

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS & RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF:

SOAHR Docket No. 2007-1541REHD
DHS Reg No: 2007-04550
Case No: [REDACTED]

[REDACTED]

Claimant

_____ /

ADMINISTRATIVE LAW JUDGE: Marya A. Nelson-Davis

REHEARING DECISION

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9; MCL 400.37; and MAC R 400.919 upon an Order of Rehearing granted on August 27, 2008. Claimant was represented by [REDACTED].

ISSUE

Did the Administrative Law Judge err when she reversed the Department's determination that the Order for removal of the child from the home did not meet the requirements for Title IV-E funding?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

- (1) On January 18, 2007, Administrative Law Judge (ALJ) Rhonda P. Craig issued a Decision & Order in which she reversed the Department of Human Services (DHS) decision to terminate Title IV-E funding.
- (2) Findings of Fact 1, 2, & 4-8 from ALJ Craig's Decision & Order are incorporated herein by reference.

- (3) The October 10, 2004 Order from the Washtenaw County Circuit Court indicated that “conditions or surroundings of the child(ren) are such as to endanger the health, safety, or welfare of the child(ren) and it is contrary to the welfare of the child(ren) to remain in the home because parents unable to care for the minor due to arrest, minor has contracted medical condition, no suitable relative placement can be located.”

CONCLUSIONS OF LAW

Federal foster care funding is subject to the conditions of Title IV-E of the Social Security Act, 42 U.S.C. 670-679b. Pursuant to a congressional mandate, the US Department of Health and Human Services (HHS) promulgated regulations to implement Title IV-E. These regulations are now codified at 45 C.F.R. 1355, 1356, and 1357. Introductory materials and comments for Title IV-E, commonly known as the *preamble*, are set forth in the Federal Register at 65 FR 4020-4093. Further guidance has been provided from HHS through a variety of publications including the *Title IV-E Foster Care Eligibility Review Guide* and the *Child Welfare Policy Manual*.

Federal IV-E regulations provide that judicial determinations “must be explicitly documented and must be made on a case-by-case basis.” 45 C.F.R. 1356.21(d)(1). The Federal Register of Tuesday, January 25, 2000, explains the reasoning for the regulations found at 45 C.F.R. 1356.21(d) which require IV-E documentation of reasonable efforts and contrary to the welfare determinations 65 FR 4020 provides in pertinent part

Our purpose for proposing this policy can be found in the legislative history of the Federal foster care program. The Senate report on the bill characterized the required judicial determinations as ... important safeguard(s) against inappropriate agency action ... and made clear that such requirements were not to become ... a mere pro forma exercise in paper shuffling to obtain Federal funding ... (Senate Report No. 336, 96th Cong., 2d Sess. 16 (1980).

The Federal Register goes on to explain that:

While we can allow some flexibility in this area, it is a statutory requirement that the specific judicial determinations regarding reasonable efforts and contrary to the welfare be explicit in court orders. Section 1356.21(d) (1) of the regulation states that we will accept transcripts of the court proceedings if the

necessary judicial determinations are not in the court orders.

The Title *IV-E Foster Care Review Guide* further interprets 45 C.F.R. 1356 (d)(1) to mean that "... the court orders must definitively articulate the judge's child specific ruling pertaining to the 'contrary to the welfare' and 'reasonable efforts' determinations." The *Child Welfare Policy Manual* provides in pertinent part:

The contrary to the welfare finding must be explicit and made on a case by case basis. Items such as nunc pro tunc orders, affidavits, and bench notes are not acceptable substitutes for a court order. Only an official transcript is sufficient evidence of the judicial determination." (Source ACYF-CB-PA-01-01)

Federal Title IV–E law provides that the presiding judge must make a finding in the first court order removing the child from the home that "continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interests of the child." 45 C.F.R. 1356.21(c). A finding of contrary to the welfare and best interests of the child must be based on an actual judicial inquiry and demonstration of what would be contrary to the welfare of the child and in the best interests of the child. 45 C.F.R. 1356.21(d); 65 FR 4055-56. The only exception to this requirement occurs when the presiding judge, in his court order, omits a contrary to the welfare finding. This "technical error" exception applies only when the presiding judge makes both a contrary to the welfare inquiry and finding at the first removal hearing, but fails to include those findings in the court order .Transcript(s) of the applicable court proceeding can remedy this error by omission so long as the court's inquiry and findings are memorialized in the transcript of the proceeding. 45 C.F.R. 1356.21(d)(1).

