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**SC89190**

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**IN THE SUPREME COURT OF MISSOURI**

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**RENEE YOUNG AND CHRISTOPHER YOUNG,**

**Appellants,**

**v.**

**MISSOURI DEPARTMENT OF SOCIAL SERVICES,  
CHILDREN'S DIVISION,**

**Respondent.**

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

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**Respondent's Substitute Brief**

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**JEREMIAH W. (JAY) NIXON  
Attorney General**

**SARAH E. LEDGERWOOD  
Missouri Bar No. 53205  
Assistant Attorney General**

**Post Office Box 899  
Jefferson City, Missouri 65102  
Phone: (573) 751-3321; Fax (573) 751-5660  
Sarah.Ledgerwood@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT**

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## Statement of Facts

Appellants' statement of facts is insufficient. Accordingly, the Division submits its own Statement of Facts.

### The Division and the BFC subsidy.

Pursuant to § 453.073, RSMo, the Missouri Department of Social Services, Children's Division, facilitates the adoption subsidy program in the State of Missouri, including the behavioral foster care subsidy (BFC). The BFC subsidy is designed to assist parents of children with behavioral problems. LF<sup>1</sup> 151. The BFC subsidy is for children who display behavioral problems that are "significant," require "extraordinary supervision," and are of a "status" nature. LF 418. Under BFC, parents receive financial support that is to be used in obtaining professional assistance to aid in the modification of their children's behavior and for training for the parents in dealing with problematic behavior. *Id.* The BFC subsidy results in an increase in the cash maintenance amount of the adoption subsidy over the standard rate. *Id.*

After a request for the subsidy, the parents and members of the Division and others, including teachers or care givers, discuss the appropriateness of the subsidy based on the child's needs. LF 151-53; 418-420. In order to gain additional understanding of the appropriateness of the program for a particular child, the Division can use a consultant with expertise in the area of behavioral services. *Id.*

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<sup>1</sup> Citations to the Legal File will be cited as LF followed by a page number.

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. LF 26-27.

Section 14.5, “Characteristics of the BFC Appropriate Child,” states that “[c]hildren placed in a behavioral foster home need greater structure, supervision and are less able to assume responsibility for their daily care[.]” LF 26. Section 14.5 further states that children appropriate for the BFC program fall into one of two groups,

1. Children presently in a residential setting who may be moved to a less intensive setting, but not to a traditional foster home or to their parents’ home; or
2. Children who lack a viable placement in a traditional foster home and because of their presenting problems would be placed in a residential setting unless an available behavioral foster home can be found.

LF 26.

Section 14.6 details the presenting problems a BFC candidate may have. LF 26-27.

Those problems may include:

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 with contributes to placement disruptions and inability to function productively with peers, parent figures, birth family, etc.; any of above behaviors, coupled with medical problems; or any of 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.

LF 26-27.

The Youngs' request for the BFC subsidy

In February, 2001, the Division placed J.Y. and H.Y. in pre-adoptive placement in the home of Appellants Renee and Christopher Young (the Youngs). LF 253. At the time of placement, in February 2001, J.Y. was 6 years old, born July 26, 1994, and H.Y. was 4 years old, born May 5, 1996. LF 307, 311. On February 27, 2003, the Youngs signed an Adoption Subsidy Agreement (Agreement 1) with the Division. LF 301-307. Agreement 1 provided

for a cash maintenance amount of the standard rate, to continue until J.Y. and H.Y. reached 18 years of age, or 21 years of age if the situation warranted a continuation. *Id.* Though at that time the Youngs were aware of J.Y. and H.Y.'s behavioral problems, Agreement 1 did not suggest that J.Y. and H.Y. might receive the Behavioral Foster Care subsidy (BFC subsidy). *Id.*

In March 2003, the Youngs' adoption of J.Y. and H.Y. was complete. LF 254. On December 5, 2003, after adopting a natural sibling of J.Y. and H.Y., the Youngs signed a second Adoption Subsidy Agreement with the Division. (Agreement 2). Like Agreement 1, Agreement 2 provided for cash maintenance at the standard rate until J.Y. and H.Y. reached 18 years of age, to be continued to 21 years of age if necessary. LF 308-313. Again, there was no request on behalf of J.Y. and H.Y. for the BFC subsidy, though the Youngs were aware of J.Y. and H.Y.'s behavioral issues. *Id.*

Prior to placement and adoption with the Youngs, J.Y. demonstrated behavioral issues including hitting other children, not following directions and fighting. LF 356-58. After adoption, in 2003, J.Y. had other behavioral problems including throwing spit wads, fighting, teasing, kicking, and cursing. LF 360, 366-368, 372-374. However, the Youngs admit that at least some of J.Y.'s behaviors had improved over time and that he has learned to trust the Youngs and lets them care for him. LF 283. The frequency of reports from school or daycare diminished after 2003. LF 356-84.

