

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Tennessee Department of  
Children's Services  
Docket No. A-10-16  
Decision No. 2307

DATE: March 22, 2010

DECISION

The Tennessee Department of Children's Services (Tennessee) appealed a determination by the Administration for Children and Families (ACF). Based on its review of a sample of Tennessee's foster care cases for the period April 1, 2008 through September 30, 2008, ACF found that six of the 80 cases reviewed did not meet eligibility requirements during the period under review and that another case was ineligible for federal funding for a different period. As a result, ACF determined that Tennessee was not in substantial compliance with federal eligibility requirements and disallowed \$25,121 in federal funds claimed by Tennessee for foster care maintenance payments and administrative costs for the sample cases for the periods of ineligibility.

Tennessee appeals ACF's findings for three of the six cases ACF found did not meet eligibility requirements during the period under review. A finding in favor of Tennessee on two or more cases would result in not only a reversal of the disallowance associated with those cases, but also a reversal of ACF's determination that Tennessee was not in substantial compliance with federal eligibility requirements.

For the reasons discussed below, we uphold ACF's findings on the three disputed cases and therefore uphold the disallowance and ACF's determination that Tennessee was not in substantial compliance. Contrary to what Tennessee argues, it is not sufficient that Tennessee placed the children in the sample cases in child care institutions that were approved as meeting licensing standards. The institutions were ineligible because

the licensing files for the institutions did not contain documentation verifying that child safety requirements were timely addressed during the period under review.

### **Background**

Title IV-E of the Social Security Act (Act) provides, among other things, for federal funding for foster care maintenance payments on behalf of children meeting certain federal requirements who are placed in qualifying foster family homes or child care institutions.<sup>1</sup> In addition, section 474(a)(3) of the Act authorizes federal funding for "amounts . . . found necessary by the Secretary . . . for the proper and efficient administration of the State plan."

The title IV-E regulations were amended on January 25, 2000 (with a March 27, 2000 effective date) and implemented certain provisions of the Adoption and Safe Families Act of 1997, Public Law No. 105-89. 65 Fed. Reg. 4020 (Jan. 25, 2000). Revisions made to the title IV-E regulations at 45 C.F.R. Parts 1355 and 1356 included the addition of new provisions to address child safety. The amended regulations also set out a new process for review of state compliance with title IV-E child and provider eligibility requirements.

Under the review process at 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 or child care institutions.

If a state's ineligible cases in the sample (error cases) do not exceed eight in an "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. A disallowance is assessed, however, for foster care maintenance payments and related administrative costs associated with the individual error cases in the sample "for the period of time the

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<sup>1</sup> The current version of the Social Security Act can be found at [www.ssa.gov/OP\\_Home/ssact/comp-ssa.htm](http://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.

cases are ineligible." 45 C.F.R. § 1356.71(c)(4). If a state's program is deemed not in substantial compliance based on more than eight error cases, a program improvement plan is required. ACF may also conduct a "subsequent primary review" using a sample of 80 cases and a threshold of no more than four error cases. 45 C.F.R. § 1356.71(c)(4).

A state found not to be in substantial compliance in a primary review is subject to a "secondary review" of 150 sample cases, which will result in a disallowance that is based on an extrapolation from the sample to the universe of cases if both case and dollar error rates in the secondary review exceed 10 percent. 45 C.F.R. §§ 1356.71(c)(5) and (6). Based on findings of any review, ACF may also disallow amounts associated with ineligible payments for what ACF calls "non-error" cases because they are not part of the sample from the period under review.

In June 2009, ACF conducted a "subsequent primary review" of a sample of Tennessee's foster care cases for which maintenance payments were made during the period April 1, 2008 through September 30, 2008. ACF found six error cases in the period under review (only three of which Tennessee appeals), as well as one non-error case. Since Tennessee had more than four error cases, ACF determined that Tennessee was not in substantial compliance with title IV-E eligibility requirements. ACF also disallowed \$21,632 in foster care maintenance payments and \$3,489 in related administrative costs for the error and non-error cases.

