



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: May 12, 2017
MAHS Docket No.: 17-002378
Agency No.: [REDACTED]
Petitioner: [REDACTED]

[REDACTED]

MAHS Docket No.: 17-002376
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Aaron McClintic

HEARING DECISION

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a telephone hearing was held on April 12, 2017, from Lansing, Michigan. The Petitioners were represented by Attorney [REDACTED]. The Petitioner's Attorney, [REDACTED] agreed to consolidate the cases of [REDACTED] and [REDACTED] because the facts were essentially the same, the Department did not object to the consolidation. The Department of Health and Human Services (Department) was represented by Assistant Attorneys General [REDACTED] and [REDACTED]. [REDACTED] and [REDACTED] testified for the Department. Department Exhibit 1, pp. 1-73 was received and admitted without objection.

ISSUE

Did the Department properly deny Title IV-E funding for Petitioners?

FINDINGS OF FACT

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

1. The Petitioners, [REDACTED] and [REDACTED], are minor children who were removed from their parents and taken into custody by the Department on September 5, 2016.

2. On September 5, 2016, a Petition for Delinquency Proceedings was filed, seeking removal of the Petitioners from their parents.
3. A hearing was conducted in the [REDACTED] Family Court pursuant to the Petition on September 5, 2016. The Petitioners were removed after the hearing on September 5, 2016.
4. The [REDACTED] Family Court entered an Order to Apprehend and Detain in the Delinquency Proceeding on September 5, 2016, finding that there are reasonable grounds to apprehend the juvenile in compliance with MCL 721A.2, MCR 3.933(B), or MCR 3.983 because “the juvenile is charged with a committing an offense that would provide authority for issuance of a warrant were the juvenile an adult. Date of offense: 09/05/2016 Offense: BREAKING AN ENTERING.”(Dept. Ex. 1, p.8)
5. On October 10, 2016, a Child Protective Proceeding Petition was filed in the [REDACTED] Family Division Court.
6. The [REDACTED] Family Court Judge issued an Order After Preliminary Hearing (“Order”) on October 11, 2016, ordering the Petitioners be placed with the Department for care and supervision and that they also be placed with [REDACTED]. The Order specifically found that “It is contrary to the welfare of the juvenile to remain in the home, or placement would be in the best interests of the juvenile, because: The children had been residing in their grandmother’s home. They were kicked out due to their criminality and unacceptable behavior. This resulted in them being homeless for several weeks. Neither parent is willing to provide for their care and custody of the children. The children have been detained at the [REDACTED] Juvenile Home on delinquency petitions and the parents refuse to take custody upon their release.” (Dept. Ex. 1, p. 19.)
7. The Order also found that “Consistent with the circumstances, reasonable efforts were made to prevent or eliminate removal of the juvenile from the home. Those efforts include: DHHS has attempted to find a family member to take the children and all have refused. Services offered include Project Impact, Families First, and AOI. All have been refused. Probation and Juvenile Court services have been provided to the children. Mother receives food assistance and father receives Medicaid.” (Dept. Ex.1, p.19)
8. Petitioners never returned to their parents’ care between September 5, 2016, and October 10, 2016.
9. The Petitioner applied for Title IV-E funding on an unspecified date as no application date was provided.
10. The Federal Compliance Division reviewers reviewed the delinquency order and found this case would not be IV-E eligible due to contrary findings not being made on the order unless there was a transcript that had the findings.

11. On November 15, 2016, the [REDACTED] County Department sent a Notice of Case Action denying the Petitioners' Payments for Title IV-E funding stating "The court order does not contain a finding with case specific documentation that is contrary to the child's welfare to remain in the home. There was no hearing within 60 days of the child's removal that resulted in a court order with case specific documentation finding that reasonable efforts to prevent removal had been made. The placement is not eligible for title IV-E funding. And while in detention." (Dept. Exh. 1, p.72-73).
12. The Petitioners' Attorney Guardian Ad Litem, Attorney [REDACTED], requested a timely hearing on February 8, 2017. (Dept. Ex. 1, pp. 4-5.)

