

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES**

IN THE MATTER OF:

[REDACTED]

Reg. No.: 15-005195
15-005198
15-005190

[REDACTED]

Issue No.: TITLE IV-E

Case No.:

[REDACTED]

[REDACTED]

Hearing Date: May 21, 2015
County: CASS

ADMINISTRATIVE LAW JUDGE: Lynn M. Ferris

HEARING DECISION

Following Claimant's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a three way hearing was held on March 21, 2015, from Detroit, Michigan.

Petitioners' duly court-appointed Legal Guardian Ad Litem (LGAL), Attorney [REDACTED] [REDACTED]k, appeared on behalf of the Petitioners, [REDACTED] [REDACTED] none of whom appeared.

[REDACTED], Assistant Attorney General, appeared on behalf of the Respondent, the Department of Health and Human Services ("Department"). [REDACTED], Child Welfare Funding Specialist, [REDACTED], Department Analyst - Federal Compliance, [REDACTED]n, Department Analyst - Title IV E Specialist and [REDACTED], Child Welfare Funding Manager (Lansing), also appeared on behalf of the Department of Health and Human Services (Department).

The hearings for these three Petitioners' cases were consolidated for purposes of the hearing and this Hearing Decision which will address and determine the Petitioners' appeals for Registration numbers: 15-005195,([REDACTED]); 15-005198, ([REDACTED]) 15-005190,([REDACTED] [REDACTED])

ISSUE

Did the Department properly deny Petitioner's Odom and Scott, (Arionna) Title IV-E eligibility due to income in the removal month due to family income exceeding the former AFDC program standards?

Did the Department properly deny Petitioner Antjuan Scott's Title IV-E eligibility due to his placement with a relative in a non-licensed Foster Care Home?

FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. The Petitioners [REDACTED] are minor children who were all living together with their mother at the time of their removal. The Petitioners were removed from [REDACTED] (their mother) care by court order on [REDACTED].
2. The Petitioners' mother, [REDACTED] was incarcerated on [REDACTED].
3. The Legal Guardian Ad Litem and Attorney for Petitioners, [REDACTED] and [REDACTED], Assistant Attorney General stipulated on behalf of their respective clients the Petitioners and the Department of Community Health and Human Services that the Petitioners were deprived of parental support as a result of their mother's ([REDACTED]) incarceration.
4. The Legal Guardian Ad Litem [REDACTED] and representative for Petitioner for [REDACTED] and [REDACTED], Assistant Attorney General on behalf of the Department stipulated with regard to Petitioner [REDACTED] that the Department's determination by Notice of Case Action on [REDACTED] denying Title IV-E eligibility due to the Petitioner being placed in the home of a relative in an unlicensed foster care home was correct (FOM 902, May 1, 2014, p. 26). As a result of this stipulation, the hearing request dated [REDACTED] on behalf of Petitioner [REDACTED], Registration No. 15-005190 is dismissed pursuant to stipulation of counsel for the parties. Exhibit C
5. The Petitioners' mother [REDACTED] was working during the month of December 2014, the removal month, and received earned income. Exhibit A

6. As part of its review to determine eligibility for Title IV E funding, the Department obtained a verification of employment from the Petitioners' mother's employer for December 2014 (Exhibit A). The Petitioners' mother was working in December 2014 and the verification of employment reported gross earnings of \$396.55 (██████████); \$419.73 (██████████) and \$418.18 (██████████, ██████████). Exhibit A
7. The Department calculated the December 2014 Family income to be \$1234.46 and determined that this income exceeded the former AFDC program standards.
8. The Petitioners' mother, ██████████, was required to pay child support for ██████████, but did not pay any child support for either child during December 2014 as the children were residing with their mother, ██████████, in her home.
9. On ██████████ the Department issued Notices of Case Action denying Title IV E funding for ██████████ due to the family's income exceeding the former AFDC program standards. Exhibit B (The notice reasons for denial of Title IV E funding for each child are identical except for the name, registration number, Department case number and ID).
10. On ██████████, the Petitioners' Legal Guardian Ad Litem Attorney filed a timely hearing request protesting the Department's denial of Title IV E funding eligibility based upon the household's income exceeding the AFDC eligibility requirements.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Children's Foster Care Manual, FOM, and Title IV-E requirements, 42 USC 670, *et seq.* The Adoption Assistance and Child Welfare Act of 1980. Title IV-E is The Foster Care Program implemented by the Social Security Act Section 401 *et seq.*, as amended and implemented under the Code of Federal Regulations at 45 CFR parts 1355, 1356 and 1357.

