DEPARTMENTAL APPEALS BOARD

Department of Health and Human Services

SUBJECT: Illinois Department of Children and Family Services
Docket No. 87-154
Decision No. 1037

DATE: April 13, 1989

DECISION

The Illinois Department of Children and Family Services (State) appealed a determination by the Administration for Children, Youth and Families (ACYF, Agency) of the Office of Human Development Services. ACYF found that the State was ineligible for $1,034,619 awarded to the State for fiscal year (FY) 1984 under section 427 of title IV-B of the Social Security Act (Act). Section 427 of the Act provides that a state may receive additional funds for child welfare services, beyond the amount available under section 420 of the Act, if the state meets certain requirements for protecting children in foster care.

ACYF initially approved the State's request for section 427 funds for FY 1984 based on a written certification by the State that it met the requirements of section 427. Subsequently, ACYF performed a compliance review to validate the State's self-certification. ACYF evaluated the State's compliance on two levels: whether the State had established policies and procedures for implementing the section 427 requirements and whether these policies and procedures were operational. ACYF determined that the State had policies and procedures for implementing the section 427 requirements; however, after surveying a sample of foster care case records, ACYF found that the requirements were not actually met in a sufficient number of cases to constitute compliance. ACYF required a 90% rate of compliance in order for the State to be found eligible for section 427 funds, based on the number of years the State had participated in the section 427 program.1/ ACYF found a total of 14 out of 32 cases to be unacceptable. The State contested ACYF's findings in 11 of these cases. There is no dispute that if the

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1/ ACYF usually reviewed a state's first, second and fifth years of participation in the section 427 program, requiring 90% compliance in the last of these reviews, known as the "triennial" review. Here, the review of the State's fourth year of participation was considered the triennial review since the biennial review was omitted.

Board reversed ACYF's findings on even one of the failed cases, there would not be a sufficient number of failed cases to find that the State was ineligible for the FY 1984 section 427 funds.2/ As discussed below, however, we sustain ACYF's findings with respect to all of the contested cases. We also reject the State's more general argument that the Agency's application of a 90% compliance standard was arbitrary, capricious, and an abuse of discretion. Accordingly, we affirm ACYF's determination that the State was ineligible for the FY 1984 section 427 funds.

Applicable Law

As one of the conditions for the receipt of additional child welfare funds, section 427(a)(2)(B) requires that a state have implemented and be operating to the satisfaction of the Secretary--

> A case review system (as defined in section 475(5)) for each child receiving foster care under the supervision of the State. . . .

Section 475(5) provides that--

> The term "case review system" means a procedure for assuring that--
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> (A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,
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> (B) the status of each child is reviewed periodically but no less frequently than once every

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2/ ACYF asserted that if the Board were to reverse its determination that the State was ineligible for the FY 1984 section 427 funds, it could continue the case record survey until it reached a point at which there was a sufficient number of cases to find the State either eligible or ineligible. The State took the position that if the Board accepted its argument that a certain class of children (those placed in relatives' homes which were not approved as meeting licensing standards) was improperly included in the survey, a new survey would have to be done using a new sample which excluded those children. In view of our conclusion that all of the 11 cases were properly failed, however, we need not reach this issue.

> six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship, and
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> (C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis); and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.

Section 475(6) defines an "administrative review" to mean--

> a review open to the participation of the parents of the child conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

These provisions were added by the Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, which amended the program of child welfare services under title IV-B of the Social Security Act and also established a new foster care maintenance program under title IV-E of the Act. These amendments had three major goals:

(1) prevention of unnecessary separation of a child from its parents; (2) improved quality of care and services to children and their families; and (3) permanency for foster care children through reunification with parents or through adoption or other permanency planning. See 45 Fed. Reg. 86818 (December 30, 1980).

The State's arguments

The State raised several different arguments concerning the 11 contested cases. The State argued that six failed cases (#1, 7, 13, 18, 26, and 28) involved children in relatives' homes who were not in "foster care" within the meaning of section 427 and, therefore, should not have been included in the case universe or the sample. This issue was considered particularly significant by the parties because it arises not only in FY 1984 but in succeeding years as well.

One of the cases raising this "relative" issue (#18) was originally failed because no case record could be located. The State argued that the proper procedure would have been either to pass the case or to substitute another case.

The State argued that four additional cases (#19, 27, 31 and 32), which failed on the ground that there was inadequate documentation of dispositional hearings, had hearings on Calendar 18/19 or Calendar 70/80 of the Cook County Juvenile Court which constituted dispositional hearings.

In one of the cases raising the "Calendar 18/19" issue (#27), the State contended that there was also a hearing (at which parental rights were terminated) which could be considered a timely dispositional hearing because it was scheduled before the due date although it was then continued to a later date. The State also argued that even if the later date was the relevant date, the hearing should not be considered untimely since it was only two days past the 30-day grace period which the Agency agreed was applicable.3/

3/ Two of the cases mentioned above (#31 and #32) were also failed on the ground that there was no timely periodic review. In view of our conclusion, discussed below, that the dispositional hearing requirement was not met in these cases, we do not consider whether the periodic review requirement was met.

The last contested case (#10) was failed on the ground that no dispositional hearing had been held since 1981. The State asserted that a regulatory exception exempting children in adoptive placements from the dispositional hearing requirement applied in this case. The State also argued that prior year failings were outside the scope of the FY 1984 review.