Tennessee appealed the review findings only with respect to the three "error" cases identified as sample cases TN-2, TN-4, and TN-33. A chart in the ACF review report lists periods of ineligibility for each case as follows: TN-2 (02/19/2008 - 09/03/2008); TN-4 (3/25/2008 - 09/30/2008); TN-33 (03/02/2008 - 06/26/2008). TN Ex. A, Review Report at 3. For each of these cases, the chart states the following reason for finding the payment ineligible:

Safety requirements for foster care provider not met  
[472(b)(c); 45 CFR 1356.71(d)(1)(iv), 1355.20]

Id. (punctuation as in original).

Subsection 472(b) of the Act restricts foster care maintenance payments under title IV-E to children who are described in subsection 472(a) and are either in a foster family home or in a child care institution, as defined in subsection (c).

Section 1356.71(d)(1)(iv) of the regulations provides that states will be reviewed against the requirements of title IV-E "regarding," among other things, "[p]lacement in a licensed family foster home or child care institution."

Section 1355.20 defines a "child care institution" as a -

private child care institution, or a public child care institution which accommodates no more than twenty-five children, and is licensed by the State in which it is situated or has been approved by the agency of such State . . . responsible for licensing or approval of institutions of this type as meeting the standards established for such licensing. . . .

As the title IV-E requirement applying to the cases at issue, the text of the review report cites to 45 C.F.R. § 1356.30(f). TN Ex. A, Review Report at 5. That section provides:

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 have been addressed.

The review report describes ACF's findings regarding the safety requirements as follows:

In some of the cases reviewed, the annual reassessment of the safety requirements of the childcare institutions where the child was placed during the [period under review] had not been completed timely. The foster care provider was re-approved without receipt of criminal records checks on some of the staff. This was found during the review not to meet Federal safety requirements since Tennessee's Department of Children's Services licensing requirements state that "All prospective and existing staff shall undergo a criminal records check prior to commencing work at any facility." In some cases it also was determined the State did not adhere to its policy that requires completion of the child protective service clearances.

TN Ex. A, Review Report at 4 (emphasis added).

The review report recommended that Tennessee "ensure that the files in the childcare institutions contain documentation related to the safety consideration of all staff as required by State policy" and that Tennessee "establish a procedure to

monitor the childcare institutions' timely implementation of background checks for their staff in accordance with State requirements." Id. at 5.

### Tennessee's arguments

On appeal, Tennessee argues that it "was in substantial compliance at the time of the review because of the fact that state policies, procedures and protocol did exist to ensure that these contract facilities were performing the required background checks on the employees of these agencies . . . ." TN App. Br. at 2. In support of this statement, Tennessee cites to its Exhibits B, C, and D. Tennessee Exhibit B is the affidavit of the Assistant Director, Department of Children's Services (DCS), Child Placement & Private Providers Division. Exhibit C contains a one-page document identified as an excerpt from Tennessee's Provider Policy Manual and a document identified as DCS Policy 4.1, which is incorporated by reference into the manual excerpt. Exhibit D is the protocol for a Program Accountability Review (PAR) that Tennessee uses to monitor "designated DCS contract groups with whom [DCS] contracts." TN Ex. D, at 1.

According to Tennessee, the PAR process was in place during the review period and was used with the three facilities in the three cases appealed. Tennessee asserts that "PAR provides comprehensive monitoring services to ensure that program objectives are met and to promote efficient and effective management of state resources." TN App. Br. at 2. Specifically, Tennessee asserts that PAR: (1) monitors contractor compliance with contract terms and the specific program requirements; (2) reviews whether the contractor adheres to applicable laws and regulations; and (3) measures the contractor's "progress toward the desired results and outcomes for the youth in its facilities." Id.

If the PAR monitoring identifies areas of noncompliance, Tennessee asserts, there is an expectation that corrective action will be taken to ensure compliance. With respect to the facilities in question, Tennessee does not specifically say they were found to be in noncompliance, but implies this by saying that the facilities "were being responsive to the corrective measures . . . ." Id. at 3.

