Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Virginia Department of Social Services
Docket No. A-11-21
Decision No. 2379
May 11, 2011

DECISION

The Virginia Department of Social Services (Virginia) appeals a determination by the Administration for Children and Families (ACF) based on a review of a sample of foster care cases for which Virginia claimed funds under title IV-E of the Social Security Act for the period October 1, 2009 through March 31, 2010. ACF disallowed Virginia's claim for foster care maintenance payments and associated administrative costs for several sample cases. Virginia disputes ACF's finding that the child in one of the sample cases (sample case 23) was not eligible for title IV-E funds because the requirement in the statute and regulations for a judicial determination that continuation in the home would be contrary to the welfare of the child was not met.

For the reasons discussed below, we conclude that the requirement for a "contrary to the welfare determination" was met. Accordingly, we reverse the disallowance for this sample case, which totals $17,922.

The record for decision includes the briefs and exhibits filed by the parties and the transcript of an informal conference.

Legal Background

Title IV-E of the Social Security Act (Act), Public Law No. 96-272, as amended by the Adoption and Safe Families Act of 1997, Public Law No. 105-89, and by section 7404 of the Deficit Reduction Act of 2005, Public Law No. 109-171, makes federal funding available for certain state foster care maintenance payments. To qualify for IV-E funding, the payments must be made on behalf of a child who has been removed from the home of a relative "into foster care" where the removal and foster care placement met (and the placement continues to meet) the requirements of section 472(a)(2) of the Act

and the child, while in the home, would have met the "AFDC eligibility requirement" in section 472(a)(3) of the Act.[1] Section 472(a)(1) of the Act. Section 472(a)(2) provides:

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

Section 1356.21(c), titled "*Contrary to the welfare determination*," provides:

> 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.

Section 1356.21(k)(1) of 45 C.F.R. provides:

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

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[1] The current version of the Act can be found at http://www.socialsecurity.gov /OP_home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

AFDC, the Aid to Families with Dependent Children program, was authorized by the former title IV-A of the Act as in effect until June 1, 1995. Section 406(a) specified the relatives from whom the child's removal would qualify as removal from home.

> (i) A voluntary placement agreement entered into by a parent or guardian which leads to a physical or constructive removal (i.e., a non-physical or paper removal of custody) of the child from the home; or
> (ii) A judicial order for a physical or constructive removal of the child from a parent or specified relative.

Pursuant to section 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. 45 C.F.R. § 1356.71(d) (1) and (2).

If the number of ineligible cases in the sample for which the state made payments during the period under review does 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 associated administrative costs for the ineligible cases in the sample "for the period of time the cases are ineligible." 45 C.F.R. § 1356.71(c)(4).

Case Background

ACF conducted a primary review of a sample of cases for which Virginia claimed IV-E funds for the period October 1, 2009 through March 31, 2010. ACF found Virginia in substantial compliance with federal requirements governing the eligibility of children and providers for IV-E funds but disallowed IV-E funds pertaining to several sample cases. ACF Ex. 2. In its appeal, Virginia challenges only ACF's finding regarding sample case 23. The following facts regarding sample case 23 are undisputed.

The child lived with his mother and was on probation under a court order dated October 22, 2008. ACF Ex. 3, at 1. On November 16, 2009, a probation officer filed a petition requesting that the child's probation status be modified or revoked because he had violated the terms of his probation. *Id*.; *see also* VA Response to Supplemental Submission at 2. On November 23, 2009, the Juvenile and Domestic Relations District Court held a detention hearing. *Id.* at 3. The court found "that there is probable cause to believe that the juvenile committed the delinquent act alleged" and entered the following "Detention Hearing Order":

> That the juvenile be taken into immediate custody and placed at Crater Detention Center, a SECURE FACILITY.
>
> THERE TO REMAIN OR BE DETAINED UNTIL BROUGHT BEFORE THIS COURT ON December 9, 2009, AT 9:00 AM, OR UNTIL FURTHER ORDER OF THIS COURT.

Id. at 3-4 (capitalization in original).

The child was placed in the Crater Detention Center on November 23, 2009. The Crater Detention Center did not qualify as a foster family home or child-care institution, and Virginia claimed no IV-E funds for this placement. *See* Tr. at 5-6.