The arguments noted here, as well as the State's general argument that the 90% compliance standard was not proper, are discussed below.

Whether children placed with relatives were in foster care

Section 427(a) of the Act requires that a state have "a case review system (as defined in section 475(5)) for each child receiving foster care under the supervision of the State . . . ." The term "foster care" is not further defined in the Act or in the Agency's implementing regulations. This led to a dispute with respect to the definition of foster care to be used in selecting the universe for the FY 1984 case review. The State took the position that the universe should consist of children in homes which were licensed by the State as foster family homes or approved by the State as meeting foster family home licensing standards. The State thus used as the definition of "foster care" the definition of the term "foster family home" set out in section 472(c) of title IV-E of the Act. The State asserted that under this definition it could exclude from the universe children in those relatives' homes which the State referred to as "approved only" homes since "approved only" homes were not approved as meeting foster family home licensing standards.4/

The Agency contended that all children placed with relatives were in foster care within the meaning of section 427, and required that they be included in the universe. Six cases (#1, 7, 13, 18, 26, and 28) which the State contended involved children living in "approved

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4/ A "foster family home" under State licensing regulations could provide child care only for unrelated children. Thus, relatives' homes could not be licensed as foster family homes although they could be approved as meeting the licensing standards for foster family homes.

There is no dispute that the universe properly included only children who had been in foster care, however defined, for at least six months during FY 1984.

only" relative homes failed the case record survey because they lacked timely periodic reviews or dispositional hearings. The State argued that the cases fell outside its definition of foster care and were thus improperly included in the universe.5/

We first note that this argument may not be material here. As discussed later, the State failed to establish, even when specifically given an opportunity to do so, that any of the children in question were in "approved only" homes. Since it is possible that the State could establish this as a matter of fact if given a further opportunity, however, we proceed to consider the legal issue which the State raised.

We find that, contrary to what the State alleged, "approved only" homes were approved as meeting licensing standards for foster family homes. Thus, children placed in "approved only" homes were in foster care, even under the definition of that term the State contended applied, and should have been afforded the section 427 protections. (Accordingly, we need not reach the question whether the State's definition of foster care is correct.) We make this finding even if the policy adopted by the State after these homes were approved for placement can be read as providing that "approved only" homes were not approved as meeting foster family home licensing standards. As explained in detail below, these homes were approved as

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5/ It is difficult to assess the impact in this case of excluding "approved only" children from the ambit of section 427. In response to questions at the hearing, a State witness (formerly Chief of the Office of Rules and Procedures in the Division of Policy and Plans, DCFS) testified that she did not know the percentage of children under the supervision of the State who were placed with relatives in FY 1981 or 1984 or the percentage of children placed with relatives who were excluded (or would have been excluded) from the FY 1981 or 1984 sample. Transcript of 7/18/88 hearing, p. 122. The witness made a "guesstimate" that 10% of children under the State's supervision were placed with relatives but the Agency suggested that this figure may have been as high as 25%. Id., p. 119. We find it highly unlikely that someone in the position occupied by the State's witness during the years in question would have so little command of these facts. The witness' evasive testimony thus leads us to infer that the exclusion of children in "approved only" homes may have substantially reduced the number of children considered by the State to be in foster care.

meeting the licensing standards in effect until October 1981. When the licensing standards were changed, these homes were unable to meet the new standards but were regularly reapproved as meeting the earlier standards. Under these circumstances, the State was not justified in distinguishing between "approved only" homes and homes approved as meeting the new licensing standards for purposes of determining which children should have been afforded the section 427 protections.

In order to explain our determination on this issue, we set out here what the record shows about the situation as it existed prior to November 30, 1981. At that time, the Illinois Department of Children and Family Services (DCFS) required that a caseworker fill out a one-page Relative Foster Care Approval Checklist (Form CFS 454) in order to determine whether a child could appropriately be placed in the home of a relative. State's appeal file, Ex. 42, Child Welfare Manual section 2.8.3. In Illinois Dept. of Public Aid, DAB No. 478 (1983), the State contended that, although the process used for approving homes of relatives was less formal than the process used for licensing other homes in which children were placed, the same standards were applied so that relatives' homes were properly considered as approved as meeting licensing standards (and thus as "foster family homes") for purposes of qualifying for foster care payments under section 408 of title IV-A of the Act providing for Aid to Families with Dependent Children - Foster Care (AFDC-FC).6/ The Board concluded that the Checklist--which summarized the more detailed health and safety standards in the licensing regulation--was sufficient to remind the caseworkers of the standards that should apply and thus adequately documented that the licensing standards were applied and met. Accordingly, the Board reversed the disallowance of FFP claimed by the State for AFDC-FC payments for children in approved relatives' homes.

In October 1981, the State's licensing standards were revised. Letter from Engman to Ford dated November 18, 1988, attachments. Thereafter, effective December 1, 1981, DCFS adopted rules which provided as follows:

> New Relative Caretaker. When a child for whom DCFS is legally responsible is placed with a relative caretaker after November 30, 1981 the relative home

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6/ The AFDC-FC program was subsequently transferred to the new title IV-E, which adopted the same definition of "foster family home" originally used in title IV-A.

> must be evaluated to determine whether foster family home licensing standards are met within three (3) months after placement.
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> * * * *
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> Relatives Approved Prior To November 30, 1981. Current relative caretaker homes must be approved as meeting foster family home licensing standards no later than one year from the last approval date (most recent CFS 454).

