

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Georgia Department of Human Resources
Docket No. A-07-30
Decision No. 2099

DATE: July 10, 2007

DECISION

The Georgia Department of Human Resources (Georgia, State) appealed the November 7, 2006 determination of the Administration for Children and Families (ACF) disallowing \$144,815 in federal financial participation (FFP) for foster care maintenance payments and associated administrative costs. The disallowance arose from an eligibility review on September 11, 2006 which tested a sample of 80 foster care cases and determined that six cases were in error. ACF concluded that Georgia was not in substantial compliance with eligibility requirements because the number of error cases in the sample exceeded four. ACF imposed disallowances based on the payments and administrative costs relating to the specific error cases and on eight cases found to have ineligible payments made outside the review period.

Georgia originally sought to challenge the error findings as to two of the error cases, but in its brief asserts that only one of the cases is now at issue. In that case, ACF determined that one child (referred to herein as B.T. for privacy reasons) was not validly removed from his home. ACF found that Georgia failed to physically remove B.T. from his mother immediately after a court determined that remaining with his mother was contrary to his best interests. Georgia responds that it sought the judicial determination precisely because B.T.'s mother became a fugitive and took B.T. with her when she fled after assaulting and robbing her grandmother. According to Georgia, B.T. was taken into physical custody as soon as the mother was located within 10 days of the court order.

We conclude that B.T. was validly removed pursuant to the judicial determination and, hence, we reverse the disallowance of costs relating to B.T.'s error case, in the amount of \$3,987.

Legal and Case Background

Title IV-E was originally enacted as part of the Adoption Assistance and Child Welfare Act of 1980, Public Law No. 96-272. Under section 472(a) of title IV-E of the Social Security Act (Act),¹ as amended by the Adoption and Safe Families Act of 1997 (ASFA), Public Law No. 105-89, federal matching of state foster care maintenance payments is available for a child in foster care who would have been eligible for Aid to Families with Dependent Children under title IV-A as in effect as of June 1, 1995 -

but for his removal from the home of a relative
. . . if-

(1) the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 471(a) (15) for a child have been made[.]

Regulations implementing ASFA were revised effective March 27, 2000. 65 Fed. Reg. 4020 (Jan. 25, 2000).

Pursuant to 45 C.F.R. § 1356.71, ACF conducts primary reviews of state compliance with title IV-E foster care eligibility requirements every three years based on a randomly drawn sample of 80 cases. ACF reviews these sample cases to determine whether title IV-E payments were made (1) on behalf of eligible children and (2) to eligible foster family homes and child care institutions. If a state's ineligible cases in the sample (error cases) do not exceed eight in the "initial primary review," a state's program is deemed in "substantial compliance," and the state is not subject to another primary review for three years. However, a disallowance is assessed for payments and administrative costs associated with the individual error cases in the sample "for the period of time the cases are ineligible." 45 C.F.R. § 1356.71(c)(4). If a state's program is deemed not in

¹ The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

substantial compliance based on more than eight error cases, a program improvement plan (PIP) is required. A "subsequent primary review" may be conducted with a sample of 80 cases and a threshold of no more than four errors. 45 C.F.R. § 1356.71(c)(4). A state may also be subject to a "secondary review" of 150 randomly drawn cases, which will result in a disallowance that is based on an extrapolation from the sample to the universe of claims paid if both case and dollar error rates in the secondary review exceed 10 percent. 45 C.F.R. § 1356.71(c)(5) and (6).

In this case, ACF conducted a "subsequent primary review." Based on the finding of six error cases, ACF determined that Georgia was "not in substantial compliance with Federal child and provider eligibility requirements for the period from October 1, 2005, through March 31, 2006." Georgia Ex. E, at 1. Georgia was required to develop a PIP within 90 days (not at issue here) and to pay disallowances of the following amounts: (1) as to the individual error cases, \$13,984 in maintenance payments and \$8,023 in administrative costs and (2) an additional \$86,157 in maintenance payments and \$36,651 in administrative costs for ineligible payments made outside the review period.

