

**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 REPLY BRIEF OF APPELLANTS**

---

**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 .....	3
Argument.....	5
Point I .....	5
This Court’s decision in <i>Little Hills</i> and Section 453.074 require the Division to promulgate rules and regulations governing the BFC subsidy. (Replying to Respondent’s Point I.)	
Point II .....	10
The Child Welfare Manual is not sufficient to comply with the requirements of Sections 453.073 and 453.074 (Reply to Respondent’s Point II.)	
Point III .....	14
The denial of the BFC subsidy for the Youngs was not based on competent and substantial evidence. (Reply to Respondent’s Point III.)	
Point IV .....	16
The Division’s decision to deny the BFC subsidy to the Youngs is against public policy. (Reply to Respondent’s Point IV.)	
Conclusion .....	17
Certificate of Compliance and Service .....	18

## TABLE OF AUTHORITIES

<i>Chrismer v. Missouri State Division of Family Services</i> , 816 S.W.2d 696 (Mo. App. W.D. 1991) .....	12, 13
<i>Department of Social Services v. Little Hills Healthcare</i> , 236.S.W.3d 637 (Mo. 2007) .....	5, 6, 9
<i>Department of Social Services v. Senior Citizens Nursing Home District</i> , 224 S.W.3d 1 (Mo. App. W.D. 2007) .....	12
<i>Gee v. Department of Social Services</i> , 207 S.W.3d 715 (Mo. App. W.D. 2006) .....	12, 13
<i>Hutchings v. Roling</i> , 151 S.W.3d 85 (Mo. App. E.D. 2004) .....	12, 13
<i>NME Hospital, Inc. v. Department of Social Services, Division of Medical Services</i> , 850 S.W. 2d 71 (Mo. 1993) .....	6

## STATUTES

Section 208.153.1, RSMo. (Cum. Supp.2007).....	6
Section 452.375 (Cum. Supp. 2007) .....	9
Section 453.073, RSMo. (Cum. Supp. 2007) .....	8, 10, 12, 16.
Section 453.074, RSMo. (2000) .....	5, 8, 9, 10, 16

**OTHER AUTHORITIES**

Missouri Child Welfare Manual Section 4 .....8, 10, 11, 14

**WEBSTERS' NINTH NEW COLLEGIATE DICTIONARY**

(4<sup>th</sup> ED. 1990) .....11

## ARGUMENT

### **I. This Court’s decision in *Little Hills* and Section 453.074 require the Division to promulgate rules and regulations governing the BFC subsidy.**

#### **(Replying to Respondent’s Point I.)**

In Respondent’s Substitute Brief, the Division states, “Requiring that someone be given applicable ‘rules’ is not the same as requiring that an agency actually promulgate rules – the essence of the *Little Hills* holding.” Respondent’s Substitute Brief, p. 17. The Division cites no case law for this proposition, and this proposition cannot be true in light of this Court’s decision in *Little Hills* and because the Legislature has stated its clear intent that there be rules in this context. *Department of Social Services v. Little Hills Healthcare*, 236 S.W.3d 637 (Mo. 2007).

The Division relies on the fact that Section 453.074 requires that the Division provide “all petitioners for adoption with the rules and eligibility requirements for subsidies,” without stating affirmatively that the Division must write rules. § 453.074, RSMo. (2000). While the Legislature might have said rules must be promulgated, surely the Legislature assumed that by mandating the rules be given to parents that the Division would have to draft them.

The intent of the Legislature to provide parents – who are offering to open their homes to abused and neglected children – with the rules and eligibility requirements for a program to assist them is blocked if the Division refuses to promulgate rules and eligibility requirements.

The Division has squarely placed the issue before the Court: If an administrative agency is required by law to take an action, can it refuse to take that action simply because another step is needed before the required action can be taken? Can an administrative agency refuse to provide a person with his right to a fair hearing because it decides not to hire hearing officers?

The Division is incorrect in suggesting that this Court relied on a specific statutory mandate for a rule in its decision in *Little Hills*. Rather, the Youngs read the decision as analyzing the need for a rule under the Administrative Procedure Act and the precedent stated in *NME Hospitals, Inc. v. Department of Social Servs*, 850 S.W.2d 71, 74 (Mo. banc 1993). This Court did not rely on Section 208.153.1, RSMo. (2000) as argued by the Division. Respondent's Substitute Brief, p. 16-17. In addition, in the situation in *Little Hills*, the Agency had promulgated many regulations on the topic already, and yet this Court found more were needed. Here the Division has none.