State's appeal file, Ex. 47, section 332.5. The DCFS rules further provided that relative homes approved prior to November 30, 1981 which were unable to meet licensing standards could be "grandfathered as approved only following determinations by Department staff that the health, safety and well-being of the related children are insured through continuation of the placement." State's appeal file, Ex. 46, section 332.5.7/ These determinations were to be made using Form CFS 454, the same checklist utilized previously to approve all relatives' homes. State's appeal file, Ex. 47, section 332.4, 332.5. Thus, such homes, although not meeting current licensing standards, could continue to be approved as meeting the earlier licensing standards.

Nevertheless, the DCFS rules specifically stated that approval of the grandfathered homes was "not synonymous with 'approval as meeting foster family home licensing standards'" (Id., section 332.5), and that "[t]hese homes shall not be designated 'approved as meeting licensing standards'" (Id., section 332.4). The State took the position that this meant that children in "approved only" homes were not considered to be in foster care for purposes of section 427. There is nothing in the DCFS rules that expressly states that as the State's policy, however. The only basis for such an argument lies in the

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7/ Exhibit 46 was a rule adopted by DCFS pursuant to authority in Section 1 et seq. of An Act Creating the Illinois Department of Children and Family Services (Ill. Rev. Stat., 1979, Ch. 23, Sec. 5001 et seq.). See Ex. 46, p. 1, Authority Note. The DCFS rules were filed with the Illinois Secretary of State. See transcript of 7/18/88 hearing, p. 49. Exhibit 47 was part of the procedures adopted by DCFS to implement its own rules. See Ex. 47, p. 1, caption, and transcript of 7/18/88 hearing, p. 50. Exhibit 7, cited below, was a DCFS rule. See transcript of 7/18/88 hearing, p. 46.

fact that other DCFS rules required "administrative case reviews" only for children "in foster family homes which are licensed or approved as meeting licensing standards, group homes, or child care institutions." State's appeal file, Ex. 7, p. 4, section 305.6 a) 1). A State witness indicated in testimony at the hearing that administrative case reviews were designed to meet the requirements of section 427. Transcript of 7/18/88 hearing, pp. 46-47, 58-59. 8/ Thus, the DCFS rules could be read as not requiring periodic reviews within the meaning of section 427 for children placed in "approved only" homes.

In our view, however, this does not conclusively establish that these children were not in foster care even as that term is defined by the State. The DCFS rules also provided that "the Department may elect to conduct administrative case reviews on other groups of children [than those in foster family homes which are licensed or approved as meeting licensing standards, group homes or child care institutions] as fiscal and staffing resources permit." State's appeal file, Ex. 7, p. 4. There is, moreover, no indication in the DCFS rules furnished for the record in this case that children in "approved only" homes were not required to be given dispositional hearings as called for by section 427. Furthermore, the fact, discussed later, that the State included children in "approved only" homes in the inventory required by section 427, and that the State did not rule out the possibility that federal foster care maintenance payments were claimed for these children also casts some doubt on the State's position. Thus, it appears that the distinction alleged by the State to exist for purposes of section 427 between children in "approved only" homes and other children placed with relatives may have been developed after-the-fact in order to avoid the loss of section 427 funds, rather than intended at the time the DCFS rules were amended in 1981.

Even if the State's formal policy did not consider children in "approved only" homes to be in foster care, this is not dispositive. The Board has previously

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8/ The DCFS rules required only "regular six-month case reviews" for "all other children and families served by the Department." State's appeal file, Ex. 7, p. 4, section 305.6 a) 2). The same witness testified that these reviews were distinguishable from the administrative case reviews because they did not involve the independent third party required by section 427. Transcript of 7/18/88 hearing, p. 47.

recognized that "some deference should be accorded to a state's interpretation of its own law and regulations, so long as that interpretation is reasonable and does not conflict with federal program purposes." Illinois Dept. of Public Aid, supra, p. 11; see also Florida Dept. of Health and Rehabilitative Services, DAB No. 414 (1982). It is not clear that the DCFS rules here rise to the level of the State's "own law or regulations," however, since their purpose was (at least in part) to implement the federal section 427 requirements. In any event, as explained below, we conclude that it was unreasonable for the State to provide that children in relatives' homes which were approved as meeting the earlier licensing standards were not in homes approved as meeting licensing standards for purposes of section 427.

As indicated above, DCFS policy before FY 1982 in effect required relatives' homes to meet foster family home licensing standards. This policy did not change in FY 1982; only the licensing standards changed. DCFS rules provided for a transition between the old and new licensing standards so that a child did not have to be removed from a relative's home which could not comply with some of the new licensing standards which were not critical to assure the child's health, safety, and well-being. Although a separate procedure for the continuing approval of such homes was apparently justified, we see no basis for distinguishing between such homes and homes approved as meeting the new licensing standards for purposes of section 427. The preamble to the final regulations implementing section 427 indicates that a placement which in fact provides foster care and is licensed or approved under some provision of state law may be considered a foster family home even if it is not called that by the state. 48 Fed. Reg. 23104, 23105 (May 23, 1983). Moreover, an underlying purpose of section 427 was to encourage states to take steps to ensure that children do not remain adrift in the foster care system. Id. at 23104. The record is devoid of evidence that children in relatives' homes whose status differed from that of other children in this type of placement only because the licensing standards had been updated were any less in need of the section 427 protections.