This appeal followed.

Analysis

(1) The only issue remaining on appeal is whether B.T.'s case was in error.

In its original notice of appeal, Georgia asserted that it was in compliance with the cited requirements relating to two of the six error cases. Notice of Appeal at 1-2. Had both error findings been overturned, the number of error cases would have dropped to four, below the threshold for noncompliance. In its brief, however, Georgia chooses not to challenge one of the error case determinations mentioned in the notice of appeal, and expressly states that "the only ruling that is challenged concerns the 'valid removal of the child from the home during the most recent foster care episode'" in relation to B.T. (whose case is discussed in detail in the next section). Georgia Br. at 1.

ACF points out that given Georgia's decision to contest only one error case, "the number of undisputed cases (five) still exceeds the maximum number allowable for substantial compliance (four)." ACF Response Br. at 3. ACF therefore argues that the finding that Georgia was not in substantial compliance is "unaffected" by this appeal. Georgia did not dispute this assertion and made no

argument concerning the disallowance amounts other than the \$3,987 relating to B.T.'s case.

We conclude that the disallowances of \$18,020 of the \$22,007 relating to the individual error cases and \$122,808 relating to ineligible payments made outside the review period are unchallenged and therefore not at issue before us. We discuss in the next section the remaining issue concerning B.T.'s case affecting \$3,987.

(2) The error finding in B.T.'s sample case is unsupported.

The reviewers initially cited B.T.'s case as in error under two elements of the review instrument which assessed whether there were judicial findings that continuing in the home was contrary to B.T.'s welfare and whether reasonable reunification efforts had been made. ACF Br. at 3; Georgia Ex. D. ACF vacated those findings but instead cited B.T.'s case as in error under a different element assessing whether "there was a valid removal of the child from the home during the most recent foster care episode."² ACF Br. at 3; ACF Ex. 1, at 1-2. The relevant requirement derives from the statutory language that a child must have been removed from the home of a specified relative as a "result of a judicial determination to the effect that continuation therein would be contrary to the welfare" of that child.³ Section 472(a) of the Act. The alleged error in B.T.'s case revolved around whether Georgia physically removed the child from the mother's custody quickly enough after the court determined that remaining with the mother would be contrary to the welfare of the child. B.T. was not physically removed from

² The review instrument for this element states as follows:

A valid removal has not occurred when a court ruling . . . sanctions the removal of the child from the parent . . . and the child is allowed to remain in the same specified relative's home under the supervision of the State agency (see 45 CFR §1356.21(k)(2)). The physical removal from the home must coincide with the judicial ruling . . . that authorizes the child's removal from the home and placement in foster care.

ACF Ex. 1, at 2.

³ This case does not involve the alternative of a voluntary placement or the additional requirement that reasonable efforts to keep the child in the home have been made.

his mother until ten days after the court order containing the judicial determination was issued.⁴

Georgia does not contest that physical removal was required here.⁵ Indeed, B.T. was physically removed from his mother. ACF alleges, however, that the physical removal failed to coincide with the judicial determination.

Georgia argues that neither the Act nor the regulations expressly require that the removal coincide with the judicial determination. ACF takes the position that requiring the removal to be the "result" of the judicial determination implies the element of timeliness. ACF Br. at 5-7. Thus, the logic is that a removal that occurs well after the determination is unlikely to have been undertaken pursuant to the court determination and also implies that the child remained during the delay in a home already determined to be contrary to the child's welfare. ACF's regulations were amended in 2000 to provide that a "removal has not occurred in situations where legal custody is removed from the parent or relative and the child remains with the same relative in that home." 65 Fed. Reg. 4,020, 4,062-63 (Jan. 25, 2000), adding subsection (k) to 45 C.F.R. § 1356.21 (emphasis added). While this regulatory language does not specify the particular timeframe in which the removal must be accomplished, the language clearly implies that a state must take diligent action to effect removal after the judicial determination is issued.