The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance has been denied. MAC R 400.903(1). Clients have the right to contest a department decision affecting eligibility or benefit levels whenever it is believed that the decision is incorrect. The department will provide an administrative hearing to review the decision and determine the appropriateness of that decision. BAM 600

Legal authority for DHS to provide, purchase or participate in the cost of out-of-home care for a child has been established in state law: the juvenile code, MCL 712A.1 et seq.; the Social Welfare Act, MCL 400.1 et seq.; the Michigan Children's Institute Act, MCL 400.201 et seq.; the Michigan Adoption Code, MCL 710.21 et seq.; and the Youth Rehabilitation Services Act, MCL 803.301, et seq. These laws specify the method of DHS participation in the cost of care. The legislature has established a system whereby either:

1. The local court may provide out-of-home care services directly and request reimbursement by the state (child care fund).
2. The court may commit the child to the state and reimburse the state for the cost of care provided (state ward board and care).

Under option #1, the court may request that DHS provide casework service through a placement and care order. FOM 901-6 (May 1, 2014) p. 1.

In this case, after the Petitioners removal from the family home pursuant to court order, the Department was required to determine Title IV-E eligibility for Petitioners' (Scott [Arionna] and Odom) care. On January 26, 2015 by Notice of Case Action the Department determined that the Petitioners [REDACTED] and [REDACTED] were not eligible for Title IV-E funding. The Department's determination was based upon the gross earned income earned by the Petitioners' mother during December 2014 and earned prior to the [REDACTED] removal date. Based upon the income reported by the mother's employer, the Department determined that the gross income of \$1234.46 exceeded the former AFDC program's standards. Exhibit B

In this case Petitioners were placed in foster care. Foster Care is defined in Department policy as:

Means 24-hour substitute care for children placed away from their parents or guardians and for whom DHS has placement and care responsibility. This includes, but is not limited to, placements supervised by a private child placing agency under contract with DHS, placements in foster family homes, relative's homes, group homes, emergency shelters, residential facilities, child care institutions and preadoptive placements. A child is in foster care regardless of whether the foster care facility is licensed and payments are being made for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is federal matching of any payments. FOM 721 (February 1, 2015) p. 20

Title IV-E is a funding source which requires all applicable federal regulations be followed for use of the fund. Other funding sources such as state ward board and care,

county child care funds, and limited term and emergency foster care funding are listed in FOM 901-8, Fund Sources. Title IV-E funding is a source of financial support for children placed in foster care (FOM 902,May 1, 2014, p. 1).

There are two types of title IV-E categories: title IV-E eligible and title IV-E reimbursable. Both must occur concurrently before title IV-E payments can be issued. Definitions of the two types of title IV-E categories are:

- Title IV-E eligible** - Initial title IV-E eligibility is determined based on information related to the child and removal household when the child is initially removed from their home. Specific eligibility requirements are detailed within this manual item.
- Title IV-E reimbursable** - Federal financial participation (FFP) is available for a child who meets all title IV-E eligibility requirements. A child's reimbursability status can change based on specific factors. Some of these factors include the child's placement and DHS having sole care and custody. FOM 902, p. 1-2

Title IV-E eligibility may begin on the first day of placement in the month in which all eligibility criteria are met. Eligibility criteria which must be met include:

- Required judicial determinations of reasonable efforts and contrary to the welfare on a signed court order.
- AFDC eligibility, including establishment of financial need and deprivation.
- Living with and removed from the same specified relative.
- A child must be under the age of 18, unless enrolled full-time in high school or an equivalent vocational or technical course and can reasonably be expected to complete the course prior to their nineteenth birthday; see IV-E Age Requirements and Exceptions section in this policy item.
- Legal jurisdiction, by way of a signed court order from a family or tribal court that gives DHS placement and care responsibilities. FOM 902, p. 4.

Title IV-E funding must be denied or cancelled based upon the following factors:

The family's income exceeds the former AFDC program's standards; see FOM 902, Funding Determinations and Title IV-E Eligibility, AFDC Income and Assets.

The home from which the child was removed does not meet the former AFDC program's deprivation requirements; see FOM 902, Funding Determinations and Title IV-E Eligibility, Former AFDC Program Eligibility Requirements.

The family has assets exceeding the former AFDC program's standards; see FOM 902, Funding Determinations and Title IV-E Eligibility, AFDC Income and Assets. FOM 902-5, (May 1, 2014) p. 1.

