

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Arkansas Department of Health DATE: August 20, 2007
 and Human Services
 Docket No. A-07-35
 Decision No. 2106

DECISION

The Arkansas Department of Health and Human Services (Arkansas, State) appealed in part the November 21, 2006 determination of the Administration for Children and Families (ACF) disallowing \$105,255.62 in federal financial participation (FFP) for foster care maintenance payments and associated administrative costs claimed under title IV-E of the Social Security Act (Act). ACF's determination was based on a "secondary review" of payments claimed by Arkansas for 150 sample cases during the period October 1, 2005 through March 31, 2006. The purpose of the review was to determine whether the payments were made on behalf of eligible children to eligible foster care providers. ACF found that Arkansas was in substantial compliance with the IV-E eligibility requirements but that 12 sample cases were "error cases" because they had ineligible payments during the review period.

Arkansas initially disputed ACF's calculation of the disallowance amount for one of the "error cases" (Sample #10) and ACF's findings with respect to seven of the "error cases" but then withdrew its appeal with respect to two of the seven (Sample #57 and Sample #79). Arkansas Br. at 2-3. After ACF recalculated the disallowance amount for Sample #10 and withdrew the error findings for Sample #33 and Sample #136 based on additional documentation provided by Arkansas, only three "error cases" remain in dispute—Sample #46, Sample #70, and Sample #103. ACF found Sample #46 and Sample #103 in error on the ground that the child in each case was not validly removed from home. ACF found Sample #70 in error on the ground that the child's financial need was not documented. For the reasons discussed below, we reverse the disallowance with respect to all three cases.

Legal Background

Title IV-E was originally enacted as part of the Adoption Assistance and Child Welfare Act of 1980, Public Law No. 96-272.¹ Under section 472(a) of title IV-E, as amended by the Adoption and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 (AFDC) 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[.]

Revised regulations implementing ASFA were effective March 27, 2000. 65 Fed. Reg. 4020 (Jan. 25, 2000). Under prior policy, ACF interpreted the term "removal" in the statute to mean a physical removal. See 65 Fed. Reg. at 4062. This policy created a disincentive for relative placements because a child who was residing with a relative between the time the child was physically removed from the parent and the time the child entered foster care could not be eligible for IV-E funding. Id. at 4062-4063. To address this problem, the revised regulations "permit the removal of the child from the home, in such circumstances, to be a 'constructive' (i.e., a nonphysical) removal." Id. In this context, section 1356.21(k)(2) of 45 C.F.R. provides:

(2) A removal has not occurred in situations where legal custody is removed from the parent or relative and

¹ Social Security Act §§ 470 through 479A; 42 U.S.C.A. §§ 670 through 679b. 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.

the child remains with the same relative in that home under supervision by the State agency.

Section 1356.71 of 45 C.F.R. sets out a process for reviewing the eligibility of children in foster care and the eligibility of foster care providers for maintenance payments under title IV-E. For the type of eligibility review at issue here (a "secondary review"), a state is considered to be in "substantial compliance" if either the case ineligibility or dollar error rate does not exceed 10 percent (based on the sample cases). 45 C.F.R. § 1356.71(c)(6) and (h)(2)(i). If, as here, a state is in substantial compliance, a disallowance will nevertheless be assessed "for the ineligible cases for the period of time the cases are ineligible." 45 C.F.R. § 1356.71(c)(6).

Analysis

We first discuss, in turn, the two disputed sample cases which raise the question of whether there was a valid removal of the child from the home (Sample #46 and Sample #103) and then discuss the sample case which raises the question of whether the child would have been AFDC-eligible in the home from which the child was removed (Sample #70).

Sample #46

ACF cited Sample #46 as an error case under an element of the Title IV-E Foster Care Eligibility On-Site Review Instrument and Instructions (review instrument) assessing whether "there was a valid removal of the child from the home during the most recent foster care episode." The review instrument states in pertinent part that-

[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. 22, at 9 (Question 8). The alleged error in this case revolved around whether Arkansas physically removed the child from the father's home quickly enough after the "judicial ruling" removing the child from home. The reviewers found that although the court ordered the child and a sibling removed from the father's custody on September 20, 2005, the children lived with

the father until October 10, 2005, when the Department of Children and Family Services picked the children up from school after being notified by the school that the children were there. ACF Ex. 22, at 9, 15. According to a court report, a friend with whom the father and children had been residing reported that the father left that address approximately two days before the September 20 hearing, leaving no forwarding address, and the children had been absent from school more than 10 days before they were located. AR Ex. 14, at 2. According to the IV-E eligibility review report attached to the disallowance letter, [t]here was no evidence of a valid removal of the child from the home" because "[t]he child was allowed to physically remain, for a period of time, with the specified relative from whom the child was legally removed pursuant to the judicial findings" and "[t]he delayed physical removal was not explicitly authorized by the removal court order." At 3.

