

STATE OF MICHIGAN  
INGHAM COUNTY CIRCUIT COURT

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In the Matter of

;  
Petitioner

Case No. 0  
Honorable JAMES R. GIDDINGS

v.

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

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PETITIONER'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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## STATEMENT OF ISSUES INVOLVED

1. DOES THE NONCOMPLIANCE WITH THE ASSET VERIFICATION REQUEST AND THE NONEXISTENT INCOME VERIFICATION REQUEST PRECLUDE ELIGIBILITY WHEN THE CLASSIFICATION OF THE SPECIAL NEEDS TRUST AS AN "OTHER TRUST" UNDER PEM 401 IS CORRECT, BUT THE DETERMINATION THAT THE ASSETS IN THE TRUST ARE COUNTABLE OR AVAILABLE FOR MEDICAID PURPOSES IS LEGALLY INCORRECT?
  - a. Is The Classification of the Special Needs Trust as an "Other Trust" Under PEM 401 Accurate?
  - b. Is the Determination that the Assets in the Principal of the Trust are Countable for Medicaid Purposes Incorrect? Does Noncompliance with a Verification Request Preclude Eligibility if the Assets are not "Countable," the Assets Are Not Subject to Verification, and an Objection to the Memo is Timely Filed?
  - c. If the Income from the Trust would be Countable as Unearned Income for [redacted] if [redacted] Received any Income Disbursements, If the Verification Checklist Did Not Request Verification of Income, If the Trust Only Allows for Payments to be Made to keep [redacted] Eligible, and If Disbursements to Third Parties for [redacted] Benefit are Therefore Not "Income" Under the Definition of Income Found In PEM 401, Should the Decision of ALJ Sexton be Overturned Under MCL 24.306(1) For Being Legally and Factually Incorrect, Arbitrary and Capricious?
2. WAS [redacted] DENIED HER BASIC DUE PROCESS OF LAW RIGHTS WHEN ALJ SEXTON CONDUCTED THE HEARING WITHOUT THE PRESENCE OF [redacted] OR HER ATTORNEY, WHEN SHE WAS NOT AFFORDDDED THE OPPORTUNITY TO PREPARE FOR OR ADDRESS THE ISSUE OF NONCOMPLIANCE WITH VERIFICATION REQUESTS, WHEN THE NOTICE OF HEARING FAILED TO STATE THE ISSUES INVOLVED AS REQUIRED UNDER MCL 24.271(d), WHEN NEITHER THE NOTICE OF HEARING OR THE HEARING SUMMARY ADEQUATELY STATED THE ISSUE OF NONCOMPLIANCE WITH VERIFICATION REQUESTS, AND WHEN THE DENIAL OF THE ORAL REQUEST FOR POSTPONEMENT WAS NOT BASED ON A GOOD CAUSE EVALUATION?
  - a. Were [redacted] Due Process Rights Deprived when [redacted] was Not Notified of the Negative Action Taken Against Her, The Notice of Hearing Failed to State the Issues Involved as Required Under MCL 24.271(d) and Neither the Notice of Hearing or the Hearing Summary Adequately Stated the Issue of Non-Compliance with Verification Requests?
  - b. Did the Denial of [redacted] Oral Request for Postponement Without a Good Cause Evaluation Result in a Deprivation of [redacted] Due Process Rights?
3. IN CONSIDERATION OF THE DEPRIVATION OF [redacted] DUE PROCESS RIGHTS, PUBLIC POLICY, AND THE VEXATIOUS NATURE OF THE ADMINISTRATIVE HEARING, IS AN AWARD OF ATTORNEY FEES NECESSARY AND APPROPRIATE IN THIS CASE?

## STANDARD OF REVIEW

Article Six, section 28, of the Michigan Constitution provides

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law. Const 1963, art 6, § 28, *emphasis added*.