The child has the right to contest a Department decision affecting Title IV-E eligibility. After the Department notifies the court of a denial or cancellation, the court may appoint the child's lawyer-guardian ad litem as the child's authorized hearing representative (AHR) to request an administrative hearing. The Department provides an administrative hearing to review the decision and determine its appropriateness. FOM 902 -05, May 1, 2014, p. 3

Title IV-E, 42 USC 670, et seq., allows the states to use federal funds to pay for part of the cost of foster care for eligible children. Eligibility is examined on pre-1966 Aid to Families with Dependent Children (AFDC) program. 42 USC672 (h). To be eligible for Title IV-E funding, a child must be deprived of parental support **and** be in need of financial assistance (FOM 902, p.9; ¹Child Welfare Policy Manual, Ch. 8.4a, Question 19).

In this matter, the Guardian Ad Litem (GAL) asserts several legal arguments opposing the Department's actions denying Title IV E fund eligibility. These arguments are addressed below.

The standard of review applied in this case by the undersigned is governed in part by the following:

Where Department policy is not contrary to existing law, the authority of an administrative law judge is limited to determining whether the Department's actions were in accordance with Department policy. BAM 600 (March 2014), p. 39. Administrative law judges presiding over Department hearings "have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations, or overrule or make exceptions to Department policy." (Delegation of Hearing Authority executed by Maura Corrigan, Department Director, July 13, 2011).

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From the outset it must be understood that the undersigned Administrative Law Judge has no equitable authority when rendering a Hearing Decision. In the absence of an express legislative conferral of authority, an administrative agency generally lacks the powers of a court of equity. *Delke v Scheuren*, 185 Mich App 326, 332; 460 NW2d 324 (1990). Because the Legislature has not conferred equitable authority to MAHS with respect to hearings relating to Department actions in this matter, the undersigned is precluded from addressing equitable arguments.

The legal issues which will be examined consider Title IV E funding eligibility which requires that a child must be deprived of parental support and in need of financial assistance (FPM 902, p.4; Child Welfare Policy Manual, Chap. 8.4a, Question 19). The Legal Guardian Ad Litem (LGAL) in her brief filed on behalf of the Petitioners asks the undersigned to consider the requirement that the Department consider income in the removal month prior to the Petitioner's removal as arbitrary and capricious. The basis for this argument is premised upon the fact that had the Petitioners been removed 3 days later, (January 2015), or had the Petitioners been removed at the beginning of December 2014 when less income would have been earned by their mother from employment, the Petitioners would have been found eligible as the income would not be available as the mother of Petitioners was incarcerated and thus Petitioners would have not disqualified the Petitioners from receiving Title IV E funds. This argument is clearly anticipated by the requirement of title IV E agencies that it look only to the month of removal, but prior to, the child's removal from the home when determining deprivation and or need.

These eligibility criteria of deprivation and need must be met in the month of, but prior to the child's removal from the home (FOM 902, Child Welfare Policy Manual, Ch. 8.4a, Question 21). Question 21 and its answer are particularly applicable to the facts in this matter. The question concerns whether the title IV agency should look to household circumstances at the time of the child's removal, or should the agency look at the whole month of the removal petition to determine deprivation and/or income? "For example, can a child's deprivation be based on circumstances that occur in the month of removal but after the child's removal from the home? The answer provides: "The AFDC eligibility criteria, including deprivation, must be met in the month of, but prior to, the child's removal from the home. The title IV E agency may not establish the child's deprivation based on household circumstances that occur after the child's removal". This is based on section 472(a)(1)(B) and 472(a)(3) of the Social Security Act.

¹ This manual is published by the Administration for Children and Families (AFC) which administers the Title IV E for the Federal government. It can be accessed online at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/index.jsp

When determining need the Department must consider all income and assets when determining eligibility Policy found in FOM 902 provides:

AFDC Income and Assets

The removal household determines whose income to use in determining the eligibility group. The same members used to determine the eligibility group are used in determining the group size. A member is not included in the eligibility group or group size if he/she was receiving SSI during the removal month. The child's income and assets are always used in determinations unless he/she received SSI for the removal month. A trust fund established for a child must not be considered as available property for that child unless it is designated and available to be used for his/her ordinary living expenses. The following are examples:

- For a child removed from the parent(s). FOM 902, p.14.

The gross earned income, net unearned income and assets of the child, **parent(s)**, stepparent(s), sibling(s) and stepsibling(s) under age 18 (or are age 18 and attending school and are expected to graduate by age 19), must be considered in the initial eligibility determination.

