

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Missouri Department of Social Services  
Docket No. A-09-52  
Decision No. 2253

DATE: June 15, 2009

DECISION

The Missouri Department of Social Services (Missouri) appealed the December 22, 2008 decision of the Administration for Children and Families (ACF). ACF disallowed federal funding for foster care maintenance payments and associated administrative costs and found that Missouri was not in substantial compliance with the federal provisions governing the eligibility of children and providers for such payments. ACF's decision was based on an eligibility review that tested a sample of payments claimed by Missouri during the period October 1, 2007 through March 31, 2008. ACF determined that five sample cases were ineligible for either part or all of the review period, one more than the number of ineligible cases allowed for a finding of substantial compliance.

Missouri disputed the eligibility review findings for three of the sample cases. Missouri disputed ACF's finding, in sample case #80, that there was a court order removing the child from home that did not include the requisite determination that removal was contrary to the welfare of the child. Missouri also disputed ACF's findings that sample case #73 and oversample case #2 were ineligible because payments were made to a licensed or approved foster home for a full month although the child was in the home for only part of the month. Missouri argued that the children were eligible when the payments were made, so the payments were not eligibility errors, but merely overpayments.

For the reasons discussed below, we conclude that Missouri was in substantial compliance with the requirements for the foster

care program. Missouri reasonably determined that the court order on which ACF relied in sample #80 was not an order sanctioning removal of the child from home and that the first removal order did contain a contrary to the welfare determination. Also, we agree with Missouri that ACF's own policy treats a child on a trial home visit, like the child in sample case #73, as eligible, so that this sample case was not ineligible, even though the payment exceeded the allowable amount. Since our finding for either of these cases means Missouri had fewer than five ineligible cases in the review period, we do not need to address whether oversample case #2 involved an eligibility error.<sup>1</sup>

With respect to the disallowance, we reverse the \$22,046.90 disallowance associated with sample case #80, but uphold the remaining disallowance. Missouri concedes that it is required to repay the \$5,812.80 disallowed for sample case #73 and oversample case #2. Moreover, Missouri does not dispute ACF's findings for two cases found ineligible during the review period or ACF's finding that Missouri made ineligible payments for three other cases outside of the review period.

### **Legal Background**

Title IV-E of the Social Security Act (Act), as amended by the Adoption and Safe Families Act of 1997 (ASFA), Public Law No. 105-89, makes federal matching of state foster care maintenance payments available for a child in foster care who would have been eligible for Aid to Families with Dependent Children under title IV-A of the Act as in effect as of June 1, 1995--

but for his removal from the home of a  
relative . . . if

(1) the removal from the home occurred pursuant to a  
voluntary placement agreement entered into by the

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<sup>1</sup> Missouri had challenged ACF's position that, while this appeal was pending, Missouri was required to submit a program improvement plan to remedy its noncompliance. MO Br. at 4-6. Missouri later stated that the Board need not address this issue unless the parties are unable to resolve it themselves and has not advised the Board that it remains unresolved. MO Reply Br. at 1, n.1. In any event, our decision renders this issue moot.

child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 471(a)(15) for a child have been made[.]

Section 472(a)(2) of the Act (42 U.S.C. § 672(a)).<sup>2</sup>

Section 1356.21(c) of 45 C.F.R. 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) 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.

\* \* \* \* \*

(3) A child is considered constructively removed on the date of the first judicial order removing custody, even

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<sup>2</sup> Effective October 1, 2005, section 472(a)(2) was amended by the Deficit Reduction Act of 2005, Public Law No. 109-171, § 7404. We quote from the earlier version, which was in effect during the period relevant here.

temporarily, from the appropriate specified relative or the date that the voluntary placement agreement is signed by all relevant parties.

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. Section 1356.71(d)(1) and (2). The requirements subject to review include whether the child is placed in a licensed foster family home or child care institution. Section 1356.71(d)(1)(iv).

If a state's ineligible cases in the sample (error cases) 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." Section 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. Section 1356.71(c)(5) and (6).

