



Memorandum

Date FEB 18 2000

From June Gibbs Brown
Inspector General *June G Brown*

Subject Maintenance Payments to For-Profit Child Care Providers Under the Title IV-E Foster Care Program in Illinois (A-05-99-00004)

To Olivia A. Golden
Assistant Secretary
for Children and Families

This is to alert you to the issuance of our final report on February 23, 2000. A copy is attached. The objective of our review was to determine if the Illinois Department of Children and Family Services (DCFS) improperly claimed Title IV-E foster care maintenance payments made to for-profit child care providers.

The DCFS' claims processing system was not completely effective in excluding maintenance payments to for-profit child care providers ineligible for Federal financial participation (FFP). Section 472 of the Social Security Act, 42 U.S.C. 672, requires that foster care maintenance payments be made on behalf of an eligible child to nonprofit child placement agencies and child care institutions. During the period July 1, 1992 through March 31, 1999, DCFS improperly claimed \$22,551,036 (Federal share - \$11,275,518) for child maintenance payments to for-profit child placement agencies and institutions.

The DCFS agrees with a financial adjustment of \$10,088,946 (\$5,044,473 FFP), which represents payments that were made through foster care providers to "specialized" foster care families. However, they do not agree that payments of \$12,462,090 (\$6,231,045 FFP) made through foster care providers to "traditional" foster care families should be returned to the Federal Government. In their view, these latter payments are fixed amounts that must be passed through to the foster care families, whereas the specialized payments are negotiated amounts paid to the foster care provider. We fail to see the distinction for allowing either payment arrangement when the payments flow through for-profit providers. We are referring the \$22,551,036 (\$11,275,518 FFP) improperly claimed maintenance payments to the Administration of Children and Families (ACF) for their determination and resolution.

We are recommending that the DCFS work with ACF to resolve these improperly claimed maintenance payments and implement controls to preclude the claiming of FFP for foster care maintenance payments made to for-profit child care providers.

Page 2 - Olivia A. Golden

Any questions or comments on any aspect of this memorandum are welcome. Please address them to John A. Ferris, Assistant Inspector General for Administrations of Children, Family, and Aging Audits, at (202) 619-1175.

Attachment

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**MAINTENANCE PAYMENTS TO
FOR-PROFIT CHILD CARE PROVIDERS
UNDER THE TITLE IV-E FOSTER CARE
PROGRAM IN ILLINOIS**



**JUNE GIBBS BROWN
Inspector General**

**FEBRUARY 2000
A-05-99-00004**



DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF AUDIT SERVICES
233 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS 60601

REGION V
OFFICE OF
INSPECTOR GENERAL

CIN: A-05-99-00004

Mr. Jess McDonald, Director
Illinois Department of Children and Family Services
406 East Monroe Street
Springfield, Illinois 62701

Dear Mr. McDonald:

This report provides you with the results of our audit of Maintenance Payments to For-Profit Child Care Providers Under the Title IV-E Foster Care Program, administered by the Illinois Department of Children and Family Services (DCFS). Our objective was to determine whether DCFS improperly claimed Title IV-E foster care maintenance payments made to for-profit child care providers.

The DCFS' claims processing system was not completely effective in excluding maintenance payments to for-profit child care providers ineligible for Federal financial participation (FFP). Section 472 of the Social Security Act, 42 U.S.C. 672, requires that foster care maintenance payments be made on behalf of an eligible child to nonprofit child placement agencies and child care institutions. During the period July 1, 1992 through March 31, 1999, DCFS improperly claimed \$22,551,036 (\$11,275,518 FFP) for child maintenance payments to for-profit child placement agencies and child care institutions.

The DCFS agrees with a financial adjustment of \$10,088,946 (\$5,044,473 FFP), which represents payments that were made through foster care providers to "specialized" foster care families. However, they do not agree that payments of \$12,462,090 (\$6,231,045 FFP) made through foster care providers to "traditional" foster care families should be returned to the Federal Government. In their view, these latter payments are fixed amounts that must be passed through to the foster care families, whereas the specialized payments are negotiated amounts paid to the foster care provider. We fail to see the distinction for allowing either payment arrangement when the payments flow through for-profit providers. We are referring the \$22,551,036 (\$11,275,518 FFP) improperly claimed maintenance payments to the Administration of Children and Families (ACF) for their determination and resolution.

We are recommending that the DCFS work with ACF to resolve these improperly claimed maintenance payments and implement controls to preclude the claiming of FFP for foster care maintenance payments made to for-profit child care providers.

BACKGROUND

The Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, was enacted on June 17, 1980. This legislation established a new program, referred to as the Title IV-E Foster Care program and specifically titled, "Federal Payments for Foster Care and Adoption Assistance." Effective October 1, 1982, Title IV-E replaced the foster care component of the Aid to Families with Dependent Children (AFDC) program. Title IV-E is administered by the U.S. Department of Health and Human Services, ACF.

In the latter part of Calendar Year 1997 and in 1998, there were discussions and correspondence between DCFS and ACF regarding the claiming of two for-profit providers for Title IV-E reimbursement. In this regard, ACF requested that we determine if the DCFS's claims processing system was effective in excluding maintenance payments to for-profit child care providers. Consequently, this audit is a confirmation of information submitted by the State.

