Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Rhode Island Department of Children, Youth and Families
Docket No. A-11-49
Decision No. 2386
June 15, 2011

DECISION

The Rhode Island Department of Children, Youth and Families (Rhode Island) appeals a January 11, 2011 determination by the Administration for Children and Families (ACF) disallowing $904,731 in federal funds claimed under title IV-E of the Social Security Act for foster care maintenance payments and associated administrative costs. ACF based its determination on a secondary review of a sample of cases for which foster care maintenance payments were made during the period October 1, 2009 through March 31, 2010. ACF found that 14 sample cases were ineligible for IV-E payments for part or all of that six-month period and, in all but one case, before that period as well. Rhode Island disputes ACF's ineligibility finding for ten of these sample cases, identified as sample cases 18, 55, 59, 71, 78, 91, 98, 117, 120 and 122.

As explained below, Rhode Island timely filed a notice of appeal pursuant to the Board's regulations at 45 C.F.R. Part 16, but did not timely file a brief and appeal file or show good cause for an extension of time to file that submission. The applicable procedural regulations authorize the Board to take any action it considers appropriate where the appellant fails to meet filing deadlines. *See* 45 C.F.R. § 16.15(b). We have determined that it is appropriate to proceed to decision without any further development of the record. Based on the limited record before us, we conclude that ACF's disallowance letter states a legally sufficient basis for disallowing all of the disputed costs. Accordingly, we uphold the disallowance in full.

I. It is appropriate to proceed to decision in this case without any further development of the record.

Applicable procedural regulations

The IV-E regulations provide that "States may appeal any disallowance actions taken by ACF to the HHS Departmental Appeals Board in accordance with regulations at 45 CFR Part 16." 45 C.F.R. § 1356.71(j)(4). Part 16 contains the requirements and procedures of the Board applicable to certain disputes arising under Department of Health and Human Services programs, including appeals of disallowances in mandatory grant programs. *See* 45 C.F.R. § 16.1 and Appendix A, ¶ B(a)(1).

Section 16.7(a) of 45 C.F.R. provides that "a prospective appellant must submit a notice of appeal to the Board within 30 days after receiving the final decision" from the HHS component that is the federal party in the appeal. It further provides: "The notice of appeal must include a copy of the final decision, a statement of the amount in dispute in the appeal, and a brief statement of why the decision is wrong." Section 16.7(b) provides that, within 10 days after receiving the notice of appeal, the Board "will send an acknowledgment" advising the parties of the next steps in the appeal. Section 16.8 provides in part:

> [T]he appellant and the respondent each participate in developing an appeal file for the Board to review. Each also submits written argument in support of its position. The responsibilities of each are as follows:
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> (a) *The appellant's responsibility.* Within 30 days after receiving the acknowledgment of the appeal, the appellant shall submit the following to the Board (with a copy to the respondent):
> (1) An appeal file containing the documents supporting the claim . . . .
> (2) A written statement of the appellant's argument concerning why the respondent's final decision is wrong (appellant's brief).
> (b) *The respondent's responsibility.* Within 30 days after receiving the appellant's submission under paragraph (a) of this section, the respondent shall submit the following to the Board (with a copy to the appellant):
> (1) A supplement to the appeal file containing any additional documents supporting the respondent's position . . . .
> (2) A written statement (respondent's brief) responding to the appellant's brief.
> (c) *The appellant's reply.* Within 15 days after receiving the respondent's submission, the appellant may submit a short reply. . . .

Section 16.15 provides in part:

> (a) Since one of the objectives of administrative dispute resolution is to provide a decision as fast as possible consistent with fairness, the Board will not allow parties to delay the process unduly. The Board may grant extensions of time, but only if the party gives a good reason for the delay.
>
> (b) If the appellant fails to meet any filing or procedural deadlines, appeal file or brief submission requirements, or other requirements established by the Board, the Board may dismiss the appeal, may issue an order requiring the party to show cause why the appeal should not be dismissed, or may take other action the Board considers appropriate.

Procedural history of this case

Rhode Island, represented by legal counsel, filed a notice of appeal dated February 18, 2011, attaching a copy of ACF's January 11 disallowance determination and the enclosed report on the secondary review. The notice of appeal stated that "we disagree with the error determination in ten (10) of the fourteen (14) cases found not to have been compliant for the period under review" and listed the 10 disputed sample cases and the amount of "maintenance" and "admin" claimed for each sample case. 2/18/11 letter at 1.