Prior to placement, H.Y. acted out sexually. LF 315. After her adoption, H.Y. demonstrated behavioral problems including fighting, wandering away from a group, and

taking a bottle of water from school without paying for it. LF 328, 329, 333, 336. H.Y. also made progress following adoption in the Youngs' home. LF 326-27. The frequency of reports from school or daycare diminished after 2003. LF 462-473.

In early March, 2004, the Youngs requested the BFC subsidy for J.Y. and H.Y. LF 173-174, 314-16, 338-340. The Division held meetings on September 12, 2004 and October 14, 2004 with the Youngs who presented information on J.Y. and H.Y. including documentation from mental health professionals, school, daycare, and other relevant information. LF 173-74; 314-337; 338-84.

In the adoption process, the Youngs met with Trish Sparks. LF 145. Trish Sparks is an adoption specialist with the Division. LF 144. She has been an adoption specialist for six years. *Id.* She works with children and potential adoptive families and helps negotiate subsidy services. *Id.* She provides information to families and works with them up to the finalization of adoption. *Id.*

Sparks worked with the Youngs on two occasions, first when they adopted J.Y. and H.Y., and later when they adopted a sibling of J.Y. and H.Y. LF 145. At the time of J.Y. and H.Y.'s adoption, Sparks worked with the Youngs to negotiate a subsidy for J.Y. and H.Y. with the Division. *Id.* The subsidy reimbursed them at the standard foster care rate and did not include the behavioral foster care rate. LF 145-46. The first Agreement was finalized in March, 2003 and signed by both the Youngs and the Division. *Id.*; LF 301-307.

In December, 2003, after the adoption of another child, the Division and the Youngs executed a second Agreement. LF 148; 308-313. Again, the Agreement provided for an

adoption subsidy at the standard rate and did not include the behavioral foster care rate. LF 148-149. Sparks first discussed the BFC subsidy with the Youngs prior to J.Y. and H.Y.'s adoption, but they made no request for the BFC subsidy at that time. LF 150.

Generally, after the Division receives a request for the BFC subsidy, Sparks mails out a referral packet of information. LF 151. The packet contains information, as well as forms to fill out describing behaviors of the child in the home, school and daycare, and a request for supporting documentation. *Id.* Once the applicant returns the packet, Sparks sets up a meeting with the Division, the consultant, and the family. *Id.* Sparks is not a decision maker but is part of the staffing team and provides the Division and consultant with any relevant information she obtained during her work with the family. LF 156, 170.

In this case, the Youngs requested the BFC subsidy in March, 2004. LF 173-74. Sparks mailed them a referral packet. *Id.* Sparks received the packet back from the Youngs on both J.Y. and H.Y. and she set up a staffing meeting with members of the Division, the Youngs, and the Division's consultant. LF 152. Sparks met with J.Y. and H.Y. between 4 and 6 times. LF 155. She reviewed documents from school, daycare, a therapist and a psychologist, as well as the referral request for the BFC program. LF 161-62.

Sparks, and the Division, participated in the two staffing meetings relative to J.Y. and H.Y. *Id.* After the first meeting, the Division requested additional information from the Youngs. LF 153. The Division needed documents supporting behavioral issues in the home and outside the home. *Id.* The Youngs provided additional information and held a second

staffing meeting. *Id.* At the conclusion of the meeting, the Division determined that J.Y. and H.Y. were not entitled to the BFC subsidy. *Id.*

In determining whether to grant the BFC subsidy to J.Y. and H.Y., the Division utilized the services of consultant Marie Clark, Director of the Behavioral Science Institute. LF 10-20; 170-172; 173- 248. Clark is a trainer and consultant for the Division. LF 173. The Division has utilized her as a consultant for more than 17 years. *Id.* Clark is an expert in child behavioral problems and has been the director of the Behavioral Institute in St. Louis for over 18 years. *Id.* Clark has a bachelor's degree in psychology, a master's degree in psychology, and a post-graduate certificate in mental and family therapy. *Id.* Clark is not licensed in the State of Missouri; she passed the family therapist licensing examination, but her masters' program was only based on 32 hours of study rather than the 40 hours required by the State of Missouri. LF 219-220. Clark has consulted on thousands of cases for the Division. LF 173-74.

