Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Michigan Department of Human Services
Docket No. A-11-1
Decision No. 2360
January 14, 2011

DECISION

The Michigan Department of Human Services (Michigan) appeals a determination by the Administration for Children and Families (ACF) based on a review of a sample of foster care cases for which Michigan claimed federal funds under title IV-E of the Social Security Act for the period April 1 through September 30, 2010. ACF disallowed part of Michigan's claim for foster care maintenance payments and associated administrative costs and found that Michigan was not in substantial compliance with federal requirements governing the eligibility of children and providers for IV-E funds. As relevant here, ACF determined that six sample cases were ineligible during the period under review, two more than the number of ineligible cases allowed for a finding of substantial compliance.

Michigan disputes the eligibility review findings for two of the sample cases. In each of those cases, Michigan made an initial determination that the child was IV-E eligible, but later determined that the child was ineligible. A request for a hearing before the State agency on the ineligibility determination was timely filed on behalf of each child. Michigan argues that, pursuant to 45 C.F.R. § 205.10(b), each child was eligible for IV-E payments made until a decision was issued pursuant to a hearing before the State agency. ACF responds that this regulation does not apply on the facts of these cases.

For the reasons discussed below, we conclude that ACF should have treated the two sample cases at issue as IV-E eligible during the period under review. Accordingly, we reverse the disallowance associated with these cases, which totals $67,264, and we conclude that Michigan was in substantial compliance with the federal requirements for the foster care program.

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 matching of

state foster care maintenance payments available for a child who has been removed from the home of a relative into foster care if 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)(A) requires that the removal and foster care placement be 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[.]

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:
> (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.

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

> For purposes of meeting the requirements for living with a specified relative prior from removal from the home under section 472(a)(1) of the Act . . ., one of the two following situations must apply:
> (1) The child was living with the parent or specified relative, and was AFDC eligible in that home in the month of the voluntary placement agreement or initiation of court proceedings; or
> (2) The child had been living with the parent or specified relative within six months of the month of the voluntary placement agreement or the initiation of court proceedings, and the child would have been AFDC eligible in that month if s/he had still been living in that home.

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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.

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 ineligible cases in the sample do not exceed eight in the "initial primary review," or four in a "subsequent primary review" (the type of review conducted here) , a state's program is deemed in "substantial compliance," and the state is not subject to another primary review for three years. However, a disallowance is assessed for payments and administrative costs associated with the individual error cases in the sample "for the period of time the cases are ineligible." 45 C.F.R. § 1356.71(c) (4). If a state's program is deemed not in substantial compliance, a program improvement plan is required, followed by a "secondary review" of 150 randomly drawn cases, which will result in a disallowance that is based on an extrapolation from the sample to the universe of claims paid if both case and dollar error rates in the secondary review exceed 10 percent. 45 C.F.R. § 1356.71(c) (5) and (6).

Section 471(a)(12) of the Act provides that in order for a state to be eligible for IV-E payments, the state shall have a plan approved by the Secretary which—

> provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness[.]

The conference report on Public Law No. 96-272 states that section 471(a)(12) "provides that hearing procedures under the new IV-E program would be the same as under current IV-A law." H.R. Rep. No. 900, at 45 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 1561, 1565. Former title IV-A required that a State plan for aid to families with dependent children "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness." Section 402(a)(4) of the Act. This provision was implemented by 45 C.F.R. § 205.10, which also applies to certain other public assistance programs, and is incorporated by reference in the IV-E regulations. *See* 45 C.F.R. § 1355.30(p)(2). Section 205.10(a)(4) requires that a State plan provide for a hearing before the State agency in "cases of intended action to discontinue, terminate, suspend or reduce assistance . . . ." *See also* 45 C.F.R. § 205.10(a)(5) (requiring an opportunity for a hearing to "any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance ...."). Section 205.10(b) provides in pertinent part:

> *Federal financial participation.* Federal financial participation is available for the following items:
> (1) Payments of assistance continued pending a hearing decision.

Case Background

The following facts shown by the record are undisputed.

ACF conducted a subsequent primary review in June 2010. The report on the review identified six sample cases as ineligible for IV-E payments made for the period under review, April 1 through September 30, 2009. The report identified an additional sample case (which is not at issue here) as ineligible for IV-E payments made for a prior period. ACF disallowed a total of $74,318 claimed for foster care maintenance payments and associated administrative costs for these sample cases. The two disputed sample cases, Case Nos. 46 and 61, involving children identified as TW and BC, respectively, were among the six sample cases found ineligible for the period under review. Michigan claimed federal funding totaling $67,264 for these two sample cases.

