

David v. Goliath: One Client's Fight for Attorney Fees and Costs

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As Advocates for folks dependent on needs-based public benefits, we all experience repeated violations of the basic Constitutional rights of due process. When due process rights are violated within the course of the Medicaid eligibility process, or during the administrative hearing phase, an award of attorney fees and costs against the agency may be appropriate and necessary. An individual that prevails at the administrative level should request attorney fees and costs under the Administrative Procedures Act. If the individual does not prevail at the administrative level, and appeals the decision to the Circuit Court level or higher, the prevailing party should consider state or federal law for relief.

The need to enforce the Constitutional protections of due process is necessary in an effort to level the legal battleground for our clients that rely upon public benefits. The system is difficult to navigate and becomes even more of a struggle when the rules are ignored by the administrative agencies. Consider the unlimited legal representation and resources agencies have at their beck and call, versus the limited resources of a beneficiary on needs-based benefits. It is a very real time David v. Goliath situation.

The remainder of this article will detail our personal David v. Goliath tale: Client S v. the Michigan Department of Human Services (DHS).

BACKGROUND AND PROCEDURAL HISTORY

Client S is an individual with a disability who has been receiving Medicaid services continuously since 1999. In 2003, Client S's father executed the "Client S Irrevocable Special Needs Trust" (SNT). The SNT was funded by S's father upon his death in April 2003, and Client S is the sole beneficiary. In September 2006, Client S reported to DHS that S had the interest

in a trust. A week later, a departmental analyst at DHS (Goliath) issued a memo asserting that the value of the principal of the SNT is a countable asset, and any payments made to S or her legal representative were to be treated as unearned income. A form (3503) was also sent to S, requesting that she disclose the assets contained in the SNT. In response, S's attorney submitted a request for hearing to appeal DHS's incorrect conclusion that that assets were countable. In January 2007, S's attorney received a notice of hearing stating that the hearing would be held February 15, 2007. Due to a scheduling conflict, S's attorney requested, but was unreasonably denied an adjournment. Instead, a DHS employee notified the attorney that she could submit a brief in lieu of appearing, as long as someone could submit the brief into evidence at the hearing. The hearing took place as scheduled and the brief was entered into evidence. The brief was clear as to the Trust's terms. In March 2007 a written decision and order was issued by Administrative Law Judge Jay W. Sexton (ALJ), upholding the denial of S's eligibility based on her failure to reply to Form 3503. The form requested a verification of Trust assets, which had nothing to do with the terms of the Trust at issue. ALJ Sexton did not address the issue of whether or not the trust assets are countable for Medicaid purposes. Nor did he ever even read the terms of the Trust, even though it was only the terms of the Trust that were relevant, not the contents of the Trust nor income from the Trust.

On appeal to the Circuit Court, S argued that the determination that the assets in the SNT were countable for Medicaid purposes was legally incorrect, and that an objection to the asset disclosure form was timely filed and therefore noncompliance with the verification request (Form 3503) must not preclude Medicaid eligibility. S argued that under the Program Eligibility Manual (PEM), only countable income is subject to verification, and the SNT by its terms, remained a non-countable asset. Instead of waiting to file a Post-Judgment Motion for Fees and Costs, S requested an award of fees and costs in the Appellant's Responsive Brief, to give the court an opportunity to address the issue in the order following oral arguments.

THE PLOT THICKENS...

In Appellant's responsive brief, S argued that an award of fees and costs is appropriate pursuant to Michigan law, specifically: MCR 2.625, MCR 7.101 (O) and (P), and MCL 24.323. According to MCR 2.625, the court may grant costs to a prevailing party in an action, unless otherwise prohibited. S argued that if the Circuit Court determines that the ALJ decision should be overturned, then she is the prevailing party and entitled to fees and costs. It is important to note that an award of fees and costs may include reasonable attorney fees under MCL 600.2591. The factors that determine "reasonableness" of attorney fees in such cases are outlined in the Michigan Rules of Professional Conduct (MRPC) 1.5(a). Michigan case law has also established a test to determine the reasonableness of challenged attorney fees. Although there is no precise formula, the following factors are taken into account: professional standing and experience of the attorney; the skill, time and labor involved; the amount in question and result achieved; difficulty of the case; expenses incurred, and the nature and length of the professional relationship with the client. *Crawley v Schick*, 48 Mich App 728, 737 (1973). S argued that a Medicaid beneficiary should not have to bear the cost of enforcing public policy and defending her rights against a government agency with an unlimited legal budget. David cannot fight Goliath without some help...or at the very least a sling shot.