In West Virginia Dept. of Health and Human Resources, DAB No. 2017 (2006), the Board held that the unusual circumstances in the two sample cases challenged justified the period of time elapsing between the issuance of the judicial determination and the physical removal of the child while still satisfying the requirement that the state have acted "pursuant to" or as "the result of" the requisite court orders. Section 472(a)(1) of the

⁴ The parties variously refer to the time involved as eight or ten days, but it is not disputed that the court order was issued at 9:30 PM on August 9, 2002, and the child was located and removed from the mother on August 19, 2002. Compare, e.g., Georgia Br. at 3 and Georgia Ex. D. The difference appears to depend on whether the days on which the order was issued and the child removed are included in the count or only the intervening days.

⁵ Constructive removal is permitted in some situations, none of which are relevant here.

Act; 45 C.F.R. § 1356.21(k). In that case, the children remained living at home for some weeks after the judicial determination. In each instance, the court had specifically ordered that the child remain in the home until removal to a specialized treatment foster care placement became available, and each removal order was based on the child's behavioral needs rather than on any allegation of abuse. DAB No. 2017, at 7-8. The Board explained its holding that the children were removed as a result of the judicial determination despite the delays, as follows:

Neither the regulations nor the manual provisions cited by ACF require (or even imply) that the physical removal must coincide with the court's contrary to the welfare determination. The only provision in the regulations regarding the timing of the contrary to the welfare determination is section 1356.21(c), which states that this determination "must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home." Each of the court orders in question here contained a contrary to the welfare determination and, in ordering the child removed from home as soon as the ordered placement was available, "sanctioned" the child's removal from home. ACF made no finding that either order was not the "first court ruling" to order the child removed from home.

The only question that remains is whether the child's removal was "the result of" or "pursuant to" the court orders, as required by section 472(a)(1) of the Act and sections 1356.21(c) and (k)(1) of the regulations. This requirement is satisfied since, as West Virginia observes, "[b]ut for the court orders, the juveniles would not have been physically removed from their homes and placed in a residential treatment facility." West Virginia Reply Br. at 6-7. While in each case the child remained in the home for several weeks following the order, the order expressly approved this delay in the child's physical removal, and no other order was necessary to effectuate the child's removal. Indeed, in each case, the court's determination that it was contrary to the child's welfare to remain in the home can be viewed as contingent on the child being placed in a specialized facility that could meet the child's needs. Thus, when the child was ultimately physically removed from the home, it was as a result of, or pursuant to, the court order.

DAB No. 2017, at 8-9 (footnote omitted). The Board explicitly limited its conclusion in West Virginia to the facts of the two sample cases at issue there, "where the removal was ordered primarily due to the child's behavior, not allegations of abuse or neglect on the part of the parents, and removal was delayed only until a bed became available in a specialized foster care facility." Id. at 9.

On February 12, 2007, ACF added a question and answer to its Child Welfare Policy Manual (CWPL) addressing the removal requirement, as follows:

Question: Once a court order is issued with a judicial determination that remaining in the home is contrary to the child's welfare, does the State have to actually remove the child at that time and place the child in foster care?

Answer: Yes. Section 472(a)(2) of the Social Security Act predicates a child's receipt of title IV-E funds on the child's removal from home as the result of either a voluntary placement agreement or a judicial determination that to remain at home is contrary to the child's welfare.

The judicial determination that results in the child's removal must coincide with (i.e., occur at the same time as) the agency's action to physically or constructively remove the child, unless the court order specifies an alternative timeframe for removal, as allowed for in the Departmental Appeals Board (DAB) decision # 2017.