Tennessee says that "the reason for the disallowance was that some of the providers were re-approved without receipt of the criminal records check on some of the staff and without the child protective services clearances in some instances." Id.

Tennessee does not directly assert (or provide evidence) that the criminal record checks and clearances at issue were timely completed and documented. Indeed, Tennessee acknowledges that "[s]ome employee files were supplemented at the time that the reviewers were in the state" and asserts merely that "[a]t the time of the review all files were in perfect shape." Id. at 4.

Tennessee focuses on the requirement that institutions be licensed or approved as meeting licensing standards, citing Board cases on this issue. Tennessee asserts:

In actuality, these providers had been fully re-approved in accordance with the applicable state policies. Prior to the IV-E review, [DCS] simply completed a re-check on some of these agencies. At no time during the [period under review] did the State revoke or suspend the license or revoke, suspend or limit their approval as a placement resource for DCS children.

Id. at 3, citing TN Ex. E.

According to Tennessee, it was "penalized" because it "went to the extra step of re-documenting some of the criminal background checks and some of the [child protective services] checks" but that "[a]t no time was the safety of the children in the care and custody of DCS compromised in any way." Id.

Finally, Tennessee argues that "there is no federal guideline or policy governing this specific issue, and therefore, the State must be in compliance with our own policies as articulated in the State Plan document." Id. at 3. Tennessee takes the position that it was and currently is in compliance with these policies and therefore should be considered compliant with the federal requirements as well.

### **Analysis**

As we discuss below, Tennessee's arguments do not address the basis for ACF's findings in the three disputed cases, and its evidence is not sufficient to rebut those findings. Since Tennessee provided no documentation verifying that the applicable safety requirements had been timely addressed for the child care institutions in which Tennessee placed the children in the three sample cases, we uphold ACF's findings that these institutions were not eligible title IV-E providers during the period under review, even if they were licensed or approved.

1. *The relevant issue is whether the files for the child care institutions contained documentation which verifies that safety considerations with respect to the staff have been addressed.*

Contrary to what Tennessee argues, this case does not turn on whether the child care institutions at issue were licensed or approved as meeting state licensing standards. Thus, the Board cases that Tennessee cites regarding licensure and approval are irrelevant.

As noted above, the federal requirement the ACF review found was not met was the requirement at section 1356.30(f) that the licensing file for a child care institution contain "documentation which verifies that safety considerations with respect to the staff have been addressed." Section 1356.30(f) clearly makes this documentation a prerequisite for a child care institution to be "eligible for title IV-E funding."

Tennessee is correct that, with respect to child care institutions, states have some discretion about what safety requirements to adopt. Under section 471(a)(22) of the Act, a state's title IV-E plan must provide that "the State shall develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children."<sup>2</sup> States are also responsible for establishing and maintaining standards for child care institutions (including safety standards) that are reasonably in accord with national standards. Act, § 471(a)(10).

Whatever licensing standards a state adopts for child care institutions regarding child safety, however, federal regulations reasonably require that no federal payments will be made unless the licensing file for the institution contains documentation which verifies that the safety considerations with respect to staff have been addressed. Thus, even if, as Tennessee asserts, no child was, in fact, unsafe, federal IV-E payments will not be made in the absence of the requisite documentation, intended to ensure the children's safety.

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<sup>2</sup> This contrasts with the statutory provision requiring criminal record checks and child and abuse registry checks for prospective foster care and adoptive parents. See Act, § 471(a)(20), as amended in 2006 by Pub. L. No. 109-248.

Contrary to what Tennessee argues, ACF has issued guidance specifically addressing this issue. The Title IV-E Foster Care Eligibility Guide (Guide) explains the safety requirements.<sup>3</sup> The Guide explains that, although compliance with the safety requirements is a condition of full licensure, "compliance with the safety provision is assessed as a separate requirement for purposes of the eligibility review." ACF Ex. 1, at 15. The Guide states:

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 must provide documentation verifying that safety considerations with respect to the staff of the institution are satisfied for the duration of the child's placement for the [period under review]. The documentation must demonstrate that the staff of the childcare institution meets the safety criteria that the State establishes, . . . . If the childcare institution does 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.