Next, S argued that under MCR 7.101(O), any inconvenience or cost incurred by the prevailing party in an administrative appeal can be taxed against the opposing party. In this case, S had to spend thousands of dollars on attorney fees to protect and defend her Medicaid eligibility against a meritless position by the agency. Her fees were both necessary and reasonable, as without them, she would have been unable to challenge DHS, and would have lost her Medicaid benefits. Again, David needed some help.

S also requested an award of damages and sanctions against DHS for an arbitrary and capricious material error of law. According to MCR 7.101(P), the Circuit Court may assess

damages when it determines that any part of the appeal was “vexatious” because testimony or arguments grossly lacked the requirements of propriety. MRC 7.101(P)(1)(b). S successfully asserted that DHS’s arguments throughout the administrative hearing and appeal process grossly lacked the requirements of propriety and were vexatious in nature. This was because: (1) DHS argued that S was ineligible for Medicaid based on the fact that she failed to verify assets, which was wrong, (2) because she failed to provide information related to income at the hearing, which was also wrong, (3) DHS changed the stated reason for the denial without notice, and (4) DHS failed to grant a properly and reasonably requested adjournment, depriving her of a fair hearing.

Lastly, S argued that costs and fees could be awarded under MCL 24.323. Under the Administrative Procedures Act, a Circuit Court is given the authority to overturn arbitrary and capricious decisions of an Administrative Law Judge. Moreover, there is a portion of the Administrative Procedures Act that states a presiding officer may award costs and fees to a prevailing party. S argued that the Circuit Court Judge in this case falls under the definition of a “presiding officer” and the definition is not limited to a person presiding at the administrative level.

During the course of the appeal, the Attorney General rendered S eligible for Medicaid and fought to get the issue of fees and costs dismissed as moot. Despite the Attorney General’s attempt, the fight for attorney fees and costs continued and the Circuit Court Judge ruled for Client S based on MCR 7.101(P). The Judge relied on MCR 7.101(P) stating that parts of the appeal were vexatious and certain arguments used by DHS lacked the requirements of propriety. As for Client S’s other arguments, the Judge determined that Client S did not prevail based on MCR 2.625 because Client S was technically not the “prevailing party” (since DHS eventually acquiesced and reinstated Client S’s Medicaid eligibility, it was considered more of a settlement). Regarding MCR 7.101(O), the Court maintained that any inconvenience borne by

Client S was a necessary part of the process. The Judge also stated that a Circuit Court Judge does not fall under the definition of “presiding officer” in MCL 24.323, thus rejecting that argument.

After the Judge ruled that Client S should be awarded fees under MCR 7.101(P), the fight began on the issue of reasonableness of fees. DHS argued that the amounts were overstated and Client S should not get the full amount requested (See [Respondent's Supplemental Brief](#)).¹ In its brief, DHS countered that attorneys who pursue administrative appeals are typically entitled to no more than \$75 per hour. In response Client S's attorney obtained numerous affidavits from her colleagues in the elder and disability law field to support the reasonableness of her fees (See [Affidavit Regarding Fees](#))² and submitted the affidavits with a brief to support the reasonableness of the fees requested (See [Counter-Response to DHS' Brief Opposing Fees or Costs](#)).³ Client S argued that it would be very difficult to find an elder law attorney who appeals administrative decisions to the Circuit Court for \$75 per hour. The affidavits illustrate that many attorneys in the field of elder law in Michigan would charge between \$150 and \$350 per hour for a similar appeal.

Client S ultimately prevailed and the Judge ordered DHS to pay \$4,500.00 in attorney fees and costs in May 2009 (See [Order](#))⁴ and ([Settlement Check](#)).⁵

¹ <http://www.pekdadvocacy.com/documents/pattispublications/Court-Appellate/Petitioner%27sBriefonAppeal.pdf>

² <http://www.pekdadvocacy.com/documents/pattispublications/Court-Appellate/AffidavitReFees.pdf>

³ <http://www.pekdadvocacy.com/documents/pattispublications/Court-Appellate/CounterResponsetoBrief.pdf>

⁴ [http://www.pekdadvocacy.com/documents/pattispublications/Court-Appellate/Order\(5-22-09\).pdf](http://www.pekdadvocacy.com/documents/pattispublications/Court-Appellate/Order(5-22-09).pdf)

⁵ <http://www.pekdadvocacy.com/documents/pattispublications/Court-Appellate/SettlementCheck.pdf>