If a court makes a judicial determination that it is contrary to the child's welfare to remain at home (without specifying an alternative timeframe) and the child does, in fact, remain at home and no removal occurs, the requirement for removal is not met and the child is ineligible for title IV-E. If the child's safety is not at risk and a State chooses to offer support services to the family in-home to prevent having to remove the child, it should do so. States cannot issue "blanket" removal orders, however, in an attempt to guarantee title IV-E eligibility in the event that the child has to be removed from home at some point in the future.

CWPL, Ch. 8, §8.3A.6 (2007) (emphasis added), available online at http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/index.jsp.

This clarifying question and answer, as ACF characterizes them, were added long after the events at issue and during the pendency of this appeal. Cf. ACF Br. at 6. ACF asserts, however, that the discussion merely continues ACF's prior interpretation that section 472(a)(2) of the Act requires the state to take action implementing the "immediate physical removal" of a child once a court has made the necessary determination, absent circumstances of the kind articulated in West Virginia. Id.

The decision in West Virginia dealt with an unusual set of circumstances in which the strict application of a requirement that physical removal "coincide" with the court determination would not serve the purposes which ACF explains for the timing of removal. ACF's answer above indicates that states should not be obtaining court determinations that remaining in the current home is contrary to the child's welfare only to leave the child in the home while the state undertakes other strategies. State delays of that kind treat the judicial determination as a sort of back-up plan and undercut the credibility of either the contrary-to-the-welfare determination or the state's commitment to protecting the child. In West Virginia, the State was not ignoring an order and delaying removal from a dangerous situation but instead was diligently following a court order to move the children directly to a treatment facility as soon as it became available to meet the children's special needs.

A close examination of the court orders and surrounding circumstances relating to B.T.'s removal, even though not identical to the situation addressed in West Virginia, demonstrates that analogous considerations support the conclusion that Georgia's actions here complied with the requirement that the child be removed pursuant to the judicial determination and not be left in the same home beyond the time contemplated by the court.

B.T.'s mother had a lengthy history with Georgia's foster care agency that included episodes of substance abuse treatment and relapses. Georgia Ex. A at 2. She regained legal custody of B.T., then three years old, on February 22, 2005 after she completed in-patient treatment, moved into her grandmother's house, and participated in continuing aftercare for her substance abuse. Id. The State agency kept the case open, however, and continued to provide services, including a parenting coach and random drug screens. Id. On August 9, 2005, the State agency received a report that the mother had assaulted her grandmother,

threatened to kill her, stole her car and \$5,000 in cash, and fled with the child. Id. A warrant was issued for her arrest for aggravated assault. Georgia Ex. B at 1.

Also on August 9, 2005, the State agency sought an emergency order from the court to permit it to remove B.T. from his mother as soon as she could be found. Georgia Ex. A at 1. In its order dated August 9, 2005, the court specifically noted that the mother's flight and the outstanding arrest warrant was the reason that continuing in the mother's custody was contrary to the child's welfare. Georgia Ex. B at 1. The court further authorized the State agency to take "emergency custody" and to place B.T. in a foster home pending a further shelter care hearing set for August 11, 2005. Id. It is clear from the order that the court was aware that the whereabouts of the mother and child were unknown and that they were being urgently sought and therefore empowered the State agency to take immediate action to physically remove and protect the child when the mother was arrested. Id. at 1-2.

The State agency filed a complaint with the court on August 10, 2005, providing details of B.T.'s mother's history and fugitive status. Georgia Ex. A. The shelter care hearing scheduled for August 11, 2005 was not held since B.T.'s mother was not apprehended until August 19, 2005 when she was captured in a motel room with B.T. surrounded by numerous aerosol cans, which she had a history of using for substance abuse. Georgia Ex. C at 1. It appears that the child was taken into custody by the State at that point (as authorized by the August 9, 2005 order) and a 72-hour shelter care hearing was held on August 22, 2005. Id. The court ordered that B.T. remain in shelter care and noted that the "precipitating cause of the removal" was the issuance of criminal warrants for the mother's arrest, her flight from the county with the child to parts unknown, and the emergency order issued by the court on August 9, 2005 "to pick up the child." Id. at 1. The mother did not object to B.T.'s removal to shelter care and the court ordered custody to the State agency. Id. at 1-2.