Id. at 16. The Guide also clarifies that no title IV-E foster care maintenance payments may be made on behalf of a child before the month the child care institution complies with the safety requirements. Id. at 17.

This guidance is consistent with the preamble to the 2000 final rule. For example, the preamble stated that, during a IV-E eligibility review, ACF would examine a provider's license to determine that the facility is an appropriate type of facility, that its license was valid for the duration of the child's placement, and "that the safety requirements at § 1356.30 have been addressed." 65 Fed. Reg. at 4072.

In other words, it is not enough to document that a child care institution was licensed; additionally, a state must have

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<sup>3</sup> ACF Exhibit 1 is the 2007 version of the Guide. The Guide was first transmitted to states with an ACF Information Memorandum issued in 2001 (ACYF-CB-IM-01-11).



documentation verifying that the institution met the safety requirements established by the state during the period a title IV-E child was placed in the institution.

*2. Tennessee did not rebut the review finding that its policy during the review period was to require background checks for staff prior to commencing work at any facility.*

ACF's review report found that Tennessee had the following licensing requirement during the review period: "All prospective and existing staff shall undergo a criminal records check prior to commencing work at any facility." TN Ex. A, Review Report at 4. The report also found that state policy "requires completion of the child protective services clearances." Id.

Tennessee's appeal brief does not address specifically what its title IV-E State Plan provides regarding child care institution staff, nor what its licensing requirements or policies were during the period under review (April 1, 2008 through September 30, 2008). Tennessee did provide as its Exhibit C a one-page document titled "Background Checks" (with a handwritten note identifying it as an "[e]xcerpt from the Provider Policy Manual") and a copy of DCS Policy 4.1.

DCS Policy 4.1 applies by its own terms only to DCS employees, but the excerpt from the manual applies it to provider employees. DCS Policy 4.1 requires the completion of the following background checks: (1) a criminal history check including a check of current local court records and state and federal fingerprint checks; (2) child protective services records checks; and (3) and an internet records clearance. This policy also specifies forms to be completed to document the checks and the results of those checks. In addition to referring to DCS Policy 4.1 regarding employee background checks, the excerpt from the Provider Policy Manual contains a provision allowing new employees to begin work prior to the receipt of results of fingerprint checks. Such work is permitted, however, only after all other required screenings and background check results have been received (with no indication of any criminal history), and, even then, only if the new employee is never left alone with children.

For the following reasons, we find Tennessee's Exhibit C insufficient to show that the ACF review incorrectly found that the state policy applicable during the period under review required completion of the background checks at issue prior to a

new employee commencing work at a facility and completion of child protective services clearances.

First, Tennessee did not show that the documents in Exhibit C are the policies in effect during the period under review. The excerpt from the Provider Policy Manual is undated, and the version of DCS Policy 4.1 provided by Tennessee is the policy effective 06/04/09, after the period under review.<sup>4</sup>

Second, even assuming these policies were in effect during the period under review, the manual excerpt requires completion of all background checks required under DCS Policy 4.1 except for the fingerprint checks before a new employee may begin work, and then the employee may work only on the condition that the new employee is never alone with a child.

Yet, Tennessee does not does not deny that, for some of the child care institutions at issue, child protective service clearances were missing. Nor does Tennessee allege that any of the staff whose background checks were found not to have been timely completed in fact lacked only a fingerprint check and never worked alone with a child.

*3. Tennessee's evidence does not show that any files for the institutions at issue contained documentation to verify that the safety considerations, reflected in state policy, were met for the period under review.*

Tennessee's Exhibit E contains copies of licenses issued by the Tennessee Department of Mental Health and Developmental Disabilities to various residential mental health or drug treatment facilities, as well as two licenses issued by DCS to two child-placing agencies. Neither the review report nor Tennessee identifies specifically the institutions at issue or states who placed them there. We presume, for purposes of this decision, that each of the children from the three sample cases was placed in at least one of the licensed treatment facilities during the period under review.

