

## Memorandum

**To:** HHS, Administration of Children and Families (Aysha Schomburg, Allison Lowery Palmer, Joe Bock, Larry Handerhan, Jennifer Cannistra, Gayle Collins, William Meltzer, Randi Walters, Amy Bonner, Lexie Grüber-Pérez)

**From:** Daniel Hatcher, Professor of Law, University of Baltimore School of Law

**Re:** ACF Oversight Authority Regarding State Child Welfare Agencies: Foster Care, Children's Best Interests, Children's Resources (including Social Security), and Self-Sufficiency.

**Date:** September 30, 2021

Thank you for the opportunity to discuss concerns regarding how state child welfare agencies are misusing foster children's resources (including Social Security benefits, VA benefits, and other children's resources). During our meeting on September 28, 2021, ACF requested examples of statutory and regulatory authority that may allow the federal agency to exercise oversight over state agencies regarding these issues. The following is far from exhaustive and is intended as examples of just some of the ACF authority that exists.

### **Regarding data and reports, 42 U.S. Code § 671 provides broad authority for the federal agency to order reports/data from the state agencies:**

(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the [Secretary](#) may from time to time require, and comply with such provisions as the [Secretary](#) may from time to time find necessary to assure the correctness and verification of such reports . . .

Also, 45 § 1355.34 ("Criteria for determining substantial conformity") provides authority for ACF to monitor state agencies in their adherence to statutory/regulatory requirements and in whether the state agency services promote the program goals, objectives and principles (including serving the children's best interests and promoting the children's future self-sufficiency, as set out in the next section). Not only does the regulation provide ACF the authority to monitor the state agencies, it requires ACF to do so:

(a) *Criteria to be satisfied.* ACF will determine a [title IV-E agency's](#) substantial conformity with title IV-B and title IV-E plan requirements based on the following:

- (1) Its ability to meet national standards, set by the [Secretary](#), for the statewide/Tribal service area data indicators associated with specific outcomes for children and families;
- (2) Its ability to meet [criteria related to outcomes](#) for children and families; and
- (3) Its ability to meet criteria related to the [title IV-E agency's](#) capacity to deliver services leading to improved outcomes.

**Regarding the federal agency’s authority to directly address the state child welfare agency’s use of children’s funds/resources, including SSI/OASDI, there are multiple sources of authority.**

1) CFR part 1355 “applies to [States](#) and Indian Tribes and contains general requirements for Federal financial participation under titles IV-B and IV-E of the [Social Security Act](#).” Within part 1355, “45 CFR § 1355.25 - Principles of child and family services,” the regulation that was promulgated in 1996. The regulation provides clear principles that must guide state child welfare agencies. Below are just a few of the principles, directly requiring state agencies to only act in the best interests of the children, and even specifically requiring the agencies to help youth in ways that improve their future self-sufficiency:

(a) The safety and well-being of children and of all family members is paramount. . .

(c) Services promote the healthy development of children and youth, promote permanency for all children and help prepare youth emancipating from the [foster care](#) system for self-sufficiency and independent living.

(d) Services may focus on prevention, protection, or other short or long-term interventions to meet the needs of the family and the best interests and need of the individual(s) who may be placed in out-of-home care.

The principles are clear, and ACF has clear authority to ensure those principles are adhered to. Thus, this regulation also provides authority for ACF to request data/reports from state agencies, and to provide policy directives, including how state agencies must only help manage children’s resources in a manner that is in the individual children’s best interests.

2) Next, ACF already puts out a policy manual (often adding/updating) addressing providing broad interpretations and directives in all child welfare related issues: [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/index.jsp](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/index.jsp) ACF’s policy manual includes broad discussion regarding IV-E, and even specifically addresses SSI with interpretation/directives. Section 8.4D of the manual addresses the interaction between IV-E and SSI and provides a directive regarding the issue of “How should the decision to apply for SSI or title IV-E benefits be made?” ACF clearly concludes and directs that state agencies should decide between seeking SSI or IV-E based on the child’s best interests:

“Information regarding the benefits available under each program should be made available by the title IV-E agency so that an informed choice can be made in the child's best interest. To achieve this goal, title IV-E agencies should exchange information regarding eligibility requirements and benefits with local Social Security district offices and establish formal procedures to refer clients and their representatives to the local Social Security district office for consultation and/or application when appropriate.”