An agency's findings of fact are to be given deference, *VanZandt v State Emp Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005). However, an agency's decision that "is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious," is a decision that is not authorized by law. *Brandon School Dist v Michigan Ed Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991). This determination mirrors the standard of review detailed in the Administrative Procedures Act (APA), 1969 PA 306, MCL 24.306(1). The APA states that a court shall set aside a decision of an agency if it (a) violates the constitution or a statute, (b) exceeds statutory authority or the agency's jurisdiction, (c) was made upon unlawful procedure, (d) is not supported by competent, material and substantial evidence on the whole record, (e) is arbitrary, capricious, or an abuse of discretion, or (f) is affected by any other substantial or material error of law. *Id.* Further, the reviewing court may "reverse or modify the decision or order [of the administrative agency] or remand the case for further proceedings." MCL 24.306(2).

In reviewing whether an agency's decision is supported by competent, material, and substantial evidence on the whole record, a court must review the entire record. *Great Lakes Sales, Inc v State Tax Comm*, 194 Mich App 271, 280; 486 NW2d 367 (1992). Substantial evidence is "the amount of evidence that a reasonable person would accept as sufficient to support a conclusion," which is less than a preponderance of the evidence, but is more than a mere scintilla. *In re Payne*, 444 Mich 679, 692 (1994).

## FACTS

1. [REDACTED] (hereinafter [REDACTED]) is a forty-nine-year-old (49) Medicaid beneficiary who resides at [REDACTED].
2. [REDACTED] is a person with disabilities and has received services through Michigan's MA-P program continuously since November 10, 1999.<sup>1</sup>
3. [REDACTED] father, [REDACTED], executed the [REDACTED] Irrevocable Special Needs Trust" (SNT) on March 28, 2003. [REDACTED] is the sole beneficiary of the SNT. The Grantor of the SNT is [REDACTED], and the SNT was funded by third party [REDACTED] upon his death on April 18, 2003.<sup>2</sup>
4. [REDACTED] did not report the SNT to the Department on her MA-P applications for 2003, 2004, or 2005.<sup>3</sup>
5. On or about September 13, 2006, [REDACTED] reported to the DHS caseworker, [REDACTED] that she had an unspecified interest in a Trust.<sup>4</sup>
6. On or about September 18, 2006, [REDACTED], the Departmental Analyst in the Medicaid Policy Unit, issued a memo that stated in pertinent part that the SNT "does not meet the guidelines of a Medicaid Trust and must be considered an Other Trust" and that the "countable asset for [REDACTED]; the value of all the countable net income and the countable assets in the principal of the trust . . . Count any payments made by the trust to [REDACTED] or her legal representative as her unearned income".<sup>5</sup>
7. On or about September 20, 2006, [REDACTED], Chippewa County DHS eligibility specialist, faxed a request for information to Chemical Bank & Trust, the bank holding the assets of [REDACTED] SNT.<sup>6</sup> [REDACTED] Trustee of SNT, then received a copy of the faxed information.
8. At the February 15, 2007, Hearing, [REDACTED], o, witness for DHS, testified that on October 5, 2006, Labron sent DHS Form 3503 to Sid, requesting that [REDACTED] disclose the assets contained in the SNT.<sup>7</sup>

<sup>1</sup> Hearing Transcript at 23, lines 11-13; Administrative Record (hereinafter "AR") Tab 1 at 2.

<sup>2</sup> Hearing Decision at 2; AR Tab 1 at 2 and Tab 2 at 45.

<sup>3</sup> Hearing Transcript at 28-29.

<sup>4</sup> AR Tab 2 at 30.

<sup>5</sup> AR Tab 2 at 14 [9].

<sup>6</sup> AR Tab 2 at 30.

<sup>7</sup> Hearing Transcript at 27, lines 9-13.



