

SC89190

IN THE SUPREME COURT OF MISSOURI

RENEE YOUNG AND CHRISTOPHER YOUNG,

Appellants,

V.

**FAMILY SUPPORT DIVISION OF THE
MISSOURI DEPARTMENT OF SOCIAL SERVICES,**

Respondent.

**Upon Transfer by the Supreme Court from the
Court of Appeals, Eastern District**

SUBSTITUTE BRIEF OF APPELLANTS AND APPENDIX

**John J. Ammann, #34308
Saint Louis University Legal Clinic
321 North Spring
St. Louis, Mo. 63108
314-977-2778
Fax: 314-977-3334**

**Attorney for the Appellants,
Christopher and Renee Young**

TABLE OF CONTENTS

TABLE OF AUTHORITIES 5

JURISDICTIONAL STATEMENT.....8

SUMMARY OF CASE9

STATEMENT OF FACTS11

POINTS RELIED ON.....27

ARGUMENT31

POINT I. The Family Support Division (FSD) erred in denying the Behavioral Foster Care (BFC) rate of adoption subsidy benefits to the Young family because the denial was unauthorized by law and was arbitrary and unreasonable pursuant to review under Sections 536.140 and 208.110 in that, *Department of Social Services v. Little Hills*, 236.S.W.3d 637 (Mo. 2007) and Section 453.074 require the Agency to adopt formal rules and regulations governing the Behavioral Foster Care subsidy so parents can be informed about the rules, including the procedure and required level of proof a child must meet to obtain the subsidy, and no such rules or regulations exist.

.....31

POINT II. FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because its decision was unauthorized by law and arbitrary and unreasonable, pursuant to review under Sections 536.140 and 208.110, because the Child Welfare Manual provisions regarding adoption subsidies do not have the force of law in that they do not constitute “rules and eligibility requirements” as required by Section 453.074.

.....41

POINT III. FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because the denial was unauthorized by law and arbitrary and unreasonable, pursuant to review under Sections 536.140 and 205.110, in that the Agency relied on factors unstated in any statute or regulation, or in the Agency’s own Manual by requiring the children’s behavioral problems must be severe, occur daily, and occur across all settings.

.....46

POINT IV. The FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because the denial was not based on competent and substantial evidence based on the whole record, pursuant to review under Section 536.140 and 208.110, in that all of the evidence showed the Young children had significant behavioral problems and met and exceeded the criteria for the BFC rate, and even met the additional requirements set forth by the consultant of the agency.

.....52

POINT V. FSD erred in denying the Youngs participation in the BFC program because the decision was unauthorized by law and was arbitrary, capricious and unreasonable, pursuant to review under Sections 536.140 and 205.110, in that federal and state law and the public policy stated therein require that the adoption subsidy program be used to provide permanent homes for abused and neglected children.

.....59

CONCLUSION 65

CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE...66

APPENDIX A-1

TABLE OF AUTHORITIES

CASES	Pages
<i>Chrismer v. Missouri State Division of Family Services</i> , 816 S.W.2d 696 (Mo. App. W.D. 1991)	45, 50
<i>Community Bancshares, Inc. v. Secretary of State</i> , 43 S.W.3d 821, 823 (Mo. banc 2001).	32, 42, 47, 53, 60
<i>Department of Social Services v. Little Hills Healthcare</i> , 236.S.W.3d 637 (Mo. 2007)	9, 27, 31, 32, 33, 34, 35, 36, 37, 39, 40
<i>Department of Social Services v. Senior Citizens Nursing Home District</i> , 224 S.W.3d 1 (Mo. App. W.D. 2007)	29, 48
<i>Gee v. Department of Social Services</i> , 207 S.W.3d 715 (Mo. App. W.D. 2006)	49, 50
<i>Hutchings v. Roling</i> , 151 S.W.3d 85 (Mo. App. E.D. 2004)	29, 49, 54
<i>J.P. v. Missouri Department of Social Services</i> , 752 S.W.2d 847 (Mo. App. W.D. 1988)	27, 29, 30, 32, 48, 61, 65
<i>NME Hospital, Inc. v. Department of Social Services, Division of Medical Services</i> , 850 S.W. 2d 71 (Mo. 1993)	27, 33, 34
<i>Reed v. Missouri Dept. of Social Services</i> , 193 S.W.3d 839 (Mo. App. E.D. 2006)	27, 28, 29, 44, 48
<i>TAP Pharmaceutical Products, Inc, v. State Board of Pharmacy</i> , 238 S.W.3d 140 (Mo. banc 2007)	32, 42, 47, 53, 60

FEDERAL CASE LAW

In E.C. v. Blunt, 2006 U.S. DIST. LEXIS 27506, No. 05-726-CV-W-SOW (W.D. Mo., May 9, 2006).....62, 63

STATUTES

42 U.S.C. § 673 (2006)33, 61

Section 208.110, RSMo. (2000) 27, 28, 29, 31, 41, 52

Section 453.005, (Cum. Supp. 2007)30, 60

Section 453.073, RSMo. (Cum. Supp. 2007)62

Section 453.074, RSMo. (2000) ...9, 10, 27, 28, 31, 37, 39, 40, 41, 42, 45, 47, 51

Section 536.010, RSMo. (Cum. Supp. 2007)28, 33, 34

Section 536.021, RSMo. (Cum. Supp. 2007)28, 34

Section 536.140, RSMo (Cum. Supp. 2007)27, 28, 29, 30, 31, 41, 46, 52, 59

OTHER AUTHORITIES

Regulations

2 CSR 30-9.030 (2008)35

13 CSR 70-15.010(15).....34

13 CSR 35-80.010 (2008) 35

13 CSR 35-80.020 (2008)35

Missouri Child Welfare Manual Section 4
9, 10, 20, 22, 23, 24, 28, 37, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 53, 564, 55,
57, 58

WEB SITES OF NATIONAL ADOPTION ORGANIZATIONS

www.childrensrights.org.

63

JURISDICTIONAL STATEMENT

On May, 20, 2008, this Court ordered transfer of this case from the Missouri Court of Appeals, Eastern District after disposition pursuant to Supreme Court Rule 83.04. Therefore, this Court has jurisdiction pursuant to the Missouri Constitution, Article V, Section 10.

The Youngs brought an action in the Circuit Court of Jefferson County for administrative review of the decision of the Family Support Division of the Missouri Department of Social Services denying the Young family's request for an adoption subsidy through the Behavioral Foster Care program for two of their adopted children. After the Circuit Court affirmed the Agency's decision, the Youngs appealed to the Court of Appeals, Eastern District, which affirmed the Agency's decision on December 26, 2007. The Appeals Court thereafter denied the Youngs' Motion for Transfer. The Youngs then sought transfer by this Court, which was granted.

SUMMARY OF THE CASE

The Young family became foster parents to two young children in 2001 after the children were discovered to be abused and neglected while living in the home of their natural parents, a home which was serving as a meth lab. After serving as foster parents for two years, the Youngs adopted the two children, referred to here as H.Y. and J.Y. After adopting the children, in an effort to get assistance from the State to cope with the children's significant behavioral problems, the Youngs applied to participate in the Behavioral Foster Care (BFC) subsidy program which provides support to foster and adoptive parents of children with behavioral problems.

The Family Support Division denied the Youngs' request to participate in the BFC program, and the Youngs filed unsuccessful appeals with the agency, the circuit court of Jefferson County, and the Missouri Court of Appeals.

In this their Substitute Brief after transfer by this Court, the Youngs argue first that the Family Support Division erred in denying them this subsidy because this Court in *Little Hills* and Section 453.074 require the agency to adopt formal rules and regulations governing the subsidy, which FSD has failed to do. In their second point, the Youngs argue that the Child Welfare Manual does not have the

force of law and does not constitute “rules and eligibility requirements” as required under Section 453.074. Next, in their third point, the Youngs argue that the Agency relied on factors not stated in any rule, regulation or even its own Manual to deny the Youngs participation in the program. Fourth, the Youngs argue that even if the provisions of the Manual apply, the children qualified for the program. The Youngs’ fifth and final argument is that federal and state law and the public policy therein clearly express the need to support families who adopt abused and neglected children.

