost of the demonstration project may not exceed the total amount of Federal funds that would have been expended by the State under the State plans approved under Parts B and E of title IV if the waiver demonstration had not been conducted

Id. at 2 (section 1.7). The terms and conditions also state in a separate section captioned "Cost Neutrality":

Except for costs of evaluating and developing this project . . . , beginning with the deemed beginning date the operation of this demonstration is to be cost-neutral to the Federal government with respect to benefit and administrative costs for titles IV-B and IV-E of the Social Security Act.

Id. at 16 (section 4.2). In addition, the terms and conditions contain the following instructions under the subheading "Claiming":

The amount of title IV-E funds a State may claim under both the *guardianship components* of this demonstration will be based on an analysis of the costs of cases within the respective control groups and will be determined by application of the cost neutrality formula in this Section. The calculation below will be performed for maintenance or adoption assistance payments and administrative payments on a quarterly basis.

Step 1. Calculate the average title IV-E cost per control group case by dividing the cumulative title IV-E costs for control group by the number of control cases.

Step 2. Multiply the average derived in step (1) above by the number of experimental cases. The result is the cumulative cost for the experimental cases.

Step 3. The cumulative demonstration cost will be equal to the cumulative allowable title IV-E maintenance payments and administrative costs for the control cases plus the cumulative cost for the experimental cases as calculated above.

Id. (italics in original).

CYFD contracted with TriWest Group, LLC (TriWest) to conduct the evaluation of its demonstration project. CYFD Ex. 5, at 5. TriWest's May 31, 2000 Final Evaluation Plan indicates that the purpose of the project is to assess "the impact of making assisted guardianships available to children for whom reunification or adoption are not options[.]" CYFC Ex. 5, at 2; see also id. at 3 (stating that the "major objectives of the project include . . . [d]emonstration of improved outcomes in the areas of safety, permanency, and well-being for . . . non Native American children in State custody through implementation of assisted guardianships."). The plan indicates that children eligible to participate in the State guardianship component will be randomly assigned to either an experimental or control group. See CYFD Ex. 5, at 2, 7 (emphasis added). The plan also states that for this component, "the population will be Title IV-E eligible non-Native American children in State custody who are referred for care during the first three years of the project (SFY 2001 - 2003) and meet the criteria described in General Conditions for Components Involving Assisted Guardianship, above." Id. at 6. Those criteria were "that no child may participate in a guardianship demonstration unless it has been determined that the child cannot be reunited with [his/her]

parent(s) and that adoption is not possible . . . or is not in the best interests of the child, and the child has been adjudicated as required by New Mexico Code" Id. at 5.

The Interim Status Report for December 31, 2000 does not track the project design set out in the Final Evaluation Plan, however. Instead of providing that all children meeting the criteria described above will be randomly assigned to either an experimental or control group, the report indicates that all children entering the child welfare system will be randomly assigned to an experimental or control group. CYFD Ex. 12, at 22-25 (emphasis added).

By the end of the project, there were 3,392 children assigned to the experimental group and 3,434 children assigned to the control group.⁶ The assignments were made based on whether the identification number the child was given upon entering the child welfare system was odd or even, except in the case of siblings, who were assigned to the same group. See, e.g., CYFD Ex. 15, at 9.⁷ The number of children in each group increased over the duration of the project as new children entered the child welfare system.

Basis for the disallowance

While the project was ongoing, CYFD failed to properly complete the part of the quarterly claiming forms used to determine whether the project was meeting the cost neutrality limit. ACF Exs. 21, 23, and 24. Following the end of the project on December 31, 2005, ACF gave CYFD additional time to complete the cost neutrality calculations. See CYFD Ex. 1, at 1. Using the formula in the waiver terms and conditions, TriWest determined that the cost neutrality limit was exceeded by \$3,373,163.11.

⁶ The final evaluation report shows that there were 6,291 children assigned to the experimental group, including 234 children in assisted guardianships, and 6,199 children assigned to the control group. CYFD Ex. 21, at 31, 35. TriWest later adjusted these numbers after determining that it had failed to limit the pool of children to those who were eligible for services funded with IV-E and less than 18 years of age. CYFD Ex. 25, at 4.

⁷ Several children who were initially randomly assigned to the control group were reassigned to the experimental group and placed in assisted guardianships under an "exemption" for a "hardship situation." CYFD Ex. 21, at 31.

