



INVESTIGATIVE REPORT

Ombudsman Complaint A2005-0220
(Final Finding of Record and Recommendations)
Edited to remove confidential and identifying information

June 26, 2006

A Southcentral Alaska couple complained to the Office of the Ombudsman in February 2005 about the Office of Children's Services (OCS). Specifically, they were dissatisfied with the transition from foster care payments to a Title IV-E deferred adoption assistance agreement. They felt that the OCS transition policies deprived him of a month of foster care payments to which he was entitled.

The complainant alleged that OCS arbitrarily and unfairly failed to pay him and his wife foster care payments due for the month of June 2004. The standard of arbitrary deals with whether OCS based its decision on intelligible or understandable public policies. The standard of fairness deals with whether OCS provided the complainant with adequate and reasonable notice of the matter at issue.

The preponderance of evidence leads the ombudsman to find that the complainant's allegation is *partially justified*, based on OCS failure to provide adequate notice of the existing policy. As a remedy, the ombudsman recommends that OCS pay the complainant for foster care services provided during the first 29 days of June 2004. OCS concurred with the findings and recommendations.

BACKGROUND

The Alaska Department of Health and Social Services (DH&SS), through OCS, is responsible for finding homes for children who have been abused, neglected, or abandoned. The department recruits and licenses foster parents, places children in their homes, and provides financial and other support to make the placement successful.

OCS contracted with the complainant and his wife for foster parent services for children in state custody. Under this agreement, the complainant cared for an infant girl, Mary¹, beginning June 28, 2002, when she was a newborn. They received \$652 per month for their expenses and services.²

¹ Not her real name. The girl's name has been changed out of respect for her privacy.

² Foster care payments are addressed in the Alaska Administrative Code, at 7 AAC 53.080 (a):

(a) The division will pay for a child placed by the division in a child foster home with which the division has entered into a child foster care agreement. The division will pay the appropriate rate established under 7 AAC 53.030 - 7 AAC 53.060 multiplied by the number of days of care provided.

The complainants decided they wanted to adopt Mary.

Under federal and state law, OCS may provide subsidies to families to encourage adoption of hard-to-place or special needs children. The federal government provides adoption assistance funds under Title IV-E of the Social Security Act, and the state distributes adoption subsidies according to state regulations and policies, which must remain within the federal guidelines.

To receive a monetary subsidy, a child under the age of three must have a documented disability such as mental illness, hearing or vision impairment, or diabetes, among many others. Often, young children do not develop or manifest a disability until later in their childhood or adolescence. These young children may qualify for a “deferred subsidy.” Deferred subsidies make no cash payments but qualify the child for continued Medicaid coverage. In addition, the adoptive parents can negotiate a monetary subsidy later if the child’s health changes.

Mary qualified for a deferred subsidy, indicating that, although she did not manifest a disability at the time of adoption, she was at risk for later problems.

On June 14, 2004, the standing master of the Anchorage Superior Court, John Duggan, presided at a hearing on the complainants’ petition for adoption. Mr. Duggan recommended approval, and Superior Court Judge John Suddock signed a decree of adoption in June, 2004. According to the Alaska Rules of Court (Rule 58.1), the decree took effect on the date the order was signed. Thus, the adoption became final on June, 2004. Shortly afterward, the complainants submitted a request for foster care payment for the month of June, which they considered their final month of foster care.

OCS denied the request. OCS explained that the deferred subsidy agreement (with no monetary payments) took effect June 1, 2004, and replaced the foster care payments. In a letter to a legislator, who had intervened on behalf of the complainants, OCS wrote:

Based on the existing Federal policy, the [complainants] have received all payments that were due and owed to them. While the [complainants] may not be happy with the result, we are not able to process a foster care payment for the month of June as the subsidy agreement of zero dollars was in effect.

After complaining to OCS supervisors and to their legislators about the OCS decision, the complainants filed a complaint with the ombudsman.

The ombudsman opened a complaint file with the following allegation, stated in terms that conform with AS 24.55.150, which authorizes the ombudsman to investigate complaints about administrative acts of state agencies:

Allegation 1: OCS arbitrarily denied the complainants’ request for foster care payments for the month of June 2004.