It is also significant that the State included children in "approved only" homes in the inventory required by section 427(a)(1). That section requires "an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory. . . ." If the State considered children in "approved only" homes to be in foster care for

purposes of the inventory, their exclusion from the section 427(a) case reviews becomes suspect. The State argued that it was permitted to include children in addition to those in foster care in the inventory, and that the children in "approved only" homes were such additional children. It cited in support of its position 45 C.F.R. 1357.25 (1983), which states that "the inventory must include those children under the placement and care responsibility of the State title IV-B or IV-E agencies. At the State's discretion, other children may be included." The State provided no evidence, however, that it included children in "approved only" homes in the inventory because they were considered "other children" rather than because they were considered to be in foster care.

Our conclusion that the six children in question here were properly included in the universe sampled can also be supported on the ground that the State never established that the children were in fact in "approved only" homes. The State said that it determined that the six children were in "approved only" homes "based upon its review of its computer files." Letter from Engman to Ford dated November 18, 1988, p. 1. The State did not identify the nature of these files, although it did indicate elsewhere that State records had different care codes for children in homes approved as meeting licensing standards and children in "approved only" homes. Id., Attachment, p. 2. The Agency took the position that it was unwilling to rely on "case coding or statements made by State staff," but would require "documentation in the provider record" to establish that the child was placed in an "approved only" home. Agency's Reply to State's Responses to Questions Posed by the Board at Closing Argument, p. 1. The State declined to provide documentation from the provider records, contending that it would be too burdensome.

We do not agree with the Agency that the only adequate documentation of the status of the children in question would be provider records.9/ However, we agree with the Agency that the State's general statement regarding its review of its computer files is not adequate proof of the critical fact that each of the six children was in an "approved only" home. Since the State did not establish

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9/ It is possible that a child's individual case record might contain information which would show that the child was in an "approved only" home. However, the State failed to provide any portion of the case record for any of the six children.

that the children in cases #1, #7, #13, #18, #26, and #28 were in "approved only" homes, the record contains no factual predicate for the State's legal argument that children in "approved only" homes were not in foster care.10/

Accordingly, we sustain the Agency's findings that cases #1, 7, 13, 18, 26 and 28 were out of compliance.

Whether case #18 was properly failed because the case file could not be located during the case record survey

The Agency failed case #18 because the State was unable to locate the child's individual case file during the case record survey. The State contended that it was "arbitrary in the extreme to fail a case for inability to find the file, especially when the case was closed during the year being audited. . . [and] was more likely than not to have met the review criteria." State's brief dated December 16, 1987, p. 53. The State asserted that the procedure used in the FY 1981 case record survey was either to pass a case for which the file was missing or to replace the case with the next available case from the oversample, which consisted of cases drawn from the universe in excess of the maximum number required for a sample. The Agency confirmed that for FY 1981 it did not

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10/ We also note that the State failed to prove that no claims had been made under title IV-E for foster care maintenance payments for the children in question. If there were any such claims, this would also undermine the State's position that the children were not in foster care, since children must be in homes which are licensed as foster family homes or approved as meeting foster family home licensing standards in order to receive foster care maintenance payments. Although the State asserted that there had been no such claims, it stated that its assertion was "based upon the knowledge of DCFS personnel," and that it would be too burdensome to verify the response by documentary evidence. Letter from Engman to Ford dated November 18, 1988, p. 2. Moreover, the State's assertion is questionable since the State's practice during the period in question in DAB No. 478 was to claim foster care maintenance payments for children in relatives' homes approved pursuant to the Checklist and the State pointed to no provision of its rules or policies which would have changed this practice.

fail cases where the case file was missing. Transcript of 7/19/88 hearing, pp. 348-349.11/

During the course of the appeal, the State located information about case #18 which it contended established that the section 427 protections had been met. Neither the State nor the Agency indicated that this information could not have been considered in lieu of a case file during the case record survey. As we explain below, the information submitted shows that the section 427 requirements were not met in this case; thus, the question whether the Agency's treatment of the missing case file was proper has been rendered moot.12/

The State submitted a computer print-out which showed that the child was first placed in State care, in the home of a relative, on 11/16/83, that a "6 month review" was held 5/9/84, and that the child was released from State guardianship to the relative's home by court order on 7/9/84. State's appeal file, Ex. 40. The State argued that a timely "administrative review" was held, that no dispositional hearing was required, and that in any event the child was not required to be afforded the section 427 protections because of her placement in a relative's home. State's reply brief, p. 27. These arguments do not avail the State. As discussed previously, we reject the State's position that children placed with relatives in "approved only" homes were not subject to the requirements of section 427. Moreover, while it is clear that no dispositional hearing was required since the child was in foster care less than eight months, the evidence shows that the requirement for a periodic review, which was applicable, was not satisfied. The computer print-out specifically indicates that the review held was a "6 month review"; however, as noted previously, the State distinguished between six month reviews and administrative reviews, acknowledging that only administrative reviews satisfied the requirements of section 427.

11/ However, there is no information in the record for this case, nor did the State contend, that the Agency's treatment of missing cases was not same for all states' triennial reviews.