CYFD Ex. 25, at 3. CYFD then hired a statistical consultant to determine why this figure exceeded the entire cost of the assisted guardianship program (identified in the statistician's affidavit as \$2.5 million, including both the federal and non-federal share). CYFD Ex. 25, at 1; CYFD Ex. 10 (Affidavit of Mary Ann Shaening, Ph.D.). According to Ms. Shaening, since only 198 children in the experimental group were placed in assisted guardianships, the formula in the waiver terms and conditions "inappropriately attributes all cost differences between two large groups to the impact of a much smaller group (of only 198 children) who actually were subjected to the experimental condition of receiving assisted guardianships," and therefore "does not yield accurate or meaningful results." CYFD Ex. 10, at 1. Ms. Shaening also identified as a secondary reason for these results the fact that the average length of time that a child was in custody, i.e., "average days in episode," varied significantly between the experimental group and the control group after excluding the assisted guardianship children as a factor. Id. at 2. Ms. Shaening determined that had the days in episode been comparable for the two groups, the costs of the control group would have increased, reducing the amount by which the cost neutrality limit was exceeded to \$552,374. Id. Ms. Shaening stated that this illustrated that, even adjusting for the difference in days in episode, the experimental group and the control group "were not comparable." Id. Ms. Shaening then suggested that "[t]he most direct way of determining cost neutrality of the waiver project . . . would be to compare the actual Federal costs of the 198 assisted guardianships with what these 198 children would have received in Title IV-E payments had they remained in foster care." Id. By letter dated May 31, 2006, CYFD presented the results of Ms. Shaening's analysis to ACF, noting that when the "the cost neutrality formula is applied to the demonstration [experimental] group and the control group (with the adjustment) . . . the cost of the demonstration group exceeded the cost neutrality limit by approximately 1.6 percent." CYFD Ex. 25, at 1. The letter continued:

This method for calculating cost neutrality is not ideal, as you know. The waiver terms and conditions' selection criteria and the original evaluation plan provide that the comparison groups should have been based upon eligible children (children who cannot return home and who are not likely to be adopted). Unfortunately, this criteria was not readily available in the data base of the evaluator. With additional time, we could possibl[y] construct a comparison group with similar demographics to those of the subsidized guardianship group that would allow us to more

accurately compute cost neutrality. Additionally, the administrative costs associated with the two groups are not included in the current calculations. . . .

Id. at 2. Although ACF granted CYFD an additional extension until August 31, 2006 to finalize the cost neutrality calculations, there is no evidence of additional calculations in the record. By letter dated September 25, 2006, ACF stated that it "concur[s] with CYFD's calculation that the total submitted costs for the experimental group exceeded the calculated cost neutrality limit by \$552,374" FFP and that it was disallowing this amount, i.e., the amount calculated by Ms. Shaening using ACF's formula after adjusting for the difference in days in episode. CYFD Ex. 1, at 1.

Discussion

CYFD acknowledges that its project was subject to a cost neutrality limit but disputes ACF's determination that it exceeded that limit. According to CYFD, its project was cost neutral because the payments made for children in assisted guardianships did not exceed the amount that would have been paid if these children had remained in foster care and continued to receive maintenance payments funded by title IV-E. As explained below, we conclude that CYFD was required by section 1130 and the waiver terms and conditions to use a different comparison to determine the cost neutrality limit, that in any event CYFD's alternative methodology does not demonstrate cost neutrality, and that any cost savings to the federal government after the project ended may not be used to offset the excess costs incurred during the term of the project for purposes of the cost neutrality calculation.

Under section 1130(g), a project is cost neutral where "the total amount of Federal funds that will be expended under . . . the project . . . will not exceed the amount of such funds that would be expended by the State under the State plans approved under parts B and E of title IV if the project were not conducted." Although this language does not specify how the latter amount is to be determined, that becomes apparent when section 1130(g) is read in light of the requirement in section 1130(e) that a project "provide, where appropriate, for random assignment of children and families to groups served under the project and to control groups[.]" ACF's 1995 Federal Register notice, which constitutes ACF's official interpretation of section 1130, explains that such groups are to be used to determine cost neutrality by making "the costs associated with the control group (foster care rates and administrative costs)

. . . the baseline for cost neutrality (i.e., the average cost for a control group case is assumed to be the amount that would have been spent on each experimental case)." 60 Fed. Reg. 31,478, 31,480. In addition, the waiver terms and conditions state that "eligible children will be randomly assigned to a control and experimental group and compared on process, outcomes and costs." The waiver terms and conditions also specify that "[c]osts for the experimental group will be compared to costs of the control group" CYFD Ex. 3, at 10. Finally, the waiver terms and conditions set out a formula (quoted earlier) for determining cost neutrality using this comparison. Thus, CYFD's comparison of the costs of the subsidies for children in assisted guardianships with the IV-E foster care maintenance payments that hypothetically would have been made on behalf of the same children had they remained in foster care was not the comparison required by section 1130 and the waiver terms and conditions.