STATEMENT OF FACTS

H.Y. and J.Y.,¹ who are siblings, lived in a home which doubled as a methamphetamine production lab. H.Y. and J.Y. were removed from this home by the Children's Division of the Missouri Department of Social Services, which then placed them with the Youngs. The Children's Division placed H.Y. and J.Y., then ages 4 and 6 respectively, in the care of the Young family in February of 2001. L.F. Vol. I p. 130. After caring for the children for two years as foster parents, Christopher and Renee Young adopted these two special needs children in March of 2003. L.F. Vol. I p. 130- 31. H.Y., a girl born on May 5, 1996, and now 12, and J.Y., a boy born July 26, 1994, and now 13, have lived with the Youngs continually since they were placed in the home as foster children.

The Youngs received the basic adoption subsidy for both children from the date of the adoption. L.F. Vol. III p.307, 311. In March of 2004, the Youngs, who live in Imperial, Missouri, L.F. Vol. II p. 253, requested placement of the

¹ To protect the privacy of the children, the Youngs respectfully request the Court and opposing Counsel to refer to these children by their initials, J.Y. for the Youngs' son and H.Y. for their daughter.

children into the Behavioral Foster Care program (BFC). BFC provides a higher monthly stipend to foster and adoptive parents of children with behavioral problems than the basic adoption subsidy amount so that parents can obtain professional assistance to attempt to modify the children's behavior and to help the parents find training to deal with the problem behavior. L.F. Vol. I p. 26-28. On September 12, 2004, and October 14, 2004, meetings were held pursuant to Division policy and procedure to decide whether J.Y. and H.Y. qualified for BFC subsidies. The Youngs received letters dated November 10, 2004, and January 18, 2005, stating that the BFC subsidy classification for J.Y. and H.Y. had been denied. L.F. Vol. III p. 406-08. The January 18, 2005, letter stated that to qualify for BFC, "the behaviors should be those that are occurring on a regular basis (i.e. daily), across settings (i.e. home, school, daycare, church, etc) and are occurring at this time." L.F. Vol. III p. 406. After getting this decision, the Youngs requested a hearing on the denial of entrance into the BFC program.

The administrative hearing was held on April 27, 2005, before Bradley Hanan, Esq. At the hearing, there was extensive evidence, both testimonial and by way of medical records, school records, and day care records of the nature of the children's problems, both medical and behavioral.

The health care professionals, Dr. David Lipsitz, a clinical psychologist, and

Rhonda Kane, a licensed counselor, diagnosed J.Y. with the following:

Attention Deficit Hyperactivity Disorder

Oppositional Defiant Disorder

Impulse Control Disorder

Severe impulsivity, consistently symptomatic and persistently symptomatic

Problems with Primary Support Group and Social Environment

Needs intense supervision

J.Y. was found to be “probably dangerous”

L.F. Vol. III p. 341- 352. Reports from J.Y.’s school, day care and home included the following incidents.

4-30-03 Spit spitwads. L.F. Vol. IV p. 449

5-2-03 Shoved another student. L.F. Vol. IV p. 450

5-6-03 Spelled a curse word in class L.F. Vol. IV p. 451

8-26-03 Wouldn’t let go of table. L.F. Vol. III p. 418

8 -29-03 Jumped off a table. Threw a chair. L.F. Vol III p. 366

8-29-03 Told teacher to “Screw off.” L.F. Vol. III p. 419

9-17-03 Kicked another child on the bus. L.F. Vol. III p. 367

9-18-03 Threw ball at child’s stomach L.F. Vol. III p. 361

9-24-03 Threw his back pack. L.F. Vol III p. 369

10-3-03 Kicked other kids. L.F. Vol III p. 372

10-10-03 Bit the arm of another child. L.F. Vol III p. 373

5-27-04 Shoved H.Y. off a set of drawers. L.F. Vol. IV p. 470

7-27-04 Punched H.Y. L. F. Vol. III p. 374

9-2-04 Spit in presence of teacher. L.F. Vol III p. 375

9-30-04 Kicking things and throwing things L. F. Vol. III p. 376

10-4-04 Slapped brother in face. L.F. Vol. III p. 379

10-13-04 Slammed another child to the ground. L.F. Vol III p. 380

10-20-04 Banged his head on a shelf for 10 minutes. L.F. Vol III p.
377

10-21-04 Punched another student. L.F. Vol. IV p. 455

11-17-04 Pushed a child, threw backpack into parking lot.
L.F. Vol. III p. 381

12-9-04 Hitting downspout. L.F. Vol. III p. 382

12-9-04 Ran into and hurt another child. L.F. Vol. IV p. 435

12-15-04 Climbed on tables. L.F. Vol. IV p. 436

12-20-04 Crawling on table, loud. L.F. Vol. IV p. 437

1-19-05 Knocked teacher's hand off the door. L.F. Vol IV p. 438

1-19-05 J.Y. shoved H.Y. off some furniture. L.F. Vol. III p. 331

Many of these notices of behavior problems referenced that J.Y. would be serving a suspension, some in school and some at home. In addition to the behavioral problems, J.Y. suffers from asthma which limits his activities, making him angry when he cannot play outside with others. L.F. Vol. II p. 258. He uses two inhalers a day and uses a nebulizer to help control his asthma. L.F. Vol. II p. 259.

J.Y. also suffers from the physical and emotional effects of scars on his arms from growing up in a house with a meth lab. L.F. Vol. III p. 264. He insists on wearing long sleeve shirts so people don't ask about the scars. L.F. Vol. III p. 264.

Regarding H.Y., the health care professionals, Dr. Lipsitz and Ms. Kane, found that she had:

Attention Deficit Hyperactivity Disorder

Combined Hyperactive/Impulse and Inattentive Type

Impulse Control Disorder

Problems with Primary Support Group and Social Environment

Possibly Obsessive Compulsive Disorder

She is "possibly dangerous"

She sneaks and lies

Needs to be supervised as a younger child would

L.F. Vol. III p. 314-327.

The school and day care reports on H.Y. along with family reports, showed the following incidents:

3-6-03 Jumping on a cot. L.F. Vol. IV p. 462

3-26-03 Pushed J.Y. L.F. Vol. IV p. 463

2-11-04 Kicked a TV screen three times. L.F. Vol. IV p. 464

2-12-04 Refused to stay on sidewalk with class. L.F. Vol. III p. 328

2-12-04 Wandering from group waiting for bus. L.F. Vol. IV p. 465

4-1-04 Hit another child on the head. L.F. Vol. IV p. 466

7-27-04 Got into a fight with J.Y. H.Y. needed an icepack. L.F.

Vol. IV p. 471

10-4-04 Stole bottled water. L.F. Vol. IV p. 467

12-14-04 Lying to teacher. L.F. Vol. IV p. 521

12-28-04 Punched and bit another child, started a “gang” to pick on other girls. L.F. Vol. IV p. 472

1-3-05 Chasing another child. L.F. Vol. IV p. 473

1-7-05 Pushed another student. L.F. Vol. IV p. 524.

1-25-05 Pulled shirt off her shoulders. L.F. Vol. IV p. 513..

2-24-05 Lying about homework L.F. Vol. IV p. 510

4-1-05 Put buttocks in child's face L.F. Vol. IV p. 503

In addition to these incidents, Mrs. Young testified that H.Y. had sexually acted out and was a perpetrator, L.F. Vol III p. 270, 273, and had asked other children to take off their clothes. L.F. Vol. III p. 273. H.Y. once poked a paperclip through her ear. L.F. Vol. III p. 271-272. She had stolen mail from neighbors' mailboxes. L.F. Vol. III p. 272. One time she went into a neighbor's garage, opened cans of paint, and started painting the inside of the garage. L.F. Vol. III p. 271. H.Y. cannot be let out of the Youngs' sight for fear of what she might do. L.F. Vol. III p. 270. She had served in-school suspensions for her behavior problems. L.F. Vol. IV p. 511, p. 518; L.F. Vol. III p. 268-69.