9. The DHS Form 3503 that was issued to [redacted] only requested a disclosure of assets and did not request verification of [redacted]'s income. Exhibit A.<sup>8</sup>
10. In challenge of the September 18, 2006, memo issued by [redacted], the Departmental Analyst in the Medicaid Policy Unit, on October 16, 2006, [redacted] attorney, [redacted], submitted a request for a hearing to appeal the Department's conclusion that the trust assets were countable, and to dispute the conclusion that a review of the SNT's assets was necessary.<sup>9</sup>
11. On January 25, 2007, [redacted] received a notice of hearing indicating that a hearing would be held on February 15, 2007.<sup>10</sup>
12. On February 5, 2007, [redacted] requested an adjournment of the hearing.<sup>11</sup>
13. On February 9, 2007, Department employee [redacted] testified [redacted] that the request for adjournment was denied. [redacted] indicated that DHS would accept a brief in lieu of [redacted] or [redacted]'s appearance if [redacted] could arrange for someone to submit the brief into evidence.<sup>12</sup>
14. An administrative hearing was held on Thursday, February 15, 2007, before Administrative Law Judge Jay W. Sexton. In lieu of testimony, [redacted] submitted a Brief on the issue of whether the SNT was a countable asset and whether the verification request was appropriate.<sup>13</sup>
15. On March 20, 2007, Administrative Law Judge Jay W. Sexton (hereinafter "ALJ Sexton") issued a written Decision and Order upholding DHS's denial of [redacted]'s eligibility based upon her failure to reply to the Form 3503. ALJ Sexton did "not reach the question of whether or not the trust assets are countable for MA-P eligibility purposes."<sup>14</sup>

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<sup>8</sup> This Exhibit was referenced during the Hearing (see Hearing Transcript page 29 lines 24-25 and page 30 lines 1-5), and was marked as "A-1, Page 15." For inexplicable reasons, this Exhibit is not included in the Administrative Record.

<sup>9</sup> AR Tab 2 at 22 [2].

<sup>10</sup> AR Tab 2 at 24.

<sup>11</sup> AR Tab 2 at 24.

<sup>12</sup> AR Tab 2 at 24.

<sup>13</sup> Transcript at 34, lines 12-19.

<sup>14</sup> AR Tab 1 at 5.

## ARGUMENT

- I. THE CLASSIFICATION OF THE SPECIAL NEEDS TRUST AS AN "OTHER TRUST" UNDER PEM 401 IS CORRECT, BUT THE DETERMINATION THAT THE ASSETS IN THE TRUST ARE COUNTABLE OR AVAILABLE FOR MEDICAID PURPOSES IS LEGALLY INCORRECT. IF THE TRUST TERMS MAKE THE TRUST EXEMPT OR UNAVAILABLE, THE TYPE OF ASSETS OR VALUE OF SAME IS NOT RELEVANT TO DETERMINE MEDICAID ELIGIBILITY; THERE WAS NO REQUEST TO VERIFY INCOME AND THE ASSET VERIFICATION REQUEST IS BASELESS AND LACKS MERIT. THUS THE NONCOMPLIANCE WITH THE ASSET VERIFICATION REQUEST AND THE NONEXISTENT INCOME VERIFICATION REQUEST MUST NOT PRECLUDE ELIGIBILITY.

- a. The Classification of the Special Needs Trust as an "Other Trust" Under PEM 401 Is Accurate.

The criteria for determining whether a Trust is a "Medicaid Trust" is detailed in the Department of Human Services' Program Eligibility Manual ("PEM") at 401 page 5.<sup>15</sup> The "Medicaid Trust Criteria" portion of PEM 401 states in relevant part:

A Medicaid trust is a trust that meets conditions 1 through 5 below:

1. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, an MA post-eligibility patient-pay amount, a divestment penalty or an initial assessment amount. A person's resources include his spouse's resources (see definition).
2. The trust was established by:
  - the person, or
  - the person's spouse, or
  - someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or the person's spouse, or an attorney, or adult child.
  - someone else (including a court or administrative body) acting at the direction or upon the request of the person or the person's spouse or an attorney ordered by the court
3. The trust was established on or after August 11, 1993.
4. The trust was not established by a will.
5. The trust is not described in "Exception A, Special Needs Trust" or "Exception B, Pooled Trust" below.<sup>16</sup>

The Special Needs Trust ("SNT") is not a "Medicaid trust" because it does not meet criteria one (1) or criteria two (2) of the "Medicaid Trust" definition under PEM 401. A Trust must meet all five of the above-listed criteria to be considered a Medicaid Trust per

<sup>15</sup> AR Tab 2 at 51.

