The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3636
FACSIMILE: 803-253-6283

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The Honorable James L. Solomon, Jr.
Commissioner, South Carolina Department
of Social Services
P. O. Box 1520
Columbia, SC 29202-1520

Dear Commissioner Solomon:

You have requested the opinion of this office as to whether the prerequisites of § 20-7-736(E), South Carolina Code of Laws 1976, as amended, for removing a child from his/her home comply with the requirements of § 472(a)(1) of the Social Security Act. You indicate your request is made to assess your agency's compliance with Title IV-E, § 472(a)(1) and § 471(a)(15) of the Social Security Act.

Pub. L. No. 96-272, The Adoption Assistance and Child Welfare Act ("Act") amending Title IV of the Social Security Act was signed into law in 1980. The Act created the Title IV-E Program, 42 U.S.C. §§ 670-676, which provides reimbursement to the states for Foster Care Maintenance and Adoption Assistance Payments made by the states on behalf of eligible children.

To participate in the AFDC Program, the state must conform to the mandatory requirements of the Social Security Act as well as rules and regulations promulgated by the Department of Health and Human Services. A state risks losing federal funds if its plan for foster care does not comply with the statutory scheme.

42 U.S.C. § 672(a)(1), provides that foster care maintenance payments may be made on behalf of otherwise eligible children who were removed from the home of a parent/guardian as a result of a judicial determination that continuation therein would be contrary to the welfare of the child and that reasonable efforts have been made for the child to remain in the home.

The relevant South Carolina statute § 20-7-736(E) provides:

> (E) A child shall not be removed from the custody of the parent or guardian unless the court finds that:
>
> (1) The child has been physically injured as defined in § 20-7-490 and there is a preponderance of the evidence that the child cannot be protected from further physical injury without being removed.
>
> (2) The child has been endangered as otherwise defined in § 20-7-490 and there is clear and convincing evidence that the child cannot be protected from further harm of the type justifying intervention without being removed.
>
> (3) There is an alternative placement available but in no case shall the placement be a facility for detention of criminal or juvenile offenders.

In response to a request concerning the judicial determination requirement for Title IV-E, Foster Care, the federal agency has issued an administrative interpretation which provides that the court order issued in relation to removal must clearly evidence a determination by the court that continuation in the home would be contrary to the child's welfare. "The fact that state laws include generic provisions referring to a class of children is not sufficient to satisfy the requirements of § 472 which relate to an individual determination for each child. However, if state law unambiguously requires that removal may only be based on a determination that remaining in the home will be contrary to the child's welfare (and in the appropriate circumstances, that removal can only be ordered after reasonable efforts to prevent removal have been made), it must be assumed that a judge who orders a child's removal from the home in accordance with that state law does so only for the reasons authorized by the State statute. This conclusion can be drawn only if the State law clearly allows removal under no other circumstances except those required under § 472(a)(1) of the act. If a state can show that it has such a clear an unequivocal state law, and if the court order is expressly based on that law, then the order can be accepted as sufficient evidence that the required determinations have been made." ACYF-PIQ-86-02. This interpretation was in response to a situation where the court order

simply referenced a statute but did not contain language to satisfy the requirements of § 472(a).

Our state statute § 20-7-736(E) requires a specific finding which would be reflected in the order. In order to remove a child from the custody of the parent or guardian pursuant to § 20-7-736(E), the family court must specifically find (1) physical injury and that the child cannot be protected from further physical injury absent removal or (2) that the child has been endangered and cannot be protected absent removal.

Congress has not mandated that states adopt the exact language of Title 42 U.S.C. 672 but rather that the judicial determination be to the effect that continuation therein will be contrary to the welfare of such child. An indian tribal council's decision that removal of a child would be in his best interest was found to satisfy the judicial determination of § 672(a)(1) in a Court of Appeals case from the Ninth Circuit, Native Village of Stevens vs. Smith, 770 F.2d 1486 (1985). In addition, the federal agency policy interpretation ACYF-PIQ-86-02 also concludes that the phase "placement is in the best interest of the child" has the same meaning as "continuation therein would be contrary to the welfare of the child" as stated in § 472(a)(1).

While the South Carolina Statute does not use the exact language of § 672(a)(1), it does require the same conclusion that a continuation in the home will be contrary to the welfare of the child.

Since the court must make an individual determination for each child where it orders removal and removal can only be based on such a determination, it is the opinion of this office that fulfilling the statutory requirements of § 20-7-736(E) and making the appropriate findings pursuant to this section is sufficient to meet the required "judicial determination" of the Social Security Act.

While it is the opinion of this office that the determination made by the court pursuant to Section 20-7-736(E) is in compliance with the federal mandate, the inclusion, by family court judges in orders removing custody, of the exact language of the federal statute would certainly remove the question from being subject to interpretation.

You may wish to seek an interpretation from the administrative agency concerning the finding pursuant to § 20-7-736(E) meeting the federal requirements.

In a case involving an interpretation by the Department of Health and Human Services, (formerly HEW) regarding administration of the AFDC-Foster Care Program, the U. S. Supreme Court held that

administrative interpretation of a statutory provision by a government agency should be entitled to considerable deference, especially when the agency participated in developing the provision Miller vs. Youakim, 440 U.S. 125, 59 L. Ed 2d 194, 99 S.Ct. 957 (1979).

Very truly yours,

Ruby Brice McClain
Assistant Attorney General

RBM/bsg

REVIEWED AND APPROVED BY:

Joseph D. Shine
Chief Deputy Attorney General

Robert D. Cook
Executive Assistant for Opinions