In a letter dated February 23, the Board acknowledged receipt of the notice of appeal and set out the next steps in the case. The Board's letter was addressed to Rhode Island's counsel at the pre-printed address for the Executive Office of Health and Human Services (of which the Department of Children, Youth and Families is a part) in Cranston, Rhode Island shown on the notice of appeal. The appellant was directed to file its brief and appeal file within 30 days after receiving the Board's letter. The certified mail receipt card shows that someone (not Rhode Island's counsel) signed for the Board's letter on February 24, 2011.

On April 7, 2011, Rhode Island's counsel wrote to the Board stating that, since filing the notice of appeal, she had been relocated to the Department of Children, Youth and Families in Providence, Rhode Island, and that the Board's correspondence was forwarded to her from Cranston, Rhode Island. She stated that, "[a]s a result, the effective date of receipt of your correspondence at the Department of Children, Youth and Families was April 1, 2011 and our response is due . . . on or before May 1, 2011." Since someone in the Executive Office of Health and Human Services received the Board's acknowledgment letter on February 24, however, the 30-day time period for Rhode Island to file its response ran from February 24, not April 1. The Board nevertheless determined that, in view of the relocation of counsel's office, the Board would accept as timely a brief and appeal file filed by May 2 (the first business day following the 30th day from April 1), although the Board did not issue a written determination to that effect at the time.

On May 5, Board staff received an e-mail from ACF's counsel inquiring whether the Board had received Rhode Island's brief and appeal file. Board staff responded in a May 5 e-mail addressed to ACF's counsel and copied to Rhode Island's counsel that stated in part:

> Based on the representation in the State['s] April 7 letter that the "effective date" of receipt of the Board's acknowledgment letter was April 1, the State's brief and appeal file should have been filed by May 2. The Board has not yet received a submission from the State. There is generally a one-day delay from the date incoming mail is receiving in our mailroom to the date it is delivered. The State should of course serve a copy of its brief and appeal file on ACF, as required by 45 C.F.R. §16.20.

On May 10, Board staff called Rhode Island's counsel's office to inquire whether she had filed Rhode Island's brief and appeal file. Board staff was informed that counsel was would be out of the office until May 13 and that the message would be relayed to her upon her return.

On May 17, having not received Rhode Island's brief and appeal file or any other communication from Rhode Island, the Presiding Board Member issued an Order to Show Cause quoting the Board's regulations at section 16.15(a) and (b) and directing Rhode Island "to show cause" in writing within 10 days of its receipt of the Order, "why the Board should not dismiss its appeal for failing to file a brief and appeal file by May 2, 2011 or to request an extension for filing its brief and appeal [file] by that date." Order at 3. The Order further stated: "The Board will dismiss the appeal with prejudice if the appellant does not file a timely response to this order or if the appellant timely responds but fails to show good cause why the Board should not dismiss the appeal." *Id.*

On May 23, the Board received a letter from Rhode Island's counsel dated May 13 stating: "Please note that I have relocated to the Department of Children, Youth and Families in Providence, Rhode Island. Your correspondence was forwarded to my previous address in Cranston, RI. Therefore, if possible, I would respectfully request an extension concerning the above-entitled matter to June 15, 2011."

On June 3, the Board received Rhode Island's response to the Order, dated May 26. In the response, Rhode Island's counsel acknowledged that "the May 2, 2011 deadline passed without a request for extension of time" and offered the following explanation:

> I returned to my office from a CFS conference in Washington on May 16, 2011. The Department's extension request was prepared in a timely manner, but was mistakenly held for my signature without internal notification to me; resulting in the unexpected delay in its transmission to the Departmental Appeals Board. The change in my office locations and staff are two primary circumstances causing this faulty participation in the Appellate process. I am seeking that this Board not Dismiss the Appeal as the Board Regulations, which guard fairness of process . . ., would not be compromised.
>
> . . . . The "perfect storm" of circumstances resulting in needing and then, the delay in properly requesting, an extension to file a brief in support of our appeal, is set forth above; there was no intent to unduly delay [the process] or miss a deadline.
>
> I have contacted the other parties involved in this action and leave those contacts with the good faith belief that they have not been aggrieved by Department of Children, Youth & Families' failure to file a timely response.

Letter dated 5/26/11, at 1-2 (unnumbered). ACF chose not to reply to Rhode Island's response to the Order, although the Order provided an opportunity for ACF to do so. ACF e-mail dated 6/3/11.

