

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

[REDACTED]

Claimants

Reg. No: 2008-31562

Issue No: 6033

Case No:

[REDACTED]

Load No:

Hearing Date:

January 14, 2009

Muskegon County DHS

ADMINISTRATIVE LAW JUDGE: Landis Y. Lain

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon claimant's request for a hearing. After due notice, a telephone hearing was held on January 14, 2009. [REDACTED], Guardian Ad Litem, appeared on behalf of the claimants. [REDACTED] appeared on behalf of [REDACTED].

ISSUE

Whether the Department of Human Services (department) acted in compliance with department policy when it determined claimant's eligibility for Title IV-E payments?

FINDINGS OF FACT

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

(1) A preliminary hearing (Child Protective proceedings) was held on May 7, 2008. At that hearing it was determined that one of the children's [REDACTED] (hereinafter claimants or the children), fathers did not receive notice of the hearing.

(2) A Preliminary Order was issued from this hearing which released ([REDACTED]

[REDACTED] the children to the care of a relative, under DHS supervision.

(3) The order indicates that the placement would continue, pending resumption of the Preliminary Hearing on May 8, 2008.

(4) Upon receipt of the court order, the department conducted a Title IV-E review and determined that the children did not qualify to receive Title IV-E eligibility. The Case review determined that the May 7, 2008 letter placing the children did not contain a Contrary to the welfare finding.

(5) The [REDACTED] was notified of the problem and indicated that it was not their intention to place the children. The children were not removed from the home on [REDACTED].

(6) On May 8, 2008, the Court issued an Order After Preliminary Hearing, stating that the children are released to [REDACTED] under the supervision of the Department of Human Services and was to have no contact with [REDACTED]. Placement was to continue pending the resumption of the preliminary hearing. (Department Exhibit #3)

(7) The Court forwarded DHS an amended Order After Preliminary Hearing on May 8, 2008 stating that notice of hearing was given as required by law and deleted the child's placement under DHS supervision. The order stated the following:

- There was probable cause to believe the legal/putative fathers were [REDACTED]. There was probable cause to believe that one or more of the allegations in the petition were true.
- It was "contrary to the welfare of the children to remain in the home because: the alleged domestic violence in the home between the mother and her long term partner places the children at a substantial risk of harm. The mother has been requested to remove him from the home in the past and after she indicated that he was no longer in the home there have been reports that he has not left."

- Reasonable efforts were made to prevent removal of the children from the home. Those efforts include: The Department of Human Services has provided the family with [REDACTED] and [REDACTED] money to get a home. (Department Exhibit 4)

(8) On June 16, 2008, the department caseworker notified the Guardian Ad Litem that the children were not eligible for Title IV-E funding.

(9) On September 4, 2008, the Guardian Ad Litem filed a request for a hearing to contest the department's negative action.

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).

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.” In addition, Federal regulations require a court finding within 60 days of the child’s actual removal that reasonable efforts have been made to prevent the child’s removal. See 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 and/or reasonable efforts finding. This “technical error” exception applies only when the

presiding judge makes a contrary to the welfare and/or reasonable efforts inquiry and findings at the first removal hearing, but fails to include those findings in the subsequent court order.

Transcript(s) of the applicable court proceeding can remedy the court's error so long as the Court's inquiry and findings are memorialized in the transcript. 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

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, not 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.

Department manuals provide the following policy statements and instructions for caseworkers:

Title IV-E is a funding source.

To be eligible for payment under Title IV-E, children must, by Family Court or Tribal Court order, be under DHS supervision for placement and care or committed to DHS.

If a youth has been initially determined not eligible for Title IV-E funding (based on ineligibility of the family for the former AFDC grant program or the judicial determinations do not meet the time requirements detailed in CFF 902-2, s/he will never be eligible for Title IV-E funding while in this placement episode.

Title IV-E foster care payments may begin from the first day of placement in the month in which all eligibility criteria are met. Eligibility criteria which must be met includes:

- Required judicial determinations of "reasonable efforts" and "contrary to the welfare" on a signed court order.
- AFDC eligibility, including establishment of financial need and deprivation.
- Living with and removed from same AFDC specified relative.
- A child must be under the age of 18, unless enrolled full-time in high school or an equivalent vocational or technical course and can reasonably be expected to complete the course prior to the nineteenth birthday.
- Legal jurisdiction, by way of a signed court order from a family or tribal Court order that gives DHS Placement and care responsibilities.

A family court order must exist which makes the Department of Human Services responsible for the child's placement and care.

Court orders do not have to contain the exact words "placement and care;" substitute wording such as "care and supervision," "placement and supervision" or "placed in foster care or with a

suitable relative,” may be used without affecting Title IV-E funding eligibility.

Child and Family Services, Foster Care (CFF) 902-1

A family court order giving the DHS responsibility for placement and care acts as the application for Title IV-E. For youth released under Act 296, P.A. 1974, the order terminating rights meets this requirement as long as the DHS is given responsibility for placement and care.

Jurisdiction of the eligible child must have been taken under either the neglect or delinquency section of the Juvenile Code.

Orders for state wards must include the words: “committed to the Michigan Department of Human Services.” The public act under which the youth is committed (i.e., the Youth Rehabilitation Services Act, 1974 P.A., 150 or the MCI Act, 1935 P.A., 220) must be identified on the commitment order. Orders for temporary or permanent court wards must contain the words: “placed with the Michigan Department of Human Services for placement and care.” See MCL 400.55(H).