The Division also argues that a case-by-case review is important in the

adoption subsidy context because every child is different. The Youngs<sup>1</sup> would agree that each child is unique and has individual needs, but this does not allow for arbitrary decisions by the Division nor should it allow for the Division to operate without “rules and eligibility requirements.” Moreover, it is because of the uniqueness of each child that rules and eligibility requirements are needed for parents to know how and whether their children will be eligible for the subsidy. The Division argues that decisions cannot be applied in uniform fashion when dealing with children with behavioral problems, but surely the Division is capable of promulgating rules about the BFC program which would apply to all families. These would include: procedures for applications, what standard of proof is required, whether medical evidence is required, what behaviors qualify, how frequently the behaviors must occur, how recent the behaviors must be, and whether professional treatment of the child is required. The Division has nothing related to these matters written anywhere. If residential care providers, doctors and hospitals are entitled to regulations regarding assistance programs, parents should be as well.

---

<sup>1</sup>The Youngs appreciate the Division’s use of initials in referring to the children to protect their privacy.

The only written statements about the BFC subsidy are found in the Child Welfare Manual. But the Division refers to the Child Welfare Manual as mere “guidelines.” Respondent’s Substitute Brief, p. 18. The Division states, “To ensure consistent compliance with § 453.073, RSMo, the Division has set out guidelines and procedures in Chapters 14.5 and 14.6 of the Manual.”

Respondent’s Substitute Brief, p. 18. But “guidelines” are not law and the Division concedes as much. Therefore, their existence is not relevant. And “guidelines” do not satisfy the requirement for “rules and eligibility requirements” found in Section 453.074.

Yet the Division wants to use the Manual to deny benefits to the Youngs, while at the same time arguing the Manual cannot be used to bind the Division.

The Division also states in its brief, “To aid in the consistent implementation of §453.073, RSMo., the Division and its expert often evaluate an applicant based on a number of presenting problems that a BFC-appropriate child might have, detailed in the Children’s Division Child Welfare Manual, § 4, chapter 14.5 and 14.6.” (Emphasis added). Respondent’s Substitute Brief, p. 6. The Division here concedes the Manual is not used in all cases, but is also conceding that for there to be a consistent implementation of Section 453.073, there is a need to make reference to some other guiding principles. The Division has simply decided not to

have anything binding, at least not on itself.

The Division argues that “much like the ‘best interest of the child’ standard allows for a careful and specific evaluation of an individual child’s needs and conditions, here too, the Division must be allowed a careful and specific evaluation to determine if a child is eligible for the BFC subsidy.” Respondent’s Substitute Brief, p. 20. What the Division fails to say is that the statute setting forth the standard of “best interest” of a child in a custody case does state specific criteria. Section 452.375 states: “The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including . . . .” The statute then lists eight specific factors a court must review. §452.375, RSMo. (Cum. Supp. 2007).

In the present case, the statute does not have specific criteria for the adoption subsidy program in general or the BFC program specifically, but defers to the Division to adopt and disseminate such rules. The Youngs could not have been given any rules or eligibility requirements for the program because none exists.

The Division is violating Section 453.074 and this Court’s mandate in *Little Hills* and the decision should be reversed and remanded with directions to grant the Youngs the BFC subsidy.

**II. The Child Welfare Manual is not sufficient to comply with the requirements of Sections 453.073 and 453.074 (Reply to Respondent's Point II.)**

The Division argues that the “Child Welfare Manual only clarifies the requirements set out in statute.” Respondent’s Substitute Brief, p. 20. The Division states, “There is nothing in the Division’s statutes or regulations that articulate specific presenting problems, much less make the presenting problems contained in Chapter 14.6 eligibility requirements.” But then the Division, in the same paragraph, states, “The Division uses the Manual, for itself and parents, to implement the adoption subsidy program.” Respondent’s Substitute Brief, p. 21. The Division’s Brief also states, “Even if the Manual could be read to contain requirements for participation in the BFC program, which the Division does not concede, neither Clark nor the Division expanded the list in denying J.Y. and H.Y’s participation in the program.” *Id.* at p. 21. (Emphasis added.)

This is precisely the problem. The Division is in this Court arguing that the Manual’s guidelines used to implement the program are not considered by the Division to be eligibility requirements. The Division thus has no eligibility requirements at all. However, the decision of the Division being reviewed by this Court relies heavily upon the provisions of the Child Welfare Manual to deny the

Youngs the subsidy. In pertinent part, the decision sets forth the criteria in Section 4, Chapter 14.6 of the Child Welfare Manual, then states: “In reviewing Claimants’ request for placement of their adopted children in the BFC program, the Agency’s consultant determined that neither of the children was eligible for the BFC program based on the Agency’s written criteria.” Appellants’ Substitute Appendix, A-10. Those written criteria come from the Manual provisions which the Division is now not willing to concede are “requirements for participation in the BFC program.”