<sup>16</sup> Department of Human Services Program Eligibility Manual 401, page 5 (PPB 2007-009, 7/1/2007).

PEM 401. The SNT was funded with the assets of [redacted]’s father, [redacted], upon his death per a “transfer on death account agreement” which was executed the same day that the SNT was created.<sup>17</sup> [redacted]’s assets or income are not countable for a determination of [redacted]’s Medicaid eligibility. Further, the SNT does not meet criteria two (2) of the “Medicaid Trust” definition under PEM 401 because the SNT was created by [redacted], [redacted]’s father, on March 28, 2003.<sup>18</sup> [redacted] did not have legal authority to act in place of or on behalf of his adult child, [redacted], nor was he ever acting at the direction of, or upon, [redacted]’s request.

The SNT is an “Other Trust” because it does not meet the criteria for a “Medicaid Trust”, an “Exception A” trust, an “Exception B” trust, or a “Medicaid Qualifying Trust.” PEM 401 at 13. The SNT is not an Exception A trust because it does not impose on the Trustee an automatic duty to repay Medicaid upon [redacted]’s death and is not funded with [redacted]’s assets. PEM 401 at 6. The SNT is not an Exception B trust because it does not contain [redacted]’s resources, was not established by a nonprofit association, is not managed by a nonprofit organization, does not contain an automatic duty to repay Medicaid, and so forth. PEM 401 at 6-7. Further, the SNT is not a “Medicaid Qualifying Trust” because it was not established before August 11, 1993, and it was not established by a person whose assets must be considered. PEM 401 at 12. The SNT is a third party Special Needs Trust with pure discretionary terms similar to those in *Miller v Department of Mental Health*, 432 Mich 426, 436-7; 442 NW2d 617 (1989).

The September 18, 2006, memo issued by Teresa Merritt-Ellis, the Department Analyst in the Medicaid Policy Unit of the Department of Human Services, correctly stated that the SNT “does not meet the guidelines of a Medicaid Trust and must be considered an Other Trust.”<sup>19</sup>

- b. The Determination that the Assets in the Principal of the Trust are Countable for Medicaid Purposes is Incorrect. Because the Assets are not “Countable,” the Assets Are Not Subject to Verification, and an Objection to the Memo was Timely Filed; Thus the Noncompliance with the Verification Request Must Not Preclude Eligibility.

According to the Program Administrative Manual at 130, the Department is to “[o]btain verification when: Required by policy. PEM items specify which factors and under what circumstances verification is required.”<sup>20</sup> Verification may also be obtained if there is an

<sup>17</sup> AR Tab 2 at 46.

<sup>18</sup> AR Tab 2 at 25.

<sup>19</sup> AR Tab 2 at 14 [9].

<sup>20</sup> Program Administrative Manual 130, page 6 (PPB 2007-009 7/1/2007).

approved local-office requirement or if the “information regarding an eligibility factor is unclear, inconsistent, incomplete or contradictory.” *Id.*

Under Program Eligibility Manual 500 at 38, only countable income is subject to verification.<sup>21</sup> Further, under the “Other Trusts” portion of PEM 401, “[t]he trust principal is considered an available asset of the person who is legally able to: [d]irect use of the trust principal for his needs, or [d]irect that ownership of the principal revert to himself.” PEM 401 at 13. Payments received from the Trust by the beneficiary are to be counted as unearned, countable income. *Id.*

As stated *supra*, the SNT is a third party Special Needs Trust with pure discretionary terms similar to those in *Miller v Department of Mental Health*, 432 Mich 426, 436-7; 442 NW2d 617 (1989). Under *Miller*, a beneficiary of a third party discretionary trust does not have an ascertainable interest in the assets of the trust, and that “interest is not subject to the claims of creditors, including the claims of the United States and of the state.” *Id.* at 436-7.