OBJECTIVES, SCOPE, AND METHODOLOGY

Our audit was performed in accordance with generally accepted government auditing standards. The primary objective of our audit was to determine if DCFS improperly claimed foster care maintenance payments to for-profit child care providers under Title IV-E.

To achieve our audit objective, we:

- ▶ reviewed contracts between DCFS and selected child care providers.
- ▶ verified the legal status of selected providers to the corporate records maintained by the Secretary of State.
- ▶ reviewed the claiming system to determine the controls in place to preclude the claiming of for-profit providers under Title IV-E.
- ▶ reviewed the Title IV-E claiming records of certain for-profit providers, taking into consideration adjustments already made by DCFS to the Title IV-E claim.
- ▶ reviewed ACF policy announcements, and correspondence concerning the allowability under Title IV-E of maintenance payments made to for-profit providers.

During our audit at DCFS, we also addressed two secondary objectives relating to foster care. These objectives were to determine whether: (i) the appropriate adjustments were made to the Title IV-E program for funds recovered from terminated purchase of service agencies and (ii) child placement agencies retained a portion of the foster care maintenance payment for their administrative costs. Our review disclosed that controls were adequate and that there were no recoveries to be identified at closed agencies. The Title IV-E claims processing system precludes

claims on behalf of children placed by closed agencies after their contracts were terminated and the children removed from the agencies. In addition, we found no evidence to indicate that child placement agencies were retaining a portion of the maintenance payment for administrative costs. As a result, it was determined that no additional audit effort was warranted in these two areas.

We conducted our field work at DCFS' administrative offices in Springfield, Illinois. Field work was completed in May 1999.

RESULTS OF AUDIT

During the period July 1, 1992 through March 31, 1999, DCFS improperly claimed \$22,551,036 (\$11,275,518 FFP) under the Title IV-E program for foster care maintenance payments to for-profit child care providers. To be eligible for Title IV-E reimbursement, foster care maintenance payments must be made directly from DCFS to foster family homes or child-care institutions or through the public or private nonprofit child placement or child-care agencies with which DCFS contracts for services. During our audit, for-profit child care providers were not considered eligible. Weaknesses in the system, established to exclude for-profit provider and child placing agency payments from the Title IV-E claims, allowed the maintenance payments to be erroneously claimed. Improvements are needed in the controls to preclude the claiming of foster care maintenance payments to for-profit child care providers.

Section 472 (b) of the Social Security Act (Act), 42 U.S.C. 672 (b), provides:

Foster care maintenance payments may be made under this part only on behalf of a child ... who is (1) in the foster family home of an individual, whether the payments therefor are made to such individual or to a public or nonprofit private child-placement or child-care agency, or (2) in a child-care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency....

As a result, maintenance payments on behalf of children in foster homes or in child-care institutions can only be claimed for FFP if the payments are made to the foster care home, the child care institution, or public or nonprofit private child-placement or child care agency.

While the statute further defines foster family homes and child-care institutions, 1996 legislation modified the child care institution definition as it pertained to profitability. A foster family home is defined as "a foster family home for children which is licensed by the State in which it is situated...." A child-care institution was defined as "a nonprofit private child-care institution, or a public child-care institution which accommodates no more than 25 children, which 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 such institutions of this type...." Effective August 22, 1996, the Welfare Reform Act of 1996 amended the definition of child-care institution by striking the word "nonprofit," and consequently making payments to for-profit child care institutions allowable under Title IV-E. However, no similar reference was made to allow maintenance payments

made to for-profit child placement agencies for pass-through to children in foster family homes. The language pertaining to for-profit child placement agencies remains unchanged.

The DCFS distributes maintenance payments directly to foster family homes and contracted child care institutions and indirectly through contracted child placement agencies. To comply with the pre-1996 rule prohibiting maintenance payments being charged to for-profit child care institutions and child placement agencies, DCFS implemented a control requiring its Eligibility Determination Unit (EDU) to verify the for-profit or not-for-profit status of its contracted providers as part of the eligibility determination process. Based on the results of these eligibility reviews and depending upon which type of provider was used, each child was assigned a group code which determined whether its costs were allowable for FFP under Title IV-E.

To assist the EDU staff in determining the provider's for-profit or not-for-profit status, the foster child's placement information on the computerized living arrangement history screen was used to establish whether a contracted provider was used. The listed provider name was compared to typed listings of contracted child placement agencies and child care institutions, which identified the corporate status of each provider. Prior to 1997, the living arrangement history file did not always identify the child placement agency. Instead, the placement information listed the name of the foster family home where the child lived, rather than the name of the supervising child placement agency. In these situations, EDU staff was unaware that for-profit child placement agencies were supervising the cases. If the child met all other eligibility requirements, its maintenance payments were claimed for FFP, even though the payments were passed-through an ineligible for-profit child placement agency. Subsequent to 1997, additional data fields were added to the living arrangement history screen to reduce the chance of claiming for-profit child placement agencies. In addition, the prior manual process of reviewing the data screens and the contractor listings were subject to human error which, in part, caused a portion of the DCFS overclaim.

Voluntary Self-Disclosure. In a letter to ACF, dated June 12, 1998, DCFS disclosed that it claimed maintenance payments to two for-profit providers under Title IV-E. Although DCFS contended that it had not intended to claim for-profit providers, it did not believe that the applicable laws require a disallowance of the maintenance payments made to these two agencies. Its primary contention was that Federal reimbursement to DCFS for maintenance payments is appropriate as long as the child for whom the payment is made is eligible. When we initiated our review, DCFS indicated that maintenance payments to three additional for-profit child placement agencies had been claimed for Federal reimbursement. The total amount improperly claimed on behalf of these five for-profit providers was \$22,352,702.