In testimony applying to both children, the parents stated that the family rarely goes out anywhere because of the children's behavior problems, including tantrums. They testified they need three babysitters on the rare times they go out because of the behavior problems of the children. L.F. Vol. III. p. 266. In addition to this evidence, the parents testified that the problem behaviors of the children occur every day, and occur at home, at school, and at day care. L.F. Vol. III p. 266- 67. Mrs. Young said that school officials do not "write up" every incident of

behavior problems at school, and that sometimes the school would just call and tell them to pick up J.Y. when he was causing a disturbance. L.F. Vol. III p. 267-268. They also listed all the medications the children take for hyperactivity, including attention deficit and tantrums. L.F. Vol III p. 289. The parents testified they would use the added subsidy to help pay for special therapies for the children, and to pay for activities to keep them occupied. L.F. Vol. III p. 274, 290 - 92. Mr. Young has changed his work schedule to be home when the children get home after school so they don't have to go to a day care after school. L.F. Vol. III p. 289.

The Youngs have attended the required special classes to be able to receive the behavioral subsidy. L.F. Vol. III p. 266.

The Division's first witness at the hearing was Trish Sparks, an adoption specialist with the Children's Division. L.F. Vol. II p. 144. When the Youngs adopted the children, they received the basic subsidy rate of \$277 per month for each child. L.F. Vol. II p. 145-147. Ms. Sparks was part of the team reviewing the Youngs' request to receive a higher subsidy under the BFC program. This is even though she was not familiar with the criteria used for determining who was eligible for BFC, L.F. Vol. II p. 155, and did not have authority to approve the BFC rate. L.F. Vol. II p. 160. Asked by the agency's lawyer, "What type of criteria do you

look for in determining whether or not to accept a child into behavioral foster care program?” she responded, “That’s a difficult question, I don’t make those determinations per say um, I know they look for um behaviors um outside the home and in the home. Again, the supporting documentation for those behaviors. I, I really, specifics I don’t know.” L.F. Vol. II p. 153. She did not know how often the behaviors had to occur before someone could qualify for BFC. At first, Ms. Sparks stated that the Division’s consultant, Marie Clark, is the one who makes the decision, L.F. Vol. II p. 171, but then later said Ms. Clark suggests a decision to the team and then the team makes the final decision. Ms. Sparks does not know Ms. Clark’s qualifications. L.F. Vol. II p. 171-172.

Ms. Sparks had not evaluated the children, L.F. Vol II p. 155, and was not aware of J.Y.’s temper tantrums. L.F. Vol. II p. 169. She further stated that if J.Y. were not adopted he might be placed in residential care, that the adoption subsidy plan anticipated the possibility of residential treatment, most likely for a behavioral problem, L.F. Vol. II. P. 155 - 57, and that a residential treatment facility would cost the State more than the BFC rate paid to the adoptive parents. L.F. Vol. II p.159. Ms. Sparks had concluded that the “child (J.Y.) has behaviors that occur pretty regularly.” L.F. Vol. II p. 164-165. Asked if J.Y. was dangerous she said, “I don’t know.” L.F. Vol. II p. 168.

The Division's only other witness was Marie Clark who is a paid consultant who reviews BFC applications for the State. L.F. Vol. II p. 173. Ms. Clark stated that she was denying J.Y. and H.Y. the BFC subsidies based on the lack of daily frequency of the behavior, a lack of severity, and a lack of continuity of behavior across all settings including, school, day care, and home. She stated it was her belief that behaviors on the listing had to occur daily. Ms. Clark believed the Children's Division Manual on BFC included a requirement that the behaviors stated in the listings must occur daily. L.F. Vol. II p 53. She testified: "Well we look for behaviors that occur on a daily basis. So they need to be pretty frequent. Except maybe in the case of sexual acting out and then if there's three or four incidents a week that's sufficient in terms of victimizing other people." L.F. Vol. II p. 176. Ms. Clark said she could not find the word "daily" in the list, although she thought it was there.

Ms. Clark testified that she is not a licensed doctor, psychologist, psychiatrist or therapist and had been denied a license to be a therapist and psychologist. L.F. Vol. II p. 219. Ms. Clark stated she had no reason to doubt the opinions of the children's specialists. L.F. Vol. II p. 206.

Ms. Clark stated part of her opinion was based on the fact some of the problem behavior of the children was not recent enough. But later in cross-

examination, she admitted many of the behaviors were recent and were indications of behavioral problems qualifying under the BFC program. L.F. Vol. II p. 222- 27. When asked about the incident where J.Y. knocked a teacher's hand off a door handle, Ms. Clark responded that "kids do that stuff all the time." She added, "I don't see it as being that significant." L.F. Vol. II p. 230-31. In her testimony, Ms. Clark was asked what constituted a behavior at school that would be a behavioral problem in terms of the BFC program. Ms. Clark responded "behaviors that would get him suspended or expelled from school." L.F. Vol. II p. 198. She appeared not to be aware that both children had been suspended several times.

While Ms. Clark testified that children with Attention Deficit Hyperactivity Disorder (ADHD) do not necessarily qualify for BFC, she conceded that more than half the children she has approved for BFC have ADHD. L.F. Vol. II p. 238. It is not clear why the Young children are not in that majority. Marie Clark acknowledged that suspension from school and the presence of a Section 504 plan would be evidence of behavior severity, but did not even at first acknowledge that J.Y. had a 504 plan and that both children had been given multiple suspensions. L.F. Vol. II p. 198.

Ms. Clark's testimony also referred to a distinction between problems that could be addressed by therapeutic means as opposed to purely behavioral

problems. L.F. Vol. II p. 192. She gave an example: a behavioral problem would include fighting, hitting and destruction of property, while a therapeutic problem would be something like depression. *Id.*

The hearing officer issued a decision on November 9, 2005, rejecting the Young's application for entrance into the BFC program. L.F. Vol. I. p. 10. Mr. Hanan's opinion stated that the basis of the rejection was that the defendant's expert, Marie Clark, found that neither J.Y. nor H.Y. were qualified for the BFC program. *Id.* The opinion also stated that even though the listed BFC behaviors were present in both children, the children did not qualify for the BFC subsidy because Ms. Clark said that the behaviors were not severe enough or consistent enough. L.F. Vol. I p. 19.

The Youngs filed their "Notice and Affidavit of Appeal to Circuit Court" on January 18, 2006. L.F. Vol. IV. P. 595.

During the hearing in the Circuit Court on administrative review, the Court questioned the attorney for the Children's Division about the standard for considering the behavioral subsidy. The Court had questions about the basis for Ms. Clark requiring that the behavior be "severe" when that word does not appear in the Manual:

THE COURT: It could have said severe and it did not.

It said significant. Significant means noticeable. It doesn't mean severe. TR. p. 22

THE COURT: And if this decision was based upon a level of severity, then it was done incorrectly. TR. p. 22

THE COURT: So she (the consultant) is determining questions of law, then. She's interpreting the law?

MS. HERNANDEZ-JOHNSON: She's interpreting whether or not they rise to a level of severity which determines –

THE COURT: Which is not the law. She's using the wrong standard. That's what these people have been trying to tell you. TR. p. 23.

...

THE COURT: Where do I find the rules and regulations for the behavioral foster care program?

MS. HERNANDEZ-JOHNSON: What they're using, the child welfare manual, are the guidelines that we use. They are the one –

THE COURT: You do not have any rules or regulations

promulgated?

MS. HERNANDEZ-JOHNSON: Not specific regulations,
Your Honor. What we –

THE COURT: Well the statute requires you to give them to
people, and you don't even have them? Is that what you're
telling me?

MS. HERNANDEZ-JOHNSON: Well, we have these, the
Child Welfare Manual.

THE COURT: Have those been adopted as the rules and
regulations under the administrative –

MS. HERNANDEZ-JOHNSON: The rules are not
regulations. They are what we are following, but what
they say are maybe. And is is they they [sic] actually say.
These are the policies. These are the rules that they're
utilizing, but those rules say may, they don't say shall,
just as the laws say may or shall, these say may. These are
characteristics that they –

THE COURT: Well, it's totally arbitrary, the application
of this program. TR. p. 36.