CYFD takes the position that it was not required to use the formula in the waiver terms and conditions to calculate the cost neutrality limit. Instead, CYFD maintains, the provision in the terms and conditions that payments for an assisted guardianship will not exceed the amount that would have been paid for subsidized adoption for children in foster care in state custody is the applicable cost neutrality provision. See CYFD Br. at 8-9, CYFD Ex. 3, at 3. However, this provision appears in the "Implementation" section of the waiver terms and conditions with no indication that it is intended as a test for cost neutrality. Although CYFD might have believed that limiting the payment amounts for assisted guardianships in this manner would ensure cost neutrality, the cost neutrality formula was clearly intended as the means for determining whether the project was in fact cost neutral.

CYFD also takes the position that "cost neutrality to the Federal government was . . . guaranteed" by the provision on the payment amount for assisted guardianships. See CYFD Ex. 9 (Affidavit of Maryellen Bearzi, Deputy Director, Protective Services, CYFD, dated 13/13/07). We conclude, however, that comparing the cost of the guardianship subsidies with the amount that would have been spent for foster care payments for the same children is not a reasonable basis for determining whether the demonstration project was cost neutral.⁸ CYFD assumes that all of the children

⁸ According to CYFD, "[g]uardianship payments were determined in exactly the same manner as adoption payments which, (continued...)

who were placed in assisted guardianships would otherwise have remained in foster care. According to CYFD, such an assumption is reasonable because the criteria for placing children in assisted guardianships included that the children be "in foster care under State custody" and "children for whom reunification with the biological family or adoption are not options." CYFD Br. at 2, quoting CYFD Ex. 3, at 3 (waiver terms and conditions). However, as CYFD itself points out, whether reunification or adoption is possible is a judgment a court makes at a particular point in time. See CYFD Br. at 11. Thus, a child who was placed in an assisted guardianship might have later been reunified or adopted had he or she remained in foster care.

Even if CYFD could establish that the children in assisted guardianships would otherwise have remained in foster care, we are not persuaded that the amount of the guardianship payment for each child was the same as the amount of foster care maintenance payments that would have been paid if the child had remained in foster care. According to CYFD, there was nothing "about guardianship placements per se that would cause a different level of subsidy for a particular child." CYFD Reply Br. at 11. However, CYFD provided no assurance that the various factors that affect the amount of monthly foster care maintenance payments for a child would not result in different payment amounts, on average, for children placed in assisted guardianships than for children in foster care. The rates actually paid per child include non-standard allowances to meet the individual needs of children. See CYFD Reply Br., Appendix (App.) 1, at 3-7. Some of these items depend on whether the parents provided certain items to the child and sought reimbursement for them, such as vacations, extracurricular activities, mentoring, and holiday gifts. Id. CYFD has not shown any basis for assuming that guardians in assisted guardianships received these allowances with the same frequency as foster parents of children eligible for but not placed in assisted guardianships. Moreover, the total amount of foster care maintenance payments reflects the length of time that a child remains in foster care. As indicated above, it is simply speculative to assume that a child would have

⁸(...continued)
 under [section 473(a)(3) of the Act]
 '. . . in no case may . . . exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment [or in this case, guardianship payment] is made had been in a foster family home.'" CYFD Reply Br. at 9.

remained in foster care if he or she had not been placed in an assisted guardianship.