Federal regulations and Department policy clearly require a judicial determination regarding "reasonable efforts" within 60 days of the Claimants actual placement.

(b) *Reasonable efforts.* The State must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured; to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child); and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. In order to satisfy the "reasonable efforts" requirements of section 471(a) (15) (as implemented

through section 472(a) (1) of the Act), the State must meet the requirements of paragraphs (b) and (d) of this section. In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child's health and safety must be the State's paramount concern.

(1) *Judicial determination of reasonable efforts to prevent a child's removal from the home.* (i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the removal, in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home pursuant to paragraph (k)(1)(ii) of this section.

(ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the title IV-E foster care maintenance payments program for the duration of that stay in foster care.

45 CFR 1356.21(b), CFF 902-2

Federal regulations at 45 CFR 1356.21(d) (2) state that "Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of reasonable efforts and contrary to the welfare judicial determinations." Supporting comments in the January 25, 2000, Federal Register state that:

"We placed the ban on nunc pro tunc orders because we discovered that they were being used months, sometimes years, later to meet reasonable efforts and contrary to the welfare requirements that had not been met at the time the original hearing took place".

65 FR 4020-4093

Federal Regulations also provide that a judicial determination of "reasonable efforts" to prevent a child's removal from home or to reunify the child and family is not required if the Department obtains a judicial determination of one of the following:

(i) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) A court of competent jurisdiction has determined that the parent has been convicted of:

(A) Murder (which would have been an offense under section 1111(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(B) Voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(C) Aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter; or

(D) A felony assault that results in serious bodily injury to the child or another child of the parent; or,

(iii) The parental rights of the parent with respect to a sibling have been terminated involuntarily.

42 CFR 1356.21(b) (3)

The Department of Human Services policy for Title IV-E eligibility, in effect at the time of the Department's proposed action, provides, in pertinent part:

In order for a child to be Title IV- E eligibility the court order must contain documentation of the evidence used by the court to make the following judicial findings. Court order may contain check boxes for the finding, but the determinations:

- must be explicit and made on a case by case basis. Cannot be amended by a subsequent

order .e.g.nunc pro tunc order which amends the original order.

Other criteria include:

- Orders may reference the petition or court report or other reports available to the court as documentation of the evidence used for these finding. (See” contrary to the welfare’ below for restrictions on references to the petition.) Copies of the petition or reports, nor already contained within the case file, must be attached to the court order and contained in the child’s case record. (the court does not need to attach the ISP/USP or court report that was submitted by FIA to the court order.)
- If a worker’s testimony is used to support the judicial findings, the court must either list the evidence used within the court order or attach a copy of the transcript to the court order. The entire transcript does not need to be attached to the court order.
- The court order may not reference state law for these determinations.

The specific findings are:

Regulation require the court to make a “contrary to the welfare” or ”best interest” determinations IN THE FIRST COURT ORDER REMOVING THE CHILD FROM HIS/HER HOME for Title IV–E eligibility. The first court order is defined as the emergency removal order (e.g. JC 05 or the preliminary hearing order (e.g. JC 10 or JC 11a) if there was not emergency removal order, the “contrary to the Welfare” determination must also be made within the first court order for each new placement episode, regardless of whether a new petition if filed or not. See CFF 902, FINANCIAL DETERMINATIONS for information on placement episode.

The child is ineligible for the current placement episode if the finding is not made in the first order for

each placement episode. The determination must be explicit and made on a case by case basis.

Children's Foster Care Manual 902-2,
pp 11-12

Department policy at the Children's Foster Care Manual CFF 902-2, pp 11, 13 provides that a finding of "reasonable efforts" must be made within 60 days of the child's placement.

In the present matter, the undisputed facts show that in October 2004, the [REDACTED] [REDACTED] heard the Washtenaw County Family Independence Agency (FIA, now Department of Human Services) petition for removal of the Claimant from her home. On October 10, 2004, the [REDACTED] issued an order to have Claimant placed at a hospital if medically necessary until medically released to FIA for placement. This Order included the following finding:

- a. conditions or surroundings of the child(ren) are such as to endanger the health, safety, or welfare of the child(ren) and it is contrary to the welfare of the child(ren) to remain in the home because parents unable to care for minor due to arrest, minor has contracted medical condition, no suitable relative placement can be located." (Claimant Exhibit B)

