Recommendation 79-2

Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program

(Adopted June 7-8, 1979)

Public assistance in the United States was originally exclusively a function of local governments. States first became involved by their establishment of institutions to accommodate particular categories of persons, e.g., the blind, the insane, the deaf, the aged. Early in this century many States established programs of cash benefit payments for needy mothers and aged persons. A Federal role in public assistance did not develop until the Depression: first with a temporary program of grants-in-aid enacted in 1933; and then with a permanent program established in 1935 by the Social Security Act, under which the Federal Government was authorized to reimburse specified portions of the State and local public assistance payments for three categories of needy persons, the aged, the blind, and dependent children. A fourth category, the disabled, was added in 1951, and in 1965 Medicaid, a similar grant-in-aid program for the medically indigent, was established.

From 1936 to 1974 a series of Federal agencies exercised the Federal role which, pursuant to the pertinent titles of the Social Security Act, was to enunciate the eligibility conditions to be met by State public assistance programs (including substantive, procedural and administrative features) and to make payments by way of reimbursement to the States of statutorily stipulated fractions of public assistance expenditures under their eligible programs. The responsible Federal agency, since 1953 the Department of Health, Education and Welfare (HEW), exercised considerable influence over State public assistance programs through establishment of State program conditions and review of State program operations for purposes of determining the fact and amount of State reimbursement entitlement.

In 1972, Congress replaced Federal grant-in-aid support for State programs of public assistance to the needy elderly, blind, and disabled with a federally administered cash benefit program for the same groups. This program is known as the Supplemental Security Income Program or SSI. The Federal-State grant-in-aid program for needy families with dependent children (AFDC) was left untouched by the transformation of SSI. (Proposals for and discussion of "welfare reform" usually refer to making a comparable transformation of AFDC; in 1972 such a proposal, the Family Assistance Program, was rejected by the Congress as it enacted SSI.)

State public assistance programs for the aged, blind, and disabled have not been entirely displaced by SSI, because the level of Federal SSI benefits (below what many States were paying under their predecessor programs) and the simplification of its benefit formula (as compared with prior State programs) leave substantial room or need for supplementary State assistance to these groups. As initially enacted, the 1972 SSI legislation encouraged States voluntarily to supplement the Federal SSI amounts, but subsequent amendments require them to do so in amounts based on their prior public assistance expenditures. (The requirements are imposed as a condition for continued receipt of Federal grant-in-aid support for State Medicaid programs.)

Federal administration of the SSI program is lodged in the Social Security Administration (SSA), a major operating element of HEW. SSA and a State may enter into an agreement for SSA to administer the State's supplementary benefits, and in such event SSA includes both the basic Federal SSI benefit and the State supplement in a single check to the recipient. Strong fiscal inducements structured with the SSI program have led most States with significant supplements to enter such agreements.

To implement its role as administrator of State supplementary benefits, SSA developed a set of proposed model agreements which it distributed for consideration by the States through the American Public Welfare Association (APWA), which had contracted with SSA to serve as liaison with all the States. Through a process of negotiation over those model agreements with a committee established through APWA, SSA and that committee agreed upon the general terms and conditions which formed the basis for SSA's original agreements with the 31 States electing Federal administration of State benefits. (Some of those States have since withdrawn from Federal administration, and others have joined; currently 27 States have their supplementary benefits administered by SSA.) Similar negotiations over revised model agreements took place in 1974 and 1976. Overall this process was quite successful, yielding general terms and conditions (still called "model agreements") which reflected and responded to State interests and problems, as well as the Federal interest. While notice-and comment rulemaking procedures of § 553 of the Administrative Procedure Act were utilized by SSA to establish by regulation some of the basic parameters of these Federal-State agreements, they were not followed in promulgating the general terms and conditions of those agreements, either initially or in subsequent revisions. Those provisions, as contained in the model agreements, deal with many important issues not covered by the regulations, including some of significant potential interest to supplementary benefit recipients. Combining notice and public comment procedures with the process of discussion with the States, through a representative

committee, would assure individual States, beneficiaries and other interested persons and groups a full opportunity to present views upon proposed agreement terms and the agreement-formation process.