12/ We note, in any event, that the State did not allege that it was prejudiced by any Agency change in the treatment of missing files. To show this, the State would have to establish that it would have passed the case record survey if case #18 had been deemed in compliance or if another case had been substituted for case #18.

Since there is no reason to conclude that information that might have been contained in the actual case file would disprove our conclusion that the section 427 requirements were not met, we sustain the Agency's finding that case #18 was out of compliance.

Whether "Calendar 18/19" and "Calendar 70/80" hearings constituted dispositional hearings

ACYF found four cases (#19, 27, 31, and 32) unacceptable on the ground that the information provided by the State was not sufficient to document that dispositional hearings were held. The State contended that the dispositional hearing requirement was satisfied in all but case #32 (discussed later) by the conduct of a hearing on "Calendar 18/19" of the Cook County Juvenile Court. The State took the position that it was not necessary to document what happened at the hearing in each case because the Calendar 18/19 hearings generally satisfied the section 427 requirements for a dispositional hearing.

According to the State, a hearing on Calendar 18/19 consisted of a meeting or conference between the Guardian ad Litem (G.A.L.) and a DCFS liaison. The child's caseworker was instructed to file a written report three days prior to the hearing date, but was directed not to appear at the hearing or to tell either the child or the child's parents to appear. The DCFS liaison would present the caseworker's report, which dealt with the child's permanency goal and objectives and the child's progress toward achieving those, to the G.A.L. If the G.A.L. was satisfied with the progress being made, he would recommend that the child remain in his or her current foster care placement. The court would then enter an order based on the G.A.L.'s dispositional recommendation. If the G.A.L. determined that a change in the child's status was required, he would refer the case to another calendar for further proceedings. State's appeal file, Ex. 29, p. 5; Transcript of 2/18/88 hearing, pp. 172-174, 185. 13/ In the three cases in question, the G.A.L. determined that the child's status should remain the same until the date set for the next Calendar 18/19 hearing. Neither the child nor the child's parents attended the hearing in any of these cases. State's appeal file, Ex. 32, Attachment #2.

13/ The transcript contains two pages numbered "185." We refer here to both pages.

The State did not establish that the Calendar 18/19 hearings met the requirements for a dispositional hearing in these three cases. Section 475(5)(C) requires that "procedural safeguards will be applied . . . to assure each child in foster care under the supervision of the State of a dispositional hearing . ... ." An opportunity for parental participation should clearly be considered a procedural safeguard in a proceeding at which their child's future is at stake. Moreover, in PI 82-06, a program instruction dated June 3, 1982 which was sent to the states, ACYF stated that section 475(5)(C) "requires that a hearing be held with the concomitant due process safeguards that apply to court proceedings." State's appeal file, Ex. 3, p. 9. A due process safeguard applicable to any court proceeding is notice and an opportunity to be heard for interested parties. A child's parents whose rights have not been terminated are interested parties to a dispositional hearing since, in the parents' absence, the full range of possible dispositions specified in section 475(5)(C)--notably return to the parent and placement for adoption--could not be explored adequately. Thus, Calendar 18/19 hearings do not qualify as dispositional hearings where parents who are interested parties are not afforded an opportunity to participate.14/

The State also asserted that the Act gives procedural rights, such as the right to notice of a hearing, to parents only if certain issues not involved here are raised. The statutory provision on which the State relied, section 475(5)(C), provides that--

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14/ It appears from the court's instructions that parents would be notified of the hearing if the caseworker believed their presence was required and obtained the permission of the DCFS liaison. State's appeal file, Ex. 29, p. 5. If notice was given but the parents failed to appear, then arguably the dispositional hearing requirement was met. However, there is no evidence that any attempt was made to notify the parents in any of the three cases in question here of the hearings.

We need not decide here whether the parents' right to be heard could be satisfied other than by an opportunity to participate directly in the dispositional hearing (such as by the incorporation of their oral or written comments in the caseworker's report to the G.A.L.), since there is no evidence of any such provision for parental participation.

> procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.

We see no basis, however, for the State's view that this provision makes an opportunity for parental participation in dispositional hearings unnecessary. Notice to the parents is required under this provision in a variety of situations, including dispositional hearings which will result in a change in the child's placement. There is nothing in this provision which undercuts our interpretation of the earlier reference in section 475(5)(C) to procedural safeguards as requiring that parents be notified of a dispositional hearing.

The State also asserted that the parents' presence was not required since cases were placed on Calendar 18/19 only in those instances where parents were "inactive," i.e., neither "working with the DCFS [n]or opposing DCFS's plan. . . ," or had not been located. Transcript of 7/18/88 hearing, p. 171. If the State had established that the parents in the three cases in question here could not be located or that their rights had been terminated, then arguably the Calendar 18/19 hearings could qualify as dispositional hearings. (See note 14.) The State did not provide any evidence to this effect, however. Accordingly, we assume that the cases were placed on Calendar 18/19 because the parents were "inactive" rather than missing. Simply because a child's current plan did not require the parents' involvement does not mean that the G.A.L. should not have considered the possibility of other dispositions requiring their involvement, however. The State's argument makes clear that the scope of the Calendar 18/19 hearings was a very narrow one--to review the progress being made towards goals established in the child's current case plan. The purpose of a dispositional hearing, however, is to provide a forum in which it can be determined whether the child's current case plan or some other case plan is appropriate. In the parents' absence, a meaningful consideration of dispositions other than continuing the child in the current foster care placement was not possible.15/

15/ The limited nature of the Calendar 18/19 hearings is also evident from the fact that the G.A.L. had to transfer a case to another calendar not under his supervision if he

(continued...)

