

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. L-08/17-399  
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Appeal of )  
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INTRODUCTION

Petitioner appeals the amount of subsidy made available under an adoption assistance agreement by the Department for Children and Families ("Department") after her adopted child turned 18. The primary issue is whether petitioner's adoption assistance was properly reduced when the adopted child turned 18. Petitioner contends that pursuant to the original adoption assistance agreement, the Department was obligated to continue the subsidy at the amount in effect prior to the child's 18<sup>th</sup> birthday. The parties filed memoranda of law on certain contested legal issues and agreed that, if the Hearing Officer recommended that the Board rule against petitioner on those legal issues, there would be no disputed issues of fact in this appeal and no need for a hearing. This recommendation is based on the Hearing Officer's analysis of the applicable law finding in the Department's favor on petitioner's legal claims and thus no hearing was held.

FINDINGS OF FACT

1. Petitioner is the adoptive parent of a child born prematurely in September 1999, with a variety of significant medical problems that persist to this day. Based on these problems, the child was determined to be eligible for a special needs subsidy as part of petitioner's adoption of the child, which occurred in 2001.

2. An Adoption Assistance Agreement was executed between petitioner and the Department in April of 2001, which initially provided a subsidy of \$92.10 per day<sup>1</sup> or \$2,763.05 per month. This appeal pertains to the termination of this agreement, which contains the following language with the terms that are at issue are in **boldface type** below:

*Section IV. Termination:*

*Termination will occur in any of the following circumstances:*

- A. upon the conclusion of the terms of this Agreement;*
- B. upon the adoptive parent(s) request;*
- C. upon the adopted child's death, marriage, or entry into military service;*

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<sup>1</sup> The adoption assistance agreement between the Department and petitioner was amended at least twice over the course of the past 18 years, the last two times being in 2014 and again in 2017. Both amendments reflect that the amount of the subsidy had risen to \$100 per day.

***D. when the child reaches the age of 18. If the child has a documented mental or physical handicap which warrants continuation, adoption assistance may be provided until the child reaches his or her 21<sup>st</sup> birthday. Payments past the 18<sup>th</sup> birthday of the adopted child shall continue only upon waiver from the commissioner of the Department or designate;***

3. The original agreement provided further that "this Agreement will expire on the adopted child's 18<sup>th</sup> birthday or on September 6, 2017 subject to annual review, unless termination occurs as a result of one or more of the conditions set forth in Section IV, Termination."

4. As noted above, petitioner had signed and consented to at least two separate amendments to the original Adoption Assistance Agreement, dated respectively 11/15/14 and 6/13/17. Each of those amended agreements provided additional assistance for camp activities, and also contained the following language: "[a]ny changes in the cash assistance payment may not exceed the foster care reimbursement rates had the child remained in foster care."

5. On August 11, 2017 petitioner executed with the Department, an "over-age-18" adoption assistance agreement, at a daily/monthly rate of \$27.59/\$839.29. The new rate is the maximum available standard rate for children in foster care.

6. Petitioner contends that because the child's disabilities continue, the original 2001 Adoption Assistance Agreement mandates that the subsidy continue at the same rate that had been paid pursuant to the "under-18" agreements until the child is 21 years of age. This assertion is based on the language of the original 2001 agreement, as well as on certain related policy and guidance documents.

7. The Department disagrees and asserts that the "under-18" agreement was properly terminated upon the child's 18<sup>th</sup> birthday and that the "over age 18" agreement effective September 6, 2017, providing a daily subsidy of \$27.59, is proper based on not only the language of the agreement, but also federal law, as well as interim policy changes and the mutually agreed upon amendments to the assistance agreement that occurred after the execution of the initial agreement.

ORDER

The Department's decision is affirmed.