...

THE COURT: Ms. Hernandez-Johnson, do we have to have somebody rob a gas station every day before we treat that as abnormal behavior in our society? Of course not; that was a rhetorical question, but I see no requirement that these be daily incidents. TR. p. 42.

...

THE COURT: Can' you interpret these legal words like the rest of us in your profession do? It doesn't say severe; it doesn't say daily. It could have, but they didn't. TR. p. 43.

In the argument in the Circuit Court, Counsel for the Children's Division admitted that "there's never been a contention that they don't have some behavior problems." TR. p. 19. Despite its criticism of the Division's position on the standards for BFC, the Circuit Court issued its "Judgment on Administrative Appeal" on January 16, 2007, affirming the decision of the Agency. L.F. Vol. 1 p.

9. The Court stated:

Although the Court finds from the evidence on the record that perhaps a different ruling would have been appropriate, this Court's function in this matter is not to substitute its

judgment of the evidence for that of the Administrative Hearing Officer. This Court is constrained to find that the Decision of the Administrative Hearing Officer is supported by substantial competent evidence, and is not clearly against the weight of that evidence. L.F. Vol. I p. 9.

The Court of Appeals affirmed the decision of DSS on December 27, 2007.

The Youngs sought reconsideration or transfer from the Court of Appelas, which was denied. This Court granted transfer on May 20, 2008.

POINTS RELIED ON

I. The Family Support Division (FSD) erred in denying the Behavioral Foster Care (BFC) rate of adoption subsidy benefits to the Young family because the denial was unauthorized by law and was arbitrary and unreasonable pursuant to review under Sections 536.140 and 208.110 in that, *Department of Social Services v. Little Hills*, 236.S.W.3d 637 (Mo. 2007) and Section 453.074 require the Agency to adopt formal rules and regulations governing the Behavioral Foster Care subsidy so parents can be informed about the rules, including the procedure and required level of proof a child must meet to obtain the subsidy, and no such rules or regulations exist.

Department of Social Services v. Little Hills Healthcare, 236 S.W.3d 637 (Mo. 2007)

J.P. v. Missouri Department of Social Services, 752 S.W.2d 847 (Mo. App. W.D. 1988).

NME Hospital, Inc. v. Department of Social Services, Division of Medical Services. 850 S.W. 2d 71 (Mo. 1993)

Reed v. Missouri Department of Social Services, 193 S.W.3d 839, 843-44 (Mo. App. E.D. 2006)

Section 453.074, RSMo. (2000)

Section 536.010, RSMo. (Cum. Supp. 2007)

Section 536.021, RSMo. (Cum. Supp. 2007)

II. FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because its decision was unauthorized by law and arbitrary and unreasonable, pursuant to review under Sections 536.140 and 208.110, because the Child Welfare Manual provisions regarding adoption subsidies do not have the force of law in that they do not constitute “rules and eligibility requirements” as required by Section 453.074.

Reed v. Missouri Department of Social Services, 193 S.W.3d 839, 843-44

(Mo. App. E.D. 2006)

Section 453.074, RSMo. (2000)

III. FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because the denial was unauthorized by law and was arbitrary and unreasonable, pursuant to review under Sections 536.140 and 205.110, in that the Agency relied on factors unstated in any statute or regulation, or in the Agency’s own Manual by requiring the children’s behavioral problems must be severe, occur daily, and occur across all settings.

Department of Social Services v. Senior Citizens Nursing Home District, 224 S.W.3d 1, 33 (Mo. App. W.D. 2007).

Hutchings v. Roling, 151 S.W.3d 85, 88 (Mo. App. E.D. 2004),

J.P. v. Missouri Department of Social Services, 752 S.W.2d 847 (Mo. App. W.D. 1988).

Reed v. Missouri Department of Social Services, 193 S.W.3d 839, 841-842 (Mo. App. E.D. 2006),

IV. FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because the denial was not based on competent and substantial evidence based on the whole record, pursuant to review under Section 536.140 and 208.110, in that all of the evidence showed the Young children had significant behavioral problems and met and exceeded the criteria for the BFC rate, and even met the additional requirements set forth by the consultant of the agency.

Hutchings v. Roling, 151 S.W.3d 85, 88 (Mo. App. E.D. 2004),

V. FSD erred in denying the Youngs participation in the BFC program because the decision was unauthorized by law and was arbitrary and

unreasonable, pursuant to review under Sections 536.140 and 205.110, in that federal and state law and the public policy stated therein require that the adoption subsidy program be used to provide permanent homes for abused and neglected children.

In E.C. v. Blunt, 2006 U.S. DIST. LEXIS 27506, No. 05-726-CV-W-SOW (W.D. Mo., May 9, 2006)

J.P. v. Missouri Department of Social Services, 752 S.W.2d 847, 849 (Mo. App. W.D. 1988),

Section 453.005, RSMo. (2007 Cum. Supp.)

42 U.S.C. § 673 (2000).

ARGUMENT

I. The Family Support Division (FSD) erred in denying the Behavioral Foster Care (BFC) rate of adoption subsidy benefits to the Young family because the denial was unauthorized by law and was arbitrary and unreasonable pursuant to review under Sections 536.140 and 208.110 in that, the *Department of Social Services v. Little Hills*, 236.S.W.3d 637 (Mo. 2007) and Section 453.074 require the Agency to adopt formal rules and regulations governing the Behavioral Foster Care subsidy so parents can be informed about the rules, including the procedure and required level of proof a child must meet to obtain the subsidy, and no such rules or regulations exist.

Standard of Review

This Court has set forth the standard of review in an appeal of a decision of an administrative agency as follows:

In an appeal following judicial review of an agency's administrative action, this Court reviews the decision of the agency, not the circuit court. Pursuant to section 536.140.2, this Court reviews to determine "whether the agency's findings are supported by competent and substantial evidence on the

record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law.” [citation omitted].

TAP Pharmaceutical Products, Inc, v. State Board of Pharmacy, 238 S.W.3d 140, 141-42 (Mo. banc 2007), citing *Community Bancshares, Inc. v. Secretary of State*, 43 S.W.3d 821, 823 (Mo. banc 2001).

Because no rules or regulations exist for the BFC program, FSD’s decision denying the BFC rate for H.Y. and J.Y. is unauthorized by law, is arbitrary and unreasonable and the decision of FSD should be reversed and remanded with directions to find the Youngs eligible for the program.

This Court’s Decision in Little Hills Clearly Requires FSD to Adopt Formal Rules and Regulations Governing the BFC Subsidy.

The goal of the adoption subsidy program, which is a joint program between the state and federal government, is to find permanent homes through adoption for abused and neglected children who are in foster care and who would live in institutions and remain in foster homes were it not for the subsidy program which assists adoptive parents. *J.P. v. Missouri Department of Social Services*, 752 S.W.2d 847, 849 (Mo. App. W.D. 1988). The BFC program provides a monthly subsidy for foster and adoptive parents who care for children with behavioral

problems, and the BFC rate is higher than the basic rate for children without behavioral problems.

FSD made its decision to deny the Youngs participation in the BFC program without having any rules or regulations upon which to base its decision, even though it was required to have such rules and regulations. In *Department of Social Services v. Little Hills Healthcare*, 236 S.W.3d 637 (Mo. 2007), this Court, in a unanimous decision, held that formal rules are required to explain how the Department of Social Services (DSS) calculates estimated Medicaid days for reimbursement to hospitals. *Id.* at 643-44. This Court held that a “failure to promulgate a rule as required voids the decision that should have been properly promulgated as a rule.” *Id.* at 643. Here, DSS concedes it does not have formal rules regarding how a child qualifies for the BFC program.

