

VOLUME NO. 38

OPINION NO. 11

ADOPTION - Relinquishment of children to private placement agencies, foster care services for relinquished children, payment for costs of;

COUNTIES - Boards of Public Welfare, Departments of Public Welfare, determination of eligibility for foster care services, applicability of state laws and regulations, public welfare payments for foster care;

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES - Relinquished children, provision of foster care services for, liability for retroactive foster care payments;

JUVENILES - Foster home placement for relinquished children, relinquishment to private placement agencies, foster care payments on behalf of;

PARENT AND CHILD - Voluntary relinquishment of children for adoption through private placement agencies;

MONTANA CODE ANNOTATED - Sections 41-3-103(3), 41-3-104 41-3-302, Title 53;

REVISED CODES OF MONTANA, 1947 - Sections 10-1301, 10-1315, 10-1320, Title 71.

HELD: 1. County departments of public welfare may not deny foster care payments solely because the child receiving foster care has been relinquished to a private placement agency and, if eligibility is established, county departments of public welfare are required to approve such payments to a foster home on behalf of a child who has been relinquished to a private placement agency.

2. In the absence of a determination that foster care assistance was improperly denied, neither a county department of public welfare nor the Department of Social and Rehabilitation Services is required to retroactively pay foster care costs on behalf of a relinquished child. Where such a determination is made, only the foster home involved is entitled to such payments.

6 March 1979

Jon Meredith, Chief Counsel
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Dear Mr. Meredith:

You have requested my opinion on the following questions:

1. Are county departments of public welfare required to provide foster care payments on behalf of a child who has been relinquished to a private placement agency?
2. If county departments of public welfare and/or the Department of Social and Rehabilitation Services are required to provide foster care payments on behalf of a child who has been relinquished to a private placement agency, is either the county department in question or SRS required to retroactively reimburse private placement agencies for foster care costs where county departments have denied payments for such costs?

Your questions concern payments to foster family homes which provide foster care services to children who are voluntarily relinquished by their parent or parents to private placement agencies for adoption. Background information you have furnished discloses that a child may be relinquished to a private placement agency or to the state and that in either case the child is usually cared for in a licensed foster home until placed with an adoptive family. The kind of foster care provided by the foster home is the same whether the child has been relinquished to a private placement agency or the state and, in some instances, the same foster home takes in children relinquished to either.

Where a child has been relinquished to the State, the Department of Social and Rehabilitation Services (hereinafter SRS) and the department of public welfare of the child's county of residence provide public assistance in the form of foster care payments on behalf of the child to the foster home involved. Where a child is relinquished to a private placement agency, however, some county welfare departments have refused to approve public assistance for foster care services and therefore the foster homes involved have not received foster care payments from the State on behalf of such children.

Your first question is whether county welfare departments are required to approve public assistance for the foster care of children relinquished to private as well as public placement agencies.

Under section 41-3-302, MCA (section 10-1315, R.C.M. 1947), SRS and county welfare departments have primary responsibility for providing protective services for dependent youth. Section 41-3-103(3), MCA (section 10-1301, R.C.M. 1947), defines "dependent youth" and includes the following:

A child may be considered dependent and legal custody transferred to a licensed agency if the parent or parents voluntarily relinquish custody of the child.

Under section 41-3-104, MCA (section 10-1320, R.C.M. 1947), SRS is authorized to pay foster care costs on behalf of a dependent child pursuant to agreements entered into by SRS. The county welfare department of the county of the child's residence is required to reimburse SRS for the county's one-half share of such payments thereafter.

Foster care for relinquished children is also addressed in Title 53, chapter 4, MCA (Title 71, R.C.M. 1947). Under section 53-2-201(1), MCA (section 71-210, R.C.M. 1947), SRS is generally directed to:

(b) administer or supervise all child welfare activities, including * * * the care of dependent, neglected and delinquent children in foster family homes, especially children placed for adoption or those of illegitimate birth;

Section 53-4-112, MCA (section 71-709, R.C.M. 1947), specifically provides:

The department [SRS] shall make provision for establishing and strengthening child welfare services, including protective services, and for care of children in family foster homes. When funds are available for that purpose, the department may make agreements for the payment of compensation for keeping children in family foster homes.