Ruling denying Rhode Island's request for extension of time to file brief and appeal file

We find that Rhode Island has not shown good cause for an extension of time to June 15 to file its brief and appeal file. Rhode Island's May 13 letter requesting an extension simply states that counsel's office had been relocated and that the Board's acknowledgment letter had been forwarded to her. However, Rhode Island's April 7 letter noted the same facts and in effect requested an extension of time to May 1 based on those facts. Rhode Island's May 13 letter does not explain why the 30-day period following counsel's April 1 receipt of the acknowledgment letter was insufficient for Rhode Island to prepare its brief and appeal file for submission to the Board. Nor is there any such explanation in Rhode Island's May 26 response to the Board's Order, which merely attempts to explain why Rhode Island's request for an extension of time was not filed earlier.

Rhode Island's response to the Board's Order also alleges that counsel had "no intent to delay" the Board proceedings by waiting so long to file Rhode Island's request for an extension. The Board's regulations do not require that an extension request be filed before the applicable filing deadline has passed. Thus, if Rhode Island had shown good reasons for needing an extension, the Board would have granted the request. However, Rhode Island has shown no valid reason why it could not file its brief and appeal file 30 days after the date Rhode Island's counsel actually received the Board's acknowledgment letter. In any event, we note that while Rhode Island's counsel did not likely deliberately set out to delay Board proceedings, her actions and omissions have clearly had this effect.

Rhode Island's response to the Order also implies that it would be "unfair" if the Board were to dismiss this appeal with prejudice on the ground that Rhode Island failed to timely file its brief and appeal file or show good cause for an extension of time to file that submission. We disagree. Rhode Island had legal notice of the regulations requiring it to file its brief and appeal file within 30 days of its receipt of the Board's acknowledgment. The Board's acknowledgment letter expressly referred to this requirement. Rhode Island itself recognized this requirement when it stated in its May 7 letter that since the "effective date" of its receipt of the acknowledgment letter was April 1, its brief was due to be filed on May 2 (the first business day after the 30th day). Yet, Rhode Island offers no cogent explanation of why it failed to meet this deadline. The Board's regulations specifically empower it to dismiss an appeal when a party fails to meet a deadline for filing a brief.

In this case, however, we have determined that both parties are better served if we proceed to decision based on the limited record before us, which consists of Rhode Island's notice of appeal, ACF's disallowance letter, and ACF's report on the eligibility review. As explained below, we have concluded that, on its face, ACF's disallowance letter states a legally sufficient basis for disallowing all of the disputed costs. Accordingly, we uphold the disallowance in full.

II. ACF's disallowance letter states a legally sufficient basis for disallowing the disputed costs.

IV-E foster care program background

Title IV-E of the Social Security Act (Act) 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] Act, § 472(a)(1). In 2001, ACF issued its Title IV-E Foster Care Eligibility Review Guide, which was transmitted to states as an attachment to an ACF Information Memorandum, ACYF-CB-IM-01-11 (currently accessible at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2001/im0111.htm). Thus, Rhode Island had timely notice of this issuance.

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. 45 C.F.R. § 1356.71(d) (1) and (2). If a state's program is deemed not in substantial compliance, a program improvement plan is required, and, after completion of the plan, the state is subject to a secondary review of 150 randomly drawn cases. States are subject to a disallowance computed on the basis of payments associated with ineligible cases for the entire period of time that each case has been ineligible. 45 C.F.R. § 1356.71(j). Where a state is found not in substantial compliance on a secondary review, a disallowance is taken based on an extrapolation from the sample to the universe of claims paid. *Id.*

ACF's determination disallowing foster care payments

In a letter dated January 11, 2011, ACF advised Rhode Island that it was disallowing $904,731 in federal funds based on a secondary review of Rhode Island's title IV-E foster care program. ACF stated that the review team determined that 14 of the 150 cases reviewed were "in error" for either part or all of the six-month period under review of October 1, 2009 through March 31, 2010. 1/11/11 letter, at 1. Accordingly, ACF said, it was disallowing $710,323 in foster care maintenance payments and $194,408 in related administrative costs associated with the error cases. ACF also stated that, although 14

[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.

cases were determined to be in error, "this finding does not exceed the 10 percent threshold for substantial compliance in a secondary review." *Id.*