Furthermore, CYFD's comparison does not account for additional administrative costs eligible for IV-E funding that might have been incurred as a result of the project. The waiver terms and conditions expressly provide that the project "is to be cost-neutral to the Federal government with respect to benefit and administrative costs[" CYFD Ex. 3, at 16 (emphasis added). CYFD nevertheless asserts that "there were no separate administrative costs to the waiver. . . . The same social workers did the same work . . . as they have always done" CYFD Reply Br. at 13, n.1. This argument has no merit. Among the questions to be evaluated in the demonstration project was "[t]he differences between the experimental and control groups with regard to comparable resources, services, activities, staffing, etc." CYFD Ex. 3, at 14; see also id. at 9. CYFD cannot simply assume the answer based on the fact that the same social workers and administrators provided services to children in both of these settings. Indeed, a synthesis of findings from the seven state-assisted guardianship demonstration projects notes that caseworkers raised "objections to the additional time, effort and paperwork required to process guardianships." ACF Ex. 30, at 2. Moreover, additional social work services might have been provided to comply with the requirement in the waiver terms and conditions for delivery of "post-placement services of the type generally provided by the State for adoptive placements" (CYFD Ex. 3, at 6) and the requirement that guardianship homes be licensed or approved or have a homestudy "as would be done for an adoptive placement" (CYFD Ex. 3, at 5).⁹

As CYFD points out, the methodology on which the disallowance amount was based is also problematic. CYFD asserts, and ACF does not dispute, that strict application of the formula in the waiver terms and conditions yields an amount of \$3,373,163.11 in excess of the cost neutrality limit, more than the \$2.5 million total project costs (of which \$1.8 was the federal share). This anomolous result, however, is clearly attributable to CYFD's failure to use the project design required by the waiver terms and conditions. The waiver terms and conditions provide for screening all children in foster care in state custody to identify those children who meet certain criteria for eligibility

⁹ While foster care homes must also be licensed or approved, more than one child could be placed in the same foster home (at the same time or in succession) without the home going through the licensing or approval process each time.

for assisted guardianships. The waiver terms and conditions further provide that children meeting these criteria are to be randomly assigned to either the experimental group or the control group. This contemplates that both the experimental and control groups be drawn from children who are eligible for assisted guardianships. Although the Final Evaluation Plan prepared by TriWest describes such a procedure, TriWest's subsequent status reports indicate, and CYFD acknowledges, that children were not screened prior to assignment to the experimental or control group. See, e.g., CYFD Ex. 12, at 22-25; CYFD Reply Br. at 5. Moreover, only 198 of the 3,392 children in the experimental group were placed in assisted guardianships. Following the formula in the waiver terms and conditions, TriWest calculated the average cost (federal share) for a child in the control group of 3,434 children, and multiplied the resulting figure by 3,392 to determine the cost neutrality limit. The \$3,373,163.11 by which the federal share of the cumulative costs of the experimental group exceeded this limit was plainly not attributable solely to the very small number of children who were in assisted guardianships. CYFD can hardly complain that it is disadvantaged by the use of this formula, however, since it did not set up the experimental and control groups in accordance with the waiver terms and conditions and did not offer any valid alternative method of determining cost neutrality.

Moreover, ACF did not disallow the full amount in excess of the cost neutrality limit calculated using this formula. Instead, ACF recognized the downward adjustment in the control group costs calculated by CYFD's statistician based on the difference in "days in episode" between the experimental group and the control group, which reduced the excess costs under the formula to \$552,374. CYFD nevertheless challenges ACF's reliance on its adjusted figure as the basis for the disallowance on the ground that the adjustment was intended only to demonstrate that application of the formula to CYFD's data was not scientifically sound. CYFD clearly benefitted from the use of this figure, however, since ACF might have been justified in disallowing all of the project costs in light of CYFD's failure to carry out the project in accordance with the requirement in the waiver terms and conditions that "eligible children . . . be randomly assigned to a control and experimental group and compared on process, outcomes, and costs." CYFD Ex. 3, at 8. This requirement is related to the underlying purpose of the section 1130 demonstration projects, stated in ACF's 1995 Federal Register notice, to test new approaches to the delivery of child welfare services that will lead to improvements in the delivery of such services. This purpose was thwarted by CYFD's failure to have a control group comparable to the group of children who were placed

in assisted guardianships. In the absence of such a control group, CYFD could not test whether the use of assisted guardianships was a more effective way of achieving permanence for children than leaving them in the foster care system, and at what cost.¹⁰ Indeed, ACF warned CYFD of the possibility that all project costs might be disallowed if CYFD failed to correct the financial reports to calculate cost neutrality using data from experimental and control groups. CYFD Ex. 22, at 4.