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Children's Foster Care Manual, FOM, Bridges Administrative Manual, (BAM), and Children's Protective Services Manual (PSM). Title IV-E requirements, 42 USC 670, et seq. The Adoption Assistance and Child Welfare Act of 1980. Title IV-E is The Foster Care Program implemented by the Social Security Act Section 401 et seq., as amended and implemented under the Code of Federal Regulations at 45 CFR parts 1355, 1356 and 1357.

The issue in this case is whether the Department of Health and Human Services properly denied the Petitioners' Title IV-E funding. Respondent Department contends that the Order to Apprehend and Detained issued September 5, 2016, did not contain sufficient contrary to the welfare findings with case specific documentation to support Title IV-E funding.

Any child for whom Title IV-E foster care maintenance payments are claimed must meet the eligibility criteria described in Section 472 (a) of the Social Security Act (the Act). These general requirements are: (a) the child must be a "dependent child" as defined in Section 406 (a) or 407 of the Act and the applicable regulation, 45 CFR 233.90 (c)(1) , but for his or her removal from the home of a specified relative; (b) that the child was eligible for Aid to Families with Dependent children(AFDC) in the month described in Section 472(a) (3) (A)(i) of the Act; (c) the child must be removed from the home of a relative pursuant to a voluntary placement agreement or as a result of a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child and reasonable efforts were made prior to the placement to prevent the need for removal of the child from his home; and (d) the child's placement and care must be the responsibility of the state Title IV-E agency or another public agency with whom the state agency has a currently effective agreement. Child Welfare Policy Manual, October 2015, Section a .3 A.1. See also FOM 902, (November 1, 2012).

For juvenile justice wards, the court order may not reference the petition to document this finding because the petition often only details the youth's delinquent behavior. Other juvenile justice criteria include:

A finding must be based on either: The parents' actions that put the child at risk of harm. The youth's threat to self, provided the court order details case specific documentation the court utilized for making the determination. A finding cannot be based on: The youth's delinquent behavior. Reference to removal is in society's best interest. The youth is a threat to the community. FOM 902

Title IV-E funding must be denied or cancelled based upon the following factors: The court order does not contain a finding with case specific documentation that it is contrary to the child's welfare to remain in the home; see FOM 902, Funding Determinations and Title IV-E Eligibility, Continuation In The Home Is Contrary To The Child's Welfare Determination. FOM 902-05

The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance has been denied. MAC R 400.903(1). Clients have the right to contest a department decision affecting eligibility or benefit levels whenever it is believed that the decision is incorrect. The Department will provide an administrative hearing to review the decision and determine the appropriateness of that decision. FOM 902-05 (January 1, 2012), p. 3.

Legal authority for Department to provide, purchase or participate in the cost of out-of-home care for a child has been established in state law: the juvenile code, MCL 712A.1 et seq.; the Social Welfare Act, MCL 400.1 et seq.; the Michigan Children's Institute Act, MCL 400.201 et seq.; the Michigan Adoption Code, MCL 710.21 et seq.; and the Youth Rehabilitation Services Act, MCL 803.301, et seq. These laws specify the method of Department participation in the cost of care. The legislature has established a system whereby either:

1. The local court may provide out-of-home care services directly and request reimbursement by the state (child care fund).
2. The court may commit the child to the state and reimburse the state for the cost of care provided (state ward board and care).

Under option #1, the court may request that Department provide casework service through a placement and care order. FOM 901-6 (May 1, 2014), p. 1.

In this case, Petitioners were taken into custody and removed from their home on September 5, 2016, after a hearing conducted pursuant to a Petition for Delinquency Proceedings filed in the [REDACTED].

No transcript of the September 5, 2016, proceeding was provided and is not part of the record in this case.

The language in FOM 902 above referenced requires that the contrary to the welfare or best interest determination be made by the court in the first court order removing the child from his/her home. In the instant matter, the finding of contrary to the welfare was not adequately made in the Order After Preliminary Hearing. It merely states, "the juvenile is charged with a committing an offense that would provide authority for issuance of a warrant were the juvenile an adult. Date of offense: 09/05/2016 Offense: BREAKING AN ENTERING."(Dept. Ex. 1, p.8)

PLACEMENT EPISODE

A new initial determination of title IV-E eligibility must be completed for each new out-of-home placement episode regardless of whether a new petition is filed with the court.