Despite the holding in *Miler*, in recognition of the public policy that “a person ought not be able to shelter his assets from his creditors in a discretionary trust of which he is the beneficiary and thus be able to enjoy all the benefits of ownership of the property without any of the burdens,” other third-party discretionary special needs trust cases hold that the assets within the trusts are countable.<sup>22</sup> The Court of Appeals found in *McKeon v Department of Mental Health (In re Johannes Trust)*, 191 Mich App 514, 518; 479 NW2d 25 (1991), where a sister created a third-party special needs trust for her disabled sister with money that the disabled sister inherited from an aunt, that the assets of a trust are reachable by creditors when the beneficiary is also the settlor of the trust. Similarly, in *Colman v Department of Mental Health (In re Hertsberg Inter Vivos Trust)*, 457 Mich 430; 578 NW2d 289 (1998), the Michigan Supreme Court held that a discretionary trust created by the Barbara Hertsberg’s mother was “available” to Barbara, and thereby reachable by the State. In *Hertsberg*, Barbara’s mother was ordered to fund a trust for the benefit of Barbara after Barbara filed a complaint alleging that her mother neglected her and failed to financially support her. The *Hertsberg* beneficiary, Barbara, was found to be the settlor of the trust because the “cause of action was a form of property belonging

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<sup>21</sup> Program Eligibility Manual 500, page 38 (PPB 2007-009 7/1/2007).

<sup>22</sup> *McKeon v Department of Mental Health (In re Johannes Trust)*, 191 Mich App 514, 518; 479 NW2d 25 (1991).

to [Barbara] and the proceeds of that settlement formed the consideration for the trust” and the trust assets were thereby attributable to her. *Id.* at 437.

The Department does not allege that [redacted] is the true settlor of the SNT, that it was funded with her assets, or that she directed its creation. In this case, [redacted]’s father created and funded the trust of his own volition, and not at the direction of [redacted] or a court; because the SNT assets are not attributable to [redacted], the holdings in *Hertsberg* and *Johannes* do not apply to the case at hand. As there is no indication that [redacted] is sheltering assets from creditors (i.e. the Department) with a discretionary trust, or enjoying the benefits of ownership of the assets, this Honorable Court must find that the SNT is not a countable or available asset under PEM 401 and is not subject to verification under PEM 500,

The disputed memo issued by the Department Analyst in the Medicaid Policy Unit of the DHS contained inaccurate information, which [redacted] objected to in a timely manner by submitting a request for a fair hearing.<sup>23</sup> The memo cites PEM 401 pages eight (8) and ten (10) when advising Eligibility Specialist Linda Labron.<sup>24</sup> However, pages five (5) through twelve (12) of PEM 401 provide detailed explanations and definitions for the rules that apply to Medicaid Trusts only. The policies pertaining to “Other Trusts” are found at pages thirteen (13) and fourteen (14) of PEM 401.

The principal of the SNT will be considered an available asset to [redacted] if she can direct the use of the trust principal for her needs or direct that ownership of the principal revert to her. PEM 401 at 13. The Trust Agreement for the SNT unambiguously states the following:

**1.3 Purpose:** This trust is established to provide amenities, and not support, to my daughter, [redacted].

**1.4 Additions:** Settlor or any other person except Settlor’s daughter, [redacted], may transfer assets to Trustee at any time by assignment, will, beneficiary designation, or any other means.<sup>25</sup>

**4.1 Specific Instructions, Limitations:** Trustee, will, in its sole and uncontrolled discretion, expend so much of the income and principal of this trust for the sole benefit of [redacted] as Trustee deems to be in the beneficiary’s best interest. Expenditures may include but are not strictly limited to the purchase of furnishings, payment of costs related to entertainment, nonreimbursed dental and medical expenses, travel/vacations, transportation, enrichment classes or lessons, periodic evaluation of the living conditions of the beneficiary by trustee, direct services billed to the trust by the provider or through an agency that may contract

<sup>23</sup> AR Tab 2 at 22 [2].