Clark reviewed numerous documents related to J.Y. and H.Y. including documents that pre-dated any consideration of the BFC subsidy. LF 300-526. She reviewed the original March 2003 adoption subsidy agreement. LF 301-307. Agreement 1 provided a subsidy at the standard amount and did not include the BFC subsidy, *Id.* LF 308-313. And she reviewed Agreement 2, completed in December 2003, which also provided for the subsidy at the standard rate and did not include the BFC subsidy. *Id.*

Next, Clark reviewed the BFC referral packet for H.Y. LF 314-337. The packet included the referral application from the Youngs, LF 314-316, evaluations from her

therapist and a psychologist, LF 317-327, and incident reports from school and daycare. LF 328-337.

Clark also reviewed the BFC referral packet for J.Y. LF 338-384. She reviewed J.Y.'s referral, LF 338-340, J.Y. psychological evaluation, LF 341-352, and incident reports from 2001-2004 for J.Y.. LF 356-84. She also reviewed J.Y.'s §504 behavioral plan. LF 388-92. Finally, Clark reviewed e-mails between the Youngs and the school. LF 501-26.

Clark reviewed J.Y. and H.Y.'s records and considered them in light of § 453.073, RSMo and the Manual. LF 153, 181, 187-88, 215, 218. Based on all this information, her education and experience in reviewing thousands of cases, Clark's opinion and recommendation to the Division was that the Division deny J.Y. and H.Y. the BFC subsidy. LF 181, 186. According to Clark, J.Y. and H.Y.'s problems were therapeutic, not behavioral. LF 180 and 184. These problems could be modified by psychotherapy, not behavioral intervention. *Id.* It was also relevant to her that a lot of the behavioral problems were more than a year old, (LF 186), and that some of the problems had lessened over time, with improvement in other issues, including J.Y.'s ability to trust the Youngs. LF 283. Further, she found that the Youngs had a plan for dealing with behavioral issues. LF 188. The school, likewise, demonstrated a plan for dealing with J.Y. and H.Y.'s issues. LF 188. Additionally, although both J.Y. and H.Y. were diagnosed with ADHD, that alone did not qualify them for the subsidy. LF 180 and 183. Finally, the fact that H.Y. took one bottle of water from school did not raise her behavior to the level of status offender. LF 179.

Importantly, though, Clark noted that J.Y. and H.Y. did not exhibit a combination of behaviors that were disruptive to placement. LF 210.

Moreover, the recent behavior issues documented, according to Clark, were not sufficiently severe to qualify J.Y. and H.Y. for the BFC subsidy. *Id.* In Clark's opinion, the behaviors were reflective of medical conditions, including Attention Deficit Hyperactivity Disorder, that do not automatically qualify a child for the BFC subsidy. *Id.* Clark's November 10, 2004 recommendation to the Division detailed all these reasons for denying J.Y. and H.Y. the BFC subsidy. LF 187. Following her November 10, 2004 recommendation, Clark reviewed the e-mails between the Youngs and the school. LF 501-26. Clark wrote a second letter on January 18, 2005, also opining that J.Y. and H.Y. were not entitled to the BFC subsidy. LF 189.

On January 27, 2005, the Division issued the Youngs a decision denying J.Y. and H.Y. the BFC subsidy. LF 581-82. The Youngs requested an administrative hearing on the issue. LF 583. The administrative hearing occurred April 27, 2005. LF 10-20, 584-594. The Division presented evidence and testimony from Clark as well as Division employee Trish Sparks. LF 172-248; 144-172.

Ms. Clark testified at the administrative hearing. LF 172-248. Clark testified in great detail as to her review of J.Y. and H.Y.'s records and her opinion and recommendation that the Division deny J.Y. and H.Y. the BFC subsidy. Trish Sparks also testified at the hearing as to her involvement with the Youngs. LF 144-56.

The Youngs also testified at the hearing. LF 252-297. Mrs. Young testified that some of J.Y.'s behaviors have improved. LF 283. That J.Y. has learned to trust the Youngs and let them care for him. *Id.* She also testified that some of the issues were actually fighting between J.Y. and H.Y. LF 284-85. She also testified that the family goes to family therapy in addition to J.Y. and H.Y. attending their therapy. LF 287. Mr. Young testified that they have a strategy for dealing with J.Y.'s tantrums that has worked well. LF 291.

The Youngs presented no mental health professional or expert on J.Y. and H.Y.'s behalf either at the staffing meetings or during the hearing.