For purposes of determining whether this sample case was an error case, we need not address the parties' legal arguments regarding what constitutes a valid removal. Section 472(a) of the Act requires 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." Section 472(a) of the Act. The reviewers found here that the "removal court order" was dated October 13, 2005 and that this order contained a contrary to the welfare finding. ACF Ex. 22, at 10 (Questions 11(b) and 11(c)). The order to which this refers is captioned "Amended Ex Parte Order for Emergency Custody." This order states that [t]here is probable cause to believe that the juveniles are dependent-neglected and it is contrary to the welfare of the juveniles to remain with the present custodian," states that "[i]mmediate removal of the juveniles from the present custodian is necessary," and further states that the children "shall be placed in the custody of the Arkansas Department of Health and Human Services pending further orders of this Court, with appropriate law enforcement or personnel directed to assist, if necessary, in placing said juveniles in the custody of the Arkansas Department of Health and Human Services." ACF Ex. 22, at 2.² The September

² This type of order is authorized by section 9-27-314 of the Arkansas Code, which provides that "[i]n any case in which there is probable cause to believe that immediate emergency custody is necessary to protect the health or physical well-being of the juvenile from immediate danger or to prevent the juvenile's removal from the state, the circuit court shall issue

(continued...)

20, 2005 order referred to earlier merely notes that the father failed to appear for a hearing on the same date, may be homeless and missed drug screens, and orders a "72 DHS Emergency hold for children." AR Ex. 13, at 1. Thus, ACF should have considered the October 13, 2005 order rather than the September 20, 2005 order in determining whether the child remained in the father's home after the date of the removal order. Since the October 13, 2005 emergency removal order sanctioned a physical removal which had already taken place on October 10, 2005, there was clearly no violation of section 1356.21(k)(2).

Accordingly, we reverse ACF's finding that Sample #46 was an error case.

Sample #103

ACF cited Sample #103 as an error case under the same element of the review instrument discussed above. ACF Ex. 23, at 5. An Ex Parte Order for Emergency Custody identical to the October 13, 2005 order described above was issued on January 13, 2006 (AR Ex. 17, at 1) and the reviewers properly identified this as the "removal court order" (ACF Ex. 23, at 6). The circumstances leading to the removal order are indicated in a caseworker's January 12, 2006 affidavit stating that the mother had tested positive for cocaine when she gave birth to the child's younger sibling in December 2005 and again on January 3, 2006 when she came to the DHS office. AR Ex. 16 (last two pages). ACF asserts that the child had not been physically removed from his mother as of February 9, 2006, "almost one month after the order for removal." ACF Br. at 10. According to ACF, the child's eventual removal was not valid because "[t]he judicial determination that results in the child's removal must coincide with (that is, occur at the same time as) the agency's action to physically or constructively remove the child." *Id.* at 8, citing ACF's March 2006 Title IV-E Foster Care Eligibility Review Guide (stating in part "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 under the responsibility of the State agency").³ ACF acknowledges that "neither the IV-E statute

²(...continued)

an ex parte order for emergency custody, guardian, or custodian and shall determine the appropriate plan for placement of the juvenile."

³ The Review Guide is available online at

(continued...)

nor regulation require that legal removal coincide with physical removal of the child[.]” Id. ACF argues, however, that “this requirement is a reasonable interpretation of the IV-E statute which predicates the receipt of IV-E payments upon the removal of the child” and that an agency’s reasonable interpretation is entitled to deference. Id. at 8-9.⁴ ACF also asserts that Arkansas “failed to present any evidence of either its efforts to locate this child or to secure a court order permitting a delay in the physical removal of the child.” Id. at 10.⁵

However, we need not reach here the questions of whether a physical removal that occurs approximately one month after the date of a court removal order may properly be considered to coincide with the order or whether ACF’s interpretation of the statute is reasonable. As discussed below, we conclude that the record establishes that the child’s physical removal occurred on January 25, 2006, as Arkansas asserts. Moreover, as we also discuss, there is evidence in the record to support Arkansas’ assertion that it “was actively attempting to locate the parent who had physical possession of the child.” AR Br. at 2. Since

³(...continued)

http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2001/im0111a1_2007.htm.

⁴ In its 2007 Child Welfare Policy Manual, issued after the review period in question here, ACF stated that the court removal order must coincide with the agency’s action to physically or constructively remove the child, rather than with the physical removal itself, as stated in the Review Guide. See Child Welfare Policy Manual, Ch. 8, §8.3A.6 (2007), available online at http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/index.jsp.

⁵ Citing West Virginia Dept. of Health and Human Resources, DAB No. 2017 (2006), ACF states that the Board “has recognized court orders that specifically authorize a delay in physical removal as a valid removal.” ACF Br. at 9. In a decision issued after ACF’s brief was filed, the Board concluded that a child’s physical removal from the custodial parent 10 days after the court removal order complied with ACF’s policy where (1) the state 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 for the child’s removal, since the court contemplated the child’s mother’s arrest in order achieve physical custody. Georgia Dept. of Human Resources, DAB No. 2099 (2007).

ACF's error finding relied on incorrect factual premises, there is no basis for upholding that finding.