<sup>24</sup> AR Tab 2 at 14 [9].

<sup>25</sup> AR Tab 2 at 12 [11] *emphasis added*.

for or employ a person providing direct services to the beneficiary and such other amenities are not available to [redacted] from any other source. Trustee is authorized to hire a consultant to provide information to trustee concerning the needs of the beneficiary with respect to expenditures under this paragraph. It is the Settlor's express intention that neither the income nor the principal of this trust will be used for the food, clothing, or shelter of [redacted]. This is a trust for amenities only; distributions are wholly within the discretion of the Trustee but will not be made for the "support" of the beneficiary.<sup>26</sup>

As quoted above, the SNT provides that "distributions are wholly within the discretion of the Trustee." The Trustee, [redacted], is neither related to [redacted] by blood or marriage and is [redacted]'s family friend; [redacted] has no legal authority to control [redacted]'s discretionary decision making. No arguments have been made by the Department, and no facts have been submitted alleging, that the above-quoted discretionary language is a covert scheme which allows Sid to direct the use of the principal for her needs.

There is no language in the SNT that supports a conclusion that [redacted] can direct use of the trust principal for her needs, or direct that ownership of the principal revert to herself. Thereby, because the SNT is a pure discretionary trust, the SNT principal must not be considered a countable or available asset under *Miller*. 432 Mich 426 (1989). As it is not a countable asset, it is not subject to the scrutiny of the DHS Form 3503 ("Verification Checklist") as to the amount or nature of the assets, under PAM 130 at page 6.<sup>27</sup> The Department did not present at the hearing or otherwise, an approved local policy requiring the verification of excluded assets or income, and the information previously provided by [redacted] regarding her eligibility was not unclear, inconsistent, incomplete, or contradictory. PAM 130 at 6.

There is no basis in law or policy for [redacted] to verify assets that are not countable or non-existent income. As the SNT assets are not countable, as [redacted] did not have income from the SNT, and as the Department had no evidence contradicting [redacted]'s assertion that she did not receive income from the SNT, the Department improperly issued the Verification Checklist. As the Verification Checklist was improperly issued, the failure to provide such verification cannot result in the termination of [redacted]'s Medicaid eligibility.

<sup>26</sup> AR Tab 2 at 10 [13].

<sup>27</sup> Program Administrative Manual ("PAM") at 130, page 6 (2007-009 7/1/2007).

Upon receipt of the September 18 Memo and the Verification Checklist, [redacted] timely submitted a request for a hearing.<sup>28</sup> A fair hearing was requested to determine whether the assets contained in the SNT are not countable and that the assets are not subject to verification. Evaluating whether the SNT is a countable asset is an obvious prerequisite to determining whether the Verification Checklist was properly issued, and confirms that noncompliance with the Verification Checklist is completely irrelevant for an eligibility determination.

ALJ Sexton did not address the issue of whether the SNT is a countable asset as a prerequisite to determining whether the Verification Checklist was properly issued. Thus, ALJ Sexton's decision to penalize [redacted] for not complying with the irrelevant fishing inquiry by the Department is completely arbitrary, and is not based upon proper procedure, because he did not consider the validity of [redacted]'s objection to the determinations contained in the September 18 Memo and the issuance of the Verification Checklist. As the decision of ALJ Sexton is not based upon proper procedure (MCL 24.306(1)(c)), is not supported by competent, material, or substantial evidence on the whole record (MCL 24.306(1)(d)), is arbitrary and capricious (MCL 24.306(1)(3)), and is based on a substantial error of fact and law (MCL 24.306(1)(f)), this Honorable Court must reverse the final decision of ALJ Sexton, this case must be remanded with a clarification of issues, and a full and fair hearing should be held on all the issues raised by the Department's inappropriate actions.

