

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 14,739

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Appeal of )

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INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) finding her and her husband ineligible for an ongoing adoption assistance subsidy related to their adoption of a child in 1985. The issue is whether the petitioner's child qualifies retroactively for such assistance.

FINDINGS OF FACT

The facts in this matter are not in dispute and are as follows:

1. In October 1984, K.W., a three and a half year old girl in the state's custody, came to live with the petitioner and her husband. K.W.'s natural parents' rights had been terminated by court order on July 26, 1984 with a finding that her parents were unable to care for her. K.W.'s natural mother was seventeen years old and would have been eligible for ANFC if she had applied. The petitioner and her husband received foster care payments through SRS at the time of her initial arrival.
2. On May 29, 1985, the petitioner's adoption of K.W. was finalized by the probate court. Although the petitioner and her husband had been working with SRS towards the adoption of K.W., no one at SRS advised the petitioner of the existence of adoption subsidies or that the child they were adopting might be eligible for such a subsidy prior to finalization of the adoption. The petitioner was completely unaware that such a program existed and therefore did not apply for the program.
3. K.W., who is now fifteen and a half years old, has had serious ongoing medical problems since the time she was placed with the petitioner, primarily involving emotional disturbances. As an infant, K.W. had a severe head injury and other physical and emotional injuries inflicted upon her by her birth parents and grandparents all of whom suffered from chronic severe alcoholism. She witnessed extreme domestic violence as a child and was at one point taken to a hospital and abandoned. She had numerous caretakers and moves during the first four years of her life. She is still in treatment for emotional disturbances relating to her early years, which treatment has been paid for by the petitioner and her husband with some personal hardship. A mental health team working with K.W., who is currently in a crisis situation, has recommended to her adoptive parents that she go to a private residential school within this state

which has a therapeutic program for emotionally abused children but for which her adoptive parents cannot pay. It was in discussions with this mental health team in the Fall of 1996 that the petitioner first learned of the existence of the adoption subsidy program.

4. Shortly after learning of the existence of the program, the petitioner applied for a subsidy. She was denied this subsidy because she did not sign an agreement with SRS for the subsidy prior to the finalization of the adoption in 1985. A complete copy of the Commissioner's Review of the denial decision is appended hereto as Exhibit No. One and is incorporated by reference. SRS is sympathetic with the residential placement sought for the child and would like to help pay for the school through the adoption assistance program but feels it cannot do so without an order from the Board.

4. SRS does not contest the fact that it had an obligation to advise the petitioner of the existence of this program back in 1984 and that it has no record that it did so before finalization of the adoption. SRS offered by way of explanation for this failure that the adoption subsidy program was new in 1985 when the petitioner adopted K.W., that adoption workers were often unfamiliar with its requirements and that no procedures were in place for notifying adoptive parents of its existence. SRS agrees that K.W. was a child with special needs when she was placed with petitioner, was in the custody of and receiving foster care payments through SRS, that her parents' legal rights had been terminated by a Court because they could not care for her, and that her parents were ANFC eligible at that time. SRS agrees that the child met all the criteria for an adoption subsidy between October 1984 and May of 1985 and would have been granted assistance if the petitioner had applied for it. It also agrees that the most likely reason the petitioner did not apply for assistance before finalization of the adoption was that she was unaware of the existence of the program.

### ORDER

The decision of the Department denying the petitioner adoption subsidy benefits is reversed.

### REASONS

The starting point for the legal analysis in this matter is the federal statute that created the adoption assistance program. 42 U.S.C. § 673 includes the following:

Adoption assistance program

(a) Agreements with adoptive parents of children with special needs; State payments; qualifying children; amount of payments; changes in circumstances; placement period prior to adoption; nonrecurring adoption expenses

. . .

(2) . . . a child meets the requirements of this paragraph if such child--

(A)(i) at the time adoption proceedings were initiated, met the requirements of (AFDC eligibility) or would have met such requirements except for his removal from the home of a relative . . . either pursuant to a voluntary placement agreement with respect to which Federal payments are provided . . .

or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,

(ii) meets all of the requirements of subchapter XVI of this chapter with respect to eligibility for supplemental security income benefits, or

(iii) is a child whose costs in a foster family home or child care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent. . . .

(B)(i) received aid under the State plan (for AFDC) in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(ii)(I) would have received such aid in or for such month if application had been made therefor, or (II) had been living with a relative . . . within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made, or

(iii) is a child described in subparagraph (A)(ii) or (A)(iii), and

(C) has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.

. . .

(c) Children with special needs

For purposes of this section, a child shall not be considered a child with special needs unless--

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

The above criteria can be summarized as requiring that to be eligible for adoption assistance a child must 1) be either ANFC or SSI eligible at the time the adoption proceedings are initiated; 2) be receiving or eligible for ANFC at the time of the adoption assistance agreement or the court proceedings removing the child from the home; and 3) have "special needs"--i.e., cannot return to live with its parents, have a medical or situational handicap, and because of that handicap cannot be placed for adoption without

providing adoption assistance payments.

Federal regulations implementing the above provisions further provide:

The adoption assistance agreement for payments pursuant to section 473(a)(2) must meet the requirements of section 475(3) of the Act and must:

(1) Be signed and in effect at the time of or prior to the final decree of adoption. A copy of the signed agreement must be given to each party . . . .

42 C.F.R. § 1356.40 (b).

The above regulation makes it clear that to be eligible for the adoption assistance program an adoption assistance agreement between SRS and the adopting parents "must...be signed and in effect at the time of or prior to the final decree of adoption". There is no question in this matter that the petitioner did not even apply for adoption assistance until more than twelve years after she had adopted the child. However, the petitioner argues that her child should be found to be eligible retroactively because the Department failed in its duty to advise her of the existence of the program and that she was prevented by that breach of duty from participation in a program for which she was otherwise eligible and which her child desperately needs now.