The child remained at the Crater Detention Center until December 9, 2009. Notice of Appeal dated 11/19/10, at 3. The Juvenile and Domestic Relations District Court held a hearing on December 9, 2009 and issued an "Order for Custody Transfer to Agency" dated December 9 which stated in part:

> Continued placement in the home would be contrary to the welfare of the child based upon: the following facts: There is no information on the father. Family home is not stable and mother and child have been in Court many times. Presently there is an allegation of child assaulting mother. Mother is presently hospitalized & unable to care for the child. Child has been in Detention. There are no known family members available to care for the child.

ACF Ex. 3, at 6.[2] The court also ordered as follows:

> The above-named child shall temporarily be placed with the local board of social services of Sussex County without prior notice or an opportunity to be heard because: . . . the following emergency and need for temporary placement exists: the child needs to be released from detention and there is no known person or family member available to care for the child.

Id. at 7. The court also stated that "[a]s this order requires the local board of social services to temporarily accept the child for placement without prior notice or an opportunity to be heard, a hearing shall be held within 14 days on 12/21/2009[.]" In addition, the court stated, "A hearing to review the foster care plan . . . shall be held . . . . on 1/13/20[10] at 11:00 a.m. and the local board or agency shall file the foster care plan by 12/30/09." *Id*.

The Department of Social Services took custody of the child and placed him in foster care on December 9, 2009. Notice of Appeal at 3.

Virginia claimed title IV-E funds for foster care maintenance payments and associated administrative costs for the child in sample case 23 for the period December 9, 2009 through June 30, 2010. Tr. at 4-5; ACF Ex. 1 (Virginia Primary Review Title IV-E

[2] Virginia also submitted an unsigned order dated December 9, 2009 which made similar findings and continued the case to December 21, 2009. VA Item 9 (attached to brief dated 12/22/10).

Foster Care Eligibility Review Report of Findings) at 7. The review report found the child was not IV-E eligible because a contrary to the welfare determination was "not in the removal court order." ACF Ex. 1, at 7. It is undisputed that while there was no contrary to the welfare determination in the November 23 Detention Hearing Order, there was a contrary to the welfare determination in the December 9 Order for Custody Transfer to Agency. The disallowance reflects ACF's view that for the child to be eligible for IV-E, the contrary to the welfare determination would have to appear in the November 23 order.

Discussion

This case raises an issue of regulatory interpretation. The regulation in question, section 1356.21(c), states in pertinent part:

> 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.

The parties disagree as to whether the November 23 Detention Order or the December 9 Order for Custody Transfer to Agency was the "first court ruling that sanction[ed]" or "pertain[ed] to" the child's removal from home within the meaning of section 1356.21(c). ACF argues that "the first court ruling" must be read literally, without regard to whether the child is removed from home for purposes of foster care. ACF Supplemental Submission at 2; *see also* ACF Br. at 6 (the "regulation makes no distinction between removal orders for juvenile justice purposes and foster care purposes."). Under ACF's reading, the regulation would have required the judge entering the November 23 court order to make a contrary to the welfare determination even though the sole purpose of that order was to place the child in detention for violating the terms of his probation.

Virginia argues that this reading ignores the language of section 472(a) of the Act, the provision that section 1356.21(c) implements, which Virginia says "clearly limits the eligibility requirements to cases where there is a removal and foster care placement." Virginia Response to Supplemental Submission at 4. According to Virginia, a contrary to the welfare determination was not required when the judge issued the November 23 detention order because "(1) . . . . by statute, the Virginia courts cannot place a child in foster care with a detention order;" (2) the placement is the responsibility of the Department of Juvenile Justice, which is not the agency responsible for administering Virginia's IV-E plan; and (3) detention centers are not a child care institution as that term is used for title IV-E eligibility." *Id*. at 4-5. Thus, under Virginia's reading, a contrary to the welfare determination would not have been required until December 9, when the

judge ordered the child placed in foster care, since the November 23 order did not implicate foster care under title IV-E.

We are not persuaded by ACF's argument that the November 23 court order was the "first court ruling" under the plain meaning of that language in section 1356.21(c). Seemingly plain language may need to be read in context in order to discern its intended meaning. *See* 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 46.05 (6th ed. 2002) ("'even apparently plain words, divorced from the context in which they arise . . . , may not accurately convey'" their intended meaning). As Virginia's argument indicates, the context of section 1356.21(c) suggests an interpretation of the phrase "first court ruling" other than that advanced by ACF here, at least under the facts of sample case 23.