Allegation 2: OCS unfairly administered the complainants’ transition from foster care payments to a deferred adoption subsidy.

Assistant Ombudsman Mark Kissel gave verbal notice of investigation to Tracy Spartz-Campbell, OCS Social Services Program Coordinator, on March 17, 2005.

INVESTIGATION

The foster father said he expected to receive a foster care payment for the month of June. He said that the OCS social worker assigned to Mary had told him several times that OCS would pay for foster care until the adoption became final. He said he remembered this particularly because he and his wife had agreed to a zero-dollar deferred subsidy, which raised questions in his mind about money. That social worker, Elena Franks, has since retired from state service and could not be contacted for verification.

Interview with Ms. Spartz-Campbell

The ombudsman investigator interviewed OCS Social Services Program Coordinator Tracy Spartz-Campbell to learn more about the way OCS administers the adoption subsidy program. She said that when a child becomes legally free for adoption, and the foster parents commit to adoption, OCS changes the nominal placement of the child from a foster placement to a pre-adoptive placement. The practical difference is that foster payments cease and adoption subsidy payments, if any, begin. Ms. Spartz-Campbell said that from June 1, when foster care ended, until June 30, when Mary's adoption became final, the complainants were providing "pre-adoptive care."

"We may not necessarily pay for the care although we retain custody of the child," she said. "So the placement itself would become a pre-adoptive placement. In this case, from a financial point of view, that would have occurred on June 1."

She said that none of the papers the complainants signed notified them of their change in status from foster parents to pre-adoptive parents.

Ms. Spartz-Campbell explained:

The placement itself switches because we have this agreement. It says this is going to be an adoptive home. The family by this point has filed a petition with the court to adopt the child. Everything is saying that this child is being adopted, so this has become a pre-adoptive placement, based on the actions the family is taking and based on the actions our agency is taking. They filed a petition for adoption on the 12th of May 2004, which is giving their intention to become adoptive parents. And then, of course, we followed up with them on finalizing the subsidy—for that to become effective as soon as possible. And in this case that was June 1.

The ombudsman investigator asked how this is explained to the adoptive family.

"That should be occurring between them and their social worker," Ms. Spartz-Campbell responded. "Now whether that conversation took place, I cannot tell you."

The ombudsman investigator asked Ms. Spartz-Campbell why the state chooses to coordinate the transition from foster care payments to adoption subsidies in the manner it does.

She responded that she had been working with adoption subsidies for about five years and this has been standard practice. She said she believes it has been done the same way since the program started.

“I know there are pretty strong federal policies that subsidy agreements have to be approved and established prior to the finalization of the adoption,” she said.

She said Alaska’s interpretation of federal rules is the basis of the OCS regulations and policy.

Federal Rules

Federal rules indicate that the adoption subsidy agreement must be signed before the adoption is final, and in effect no later than the date of the adoption. The U.S. Dept. of Health and Human Services, Administration for Children and Families (ACF) issued a policy announcement (Log ACYF-CB-PA-01-01, Jan. 23, 2001) regarding Title IV-E adoption assistance eligibility. This announcement makes several references to the timing of the adoption assistance agreement.

On page 8 it states:

Title IV-E adoption assistance is available on behalf of a child if s/he meets all of the eligibility criteria and the State agency enters into an adoption assistance agreement with the prospective adoptive parent(s) prior to the finalization of the adoption. [emphasis in original]

On page 19 it states:

Federal regulations at 45 CFR 1356.40(b)(1) require that the adoption assistance agreement be signed and in effect at the time of, or prior to, the final decree of adoption.

OCS Adoption Subsidy Policies and Procedures

The Alaska DH&SS Child Protective Services Manual has a section on adoption subsidies. Policy 6.2.2.6.A (e) states that:

The subsidy agreement must be signed by the Division Director or designee before the adoption is finalized.

Paragraph (f) continues:

When the subsidy has been approved and signed, the Adoption Clerk in State Office will initiate the subsidy. It is not necessary to wait for finalization.

If foster care payments have been paid to the adoptive family, the State Office adoptions staff will coordinate the timing of the closing of foster care and starting the subsidy, and will close foster care on the provider payment system.