The ACF responded to this contention in a letter, dated January 26, 1999 which explained that the statute and other guidance support the conclusion that maintenance payments may not be made to or through a for-profit child placement agency. Title IV-E requirements prohibit FFP for maintenance payments made to for-profit entities which distribute such payments to and on behalf of children in foster family homes.

Although DCFS had identified five for-profit entities, it was adjusting the Title IV-E quarterly claims of one provider 1 quarter at a time, since it did not have the cash resources to pay the entire amount at one time. Once DCFS was notified of our plans to audit the for-profit claims under Title IV-E, an adjustment of approximately \$14 million was made to the claim in the quarter ending December 31, 1998. During our field work, partial adjustments were made for three more of the for-profit agencies. These adjustments were taken into consideration in our computation of the improper claims for maintenance payments to the for-profit providers. To our knowledge, DCFS has made no further financial adjustments.

In responding to the ACF request, our audit disclosed eight additional for-profit entities that were claimed under Title IV-E in the amount of \$198,334. The Title IV-E requirements prohibit FFP when a State makes maintenance payments to a for-profit entity, even if the entity distributes such payments to the foster family home or child-care institution on behalf of eligible children. As of March 31, 1999, maintenance payments amounting to \$22,551,036 were improperly claimed under Title IV-E for the 13 for-profit providers.

The DCFS agrees with a financial adjustment of \$10,088,946 (\$5,044,473 FFP), which represents payments that were made through foster care providers to “specialized” foster care families. However, they do not agree that payments of \$12,462,090 (\$6,231,045 FFP) made through foster care providers to “traditional” foster care families should be returned to the Federal Government. In their view, these latter payments are fixed amounts that must be passed through to the foster care families, whereas the specialized payments are negotiated amounts paid to the foster care provider. We fail to see the distinction for allowing either payment arrangement when the payments flow through for-profit providers. We are referring the \$22,551,036 (\$11,275,518 FFP) improperly claimed maintenance payments to the Administration of Children and Families (ACF) for their determination and resolution.

These maintenance payments were primarily for specialized foster care services and for traditional and relative foster care services. In the provision of specialized foster care services, the rates paid to the providers were based on the specific and specialized needs of each child. Whereas, the maintenance payments for traditional and relative foster care services were uniform and the same for all providers and must be passed through to the foster parents.

RECOMMENDATIONS

We are recommending that the DCFS work with ACF to resolve these improperly claimed maintenance payments and implement controls to preclude the claiming of FFP for foster care maintenance payments made to for-profit child care providers.

DCFS COMMENTS AND OAS RESPONSE

The DCFS agrees with an adjustment of \$10,088,946 (\$5,044,473 FFP), which represents payments that were made through foster care providers to “specialized” foster care families.

However, they do not agree that payments of \$12,462,090 (\$6,231,045 FFP) through foster care providers to “traditional” foster care families should be returned to the Federal Government. In their view, these latter payments are fixed amounts that must be passed through to the foster care families, whereas the specialized payments are negotiated amounts paid to the foster care provider.

We fail to see the distinction for allowing either payment arrangement when the payments flow through for-profit providers. Accordingly, we believe that DCFS improperly claimed \$22,551,036 (\$11,275,518 FFP) for foster care maintenance payments to for-profit child placement agencies.

In addition, DCFS did not agree that adequate controls to preclude incorrect for-profit claiming in the future should be implemented. It contends that, if the disputed costs are allowable, then the recommended controls are unnecessary. Since claims made for payments to for-profit providers are unallowable, necessary procedures and controls must be implemented to detect and prevent improper claims.

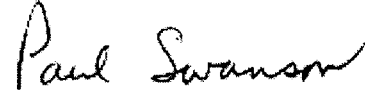
As stated in the report, ACF confirmed to DCFS officials on January 26, 1999, that Title IV-E requirements prohibit FFP from being made available where a State has paid maintenance payments to a for-profit entity, which then distributes such payments to and on behalf of children in foster family homes. The FFP is not available for foster care maintenance payments made through a for-profit child placement agency. Maintenance payments to for-profit entities do not qualify for Federal reimbursement because they have not been made in conformity with section 472 of the Act. The full text of the ACF letter is included as an attachment to the report.

Final determination as to actions taken on all matters reported will be made by the HHS action official. We request that you respond to the HHS action official within 30 days from the date of this letter. Your response should present any comments or additional information that you believe may have a bearing on the final determination. It should be directed to: Regional Administrator, Administration for Children and Families, Region V, 233 North Michigan Avenue, 4th Floor, Chicago, Illinois 60601.

In accordance with the principles of the Freedom of Information Act (Public Law 90-23), OIG, OAS reports issued to the Department’s grantees and contractors are made available, if requested, to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act which the Department chooses to exercise.
(See 45 CFR Part 5.)

To facilitate identification, please refer to Common Identification Number A-05-99-00004 in all correspondence relating to this report.

Sincerely,

A handwritten signature in cursive script that reads "Paul Swanson". The signature is written in black ink and is positioned directly below the word "Sincerely,".