The federal agency responsible for administering this program, the U.S. Department of Health and Human Services, has issued two policy interpretation memoranda (called PIQs) addressing this question. The first PIQ, ACF-PIQ-88-06 issued December 2, 1988, stated that if there are "extenuating circumstances" adoptive parents may request a fair hearing to demonstrate that "all facts relevant to the child's eligibility were not presented at the time of the request for assistance." If they make that showing, "the State may reverse the earlier decision to deny benefits under title IV-E." Because that directive dealt only with parents who had made an application which may have been erroneously denied, a second memoranda was issued on June 25, 1992, ACF-PIQ-92-02, addressing further questions, including the state's failure to notify parents of the availability of adoption assistance:

QUESTION 3:

Would grounds for a fair hearing exist if the State agency fails to notify or advise adoptive parents of the availability of adoption assistance for a child with special needs?

RESPONSE:

Yes. The very purpose of the title IV-E adoption assistance program is to encourage the adoption of hard-to-place children. State notification to potential adoptive parents about its existence is an intrinsic part of the program and the incentive for adoption that was intended by Congress. Thus, notifying potential adoptive parents is the State agency's responsibility in its administration of the title IV-E adoption assistance program. Accordingly, the State agency's failure to notify the parents may be considered an "extenuating circumstance" which justifies a fair hearing.

...

## QUESTION 5:

May a State establish policies defining the factual circumstances which constitute an extenuating circumstance for the purpose of a fair hearing?<sup>(1)</sup>

It is permissible for States to have written guidance regarding the types of situations which would constitute the grounds for a fair hearing in order to assist fair hearing officers. However, State policies may not define the grounds for a fair hearing more narrowly than Federal policy...The types of situations which would constitute grounds for a fair hearing include: . . . (4) failure by the State agency to advise adoptive parents of the availability of adoption assistance.

If applicants or recipients of financial benefits or service programs under titles IV-B or IV-E believe that they have been wrongly denied financial assistance or excluded from a service program, they have a right to a hearing. It is the responsibility of the fair hearing officer to determine whether extenuating circumstances exist and whether the applicant or recipient was wrongfully denied eligibility.

## QUESTION 6:

May a state agency change its eligibility determination and provide adoption assistance based upon extenuating circumstances without requiring the applicant to obtain a favorable ruling in a fair hearing?

## RESPONSE:

No. However, if the State and the parents are in agreement, a trial-type evidentiary hearing would not be necessary. The undisputed documentary evidence could be presented to the fair hearing officer for his or her review and determination on the written record.

## QUESTION 7:

Who has the burden of proving extenuating circumstances and adoption assistance eligibility at a fair hearing?

## RESPONSE:

The Federal statute does not address the point explicitly. We would expect States to conclude that the adoptive parents have the burden of proving extenuating circumstances and adoption assistance eligibility at a fair hearing. However, as stated in the previous response, if the State agency is in agreement that a family had erroneously been denied benefits, it would be permissible for the State to provide such facts to the family or present corroborating facts on behalf of the family to the fair hearing officer.

It is under the interpretations found in these final two questions that the parties come before the Board in this matter and present their agreed upon facts. SRS agrees both that the petitioner would have gotten the subsidy benefits if she had applied and that it has no record of ever advising the petitioner of her right to apply for such benefits. The sole question before the Board, then, is whether these facts constitute "extenuating circumstances" so as to justify a retroactive finding of eligibility.

An Ohio trial court (Calmer v. Ohio Dept. of Human Services, et al, Case No. 188051 [Court of Common Pleas, 1991]) has determined that just such a set of circumstances as exist in this case constitutes "extenuating circumstances" needed to justify a retroactive finding of eligibility because the provision requiring signing of the agreement before finalization cannot be used to deny eligibility in cases in which the state agency has itself violated the law by not informing the adoptive parents of the existence of the adoption assistance.

The Ohio court's analysis and the analysis which will be adopted herein to determine whether there are "extenuating circumstances" is in the nature of estoppel. The Vermont Supreme Court has held that the Board has the authority to apply the equitable doctrine of estoppel in cases before it and to examine whether the Department involved had a duty to the petitioner which it has breached and which has led to unfair treatment of the petitioner. Stevens v. DSW, 159 Vt 408 (1992).

The four essential elements of estoppel to be met in this case are:

(1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted upon or the acts must be such that the party asserting the estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped.

Id., p. 421, citing Burlington Fire Fighters' Ass'n v. City of Burlington, 149 Vt. 293,299, 543 A.2d 686, 690-91(1988)

In this matter, the parties have agreed to facts that show that all of the above elements have been met. SRS was aware of the existence of the adoption subsidy program in the Fall of 1984 and Spring of 1985, and that it had an obligation to inform its foster parents and potential adoptive parents of the existence of the program. (This obligation is specifically confirmed by HHS in the interpretive memorandum, ACF-PIQ-92-02 above at Question 3.) SRS knew or should have known that its failure to notify parents meant that the parents would not apply for such assistance. The parents in this case did not know of the existence of the subsidy and based on this lack of knowledge did not apply for the program to the detriment of their child in terms of her ability to receive medical services she greatly needs.

As the petitioner has shown, with the candid and laudable assistance of SRS, that all of the elements for estoppel prescribed in Stevens, supra are met, it must be found that "extenuating circumstances" exist in this case and that SRS is estopped from enforcing the requirement of a signed subsidy agreement prior to finalization of the adoption against the petitioner. As there is no further bar to her eligibility for adoption subsidy benefits, they must be granted to her.

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1. Note: Vermont has not established such a definition.