STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:
Issue [redacted]
Case [redacted] Load
Hearing [redacted]
July

Reg. No. 2009-22641
No. 6033
No. [redacted]
No. [redacted]
Date:
20, 2010
Cheboygan County DHS

ADMINISTRATIVE LAW JUDGE: Landis. Y. Lain

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9; MSA 16.409 and MCL 400.37; MSA 16.437 upon the Claimant (Petitioner) request for a hearing. After due notice a telephone hearing was held on July 20, 2010. The Petitioner was represented by [redacted] Guardian ad Litem, [redacted]

ISSUE

Whether the Department properly determined that claimant's Title IV-E funding payment for out of home care should be cancelled/denied under the circumstances?

FINDINGS OF FACT

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

(1) The Child is [redacted] , hereinafter known as 'the Child', DOB [redacted].

(2) On October 9, 2007, after the prelim inary hearing, the Ch ild's sis ter was removed from their mother's care. At that time the child remained in the custody of his mother. (Department Exhibit #3-7)

(3) Contrary to the welfare findings were made about the sister only.

(4) On August 28, 2008, a motion reques ting review and removal of the Child was submitted to the family court. (Department Exhibit #9)

(5) On August 28, 2008, an emergency removal hearing was held.

(6) On August 28, 2008, an Order following Emergency Removal Hearing was issued. (Department Exhibit #12-16)

(7) Page one item eight of the Order indicated that contrary to the welfare findings had been made in the order authorizing the emergency removal (form JC 05b).

(8) No JC 05b was authorized and does not exist.

(9) The funding determination was completed by the department and petitioner was found to be eligible for Title IV-E funding.

(10) On March 16, 2009, a Title IV-E case reading review (DHS – 436) was completed as required by the Children's Services Supervisor.

(11) On March 17, 2009, the Court Order dated August 28, 2008, was sent to DHS Central Office for review by the Title IV-E federal compliance unit.

(12) On March 19, 2009, DHS confirmed the committee's review and indicated that if there was no JC 05B in existence then that posed a problem for Title IV-E funding eligibility for the Child.

(13) On March 23, 2009, the department caseworker sent petitioner notice that the Child was not eligible to receive Title IV-E funding because there had been no documentation of evidence used by the family court to make the contrary to the welfare determination at the first court order removing the Child from his home.

(14) On March 27, 2009, the Child's representative filed a request for a hearing to contest the department's negative action.

CONCLUSIONS OF LAW

Legal authority for the Department to provide, purchase or participate in the cost of out-of-home care for youths has been established in state law: the Probate Code Chapter XII-A, Act 288, P.A. of 1939; the Social Welfare Act. Act 280, P.A. of 1935; the Michigan Children's Institute Act, Act 220, P.A. of 1935; the Michigan Adoption Code, Act 296, P.A. of 1974; and the Youth Rehabilitation Services Act P.A. 150, of 1974. These laws specify the method of the Department involvement in these costs. The legislature has established a system whereby:

(1) the local court may provide out-of-home care directly and request reimbursement by the state (Child Care Fund), or

(2) the court may commit the youth to the state and reimburse the state for care provided (State Ward Board and Care).

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).

> 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 benc h notes are not acceptable substitutes for a court order. On ly an official transcript is sufficient evidence of the judi cial 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 we lfare, or that placement w ould 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 t hat reasonable efforts have been m ade to prevent the child's removal. See 45 C. F.R. 1356. 21(c). A finding of contrary to the welfare and best interest of the child m ust be based on an actual judic ial inquiry and dem onstration 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 exc eption to this requirement occurs when the presiding Judge, in hi s court order, omits a cont rary to the welfare and/or reasonable efforts finding. This "technica l error" exception applies only when the presiding Judge makes a contrary to the w elfare and/or reasonable efforts i nquiry and findings at the first removal hear ing, but fails to include thos e findings in the subsequent court order. Transcript(s) of the applic able court proceedi ng can remedy the court' s error so long as the Court's in quiry and findings are memori alized in the transcript. 45 C.F.R. 1356.21(d)(1).

Federal regulations and departm ent's policy clearly require a judicial det ermination regarding "reasonable efforts" within 60 days of the claimants' actual placement.

> (b) *Reasonable efforts.* The State must make reasonable efforts to maintain t he family unit and prevent t he 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 a nd family (if temporary out-of-home plac ement is necessary to ensure t he 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" requirem ents of section 471(a)(15) (as implemented through sectio n 472(a)(1) of the Act), the State must meet the r equirements of paragraphs (b) and (d) of this section. In determining reasonable efforts to be made with res pect to a c hild and in making s uch reasonable efforts, the child's health and s afety must be the State's paramount concern.
>
> (1) *Judicial determination of reasonable efforts to prevent a*

(c) *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 (FOM 902-2, pages 12-13)

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

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 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 findings. (See "contrary to the welfare" below for restrictions on references to the petition.) Copies of the petition or reports, or 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:

> Regulations 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 is 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 (FOM 902-2)

Department's policy at the Children's Foster Care Manual CFF 902-2, pp 11, 13, (FOM 902-2, pages 12-13) provides that a finding of "reasonable efforts" must be made within 60 days of the child's placement.

At hearing, the department asserted that a finding of reasonable efforts was not made in the first order of removal nor in an order issued within 60 days of the original removal of the child. There is no available transcript of the hearing.

After careful examination of the record, the Administrative Law Judge finds that the court did not make a proper finding of "reasonable efforts" within the 60 day time frame required by department policy. Although there was a contrary to the welfare finding made in the original Emergency Order of Removal, the evidence upon which the determination was relied upon was not explicitly stated in the order. The order indicated

that it was relying on t he JC 05b form, but that form is not in existence. Therefore, the department's termination of Title IV-E funding for this claimant must be upheld.

DECISION AND ORDER

The Administrative Law Judge, based upon t he above findings of fact and conclusion s of law, decides the Depar tment of Human Servic es did act in compliance with department policy when it cancelled/denied claimant 's eligibility for Title IV-E foster care funding.

Accordingly, the department's action is hereby AFFIRMED.

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

Date Signed: February 15, 2011

Date Mailed: February 16, 2011

NOTICE: Administrative Hearings may or der a rehearing or reconsideration on either its own motion or at t he request of a party within 30 days of the mailing date of this Decision and Order. Administrative Hear ings will not orde r a rehearing or reconsideration on the Department's mo tion where the final decis ion 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 mailing of the Decis ion and Order or, if a ti mely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

LYL/alc

cc: [redacted]