### **Analysis**

Below, we first discuss sample case #80 and then sample case #73.

#### Sample Case #80

The following facts appear from a transcript of a hearing in the Circuit Court of the City of St. Louis, Missouri (Missouri Exhibit 1). The child's mother, a Missouri resident who had traveled to Arkansas, offered her twin daughters—one of whom was

the child in this sample case—to a British couple for adoption.<sup>3</sup> On December 8, 2000, she transferred custody of the children to the British couple and signed a Consent to Adopt. MO Ex. 1, at 21. The natural father also signed a Consent to Adopt on December 11, 2000. Id. at 13, 15-17. A court in Pulaski County, Arkansas issued a decree of adoption, but then voided and set aside the adoption on March 6, 2001. Id. at 4-5, 11. While an appeal of the voiding was pending, the natural mother petitioned the St. Louis Circuit Court to formally revoke her consent to adoption on the ground that the British couple had falsely represented that the adoption would be an "open adoption" where the natural parents would have regular contact with the children. Id. at 8, 10-12. At a March 27, 2001 hearing on this matter, which was consolidated with the natural parents' divorce action, the St. Louis Circuit Court granted the mother's petition to revoke. Id. at 8, 25-26. In the same proceeding, the Juvenile Officer filed a petition under Missouri Revised Statutes (Mo. Rev. Stat.) § 453.110. Id. at 3. That section requires court approval before a child in the county is surrendered or transferred for adoption and provides that where custody of a child is surrendered or transferred without such approval, the court may, on petition of any public official, order an investigation and report by the Division of Family Services on the suitability of the child and the adoptive parents. The court found that the natural parents did not follow section 453.110 when they surrendered custody of the child to the British couple for purposes of adoption. Id. at 21. The court then issued the following orders: 1) that "protective care, custody and control of [the child] be and hereby is granted to the Missouri Division of Family Services for appropriate placement pending a resolution of the matter before this court," 2) that the Division of Family Services "submit a written report regarding the circumstances of the placement of the child with [the British couple] and regarding the fitness of [the natural parents] for custody of the child and any other information regarding the best interests of the child to this court upon arrival of the children in St. Louis no later than 60 days after physical custody of the children is placed with the Division of Family Services," and 3) that, upon

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<sup>3</sup> It appears that the mother previously offered the children to a California couple for adoption but there is no indication in the record that that adoption was ever approved by a court. See MO Br. at 6.

arrival of the children in St. Louis, the Juvenile Officer "file a Petition pursuant to [Mo. Rev. Stat.] Section 211.031." Id. at 22-23.<sup>4</sup> Section 211.031 gives the family court jurisdiction to order a child into the custody of the Division of Family Services. The Circuit Court nonetheless prohibited the Division of Family Services "from placing the child in the care of [the natural parents] until further written order of this court." Id. at 23. The court also accepted a stipulation by the parties which the court described as follows:

[T]hey are stipulating that this Court does have jurisdiction and will have jurisdiction under [Mo. Rev. Stat.] 211.031 at the point in time that that Petition is filed, when and if these twins are returned to the United States, and in particular to the City of St. Louis, in order to allow the Juvenile Officer to take custody of those children for protective custody pending further hearings before this court as to their ultimate placement.

Id. at 25.

On April 23, 2001, the St. Louis Circuit Court issued a Protective Custody Order which found in part as follows: 1) that probable cause exists to believe that the children are within the jurisdiction of the Court pursuant to section 211.031, 2) that the children's "best interests require that they remain in protective custody with the Division of Family Services," 3) that reasonable efforts were not required of the Division of Family Services to prevent removal of the children from the home for the reasons set forth in the prior finding of the court on March 27, 2001, and 4) continuation of the children in the home is contrary to the welfare of the children. MO Ex. 3, at 1-2. Missouri asserts, and ACF does not dispute, that this order was issued as soon as the child returned to the United States and was within the court's jurisdiction. MO Br. at 7; MO Reply Br. at 3.