The report on the eligibility review attached to ACF's January 11, 2011 letter includes a chart showing, for each sample case the review team found was an "error case," the reason for the finding with citations to the statutory and regulatory authority, the period of ineligibility, and the amount of FFP disallowed for maintenance payments and administration, respectively. *See* State of Rhode Island Department of Children, Youth and Families Secondary Review, Title IV-E Foster Care Eligibility Report of Findings for October 1, 2009 through March 31, 2010 (Report) at 3-5. The Report also contains narrative explanations of these reasons. The reviewers found each of the ten "error cases" disputed by Rhode Island ineligible for IV-E payments based on one or more of the following reasons: 1) there was no judicial determination of reasonable efforts to prevent the child's removal from home; 2) the foster family home in which the child was placed was unlicensed; 3) there was no documentation verifying safety considerations with respect to staff of the child care institution in which the child was placed; and 4) there was no valid removal from home because the child remained in the home after the court ordered the child removed from home. *See id.* at 5-8.

ACF had a legally sufficient basis for disallowing Rhode Island's payments for the disputed sample cases.

Below, we explain why we conclude that the first three reasons described above provide a legally sufficient basis for disallowing Rhode Island's payments for all of the disputed sample cases. We do not address the fourth reason because it pertains to a single sample case, sample case 122, which was also found ineligible based on one of the other reasons.

1. No judicial determination of reasonable efforts to prevent the child's removal from home (sample cases 18, 55, 59, 71, 91, 98, 117, and 122)

Section 472(a)(2) of the Act provides in part that where a court removes a child from home, there must be "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[.]" Act, § 472(a)(2)(A)(ii). Section 471(a)(15)(B) of the Act provides in part that a state's approved title IV-E plan shall provide, with certain exceptions, that "reasonable efforts shall be made to preserve and reunify families—(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; . . ."

The regulations implementing this statutory requirement state in part:

> *Judicial determination of reasonable efforts to prevent a child's removal from the home.* (i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the

> removal, in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home . . . .
>
> (ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the title IV-E foster care maintenance payments program for the duration of that stay in foster care.

45 C.F.R. § 1356.21(b)(1). Section 1356.21(b)(3) states that "[r]easonable efforts to prevent a child's removal from home . . . are not required if the State agency obtains a judicial determination that such efforts are not required because" of one of the reasons specified in that section.[2]

The regulations further provide:

> *Documentation of judicial determinations.* The judicial determinations regarding . . . reasonable efforts to prevent removal . . . 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.
>
> (1) If the reasonable efforts . . . judicial determinations are not included as required in the court orders . . . , 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) Court orders that reference State law to substantiate judicial determinations are not acceptable, even if State law provides . . . that removal can only be ordered after reasonable efforts have been made.

45 C.F.R. § 1356.21(d).

The Report (at page 5) states as follows:

> Seven cases were found to be in error because the court order removing the child from the home did not contain a judicial determination that reasonable efforts had been made to prevent removal. Although most of these cases contained evidence of a caseworker's affidavit that there had been reasonable efforts to prevent

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[2] These reasons are: a court has determined that the parent has subjected the child to aggravated circumstances as defined in state law; a court has determined that the parent has been convicted of murder or voluntary manslaughter of another child of the parent, or aiding or abetting, attempting, conspiring or soliciting to commit such a murder or voluntary manslaughter, or a felony assault that results in serious bodily injury to the child or another child of the parent; or the parental rights of the parent with respect to a sibling have been terminated involuntarily. 45 C.F.R. § 1356.21(b)(3)(i)-(iii).

> removal, the court order removing the child from the home did not specifically incorporate any provisions of the affidavit or make an explicit determination pertaining to the requisite finding. Thus, the documentation of reasonable efforts provided was no more than an affidavit. In accordance with Federal mandates, reference to reasonable efforts in an accompanying affidavit, and in the State law governing the removal proceedings, is not adequate to satisfy the judicial determination requirements under §472(a)(2)(A)(ii) of the Act and 45 CFR 1356.21(d). Further, the State did not provide a subsequent court order within 60 days of the removal or court transcript documenting the reasonable efforts determination. Therefore, the children in these cases are ineligible under title IV-E for the entire foster care episode.

Rhode Island's notice of appeal does not specifically dispute the Report's findings with respect to these seven disputed sample cases.

Based on the record before us, we find that none of the removal orders in these seven sample cases made an explicit determination that reasonable efforts were made to prevent the child's removal from home. In addition, we find that there is no basis in the record before us for finding that the removal order in any of the sample cases made an explicit determination that reasonable efforts were not required to prevent the child's removal from home for one of the reasons specified in section 1356.21(b)(3). We also find that, even where there was a caseworker's affidavit alleging facts that showed that reasonable efforts were made to prevent the child's removal from home, the removal order did not incorporate or adopt any of those alleged facts. Under section 1356.21(b)(1), such removal orders are not adequate to document that a judicial determination of reasonable efforts was made when the child was removed from home, even where state law requires a court removing a child from home to make a reasonable efforts determination.