ACF rejects Virginia's reading of the regulation as not requiring a contrary to the welfare determination in the November 23 order. According to ACF, this reading is unreasonable because it would undercut the statutory purpose "to minimize the number of children inappropriately removed from home and placed in foster care" and would "create even stronger incentives for removal and foster care placement." ACF Supplemental Submission at 14, citing 63 Fed. Reg. 50,058, 50,075 (1998) and S. Rep. No. 96-336 at 16 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1465.[3] ACF fails to explain, however, how this statutory purpose is undercut where, as here, the first court order removing the child from home had nothing to do with foster care, either immediately or potentially at some future date. We do not see how requiring a contrary to the welfare determination in such an order would do anything to minimize the number of children inappropriately removed from home and placed in foster care, much less create stronger incentives for removal and foster care placement. Thus, ACF has not shown that, on the facts of this case, Virginia's reading of section 1356.21(c) is unreasonable.[4]

ACF also argues that Virginia's interpretation is inconsistent with ACF interpretations of section 1356.21(c) of which Virginia had notice. More specifically, ACF claims that Virginia was given notice of its interpretation by the preamble to the final rule adopting section 1356.21(c) and by ACF's Child Welfare Policy Manual (Manual) issued in September 2001. As discussed below, however, we conclude that the preamble and the

[3] ACF also refers to the statutory purpose to "increase efforts at keeping families together." *Id.* However, that purpose relates not to the statutory requirement for a contrary to the welfare determination but to section 471(a)(15), which requires a judicial determination that reasonable efforts have been "to preserve and unify families."

[4] Virginia argues that it is unreasonable to expect a court order that is not issued for purposes of foster care to include a contrary to the welfare determination. *See* Virginia Br. at 5-6. We need not reach this issue here since we conclude that the interpretation of which ACF gave notice does not indicate that a contrary to the welfare determination is required in such a court order under the circumstances in sample case 23.

Manual interpretation did not give Virginia notice that the November 23 order in this case was "the first court ruling" within the meaning of section 1356.21(c).[5] We conclude, in the alternative, that the December 9 order containing the contrary to the welfare determination can reasonably be viewed as the "first court ruling" following the child's constructive return and subsequent removal from home on December 9.

I. ACF's interpretation of section 1356.21(c) in the preamble to the final rule and in the Child Welfare Policy Manual did not require a contrary to the welfare determination in the November 23 order in sample case 23.

A. The preamble to the final rule

ACF argues that "[i]n issuing the regulations, ACF expressly considered and decided against treating adjudicated delinquents differently or creating any exceptions." ACF Supplemental Submission at 16. ACF quotes the following language from the preamble to the final rule:

> G. Special Populations
> Several issues of note recurred as themes through the comments and the regulation. One was the application of the rules to certain populations, such as Indian tribal children, adjudicated delinquent children, and unaccompanied refugee minors. We clarify how in particular the provisions of the final rule apply to these populations of children, but also emphasize that overall the statute must apply to these children as they would any other child in foster care. We have no statutory authority to exempt any group from provisions such as the safety requirements or termination of parental rights requirements. Furthermore, we strongly believe that, while these requirements must apply to all children, the statute affords the State agency the flexibility to engage in appropriate individual case planning.

Id., quoting 65 Fed. Reg. 4020, 4029 (Jan. 25, 2000) (emphasis added by ACF).

ACF's reliance on this preamble language is misplaced. By stating that the requirements of the statute must apply to adjudicated delinquents "as they would [to] any other child in foster care," this language clearly refers to adjudicated delinquents who are already in foster care. The safety requirements cited as an example are requirements for foster care providers or adoptive homes. *See* 45 C.F.R. § 1356.30. The requirements for termination of parental rights, the second example cited, apply specifically to children already in

[5] At the informal conference, Virginia's counsel acknowledged that Virginia had timely notice of the Manual. Tr. at 6.

foster care (except for a child determined by a court to be an abandoned infant). *See* 45 C.F.R. § 1356.21(i). Nothing in the quoted language suggests that it addresses requirements for a child to be IV-E eligible, such as the requirement for a contrary to the welfare determination or the timing of such a determination.