In *Little Hills*, this Court relied heavily upon *NME Hospital, Inc. v. Department of Social Services, Division of Medical Services*. 850 S.W. 2d 71 (Mo. 1993), where this Court held that an attempt by the Missouri Department of Social Services to “change a statewide policy is considered a rule and failure to follow rulemaking procedures renders void the purported changes to statewide policy.” This Court in both cases cited Section 536.010(6) which states that a “rule” is any “agency statement of general applicability that implements, interprets, or

prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency.” Section 536.010(6), RSMo. (Cum. Supp. 2007). In addition to citing that statute, this Court also stated that “any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a “rule.” *Little hills*, 236 S.W.3d at 642. short cite here - citing *NME*. The issue in *Little Hills* was the subject matter of detailed regulations already, just not any regulation on the calculation method for Medicaid days which the providers were seeking *Id.* at 639, referring to 13 CSR 70-15.010(15)(2008). In the Youngs’ case, there are no regulations at all. This Court also acknowledged the benefits of formal rulemaking under the Missouri Administrative Procedure Act, including the ability of proponents and opponents to express comments about any proposed rule. *Little Hills*, 236 S.W.3d at 641, fn 9. Indeed, Section 536.021 requires that all rules be promulgated according according to a detailed procedure, including publication of the proposed rule and a comment period. Section 536.021, RSMo. (Cum. Supp. 2007).

This Court’s precedent in *Little Hills* and *NME* requires formal rulemaking for the benefit of Missourians who have adopted or will adopt special needs children because the criteria for the program have statewide impact for thousands of families, have general applicability, and have future effect.

The Youngs have found no decision subsequent to *Little Hills* determining its breadth of application. However, if hospitals, with their sophisticated doctors, administrators and lawyers, are entitled to have formally promulgated rules to determine their reimbursement rates for Medicaid, should not parents who accept the great responsibility of adopting troubled children be entitled to have rules to inform them about how their children will be determined eligible for the BFC program? The Department of Social Services (DSS) has promulgated detailed rules and regulations regarding residential care for foster children and regulations for agencies that provide residential foster care. 13 CSR 35-80.010; 13 CSR 35-80.020 (2008). If DSS believes it needs regulations to advise residential care agencies of the rules of caring for foster children, should not parents who adopt also be afforded the same rules and regulations?

State agencies promulgate rules for thousands of important matters of public policy, and it would seem there can be no more important public policy than that of protecting abused and neglected children. The Code of State Regulations includes lengthy regulations on things such as “Animal Care Facilities Minimum Standards of Operation and Transportation.” 2 CSR 30-9.030 (2008). This regulation includes provisions on preventing jagged edges on surfaces so animals do not get injured, and detailed provisions about resting areas and exercise for animals. Yet

FSD does not deem it necessary to provide for regulations addressing how the most vulnerable children in Missouri can find permanent loving homes.

This Court decided *Little Hills* after the briefs in this case were submitted in the Court of Appeals, but the Youngs advised the Appeals Court of the decision by way of letter dated November 6, 2007, (See Appendix A-32), and during oral argument Counsel for the Youngs argued that the decision applied to the Youngs' case. Yet the Court of Appeals did not address the application of *Little Hills* in its opinion. The Court of Appeals did acknowledge, in footnote 2 on page 15 of its opinion, that the Agency was deficient in informing parents about the BFC program: "The Division would assist children and their foster and adoptive parents by providing more extensive information as to the availability of benefits and their eligibility requirements particularly in terms of procedural and evidentiary requirements." *Young*, slip op. at p. 15, fn 2. As the Youngs did not have the benefit of "more extensive information," they should not be penalized for failing to meet a standard that was not in effect.

The benefit of formally promulgated rules is obvious. FSD would have to publish proposed rules, and allow for notice and comment before enacting formal rules. More importantly, the Youngs and other adoptive parents would know what criteria are used to determine eligibility for the program.

Under *Little Hills*, the failure to have any rules or regulations about the eligibility for the BFC program renders void the FSD decision denying the Youngs participation in the program, and the decision of FSD should be reversed and remanded with directions to find them eligible for the program.

Section 453.074 Also Requires Rules

While *Little Hills* requires formal rules in this situation even absent a statute requiring them, *Little Hills* read in conjunction with the applicable statute leaves no doubt that formal rules are required in this case. Section 453.074 requires the Division to provide parents with the “rules and eligibility requirements” for adoption subsidies. (Emphasis added.) Section 453.074, RSMo. (2000). FSD concedes it has no rules regarding the BFC subsidy, even though the statute mandates that adoptive parents must be informed of the subsidies available and the requirements for obtaining those subsidies. The Court of Appeals stated that this requirement “can be fulfilled without the Division creating rules through the provision and consistent implementation of the [Child Welfare] Manual.” (*Young*, slip op. p. 15) This interpretation, however, could result in the classic case of arbitrary and unreasonable agency action since FSD is unfettered by any law, rule or regulation.

There are no provisions in any statute, rule, regulation, or even the Child Welfare Manual regarding procedural and evidentiary standards for the BFC program. This leaves many unanswered questions: Who reviews the application? What evidence is acceptable? Who makes the decision? How many of the listed behaviors must be evidenced? Must a parent bring in documentation that a behavior has occurred every day?

Another major question left unanswered is whether there is a time period during which these behaviors must occur. There is no such time limit in the Manual, and there are no rules. The Court of Appeals focused on reports of the children's problem behaviors for the 12-month period prior to the staffings. (Slip Op. p. 13.) The record indicates that Marie Clark, the consultant whose opinion forms the basis of the Agency's decision, only looked at documented reports from the "past 6 months." L.F. Vol. III, p. 355. As there are no rules governing the program, and as the Child Welfare Manual does not indicate the relevant time period from which behaviors will be reviewed, the Youngs should not be penalized for not being aware of any limitations period set by the Court of Appeals or by Ms. Clark.

The lack of rules leaves parents like the Youngs, who offer to take abused children into their home and make them part of their family, with no guidance

about how to obtain the BFC subsidy. There are no mandatory rules to guide the employees of FSD in this implementation. There are no safeguards to ensure consistent implementation in the face of employee turnover and no clear statement of who is making the decision about eligibility.

There are simply too many unanswered questions for a program that literally determines whether thousands of children will have moms and dads, or grow up in institutions or spend their childhood in foster care. FSD should be required to provide rules and regulations pursuant to Section 453.074 and *Little Hills* so adoptive parents can have the answers to these questions.

**The Trial Court (though not on review here) Also Agreed
with the Youngs that the Agency Should Promulgate a Rule.**

While this Court need not give any deference to the trial court which reviewed the agency's decision, the Circuit Court's statements during the hearing are most telling and provide a sound basis to reverse FSD's decision. The lawyer for the Agency, in response to questions from the Court about the BFC guidelines, stated:

The rules are not regulations. They are what we are following, but what they say are maybe. . . . These are the policies. These are the rules that they're utilizing; but those rules say may; they don't say

shall, just as the laws say may or shall, these say may. These are characteristics that they –

The court then replied: **“Well, it’s totally arbitrary, the application of this program.”** TR. p. 36. (Emphasis added.) The trial court’s words seemed to be a foretelling of this Court’s later decision in *Little Hills*.

In summary, the *Little Hills* decision and Section 453.074, each on its own but clearly together, require that FSD promulgate rules and regulations regarding the BFC program. The Youngs cannot write the regulations for FSD. But what the Youngs can do is request that FSD’s decision denying the Youngs participation in the program be held void because it was not based on any binding law or regulation.

II. FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because its decision was unauthorized by law and was arbitrary and unreasonable, pursuant to review under Sections 536.140 and 208.110, because the Child Welfare Manual provisions regarding adoption subsidies do not have the force of law in that they do not constitute “rules and eligibility requirements” as required by Section 453.074.

Standard of Review

This Court has set forth the standard of review in an appeal of a decision of an administrative agency as follows:

In an appeal following judicial review of an agency’s administrative action, this Court reviews the decision of the agency, not the circuit court. Pursuant to section 536.140.2, this Court reviews to determine “whether the agency’s findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law.” [citation omitted].

TAP Pharmaceutical Products, Inc. v. State Board of Pharmacy, 238 S.W.3d 140, 141-42 (Mo. banc 2007), citing *Community Bancshares, Inc. v. Secretary of State*, 43 S.W.3d 821, 823 (Mo. banc 2001).