[https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=76](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=76) As authority for this directive, ACF simply cites to Title IV-E and Title XVI (the SSI program).

In fact, all the evidence I have seen indicates the state agencies make this decision based solely upon what is in the fiscal self-interests of the state in terms of revenue, rather than what is best for the child. So, ACF could request data/reports from state agencies regarding this issue. Further, ACF also provides direction in the manual regarding the question of whether state agencies may “claim title IV-E administrative costs for eligible children who receive Supplemental Security Income (SSI)?” And, ACF provides a directive that the agencies can do so – specifically recognizing in the ACF directive that some state agencies are making a “choice to fund that child’s board and care through SSI rather than title IV-E.” Thus, ACF could also seek data/reports from the agencies regarding obtaining SSI for children while also claiming IV-E administrative costs, and ACF could further clarify the role of the state agency as a fiduciary intended to only act in the child’s best interests. ACF could also provide a clear directive/clarification that applying a child’s resources towards the costs of board and care are contrary to the child’s best interests.

3) Also, the federal law under Title IV-E sets out a clear structure where the state agencies are required to provide and pay for (using state funds) “foster care maintenance payments.” 42 U.S. Code § 6729(a) (“Each State with a plan approved under this part shall make [foster care maintenance payments](#) on behalf of each [child](#) who has been removed from the home of a relative specified in [section 606\(a\) of this title](#) . . .”) Foster care maintenance is defined in 42 U.S. Code § 675 to mean “payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a [child](#)’s personal incidentals, liability insurance with respect to a [child](#), reasonable travel to the [child](#)’s home for visitation, and reasonable travel for the [child](#) to remain in the school in which the [child](#) is enrolled at the time of placement. . . .”

The structure is intended so that states pay for the foster care maintenance, with state funds, and then the states can claim a federal match for eligible children. (42 U.S. Code § 674 - Payments to States). In fact, 45 CFR § 1355.30 (“Other applicable regulations”) includes a listing of other regulations that apply to state child welfare agencies, including 45 CFR § 75.306 [Cost sharing or matching](#)—which prohibits the state agencies from using money other than state funds to pay the cost of care. The regulation even specifically prohibits the use of other (non-IV-E) federal funds (which would include Social Security Benefits) for the state costs:

**(b)** For all Federal awards, any shared costs or matching funds and all contributions, including cash and third [party](#) in-kind contributions, must be accepted as part of the [non-Federal entity](#)’s [cost sharing or matching](#) when such contributions meet all of the following criteria:

- (1)** Are verifiable from the [non-Federal entity](#)’s records;
- (2)** Are not included as contributions for any other [Federal award](#);
- (3)** Are necessary and reasonable for accomplishment of project or program objectives;
- (4)** Are allowable under [subpart E](#) of this part;
- (5)** Are not paid by the Federal Government under another [Federal award](#), except where the Federal statute authorizing a program specifically provides that Federal funds made available for such program can be applied to matching or cost sharing requirements of other Federal programs;

6) Are provided for in the approved [budget](#) when required by the [HHS awarding agency](#); and

(7) Conform to other provisions of this part, as applicable.

In addition to the prohibition of using other federal funds (including Social Security) for the state costs, the regulation also requires that the funds used must be consistent with the program objectives. If the state agency takes children's resources for state costs, such actions (and the use of those funds) are directly contrary to the state agency's objectives (including those principles listed above to adhere to the paramount purpose of serving the child's best interests). Further, the regulation also requires that the funding the states use for state costs must be provided for in state agency budgets, upon request by the HHS awarding agency. Thus, in addition to the other sources above, this regulation clearly gives ACF authority to seek data/reports, and to provide direction/clarification that state agencies must only manage children's resources (including but not limited to Social Security) in a way that serves the children's best interests. Further, ACF could clarify/direct that using a child's resources to pay state costs is prohibited.

cc: Amy Harfeld, Jill Hunter-Williams, Ian Marx