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August 8, 1986

Ms. Joyce Cheeks
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Children's Foster Care
Review Board System
2221 Devine Street, Suite 418
Columbia, SC 29205

Dear Ms. Cheeks:

In your letter of June 26, 1986, you request guidance as to the most appropriate manner in which to proceed in view of conflicting state and federal laws governing periodic review of children in foster care.

As you have noted, the pertinent federal law appears in the Adoption Assistance and Child Welfare Act of 1980 (PL 96-272) [the Federal Act], in Title 42 of the United States Code. More narrowly, we focus on Chapter 7, Subchapter IV, Part E, entitled, "Federal Payments for Foster Care and Adoption Assistance." In your letter, you cite §475(B) of the Federal Act. The June 18, 1986, letter which you enclosed from Ramona Foley to Cornelia Gibbons cites §427. It should be noted that the U. S. Code sections in the 400 series under this Federal Act have been re-numbered as a 600 series; for example, 42 U.S.C. §475(B) is now 42 U.S.C. §675(B).

42 U.S.C. §670 sets forth the Congressional declaration of purpose of IV-E of the Act:

> For the purpose of enabling each State to provide . . . foster care . . . assistance for children who otherwise would be eligible for assistance under . . . Part A [Aid to Families with Dependent Children (AFDC)] . . . there are authorized to be appropriated for each fiscal year . . . such sums as may be necessary to carry out the provisions of this part. The sums . . . shall be used for making payments to States which have . . . had approved . . . State plans under this part.

Section 671(a) lists the requisite features of a State plan and provides, in part,

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which -
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> * * *
>
> (16) . . . provides for a case review system which meet[s] the requirements described in section 675(5)(B) . . . with respect to each such child . . . .

Section 675, in defining terms as used within the subchapter, states:

> (5) The term "case review system" means a procedure for assuring that -
>
> * * *
>
> (B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review . . . . (Emphasis added).

Turning now to State law, as you are aware, §20-7-2376 of the Code of Laws of South Carolina, 1976, as amended, lists as one of the functions and powers of local foster care review boards,

> (A) To review every six months cases of children who have resided in . . . foster care for a period of more than six consecutive months . . . . (Emphasis added).

Additionally, Foster Care Review Board Regulation 24-17 D. provides:

> Each child shall be reviewed at a time period in excess of six consecutive months in foster care . . . and every six months subsequently thereafter . . . (Emphasis added).

When faced with conflicting federal and state statutes, the first consideration should be whether the federal pre-emption doctrine applies. The Supremacy Clause of Art. VI of the United States Constitution provides that all federal laws made in pursuance

of the Constitution shall be "the supreme law of the land" notwithstanding any contrary state law. Under this authority, the federal government may exercise exclusive power over a given area, in which case any state law falling within the field is pre-empted. Or, Congress may partially regulate without occupying the entire area, in which event federal laws pre-empt or take precedence only over conflicting state laws. However, the area of legislation with which we are concerned does not fall under the pre-emption doctrine. There is no constitutional grant of authority which empowers Congress to regulate the foster care of children, to the exclusion or partial exclusion of the states. To the contrary, matters of a "domestic" nature, including the broad area of protection of children, have traditionally been regulated by the states under their police powers. Therefore, §20-7-2376, is not rendered invalid by virtue of the Supremacy Clause.

The problem is, rather, more of a contractual nature. When a state accepts financial assistance from the federal government, the state is bound by any "conditions" which attach to the expenditure of the funds. Numerous cases emphasize this point. For example, participation by a state in the AFDC program is voluntary, but if a state chooses to participate it must comply with the requirements of the Social Security Act and the regulations promulgated thereunder. McCoog by and through Ferguson v. Hegstrom, 690 F.2d 1280 (Ninth Cir. 1982); Cunningham v. Toan, 728 F.2d 1101 (Eighth Cir. 1984). As previously noted, the Federal Act requires periodic review within (before the expiration of) each six month period. See §§671(a)(16), 675(5)(B). Further, §671(b) provides for either discontinuance or reduction of payments to a State in the event that an approved State plan no longer complies with the requirements of §671(a) or, through its administration, there is substantial failure to comply with the provisions of the plan. Thus, as indicated by clear statutory language and well-established case law, compliance with the Federal Act is essential if the State Department of Social Services (DSS) wishes to avoid the risk of a discontinuance or reduction of funding for this program.