ACF does not dispute that the State promptly sought a judicial determination that it was contrary to the child's welfare to remain with a fugitive whose whereabouts were unknown. ACF also does not dispute the State's assertions that, having the removal authority from the court, Georgia took action at the same time to locate the mother so it could physically recover and remove the child, although locating the mother took ten days. ACF further does not dispute that the child was physically removed to State custody as soon as the State was able to locate the child.

ACF offers no indication of what the State could have done differently to effect the removal at any point closer in time to the judicial determination. The contrary-to-the-welfare determination was based on the mother's flight and the attendant circumstances, so there would have been no justification for an earlier judicial determination. By the time events made the determination appropriate, the child's location was unknown to the State. ACF points to no evidence that Georgia intentionally left the child in the home from which the court ordered removal or failed to act with diligence to obtain physical removal.

Nevertheless, ACF argues that Georgia has merely advanced one of many "arguable excuses for delay in removal, some more plausible than others." ACF Br. at 8. ACF points out that title IV-E is "not one of the block-grant programs, which allow greater deference to states' own policies and procedures," but rather states are subject to "the requirements of title IV-E statutes and regulations, as well as to ACF's reasonable interpretations of those requirements." *Id.* at 8-9. ACF argues that the situation here was "just the sort of danger that ACF's reading of title IV-E provisions (as mandating immediate physical removal) is intended to remedy." *Id.* at 9. ACF concludes that no matter "how strongly [Georgia] may feel about its justification for the delay in this particular case, that does not mean that ACF must ignore its policy interpretation and treat this case as title IV-E eligible." *Id.*

We agree that federal statutes and regulations govern eligibility determinations for title IV-E. State interpretations of federal law cannot overrule reasonable federal interpretations. While a state is entitled to notice of how the federal agency interprets an ambiguous provision, we will defer to a reasonable federal interpretation, even where the state lacked prior notice, unless the state can prove it actually relied at the time it acted on a reasonable alternative interpretation. See, e.g., Maryland Dept. of Human Resources, et al., DAB No. 1949 (2004), and cases cited therein. We do not understand Georgia to be disputing this standard or asserting that the action it took in B.T.'s case was chosen in reliance on any alternative interpretation. We further agree with ACF that the strength of a state's convictions about any justification for delaying a child's removal is irrelevant to the child's eligibility under federal standards. Here, however, for the reasons stated below, we conclude that the circumstances of B.T.'s case do meet the statutory and regulatory requirements as interpreted by ACF (both before and after the issuance of the recent manual clarification), in that Georgia effected the physical removal as soon as possible after the court order and as contemplated by the court order itself.

We note that the manual provision does not use the same formula as ACF used in its brief to explain what it understands by the requirement that removal coincide with the judicial determination. In its brief, as quoted above, ACF speaks of "immediate physical removal." ACF Br. at 9. In its manual provision, however, ACF states that the judicial determination "that results in the child's removal must coincide with . . . the agency's **action** to physically or constructively remove the child, unless the court order specifies an alternative timeframe for removal." CWPL, ch. 8., §8.3A.6 (2007) (emphasis added). The facts shown on the record relating to B.T.'s removal establish that the State complied with ACF policy in that (1) it took immediate action to remove the child, even though completing the removal took some days, and (2) the court order effectively set out an alternative timeframe since the court contemplated B.T.'s mother's arrest in order achieve physical custody.

As to the first point, ACF offers nothing to undermine Georgia's account of events. On the same day that the mother absconded with B.T., the State both issued an arrest warrant and obtained the judicial determination. Obviously, it is impossible to guarantee that a fugitive whose whereabouts are unknown can be apprehended in a specific number of days. Nevertheless, the police succeeded in executing the arrest warrant within a matter of days and the foster care agency took action to immediately take charge of the child. Thus, while the physical removal was not simultaneous with the judicial determination, Georgia did, simultaneously with obtaining the judicial determination, take action to remove the child.