An out-of-home placement episode begins:

When a child moves from an own home living arrangement:

Parental home; see note in Reimbursable Living Arrangements regarding minor parents.

Legal guardian.

Out-of-state parent.

To an out-of-home living arrangement, or

When a case is opened with the living arrangement noted as out-of-home.

The placement episode ends when the:

Child is returned home.

Child is placed with the non-custodial legal parent.

Child is placed with a legal guardian.

Child is discharged from wardship.

Parent resides in the same home as the child.

Child's adoption is finalized. FOM 902 (May 2014)

All youth are to be screened for title IV-E eligibility at the time of acceptance. Even though an initial placement may be in a placement where title IV-E cannot be paid, such as unlicensed relatives, detention, training school, or camp, reimbursability may exist in subsequent placements.

If a youth has been initially determined not eligible for title IV-E funding (based on ineligibility of the family for the former AFDC program or the judicial determinations do not meet the time requirements; see Required Judicial Findings below), he/she will never be eligible for title IV-E funding while in this placement episode. FOM 902(May 2014)

Removal Home for Title IV-E Eligibility

When determining title IV-E eligibility, the first step in the process is to identify the child's removal home. Correctly identifying the removal home is critical.

The following criteria must be considered when identifying the removal home:

The removal home (parent or specified relative) is the home for which the court makes the judicial finding that it is contrary to the welfare for the child to remain. In almost all cases this would be the parent's home, even if the child is physically removed from a different home. FOM 902

The Order to Apprehend and Detain was the first court order issued which authorized the placement of the children.

The Order does not contain the necessary findings of contrary to the welfare and findings because it was based on Petitioners' delinquent behaviors and not their threat to themselves or others. More detail was required explaining how Petitioners were a threat to themselves and others.

The issue in this case concerns whether Department policy found in FOM 902, then in effect, requires that the court make sufficient contrary to the welfare findings in the first court order removing the child from the home. That policy specifically states that "A finding must be based on either: The parents' actions that put the child at risk of harm. The youth's threat to self, provided the court order details case specific documentation the court utilized for making the determination. A finding cannot be based on: The youth's delinquent behavior. Reference to removal is in society's best interest. The youth is a threat to the community." FOM 902

The Department argues that Petitioner is ineligible for Title IV-E funding because the court order, Order to Apprehend and Detain, did not contain sufficient contrary to the welfare findings to support Title IV-E funding. Specifically, the Department asserts that the court order removing the child from the home must contain specific findings that detail how the child is a threat to themselves and others. The Department contends in its Notice of Case Action that Petitioners are not Title IV-E eligible due to: "The court order does not contain a finding with case specific documentation that is contrary to the child's welfare to remain in the home. There was no hearing within 60 days of the child's removal that resulted in a court order with case specific documentation finding that reasonable efforts to prevent removal had been made. The placement is not eligible for title IV-E funding. And while in detention." (Dept. Ex. 1, p.72-73)

The Department has adopted and issued policy found in the Children's Foster Care Manual setting forth the requirements necessary for removal of a child from the parents' home which conform to Title IV E requirements. The Department contends its policy supports its requirement that the order removing the child be in place at the time of removal. The policy supporting this position is found in FOM 902 which provides:

Federal 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 court order must coincide with removal of the child. FOM 902, (November 1, 2012), p. 16.

An analysis of the applicable Federal statutes, regulations and policy related to the particular Title IV-E issue raised follows.

Federal Statutory Provisions Concerning Title IV-E

Title IV-E requirements pertinent to this case are found in the Social Security Act, Section. 472; 42 USC 672 which provides a framework for the Foster Care Maintenance Payments Program. The relevant statutory provisions state:

(a) In General. –

(1) Eligibility - each state with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative into foster care if --

(A) the removal and foster care placement met, and the placement continues to meet the requirements of paragraph (2) and...