Shortly after the first agreements were executed and the SSI program was underway, serious disputes about the parties' respective responsibilities and liabilities arose. The novelty of the relationship coupled with the start-up difficulties of the program created a large initial volume of controversy and uncertainty over how these disputes should be handled. The statute makes no explicit provision for administrative or judicial resolution of such disputes. In the agreements, the "disputes" paragraphs and related provisions leave significant uncertainties and deficiencies, which in turn generate substantial shortcomings in the dispute-resolution process.

The present "disputes" provision affords an opportunity for a hearing before the HEW Departmental Grant Appeals Board, but does not delegate to that Board the HEW Secretary's power of final decision. Under the dispute-settlement procedures of Federal contracts, administrative finality ordinarily attaches only to determinations of an independent and reasonably expert decisionmaking body, such as a board of contract appeals, to which the Departmental Grant Appeals Board is analogous in the present circumstances.

The breadth of coverage of the disputes provision is subject to substantial and injurious uncertainty. While there are indications that the present provision may have been intended to cover most or all disputes regarding performance of the parties, language has been used which in other Federal contracts has consistently been more narrowly interpreted.

Additionally, desirable utilization of the disputes procedure has been impaired by the awkward operation of the liability provisions of the agreement, even where disputes under such provisions would clearly be covered by the established procedures. Numerous disputes involving large sums have been stalled, without effective access to the disputes procedure, because of insufficiencies of the basic liability provisions and the measurement systems to which they were keyed. States have extensively used self-help remedies, which might have been avoided if the provisions of the agreement had furnished a surer basis for prompt resolution of these disputes.

Recommendation

1. The process of negotiation and agreement between the Secretary of HEW on the one hand, and individual States desiring Federal administration of SSI supplementary benefits on the other, is conducted in substantial part on the basis of the general terms and conditions established by HEW. These general terms and conditions (sometimes called "model agreements") are in turn related to published regulations of HEW. Both the regulations and the general terms and conditions should be developed by a procedure that embraces both (a) discussions with a representative committee of State officials, of the type that led to agreement on successive versions of the general terms and conditions in 1973, 1974, and 1976, and (b) the notice and public comment procedures of 5 U.S.C. § 553. The notice of proposed rulemaking (or, in appropriate cases, an advance notice of proposed rulemaking) should precede the discussions with the committee of State representatives. This does not necessarily imply an added cycle of notice and public comment nor any diminution of HEW's flexibility in negotiation.

Since the current general terms and conditions have never been the subject of notice and public comment, and include several areas noted in paragraphs 2 and 3 below in which procedural improvements can be achieved, HEW should initiate a full review of them, utilizing the above procedures.

2. Consideration should be given through such procedures to a new agreement provision for measuring the respective liabilities of the Federal Government and of the States. In formulating such new provision, specific consideration should be given to (a) inclusion of liability standards and measurement systems that are generally acceptable to the States, (b) explicit establishment of the right of a State to seek any adjustment of liability that its own data (derived through the generally accepted systems) may indicate, with recourse to the contractual disputes procedure in the event SSA declines adjustment on the basis of such State data, and (c) possible procedures for separate treatment of liability for errors resulting from consistent SSA practices or policies that violate statute, regulation or agreement, as distinct from liability for random errors in general.

3. On the assumption that the agreements will continue to contain a provision granting dispute resolution authority to an official or officials in HEW, the provision should be amended (a) to encompass, without doubt or ambiguity, all disputes between the parties concerning performance of their respective obligations arising out of the agreement—including Federal

claims of State noncompliance, (b) to assure prompt resolution of all disputes submitted pursuant to its terms, and (c) to provide that the last stage of the administrative dispute process is to be before the HEW Departmental Grant Appeals Board, which shall render an independent decision, based on a hearing and the record.

Citations:

44 FR 38823 (July 3, 1979)

__ FR _____ (2012)

1979 ACUS 19