STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT

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In the Matter of S

Case No.
Honorable

v.

MICHIGAN DEPARTMENT OF HUMAN SERVICES
and JAY W. SEXTON, ADMINISTRATIVE LAW JUDGE
DHSs

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Bloomfield Hills, Michigan 48302-2082

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Co-Counsel for

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S COUNTER-RESPONSE TO DHS'S POST-HEARING BRIEF OPPOSING AWARD OF FEES OR COSTS

I. ALTHOUGH [redacted]'S MEDICAID WAS EVENTUALLY REINSTATED, SHE STILL SUFFERED DUE PROCESS VIOLATIONS DUE TO DHS'S COMPLETE LACK OF COMPLIANCE WITH STATE MEDICAID POLICY AND MERITLESS LEGAL POSITION.

The Michigan Department of Human Services (DHS) repeatedly and illogically argues that because it allegedly acted with "reasonable speed" to reinstate [redacted]'s Medicaid, attorney fees and costs are not compensable.[1] This ignores the fact that there were multiple mistakes and due process violations that occurred *before* DHS considered any olive branch offer to [redacted]. Most notably, DHS failed to comply with its own Program Administrative Manual (PAM) 220's requirement to give proper and adequate written notice of a negative action; it then failed to properly request verification of [redacted]'s income under PAM 130; and did not abide by its own Medicaid regulations pertaining to verifications of un-countable assets under PAM 130 and PEM 500. Later, DHS's change in position after this Circuit Court Appeal was filed and after receipt of a letter stating that [redacted] did not receive income from the Trust, is a clear illustration that DHS had no legal or factual basis to assert its *initial* legal position that [redacted]'s must verify the Trust's assets in order to secure Medicaid. DHS took the position to deny benefits because it had the unchecked power to do so, not because it reviewed the trust terms correctly. How many Medicaid beneficiaries are able to fight back?

Along with DHS's complete lack of compliance with State Medicaid policy and federal law, [redacted]'s due process rights were repeatedly violated when: (1) she was never provided a denial notice, (2) her good faith request for an adjournment was wrongly and arbitrarily denied, and (3) when she was not notified of the inclusion of the issue of noncompliance with irrelevant verification requests as a hearing issue. DHS took the position in a memo dated September 18, 2006 that this trust was not drafted properly. See Exhibit A. In addition, the ALJ incorrectly

[1] DHS's Post-Hearing Brief Opposing Award of Fees or Costs, 3/27/09

based the decision on an issue that was not even noticed or ripe for adjudication. During a hearing held August 15, 2008, Attorney General [illegible] mitted that ALJ Sexton "never looked at the trust." See Exhibit B, page 12. In response, the Court specifically stated that "somebody could have looked at the trust a little earlier, so that we wouldn't have to drag somebody through this long, expensive, inconvenient, laborious procedure." See Exhibit B, page 12. This statement was made in reference to the fact that someone from DHS could have examined [illegible] trust sooner. Further, AG [illegible] s makes light of the legal expense, aggravation, and stress to [illegible] by cavalierly saying, "somebody could in fact have done so," in reference to DHS never looking at the trust See Exhibit B, page 12.

II. DHS'S ARGUMENT THAT [illegible] DID NOT PRESERVE HER POSITION ON THE ADMINISTRATIVE RECORD IS ERRONEOUS AND WITHOUT MERIT.

As previously stated in [illegible] ppellant's Responsive Brief[2] [illegible] r did preserve her position on the administrative record by submitting a Hearing Brief in lieu of oral testimony. Again, the sole reason [illegible] attorney, [illegible], was unable to attend the initial administrative hearing was due to DHS's refusal to grant a reasonable request for adjournment. The stated reason for DHS refusing the adjournment was because "too many adjournments are requested and hearings don't get held."[3] However, no adjournment was ever requested or granted in this matter. It appears that DHS was punishing [illegible] for having an attorney. DHS maintained its position refusing to reschedule the hearing despite the fact that [illegible] had never previously requested an adjournment, and it was aware she had a prior commitment that she was unable to reschedule. Unfortunately, [illegible] had no choice but to submit a Hearing Brief on behalf of [illegible], instead of appearing in-person or via telephone. By submitting the Hearing Brief.