Because the Agency relied solely on the Child Welfare Manual as “rules” regarding the BFC program, the decision of the Agency is unauthorized by law and totally arbitrary and should be reversed and remanded with directions to find the Youngs eligible for the program.

The Child Welfare Manual Is Not Enforceable as Law

There is no Missouri statute referring to the BFC program. There are no FSD rules or regulations in the Code of State Regulations on BFC for parents, despite the obligation of the statute which requires the State to provide parents with the rules. Section 453.074 clearly anticipates that there are rules to provide to the parents, but in fact there are none.

The only guidelines available are a list of eligibility requirements for BFC subsidies in the Children’s Division Child Welfare Manual, Section 4, Chapter 14.6. A-29, L.F.Vol. I p. 26-28. In its introductory clause to this section, the Manual states: “Children placed in a behavioral foster home need greater structure, supervision, and are less able to assume responsibility for their daily care. These

children typically have experienced multiple out-of-home placements.” *Id.* The Manual provides a list of characteristics displayed by the BFC candidate, stating:

Presenting problems displayed by the BFC candidate may include the following:

- Behaviors, which if not modified could result in the youth being designated as a status offender;
- History of irresponsible or inappropriate sexual behavior, which has resulted in the need for extraordinary supervision;
- Threatening, intimidating, or destructive behavior, which is demonstrated by multiple incidents over a period of time;
- Problems of defiance when dealing with authority figures;
- Significant problems with peer relations;
- Significant problems at school that affect academic achievement or social adjustment;
- Significant problems with lying, stealing, or manipulating;
- Significant problems of temper control;
- Mild substance abuse related problems;

- Oppositional behavior, which contributes to placement disruptions and inability to function productively with peers, parent figures, birth family, etc;
- Any of the above behaviors, coupled with medical problems; or
- Any of the above behaviors displayed by one or more children of a sibling group, qualifying the entire sibling group for placement together, if appropriate. However not all children would be eligible for the BFC maintenance rate.

A-29, Child Welfare Manual, Section 4, Chapter 14.6, L.F. Vol. 1 p. 26.

Even if this list constitutes binding rules applicable to the Youngs, the children clearly met the requirements stated in the list as discussed in Point IV below.

However, Missouri case law provides that policy manuals are not the equivalent of statutes or rules. In *Reed v. Missouri Department of Social Services*, 193 S.W.3d 839, 843-44 (Mo. App. E.D. 2006), the Court of Appeals in the present case held that the Division's Policy manuals do not have the force of law. The Court of Appeals did not discuss whether the Manual had any legal effect. Yet Counsel for FSD admitted that FSD does not view the Manual as binding when she stated that the Manual was not a regulation, and that the Manual says "maybe." TR. p. 36.

And under *Reed*, FSD employees are not bound by the Manual, the Manual

can be changed without the notice and comment procedures of formal rulemaking, and further the Manual can be changed while a case is pending. It also means FSD is free to add criteria to BFC subsidy eligibility that are not in the Manual, much as it did in this case, adding such requirements as “daily” and “across all settings” when those terms do not appear in the Manual. So while the Child Welfare Manual does not set out procedures or evidentiary standards, what little guidance it may provide does not constitute law. As such, FSD has not met the requirements of Section 453.074.

The Division’s argument that these factors are ones that “may” be used to determine the BFC subsidy, but that there are others, hidden somewhere in a consultant’s mind, fails any test for reasonableness and is clearly arbitrary. See *Chrismer v. Missouri State Division of Family Services*, 816 S.W.2d 696 (Mo. App. W.D. 1991)

Because this Court and the pertinent statute require formal rules regarding adoption subsidy programs, and because the only criteria FSD has are in its Child Welfare Manual which has no force of law, this Court should reverse the decision of FSD as unauthorized by law and for being arbitrary and unreasonable and remand the case with directions to award BFC benefits to the Youngs.

III. FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because the denial was unauthorized by law and was arbitrary and unreasonable, pursuant to review under Sections 536.140 and 205.110, in that the Agency relied on factors unstated in any statute or regulation, or in the Agency's own Manual by requiring the children's behavioral problems must be severe, occur daily, and occur across all settings.

Standard of Review

This Court has set forth the standard of review in an appeal from the decision of an administrative agency as follows:

In an appeal following judicial review of an agency's Administrative action, this Court reviews the decision of the agency, not the circuit court. Pursuant to section 536.140.2, this Court reviews to determine "whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law." [citation omitted].

TAP Pharmaceutical Products, Inc. v. State Board of Pharmacy, 238 S.W.3d 140, 141-42 (Mo. banc 2007), citing *Community Bancshares, Inc. v. Secretary of State*, 43 S.W.3d 821, 823 (Mo. banc 2001).

Because FSD relied on criteria not stated in any rule, regulation or even its Manual, the decision of the agency is unauthorized by law and totally arbitrary and should be reversed and remanded with directions to find the Youngs eligible for the program.

Use of Unstated Criteria

The Youngs' primary argument is that DSS failed in its obligation to have formally promulgated rules and regulations for the BFC program. Yet even if this Court accepts the premise that the Child Welfare Manual is enforceable and binding and satisfies the requirement of having rules, FSD erred in applying criteria that were not stated anywhere, not even in the Child Welfare Manual.

FSD's expert who reviewed the children's files applied criteria not found in the Manual when she testified that the problem behaviors had to occur "daily" and be "severe" and "across settings." The additional criteria used to deny BFC are not found in any statute or rule, and are not listed in the Child Welfare Manual. This means they could not have been provided to foster parents or adoptive parents as required by Section 453.074. Thus, FSD's primary witness unilaterally created

and applied new rules and eligibility requirements to the consideration of J.Y.'s and H.Y.'s application for admittance to the BFC program contrary to law, and the Youngs had no notice of these new criteria.

Several Missouri decisions have reversed agency decisions when the agency has **created** new criteria that go beyond the requirements of the program being reviewed. While agencies are afforded some deference in interpreting their own regulations, *Reed v. Missouri Department of Social Services*, 193 S.W.3d 839, 841-842 (Mo. App. E.D. 2006), it is "inappropriate for a court to defer to any agency's interpretation of its own regulation that was in any way expanding upon, narrowing, or otherwise inconsistent with the plain and ordinary meaning of the words used in the regulation." *Department of Social Services v. Senior Citizens Nursing Home District*, 224 S.W.3d 1, 33 (Mo. App. W.D. 2007).

In the Youngs' case, there is not even a regulation whose scope beyond which the Agency could go. Here the Agency is being allowed to expand the plain and ordinary words of the Child Welfare Manual.

The primary case in Missouri interpreting the rules for the adoption subsidy program is *J.P. v. Missouri Department of Social Services*, 752 S.W.2d 847 (Mo. App. W.D. 1988). In that case, the Court of Appeals struck down the decision of DSS to eliminate adoption subsidy payments to a family because the parent began

to receive Social Security disability payments. The court held that DSS there, as here, had expanded upon the plain meaning of the law and its own manual, which allowed for adoption subsidies to be paid in conjunction with disability benefits. *Id* at 85- 51. The court reversed the decision denying the adoption subsidy and remanded with directions to reinstate the subsidy and award retroactive benefit payments. In essence, DSS had **created** a new criteria for being able to receive the adoption subsidy.

Likewise, in *Hutchings v. Roling*, 151 S.W.3d 85, 88 (Mo. App. E.D. 2004), the Court of Appeals reversed the denial of a Medicaid-funded Home and Community Based Waiver placement to a disabled adult. When the young man's father requested the placement, the Department of Social Services **created** a waiting list which it said applied retroactively to the disabled person to prevent him from getting a waiver slot. This Court reversed the decision of DSS, finding clearly that no waiting list existed on the date when the disabled person was denied the waiver placement. *Id* at 90.

In *Gee v. Department of Social Services*, 207 S.W.3d 715 (Mo. App. W.D. 2006), a state regulation contained a requirement that an "institutionalized spouse" reside in a Medicaid-certified bed before the spouse still at home could preserve certain assets. The requirement that a person be in a Medicaid-certified bed did not

appear in the federal Medicaid law or in Missouri law which required that the State follow federal law in implementing the program. The court in *Gee* held that DSS had exceeded its authority by adding a requirement in a regulation that did not exist in federal or state law, and held the decision to deny a division of assets was not authorized by law. *Id.* at 720. The Agency had **created** a new criteria with no authority to do so.