On October 12, 2004, DHS filed a petition, asking the court to take temporary jurisdiction of Claimant and place her under the care and supervision of FIA. According to the petition:

1. On or about October 10, 2004, said mother, [REDACTED], was arrested in Ypsilanti. She and her baby, [REDACTED], were found in a stolen car with drug paraphernalia.
2. On or about October 10, 2004, said mother, [REDACTED], admitted to shooting up heroin with her child present in the car.
3. Said mother, [REDACTED], admitted to being homeless.
4. Said mother, [REDACTED], admitted to having a drug addiction.
5. The mother is currently in [REDACTED] program.
6. The legal father of [REDACTED] is [REDACTED]. There is a substantiated CPS investigation in [REDACTED] involving the father, the details are unknown at this time. (Claimant Exhibit C)

A preliminary hearing was held on October 12, 2007. The [REDACTED] found that there was probable cause to believe the facts in the petition are true based on the testimony of the FIA CPS worker, backed up by written transcript; and reasonable efforts were made, prior to the placement of the child(ren) in foster care, to prevent or eliminate the need for removing the child(ren)'s home, and reasonable efforts were made to prevent the child(ren)'s removal from child(ren)'s home or to rectify the conditions that caused the child(ren)'s removal from the child(ren)'s home in accordance with MCL 712A.18f(4). The [REDACTED] ordered that "the child(ren) be placed with out of home placement under the care and supervision of the FIA" and [REDACTED] visitation be suspended pending further order of the Court. In addition FIA was ordered to facilitate supervised visitation between [REDACTED] and her siblings no less than one time per month. The transcript of the October 12, 2004, hearing shows that on direct examination, the CPS worker assigned to Claimant's case testified that: she was on-call Sunday, October 10 when she received a call that Claimant's mother had been arrested by the [REDACTED]; she responded to the call by going to the [REDACTED] and meeting with Claimant's mother; Claimant was with her mother at the time of the arrest and needed placement in foster care; and she filed a petition, containing six paragraphs, in this matter. The worker gave an affirmative answer to the question of whether the allegations contained in the petition are fair, accurate and correct.

The Department requested a Rehearing/Reconsideration on the basis that the previous ALJ erred when she reversed the Department's determination that Claimant did not qualify for Title IV-E funding. The Department argues that there were three more hearings in this case held after October 2004; however, there was no judicial determination of reasonable efforts made within 60 days from the date the child was removed from her home.

Claimant argues that in October 2004, the month the child was removed from the home, the court made a "reasonable efforts" finding in accordance with Title IV-E eligibility requirements. The [REDACTED] reasonable efforts finding was based on the written transcript of the worker's testimony at the hearing held on October 12, 2004. In addition, the [REDACTED] concluded that the child's parents were unable to care for her, and no suitable relative could be found. However, neither the October 2004 transcript nor the October 2004 court orders comply with the Title IV-E eligibility requirements. They do not contain case stipulated facts which show, specifically, what the Department or CPS worker did to prevent the unnecessary removal of the child from her home. Further, the petition fails to establish the "reasonable efforts" made by the worker. The petition does not contain an allegation which shows clearly the efforts made by the worker to locate the absent parent or identify willing relatives to care for the child who was removed from her home.

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In conclusion, this Administrative Law Judge finds that the October 2004 Court Orders do not contain case specific documentation to support the Court's "reasonable efforts" findings. The transcript of the October 12, 2004, hearing (Claimant Exhibit D) is insufficient case specific documentation to establish IV-E eligibility. Therefore, under 45 CFR 1356(b)(1)(ii) and CFF 902-2, Claimant was not eligible for Title IV-E foster care maintenance program payments. The failure of the [REDACTED] to meet these requirements rendered Claimant, according to applicable Federal regulations and Department policy, ineligible for Title IV-E funding for the duration of her stay in foster care.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the Administrative Law Judge erred when she reversed the Department's determination that the Order for removal of the child from the home did not meet the requirements for Title IV-E funding.

Accordingly, the Department's decision regarding Claimant's eligibility for Title IV-E funding is AFFIRMED.

/s/ _____
Marya A. Nelson-Davis
Administrative Law Judge

Date Signed: May 5, 2009

Date Mailed: May 6, 2009

cc:

[REDACTED]

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***** NOTICE *****

The Appellant may appeal this Rehearing Decision to Circuit Court within 30 days of the mailing of this Rehearing Decision.