CYFD asserts that there were valid reasons for its failure to follow the original project design. According to CYFD,

[t]hese included the burden to already overworked field staff who would have been asked to establish and document eligibility for assisted guardianship . . . and the concern that CYFD would be vulnerable to criticism and even legal action because a permanency option was denied to eligible youth based on the random assignment to a group

Notice of appeal dated 10/25/06, at 2. CYFD further states that disqualifying otherwise eligible children from permanent guardianships "was inconsistent with State law on permanency planning which requires that the permanency plan for a child be determined solely by his/her best interests" and that "pre-screening" children for eligibility for guardianship "was an undertaking for which CYFD found it did not have the resources." CYFD Reply Br. at 5. Although the waiver terms and conditions required CYFD to "apprise the Department of any difficulty in achieving the estimated sample sizes for the project" (CYFD Ex. 3, at 10), CYFD does not assert that it requested, much less received, ACF's approval to change the project design for this component based on any of these considerations (which may even have been apparent when CYFD was developing its project proposal).¹¹ Instead, CYFD appears to have simply ignored its

¹⁰ TriWest's final report did compare children in assisted guardianships to the subset of adopted children in the purported control group. CYFD Ex. 21 (Evaluation Final Report) at 35-37. However, it is not clear how these comparisons relate to the project purpose of assessing the impact of assisted guardianships on children for whom reunification or adoption are not options.

¹¹ As indicated previously, CYFD obtained ACF's approval to change the project design for the tribal guardianship (continued...)

commitment under the waiver terms and conditions to include only children eligible for assisted guardianships in both the experimental and control groups.

CYFD also points out that neither it nor TriWest hid from ACF the fact that they were not using the formula in the waiver terms and conditions to ensure that the project remained cost-neutral as it progressed. This is not an appropriate basis for reversing the disallowance, however. The Board has repeatedly acknowledged the prevailing view in the federal courts that equitable estoppel does not lie against the federal government, if indeed it is available at all, absent at least a showing of affirmative misconduct. See, e.g., South Carolina Department of Social Services, DAB No. 1998 (2005); Northstar Youth Services, Inc., DAB No. 1884 (2003), and cases cited therein (including Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) and Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984)). ACF's acceptance of claim forms and reports from which it might have discerned that the cost neutrality formula was not being used does not constitute affirmative misconduct. Moreover, a government agent cannot obligate the government to pay funds in violation of statutory authority, such as project costs in excess of the section 1130 cost neutrality limit. See, e.g., Colorado Dept. of Social Services, DAB No. 1369, at 5 (1992), citing Office of Personnel Management v. Richmond.

Finally, CYFD maintains that its demonstration project saved the federal government money by shifting the costs of the care of the 198 children who were placed in assisted guardianships from title IV-E to the State after the project ended. CYFD estimates that, had those children remained in foster care, an additional \$5,837,793 in title IV-E funds would have been expended on their behalf from the time the project ended until they reached age 18. CYFD Ex. 10, at 3. These alleged cost savings, according to CYFD, would have more than offset even the unadjusted amount in excess of the cost neutrality limit calculated by TriWest using the formula in the waiver terms and conditions. CYFD argues that such cost savings are "relevant to application of the definition of cost neutrality" in section 1130(g), which it quotes in part as follows: "the total amount of Federal funds that will be expended under (or by reason of) the project over its approved term (or such portion thereof or other period as the Secretary may find appropriate)" CYFD Reply Br. at 8 (emphasis added by CYFD).

¹¹(...continued)
component of its project based on similar considerations.

This argument has no merit. The alleged cost savings result from CYFD's commitment in the waiver terms and conditions to ensure that children placed in assisted guardianships as part of the demonstration project continue to receive support in their placements after IV-E funding ends. The shifting of support for these children to State-only sources is irrelevant to the purpose of assessing the cost neutrality of the project—which is to evaluate whether alternative approaches to child welfare can improve service delivery and outcomes at the same or lower cost. The language quoted from section 1130(g) at best could be read to give the Secretary discretion to consider the impact on federal funds of costs incurred by reason of or under the demonstration project during some period other than the full project period. Here, the Secretary did not elect to exercise any such discretion. Instead, an explicit agreement between ACF and CYFD in the waiver terms and conditions set the term of the project as the period over which cost neutrality was to be measured. Since the terms and conditions also included the plan for State funding of assisted guardianships post-waiver, it is clear that the terms and conditions rejected any option of including post-waiver costs in the cost neutrality evaluation.

Conclusion

Based on the foregoing analysis, we uphold the disallowance in full.

_____/s/
Judith A. Ballard

_____/s/
Constance B. Tobias

_____/s/
Leslie A. Sussan
Presiding Board Member