We further find based on the record before us that there was no subsequent court order or court transcript within 60 days of the removal order that adequately documented a judicial determination of reasonable efforts. Thus, pursuant to section 1356.21(b), ACF properly concluded that the child in each of the disputed sample cases was ineligible for IV-E payments for the entire stay in foster care.

2. Unlicensed foster family home (sample case 78)

Section 472(b) of the Act provides in part that "[f]oster care maintenance payments may be made under this part only on behalf of a child described in subsection (a) of this section who is— (1) in the foster family home of an individual . . . , or (2) in a child-care institution . . . ." *See also* Act, § 472(a)(2)(C). Section 472(c) of the Act defines the term "foster family home" as "a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing . . . ." The Title IV-E Eligibility Review Guide states that "the statutes do

not make a distinction between a licensed foster family home and an approved foster family home" and that the terms "full licensure" and "approval" are synonymous.

The Report states that "[o]ne case lacked a license for a home where a child was placed out-of-State. This home was studied but not licensed by the receiving State." Report at 7.

Rhode Island's notice of appeal does not specifically dispute the Report's findings with respect to sample case 78.

Based on the record before us, we find that the child in sample case 78 was placed in an out-of-state foster home that was not licensed. Thus, the child was not placed in a "foster family home" within the meaning of section 472(c) of the Act. Accordingly, pursuant to section 472(b) of the Act, ACF properly concluded that the child in this disputed sample case was not eligible for IV-E payments for this stay in foster care.[3]

3. No documentation verifying safety considerations with respect to staff of the child care institution (sample cases 91 and 120).

Section 1356.30(f) of 45 C.F.R. states:

> In order for a child care institution to be eligible for title IV-E funding, the licensing file for the institution must contain documentation which verifies that safety considerations with respect to the staff of the institution have been addressed.

The Title IV-E Foster Care Eligibility Review Guide explains this requirement in part as follows:

> For childcare institutions, 45 CFR §1356.30(f) requires States to set procedures that address safety considerations with respect to the staff of the institution. The mechanism used to satisfy the safety requirement should be written into State policy, procedures or statutes, and incorporated into the licensing documentation . . . . The State agency documentation must demonstrate that the staff of the childcare institution meets the safety criteria that the State establishes, even when the child is placed in an out-of-State institution. If the childcare institution does

[3] We note that ACF's Child Welfare Policy Manual (accessible at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/index.jsp?idFlag=0) provides that the "State may claim administrative costs on behalf of an otherwise eligible child placed in an unlicensed or unapproved relative home for 12 months or the average length of time it takes the State to license or approve a foster family home, whichever is less. During this time, an application for licensure or approval of the relative home as a foster family home must be pending (section 472(i)(1)(A) of the Social Security Act)." Manual, Section 8.1B, Question Number 11; *see also* Question Number 20. However, there is no basis in the record before us to determine whether sample case 78 qualified for this exception.

> not meet the safety requirements of the State, title IV-E foster care payments cannot be made on behalf of a child who is placed in the foster care facility.

In *Tennessee Dept. of Children's Services*, DAB No. 2307 (2010), the Board quoted this language in holding that a showing that the child care institution is licensed by the state is not sufficient to meet the requirement in section 1356.30(f). The Board concluded that the licensing file for the institution must contain documentation which verifies that the licensing standards adopted by the state for child care institutions regarding child safety have been addressed. *Id.* at 7-9 (also citing 65 Fed. Reg. 4020, 4069 (2000)).

The Report states: "One case found to be in error lacked information that complete safety considerations for staff were met for the facility the child was placed in during the PUR [period under review]." Report at 7. The Report also states: "Another case lacked information that complete safety considerations for staff were met for the out-of-State facility the child was placed in during the PUR." *Id.*

Rhode Island's notice of appeal does not specifically dispute the Report's findings with respect to these two disputed sample cases.

Based on the record before us, we find that Rhode Island failed to document that staff of the child care institution in which each child was placed met all of the safety requirements adopted by the state. Thus, pursuant to section 1356.30(f), ACF properly concluded that the child in each of the disputed sample cases was ineligible for IV-E payments for the entire stay in foster care.

Conclusion

For the foregoing reasons, we uphold the disallowance in full.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member