Both parties presented briefs on the issues following the hearing. LF 572-580, 527-571. On November 9, 2005, the administrative hearing officer affirmed the Division's decision, denying J.Y. and H.Y. the BFC subsidy. LF 10-20, 584-594. The Youngs filed their notice of affidavit of appeal, or petition for judicial review, to the circuit court on January 18, 2006. LF 595. The Circuit Court affirmed the Division's decision denying J.Y. and H.Y. the BFC subsidy. LF 1. The Youngs appealed to the Missouri Court of Appeals, Eastern District. The Court of Appeals affirmed the decision denying the BFC subsidy.

## Argument

### Standard of Review

In reviewing a decision from a contested administrative case, this Court reviews the decision of the agency, not that of the circuit court. *Hohensee v. Division of Medical Services*, 135 S.W.3d 512, 517 (Mo. App. E.D. 2004), *citing Sutton v. Missouri Dep't of Social Serv.*, 733 S.W.2d 830, 831 (Mo. App. S.D. 1987). This Court reviews the record below to determine whether the decision of the agency was “supported by competent and substantial evidence based upon the entire record, whether the decision was arbitrary, capricious or unreasonable, or whether the agency abused its discretion.” *Hohensee*, 135 S.W.3d at 517; § 536.140.2, RSMo, 2000. “Importantly, when we review the agency’s decision, we consider the evidence and all reasonable inferences from that evidence in the light most favorable to the agency’s decision.” *Id.*, *citing Angelos v. St. Bd. Of Registration for the Healing Arts*, 90 S.W.3d 189, 191 (Mo. App. 2002). The decision of the agency is presumed to be valid and the burden is on the opposing party to overcome that presumption. *Id.* Finally, the determination of witness credibility is that of the administrative tribunal because the tribunal had the opportunity to personally observe the witness. *Id.*, *citing Dorman v. State Bd. Of Registration for the Healing Arts*, 62 S.W.3d 446, 454 (Mo. App. W.D. 2001). And unless that credibility determination is against the overwhelming weight of the evidence, it shall not be disturbed. *Id.*, *citing Windy Point Partners, L.L.C. and B-Sib L.L.C., v. Boone County*, 100 S.W.3d 821, 826 (Mo. App. W.D. 2003).

I. **The Division did not err in denying the BFC subsidy to the Young family because neither *Department of Social Services v. Little Hills*, 236 S.W.3d 637 (Mo. 2007) nor § 453.074, RSMo require the Agency to promulgate rules and regulations governing the BFC subsidy. (Responds to Appellants’ Point Relied On I).**

The Youngs argue, in their first point relied on, that the Division erred in denying the BFC subsidy because the Division has not promulgated a regulation to “guide the decision makers.” App. Br. at 37. The Youngs argue that this Court’s decision in *Department of Social Services v. Little Hills*, 236 S.W.3d 637 (Mo. 2007) and § 453.074, RSMo require the Department to promulgate rules for the BFC subsidy. App. Br. At 32. In making that argument, the Youngs rely on the statements of the judge in the circuit court review. Under the relevant standard of review, this Court reviews the decision of the agency, not the circuit court’s decision nor the circuit judge’s statements during oral argument. *See Hohensee*, 135 S.W.3d at 517. Irrespective of the Youngs’ reliance on the circuit court’s comments during oral argument, the Youngs are incorrect in their assertion that the *Little Hills* decision and § 453.074, RSMo require the Division to promulgate a regulation because *Little Hills* is distinguishable and there is no statute that requires the Division to promulgate a regulation.

Little Hills is distinguishable and therefore not applicable.

The Youngs ask this Court to follow its decision in *Little Hills* and apply it to the case at hand. App. Br. at 31. However, applying the decision in *Little Hills* is inappropriate for two reasons. First, *Little Hills* is distinguishable on the law. There, the court considered the impact of § 208.153.1, RSMo, which specifically requires that the

Division of Medical Services shall “by rule and regulation define the reasonable costs, manner, extent, quantity, quality, charges and fees of medical assistance herein provided.” The Youngs cite no similar statute here. Rather, they rely on § 453.073, which says nothing about the Family Support Division promulgating regulations. That statute merely requires that the Division “provide” prospective adoptive parents “with the rules and eligibility requirements for subsidies.” 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.

Second, where *Little Hills* addresses a formula that is generally applicable, this case addresses a decision that the statute makes clear cannot be applied in some uniform fashion. In *Little Hills*, this Court was considering the Department of Social Services’ calculation of Medicaid days for Missouri hospitals serving Medicaid recipients. *Little Hills*, 236 S.W.3d at 639. This Court found that the calculation method did not relate only to a specific hospital and a specific set of facts. *Id.* at 642. Here, by contrast, the statute allows – or perhaps more accurately, demands – that the consideration of each child’s eligibility for the adoption subsidy will be an individual one. The very language of § 453.073 requires careful consideration of the “needs of the child” and the child’s “physical and mental condition.” § 453.073.1, RSMo. That requires that the Division consider the specific needs and behavioral issues of each child on a case-by-case basis. Accordingly, *Little Hills* is not applicable to the Youngs’ case.