Paul Swanson
Regional Inspector General
for Audit Services

Enclosures

EXHIBIT

EXHIBIT

ILLINOIS DEPARTMENT OF CHILDREN and FAMILY SERVICES
SPRINGFIELD, ILLINOIS

SUMMARY OF MAINTENANCE PAYMENTS TO FOR-PROFIT
PROVIDERS CLAIMED UNDER THE TITLE IV-E PROGRAM
DURING THE PERIOD JULY 1, 1992 THROUGH MARCH 31, 1999

<u>Provider Name</u>	<u>Amount</u> <u>Questioned</u>	<u>DCFS</u> <u>Concurrence</u>	<u>DCFS</u> <u>Non-concurrence</u>
PSI Services	\$15,471,591	\$3,224,039	\$12,247,552
Illinois Mentor	6,457,790	6,457,790	
Camelot Care	217,284	208,783	8,501
Caledonian Family Care	124,681		124,681
Hobby Horse	81,356		81,356
Family Works	66,071	66,071	
Forest Academy	58,688	58,688	
Lifegains	35,181	35,181	
Young Sojourner	19,334	19,334	
Ocomomwoc Dev. Center	7,217	7,217	
Martin Center	6,096	6,096	
CPC Old Orchard Hospital	3,942	3,942	
Rebound Corporation	<u>1,805</u>	<u>1,805</u>	<u> </u>
Total All Providers	<u>\$22,551,036</u>	<u>\$10,088,946</u>	<u>\$12,462,090</u>
Federal Share	<u>\$11,275,518</u>	<u>\$ 5,044,473</u>	<u>\$ 6,231,045</u>

Notes to Exhibit:

Because of the manner in which DCFS submitted claims for agency specialized foster care services, the \$10,088,946 includes administrative costs of \$97,293 attributable to the preparation and distribution of maintenance payments to the foster homes by the child placement agencies. These administrative costs would also be ineligible for Federal matching.

The DCFS non-concurrence amount of \$12,462,090 being set aside pertains solely to maintenance payments. The costs of the administrative activities by the child placement agencies relating to these maintenance payments were claimed by DCFS as administration. As a result, these administrative costs were excluded from the scope of our review. In the resolution of this finding, ACF should consider the unallowable administrative costs of the child placement agencies which were claimed as administration.

DCFS COMMENTS



STATE OF ILLINOIS

George H. Ryan, Governor
Jess McDonald, Director

DEPARTMENT OF CHILDREN AND FAMILY SERVICES

406 EAST MONROE STREET
SPRINGFIELD, ILLINOIS 62701-1498

217-785-2509
217-524-3715 / TTY

Tuesday, October 12, 1999

Department of Health and Human Services
HHS Office of Audit Services, Region V
Attn: Victor Schmitt
Illinois Business Center
400 West Monroe, Suite 204 B
Springfield, Illinois 62704

Re: CIN A-05-99-00004

Dear Mr. Schmitt:

This is in response to the recent audit entitled *MAINTENANCE PAYMENTS TO FOR-PROFIT CHILD CARE PROVIDERS UNDER THE TITLE IV-E FOSTER CARE PROGRAM ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, SPRINGFIELD, ILLINOIS*, reference A-05-99-00004.

The audit consists of one two-part recommendation: A). Adjust \$22,551,036 in federal claiming and, B). Implement controls to preclude claiming of foster care maintenance payments made to ineligible for-profit child placement agencies and childcare institutions.

- A). We agree partially with the financial adjustment and propose to make the appropriate adjustments to our Title IV-E claims over the next four quarters beginning with the September 30, 1999 quarterly claim. The net amount of these adjustments will be \$10,088,946 (\$5,044,473 FFP). We have agreed to these adjustments because, unlike traditional and relative foster care payments, rates paid to specialized foster care providers are set on a individual contract basis and there is no uniform, specific amount required to be passed through to the foster parent. The amount of traditional and relative foster care payments, both the administrative and maintenance portions, are the same regardless of the provider and the maintenance portion stated in the contract **must be passed through to the foster parent.**

In regard to the remaining \$12,462,090 (\$6,231,045 FFP) we disagree with the audit recommendation and reiterate our earlier arguments as presented in the letter to Ms. Kathleen Penak, DHHS-ACF-Region V, dated June 12, 1998.

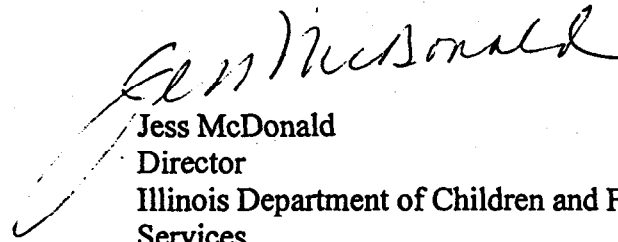
We suggest that DHHS, in a spirit of cooperation with the State, reconsider their position and the intent of the legislation and our concerns raised in the attached June 12, 1998 letter,

forgive the remaining dollars in question and not pursue collection of the aforementioned amounts.

- B). We do not agree with the second part of the recommendation regarding the implementation of adequate controls to preclude incorrect for-profit claiming in the future. For the reasons stated in the June 12, 1998 letter, we dispute DHHS' interpretation as to the Title IV-E claimability of these costs; if the costs are properly claimable, then the recommended controls are unnecessary. However, once resolved, any necessary controls to preclude inappropriate claiming can be implemented.