Chrismer v. Missouri State Division of Family Services, 816 S.W.2d 696 (Mo. App. W.D. 1991) is another case where DSS **created** a condition to add to a record of otherwise undisputed facts to deny Medical Assistance benefits. In *Chrismer*, a woman sought a determination that she was disabled in order to obtain Medical Assistance benefits. Cite All of the medical professionals agreed she suffered from depression and anxiety, but the State's doctor stated that the woman's depression was "situational." Cite The Appellate Court, finding that no other expert had stated her condition was situational, reversed the decision of the agency finding it arbitrary and unreasonable, and not based on competent and substantial evidence on the record. *Id.* at 701. The State's doctor had **created** a new aspect of a woman's medical condition that did not exist.

In the present case, FSD created the requirements that the behavior be daily, be severe, and occur across all settings. These criteria are not found in any statute,

rule, regulation or even the Child Welfare Manual. This means they could not have been provided to foster parents or adoptive parents as required by Section 453.074.

In the present case, as in all of these cases cited above, the Agency exceeded the scope of authorizing legislation and its own guidelines by adding additional criteria to the rules that applied to the benefit program at issue. In the present case, there is not even a validly promulgated regulation as there was in some of the cases discussed above. But assuming the Child Welfare Manual applies, FSD had no authority to add criteria found nowhere in federal law, state law, its own regulations, or even its own Manual.

Because FSD's decision applied criteria not stated in any law, rule or regulation and was therefore not authorized by law and was arbitrary and unreasonable, the Youngs request this Court to reverse the decision of FSD and remand the cause with directions to award them the BFC adoption subsidy rate for J.Y. and H.Y.

IV. FSD erred in denying the BFC rate of adoption subsidy benefits to the Young family because the denial was not based on competent and substantial evidence based on the whole record, pursuant to review under Section 536.140 and 208.110, in that all of the evidence showed the Young children had significant behavioral problems and met and exceeded the criteria for the Behavioral Foster Care rate, and even met the additional requirements set forth by the consultant of the agency.

Standard of Review

This Court has set forth the standard of review in appeals from the decisions of administrative agencies as follows:

In an appeal following judicial review of an agency's administrative action, this Court reviews the decision of the agency, not the circuit court. Pursuant to section 536.140.2, this Court reviews to determine "whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law." [citation omitted].

TAP Pharmaceutical Products, Inc. v. State Board of Pharmacy, 238 S.W.3d 140, 141-42 (Mo. banc 2007), citing *Community Bancshares, Inc. v. Secretary of State*, 43 S.W.3d 821, 823 (Mo. banc 2001).

Because there was no substantial and competent evidence upon which FSD could rely for its decision denying the Youngs participation in the BFC program, the agency's decision should be reversed with the agency directed to award the BFC subsidy to the Youngs.

The Young Children Met and Exceeded the Requirements of the Child Welfare Manual

As there are no rules or regulations for the Youngs to review to determine what factors are considered in determining eligibility for the BFC program, the only guidelines available are those listed in the Child Welfare Manual. A-29, Child Welfare Manual, Section 4, Chapter 14.6. While the Youngs argue that the Manual is not enforceable as law, even if it does apply, the children met and exceeded its guidelines.

First, the Agency itself in its decision, found that the children exhibited behavioral problems, L.F. Vol. I p. 10, and its lawyer admitted during argument that "there's never been a contention that they don't have some behavior problems. TR. p. 19. That is because the uncontradicted testimony of the parents, combined

with the day care and school incident reports and the reports of the health care professionals proves that J.Y. has all of the characteristics of a BFC child except sexually acting out and substance abuse, and H.Y. has all of the characteristics except substance abuse. As FSD presented no evidence to counter the evidence submitted by the Youngs, there is no substantial and competent evidence to support FSD's decision. See *Hutchings v. Roling*, 151 S.W.3d 85, 88 (Mo. App. E.D. 2004).

The Manual provision provides: "Presenting problems displayed by the BFC candidate may include the following..." A- 29, L.F. Vol. I p. 26. This list appears to be an exhaustive list, as the introduction did not use the phrase "including but not limited to." Meanwhile, the use of the word "may" is clearly intended to convey that it is not necessary to meet all of the criteria to be eligible.

On a finer note, the Child Welfare Manual clearly says a child is qualified for BFC if the child has a medical condition combined with any **one** of the other criteria. J.Y. has asthma and several of the other behaviors. In addition, the Manual says a child is qualified if any of the behaviors is exhibited by one or more children in a sibling group. A-29, L.F. Vol. p. 26. J.Y. and H.Y. are natural brother and sister. The FSD decision did not discuss eligibility under these two standards.

FSD took the position, through its consultant, that the behaviors meeting the listings must occur “daily,” must occur “across all settings,” and must be “severe.” These criteria do not appear in the Child Welfare manual. See Point III of Appellants’ Brief. The consultant did concede that incidents of sexually acting out perhaps could occur less than daily for them to be a problem: “Except maybe in the case of sexual acting out and then if there’s three or four incidents a week that’s sufficient in terms of victimizing other people.” L.F. Vol. II p. 176. Ms. Clark’s position would be that a sexual perpetrator is not a perpetrator if he does not perpetrate three or four days a week.

Even if FSD’s unwritten criteria of “severe” and “occurring daily” and occurring over “all settings” are used, J.Y. and H.Y. still easily qualify for BFC. First, with J.Y. characterized by health care professionals as “probably dangerous” and H.Y. characterized as “possibly dangerous,” no further inquiry is needed since the threat of this danger is present every day. This holds true for the other conditions of the children, including ADHD and Impulse Control Disorder. These conditions are with the children daily. The behaviors of J.Y. and H.Y. were so severe that the Youngs had to be on guard every minute of the day.

In addition, the incident reports set forth in this brief are just a representative sample of the behavioral problems the children have. Mrs. Young testified that

they did not get a written report each time there was a problem at school or the day care. L.F. Vol. III p. 267-68. She also testified the behaviors occurred daily and in all settings, including home, school day care, out in public and in the neighborhood. L.F. Vol. III, p. 266-67. This evidence was uncontradicted.

The consultant, who was paid by FSD and whose credentials were questioned at the hearing, L.F. Vol. II p. 219, did admit that she had no basis to disagree with the conclusions of the professionals who found J.Y. “probably dangerous” and H.Y. “possibly dangerous.” L.F. Vol. II p. 205-206. The consultant also failed to show basic knowledge of the rules which apply to BFC. She could not state the criteria or where they could be found until she was shown an exhibit. L.F. Vol. II p. 70. Moreover, she has never met or evaluated J.Y. or H.Y. L.F. Vol. II p. 83. She also admitted to making some mistakes in her assumptions of fact. She believed the children were not taking any medications for ADHD. L.F. Vol. II p. 55, 61. She later admitted she was in error about this. L.F. Vol. II p 201- 02. She believed there were no reports of sexual acting out by the children, L.F. Vol. II p. 179, although it is clear H.Y. had done so. Ms. Clark was wrong in her assumption the children were not having problems at school. L.F. Vol. II p. 56. She stated her opinion was based in part on a lack of suspensions and discipline referrals from the children’s school, but the entire record is replete with

them. And while the consultant testified that children with ADHD do not necessarily qualify for BFC, she conceded that more than half the children she has approved for BFC have ADHD. L.F. Vol. II p. 238. It was not clear why the Young children were not in that majority.

The consultant's testimony also hung on the distinction between problems classified as therapeutic and those classified as behavioral, but such a distinction is not in the Manual. L.F. Vol. II p. 180. She provided an imperceivable explanation, giving as an example that a behavioral problem would include fighting, hitting and destruction of property, while a therapeutic problem would be something like depression, and that therapeutic problems did not qualify a child for BFC. Again, this distinction does not appear in the Manual. Moreover, the behaviors of the Young children clearly fit into Ms. Clark's description of behavioral problems. She was specifically asked: "When a child is fighting, hitting other people, kicking teachers, sexual acting out, lying, stealing, those would be behavioral problems?" She responded: "They can be, yes." L.F. Vol. II p. 192 - 93.