There is no statutory mandate for promulgation of a regulation.

There is no statute that requires the Department to promulgate a regulation containing the eligibility requirements for the BFC subsidy. As detailed above, pursuant to § 453.073, RSMo, the Division facilitates the adoption subsidy program in Missouri. Nothing in §§ 453.073 or .074, RSMo requires the Division to promulgate a regulation. Rather, the Division follows § 453.073, RSMo itself in granting or denying subsidies. To ensure consistent compliance with § 453.073, RSMo, the Division has set out guidelines and procedures in Chapters 14.5 and 14.6 of its Manual. The list in Chapter 14.6 includes physical and mental health issues common to some BFC appropriate children. § 453.073.1, RSMo; LF 26-28. And the guidelines in Chapter 14.5 give further direction regarding the placement issues contained in § 453.073.2, RSMo. Because the Division is implementing the statute, and absent a specific directive requiring promulgation, no regulation is necessary.

The Youngs rely on the language of §453.074, RSMo in support of their allegation. The Youngs, however, only identify a portion of the statute in alleging the regulation requirement, which states that the Division is responsible for providing petitioners for adoption the rules for subsidies. § 453.074.1(2), RSMo. Read in whole, the statute provides that the Division must provide all petitioners for adoption with the rules *and eligibility requirements* for subsidies. §453.074, RSMo. The statute, in other words, requires the Division to ensure that adoption parents understand whatever rules and qualifying requirements for a subsidy exist; it does not by its language require promulgation of a rule.

Sections 453.073 and .074, RSMo can be contrasted with § 208.153.1, RSMo which specifically requires that the Division of Medical Services shall “by rule and regulation define the reasonable costs, manner, extent, quantity, quality, charges and fees of medical assistance herein provided.” Section 453.074 RSMo, can also be compared with § 208.152.3, RSMo, which states that the Division of Medical Services may require a recipient of medical assistance to pay a portion of the charges “as defined by rule duly promulgated by the Division of Medical Services[.]” Thus, if the Legislature had intended the Children’s Division to promulgate a regulation, that language would have been included in the statute, just like those related to the Division of Medical Services. The Youngs fail to cite any specific statute that requires the Children’s Division to promulgate a regulation containing the requirements for the BFC, or any adoption subsidy.

Moreover, the nature of the information the Youngs want in a regulation does not lend itself to promulgation because of the diversity in children for whom the subsidy is sought. LF 26-28. It requires the Division to identify behavioral issues in a candidate. § 453.073, RSMo. *Id.* The very language of § 453.073, RSMo requires subjectivity in considering the “needs of the child” and the child’s “physical and mental condition.” § 453.073.1, RSMo. The Division must analyze and review information provided by parents, schools, daycare, and mental health professionals to determine whether the BFC subsidy is appropriate. *Id.*; LF 173-74; 314-337; 338-84. Finally, the Manual contains those presenting problems that *may* be present singularly or in combination. LF 26. This is because every candidate’s presenting problems could be different. Thus, it would be nearly impossible to draft effective and

specific regulations containing *all* the presenting problems that a candidate could have. 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.

For these reasons, the Division is not required to promulgate a regulation containing the BFC subsidy eligibility requirements and the Youngs’ Point I should be denied.

**II. The Division did not err in denying the BFC subsidy to the Young family because the decision was authorized by, and the Division relied on, §§ 453.073 and 453.074, RSMo, and the Child Welfare Manual only clarifies the requirements set out in statute. (Responds to Appellants’ Points Relied On II and III).**

The Youngs argue that the Division’s denial was in error because the Division and its consultant relied on criteria not contained in the Manual. App. Br. at 47. But the Division based its decision to deny the BFC subsidy on § 453.073, RSMo, aided by the Manual’s additional insight into the statutory mandate. The Division did not create any new “criteria” and the Youngs’ argument should be denied.