Please contact me if you need any additional information. We look forward to your response and the release of the final version of the audit report.

Sincerely,



Jess McDonald
Director
Illinois Department of Children and Family
Services

bf

cc: Paul Swanson
Carolyn Cochran Kopel
Roy E. Miller
Nancy Haber
Connie Sabo
Cheryl Ogden

Enclosure



STATE OF ILLINOIS
JIM EDGAR, GOVERNOR
JESS McDONALD, DIRECTOR

DEPARTMENT OF
CHILDREN AND FAMILY SERVICES

406 EAST MONROE STREET
SPRINGFIELD, ILLINOIS 62701-1498

June 12, 1998

Ms. Kathleen Penak, Manager
Child Welfare Programs
Administration for Children and Families
Chicago Regional Office
105 West Adams
Chicago, Illinois 60603

Re: For-profit Provider Agencies

Dear Ms. Penak *Kathy*

At our meeting of March 2, 1998, we discussed the issue of the Title IV-E payments made to certain for-profit service providers. We said we would send you additional information and a further elaboration of our views on the issue. Although we received a note from you informing us that your research indicates that IV-E claiming for administrative payments to for-profit foster care is allowable (attached), we wanted to lay out our thinking on claiming IV-E for certain for-profit providers.

Beginning in FY 1993 and running through FY 1997, DCFS claimed Title IV-E maintenance payments totaling \$20,066,263.14 (FFP amount: \$10,033,131.57) to PSI Services, Inc. on behalf of children placed in foster family homes. PSI at the time was a for-profit entity. DCFS also claimed PSI administrative costs totaling \$11,563,630.65 (FFP amount: \$5,781,815.33). In addition, in FY 1995 through 1997, DCFS claimed another for-profit provider agency, Caledonian Family Care, maintenance payments of \$129,340.97 (FFP: \$64,670.49) and administrative costs of \$948,285.43 (FFP: \$474,142.71).

While it was not DCFS' intention at the time to claim for-profit providers, we do not believe that applicable law requires a disallowance of the maintenance payments made to those agencies. Further, we believe that federal law permits us to claim for valid administrative costs paid to a for-profit agency.

Kathleen Penak
June 12, 1998
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Maintenance Payments

First, with respect to Title IV-E maintenance payments, we are not considering payments made for children residing in for-profit institutions. DCFS made maintenance payments to the provider to be passed through to an individual foster family home, as that term is defined by law. 42 U.S.C. § 672(c). The payments are made on behalf of children who are qualified by economic need and the circumstances of their removal from the home, 42 U.S.C. § 672 (a), and by their placement in a foster family home, 42 U.S.C. § 672 (b). Such maintenance payments are a matter of statutory entitlement for the persons qualified to receive them. *Youakim v. McDonald* 71 F.3d 1274, 1288 (7th Cir. 1995); 926 F. Supp. 719, 731-32 (N.D. Ill. 1995). Children in placements meeting the federal eligibility criteria, foster family homes, cannot be denied those benefits. *Youakim*, 71 F.3d at 1286 [citing *Miller v. Youakim*, 440 U.S. 125, 133-34, 145 (1979)].

The relevant statute does not prohibit maintenance payments being made on behalf of a qualified child through a for-profit provider. The statute provides as follows:

Foster 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, whether the payments therefor are made to such individual or to a public or nonprofit private child-placement or child care agency; or

(2) in a child care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 675(4) of this title).

42 U.S.C. § 672(b). (Section 2.C.2 of Illinois' Title IV-E State Plan tracks the foregoing statutory language). The Act further provides that federal reimbursement of maintenance payments is based upon "a percentage...of the total amount expended during such quarter as foster care maintenance payments under section 672 of this title for children in foster family homes or child care institutions;..." 42 U.S.C. § 674(a)(1).

A plain reading of the statutory language suggests that federal reimbursement to the State for maintenance payments is appropriate as long as the child for whom the payment is made is qualified and without regard to the "routing" of the payment. Section 672(b) requires only that the child be in a foster family home of an individual or a child care institution in order to be eligible to receive payments. The "whether" clause in both subsections (1) and (2) does not represent a limitation on the qualification of the child to receive the payment or the ability of the State to make the payment. It does not purport to limit payments to the two specified options.

Kathleen Penak
June 12, 1998
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participate in providing services to troubled children under Parts B or E if States determine that the services they provide are appropriate.

H. Rep. No. 651, 104th Cong., 2d Sess. (1996) *reprinted in* 1996 U.S.C.C.A.N. 2183, at 2524. The Conference Report described the House version of the bill as follows:

The House provision allows States to use private for-profit foster care facilities. The House believes that States should be allowed to use private child care organizations because they are fully capable of providing quality services. States are responsible for ensuring that children are in safe and reliable care whether it is provided by public or private entities. The House can see no reason to automatically refuse participation by an entire sector of the child caring community.

H.R. Conf. Rep. No. 725, 104th Cong. 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, at 2526.

The Welfare Reform Act of 1996 did not change the IV-E law except to amend the definition of "child care institution" to include for-profit providers. *Id.* at 2789-90, 2792. Having opened the foster care system so widely to for-profit foster care providers, it is strange that Congress would have left intact a major prohibition against making payments through for-profit agencies that could be made directly to a for-profit institution, *i.e.* strange unless Congress never regarded the payment alternative language in subsection 672(b)(2) as constituting such a prohibition in the first place.