Tennessee presents no evidence, however, to show what documentation was contained in the licensing or other files for these facilities during the periods ACF found they were not

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<sup>4</sup> We also note that the website referred to in the excerpt from the Provider Policy Manual identifies the manual section on background checks as having been updated on 07/01/09.

eligible (each of which ended prior to or on September 30, 2008). Indeed, Tennessee's brief effectively concedes that the documentation in the files was inadequate during these periods since the brief refers to the institutions having to take "corrective action" and to the files being "supplemented" and in perfect shape at the time of the review, which was not until June 2009. TN App. Br. at 4. Tennessee does not assert that the documentation requirement was met during the period under review when the title IV-E payments at issue were made. Although Tennessee characterizes its actions as "re-checks" and "supplements" of the files, Tennessee provides nothing to show that the files were complete during the period under review.

Moreover, the affidavit of the DCS Assistant Director is too vague to undercut the review report finding that the background checks and clearances were not timely completed and documented. The Assistant Director attests:

At the time of the IV-E review, state policies, procedures and protocol did exist to ensure that residential contract facilities were performing required background checks on the employees of these agencies.

TN Ex. B, ¶ 5 (emphasis added). This statement does not, however, specify what policy on background checks applied during the period under review, nor does it address the issues of whether the background checks were being timely completed and whether the files for the institutions contained documentation verifying that the safety requirements were addressed.

The affidavit and brief both cite instead to the PAR protocol, asserting that Tennessee regularly audits the provider files and "completed a re-check on some of these agencies" prior to the ACF review. TN Ex. B, at ¶ 6; TN App. Br. at 3. To the extent Tennessee is relying on its PAR system to show compliance with the documentation requirement, however, that reliance is misplaced. Nothing in the PAR protocol at Tennessee Exhibit D specifically calls for review of the licensing file for a child care institution to ensure that it contains the required documentation verifying that safety considerations were addressed. While the protocol does call for review of personnel records, it also provides that a "30% sample is acceptable." TN Ex. D, at 6. Moreover, even assuming review of a sample of the personnel records would be sufficient to verify an institution's compliance with the safety requirements, completing a re-check "prior to the ACF review" is not the same as ensuring that the provider was eligible for title IV-E payments during the period under review.

In sum, Tennessee's evidence about its PAR system shows that Tennessee was doing some after-the-fact monitoring that might reveal that an institution was not, in fact, doing timely background checks. Tennessee did not, however, show that it had documentation during the review period verifying that the background checks were timely completed, as required for the institutions to be eligible for title IV-E funding.

Finally, we recognize that section 1356.30(f) does not specify exactly what type of documentation must be in the files verifying that safety considerations were addressed. In the preamble to the final rule enacting this requirement, ACF stated that it was declining "to specify the mechanism or documentation to verify that safety considerations" have been addressed and would "leave that decision to the State." 65 Fed. Reg. at 4069. Thus, Tennessee arguably had the discretion to require that a licensing file contain documentation other than the actual results of the background checks, such as the forms the current DCS Policy 4.1 uses to document the checks that were done and their results or a statement by a licensing or approving authority verifying that someone had reviewed the personnel files of the institution to ensure the checks were timely completed. If Tennessee had such alternative documentation, however, it did not provide that documentation to us, much less provide documentation showing that the background checks were, in fact, timely completed and that no child was left alone with a new employee prior to completion of all the required checks and clearances.

Placing children in child care institutions without some type of documentation verifying that the safety requirements were met puts those children at risk. In light of the regulations and guidance discussed above, Tennessee could not reasonably consider institutions for which such documentation was not timely completed to be eligible for title IV-E payments.

**Conclusion**

For the reasons stated above, we affirm ACF's determination that Tennessee was not in substantial compliance with title IV-E eligibility requirements. We also affirm ACF's determination to disallow \$25,121 in foster care maintenance payments and related administrative costs.

  
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