The State further contended that a "Calendar 70/80" hearing constituted a dispositional hearing in case #32. Calendar 70/80 was described by the State as a "guardianship calendar" for cases which did not have a pending court date for any matter of status or evidence to be heard. Transcript of 7/18/88 hearing, p. 170. Based on the case record survey, the Agency found that the documentation made available for case #32 was deficient on the ground that there was no indication "of who was present at the hearing and what disposition was ordered." State's appeal file, Ex. 31. The State subsequently provided a document signed by the judge who presided over Calendar 70/80 showing that a Calendar 70/80 hearing at which the G.A.L., a DCFS liaison, and a probation officer were present was held in this case on two occasions in FY 1984. This evidence does not justify reversing the Agency's findings, however. The disposition made at each hearing was described as follows:

> Supplemental Petition Reviewed; Return to Guardianship Calendar (i.e. child remains under guardianship and in placement with DCFS)

State's appeal file, Ex. 32, Attachment #1. This fails to specify the period of time for which the child should be continued in foster care as required by section 475(5)(C).

Accordingly, we sustain the Agency's findings that cases #19, 27, 31, and 32 were out of compliance.

The State also argued, however, that the Agency had articulated increasingly strict standards with respect to the level of documentation necessary to show that the dispositional hearing requirement had been met. The State asserted that the Agency's failure to accept the documentation which it provided in response to the

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15/ (...continued)
believed a change in the child's status was required. Thus, even if the parents were present, the G.A.L. could not effect a complete disposition of the case unless he found that a continuation of the current foster care placement was appropriate.

The Agency raised additional questions about Calendar 18/19 hearings which we need not address here in view of our conclusion that the specific Calendar 18/19 hearings at issue here were inadequate as dispositional hearings because of lack of notice to the parents.

Agency's requests was arbitrary, capricious, and an abuse of discretion, since not until recently did the Agency require documentation showing that a hearing included a consideration of all matters specified in section 475(5)(C). According to the State, when the 1984 case record survey was being conducted, "Agency personnel appeared to determine compliance with hearing requirements solely upon the basis of whether an event occurred by a certain due date." State's reply brief dated 5/16/88, p. 21. However, the State could not reasonably conclude that the dispositional hearing requirement was satisfied in every instance where some form of hearing was held by the due date. Otherwise, the State could label any hearing which involved the child as a dispositional hearing when such hearings could obviously serve different purposes. See Virginia Dept. of Social Services, DAB No. 596 (1984); Delaware Dept. of Services for Children, Youth and Their Families, DAB No. 699 (1985). Moreover, while the Agency indicated at various times that different forms of documentation were acceptable, it was implicit that the documentation would be acceptable only if it demonstrated that a dispositional hearing was held.

Accordingly, since none of the documentation provided by the State showed that hearings were held which qualified as dispositional hearings under the statute, there is no basis for reversing the Agency's findings in these cases.

Whether a dispositional hearing in case #27 which was scheduled to take place before the due date but was continued by the court until after the due date was timely

The State took the position that even if Calendar 18/19 hearings in case #27 were not properly considered dispositional hearings, there was a court hearing (before a judge) which constituted a timely dispositional hearing. According to the State, a dispositional hearing was due in this case by 3/5/84.16/ The court "half sheet" for this child shows that a hearing to terminate parental rights

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16/ The Agency asserted that there was no evidence of a dispositional hearing on 3/5/82, which would make the next hearing due on 3/5/84 under the State's then applicable requirement for a dispositional hearing every two years following the initial dispositional hearing. We need not resolve this matter, however, since as discussed below, we do not accept the State's argument which is premised on the existence of such a hearing.

(TPR hearing) was scheduled for 1/27/84.17/ State's appeal file, Ex. 28, p. 1. The "half sheet" entry for this date indicates that the TPR hearing was continued until 4/6/84. The reason for the continuance is unclear from the half sheet;18/ however, the State asserted that "[t]he parents apparently did not appear on . . . [1/27/84], and the matter was continued to April 6, 1984." State's brief dated 12/16/87, p. 52. A hearing was held on 4/6/84 at which parental rights were terminated. The State argued that since the hearing was scheduled for 1/27/84, that should be considered the date of the dispositional hearing for purposes of section 427. The State argued in the alternative that the hearing on 4/6/84 should be considered a timely dispositional hearing since it was held only two days after the due date, taking into account the 30-day grace period which the Agency agreed was applicable.

We conclude that the 4/6/84 hearing was untimely. The Board has consistently upheld the Agency's view that the granting of a grace period lies within the Agency's discretion but does not alter the basic statutory requirements and does not authorize a state to grant itself a further extension of time. See Florida Dept. of Health and Rehabilitative Services, DAB No. 643 (1985). The State did not offer any reason why this case should be treated differently.

We cannot find, moreover, that a dispositional hearing was held on 1/27/84. In a decision issued in another case after briefing in this case was completed, the Board found that ACYF had a policy which permitted it to accept a dispositional hearing as timely as long as one was scheduled for a date which was timely, even if the hearing was continued until a later date. Idaho Dept. of Health and Welfare, DAB No. 1011 (1989). However, we conclude that it was not reasonable to apply this policy under the circumstances present here. The policy is appropriately applied where it would be unfair to a state not to find the dispositional hearing requirement met. It does not excuse states from doing all that they reasonably can to assure that a timely dispositional hearing is held in each case.