ACF's position that the removal did not coincide with the court order is based on ACF's finding that the child, identified as H.S., still had not been physically removed from home as of February 9, 2006 (27 days after the removal order). As just noted, however, Arkansas asserts that H.S. was physically removed from his mother on January 25, 2006. The review instrument notes that the reviewers saw a document that "shows removal as 1-25-06" but that the document had "no details about how he was found." ACF Ex. 23, at 5. The review instrument further notes that "[s]ubsequent court orders reference [H.S.] as if he was in custody" but that "Probable cause order says department needs to relocate [H.S.]." *Id.* In its brief, ACF cites a Probable Cause Order dated February 9, 2006, as evidence that H.S. still had not been physically removed as of February 9, 2006 since the order states that "ADHHS shall use best efforts to locate [H.S.] juvenile, so that he may be placed in an approved foster placement." ACF Br. at 10, quoting ACF Ex. 23, at 2. However, the Probable Cause Order, while signed by the judge on February 9, indicates that it was issued pursuant to a hearing on January 19, 2006, which is the date given by the review instrument for this order.⁶ Thus, the order merely shows that the child had not been located as of January 19, although the order is dated February 9, and does not undercut Arkansas' assertion that H.S. was physically removed from his mother on January 25, 2006. Moreover, Arkansas' assertion that the date of removal was January 25 is corroborated by the review instrument itself, which shows that date as the date of the child's placement in a foster family home. ACF Ex. 23, at 15.

Furthermore, the record shows that, contrary to ACF's assertion, Arkansas was actively attempting to locate H.S.'s mother. According to the caseworker's "Report to Prosecuting Attorney," on January 18, 2006, the caseworker went to H.S.'s mother's home but "no one was home." AR Ex. 15, at 7. This report also shows that the caseworker and supervisor went to the mother's home again the next day but that "no one answered door." *Id.* at 8-9. A "Contacts Report" by a different caseworker shows that she attempted a "Face to Face" contact at home on January 24 "to obtain custody of the one year-old, [H.S.]." AR Ex. 19, at 1-2.

⁶ The record also contains a handwritten "Interim Order" dated January 19, 2006 which finds "that probable cause exists" and was likely prepared at the time of the hearing. AR Ex. 18.

That caseworker reported that she spoke with H.S.'s aunt and "informed her that her sister . . . needed to come to this worker's office[.]" Id. at 2. In addition, the Report to Prosecuting Attorney indicates that the caseworker conducted a face-to-face interview with H.S. and his paternal grandmother at the DHS office on January 25, 2006. AR Ex. 15, at 6. It appears that this was the point at which Arkansas took physical custody of the child.

ACF does not argue here that, even if Arkansas is correct that H.S.'s physical removal occurred on January 25 (12 days after the first removal order) and even if evidence shows efforts by Arkansas to locate H.S. and his mother, ACF would still have found that the physical removal did not "coincide with" the court order for removal. Accordingly, we reverse ACF's finding that Sample #103 was an error case.

Sample #70

In order for a child to be IV-E eligible, the state must determine that the child would have been eligible for AFDC in the home from which he or she was removed at the time of the removal. Section 472(a)(4) of the Act. The IV-E eligibility review found that Sample #70 was an error case because the child's financial need--a criterion for AFDC eligibility--was not documented. ACF Ex. 21, at 9. Financial need is based in part on the gross income in the home of the specified relative from whom the child was removed. Id.; see also 45 C.F.R. § 233.20 (a)(3)(xiii) (2004). (The review instrument indicates that the child is ineligible if gross income exceeds the state's need standard. ACF Ex. 21, at 9.) According to ACF, Arkansas failed to document the father's income during the month of removal, September 2004. ACF Br. at 7.

The documentation provided by Arkansas includes a state Employment Security Division search result which both parties read as indicating that the father had an income of zero for the quarter in question. AR Ex. 11. The only other documentation is the affidavit of a DHS employee filed with the court on September 29, 2004, which includes the name of the father's employer and indicates that the employer's address is unknown, followed by a parenthetical note that the father "does occasional odd jobs." AR Ex. 10. ACF argues that these documents contain "conflicting information" and that Arkansas should therefore have further investigated the father's income in order to establish the child's AFDC eligibility. ACF Br. at 7. Arkansas takes the position that the Employment Security Division document evidencing that no employer reported payments to the father is

not inconsistent with the statement in the affidavit that the father works odd jobs, which "does not contain a time frame or indicate the volume of work." AR Reply Br. at 2.

We conclude that there is no conflict between the two documents since the affidavit does not state or otherwise indicate that the father worked during the month of removal or that any earnings were significant enough to exceed Arkansas's need standard. Although the affidavit does not rule out that the father might have received such earnings, ACF has identified no reason why the Employment Security Division document was not adequate to establish that the father had zero income in the absence of conflicting information.

Accordingly, we reverse ACF's finding that Sample #70 was an error case.

Conclusion

For the reasons explained above, we conclude that the three remaining disputed sample cases were not error cases. Accordingly, we reverse the disallowance of foster care maintenance payments and the associated administrative costs claimed for these cases. We also uphold the disallowance with respect to the six remaining error cases (as reduced based on ACF's recalculation of the disallowance for Sample #10).

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member