ACF's regulations provide merely that:

[FFP] is available to States under an approved Title IV-E State Plan for allowable costs in expenditures for: (1) Foster care maintenance payments as defined in section 475(4) of the Act, made in accordance with 45 CFR 1356.20 through 1356.30 of this part, section 472 of the Act and section 102(d) of Pub L. 96-272, the Adoption Assistance and Child Welfare Act of 1980;...

45 CFR §1356.60 (a)(i). This rule basically begs the question. FFP is available for allowable maintenance payments.

P.L. 104-193, effective Aug. 22, 1996, struck the word "nonprofit" from the definition of "child care institution" in Section 472(c) of the Act, 42 U.S.C. § 672 (c). In July 1997, ACF issued a new policy announcement, ACYF-CB-PA-97-01 (July 25, 1997), addressing the effect of this statutory change. The PA noted that deletion of the word "nonprofit" from the definition of

Kathleen Penak
June 12, 1998
Page 3

The validity of the maintenance payment is based upon where the child is placed, not upon how or to whom the payments are made. If Congress had intended to require that the "routing" of the payments be a requirement for eligibility, it could easily and more clearly have said so by using the words "and where" instead of "whether" so that the provision would have read "...who is--(1) in the foster family home of an individual, [and where] the payments therefor are made to such individual or to a public or nonprofit private child-placement or child care agency..." It did not do so, and this suggests that Congress had some other purpose in mind.

The legislative history of the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, does not specifically discuss the issue. S. Rep. No. 96-336, 1980 U.S. CODE CONG. & AD. NEWS (96TH Cong., 2d Sess.), vol. 3, at 1448; H. Conf. Rept. No. 96-900, *Id.* at 1561. We have found no court or Departmental Appeals Board decisions interpreting or applying the statutory language.

However, it does not make sense that the statute should be construed so that a child placed in a qualified foster family home and who receives the correct foster care maintenance payment should nevertheless be deemed ineligible because the State made the payment through a for-profit agency, rather than direct to the home.

This is all the more clear following Congress' 1996 amendment of the Section 672(c)(2) definition of "child care institution" to include private for-profit child care institutions. Inasmuch as foster care maintenance payments may now be made on behalf of a child in a private, for-profit institution, and can be made directly to such institutions, it does not make sense to say the child nevertheless is ineligible because the same payment has been made indirectly through a private for-profit agency. This anomaly created by the recent amendment suggests that Congress never intended the "whether" clause in section 672(b)(2) to limit a child's eligibility for payment in the same way that "nonprofit" limited eligibility based on where the child was placed. Otherwise, Congress, in order to be consistent, also should have amended subsection 672 (b)(2) to remove that limitation, and it did not do so.

The legislative history of the 1996 amendment supports the view that Congress did not regard the "payment alternative" language in Section 672 (b)(2) as a limitation upon a child's eligibility for maintenance payments, precluding payments made through a private for-profit agency. Rather, the legislative history shows that a Congress concerned with opening foster care to the entire child caring community saw no need to address the language in subsection (b)(2).

The House Report accompanying the bill described the reason for deleting the word "nonprofit" from the definition of "child care institution" as follows:

Since 1980, public and nonprofit agencies have been the only providers eligible to participate in child protection activities. The committee provision allows the private, for-profit providers to

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child care institution "thereby [makes] Title IV-E foster care maintenance payments available on behalf of title IV-E eligible children placed in licensed for-profit child care institutions..." The PA then goes on to state that:

The language at section 472 (b) has not changed. Foster care maintenance payments must be made directly to foster family homes or child-care institutions from the State child welfare agency or through the public or private nonprofit child placement or child-care agency with which the State contracts for making and/or supervising placements. Federal financial participation is not available for foster care maintenance payments made through a for-profit child-placing or child-care agency.

This language states what ACF believes Section 472 (b) means now, and prior to August 22, 1996, but this PA was only issued in July 1997, after the payments at issue here were made, and we are unaware of any previous policy statement setting out this interpretation of the statute.

ACYF-PIQ-82-07 simply does not address the question raised by the present case. This PIQ makes clear that the State may contract for certain administrative services of the foster care program and receive FFP under Title IV-E, as long as the State agency has responsibility for placement and care of the child and supervises the activities of the contractor. It does not directly address the question of whether the State could contract for such services with a private for-profit agency or whether the State may receive FFP for maintenance payments where the payment is made to a foster family home or child care institution through a for-profit agency.

In short, the language of the statute does not appear to support ACF's interpretation as set forth in its July 1997 policy statement. That statement, in any event, does not constitute adequate notice with respect to any previous claims made by the State.

The legal basis of ACF's position aside, the situation calls clearly for a pragmatic solution. Even if the maintenance payments were deemed to have been made unlawfully, the fact remains that the payments were merely passed through to foster family homes on behalf of IV-E qualified children in the same amounts as if the State had made the payments directly to the family. If necessary, the State could conceivably recover the funds from the provider agency, which in turn could recover them from the foster family, and the State could reissue the payments on behalf of the children directly to the family. That being the case, we see no reason why it should be necessary for the State, the provider agency and the recipients to go through such a process with the attendant administrative difficulties and costs. It should be noted that these additional costs would be eligible for federal financial participation. The State thus proposes that, if necessary, the State and ACF work out a method by which such a payment recovery/reissuance plan be deemed administratively to occur without the need for actually transferring funds.