17/ The State said that a hearing was scheduled for 1/28/84; however, the date on the court "half sheet" is clearly 1/27/84.

18/ The "half sheet" uses abbreviations not explained by the State.

Here, the State did not establish that the hearing was continued for any reason other than the convenience of the State. The State alleged that "[t]he State on at least two occasions set hearings well in advance of the March 5, 1984 due date but had to continue them because of inability to effect service of notice on the parents." State's brief dated 12/16/87, p. 53. However, it is not clear that this was the reason for the continuance granted on 1/27/84 since the State stated specifically with respect to the 1/27/84 hearing not that the parents were not served, but merely that the parents did not appear. Moreover, the State also stated that on December 22, 1983, "the court directed issuance of an alias summons to the parents for a January 28, 1984 hearing." Id., p. 52. An alias summons is issued to cure a defect in form or manner of service of a prior summons. Black's Law Dictionary 66 (5th ed. 1979). There is no reason to believe that the alias summons was not successfully served, and the record shows no reason why the hearing could not have proceeded despite the parents' absence. Thus, it appears that the hearing was continued merely for the convenience of the State.

Moreover, the State did not offer any reason why the hearing could not have been rescheduled for a date on or before 3/5/84, the due date for the dispositional hearing. The court's failure to set an earlier hearing date because its calendar was too crowded would not be a legitimate reason. As the Board observed in Arkansas Dept. of Human Services, DAB No. 553 (1984)--

> It is implicit in Section 427 that states must provide the resources necessary to implement the required safeguards and insure that courts understand their role in implementing these safeguards. To recognize a court's lack of resources or diligence as an excuse for non-compliance would defeat the purpose of the statute.

Arkansas, p. 8.

Finally, we note that the facts in this case are unlike the situation presented in Idaho, where proceedings were actually commenced before the due date but were continued.

Accordingly, we sustain the Agency's finding that case #27 was out of compliance.

Whether the exception to the dispositional hearing requirement for children in adoptive placements applied in case #10

The Agency failed case #10 on the ground that the only dispositional hearing in this case was held on January 22, 1981. Although a dispositional hearing was due prior to FY 1984 (the fiscal year under review), the Agency stated that it would have passed this case if a dispositional hearing had been held by October 1, 1983 (the first day of FY 1984). The State took the position that the child was exempt from the requirement for dispositional hearings because the child was in an adoptive placement when the dispositional hearing was due. Section 1356.21(e) of 45 C.F.R. (1983) provides that dispositional hearings are not required for children in adoptive placements pending finalization of the adoption. The preamble to this regulation described the elements of an adoptive placement, stating that "[t]o the extent that this child is free for adoption, placed in an approved home for the purpose of adoption and the child's case plan goal is adoption, a subsequent dispositional hearing is not required . . . ." 48 Fed. Reg. 23104, 23109 (May 23, 1983).

The State asserted that the child was in an adoptive placement from November 1982 until May 1983. The Agency agreed that if the child was in an adoptive placement during that time, the case should have passed since the child was not required to have a dispositional hearing until 18 months after the end of the adoptive placement, which fell after the end of FY 1984.19/ The Agency, however, took the position that the child was not in an adoptive placement during the period in question.

The State cited in support of its position that the child was in an adoptive placement in November 1982 a "Client Service Plan" dated 11/17/82, which stated that the family with whom the child was living "plans to adopt." State's appeal file, Ex. 26H, p. 2. It also pointed to a "Report of Child's Progress" of the same date which stated that "[i]f or when parental rights are terminated, the . . . [foster parents] plan to pursue adoption." Id., p. 4. The child's mother had signed a document on 8/13/81 surrendering the child in order to permit adoption, and the father had died on 3/28/82, although apparently no

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19/ We need not decide whether the parties are correct that the due date was extended to eighteen months after the end of the adoptive placement since we conclude that the child was not in an adoptive placement.

action could be taken to terminate parental rights until the death certificate for the father was obtained in December 1982. State's appeal file, Ex. 26E and Ex. 26H, pp. 2, 23. The State argued that the child remained in an adoptive placement until May 1983 when both the "Client Service Plan" and "Report of Child's Progress" indicated that the adoption unit had decided to seek to place the child elsewhere for adoption. The State acknowledged that the records did not show precisely when the decision not to pursue adoption by the family with whom the child was currently living was made. It asserted, however, that the child should be considered to have been in an adoptive placement until the decision was documented in the child's case record in May 1983.

The Agency took the position that the child was not in an adoptive placement during the period in question. It asserted that parental rights were not terminated so that the child was not free for adoption. The Agency also argued that there was never any commitment made by the foster family to adopt the child, as evidenced by the submission of a petition for adoption or the signing of an adoption assistance agreement, but that the foster family had merely discussed the matter. The Agency also pointed to the lack of an approved home study for the adoptive parents as evidence that the child was not in an adoptive placement, noting the preamble language requiring that the child be "placed in an approved home for the purpose of adoption."