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[2] *See Appellant's Responsive Brief*, Argument II, 8/27/07.
[3] [illegible] *'s Hearing Brief, 2/14/07.*

r was able to preserve 's position on the administrative record. DHS's latest argument that never preserved her position is completely without merit. *See infra.* Again, DHS used it unchecked power to its own advantage.

III. HAS ESTABLISHED THAT AN AWARD OF FEES AND COSTS IS APPROPRIATE FOR ; PAST AND PRESENT ATTORNEYS AT THE RATE ; CURRENT COUNSEL CLAIMS.

The time and expense listed on the attached invoices, justify the fees for the time, effort, and expense that is spent appealing a decision from an Administrative Law Judge to the Circuit Court. See Exhibit C. DHS argues that the State Bar of Michigan "economics of laws practice survey results" illustrates that a "typical" full-time elder law attorney would be make $100 less than the hourly rate requested.[4] Unfortunately, DHS fails to understand that this case is not a "typical" elder law case (if such a case even exists). Appealing a decision from an administrative agency to the Circuit Court takes an incredible amount of experience, skill, and knowledge, not only on the topic of elder law, but administrative law and litigation in general.

Contrary to DHS's argument that the legislature states "attorneys who pursue administrative appeals are typically entitled to no more than $75/hour"[5] it would be shocking to find an elder law attorney who works on such appeals to the Circuit Court for that hourly rate (except at a Legal Aid office). As stated in Petitioner's Response dated 3/13/09, Attorney I charges $275.00 per hour when assisting clients with Medicaid issues. Based on Attorney ; expertise and experience as well as the average rate charged by attorneys of similar experience with similar cases, Attorney values her services provided at $275.00 per hour. This rate is reasonable and is well within and at times below the rates charged by other attorneys in this field within the state of Michigan. See Exhibit D.

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[4] *DHS's Post Hearing Brief Opposing Fees or Costs*, 3/27/09
[5] *DHS's Post Hearing Brief Opposing Fees or Costs*, 3/27/09

As stated in I Response dated March 15, 2009 Attorney as practiced in the area of probate and special needs estate planning for over 14 years. She is a nationally recognized leader in the area of estate planning for persons with disabilities and parents of children with disabilities. In March 2009, Attorney was bestowed with the honor of becoming a National Academy of Elder Law Attorneys (NAELA) Fellow, a title which less than 100 attorneys in the entire country hold. Attorney has extensive experience in handling cases involving administrative agencies and the amount charged by her for legal services performed are consistent with her skill level and amount of experience. Similarly, Attorney is a member of NAELA and focuses her practice in the areas of Probate and Trust Administration, Medicaid planning and Elder Law. She has been practicing law for over 10 years. Thus, DHS's contention that the first attorney was "clearly not experienced"[6] in this area of law is not supported by the facts of this case.

DHS wrongly argues that should be awarded attorney fees and costs under the Administrative Procedures Act (APA). With this argument, DHS completely disregards the fact that the did not prevail on the administrative level. As such, is unable to make a request for costs and fees under the APA.[7] Instead, Michigan Court Rule 2.625 is applicable to this case. This Honorable Court can award costs, including attorney fees, to the prevailing party in this action under MCR 2.625 (A). MCR 2.625 (A)(1), states that this Honorable Court may grant costs to a prevailing party in an action, unless otherwise prohibited. According to MCR 2.625 (B)(4), the definition of "prevailing party" includes an appellant who improves his or her position on appeal. has improved her position in the course of this appeal. It was not until this appeal was filed, proceedings commenced, and a hearing date was set that DHS decided to