We also conclude that the court here set an alternative timeframe within the meaning contemplated by ACF's policy and its manual, which references our West Virginia decision. While this case is not on all fours with West Virginia, the same principles enunciated there and adopted in ACF's recent policy clarification lead to the conclusion that B.T. is eligible for title IV-E. The court was aware in issuing the judicial contrary-to-the-welfare determination that the whereabouts of B.T. and his mother were unknown. In fact, it was precisely the mother's flight and the issuance of a warrant for her arrest that formed the basis for the determination. The court clearly contemplated that removal of B.T. would involve a search for his fugitive mother and would not be accomplished simply by picking up the child from an existing home. The court here, as in West Virginia though for different reasons, made a determination that the child needed to be removed but that certain conditions had to be met to accomplish the physical removal. This determination was not an after-the-fact excuse or a justification for delay proffered by

the State to explain inaction but a prospective recognition of very unusual circumstances which made removal necessary but impossible or inadvisable to implement at exactly the same time as the order was issued.

In both cases, physical removal was indisputably implemented. In neither case did the court set a precise date or time frame in which the state was to accomplish the pre-condition (in West Virginia, securing the ordered placements; here, apprehending B.T.'s mother). In neither case did ACF present any evidence of lack of diligence or delay on the part of the state in carrying out the court's order. In both cases, the periods between the court order and the physical removal were brief and reasonably related to the accomplishment of the pre-condition. In West Virginia, the time between the orders and the physical placements of the two children at issue was about six weeks. In the present case, only about 10 days elapsed. DAB No. 2017, at 7. The longer period in West Virginia reflected the fact that the removal was triggered by the behavioral issues and placement needs of the children rather than by abuse or neglect in the home. The short period here reflects the urgency involved in locating B.T.'s mother and removing him as quickly as possible from her possession.

Under the very unusual circumstances here, we conclude that B.T.'s removal was implemented pursuant to the judicial contrary-to-the-welfare determination. This conclusion is bolstered by the court's subsequent shelter care order in which the court indicated its understanding that Georgia had acted pursuant to the earlier determination and in no way suggested that Georgia's actions diverged from what the court contemplated in issuing the earlier order. Georgia Ex. C. In short, the search for and physical removal of B.T. upon the apprehension of his fugitive mother constituted the simultaneous action to effect the court order required by federal law and policy.

This case, like West Virginia, does not implicate the evils that ACF delineated in setting out its general reading that a removal means the immediate, physical transfer of the child's custody in order to be considered the result of or pursuant to a judicial determination. No incentive is created for a state either to seek a judicial determination when removal is not imminent or to drag its feet in physically removing a child after a judicial determination has been made. These two possibilities were the concerns expressed in ACF's manual provision. CWPL, Ch. 8, §8.3A.6 (2007). Furthermore, we limit this holding to the facts of this case, as we did in West Virginia. Other instances of parents whose whereabouts are unknown may not present the same

reasons based on which we here conclude that the child was removed promptly pursuant to a court order, such as the brevity of the time elapsed, the court's contemplation and endorsement of the State's search for the fugitive mother, the issuance of an active arrest warrant resulting in her arrest and the immediate removal of the child from her custody, and the absence of evidence of any delay on the State's part in taking action to physically remove the child.

Conclusion

For the reasons explained above, we conclude that B.T. was removed pursuant to the requisite judicial determination and was eligible for title IV-E. The sample case payment was therefore not made in error, so we reverse the associated disallowance of \$3,987.

_____/s/
Judith A. Ballard

_____/s/
Sheila Ann Hegy

_____/s/
Leslie A. Sussan
Presiding Board Member