Moreover, the preamble elsewhere states that section 1356.21(c) was intended to "clarify" ACF's "policy" on the issue of "the timing of a contrary to the welfare determination" following the Board's decision in *Pennsylvania Dept. of Public Welfare*, DAB No. 1508 (1995), with which the preamble indicates ACF disagreed. *See* 65 Fed. Reg. 4054-4055. In that decision dealing with IV-E eligibility, the Board concluded that a contrary to the welfare determination need not be made in a "shelter order" temporarily removing the child from home prior to a hearing, but may instead be made in a dispositional order issued in proceedings initiated up to six months after the child's physical removal.[6] Unlike the cases at issue in DAB No. 1508, the court order removing the child from home in sample case 23 did not temporarily remove the child pending a final disposition by the court that could potentially place the child in foster care. Accordingly, the rule ACF adopted in response to DAB No. 1508 could not have been designed to address the situation in sample case 23.

There is, therefore, no basis in the preamble for inferring that section 1356.21(c) was intended to require a contrary to the welfare determination in the November 23 court order in sample case 23 on the facts of that case.

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[6] In reaching this conclusion, the Board stated:

> Pennsylvania acknowledged that a shelter order physically removes the child from the home. [Citation omitted.] It is not clear that this constitutes a "removal" within the meaning of the Act, however, since a shelter order is generally issued before the court is able to determine whether the child's placement in foster care is warranted. In any event, contrary to what ACF argued, section 472(a)(1) does not require that a CTW determination be made at the time the child is removed from home. Instead, this section requires that the removal be the "result of" a judicial CTW determination. ACF's longstanding interpretation of this language is that a removal will be considered a judicial removal if the court proceedings leading to the CTW determination were initiated within six months of the date the child was last living in the home from which the child was removed.

DAB No. 1508, at 13-14.

B. The Child Welfare Policy Manual

ACF identifies several provisions of the Manual which it claims gave notice to Virginia that a contrary to the welfare determination was required in the November 23 order. *See* ACF Br. at 6-7; ACF Supplemental Submission at 3-4. The Manual provisions on which ACF relies do not purport to interpret specific language in the statute or regulations but simply address questions regarding specific factual situations. As explained below, to the extent the Manual provisions on which ACF relies even address the timing of a contrary to the welfare determination, the factual situations addressed are distinguishable from the facts of sample case 23. In the factual situations addressed in the Manual (like the factual situation in DAB No. 1508), the first court order temporarily removes the child from home, and the later court order relates back to the situation in the child's home at the time of that removal. We see nothing in the Manual that indicates it was intended to require a contrary to the welfare determination in the November 23 court order in the situation here.

According to ACF, question and answer 2 in Manual section 8.3A.6 (ACF Ex. 4, at 1) specifically addresses the situation in sample case 23. ACF Br. at 6. This Manual provision addresses the situation where a court order for temporary detention removes the child from home pending a subsequent court determination to adjudicate the child either delinquent or dependent. In this situation, the Manual says, the contrary to the welfare determination must be in the temporary detention order because "the later hearing order only sanctions" the child's removal from home pursuant to the temporary detention order. In other words, the subsequent court order addressed in the Manual specifically relates back to the temporary removal order and determines whether that removal was appropriate. That is not the situation here. Instead, the court determined at the time it issued the detention order on November 23 that the child should be placed in a secure detention facility given the child's probation violation. The December 9 order for the child's temporary placement with the local board of social services was not based on a determination that the child's removal from home on November 23 was justified. Instead, the December 9 order determined that the child's removal was justified as of December 9 based on the circumstances that existed at that time, i.e., that his mother or other family member was not available to care for him upon his release from detention. Thus, the December 9 order did not "only sanction" the child's prior removal from home, but instead determined that the child was appropriately removed from home on an entirely different basis from the basis stated in the November 23 order. [7]

[7] This Manual provision arguably supports Virginia's interpretation of the regulation as referring to the first court ruling for purposes of foster care since, in order for a subsequent removal order placing a child in foster care to "only sanction" the first order, the initial court order would have to pertain to foster care, either immediately or at some future date.

Question and answer 2 in Manual section 8.3A.4. (ACF Ex. 9, at 1) is also inapposite. The question asks how the state should "establish title IV-E eligibility for a child who is temporarily placed in a facility that is considered outside the scope of 'foster care,' such as a detention facility or psychiatric hospital, prior to his/her placement in foster care." The answer states that the state "must establish the child's eligibility at removal (which includes . . . judicial determinations to the effect that the child's removal from the home was contrary to his/her welfare and that reasonable efforts were made to prevent such removal) even for children who are not initially placed in a foster care setting." This Manual provision seems to assume that the state foster care agency has already decided to ultimately place the child in foster care but for some reason temporarily places the child in another setting prior to foster care. The November 23 order was not an order for a temporary placement anticipating later foster care placement.