The OCS adoption subsidy policies clearly contemplate the subsidy agreement taking effect before the adoption is finalized, and imply that the foster care payments will stop at some point “coordinated” with the effective date of the subsidy agreement.

The Adoption Subsidy Agreement

The federal adoption subsidy agreement between the complainants and OCS sets out the provisions of the subsidy agreement. OCS agreed to reimburse the adoptive parents up to \$2,000 in nonrecurring adoption expenses such as attorney fees, court costs, home study fees, and transportation. OCS agreed to provide Medicaid insurance coverage for the child. The provision regarding the subsidy amount stated:

OCS agrees to pay the adoptive parent(s) a monthly cash subsidy payment of \$0.00...

The form was signed and dated by the complainants on May 10, 2004. A line above their signatures states, “This agreement becomes effective _____.” The adoptive father said that blank was not filled in when he signed the form. The final copy of the agreement has the date “6/1/04” handwritten into the blank. The form was also signed and dated by Joanne Gibbens, a DH&SS program administrator, on June 14, 2004. Ms. Spartz-Campbell acknowledged that the effective date was added at the time Ms. Gibbens signed the agreement.

According to Ms. Spartz-Campbell, the effective date is “filled out after Joanne [Gibbens] signs it, because the agreement does not become a legal document until she signs. So what we do is we take the first date of the month in which she signs—so she signed on the fourteenth, which makes it effective on the first of June.”

She said that when the complainants signed the agreement on May 10, they would not have known when it would become effective.

Although Ms. Spartz-Campbell said that the complainants would not have known when their agreement would take effect, she said that OCS generally expects to execute the adoption subsidy agreement so that it will become effective on the first day of the month in which the adoption was finalized. She referenced AS 25.23.210, which states,

The monthly payment and the length of time for which the subsidy for a hard-to-place child is granted are left to the discretion of the commissioner....

She also pointed to an agency regulation relating to adoption subsidies to support her view.

7 AAC 53.220 (b): The division will pay the negotiated monthly payment at the beginning of the month for which payment is intended.³

Federal Opinion

The ombudsman investigator contacted Lois Ward of the federal Administration for Children and Families. Ms. Ward manages the adoption subsidy program for ACF

³ This regulation was repealed on March 31, 2005, but it was in effect at the time of the adoption.

Region 10, which includes Alaska. The ombudsman investigator asked whether federal rules mandated a transition process like the one followed in Alaska. Ms. Ward said she talked to colleagues and to Ms. Spartz-Campbell. According to Ms. Ward, federal regulations say foster parents can be paid for foster care as long as the child was in foster care even one day in the month.

“What we don't do,” she said, “is we don't mandate that the state pay the foster care for that month.”

She said Ms. Spartz-Campbell told her that Alaska has “a state regulation that says that adoption begins the first day of the month that the adoption is final.”

“We don't have any regs that say that is not okay,” Ms. Ward said. “We frankly would probably encourage them to pay the family for the month's foster care, but since they have regulation that says, 'no they are not going to do it,' we don't have anything that says that's not okay.”

Caseworker Policies and Procedures

The OCS Child Protective Services Manual provides policies and procedures for adoptions. These policies and procedures are found in section 3.15 of the manual.

Among the agency policies in this section is one regarding adoptive families:

Prospective adoptive families, including relatives and foster families, are entitled to careful preparation, assessment, placement and follow up services. The children should be carefully prepared for placement.

Section 3.15.3(e) is one of several instructions dealing with the start of subsidy payments:

If the staffing team has determined that the child is eligible for a subsidy and the family is requesting subsidy payments, subsidized adoption payments will begin as soon as the parents rights are terminated, there is a positive home study, and the subsidized adoption agreements are signed and approved in State Office.