The Youngs argue that the presenting problems listed in Chapter 14.6 are eligibility requirements and that in making her recommendation to deny J.Y. and H.Y. the subsidy, the Division’s expert, Marie Clark, went beyond the list. App. Br. at 47. The Youngs contend that Clark relied on factors such as “severity,” “daily,” and those behavioral issues occurring “across all settings” to deny the BFC subsidy and that those factors are not in the Manual. *Id.* They argue, then, that the Division created new criteria and because it is not allowed to do

so, the Division violated § 453.074, RSMo. But neither the Division nor Ms. Clark created new criteria in denying the BFC subsidy for J.Y. and H.Y. Nor did they violate any Missouri law.

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. Sections 453.073 and .074, RSMo require that the Division facilitate the adoption subsidy program, including the BFC subsidy. The statutes do not require facilitation with the specificity that the Youngs desire. In turn, chapters 14.5 and 14.6 of the Manual further explain or interpret the statutory requirements found in § 453.073, RSMo. The Division uses the Manual, for itself and parents, to implement the adoption subsidy program. Importantly, the Manual is consistent with § 453.073, RSMo. Therefore, the Division could not have violated § 453.074, RSMo by comparing J.Y. and H.Y.'s behavioral issues to the Manual. Accordingly, the Youngs' argument is without merit.

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 BFC program. In fact the language of Chapter 14.6 leads to the exact opposite result.

The Youngs argue that Clark relied on terms such as "severe," "daily," and "across all settings," none of which are in Chapter 14.6. App. Br. at 47. Thus, according to the Youngs, Clark created new criteria which she is not allowed to do. But the list of presenting problems demonstrates otherwise.

The list may not use the words Clark used, but it uses words to express the same message:

- 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;
- *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;

LF 26-27 (emphasis added).

The words and phrases in italics demonstrate severity, frequency, and behavioral patterns across settings. For example, behaviors that could, if not modified could result in the youth being a *status offender* suggests both severity of the offenses and frequency of the offenses. *Multiple* incidents, *significant* problems, and a *history* of irresponsible or inappropriate sexual behavior that necessitates *extraordinary supervision* all demonstrate severity (significant, extra ordinary supervision) and frequency (history). Additionally, that the list broadly includes peer interactions, school, and placement supports Clark's

consideration of behaviors across all settings. The Youngs' argument that Clark created new criteria is without merit.

The Youngs rely on four cases in arguing that the Division cannot create new criteria. App. Br. at 48-50. But as detailed above, the Division did not create new criteria. It evaluated J.Y. and H.Y.'s entitlement to the BFC subsidy under § 453.073, RSMo and the possible presenting problems in the Manual. LF 153, 181, 187-88, 215, 218, 581-82. And beyond that, the Youngs' cases are distinguishable.

In *Department of Social Services v. Senior Citizens Nursing Home District*, 224 S.W.3d 1, 33 (Mo. App. W.D. 2007) the Court determined that the Department improperly made a decision that was inconsistent with the plain and ordinary meaning of a regulation. But 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. Thus, *Senior Citizens* is inapplicable.

Likewise, in *J.P. v. Missouri Department of Social Services*, 752 S.W.2d 847, 851 (Mo. App. W.D. 1988) the Department made a final decision based on a misinterpretation of a regulation. The Department failed to consider factors required under state and federal law in terminating J.P.'s adoption subsidy payment. *Id.* Moreover, in that case, the Department conceded that J.P. was still eligible. *Id.* Here, the Division did consider all the relevant information and even held a second meeting with the Youngs to allow them to present more information relative to J.Y. and H.Y.'s behaviors. LF 161-62. But despite the review, the

documentation did not support entitlement to the BFC subsidy. Therefore, the BFC subsidy was appropriately denied.

In *Hutchings v. Roling*, 151 S.W.3d 85, 88-90 (Mo. App. E.D. 2004), the Department, on the date of its decision, did not have a waiting list for placement in one of its programs. *Id.* But the Department created the list and retroactively applied it to Hutchings. *Id.* Here, there was a list that existed from the time the Youngs adopted J.Y. and H.Y. and the denial was based on § 453.073, RSMo with added insight from the Manual, which is consistent with the statute. Thus, *Hutchings* is inapplicable.

In *Gee v. Department of Social Services*, 207 S.W.2d 715, 717 (Mo. App. W.D. 2006) the court determined that the Department had a state regulation that violated federal law, as well as a state law mandating that the state law be consistent with the federal law. *Id.* at 720. Here, there is no such inconsistency in the law. The Division used §§ 453.073 and 453.074, RSMo in making their decision, considering the Manual in applying the statutory language. The Division's Manual is consistent with its statutory mandate to facilitate the adoption subsidy program and there is no allegation of that law violating federal law.