Do not include the income and assets of the non-parent adult, putative father or living together partner. They are not counted in the group size. FOM 902 (May, 1, 2914) p. 14

As regards when need is to be determined the Social Security Act in Sec. 472 provides:

- (a) In General (1) Eligibility - 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 406(a) (as in effect on July 16, 1996) into foster care if –
 - (A) The removal and foster care placement met, and the placement continues to meet the requirements of paragraph (2); and
 - (B) The child, **while in the home**, would have met the AFDC eligibility requirement of paragraph (3) (Emphasis supplied)

(3) AFDC Eligibility Requirement. –

- (A) In General. – A child in the home referred to in paragraph (1) would have met the AFDC eligibility requirement of this paragraph if the child –
 - (i) would have received aid under the State plan approved under section 402 (as in effect on July 16, 1966) in the home, in or for the month in which the agreement was entered into or court proceedings leading to the determination referred to in paragraph (2) (A) (ii) [contrary to the welfare of the child] were initiated. 42 U.S.C. 672

The Social Security Act requirements cited above are consistent with the Department policy at issue in this case. The provision found in (3) above, clearly anticipates the examination based upon whether when a child is in the home the child would have met the AFDC requirements if the child (i) would have received aid

under the State plan in the home, or for the month in which court proceedings leading to the determination referred to in paragraph (2) (A) (ii) were initiated.

These provisions and make it clear that the need of the child be determined by whether the child would have met the AFDC requirement in or for the month court proceedings leading to the determination that continuation in the home from which removed would be contrary to the welfare of the child occurred. In this case that is precisely what the Department did when determining need, it looked at the household income for December 2014 and found the household income would not have qualified the household for AFDC. The Social Security Act requirements look at the point in time while the child is in the home, not after and thus anticipate situations which occurred in this case where eligibility can fluctuate depending on the removal date.

The LGAL also argues on behalf of petitioners that the eligibility determination requirement that the use of income of the household during the removal month is arbitrary and capricious as it does not comply with underlying legislative intent. It is asserted that Title IV was passed to provide assistance to children who are removed from low income, primarily single-parent households to ensure that appropriate aid was provided to the vulnerable population of needy and dependent children. In essence the LGAL for Petitioner argues that the denial is arbitrary because it is based upon income that the mother (Scott), who is now incarcerated, is no longer capable of providing. The removed children would have been conceivably eligible if removed earlier during the month December 2014 when less income was earned, or on January 1, 2015 when no income would have been earned if the children's mother was incarcerated earlier in the month.

In support of this argument the LGAL cites 45 CFR 233.90 (c)(iii) asserting that this section, which addresses absence of a parent from the home such as a parent on house arrest, who is incapable of earning income, constitutes deprivation and should also have been applied when evaluating need, or should be applied to need determinations. The regulation does not conclude that such circumstances also satisfy a finding of need. Nor does it suggest that the AFDC eligibility need requirement no longer applies once deprivation is found. It is narrow in its scope and applies only to deprivation of parental care and guidance. The regulation specifically speaks to when continued absence of the parent from the home constitutes the reason for deprivation when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child and such that the parents absence precludes counting on the parent performance of the function of planning for the present support or care of the child. This regulation's focus is on what constitutes a parent's absence from the home with respect to deprivation only.

The argument that income be actually available raised in *Heckler v Turner*, 470 U.S. 184 (1985) was cited by Petitioners as a basis for requiring income be available

when determining need. In *Heckler*, the opinion addressed whether payroll withholding taxes and their treatment should be determined as actually availability and cannot be understood to require income be available when determining need in this case. The Opinion distinguished the treatment of tax withholding from that of other work expenses and in the context where states were applying it to prevent the States from conjuring fictional sources of income and resources by imputing financial support from a person who has no obligation to furnish it or by overvaluing assets in a manner that attributes nonexistent resources to recipients. The question considered in *Heckler*, addressed how the income was determined when making an eligibility determination for AFDC and whether withholding taxes should be removed, not whether income was available ongoing. Many of the cases cited resulting in the ruling in *Heckler* speak to various efforts by the states'; by its interpretation or regulation to artificially include income of a mother's substitute father without regard to whether the putative substitute actually contributed to the children's support, and to prevent the states from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need.