Section 3.15.4 deals specifically with the issue of adoption by a foster family.

c. If the staffing team recommends that the placement of the child with the foster family should continue as an adoptive or legal-risk adoptive placement, and an adoptive home study has been completed and approved, the worker will:

3. If the adoption will be subsidized, follow the procedures in Administration Chapter, section 6.2.2.6.A Adoption Subsidies. As soon as the subsidy agreement is signed and approved, subsidy payments will be initiated. Immediate initiation of adoption subsidy is strongly encouraged as it assists the family in defining their new role as adoptive parents. Subsidy agreements cannot be signed until parental rights are terminated. State Office closes foster care payments for subsidy payments.

4. If the adoption will not be subsidized, foster care payments will be terminated as soon as the Placement Agreement is signed and parental rights have been terminated. The adoptive parents are henceforth financially responsible for the child.

Section 3.15.6 deals with adoptive placements with non-relatives. At (h)(1)(G), the manual instructs the caseworker regarding financial responsibility during the adoption process:

G. Clarify with the family the legal responsibilities of adoption and the purpose of post-placement services.

- i. There must be a clear understanding with the adoptive parents that these [sic] will be a supervisory period of at least six months before the adoption can be legally finalized, at which time the written consent of the Department to the adoption is necessary.

iii. Unless the adoption is subsidized, during the supervisory period and pending finalization of the adoption, the adoptive parent will be expected to assume full financial responsibility for the child, including the provision of medical, dental, and hospital care. Travel costs related to pre-placement visits and placement will usually be the responsibility of the adoptive parent.

iv. The adoptive parents must be advised that the child is still in the custody of the Department. Therefore consent for non-emergency major medical care must be obtained before the care is provided. Also, authorization must be obtained to travel out-of-state with the child. See the Authority to Transport a Minor form (06-9717).

H. When the placement is made, have the adoptive family sign the Adoptive Placement Agreement form (06-9722).

Explaining the Financial Changes to the complainants

The Child Protective Services Manual indicates that OCS staff will prepare the adoptive family to assume full financial responsibility for the child prior to the actual adoption. In other words, the staff are expected to explain that foster care payments will stop, and the only assistance the “pre-adoptive” parents can expect is any assistance that OCS had agreed to in an adoption subsidy agreement. Also, the adoptive family is expected to sign the Adoptive Placement Agreement form.

The OCS caseworker who worked with the family on the adoption has since retired and the investigator’s attempts to locate her failed. The ombudsman investigator contacted her supervisor, Gail Stadig, to learn what instructions the caseworker received and what notes this caseworker kept on the complainants’ case. Ms. Stadig reported that the caseworker is expected to prepare the family for adoption, “and that starts with providing information about every aspect.” Ms. Stadig said she found no notes in the caseworker’s files and electronic files indicating that she spoke to the complainants about when their foster payments would end.

The ombudsman investigator reviewed blank copies of two adoptive placement agreement forms. One of them, the "Legal-Risk Adoptive Placement Agreement" (06-9721) is the only OCS form that indicates the financial consequences of the transition from foster care to pre-adoptive care: "This placement will be considered as foster care and we will receive the foster care rate of \$_____ per day until this child's parents' rights are terminated. This placement will then become an adoptive one and unless the adoption is to be subsidized, foster care payments will be discontinued, effective the date the child becomes legally free for adoption." This form, however, was not used in the complainants' adoption.

Ms. Stadig and current caseworker Vivian Patton confirmed that the Adoptive Placement Agreement, referenced in the procedures manual [see 3.15.4(c)(4) and 3.15.6(h)(1)(H) above] was not completed in this case. Ms. Patton said that OCS did not have a home study for the complainants until after termination of Mary's biological parents' rights. Because of that, the adoption moved very quickly after the home study.

"These placement agreements are not always clear cut in all cases," she said, "and are not done on a regular basis, as we are always searching for relatives and ICWA-preferred placements.⁴ They are primarily used with children that are legally free, and an adoptive placement has been found that has a positive home study for placement of a specific child."

ANALYSIS & FINDINGS

Allegation 1

OCS arbitrarily denied the complainant's request for foster care payments for the month of June 2004.