42 USC 672 (2) (A) (2) (ii) provides:

(2) REMOVAL AND FOSTER CARE PLACEMENT REQUIREMENTS.—The removal and foster care placement of a child meet the requirements of this paragraph if—

(A) the removal and foster care placement are in accordance with—

(i) a voluntary placement agreement entered into by a parent or legal guardian of the child who is the relative referred to in paragraph (1); or

(ii) a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts of the type described in section 471(a)(15) for a child have been made; (emphasis supplied)

(B) the child's placement and care are the responsibility of—

(i) the State agency administering the State plan approved under section 471; or

(ii) any other public agency with which the State agency administering or supervising the administration of the State plan has made an agreement which is in effect; and

(iii) an Indian tribe or a tribal organization (as defined in section 479B(a)) or a tribal consortium that has a plan approved under section 471 in accordance with section 479B; and

(C) the child has been placed in a foster family home or child-care institution.

The statutory language referenced above does require a state with an approved state plan to make foster care payments if the removal and foster care placement met, and continues to meet the requirements of paragraph 2 (A) ii. Paragraph 2 (A) ii requires that the removal is in accordance with a judicial determination.

Federal Regulations Regarding Title IV-E Eligibility Requirements

Federal Regulations have been promulgated to further implement the Title IV-E eligibility requirements which must be met by the States to receive Federal Financial Participation (FFP). The regulations are found in 45 CFR 1326.21.

45 CFR 1356.21 provides:

(a) Statutory and regulatory requirements of the Federal foster care program.

To implement the foster care maintenance payments program provisions of the Title IV-E State plan and to be eligible to receive Federal financial participation (FFP) for foster care maintenance payments under this part, a **State** must meet the requirements of this section, ...

(c) Contrary to the welfare determination. Under section 472 (a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. **The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.** Emphasis supplied.

(d) Documentation of judicial determinations. The judicial determinations regarding contrary to the welfare, reasonable efforts to prevent removal and reasonable efforts to finalize the permanency plan in effect, including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and **so stated in the court order.** (Emphasis supplied).

(1) if the reasonable efforts and contrary to the welfare judicial determinations are not included as required in the court orders identified in paragraphs(b) and (c) of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that these required determinations have been made.

(2) 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.

(3) orders that reference state law to substantiate judicial determination are not acceptable, even if state law provides that a removal must be based on a judicial determination that remaining in the home would be contrary to the child's welfare or that removal can only be ordered after reasonable efforts have been made.

(k) *Removal from the home of a specified relative.*

(1) for purposes of meeting the requirements of section 472(a)(1) of the Act, a **removal from the home must occur pursuant to:**

(ii) a judicial order for physical or constructive removal of the child from a parent or specified relative. (Emphasis supplied).

A review of the above regulations found in 45 CFR 1326 requires that a judicial determination must be made, that it be made in the first court ruling that sanctions, (even temporarily) the removal of the child from the home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for Title IV-E foster care payments for the duration of the stay.

The regulations further requires at 45 CFR 1356.21 d (1): if ... the contrary to the welfare judicial determinations **are not included as required in the court orders identified in paragraph b and c** of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that these required determinations have been made. 45 CFR 1356.21 (d)(1) clearly indicates and clarifies that a court order is what is required with respect to 1356.21 c language referencing the first court ruling. Paragraph (c) requires:

c) Contrary to the welfare determination. Under section 472 (a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. **The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.** Emphasis supplied.

Reading 1356.21d(1) consistently with 1356.21 c requires that the judicial determination and first judicial ruling language stated therein be made in a court order.

As can be seen from the above cited federal regulations, the regulations require that in order to participate in federal funding, a judicial determination or finding in a court order must be made regarding contrary to the welfare, that such determination must be made in the first court order, and that the physical removal of a child must occur pursuant to a

judicial order. A reasonable interpretation of the federal regulation provisions regarding the contrary to the welfare determination is that adequate detailed case specific findings must be provided.

Child Welfare Policy Manual

Further guidance is also found in The Child Welfare Policy Manual (Manual) developed by the agency designated to administer Title IV-E, The Administration for Children & Families (ACF) which is used as a guide for determining Title IV-E program requirements and eligibility. The Manual contains questions and answers applicable to the child welfare program requirements prepared by the Children's Bureau. The Manual specifically addresses the contrary to the welfare findings which must be made. Several of the questions offer guidance as to whether a court order must be in place at the time of the removal.

8.3A.6 TITLE IV-E, Foster Care Maintenance Payments Program, Eligibility, Contrary to the Welfare

Question 4.

Court orders that sentence a child to a juvenile detention facility often include language which differs from that in a dependency order resulting in a foster care placement. Does language in a detention order indicating that the child is a "threat to himself or the community" meet the requirement in section 472(a)(2)(A)(ii) regarding "contrary to the welfare?"

Answer

A court order indicating that the child is a threat to himself satisfies the requirement of a determination that remaining in the home would be contrary to the child's welfare. However, if the court order indicates only that the child is a threat to the community, such language would not satisfy the requirement for a determination that continuation in the home would be contrary to the child's welfare.

The question posed confirms that the temporary shelter order is required in order for a child to be taken into custody and further demonstrates based upon the question posed, that a court order, even a temporary shelter order, is required to take the child into custody and must include a contrary to the welfare finding.

The standard of review applicable to an agency's interpretation of its own policy directive articulated by Michigan court decisions have held that the plain language of the statute controls. *Iscaro v Dep't of Corr.*, 2013; see also *SBC Mich v PSC* (in re Rovas Complaint, 482 Mich 90, (2008). The Supreme Court explained that the "the agency's interpretation is entitled to respectful consideration and,... Should not be overruled without cogent reasons." Further the court observed that agency interpretations can be helpful for the construction of quote doubtful or obscure provisions". Thus, it is

determined that the language of FOM 902 is clear in the plain meaning of its requirement that the first court order contain a finding that it is contrary to the welfare of the child to remain in the home.

Thus, it is determined that the removal in this matter did not conform to the requirements of the Department policy which conformed to federal law and regulations and policy regarding adequate findings; and thus, the determination that the Petitioner was ineligible for Title IV-E funding is upheld.

The Petitioners' Attorney argued that the first episode ended when the Petitioners were turned over to the Department. Petitioner's Attorney argued that the Petitioners were discharged from wardship and when the Department took jurisdiction pursuant to the Child Protective Proceeding that should have been deemed a new removal and placement. These arguments are unpersuasive. The placement episode under FOM 902 did not end when the Department took jurisdiction because the children were never returned to their parents.

Thus, after reviewing the Department's policy referenced above found in FOM 902, the Federal regulations found in 45 CFR 1356.21 et seq. and statutory provisions found in the Social Security Act, Section. 472; 42 USC 672 et seq., it is determined that they are consistent and require a court order contain adequate contrary to the welfare findings in order to conform to the requirements for Title IV-E eligibility.

It is generally accepted law that the Department cannot make a claim for federal funds that does not meet the federal statutory and regulatory requirement or Department policy as approved in the State Plan for Title IV-E. Title IV-E funding is a source of financial support for children placed in foster care. FOM 902, (May 1, 2014) p.1. Therefore, it is determined that the Department properly denied the Petitioners' Title IV-E Funding because the removal of Petitioner was not in compliance with Department policy and federal law.

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, finds that the Department acted in accordance with Department policy when it denied continuing Title IV-E funding for Petitioner in this case because the Court's Order to Apprehend and Detain did not have sufficient contrary to the welfare findings with case specific documentation that it is contrary to the child's welfare to remain in the home.

DECISION AND ORDER

Accordingly, the Department's decision is **AFFIRMED**.

AM/mc



Aaron McClintic

Administrative Law Judge

for Nick Lyon, Director

Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

Counsel for Respondent

[REDACTED]

Department Representative

[REDACTED]

DHHS

[REDACTED]

Counsel for Respondent

[REDACTED]

Petitioner

[REDACTED]

[REDACTED]

Counsel for Petitioners

[REDACTED]