We agree with the Agency that the child was not in an adoptive placement. Far from supporting the State's position that the child was in an adoptive placement, the child's case record clearly shows that DCFS never considered the placement to be an adoptive placement. The 11/17/82 "Client Service Plan" for the child indicates that, as of 5/26/82, the objective in the case was "to secure an adoptive placement." State's appeal file, Ex. 26H, p. 3. The "Report of Child's Progress" dated 5/12/83 states, however, that "[a]doptive placement was not achieved due to the Adoption Unit's decision to place outside of the area." State's appeal file, Ex. 26H, p. 25. (Emphasis added.) In contrast, when the child was subsequently placed with another family, the placement was referred to as an "adoptive placement," with the next step being "legal adoption." State's appeal file, Ex. 26H, p. 1. Since the State agency responsible for administering the foster care program and implementing the requirements of section 427 did not itself regard this placement as an adoptive placement, the State's arguments to the contrary here can be given little weight.

Even if DCFS had not clearly found that adoptive placement was not achieved during the period of November 1982 through May 1983, we would not be persuaded that the child was in an adoptive placement. While the foster family had indicated that it planned to adopt the child when parental rights were terminated, the record does not clearly show that the foster family still wanted to adopt the child once the child was actually free for adoption. The foster family's plans to adopt made prior to the termination of parental rights may have been tentative since adoption was not possible at that point. Thus, although something short of a petition for adoption or adoption assistance agreement may have been sufficient evidence of a commitment to adopt, there was no evidence here which is sufficient.20/

The State also argued that the lack of a dispositional hearing due in a prior year was not a basis for failing the case in FY 1984. A similar argument was raised in Connecticut Dept. of Children and Youth Services, DAB No. 952 (1988). There, the Agency failed cases for which there was no hearing within the 18 months plus 30 days preceding FY 1985, the year under review. The Board concluded that it was proper for the Agency to look at whether a hearing was held in prior fiscal years since it was "not possible to determine whether a hearing was due in FY 1985, and if so when, without knowing when the last hearing was held." Connecticut, p. 15. The Board further stated that--

> [i]f each year were evaluated without regard to past performance, . . . a dispositional hearing might never be held. . . . This not only violates the specific requirements of the Act with respect to the timing of . . . dispositional hearings, but also frustrates congressional intent to prevent foster care "drift." Thus, although funds are separately appropriated for each fiscal year, the section 427 protections cannot be implemented if each fiscal year is viewed separately in evaluating a state's performance.

Id., p. 16. The State offered no reason why the Board should reach a different result in the present appeal.

20/. We do not here reach the question, raised by the Agency, whether an adoptive placement could exist in the absence of an approved home study.

Accordingly, we conclude that the Agency properly failed case #10 on the ground that no dispositional hearing was held by the first day of the fiscal year under review.

Whether the use of a 90% compliance standard was arbitrary, capricious, and an abuse of discretion

Fiscal year 1984 was the fourth consecutive year that the State received section 427 funds, and the second year that the State's compliance with the section 427 requirements was reviewed. The compliance standard applied to the FY 1981 review was 66%. Since that review found that the State complied with the section 427 requirements in more than 80% of the cases in the universe--the standard applied by the Agency in second-year reviews--the Agency agreed not to conduct a FY 1982 review. For the FY 1984 review, the Agency applied the 90% standard applicable to triennial reviews (reviews which the Agency stated it would perform after two unreviewed years). The 90% standard was officially announced by ACYF in PI 85-2, dated January 29, 1985, which was after the fiscal year in question (FY 1984) but before the review for that year was conducted.

The State contended that the application of a 90% standard to the FY 1984 case record survey was arbitrary, capricious, and an abuse of discretion because the standard was a substantive rule promulgated without notice and comment rulemaking as required by section 553 of the Administrative Procedure Act (APA), and because the 90% standard was applied retroactively. As the State noted, however, the Board considered and rejected the same arguments regarding the 90% standard in Connecticut Dept. of Children and Youth Services, DAB No. 952 (1988). The Board, relying in part on King v. Lynch, 550 F. Supp. 325 (D. Mass. 1982), found that--

> the 90% compliance standard did not change the statutory requirements; it was merely the level of compliance which the Secretary decided as an administrative matter to enforce in triennial reviews. [Footnote omitted.] The 90% standard was therefore not a rule for which notice and comment rulemaking was required. . . .

Connecticut, p. 8. The State made no showing here that this conclusion was wrong as a matter of law. The Board also found in Connecticut that retroactive application of the 90% standard was not prejudicial to Connecticut, stating--

> To argue that the State was harmed by the lack of notice would be to admit that the State never intended to fully comply with the statutory requirements, but had aimed instead for the 80% level of compliance required in the prior review. Such an approach would be inconsistent with the certification submitted by the State . . . that it met the requirements of section 427.

Id., pp. 8-9. The State argued here that this "ignores the realities" because Illinois passed the FY 1981 case record survey with a compliance rate well over 80%. State's reply brief dated 5/16/88, p. 29. The fact remains, however, that the existence of any compliance rate less than 100% for purposes of the section 427 case record survey should not have affected the State's efforts to comply fully with the statute. Accordingly, we reaffirm our holding in Connecticut that the application of a 90% compliance standard for triennial reviews was proper.

Conclusion

For the foregoing reasons, we sustain ACYF's determination that the State was ineligible for FY 1984 section 427 funds.

Judith A. Ballard

Alexander G. Teitz

Cecilia Sparks Ford
Presiding Board Member