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<sup>4</sup> The court issued this order and the other orders described below from the bench as well as in a written order issued on the same date as the court proceeding (at Missouri Exhibit 2). The written order does not indicate that the court had granted the natural parents' petition to revoke their Consent to Adopt, however.

ACF found that the March 27, 2001 court order was "the first court order that removed (constructively) the child from the parents" and gave the Division of Family Services authority to place the child, who was in Great Britain at the time, in foster care upon her return to the State. MO Ex. 4, at 6 (page 2 of enclosure to 12/22/08 ACF letter). ACF concluded that this case was ineligible since neither the March 27, 2001 court order itself or the transcript of the court hearing on the same date contained a contrary to the welfare determination. Missouri maintains that the purpose of the March 27 court order was "to attempt to remedy the violation of Missouri's laws governing adoption" and that the court "concluded that it could not make a removal determination until the children at issue were returned to the United States[.]" MO Reply Br. at 2. Thus, according to Missouri, the April 23, 2001 court order was the first court order removing the child from the natural parents.

We conclude that under the unique circumstances of this case, Missouri reasonably viewed the March 27, 2001 court order as preceding the "first court order that sanctions (even temporarily)" the child's removal from home, within the meaning of section 1356.21(c). In the March 27, 2001 proceeding, the court accepted the parties' stipulation that, in the court's words, the court "will have jurisdiction" under the state statute authorizing a child's removal from home "when and if" the child was returned to St. Louis and a petition to remove the child was filed. Thus, the court as well as the parties appeared to view the court's order granting custody and control of the child to the Division of Family Services as conditioned on the occurrence of those events. In addition, the court represented that it was issuing the order pursuant to the Judicial Officer's petition under Mo. Rev. Stat. 453.110, which does not authorize the court to remove a child to the custody of the Division of Family Services. Moreover, this petition was not filed in a foster care proceeding in which the State had removed or sought to remove a child from his/her home. Rather, the proceeding was initially convened by the court to consider the natural parents' petitions to revoke their consent to the adoption and was consolidated with their divorce action. The court, far from "sanctioning" the removal of the child from her home with the mother, took steps to restore parental rights. Also, with the parents' apparent agreement, the court delayed a decision on whether to return the child to her parents until she was physically present in the United States. Thus, our holding that the March 27, 2001 order was not a court order "sanctioning" removal is consistent with the purpose of the judicial determination requirement. Congress, recognizing "the

severity of removing a child, even temporarily, from home," regarded that requirement "as a safeguard against potential inappropriate agency action." 65 Fed. Reg. 4020, 4055 (2000) (preamble to final rule); see also id. at 4056, quoting S. Rep. No. 336, 96<sup>th</sup> Cong. 2d Sess. 16 (1980). Here, the key issue before the court was not the appropriateness of an agency action, but the validity of the parents' actions.

ACF argues that the "[i]t is not clear from the transcript of the hearing that the Court understood itself to be without jurisdiction over the children." ACF Br. at 5-6. ACF notes that the court stated that "the parties . . . are stipulating that this court does have jurisdiction . . . ." Id. at 6. This quotation is misleading, however. The court went on to describe the stipulation as stating that the court "will have jurisdiction under 211.031" "at the point in time that" a petition under that section is filed "when and if" the children return to St. Louis. Thus, the clear import of the court's full description of the stipulation, which the court accepted, is that the court had no jurisdiction in the present proceeding to make a determination regarding the children's status.

ACF also argues that regardless of whether the court understood itself to be without jurisdiction over the child, the court "effectively asserted jurisdiction over the [child]," by granting custody of the child to the Division of Family Services for appropriate placement and prohibiting the Division from placing the child in the care of the parents. ACF Br. at 6. We do not agree that this is the effect of the court's order, however. As explained above, the grant of custody to the Division appears to be conditioned on the child's return to St. Louis and the Division's filing a petition for removal upon the child's return. Similarly, the prohibition on placing the child with the natural parents appears to have been made in anticipation of those events.