ACF's reliance on question and answer 1 in Manual section 8.3A.6 (ACF Ex. 4, at 1) is also misplaced. ACF quotes the following language from the answer: "We have made no distinction about the type of order in which the contrary to the welfare determination is required. Such a determination must be made in the very first court order pertaining to the child's removal from home." ACF Br. at 6. This language must be read in light of the question posed, i.e., whether an "emergency order," which the question notes is "sometimes referred to as a 'pick-up order' or 'ex-parte order,'" is considered the first court ruling for purposes of meeting the contrary to the welfare requirement. In Virginia, a child may be taken into immediate custody and placed in shelter care pursuant to an "emergency removal order" where the child is alleged to have been abused or neglected. Va. Code § 16.1-251 (at Virginia Ex. 6, at 15). The November 23 order here was not issued pursuant to this authority.

Question and answer 5 of Manual section 8.3A.6 (ACF Ex. 4, at 2) is inapposite as well. [8] ACF quotes the following language from the answer: "In juvenile justice procedures, where children are removed for correctional purposes, the courts must determine that continuation in the home would be contrary to the child's welfare if title IV-E eligibility is to be established." ACF Ex. 4, at 2. However, once again, the language in the answer must be read in light of the question, which asks whether ACF would construe a statement to the effect that a child would run away before sentencing if not detained as a contrary to the welfare determination. In other words, the question and answer does not involve the timing of a contrary to the welfare determination but, rather, what type of language would qualify as a contrary to the welfare determination. There is no issue in sample case 23 regarding whether an order contains language that would constitute a contrary to the welfare determination.

[8] Question and answer 5 of Manual section 8.3A.6 also appears in section 8.3A.1 as question and answer 2 (ACF Ex. 8, at 1).

The remaining Manual provisions cited by ACF have no bearing on the timing of a contrary to the welfare determination. For example, question and answer 1 of Manual section 8.3A.4, as in effect until April 27, 2010 (ACF Ex. 9, at 1), addresses a situation where a child is first placed in foster care and then temporarily placed in a facility that is not IV-E eligible. The child in sample case 23 was not first placed in foster care; he was placed in a secure detention facility that was not IV-E eligible.

ACF also maintains that ACYF-PIQ-91-03, dated April 3, 1991, which is cited as a source of several Manual provisions, gives "further color to" the rationale for the interpretation of section 1356.21(c) ACF advances here. Tr. at 9. However, the User's Guide to the Manual states that "[e]very PA and PIQ was officially replaced 09/24/01, the date the manual became operational" (ACF Ex. 10, at 5), and ACF acknowledges that the PIQ ("Policy Interpretation Question") was not in force during the relevant time period (Tr. at 9).[9]

For the reasons stated above, we conclude that the interpretation of section 1356.21(c) in the preamble and the Manual did not give Virginia notice that the regulation's requirement for a contrary to the welfare determination in the "first court ruling" would apply to the November 23 order in sample case 23. ACF has not persuaded us that anything in the preamble or the Manual rendered the contrary to the welfare determination in the December 9 order legally ineffective to qualify the child for IV-E beginning December 9, when he was placed in foster care. Accordingly, we conclude that Virginia's claim for foster care maintenance costs and associated administrative costs for sample case 23 was allowable.

II. The child in sample case 23 was IV-E eligible because the December 9 court order can reasonably be viewed as the "first court ruling" within the meaning of section 1356.21(c).

The undisputed facts show that the child in case 23 lived with his mother until he was taken into custody and placed in a secure detention facility because he had violated the terms of his probation. The November 23 order for the child's placement in the secure detention facility states: "THERE TO REMAIN OR BE DETAINED UNTIL BROUGHT BEFORE THIS COURT ON December 9, 2009, at 9:00 AM, OR UNTIL

[9] In any event, two of the three questions and answers in the PIQ are identical to questions and answers in the Manual that we have already determined do not, in fact, address the circumstances of sample case 23. *See* ACF Ex. 5, at 2. The remaining question and answer indicates that a contrary to the welfare determination is required in a temporary detention order where "the child has already been removed from his home and is in detention as the result of [that] order [and] the later hearing order only sanctions that removal by sentencing the child to detention for a specified period of time." *Id*. At the very least, the situation in sample case 23 is distinguishable on the ground that the December 9 order did not sanction the child's removal from home pursuant to the November 23 order.