FSD does not appear to make this distinction in its Manual. Chapter 4.4.7 of the Manual is entitled Department of Mental Health Therapeutic Foster Family Homes and Missouri Alliance Foster Homes. A-28, Child Welfare Manual Section 4, Chapter 4.4.7. This section references BFC foster homes as being recognized as

serving the function referenced in the title, that being therapeutic. So whether the help is for behavioral or therapeutic problems, the Youngs qualify.

The state's only other witness, Trish Sparks, did not know the criteria for BFC, did not know how often behaviors had to occur to make children eligible for the program, had never been to the children's school, and had never evaluated the children. L.F. Vol. II p. 32. Ms. Sparks did know that a child with behavioral problems could be placed in residential care, which is much more expensive than BFC, and that J.Y. had been approved to be placed in residential care due to his behavioral problems. L.F. Vol. II p. 159. This is important because the Manual states the reason for the BFC program is that children placed in a behavioral foster home need greater structure, supervision and are less able to assume responsibility for their daily care.

As the Young children exceeded all the guidelines set forth by FSD to be eligible for BFC, the decision of FSD denying them participation in the program is not based on competent and substantial evidence and the cause should be remanded with directions to determine the child eligible for the BFC subsidy.

V. The FSD erred in denying the Youngs participation in the BFC program because the decision was unauthorized by law and was arbitrary and unreasonable, pursuant to review under Sections 536.140 and 205.110, in that federal and state law and the public policy stated therein require that the adoption subsidy program be used to provide permanent homes for abused and neglected children.

Standard of Review

This Court has set forth the standard of review in an appeal from the decision of an administrative agency as follows:

In an appeal following judicial review of an agency's administrative action, this Court reviews the decision of the agency, not the circuit court. Pursuant to section 536.140.2, this Court reviews to determine "whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law." [citation omitted].

TAP Pharmaceutical Products, Inc. v. State Board of Pharmacy, 238 S.W.3d 140, 141-42 (Mo. banc 2007), citing *Community Bancshares, Inc. v. Secretary of State*, 43 S.W.3d 821, 823 (Mo. banc 2001).

Here, FSD's decision was unauthorized by federal and state laws regarding adoption subsidies and was arbitrary and unreasonable and should be reversed and remanded with directions for FSD to award the Youngs the BFC subsidy.

Federal and State Law and Public Policy Support the Adoptive Parents

This Court has never rendered a decision regarding Missouri's program of adoption subsidies, so the Youngs seek to have this Court confirm that Missouri law and public policy require supporting parents who take on the challenging task of adopting special needs children, particularly those with behavioral problems. Statutory provisions and case precedent provide evidence of this policy which is designed to provide loving homes for abused and neglected children instead of a childhood in institutions or foster care.

The Legislature has stated that Missouri statutes governing adoption and adoption subsidies are to be construed "so as to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home." Section 453.005, RSMo. (2007 Cum. Supp.). The word "entitlement" here should not be taken lightly, as it mandates that vulnerable

children be protected. This principle is also set forth in the federal law creating the adoption subsidy program. Adoption Assistance and Child Welfare Act, 42 U.S.C. § 673 (2000).

The Appellate Court in *J.P. v. Missouri Department of Social Services*, 752 S.W.2d 847, 849 (Mo. App. W.D. 1988), summarized the purposes of the adoption subsidy program:

The benefits at issue in this case are part of a jointly sponsored state-federal plan for encouraging adoption of foster children having special needs. A child is considered to have special needs if the state has determined that the child cannot or should not be returned to the home of the natural parents, and the child's ethnic background, age, membership in a minority or sibling group, or physical, mental, or emotional handicaps or medical needs make it unlikely that the child could be placed with adoptive parents without assistance.

42 U.S.C. § 673(c). Adoption subsidy payments provide an incentive, especially to economically borderline families, to adopt these children with special needs who otherwise would continue to live with the uncertainty of foster care and without

the benefits of a permanent home.

752 S.W.2d 847, 849. Section 453.073 sets forth the process for implementing subsidies:

Determination of the amount of monetary need is to be made by the division at the time of placement if practicable, and in reference to the needs of the child, including consideration of the physical and mental condition, and age of the child in each case; provided, however, that the subsidy amount shall not exceed the expenses of foster care and medical care for foster children paid under the homeless, dependent and neglected foster care program.

Section 453.073, RSMo. (Cum. Supp. 2007).

The United States District Court for the Western District of Missouri recently decided a case involving the Missouri adoption subsidy program, and made several statements regarding the policy behind the subsidy program. *In E.C. v. Blunt*, 2006 U.S. DIST. LEXIS 27506, No. 05-726-CV-W-SOW (W.D. Mo., May 9, 2006) the Court stated: “There is significant value to society and to an individual foster child to have that specific child move from the foster care system into a permanent, adoptive home when reunification is not possible.” *Id.* at par. 25.

E.C. v. Blunt, par. 25. “Public policy strongly favors the efficient and expeditious provision of permanency for abused and neglected children taken into the temporary custody of the state and its child welfare agency.” *Id.* at par. 90. The Federal Court continued: “It is widely recognized that there is a higher incidence of poverty, emotional and mental disability, and criminal behavior among foster youth who have attained adulthood, particularly among those foster youth who aged out of the foster care system without ever knowing a permanent family.” *Id.* at par. 92.

Granting the Youngs the BFC subsidy would not place a huge burden on the State, as the federal government pays 62% of the cost of the subsidy. See E.C. v. *Blunt*, par. 42. Missouri’s adoption subsidy does not meet the level of what is required to care for a special needs child, according to a recent study by several national organizations. The study called hitting the M.A.R.C.: Establishing Foster Care Minimum Adequate Rates for Children, found that parents who adopt special needs children ages 5 to 13 should receive \$719 per month.

www.childrensrights.org, October 2007. So even if the Youngs are admitted into the BFC program, the amount they receive will still be less than their need and less than what parents in other states receive. Without adequate support, children are likely to be placed in a residential care in an institutional setting as opposed to a

family home. In fact, J.Y. was determined to be eligible for a residential placement, a far more expensive placement than an adoptive home. L.F. Vol. II, p. 155-57

Finally, the Youngs ask this Court to consider the effects of a decision allowing FSD to deny participation in the BFC program without any rules or regulations to which FSD must adhere. Just as in E.C., children will stay in foster care longer if potential adoptive parents do not get the support they need to bring these very emotionally needy children into their homes.

As the decision of FSD is unauthorized by law, the Youngs request this Court to reverse the decision denying them participation in the BFC program and remand the case with directions to allow them to participate.

CONCLUSION

Christopher and Renee Young have opened their home and their hearts to children with special needs. They need additional financial assistance to address the children's behavioral problems, and the State has a program designed to assist them. To date, the Youngs have been refused participation in the program without justification.

Because the decision of FSD was in violation of the law and arbitrary, the Youngs pray that this Court reverse FSD's decision and remand this case with directions to grant the Youngs the BFC subsidy for J.Y. and H.Y., and award retroactive benefits to the date of application. See *J.P. v. Missouri Department of Social Services*, 752 S.W.2d 847, 849 (Mo. App. W.D. 1988) (directing the Agency to act and award retroactive benefits.)

Respectfully submitted,

John J. Ammann #34308
Saint Louis University Law Clinic
321 N. Spring Ave.
St. Louis, Mo., 60301
314-977-2778
Fax: 314-977-3334

Attorney for Appellants

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 12,298 words of text, including this certification as determined by Word software and
2. That the attached brief includes all the information required by Supreme Court Rule 55.03; and
3. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and
4. That two(2) true and correct copies of the foregoing brief were sent via U.S. Post Service, first class, postage prepaid, on this 23rd day of June, 2008, to the attorney listed below:

Sarah Ledgerwood
Assistant Attorney General
P.O. Box 899
Jefferson City, Mo. 65102

John J. Ammann