ACF also argues that, contrary to Missouri's position, the fact that the court order was issued pursuant to Mo. Rev. Stat. § 453.110 does not show that the proceeding involved an adoption, not foster care. In particular, ACF states that "Chapter 453 of the Missouri statutes is styled 'Adoption and Foster Care' and the specific provision under which the Court hearing was held is captioned 'Surrender or transfer of custody. . .'" ACF Br. at 6. However, the court expressly stated that the natural parents failed to follow section 453.110 "by surrendering custody of" the child to the British couple for purposes of adoption without approval. MO Ex. 1, at 21. Thus,



it is clear that the court was applying section 453.110 in the context of a determination about the validity of the adoption, not in the context of a determination about a foster care arrangement.

Finally, we reject any argument by ACF that the court should have determined during the March 27, 2001 proceeding whether it was appropriate to remove the child from home. The Board generally defers to a state's interpretation of provisions of its own law. See, e.g., West Virginia Dept. of Health and Human Services, DAB No. 1257, at 13, n.9. Thus, we agree with Missouri that "ACF's second-guessing as to the proper procedure under state law is not entitled to deference." MO Reply Br. at 2.

We therefore conclude that sample case #80 was not ineligible.

#### Sample Case #73

The following facts are undisputed. In sample case #73, Missouri made payments to the licensed or approved foster home in which the child had resided for part of the month after the child was placed on a trial home visit with the mother. See MO Ex. 4, at 6; MO Br. at 11. ACF determined that this case was ineligible. ACF asserts that, at the time that the payments were made, one of the requirements for IV-E eligibility was no longer met, i.e., that the child was placed in a licensed foster family home or child care institution (sample case #73). See ACF Response Br. at 7-8.

Missouri takes the position that the error in this case is merely an overpayment error because "the State paid an eligible foster care provider a rate that covered a period of time after an eligible child had left foster care." MO Br. at 11. According to Missouri, nothing in the child eligibility criteria in section 472(a)(1)-(4) of the Act allows ACF "to assign error during an eligibility review when a State overpays an approved provider on behalf of an eligible child." Id. Missouri also argues that ACF's position that this sample case involves an eligibility error is inconsistent with recent ACF guidance clarifying that a state may claim IV-E funds for the full monthly payment to a licensed provider if a child is temporarily absent from foster care less than 14 days and must pro-rate the monthly payment if the absence is longer than 14 days. Thus, Missouri maintains, the issue with respect to this sample case "is not whether the State made an error in determining eligibility, but whether the State appropriately recovered payments for absences that extended beyond 14 days." MO Reply

Br. at 5, citing Child Welfare Policy Manual § 8.3B, question 7 (added April 28, 2009) (excerpt at Missouri Exhibit 11).

We agree with Missouri that ACF's treatment of sample case #73 is inconsistent with the policy in the Child Welfare Policy Manual. That policy indicates that the effect of the child's temporary absence from the foster home for part of a month requires, at most, that the state's claim for the monthly IV-E payment be pro-rated. Contrary to what ACF determined here, nothing in the policy indicates that a child who is temporarily absent is not considered to be placed in a licensed foster family home. Moreover, under the applicable regulations, the child remained IV-E eligible despite the fact that the child was on a trial home visit for part of the month. 45 C.F.R. § 1356.21(e) (providing that a child on a trial home visit does not lose title IV-E eligibility unless the visit extends beyond six months and has not been authorized by the court, or exceeds a longer time period the court has deemed appropriate). We therefore conclude that sample case #73 involved an overpayment rather than an eligibility error.

#### **Conclusion**

For the foregoing reasons, we reverse ACF's determination that Missouri was not in substantial compliance and reverse the disallowance pertaining to sample case #80. We uphold the disallowance pertaining to the other sample cases at issue.

/s/

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Leslie A. Sussan

/s/

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Constance B. Tobias

/s/

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Judith A. Ballard  
Presiding Board Member