FURTHER ORDER OF THIS COURT." ACF Ex. 3, at 4. The order thus authorized the child's placement in the facility until December 9. At the December 9 hearing, the court found that the child "needs to be released from detention" but that the mother was hospitalized and that there were no other known family members available to care for the child. ACF Ex. 3, at 7. The court therefore ordered the child's temporary placement with the local board of social services, to be followed by a hearing on December 21 and another hearing on January 13 to review a foster care plan due on December 30.

At the informal conference, the Board inquired whether it would be reasonable to find on these facts that the child was constructively (i.e., in effect) returned home when the November 23 order expired on December 9, and then removed from home by the November 23 order. Tr. at 19-20, 28-29, 48-49. In that situation, the Board posited, Virginia would meet the requirements of section 1356.21(c) under the interpretation of that regulation ACF advances here since the December 9 order containing a contrary to the welfare determination would be the first court order within the meaning of the regulation.

ACF conceded that if the child had actually returned home when the detention period expired, the contrary to the welfare determination in the December 9 order would have qualified the child for IV-E funding for the stay in foster care beginning December 9. Tr. at 20, 29. However, ACF rejected the concept of a constructive, or effective, return to home as speculative. Tr. at 55. Accordingly, ACF rejected the hypothesis that the December 9 order, under the circumstances of this case, could reasonably be viewed as the first court ruling within the meaning of section 1356.21(c) for purposes of establishing IV-E eligibility for the foster care stay that followed. In ACF's view, the November 23 order effected the only removal from home within the meaning of the IV-E requirements.

We find that under the circumstances of this case, it is reasonable to view the child as having been constructively or effectively returned to his home when his detention period expired and then removed from the home by the December 9 order containing the contrary to the welfare determination, thus qualifying the child for IV-E. The record clearly indicates that the child would have been returned home but for the fact that neither his mother, nor another family member, was available to care for him. This scenario is consistent with Virginia's assertion that where a detention order of limited duration is issued, "the child is immediately returned to the parent without the entry of another court order" when the order expires. Tr. at 55; *see also* Tr. at 51 ("in the detention context, the child is . . . allowed by statute to be there only on a temporary short-term basis and the court is then required to either release the child on a bond or to his parent in some fashion or another.").

ACF argued that on December 9, the child was merely being "transferred" from detention to foster care, not removed from the home pursuant to that order. Tr. at 50. This

argument is not persuasive. The December 9 order made findings concerning the situation in the child's home at that time. If the court had merely been transferring the child pursuant to a removal ordered on November 23, then there would have been no need for the court to make findings about the child's home situation on December 9.[10]

ACF argued that although the IV-E regulations provide for "constructive removal" from the home, *see* section 1356.21(k), they do not provide for a "constructive return" to the home. Tr. at 50-51. ACF also argued that there was only one physical removal from the home here, effected by the November 23 order, and no constructive removal. Tr. at 46. We agree that the regulations do not specifically provide for "constructive returns," but they also do not preclude a finding that a child has been returned home after placement into court-ordered detention for reasons unrelated to foster care, even if not physically returned home. Here, we find as a matter of fact that the child, in effect, was returned to his home when the November 23 order for his detention expired on December 9 although he apparently was not physically returned there. No regulatory authority is needed to make this finding of fact. Moreover, we see no impediment in the regulations to viewing the December 9 order as effecting a constructive removal. The regulations define "constructive removal" as a "non-physical or paper removal of custody." 45 C.F.R. § 1356.21(k). The preamble to the final rule indicates that section 1356.21(k) was adopted as a limited exception related to a child living with an interim relative caretaker, instead of the parent, when the court makes a determination to place the child in foster care. *See* 65 Fed. Reg. 4020, 4030, 4062-4063. However, ACF did not explain why we could not rely on the broad definition of "constructive removal" in this case notwithstanding the reasons for the regulation stated in the preamble.

Accordingly, we conclude, in the alternative, that Virginia met the contrary to the welfare requirement necessary to establish IV-E eligibility in sample case 23 because the child was constructively or effectively returned to his home when his secure detention period expired, and the December 9 order, therefore, was the "first court ruling" relating to the December 9 removal of the child from his home within the meaning of section 1356.21(c).

[10] ACF presumably based its argument that there was merely a transfer of custody on the fact that the December 9 order is titled "Order for Custody Transfer to Agency." However, the title does not change the substance of what actually occurred.

Conclusion

For the foregoing reasons, we reverse the disallowance for sample case 23.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Sheila Ann Hegy
Presiding Board Member