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Administrative Payments

The payments made to for-profit provider agencies for administrative costs are lawful, claimable administrative costs of the IV-E program. The statute contains no prohibition against claiming otherwise valid administrative costs paid to a for-profit agency. See 42 U.S.C. § 674 (a)(3). Such payments need only be necessary for the provision of child placement services and for the proper and efficient administration of the state plan. *Id.* ACF's regulations provide that FFP is available for "administrative expenditures necessary for the proper and efficient administration of the title IV-E state plan." 45 C.F.R. & 1356.60(c).

Please contact me if you need additional information. We would like to sit down with you and others you designate to discuss our research into this issue. We look forward to your response.

Sincerely,



Phillip M. Gonet
Deputy Director
Division of Support Services

Attachment

cc: Jess McDonald
Carolyn Cochran Kopel

ACF REGION V POSITION



DEPARTMENT OF HEALTH & HUMAN SERVICES
Administration for Children and Families
Chicago Regional Office

Telephone: 312-353-4237
E-Mail: *ACF.Chicago@ACF.DHHS.GOV*
Refer To: KD5C3

105 W. Adams, 20th FL
Chicago, Illinois 60603

January 26, 1999

Jess McDonald, Director
Illinois Department of Children
and Family Services
406 East Monroe Street, Station 70
Springfield, Illinois 62701-1498

Dear Mr. McDonald:

As you requested in the January 11, 1999 Office of the Inspector General (OIG) audit entrance conference, we are formally responding to your June 12, 1998 letter regarding the allowability of Title IV-E administrative and maintenance payments made to for-profit child-placing agencies. Please note that subsequent to the receipt of the June 12, 1998 letter, informal telephone discussions on this matter had occurred between Kathleen M. Penak, Program Manager, Child Welfare Branch, and Phillip M. Gonet, Deputy Director of the DCFS Division of Support Services.

After reviewing your letter and seeking advice from our Region V Office of General Counsel (OGC), it is our position that the Title IV-E requirements prohibit Federal Financial Participation (FFP) from being made available where a State has paid maintenance payments to a for-profit entity, which then distributes such payments to and on behalf of children in foster family homes. Likewise, FFP may not be allowed for any attendant administrative costs incurred by such a for-profit entity when distributing maintenance related payment checks to foster family homes.

The following delineates our position. Prior to amendments made by the Welfare Reform Act of 1996 that became effective on August 22, 1996, Section 472 of the Social Security Act, 42 U.S.C. 672, provided in pertinent part:

Foster 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, whether the payments therefor are made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 675(4) of this title). 42 U.S.C. 672 (b)(1), (2)(emphasis added).

The statute further defined the terms "foster family home" and "child-care institution" as follows:

For the purposes of this part, (1) the term "foster family home" means 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; and (2) the term "child care institution" means a nonprofit private child-care institution, or a public child care institution which accommodates no more than twenty-five children, which 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 such institutions of this type, as meeting the standards established for such licensing." 42 U.S.C. 672(c)(emphasis added).

From the foregoing, it is clear that while these statutes were in effect, maintenance payments could only be made on behalf of children in foster family homes, or in public or nonprofit private child-care institutions. Moreover, the "whether" clauses in Section 672(b)(1) and (2) permitted such payments to be made directly to the foster family home or child-care institution, or to a public or nonprofit private child-placement or child-care agency which would reimburse the family or institution where the child was placed. Given the express limitation in Section (b)(1) and (2) authorizing maintenance payments to be made to "nonprofit private child placement or child care" agencies, a straightforward reading of the statute would prohibit maintenance payments to be made to for-profit entities.

In a policy interpretation issued on August 25, 1982, our Agency explained that title IV-E does not prohibit a state from contracting for some (but not all) administrative functions, so long as the responsibility for placement and care of the foster child remains with the state agency (See ACF-PIQ-82-07.). We explained that a state agency could chose to contract for administrative activities such as licensing, recruitment, supervision and training, and that such costs could be allowed if necessary for the proper administration of the state plan. However, our entire discussion was predicated on the assumption that the entities contracting with the state to perform such services would be nonprofit entities ("Region X asks questions concerning contracted functions performed for the State of Oregon by private nonprofit agencies under titles IV-A and IV-E and about `responsibility for placement and care.'"). While not explicit, the omission of any reference to for-profit entities is consistent with the view that section 672(b) and (c) prohibited involvement in Title IV-E by for-profit entities.

This construction is also consistent with the wording of the Illinois state plan provisions pertaining to Title IV-E. The state's plan adopts the same language of the statute and specifies that foster care maintenance payments are made only on behalf of an eligible child who, inter alia, is in the foster family home of an individual, "whether the payments are made to such individual or to a public or nonprofit private child placement or child care agency[...]" State Plan, Section 2, p. 6.

The foregoing analysis, in our view, is not affected by Congress's amendments in the 1996 Welfare Reform Act, which became effective on August 22, 1996. Congress amended only the definition of "child care institution" in section 672(c)(2) of the Act by striking the word "nonprofit" that had previously modified the phrase "private child-care institution." The pertinent House Report explained that:

Since 1980, public and nonprofit agencies have been the only providers eligible to participate in child protection activities. The committee provision allows the private, for-profit providers to participate in providing services to troubled children under Parts B or E if States determine that the services they provide are appropriate. H. Rep. No. 651, 104th Cong., 2d Sess., reprinted in 1996 U.S.C.C.A.N. 2183, 2524 (emphasis added).