The above statutes do not distinguish between children relinquished to public and private agencies in addressing the foster care needs of relinquished children in general. Regulations SRS has adopted pursuant to those statutes also indicate that relinquishment to either a public or private placement agency has no direct bearing on a decision to provide assistance for foster care services. Under ARM 46-2.6(2)-S6010, eligibility for foster care services turns on the need and dependency of the child and the appropriateness of foster care placement. The local administration of all forms of public assistance is the responsibility of county welfare departments and is governed by policies and rules established by county welfare boards. However, county departments and boards of public welfare are required to conform to SRS policies and rules and state and federal law. §§ 53-2-306 and 53-2-307, MCA (§§ 71-221 and 71-216, R.C.M. 1947). Therefore, in determining eligibility for foster care assistance, local welfare authorities must follow the guidelines set forth in ARM 46-2.6(2)-S6010 and the general provisions of the statutes discussed above. The corollary to this principle is that foster care assistance may not be denied at the local level where SRS rules or the statutes do not support such a denial.

The Montana Supreme Court has not addressed the matter in issue here. In a decision on a closely related question the Court rejected a State policy which denied assistance to expectant mothers who sought and received counseling and adoptive services from private placement agencies. In that case, Montana State Welfare Board v. Lutheran Social Services, 156 Mont. 381, 480 P.2d 181 (1971), the Court held that an expectant mother who qualifies for public assistance cannot be deprived of that assistance because she chooses a private rather than a public placement agency. Prior to that decision the State Welfare Board had refused assistance for the medical, hospital and foster home care expenses of expectant mothers who would relinquish their children to private placement agencies while approving such assistance for mothers who used public adoptive services.

The Court noted that the law regulating private placement agencies does not require them to assume financial responsibility for the prenatal expenses of mothers who use their services. The Court found no distinction between a woman who needs and requests assistance from a private or public placement agency and therefore no justification for denying public assistance to the former.

That reasoning applies here as well. No statute requires private placement agencies to provide foster care services or treats relinquishment to a private placement agency as dispositive of the State's responsibility to supply foster care assistance. A child relinquished to a private placement agency is not for that reason alone less dependent than a child relinquished to the State or less in need of foster care services authorized by law. The provision of foster care payments for board, room and personal expenses is one of the authorized foster care services. For the reasons previously discussed, such payments may not be denied solely because a child has been relinquished to a private rather than a public placement agency.

Your other question concerns reimbursement in cases where a private placement agency has paid foster homes which were refused foster care payments by county welfare departments. You ask if SRS or the county welfare department or both of them are required to reimburse the private placement agency for such payments.

It should be noted initially that where foster care payments on behalf of a child relinquished to a private agency are approved upon request, such payments are made to the foster home involved, not the placement agency. While the agency may arrange the foster care placement and advise the foster home concerning an application for assistance, the agency itself is not entitled to foster care payments.

There is a fair hearing procedure under the Administrative Procedure Act, Title 2, chapter 4, MCA (Title 82, chapter 42, R.C.M. 1947), set forth in ARM 46-2.2(2)-P230 through P2040, to determine the propriety of a denial of foster care payments. Where it is found that a denial of assistance was incorrect, SRS is directed to make corrected payments to the claimant retroactively to the date the request for assistance was denied. ARM 46-2.2(2)-P2060(5). However, unless a private placement agency is a "claimant" for purposes of foster care assistance, and there is no authority to that effect, the agency itself could not receive foster care

payments retroactively even if it is found that payments should have been approved upon the foster home's initial application.

The issue of retroactive payment does not arise in any event until eligibility is determined on review. It appears that no such review has been sought by any of the parties involved in the present dispute. Since foster care assistance may be denied for reasons related to any of several eligibility factors, all the facts relevant to a denial must be considered. It is beyond the scope of this opinion to conclude that any particular denial of foster care assistance necessarily triggers a right to retroactive payments which could be asserted by a properly designated claimant.

THEREFORE IT IS MY OPINION:

1. County departments of public welfare may not deny foster care payments solely because the child receiving foster care has been relinquished to a private placement agency and, if eligibility is established, county departments of public welfare are required to approve such payments to a foster home on behalf of a child who has been relinquished to a private placement agency.
2. In the absence of a determination that foster care assistance was improperly denied, neither a county department of public welfare nor the Department of Social and Rehabilitation Services is required to retroactively pay foster care costs on behalf of a relinquished child. Where such a determination is made, only the foster home involved is entitled to such payments.

Very truly yours,

MIKE GREELY
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