Finally, in *Chrismer v. Missouri State Division of Family Services*, 816 S.W.2d 696, 701 (Mo. App. W.D. 1991), the state made a decision based on a doctor's recommendation that was inconsistent with all the other mental health professionals' unanimous opinions. *Id.* Here, the Division's decision took into account the opinions of each of the mental health professionals, as well as supporting data in making its decision. There was no inconsistency in that decision. No other professional indicated that J.Y. and H.Y. were entitled to the BFC

subsidy because no other professional evaluated J.Y. and H.Y. specifically for the BFC subsidy. Clark was the only professional to do so and she considered the other opinions in the documents. LF 174, 193-95. Her decision was consistent with the other mental health professionals.

The Division did not create new criteria. The Youngs' case law is in applicable and accordingly, Appellants' Points II and III should be denied.

**III. The Division did not err in denying the BFC subsidy to the Young family because the denial was based on competent and substantial evidence. (Responds to Appellants' Point Relied On IV).**

In this case, the Division's decision was based on competent and substantial evidence. Substantial evidence is evidence that, if true, has probative force on the issues. *Knapp v. Missouri Local Government Employees Retirement System*, 738 S.W.2d 903, 913 (Mo. App. W.D. 1987). Substantial evidence includes competent evidence. *Id.* Competent evidence is relevant and admissible evidence that is "capable of establishing the fact in issue." *Id.* In this case, the Division based its decision on competent and substantial evidence: 1) the recommendation of their expert consultant Marie Clark; and 2) records provided by the Youngs from J.Y. and H.Y.'s schools, daycare, and mental health professionals, as well as information gathered during two staffing meetings with the Youngs.

First, the Division's denial of the BFC subsidy was based on competent and substantial evidence because based on the language of §§ 453.073 and 453.074, RSMo and the Manual, J.Y. and H.Y. did not qualify for the BFC subsidy. The statutes, as interpreted

by the Manual identify two groups of eligible children. LF 26. Both of these groups are children in a residential setting. *Id.* Here, J.Y. and H.Y. were not in a residential setting, they had been adopted by the Youngs. Therefore, they did not qualify for the BFC subsidy.

Moreover, even if J.Y. and H.Y. were possible candidates under § 453.073.2, RSMo and Chapter 14.5, they were not entitled to the subsidy based on a consideration of their physical and mental condition and behaviors under § 453.073.1, RSMo and the presenting problems detailed in Chapter 14.6 of the Manual. LF 26-27. The Division's expert, Clark, reviewed hundreds of pages of documents related to J.Y. and H.Y. LF 300-526. Based on thousands of reviews like the one in this case, she determined, for numerous reasons, that J.Y. and H.Y. were not eligible for the BFC subsidy. LF 179-186, 210<sup>2</sup>.

Following receipt of Clark's recommendation, the Division considered all the same documents, LF 300-526, and reviewed the notes taken for J.Y. and H.Y. during the staffing meetings. LF 353-355. The Division reviewed Clark's first recommendation, dated November 10, 2004, LF 385-87, and Clark's second recommendation dated January 18, 2005. LF 406. After reviewing all of this information, the Division determined that J.Y. and H.Y. were not entitled to the BFC subsidy under § 453.073, RSMo. LF 581-82. The Division supported the recommendation and reasoning of its expert consultant in denying J.Y. and H.Y. the subsidy. *Id.* The Division provided the Youngs the final decision and

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<sup>2</sup> See Resp. Br. pp. 9-11 for a full recitation of the documents Clark reviewed and the basis of her recommendation.

attached Clark's recommendation and reasoning for her decision. *Id.* Quite simply, based on all the information contained in these records, there was not support for behaviors severe enough, significant enough, frequent enough, or across all spectrums, to qualify J.Y. and H.Y. LF 19. Their problems were mainly therapeutic, appropriately addressed in therapy, which the family attended, and were diminishing with time. LF 180, 184, 186, 283, 356-84. Even the therapist and psychologists agree that psychotherapy would be effective and that the children were pleasant and cooperative.

The Division's decision was upheld by a hearing officer who had the opportunity to see the witnesses, including Clark, Sparks and the Youngs themselves and make judgments about their credibility. LF 10-20. He found Clark's expert testimony to be credible. LF 10-20. The decision to deny the BFC subsidy was again upheld. LF 19. The administrative hearing officer therefore affirmed the Division's decision, finding that J.Y. and H.Y. were not entitled to the BFC subsidy. LF 19.

The Division's decision was based on hundreds of pages of information, all reviewed by the Division and an expert in behavioral issues. Though the Youngs disagree with the outcome, it does nothing to change the fact that the decision was based on competent and substantial evidence. The decision of the Division to deny J.Y. and H.Y. the BFC subsidy, was, therefore authorized by § 453.073, RSMo, was not in excess of statutory authority and was based on competent and substantial evidence.