The Division next argues that the words “significant” and “multiple” equate with “severe” and “daily.” First, since the Division has argued the Child Welfare Manual does not constitute the eligibility requirements, these words in the Manual do not have any effect on the parents or the Division. Even if they do, “multiple” is defined as “1: consisting of, including, or involving more than one . . . 2: Many, Manifold . . . .” WEBSTERS’ NINTH NEW COLLEGIATE DICTIONARY 1152 (4<sup>th</sup> ED. 1990). The definition of “significant” is “of a noticeably or measurably large amount . . . .” *Id.* at 1096. These definitions are not equated with daily or severe which are the terms the Division applied to the Youngs.

The Division also fails in its attempt to distinguish the numerous cases cited by the Youngs when agency actions were struck down for being outside the law.

The Division argues that *Department of Social Services v. Senior Citizens Nursing Home District*, 224 S.W.3d 1, 33 (Mo. App. W.D. 2007), does not apply here because “in this case there is no regulation, nor does there need to be one. And the Division’s action was consistent with the language of § 453.073, RSMo and the Manual.” Respondent’s Substitute Brief, p. 23. However, the Division’s actions were not consistent with the statute or its Manual because it deviated from the list of eligibility requirements for the BFC subsidy given to adoptive parents.

The Division tries to distinguish *Hutchings v. Roling*, 151 S.W.3d 85, 88 (Mo. App. E.D. 2004), on the basis that “there was a list that existed from the time the Youngs adopted J.Y. and H.Y. and the denial was based on the § 453.073, RSMo with added insight from the Manual, which is consistent with the statute.” Respondent’s Substitute Brief, p. 19. The Division also tries to distinguish *Gee v. Department of Social Services*, 207 S.W.3d 715, 717 (Mo. App. W.D. 2006), and *Chrismer v. Missouri State Division of Family Services*, 816 S.W.2d 696, 701 (Mo. App. W.D. 1991), by arguing in those cases that DSS or the State had a regulation or made a decision that was inconsistent with other law or medical opinion. Respondent’s Substitute Brief, p. 19. This analysis, however, misses the mark. The purpose of citing these cases was to show that the courts of appeals will reverse decisions of DSS and other agencies of the State when they create a

requirement for program eligibility that did not exist at the time an individual sought benefits under that program. *Hutchings*, 151 S.W.3d at 90; *Gee*, 207 S.W.3d at 720; and *Chrismer*, 816 S.W.2d at 701. This is precisely what happened in the Youngs' case.

Therefore, these cases support the Youngs' contention that DSS created new requirements and criteria in determining whether the Youngs were eligible for the BFC subsidy, and its decision denying them this subsidy should be reversed.

**III. The denial of the BFC subsidy for the Youngs was not based on competent and substantial evidence. (Reply to Respondent's Point III.)**

The Division attempts to argue in this point that only children currently in a residential (group) setting are eligible for the BFC subsidy. The Division claims that because the Young children are not in a residential type setting, "they did not qualify for the BFC subsidy." Respondent's Substitute Brief, p. 25. It is unclear how the Division can make any determination about the children's eligibility when there are no criteria stating who is eligible or how one becomes eligible.

The argument about the children not being eligible because they were not in a residential setting was not raised in the agency proceeding and is therefore waived. But there is no merit to it in any event. The Division does not dispute that there are many children in adoptive homes who receive the BFC subsidy. The Division held meetings and hearings on whether the Youngs should get the BFC subsidy, moving forward all along assuming their children could participate if their behaviors were severe enough. There is no statute, rule or regulation which supports the Division's very brief contention regarding the subsidy applying only to children coming out of residential facilities.

The Division also argues the children did not qualify under the presenting problems in Chapter 14.6 of the Child Welfare Manual. But the Division does not

consider that list to be the eligibility requirements, so it is not clear how or why they apply.

Simply reciting the procedural history of the case in this point does not mean the Division followed the law, and its decision should be reversed and remanded with directions to provide the Youngs with the BFC subsidy.

**IV. The Division’s decision to deny the BFC subsidy to the Youngs is against public policy. (Reply to Respondent’s Point IV.)**

The Division states in its Point IV, “There are objective criteria contained in §§ 453.073 and 453.074, RSMo that the Division must evaluate on an individual basis for each child for whom the subsidy is sought.” It also refers to the “criteria the Legislature developed.” Respondent’s Substitute Brief, p. 30. The Division fails to cite what these “criteria” are. These statutes do not contain criteria for eligibility for adoption subsidies generally, nor do they even refer to the BFC program. More importantly, the Legislature specifically acknowledges that these statutes do not constitute the needed criteria because it added the mandate in Section 453.074 that the Division shall “[p]rovide all petitioners for adoption with the rules and eligibility requirements for subsidies.” §453.074.1(2), RSMo. (2000).

The absence of any governing rules means the Division’s decision cannot stand.

## **CONCLUSION**

For the foregoing reasons, the Youngs pray that this Court reverse the decision of the Division and remand the 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.

Respectfully submitted,

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

## **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 18 pages and 2,837 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 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 18<sup>th</sup> day of July, 2008, to the attorney listed below:

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

---

John J. Ammann