The department cannot assume financial responsibility for a youth until it is in receipt of a court order delegating legal authority for a youth to the department. Therefore, the intake and acceptance procedures outlined in [See CFF 722-1, COURT ORDERED PLACEMENTS](#) and JJ2 Item 230, SERVICE PLANS, are to be followed for any youth placed with the department for placement and care. Title IV-E funding is not to be authorized prior to the acceptance date, which is the day the court order is signed by the judge/ referee.

Orders issued by tribal courts for Indian children have the same validity as do family court orders. These orders must make the department responsible for placement and care. Orders which stipulate that placement choices be limited to foster homes on the reservation are acceptable. Family foster care services for these children are to be purchased from a Michigan Indian child welfare agency with which the state department has a contract.

In order for a child to be Title IV-E eligible the court order must contain documentation of the evidence used by the court to make the following judicial findings. Court orders may contain checkboxes for the finding, but the determinations must be explicit and made on a case by case basis. The order cannot be amended by a subsequent order, e.g., a nunc pro tunc order, which amends the original order.

Other criteria include:

- Orders may reference the petition, court report or other reports available to the court as documentation of the evidence used for these findings. (See “Continuation In The Home Is Contrary To The Welfare” determination below for restrictions on references to the petition.) Copies of the petition or reports, not already contained within the case file, must be attached to the court order and contained within the child’s case record. (The court does not need to attach the ISP/USP or court report that was submitted by the supervising agency 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.

“Continuation In The Home Is Contrary To The Child’s Welfare” Determination

Regulations require the court to make a “contrary to the welfare” or “best interest” determination **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 no 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 is filed or not.

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.

For abuse/neglect wards, the court order may reference the petition to document this finding. This is not acceptable for juvenile justice youth because the petition details the youth’s criminal behavior. Other juvenile justice criteria include:

- The finding must be based upon the parents’ actions, not the youth’s behavior. Evidence that only references the youth’s behavior does not meet this requirement.

- References to “removal is in society’s best interest” do not meet this requirement for juvenile justice youth.

As a minimally accepted standard for abuse/neglect wards:

- The child’s correct name must be on the court order, and
- A box is checked that states/finds that it is contrary to the child’s welfare to remain in his/her home, based on the petition, or DHS report, and/or testimony.

For testimony, a copy of the transcript must be attached to the court order. DHS must also have a copy of any referenced report.

Title IV-E eligibility may begin the day the written removal order is signed.

The supervising agency must make reasonable efforts to prevent removal and finalize another permanency plan except under defined circumstances. The child’s health and safety must be of paramount concern.

In order to be eligible for Title IV-E funding, the court must make two separate reasonable efforts determinations. These determinations must be:

- Explicit and made on a case by case basis. Vague references to “CPS or foster care services” or “probation services” are not acceptable.
- Made at a court hearing where the parents and child(ren) have the opportunity to attend the hearing.
- Contained in writing in the court order. It is not enough that efforts were described to the court. The court must actually decide that they were made.

The first determination, “the agency has made reasonable efforts to prevent removal from the home,” must be made at a court hearing held within 60 days of the child’s removal from his/her home. Title IV-E eligibility cannot begin until the reasonable efforts judicial determination has been obtained.

Title IV-E foster care payments may begin from the first day of placement provided the Reasonable Efforts to Prevent Removal finding has been made at a court hearing that calendar month.

If the finding is not made in the calendar month of removal, Title IV-E eligibility would begin the first day of the month in which all

eligibility criteria are met, provided that is within the 60 day time frame.

The child's case is ineligible for Title IV-E funding for the current foster care episode if:

- The judicial finding is not made within the 60 day time frame;
- The court refuses to make this finding; or
- The court finds that reasonable efforts to prevent removal were not made.

The "reasonable efforts to prevent removal" finding must be made for each placement episode within 60 days of removal, regardless of whether a new petition is filed.

The date the order is signed or received in the office is not relevant in terms of meeting the 60 day time frame. A subsequent order (e.g., a nunc pro tunc order) amending the original order

Reasonable efforts are not required to prevent the child's removal from home due to any of the following:

- Parent's conviction for murder of another child of the parent.
- Parent's conviction for voluntary manslaughter of another child of the parent.
- Parent's conviction for aiding or abetting, attempting, conspiring, or soliciting to commit the murder or voluntary manslaughter of another child of the parent.
- Parent's conviction for felony assault that resulted in serious bodily injury to the child or another child of the parent.
- The parental rights of the parent with respect to a sibling have been terminated involuntary.

Additionally, reasonable efforts are not required if the court has determined that the parent, or guardian of the child has abused the child or a sibling of the child, and per Michigan law the abuse must include 1 or more of the following aggravated circumstances (MCL 722.638(1)(a)):

- Abandonment of a young child.
- Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
- Battering, torture, or other severe physical abuse.

- Loss or serious impairment of an organ or limb.
- Life threatening injury.
- Murder or attempted murder.
- Or, the parent of the child failed to protect the child from one of the above.

Detention facilities, training schools, county juvenile justice facilities, youth camps or other facilities operated primarily for the detention of children who are determined to be delinquent are not eligible for Title IV-E funding. These facilities are not included within the definition of “foster care”.

CFF 902-2.

The original court Order After Preliminary Hearing does not contain ‘contrary to the welfare’ findings as is required by policy. As such, the department appears to have met its burden of proof that the children are not eligible for Title IV-E funding for [REDACTED] placement.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides the Department of Human Services acted in compliance with department policy. Accordingly, the department’s action is **HEREBY UPHELD**.

/s/

Landis Y. Lain
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: February 26, 2009

Date Mailed: February 26, 2009

NOTICE: Administrative Hearings may order a rehearing or reconsideration on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. Administrative Hearings will not order a rehearing or reconsideration on the Department's motion where the final decision cannot be implemented within 90 days of the filing of the original request.

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

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