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[6] *DHS's Post Hearing Brief Opposing Fees or Costs*, 3/27/09

[7] *see* MCL 24.323, MCL 24.325, and 600.2421d

change its position and approve 's Medicaid eligibility. This is a blatant violation of the due process standards laid out in 42 C.F.R. § 431.210 and *Goldberg v. Kelly*, 397 US 254 (1970). In *Goldberg*, the Supreme Court held that "a recipient [must receive] timely and adequate notice detailing the reasons for a proposed termination." *Goldberg* at 267-268. Although received notice that the hearing would take place, she never received notice of the real reason for her denial of Medicaid. The administrative hearing was supposed to be held on the issue of whether the Trust's assets were subject to verification, and whether the denial of Medicaid was proper.[8] Instead of adjudicating that issue, the ALJ arbitrarily decided to address the issue of non-compliance with verification requests instead. Due to the fact that no notice was given on this issue, was unable to object to the relevancy of the issue or DHS's position on the issue. The issue of "noncompliance" with verification requests was not sufficiently disclosed on either the Notice of Hearing or the Hearing Summary submitted by DHS, and was not notified about any negative case action regarding that issue. Moreover, the Notice of Hearing is completely silent as to *any* of the issues involved in the case; in direct conflict with the notice requirements in MCL 24.271 (2)(d).[9] It is legally incorrect to terminate benefits for not verifying something (assets) which is irrelevant to the determination. Only the trust terms were relevant.

In a similar 2008 administrative hearing, the same ALJ who presided over s administrative hearing. *In the Matter of* stated that a caseworker must give the Medicaid beneficiary "the benefit of additional information supplied by the Community Mental Health Representative..." See Exhibit E. In that case, the ALJ decided that the claimant was denied due process rights because he never received a clear and

[8] See Appellant's Brief on Appeal, Argument II.

[9] The Department issued a Hearing Summary on October 18, 2006, which contained a concise statement of facts, but failed to furnish a detailed statement on the issues to be heard at the administrative hearing.[9]

concise explanation regarding the reasons for the department's negative actions. Unfortunately, did not receive such a favorable decision at the administrative level. Instead the issues were continuously confused and the appeal to the Circuit Court was necessary to protect her rights.

The Michigan Supreme Court in *Napuche v Liquor Control Comm*, 336 Mich 398; 58 NW2d 118 (1953), citing *Dation v Ford Motor Co.*, 314 Mich 152; 22 NW2d 252 (1946), stated that

> Due process of law requires notice and opportunity to be heard. It imports the right to a fair trial of the issues involved in the controversy and a determination of disputed questions of fact on the basis of evidence.
> 336 Mich 498 at 403.

The Michigan Constitution and the Michigan Administrative Procedures Act, MCL 24.271; MSA 3.560(171), require that a person entitled to an administrative hearing be accorded the correlative right of reasonable notice of that hearing. Though was given reasonable notice of the hearing, she was not given reasonable notice of the issues to be heard at the hearing, and this directly impacted her ability to present arguments and dispute the position of the Department.

In addition, a Medicaid beneficiary must not have to bear the costs of enforcing public policy and defending her rights against a governmental agency with an unlimited legal budget. State agencies are not insulated from the consequences of their noncompliance with Federal law. *Westside Mothers v Haveman*, 289 F.3d 852 (6th Cir. 2002). As such, 's reasonable request for Attorney fees and costs is appropriate in this action and this Honorable Court should grant her request.

IV. RELIEF SOUGHT

The fees sought by I n relation to the appeal of the decision of the Department of Human Services and the Administrative Law Judge have been shown to be reasonable and actual. Therefore, . respectfully requests that this Honorable Court disregard the arguments set forth by the DHS and to find that the fees sought by are reasonable and actual, and to award the fees and costs in accordance with this finding.

Respectfully Submitted.

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ASSOCIATES

By: By:

Co-Counsel for

Co-Counsel for

Dated: April 14. 2009