The first allegation alleges that OCS acted arbitrarily. The Office of the Ombudsman's Policies and Procedures Manual at 4040(5) defines *arbitrary*. The portion that pertains to this investigation reads as follows:

A complaint is demonstrably "arbitrary" if investigation discloses that:

- (A) the action or decision is not based on an intelligible or understandable public policy decision;

The decision at question here is OCS's determination that a foster placement becomes something else once certain conditions are met. According to Ms. Spartz-Campbell, once the prospective parents file in the courts a petition to adopt, and the subsidy agreement is signed by the prospective parents and the OCS representative, OCS considers that the child has moved from a foster placement to a pre-adoptive placement. Foster payments cease on the first day of the month in which the subsidy agreement was signed by both parties, and adoption subsidy payments, if any, begin at the same time.

⁴Ms. Patton said that Mary's adoption was handled under the Indian Child Welfare Act (ICWA). Her placement with the complainants was a non-preference placement, meaning that Mary was not placed with a Native family, as defined by ICWA. According to Ms. Patton, the child is Native, but of an unrecognized tribe.

The ombudsman disagrees with OCS that federal and state laws require this particular determination. Ms. Ward of the federal ACF said that nothing in federal regulations or rules prevents Alaska from paying the disputed foster care in this case. Alaska regulations only address when the subsidy is paid [at the beginning of each month, 7 AAC 53.220 (b)] not when payment begins. AS 25.23.210 states that the start and end of the adoption subsidy payments are left to the discretion of the DH&SS commissioner. The DH&SS Policy and Procedures Manual echoes that discretion. Policy 6.2.2.6A (f) states that the Alaska adoptions office “will coordinate the timing of the closing of foster care and starting the subsidy.”

Ms. Spartz-Campbell makes much of the references in the federal ACF policy announcement (Log ACYF-CB-PA-01-01, Jan. 23, 2001) that require that an adoption assistance agreement be signed and in effect prior to the finalization of the adoption. This means that an agreement must be in effect no later than the date the court finalizes the adoption, but the ACF does not mandate exactly that the subsidy payments must begin the first of the month in which the adoption is finalized. That, according to Ms. Ward of ACF, is left to the discretion of state officials. Ms. Ward said that the timing for termination of foster care payments is also within the state’s discretion.

Ms. Spartz-Campbell’s repeated insistence that federal policy required OCS to deny the complainants a foster care payment for June 2004 is inaccurate. The regional administrator for the federal program explained that the foster care payment issue was within the state’s discretion.

OCS has, in fact, indicated how it exercises that discretion in administering the transition from foster care payments to the adoption subsidy program. The Child Protective Services Manual sections 3.15.4 and 3.15.6 are clear in the expectation that adoptive parents will assume financial responsibility for their child before adoption. The manual advises: “Immediate initiation of adoption subsidy is strongly encouraged as it assists the family in defining their new role as adoptive parents.” The rub for the complainants was that they had agreed to receive no monetary adoption subsidy.⁵ However, the CPS manual addresses unsubsidized adoptions, as well: “If the adoption will not be subsidized, foster care payments will be terminated as soon as the Placement Agreement is signed and parental rights have been terminated. The adoptive parents are henceforth financially responsible for the child.” This instruction shows the intent of the OCS policy. Of course, it does not exactly fit the complainants’ situation, because no Placement Agreement was ever completed, but the intent is clearly that foster care payments will cease at some point before the adoption is final.

The OCS policy to move adoptive parents into their parental role quickly is understandable and reasonable, even if it is not what Region 10 of the federal ACF requires. Despite OCS’s failure to complete a Placement Agreement with the complainants, the basic OCS policy – that would-be adoptive parents demonstrate the ability to assume financial responsibility for their child – is not arbitrary. Consequently, the ombudsman finds allegation 1, that OCS acted arbitrarily, *not supported* by the evidence.

Allegation 2

⁵ Ms. Spartz-Campbell argued that the complainants indeed received a subsidy—of zero. The ombudsman considers that less an argument than an unfortunate example of double-speak.

OCS unfairly administered the complainant's transition from foster care payments to a deferred adoption subsidy.