Lastly, it is asserted that the income earned by Petitioner's mother in December 2014 prior to the removal was a lump sum nonrecurring earned lump sum income, citing the Lump Sum Rule. The argument asserts that the Lump Sum Rule authorizes an exception for nonrecurring income earned or unearned once the money is utilized. In Michigan, the Lump Sum Rule "has been described as a method by which to determine the ineligibility period by dividing the family's monthly need into the lump sum received, effectively forcing the family to budget and use the lump sum through the entire ineligibility period. (Petitioners Brief p. 5 citing *Bulla v Director, Department of Social Services*, 159 Mich. App. 665 (1987); 406 NW2d 908).

In *Bulla v Director DSS*, 159 Mich App 665 (1987); 406 NW2d 908 the case involved the treatment of a lump sum settlement of worker's compensation case received by the petitioner's husband. The Court examined the application of the lump sum rule as then codified in 42 USC 602 (a) (17). The Court determined that while the petitioner and her husband were living together even though the petitioner received only a small portion of the worker's compensation settlement for the care and maintenance of her children, the application of the lump sum rule was appropriate while the petitioner and her husband were living together. It further found that the lump sum rule did not apply after her husband left. Perhaps the most important ruling the court made was in response to petitioner's argument that the lump sum rule applies only to income and not to worker's compensation awards. The Court found no merit in this argument, stating that "This Court has consistently held that the lump sum rule applies to worker's compensation awards and similar payments such as personal injury awards. *Bulla*, supra p. 1; See also *Zarko v Director, Department of Social Services*, 144 Mich App[576 (1985); 376 N.W. 2d. 765.

In order for the lump sum rule to be applied in this case the petitioners' mother's income from December 2014 must be considered a lump sum. It is determined for several

reasons this is income cannot be considered a lump sum applying the normal definition of a lump sum. The Department Glossary of relevant terms found in Department policy defines lump sum as:

“A one-time payment that is **not** an accumulation of monthly benefits. Examples: Income tax refunds, inheritances, insurance settlements, injury awards, Medical Loss Ratio Rebates, Keepseagle Track A payments”. BPG (July 2015) p. 40

Lastly a review of the current federal definition found in 45CFR 233.20 provides in its discussion of the Lump Sum Rule:

(3) Income and Resources (ii),

(F) When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income (including for AFDC, title II and other retroactive monthly benefits, and payments in the nature of a windfall, e.g., inheritances or lottery winnings, personal injury and worker compensation awards, to the extent it is not earmarked and used for the purpose for which it is paid, i.e., monies for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair of resources, etc.), the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility.

After a review of the *Bulla* decision, federal regulations and the clear meaning anticipated by the term lump sum, it is clear that the Lump Sum Rule is not to be applied in this case to characterize the petitioner's mother's earnings for December 2014 as a lump sum payment.

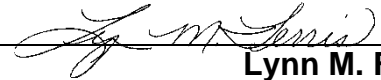
The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds pursuant to the stipulation of the parties by and through their legal representatives, that the Department properly denied Title IV-E funding for [REDACTED] and finds that the hearing request for Registration No. 15-005190 is DISMISSED.

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department properly denied Title IV E funding for [REDACTED] were ineligible due to household income received during the December 2014 removal month making them ineligible to receive AFDC in that month.

DECISION AND ORDER

The hearing request of [REDACTED] (Registration No. 15-005190) is hereby DISMISSED.

Accordingly, the Department's decision is
AFFIRMED.



Lynn M. Ferris
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

Date Signed: **July 22, 2015**

Date Mailed: **July 22, 2015**

LMF / hw

NOTICE OF APPEAL: A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides, or the circuit court in Ingham County, within 30 days of the receipt date. A copy of the claim or application for appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Hearing Decision from MAHS within 30 days of the mailing date of this Hearing Decision, or MAHS **MAY** order a rehearing or reconsideration on its own motion. MAHS **MAY** grant a party's Request for Rehearing or Reconsideration when one of the following exists:

- Newly discovered evidence that existed at the time of the original hearing that could affect the outcome of the original hearing decision;
- Misapplication of manual policy or law in the hearing decision which led to a wrong conclusion;
- Typographical, mathematical or other obvious error in the hearing decision that affects the rights of the client;
- Failure of the ALJ to address in the hearing decision relevant issues raised in the hearing request.

The party requesting a rehearing or reconsideration must specify all reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration. A request must be *received* in MAHS within 30 days of the date this Hearing Decision is mailed.

A written request may be faxed or mailed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088 and be labeled as follows:

Attention: MAHS Rehearing/Reconsideration Request

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

cc:

