

CONTACT**LEGISLATIVE AFFAIRS DEPARTMENT**

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org**STATEMENT OF THE NEW YORK CITY BAR ASSOCIATION
COUNCIL ON CHILDREN****IN RESPONSE TO REQUEST FOR COMMENTS BY
THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)
ADMINISTRATION FOR CHILDREN AND FAMILIES (ACF), CHILDREN'S BUREAU
REGARDING TITLE IV-E ADOPTION ASSISTANCE PROGRAM'S SUSPENSION
AND TERMINATION POLICIES****CASE STUDY**

15-year-old Dahjaneé's¹ biological mother passed away when she was 11 years old. She was adopted a few years later by a woman who threatened to "pimp her out" as a punishment, and accused Dahjaneé of trying to have sex with the adoptive mother's husband. After an altercation in which Dahjaneé's adoptive mother grabbed her by the neck and threw her to the floor, Dahjaneé left the home and went to live with her biological aunt. The aunt subsequently petitioned for an order of guardianship. Despite being served, the adoptive mother never came to court, and Dahjaneé's aunt received a final order of guardianship. However, Dahjaneé's aunt is not entitled to receive any adoption subsidy payments, and Dahjaneé's adoptive mother continues to get approximately \$1,100-\$1,200 per month intended for Dahjaneé's care and support. Dahjaneé's aunt is in the process of filing a child support case, but there is no guarantee that this effort will result in an order of support. In the meantime, the aunt is caring for a teenager with special needs without any of the financial assistance earmarked for Dahjaneé's care.

EXECUTIVE SUMMARY

The title IV-E adoption subsidy is intended to promote permanency and eliminate the number of hard-to-place children in long-term foster care situations. As it currently stands, however, there is no mechanism in place for states to transfer, suspend or terminate the adoption subsidy when the adoptive parent is no longer supporting the child. While the fear of improper subsidy termination harming the adopted children is valid, the current interpretations by State agencies are, in fact, harming many adopted children because they are not receiving the benefit of money that is meant to be supporting them. This problem can be addressed by HHS imposing stricter standards requiring agencies to (i) follow up with adoptive parents to verify that children continue to live with the adoptive parents receiving the subsidy, and (ii) take appropriate steps, including notice to the adoptive parent and an opportunity to be heard, in order to be in a position to terminate or suspend the adoption subsidy in accordance with due process. In addition, there should be clear administrative procedures that include an invitation for an in-person conference with the adoptive parent when children are placed in the care of another adult or determined to

¹ Internal The Children's Law Center Data, hereinafter CLC Data.

be homeless. Finally, HHS should make clear that the adoption subsidy should be connected with the child and that if the child is between 18 and 21, the subsidy should go directly to the youth or to a representative payee. These recommendations will permit State agencies to redirect adoption subsidies so that the children or their guardian can access and use the money for the purpose for which it was intended – the care and support of the children.

BACKGROUND

Title IV-E of the Social Security Act permits a State agency to terminate a child or youth's title IV-E adoption assistance subsidy under only three delineated circumstances: (1) The child has attained the age of 18, or the age of 21 if the child is determined to have a mental or physical disability which would warrant continuation of assistance; (2) the State agency determines that the adoptive parents are no longer legally responsible for support of the child; or (3) the State agency determines that the adoptive parents are no longer providing any support to the child. While the statute has these provisions, in practice, State agencies generally terminate only under the first instance or if the adoptive parent voluntarily terminates the subsidy. However, there are currently no mechanisms in place to determine whether an adoptive parent is legally responsible and/or providing care and support. Additionally, when the parent voluntarily terminates the subsidy, there is no way for the child to get access to the subsidy. Due to the vulnerable demographic of children to which the subsidy applies, as well as the threat of sanctions for improper termination, State agencies have continued to pay the subsidy even when they have been informed that the child is no longer in the care of the subsidy recipient. Adoption subsidy fraud not only negatively impacts the State budget, but also, that fraud harms the children and hinders their ability to access other resources when adoptive parents are not providing for them. We respectfully submit that the federal adoption subsidy suspension and termination policies should be clarified as to when the subsidy can be transferred, suspended or terminated.

CURRENT ROUTINE PROCESS

The current State regulation requires the social services district to send recipients of an adoption subsidy “an annual notice of obligation to support the adopted child”² The notice instructs parents to “notify the social services district if the adoptive parent(s) is no longer providing any support or is no longer legally responsible for the support of the child.”³ While parents are encouraged to respond to these notifications, there are no consequences when parents do not respond. Instead, in New York, the Office of Children and Family Services (OCFS) recommends social services districts send a second form, then call, but “[i]n no event should an adoption subsidy be suspended or terminated due to failure to reply.”⁴ Therefore, adoptive parents may refuse to abide by their contractual obligations and the State must continue to pay them.

A parent's failure to comply with the required self-reporting should trigger state suspicion, but it does not. When the agency is not receiving information from the parent regarding support and care, an investigation should commence, but it does not. The NYC Administration for Children's

² New York Adoption Subsidy and Non-Recurring Expenses Agreement (LDSS-4623A), p. 16

³ New York Adoption Subsidy and Non-Recurring Expenses Agreement (LDSS-4623A), p. 16

⁴ NY State Office of Children & Family Services, Administrative Directive, 09-OCFS-ADM-11, “Adoption Subsidy and Education Requirements for Adoptive Children,” 4 (May 7, 2009), <http://nysccc.org/wp-content/uploads/09-OCFS-ADM-11-AdoptSubsidyEducationRequirements.pdf> (hereinafter 09-OCFS-ADM-11)

Services (ACS)⁵ asserts that, “because the federal adoption assistance program is an entitlement, the state may not impose additional criteria beyond the federal requirements.”⁶ The only requirement specified in the federal law is that parents, “shall keep the State or local agency administering the program ...informed of circumstances which would ...make them ineligible for the payments, or eligible for the payments in a different amount.”⁷

Thus, the current recommended procedure is for the agency to send two letters, then call the parent.⁸ Assuming the procedure is followed and there is still no response from the parent, the subsidy continues without change. We believe that the next step should be a mandatory in-person conference to give the parent an opportunity to prove that he or she is providing support and care for the child. If the parent fails to attend the conference, or the parent attends the conference and the agency believes the parent is not providing care and support for the child, the agency should advise the parent of its intent to suspend or terminate the subsidy pending a hearing. If it is determined at a subsequent hearing that the parent is not providing care and support, the State agency should have the ability to suspend or terminate the subsidy. Under this procedure, States can put parents on notice that their adoption subsidy may be at risk for failure to cooperate with the mandated yearly reports, while providing appropriate due process to the adoptive parents.

In addition, where relations have so significantly deteriorated between parent and child that the child has moved out of the home, the subsidy should be suspended or terminated following notice to the parent and the opportunity to be heard. One such situation is when the child is returned to foster care. This suspension or termination would also apply when the child has gotten his or her own home or where there is an order preventing the child from returning to the adoptive home.

Controlling federal legislation specifies that “in no case may the amount of the adoption assistance payment ...exceed the foster care maintenance payment”⁹ It is clear that the legislative intent is for the subsidy to replace foster care payments for hard-to-place children. When parents return children of subsidized adoptions to foster care, the state’s continued payment of the adoption subsidy depletes resources for the care of all children and violates the explicit legislative intent of the subsidy. Indeed, where a child is homeless or in the care of another guardian, that youth or guardian may have to file for welfare assistance in order to survive, while the income of the adoptive parent is supplemented with funds intended for the care and support of that child.

CASE STUDY: Angelica’s Story¹⁰

After a difficult first semester in college, 18-year-old Angelica had moved back to her adoptive mother’s home to get a job and regroup before continuing her education. On Angelica’s first day of work, she was running late, and borrowed her adoptive mother’s car without asking. When she

⁵ ACS is the social services agency for New York City.

⁶ 09-OCFS-ADM-11, p. 4

⁷ 42 U.S.C. § 673(4)(B)

⁸ 09-OCFS-ADM-11, p. 4

⁹ 42 U.S.C. § 673(a)(3)

¹⁰ CLC Data

drove home, a few hours later, she found that her adoptive mother had called the police and reported that the car had been stolen. Angelica was arrested, and, at her adoptive mother's request, the Criminal Court issued a full stay away order of protection between the two of them. Angelica suddenly found herself homeless, and was excluded from the only home she knew. Angelica received no assistance or financial support, and found a bed to sleep in at Covenant House, a youth shelter. After months of homelessness, Angelica filed for child support, since her adoptive mother was still receiving a subsidy at the "special needs" rate of \$1,100-\$1,200 per month for Angelica's care. Angelica's mother hired an attorney, who asserted that the adoptive mother owed Angelica no support. The Children's Law Center represented Angelica in the child support hearing, and presented evidence that her adoptive mother was still receiving a substantial subsidy and had sent Angelica degrading and demeaning texts, which included language like "It's your real mother's turn to take care of you," and messages which referred to Angelica as a "sore that won't heal." To date, the support magistrate has not issued any decision, and Angelica's adoptive mother continues to collect her subsidy while Angelica resides in the shelter system. If the court rules that the adoption subsidy should not be transferred, Angelica's adoptive mother will be able, legally, to continue receiving the subsidy for the next two years, until Angelica is 21.