The second allegation alleges that OCS acted unfairly. The Office of the Ombudsman's Policies and Procedures Manual at 4040(3) defines *unfair*. The portion that pertains to this investigation reads as follows:

Unfair means:

(A) adequate and reasonable notice of the matter was not provided to the complainant;

OCS policy changes a foster placement into a pre-adoptive placement at a particular point in the adoption process, as explained previously. This change in status is important to the prospective parents, because foster parents receive money for their services and pre-adoptive parents do not. Pre-adoptive parents may or may not receive a monetary subsidy, depending on the special needs of the child they are adopting. The complainants signed a deferred subsidy agreement, which provides no subsidy initially but is renegotiable should baby Mary manifest special needs later.

The complainants claim that they were not told about this change in status nor that it would mean a loss of their monthly foster care payments at some point in the adoption process. In fact, the complainants assert that their social worker, Elena Franks, assured them that they would continue to receive foster care payments until the court approved the adoption decree. Ms. Spartz-Campbell said that it was the responsibility of the social worker, in this case Ms. Franks, to notify the foster parents that their foster payments will end before the adoption is final.

Unfortunately, OCS chose to rely solely on an oral notification, which has two primary weaknesses. First, oral notifications are difficult to confirm. In this case, for instance, the OCS adoption file displays no indication that the issue was discussed with the complainants. Secondly, it is difficult to confirm the content of an oral notification. Was the notification accurate and understandable? With Ms. Franks retired from state service and unavailable, we have only the recollection of the complainants with which to answer that question.

Furthermore, OCS appears to have missed at least two opportunities to explain the financial impact and document that explanation. First, OCS did not complete a placement agreement with the complainants. One of the two placement agreements used by OCS explains what foster parents can expect financially during the adoption process. Second, the Adoption Subsidy Agreement would have been an excellent vehicle for a similar explanation. Instead, the subsidy agreement became for the complainants a secret trigger to end their foster care income. The complainants did not know when the agreement would become effective or what the agreement meant for them financially. Thus, the complainants had no way of knowing when to expect the end of their foster care payments other than what they heard, or what they thought they heard, from their social worker.

Certainly, a change in status that will cost parents more than \$600 in anticipated payments is important enough to put in writing. The failure to do so, and the failure to keep any record of an oral notification, leads the ombudsman to conclude that OCS failed to provide the complainants with adequate and reasonable notice of the issue at hand.

Consequently, the ombudsman finds that OCS acted unfairly and that allegation 2 is *justified*.

RECOMMENDATIONS

Unfairness deprives citizens of knowledge required to protect their interests and to plan accordingly during the adoption subsidy process. The argument that the complainants could not expect to receive both the foster care payment and the adoption subsidy simultaneously holds no water, because the adoption subsidy was deferred. Consequently, the ombudsman recommends the following:

Recommendation 1

OCS should revise the state and federal adoption subsidy agreement forms to expressly state the financial significance of the transition from foster care to pre-adoptive care and to inform the prospective parents of when that transition will occur.

Recommendation 2

OCS should compensate the complainants for its failure to provide adequate and reasonable notice of the effect of the adoption subsidy agreement on their foster care income; OCS should pay the complainants the amount they would have been due for providing foster care during the month of June 2004 up to the day of the adoption decree.

AGENCY RESPONSE AND CLOSING

Tammy Sandoval, Deputy Commissioner of the Department of Health & Social Services, responded to this report on behalf of the agency. Ms. Sandoval concurred with the findings and recommendations. She wrote:

OCS will take the following actions:

1. Revise the existing state and federal adoption subsidy forms to expressly state the financial significance of the transition from foster care to pre-adoptive care.
2. Ensure that policy and procedure clearly reflect the expectation that prospective adoptive parents are informed of the effective date of that transition.
3. Compensate the [Complainants] for providing foster care during the month of June 2004 up to the day of the adoption decree. We anticipate a time period of 30 days to process the payment.

In light of Ms. Sandoval's response, the ombudsman will close this complaint as *rectified*.

In summary, the ombudsman finds Allegation 1 ***not supported*** and Allegation 2 ***supported***. According to Ombudsman Policy and Procedures Manual at 4060.3, when one allegation of a complaint is found to be justified and the other is found to be unsupported or indeterminate, the complaint as a whole is found to be ***partially justified***. Therefore, the ombudsman closes this complaint as ***partially justified*** and ***rectified***.