This language reconfirms that prior to the 1996 amendments, nonprofit agencies had no role in the Title IV-E program. While Congress then intended to allow participation by for-profits through the 1996 amendments, Congress's focus was on allowing participation by for-profit providers of child-care services with whom the child would actually be placed. As the Conference Report explained:

The House provision allows States to use private for-profit foster care facilities. The House believes that States should be allowed to use private child care organizations because they are fully capable of providing quality services. States are responsible for ensuring that children are in safe and reliable care whether it is provided by public or private entities. The House can see no reason to automatically refuse participation by an entire sector of the child caring community. H.R. Conf. Rep. No. 725, 104th Cong. 2d Sess., reprinted in 1996 U.S.C.C.A.N. 2649, 2791 (emphasis added).

While this legislative history makes clear that children may now be placed in the care of for-profit entities, no reference was made to allowing maintenance payments to be made to for-profit entities that would pass through such payments to children in foster family homes. This is also the clear implication that follows from Congress's decision only to amend the definition of "child care institution" in section 672(c)(2) of the Act. While Congress deliberately struck the word "nonprofit" from that section's reference to "private child-care institution[s]" where the child would be placed, Congress simultaneously chose not to delete the word "nonprofit" from section 672(b)'s language authorizing maintenance payments to be made to "a public or nonprofit private child-placement or child-care agency[.]" 42 U.S.C. 672(b)(1), (b)(2). Given Congress's deliberate attention to the issue of whether and to what extent nonprofits should be

should be allowed to participate, and the close proximity and parallel wording of sections 672(c) and 672(b), "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Field v. Mans, 116 S. Ct. 437, 442 (1995) (quoting Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991), and Russello v. United States, 464 U.S. 16, 23 (1983)). Thus, Congress's failure to amend 672(b) in a fashion parallel to 672(c) strongly suggests that Congress wished to continue to prohibit for-profit "child-placement or child care" agencies from receiving foster care maintenance payments.

In light of the foregoing, it thus appears clear that maintenance payments may not be made to a for-profit "child-placement or child care" agency, where such agency serves only administrative tasks and routes such payments to a foster family home or "child care institution."

We have also formally adopted this reading of the statute. Moreover, we have already interpreted the statutes to prohibit FFP from being paid to a state where maintenance payments have improperly been made to a for-profit entity. Thus, in the wake of the 1996 Welfare Reform Act, we issued a policy announcement explaining the effect of those amendments and stating in relevant part:

The language at section 472(b) has not changed. Foster care maintenance payments must be made directly to foster family homes or child-care institutions from the State child welfare agency or through the public or private nonprofit child placement or child-care agency with which the State contracts for making and/or supervising placements. Federal financial participation is not available for foster care maintenance payments made through a for-profit child-placing or child-care agency. ACF-CB-PA-97-01, "Amendment to the Definition of 'Child-Care Institution' under title IV-E of the Social Security Act," at p. 2 (emphasis added).

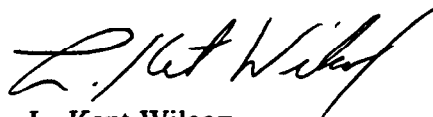
As the Supreme Court has noted, "[t]he Act provides that States will be reimbursed a percentage of foster care and administrative assistance payments when the State satisfies the requirements of the Act." Suter v. Artist M., 112 S. Ct. 1360, 1363 (1992) (citing 42 U.S.C. 672-674, 675(4)(A)). Among other matters, the Act provides that "[i]n order for a State to be eligible for payments" it "shall have a plan approved by the Secretary" which "provides for foster care maintenance payments in accordance with section 672 of this title[.]" 42 U.S.C. 671(a)(1). The Act further provides that federal reimbursement shall be made available for amounts expended "as foster care maintenance payments under section 672 of this title[.]" 42 U.S.C. 674(a)(1). The same point is also reiterated by the Secretary's regulations that provide that reimbursement is made only for payments made in accordance with the requirements of the Act. See 42 C.F.R. 1356.60(a)(i) (FFP is available for "[f]oster care maintenance payments as defined in section 475(4) of the Act, made in accordance with...section 472 of the Act....").

The availability of FFP thus turns on whether payments claimed to be for foster care maintenance comply with the terms of section 472 of the Act. As we have explained above, a natural and permissible reading of 42 U.S.C. 672(b)(1) and (b)(2) supports the conclusion that maintenance payments may not be made to, or through, a for-profit child care or child placement agency. Payments to such an entity therefore do not qualify for reimbursement because they have not been made in conformity with section 672 of the Act, even if they might be characterized in other respects as foster care maintenance payments. It follows a fortiori that administrative expenses incurred by such a for-profit agency in distributing such payments also do not qualify for FFP.

Please also note that a 1997 OIG audit of the Indiana Title IV-E program upheld this interpretation of payments made to for-profit child placing agencies. Indiana subsequently reduced its claim by the amount of the Title IV-E payments found ineligible.

If there are any questions, please have one of your staff contact Kathleen M. Penak, Program Manager, Child Welfare Branch, at (312) 886-5333.

Sincerely,



L. Kent Wilcox
Assistant Regional Administrator
for Self-Sufficiency Programs

cc: Victor Schmitt, Senior Auditor, DHHS, OIG