Further, the South Carolina General Assembly, by incorporating federal funds in the State's formal appropriation process, has impliedly bound the State to comply with federal laws attaching to the funds. Act 651 of 1978 provides, in part:

> Section 2. The General Assembly hereby reaffirms its intent . . . to modify the structure and content of the State General Appropriation Act so as to subject to the legislative appropriating process all funds expended within the state government, including

> not only those derived from the general fund but those from the federal government . . . effective with the General Appropriation Act for 1978-79.

Act 651 of 1978, as amended in 1983, was named 'The South Carolina Federal and Other Funds Oversight Act.' One of the 1983 amendments provides:

> Section 4. The General Assembly shall appropriate all anticipated federal . . . funds for the operations of state agencies in the annual General Appropriation Act and must include any conditions on the expenditure of these funds as part of the General Appropriation Act, consistent with federal laws and regulations . . . . (Emphasis added).

The foregoing language indicates a recognition by the General Assembly that any State imposed conditions on the expenditure of federal funds must not conflict with federal laws. Thus, although there appears to be no language which says in plain terms that the State, in accepting federal funds, agrees to comply with federal laws relating thereto, by strong implication the State has nevertheless made such an agreement.

The issue is further complicated by a proviso which appears in Part III, Section 2 of the 1985 Appropriations Act:

> . . . . Provided, Further, That notwithstanding any other provision of law: The funds appropriated in SECTION 1 of this Part of this act for "Foster Care of Children Review Board" . . . must be expended in accordance with and subject to the following provisions:
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> * * * *
>
> B. The functions and powers of local foster care review boards are as follows:
>
> > (1) To review every six months cases of children who have resided in . . . foster care for a period of more than six consecutive months . . . . (Emphasis added).

The appropriation to which this proviso attaches appears to be entirely from the General Fund and does not involve federal funds.

It appears that the guidance which you seek calls for suggestions toward a practical solution rather than a legal interpretation, taking into account the interests of both the Children's Foster Care Review Board System (the Board) and DSS. Clearly, under present South Carolina law, the Board is permitted to review children in foster care only after a six month period has expired. The Board presently lacks the authority to conduct reviews in a time-frame less than the six month mandate, even if it is the Board's wish to comply with the Federal Act. On the other hand, DSS presumably wants to avoid the risk of losing any portion of the federal funding through being found in noncompliance with the Federal Act. Ms. Foley's July 18, 1986, letter, quoting from the written comments of the federal audit, refers to federal review practice permitting a "30-day grace period" for periodic reviews. It is my understanding that there is no federal statute or regulation which provides for such a grace period but rather that a grace period might or might not be granted by way of an "instruction" from the Secretary of Health and Human Services to the Regional Audit Team for each audit performed. Thus, DSS cannot rely upon any grace period being allowed. Additionally, should a grace period be permitted in the future, it appears that it would be applied "after the fact," that is, at the time the audit is performed. Therefore, from the standpoint of DSS, periodic reviews should be conducted within the six month time-frame, and not later.

In order to resolve this situation, the Board might consider taking steps toward amending §20-7-2376 and Reg. 24-17 D so that State law conforms to the Federal Act. In the interim, DSS might wish to consider utilizing some other means of periodic review - not involving the Board. 42 U.S.C. §675(5)(B) provides for periodic review "by either a court or by administrative review (as defined in paragraph (6)) . . . " §675(6) defines "administrative review" as

> a review . . . 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. (Emphasis added).

Under this definition, it seems that there would be nothing to prevent DSS from implementing a separate mechanism for review, such as an internal review system. Additionally, under §20-7-2397, it appears that DSS would not be precluded from electing some other means of review. Section 20-7-2397 states that the provisions of Subarticle 4 (Foster Care Review Board)

> . . . may not be construed to limit or delay actions by agencies . . . to arrange for . . . foster care . . . or other related matters on their own initiative, nor do the provisions of this subarticle in any manner alter or restrict the duties and authority of these agencies . . . in those matters. (Emphasis added).

In reviewing Ms. Foley's letter, it appears that an agreement might already have been reached between DSS and the Board concerning an alternative form of review. Quoting from a DSS action plan in response to the audit's findings, the letter states:

> . . . . It has been agreed that on those cases in which the timeliness of the six (6) month review is in jeopardy, a mutually agreed upon mechanism triggers the need for an alternative third party review . . . .

I believe that the State law could reasonably be interpreted to mean that the requirement that a review take place after more than six (6) consecutive months applies only to the first periodic review and that subsequent six (6) month reviews could reasonably occur during the fifth month. Therefore, it might be appropriate to consider an alternative method only for the initial periodic review.

I trust the foregoing will be of assistance to the Board in determining how best to proceed.

Sincerely yours,

Jane McCue Johnson

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Assistant Attorney General

JMJ/rho

REVIEWED AND APPROVED:

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