REASONS

Adoption assistance is a joint federal-state program, falling under both federal and state law and policy (with attendant funding). Federal law provides that the amount of adoption assistance "shall be determined by agreement between

the adoptive parents and the State or local agency administering the program" and that the amount may not "exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home." 42 U.S.C. §673(a)(3). Federal law further provides that:

Notwithstanding any other provision of this section, a payment may not be made pursuant to this section to parents or relative guardians with respect to a child

(i) who has attained-

(I) 18 years of age, or such greater age as the State may elect under section 675(8)(B)(iii) of this title; or

(II) 21 years of age, if the State determines that the child has a mental or physical handicap which warrants the continuation of assistance;

42 U.S.C. § 673(a)(4)(A).

The Board has considered post-18 adoption assistance in a previous case (with the same application of the standard foster care rate), and determined that:

Nothing in the factual history of this matter or the express provisions of the Department's policy manual supports the petitioner's claim that they are legally entitled to continue receiving an adoption subsidy for H in the same amount that they received prior to his eighteenth birthday. They have made no showing that the Department has offered them a new agreement that is in

any way unfair or inconsistent with the overall application of its long-standing policies and practices.

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This provides clear and persuasive Board precedent in support of the Department's position here.

Petitioner's main legal argument in support of her position is that the reference to the federal law limiting the amount of assistance after age 18 to the so called "foster care rate" was not clearly stated in either the original 2001 agreement or the Department's policy documents in place at that time. Even assuming this to be true for the purposes of argument, the federal law imposing this limitation had been in effect since 1980.<sup>2</sup> The Department's guidance documents have been updated in the interim and are clear on this point. See Foot Note 4 below.

Furthermore, while reference to this limitation was not included in the 2001 agreement, language clearly describing the limitation did appear in the 2014 and 2017 amendments to the agreement, which petitioner voluntarily signed. The Department pointed out that the 2014 agreement contained the following language: "If the DCF Commissioner or the Commissioner's designee determines that the child has a ...

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<sup>2</sup> 42 U.S.C. §673(a)(3) See PL 96-272, 94 Stat. 500 (June 17, 1980) (adding Section 673 of Title 42)

disability that warrants assistance beyond the child's 18<sup>th</sup> birthday, the Department *may* enter into an over age 18 with the family. *The monthly stipend will remain the same as that being paid before age 18 or the amount the state pays for level III foster care, whichever is less.*" (emphasis added) Thus, insofar as the 2014 and 2017<sup>3</sup> amended agreements supersede the original 2001 agreement, petitioner's argument on this point is rendered moot.

Petitioner also claims that the Department must either terminate the Agreement altogether or, in essence, "extend" the Agreement at the same (under-18) payment rate but this is not a reasonable interpretation of federal law or the specific terms of the Agreement. The Agreement itself, and Department policy, is silent on whether over-18 assistance will continue at the same rate. But it clearly leaves the question of whether assistance may continue in the discretion of the Department, and clearly indicates the initial under-18 Agreement will terminate, or may be terminated, upon the child reaching age 18. Here, the Department did, in fact, terminate the Agreement and there is no dispute regarding its discretion to do so.

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<sup>3</sup> Substantially similar language appeared in the 2017 amended agreement.

Even more persuasively, the Agreement refers to potential continuation of payment or assistance, but not continuation of the Agreement; meaning the Agreement - as the core representation of the parties' agreed-upon terms (including payment) - terminates. As such, the Department's notification of termination and offer of a new, separate agreement is wholly consistent with the Agreement, as well as Department policy. See DCF Family Services Policy 193 (specifying that over-18 adoption assistance requires a separate agreement and is limited to the foster care rate).<sup>4</sup>

The Department's decision is therefore consistent with the applicable rules and must be affirmed by the Board. See 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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<sup>4</sup> Policy 193 provides that: "For all over-age-18 adoption assistance agreements the rate will be the current rate for Level 3 foster care, or the rate being paid before age 18, whichever is lower. Special services are not available as part of these agreements." Petitioner correctly points out that this policy was developed in February of 2014, and a predecessor policy was in place (effective in September of 1999) when she adopted her child. The preceding policy was at best ambiguous on the interpretation urged by petitioner; in light of the specific terms of the Agreement, there can be no question about how the Department interpreted the previous policy, and the new policy is (as argued by the Department) a confirmation of that interpretation. See also Fair Hearing No. R-01/11-61, *supra* at 5 (the Department's approach towards over-18 agreements is from "long-standing policies and practices.").