In 2007, Michigan made an initial determination that TW was IV-E eligible. In March 2009, Michigan reviewed the case and determined that TW had never been IV-E eligible because she had not lived with her mother within the six-month period prior to the filing of the petition to remove her from her mother's home.[2] *See* MI Br. at 4; MI Ex. 2. According to Michigan, at the time its initial determination was made, its software did not contain the appropriate questions about the length of time the child had been living with a relative. MI Ex. 2, at 1. ACF's review report found that TW was never IV-E eligible because the requirement that the child have been living with a specified relative within six months of the initiation of court proceedings was not met. ACF Ex. 2, at 7, citing section 472(a)(1) and (2) of the Act and 45 C.F.R. § 1356.21(k) and (l).

In 2008, Michigan made an initial determination that BC was IV-E eligible. In February 2009, Michigan reviewed the case and determined that BC had never been IV-E eligible because BC's father's primary residence was with BC's mother at the time BC was removed from the mother's home. *See* MI Br. at 4; MI Ex. 3. According to Michigan, Protective Services documented numerous contacts with BC's father at BC's mother's home after its initial determination was made. MI Ex. 3, at 1. ACF's review report found that BC was never IV-E eligible because the AFDC eligibility requirement that the child be deprived of parental support or care due to circumstances including the continued absence of one of the parents from the home from which the child

[2] Michigan's appeal brief states that Michigan concluded in 2007 that TW was ineligible. MI Br. at 4. We assume that Michigan erroneously typed the year as 2007 instead of 2009 since Michigan's Exhibit 3 shows the year as 2009.

was removed was not met. *Id.*, citing former section 406(a) of the Act and 45 C.F.R. §§ 233.90(c) and 233.100.[3]

In each case, a request for a hearing before the State agency was filed on the child's behalf within 10 days of notice of the State agency's determination that the child was ineligible. See MI Ex. 3, at 2, and Ex. 4, at 2. As of the time Michigan's appeal brief in the case now before us was filed, the hearing had not yet been scheduled in either case, although Michigan anticipated that the hearings would be scheduled soon. See MI Br. at 4. Michigan made foster care payments on behalf of each child for the entire period under review and claimed IV-E funds for these payments and associated administrative costs.

Analysis

As noted, section 205.10(b) of 45 C.F.R. provides that FFP "is available" in "[p]ayments of assistance continued pending a hearing decision." The hearing decision to which this refers is the decision made pursuant to the "fair hearing" required by section 205.10(a)(4) to be made available to a recipient of public assistance under the Act if the State agency's determination to "discontinue, terminate, suspend or reduce" such assistance is timely appealed. Here, Michigan continued to make payments of assistance under title IV-E to TW and BC pending such a hearing decision. Since FFP in these payments is expressly authorized by regulation, Case Nos. 46 and 61 should not have been treated as ineligible during the period under review.[4]

ACF takes the position, however, that the fair hearing requested by TW and BC was not the type of fair hearing required by section 205.10(a)(4). ACF points out that Michigan acknowledged that if a child is not IV-E eligible, the State agency can make foster care payments for children using State and county funds instead of State and federal IV-E funds. In addition, ACF says, Michigan "does not allege that the amount of the foster care payments made on behalf of [TW and BC] is at issue." ACF Br. at 10. ACF reasons that Michigan's determination that TW and BC were not IV-E eligible would therefore not result in discontinuing assistance for either child. Since section 205.10(a)(4) does not require a fair hearing under these circumstances, ACF argues, Michigan was not entitled to continued FFP under section 205.10(b).

We disagree that the right to a fair hearing is contingent on whether or not non-federal funds might be available for assistance payments. ACF cites nothing in the language or history of the Act or the regulations or in ACF policy that supports this view. Indeed, the

[3] The cited regulations addressed the AFDC deprivation requirement.

[4] Michigan argues that Case Nos. 46 and 61 should have been either treated as IV-E eligible or excluded from the sample. Since we conclude that the cases should have been treated as IV-E eligible durong the period under review, we need not consider whether they could properly have been excluded from the sample.

plain language of the Act leads us to conclude that the availability of non-federal funds is irrelevant. Section 471(a)(12) of the Act requires that an opportunity for a fair hearing be granted "to any individual whose claim for benefits available pursuant to this part is denied . . . ." (Emphasis added.) The benefits available under Part E of title IV are federally funded foster care maintenance payments, not state or county foster care payments. The regulation that the Secretary adopted to implement this provision, section 205.10(a)(4), interprets similar language in former section 402 of the Act. Viewed in the context of the statute it interprets, section 205.10(a)(4) clearly refers to federally funded assistance.