In cases like Angelica's, the State's ability to suspend the subsidy while Angelica is under a full stay away order may have encouraged negotiation and allowed the situation to be mediated. Instead, the mother is essentially rewarded for forcing her daughter out of the home by being paid over \$1,000 a month for care the adoptive mother is not providing. Additionally, if the subsidy were linked with the child and not the adult, then Angelica would be able to receive the subsidy herself and begin living a productive adult life, instead of trying to climb out of homelessness.

RECOMMENDATIONS FOR SUSPENSION AND TERMINATION PROCEDURES

a. Conference

While the current recommendation is to send two letters then call a parent who has not responded to inquiries regarding the care and support of the child, this is not the reality in New York. When a child finds himself or herself kicked out of the home or otherwise placed in the care of a guardian other than the adoptive parent, the only remedy for the child is to file for child support. Requiring follow-up procedures by the State agency, including an opportunity for conference prior to any transfer, suspension or termination of the subsidy, would provide an opportunity for the adoptive parent, the new guardian and/or the youth to demonstrate where the care and support for the child is coming from, and would give the State the opportunity to make a proper evaluation.

b. Due process

Stricter standards of State agency accountability for the disbursement of adoption subsidies would not violate due process. The current interpretation by the federal Administration for Children and Families (ACF) is that the federal adoption assistance program is an entitlement and, therefore, may not be discontinued so long as the recipient is eligible. However, the statute does not outline criteria for determining eligibility for the entitlement. Rather, the statute simply

provides that when an adoptive parent is no longer legally responsible for the child and/or no longer financially supporting the child, then the State “may not” make the payments.¹¹ This provision imposes a duty on the State to investigate suspected adoption subsidy fraud and to ensure that adoptive parents are fulfilling their obligations. Therefore, we recommend that a parent who remains non-responsive following two letters and a phone call receive a notice to attend a conference. If, after the parent has been given the opportunity to attend a conference and the State believes suspension or termination of the subsidy is warranted, it would pursue a hearing. If it is determined at a hearing that the parent is not providing adequate care to the child, then the State would be able to suspend or terminate the subsidy. Therefore, the adoptive parent’s due process rights are preserved, but a procedure would be in place, with deadlines, to make the necessary decision regarding who should receive the subsidy.

c. Transfer or Termination

If, after the parent has received notice and an opportunity to be heard, the agency finds that the parent is not financially supporting the child and/or that the parent is not legally responsible for the child, the adoption subsidy should be transferred to the child or the appropriate guardian of the child. The parent should also be flagged and prevented from finalizing subsidized adoptions or receiving foster care payments in the future.

d. The subsidy should attach to the child

In New York, the adoption subsidy is suspended upon the death of the adoptive parent.¹² However, the current interpretations prevent transfer or termination of the subsidy when the adoptive parent is still alive, even if the child is in the legal care of another adult. The circumstances under which the subsidy can be transferred should be expanded so that the subsidy is attached to the child, such that the child or his or her guardian can petition for transfer of the subsidy without the death of the adoptive parent. If the child is between the ages of 18 and 21, the subsidy should go directly to the youth or to a representative payee. Under this revision, the child will be able to get the care due to him or her no matter with whom the youth is living.

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¹¹ 42 U.S.C. § 673 (a)(4)

¹² However, ACS requires a death certificate, a standard that also leaves room for fraud. In July 2014, the NYC Department of Investigation issued a press release detailing criminal charges that were brought against a woman for stealing approximately \$121,000 of adoption subsidies. According to the complaint, three minor children were in the adoptive custody of a woman, until the woman’s death in June 2008. ACS was not notified of the woman’s death until June 2012, and continued to remit adoption subsidy payments to the woman at her Brooklyn address. The investigation found the defendant directed another individual to forge the woman’s signature on the subsidy checks and deposit them into the woman’s account. The defendant then used the deceased woman’s ATM card and between January 2008 and March 2012 illegally withdrew approximately \$121,000 in ACS-administered adoption subsidy funds from various ATMs. To our knowledge, this has been the only fraud case that has been brought with respect to the misuse of adoption subsidies. [Comments on Adoption Subsidy Termination Policies, p. 7]