In their brief, the Youngs attempt to demonstrate a lack of competent and substantial evidence by attacking Clark's credibility. App. Br. at 56. But the determination of witness

credibility is that of the administrative tribunal because the tribunal had the opportunity to personally observe the witness. *Hohensee*, 135 S.W.3d at 517, citing *Dorman v. State Bd. Of Registration for the Healing Arts*, 62 S.W.3d 446, 454 (Mo. App. W.D. 2001). And unless that credibility determination is against the overwhelming weight of the evidence, it shall not be disturbed. *Id.*, citing *Windy Point Partners, L.L.C. and B-Sib L.L.C., v. Boone County*, 100 S.W.3d 821, 826 (Mo. App. W.D. 2003).

Here, the administrative hearing officer found Clark's testimony to be credible and his decision was consistent with the Division's decision and Clark's recommendation. LF 10-20. Considering Clark's education and experience, that determination is not against the overwhelming weight of the evidence. The Youngs did not utilize the services of an expert during the staffing meetings, other than those who had completed reviews for J.Y. and H.Y. in writing, or at the administrative hearing. Accordingly, at the hearing, Clark was the only expert to testify or offer an opinion as to J.Y. and H.Y.'s entitlement to the BFC subsidy.

Clark is qualified to give the Division a recommendation in this case. Her education and experience in evaluating thousands of children for the BFC program, irrespective of licensure, qualifies her to conduct the review. Moreover, nothing in the record shows that Clark failed to consider relevant information about J.Y. and H.Y. Clark was familiar with the Division's responsibilities to implement the adoption subsidy program as well as the Manual and the presenting problems in Chapter 14.6. She used that knowledge and expertise in reviewing J.Y. and H.Y.'s situation in light of the requirements under law and the clarifications found in the Manual. There is nothing in the record to demonstrate that at the

time of her review, Clark was mistaken about facts related to J.Y. and H.Y. that would have changed her analysis of the situation.

Though Clark did identify some recent behavioral events, in her opinion, there were not enough to entitle J.Y. and H.Y. to the BFC subsidy under § 453.073 RSMo, especially when considering the Chapter 14.6 presenting problems. LF 180-90. According to Clark, she did not identify significant problems beyond those typically seen. LF 186. Based on years of experience and education, she rendered a recommendation to the Division to deny the BFC subsidy. Merely because the Youngs disagree with her recommendation and the Division's decision does not mean Clark was not credible.

The Division's decision was based on competent and substantial evidence and Appellants' Point IV should be denied.

**IV. The Division did not err in denying the BFC subsidy to the Young family because the denial furthers public policy by allowing for individualized assessment of the needs and issues of each child for whom the subsidy is sought. (Responds to Appellants' Point Relied On V).**

The Youngs argue that federal and state law and policy support adoptive parents and finding children "permanent and stable home[s]." § 453.005, RSMo. App. Br. at 60-64. The Division agrees it is in the interest of children to be placed in permanent and stable homes. However, the Legislature set out its policy for eligibility for the subsidy programs, including the BFC subsidy in §§ 453.073 and 453.074, RSMo. And under that policy, not every child is entitled to the BFC subsidy. 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. Denying a particular child the BFC subsidy based on the criteria does not mean that the Division is not furthering the policy of placing children in homes. It means that the Division is providing the subsidy to those most in need of it based on criteria the Legislature developed. In denying the BFC subsidy to the Young family, the record reflects careful consideration of those criteria based on information from the school, medical professionals, an expert, and the family themselves.<sup>3</sup>

### **Conclusion**

For the reasons stated above, the Court should affirm the Division's decision.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

SARAH E. LEDGERWOOD  
Assistant Attorney General  
Missouri Bar No. 53205  
Post Office Box 899  
Jefferson City, Missouri 65102  
Phone No. (573) 751-3321  
Fax No. (573) 751- 5660  
[Sarah.Ledgerwood@ago.mo.gov](mailto:Sarah.Ledgerwood@ago.mo.gov)  
ATTORNEYS FOR RESPONDENT

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<sup>3</sup> The Youngs continue to receive the regular adoption subsidy payment for J.Y. and H.Y.

**Certification of Service and of Compliance with Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this 11<sup>th</sup> day of July, 2008, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

John J. Ammann  
Saint Louis University Legal Clinic  
321 North Spring  
St. Louis, Missouri 63108  
Attorneys for Appellants

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 7,231 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Assistant Attorney General