Moreover, while ACF points out that Michigan did not raise any issue regarding the amount of the IV-E payments disallowed, ACF does not allege that any payment made for a child under the state and county-funded foster care program would, in fact, have been in the same amount as a maintenance payment under the IV-E program. Yet, if the amount were less, a determination of IV-E ineligibility would result in a reduction of assistance even under ACF's reading of section 205.10(a)(4).

ACF also points to the fact that "Michigan's hearing procedures provide that when a child is found ineligible under title IV-E, notice is given not to the child or to his foster parents but to the county court where the child is a resident." ACF Br. at 10, citing Michigan Childrens Foster Care Manual 902-5 (ACF Ex. 5). According to ACF, this shows that "ultimately it is the county that is impacted by the eligibility finding, not the individual child." ACF Br. at 11. ACF fails to note, however, that the Manual it cites provides for the "Client Notice" of denial or cancellation of IV-E to be sent to the Juvenile Court only in cases in which the court "retains jurisdiction[.]" ACF Ex. 5, at 2. ACF cites nothing in the record showing that the court retained jurisdiction with respect to either TW or BC. In any event, the Manual indicates that, where the court retains jurisdiction, notice to the court is necessary so that the child's court-appointed guardian ad litem can determine whether to request a hearing on behalf of the child. *Id.* Thus, the notice requirement does not have the significance attributed to it by ACF.

ACF argues further that the "conclusion that § 205.10(a)(4) does not apply here also comports with common sense policy considerations." ACF Br. at 11. According to ACF, under Michigan's interpretation, a State agency "would have no incentive to insure accurate eligibility determinations" because it could continue to receive IV-E funding in a case it has "determined to be ineligible simply by offering the substitute payor, the county government, an opportunity to appeal the eligibility determination." *Id*. In addition, ACF says, "if there were an appeal in every case, . . . ACF would have no opportunity to assess whether or not [the State agency] had properly disbursed title IV-E maintenance payments during the review period." *Id*. ACF's arguments are simply speculative. As ACF itself states and Michigan acknowledges, IV-E funds "ultimately would have to be returned to the federal government" if the hearing decision upheld the State agency's determination that a child was not IV-E eligible. *Id*.; *see also* MI Br. at 9. This would undoubtedly give a State agency some incentive to make accurate eligibility determinations. Moreover, ACF does not suggest any basis for finding that every

determination by the State agency that a child is not IV-E eligible is likely to be appealed. In any event, ACF's argument loses sight of the fact that a State agency is required to comply with all IV-E requirements, including the requirement to provide a fair hearing where IV-E payments are terminated or reduced. Applying section 205.10(b) to permit a state agency to continue to claim IV-E funding pending a hearing decision arguably facilitates compliance with this requirement.

Finally, ACF argues that the Board need not consider whether section 205.10(b) applies here because Michigan "does not dispute" ACF's findings that TW and BC "were ineligible." ACF Br. at 9, citing MI Br. at 6. According to ACF, the "analysis should end there" because there is no provision in the Act for any exceptions to the requirement that a child's removal from home must meet the requirements specified in section 472(a) of the Act in order for the child to be eligible for IV-E payments. ACF Br. at 9. ACF's argument ignores the basis for Michigan's appeal. Although Michigan does state in its brief that "TW and BC are ineligible," this merely reflects the State agency's determinations in 2009 that TW and BC were not IV-E eligible. Since the hearing requests were still pending, no final determination of ineligibility was made during the period under review. Moreover, there is no need for any statutory exception to the IV-E eligibility requirements at issue here in order for IV-E funding to be available pending a hearing decision since there was no final determination that the children did not meet those requirements. In any event, the Board is bound by the requirements of the regulation which expressly authorizes continued federal funding pending a hearing decision. *See* 45 C.F.R. § 16.14 ("The Board shall be bound by all applicable laws and regulations.").

Conclusion

For the reasons discussed above, we reverse the disallowance with respect to the two disputed sample cases and conclude that Michigan was in substantial compliance with the federal requirements for the IV-E program.

_____/s/_____
Stephen M. Godek

_____/s/_____
Leslie A. Sussan

_____/s/_____
Judith A. Ballard
Presiding Board Member