- c. The Income from the Trust would be Countable as Unearned Income for [redacted] if [redacted] Received any Income Disbursements. The Verification Checklist Did Not Request Verification of Income. Thus, ALJ Sexton's Denial of [redacted]'s Eligibility Based on Failure to Disclose Income is Legally and Factually Incorrect, Arbitrary and Capricious, and Must Be Overturned Under MCL 24.306(1). Further, Because the Trust Only Allows for Payments to be Made to keep [redacted] Eligible, Payment Can Be Made to Third Party Providers for [redacted]'s Benefit. Thus, Disbursements from the Trust to Third Parties are Not "Income" Under the Definition of Income Found in PEM 401 and PEM 500.

As described *supra*, the SNT is an "Other Trust" under PEM 401. As an Other Trust, any income "received" by Sid from the Trust is counted as unearned income and is subject to verification under PEM 401 at 13 – 14. Under PEM 500 at page 33, "[p]ayment of a person's

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<sup>28</sup> Transcript at 13 lines 9-10.

bills by a third party directly to the supplier using the third party's money is NOT income to the person."<sup>29</sup>

No income disbursements from the SNT have been made to [redacted].<sup>30</sup> The Trustee of the SNT is not authorized by the SNT Agreement to make income payments to [redacted]. The SNT Agreement states, in pertinent part:

**4.2 Power to Accumulate Income:** No payments of income or principal, other than small amounts of income advanced for incidentals, are to be made directly to [redacted]. Any income not expended by Trustee for the purchase of amenities will be added to principal from time to time and reinvested by Trustee. Trustee is expressly authorized to accumulate income.<sup>31</sup>

Because income disbursements to [redacted] may be countable, if the Department had requested verification of Income disbursements from the SNT to [redacted] on the Verification Checklist, then [redacted] would not have any reason to object to such a request and would have submitted verification. However, the Verification Checklist that was sent to [redacted] stated only the following:

I need a record of all the items and their value that are contained in the Trust. I need to know how much the payments are that are being made to this trust.<sup>32</sup>

The request does not mention income, nor can "income payments from the trust to Sid" be inferred from the fishing request for information about assets. Nor can a request for income be inferred, as income and assets must be treated differently as there are two different PEMs addressing the two sets of rules.<sup>33</sup>

Since the SNT was funded on April 18, 2003, [redacted] has not received any income payments from the SNT.<sup>34</sup> As a Medicaid beneficiary, [redacted] is only required to disclose income that she receives (or is able to receive). Because she has not received any income, and the Trustee of the SNT is not authorized to make income disbursements to [redacted], then [redacted] was not under any obligation to disclose the non-existent unearned income on her 2003, 2004, or 2005 applications.

<sup>29</sup> PEM 500, page 33 (PPB 2007-009, 7/1/2007).

<sup>30</sup> AR Tab 2 at 28 *emphasis added*.

<sup>31</sup> AR Tab 2 at 10 [13] *emphasis added*.

<sup>32</sup> AR Tab 2 at 15.

<sup>33</sup> PEM 400 contains Asset rules, and PEM 500 contains Income rules.

<sup>34</sup> AR Tab 2 at 28.



Under PAM 130 at 2, verification requests must be made in writing utilizing appropriate forms. The memo from the Department Analyst was issued on September 18, 2006.<sup>35</sup> Labron issued the Verification Checklist on October 5, 2006.<sup>36</sup> The Verification Checklist sent to Sid requested a record of the SNT assets, and payments made to the SNT, but failed to request verification of income. Thus, the Department failed to properly request verification of Sid's non-existent income. In the absence of a written request for income verification which complies with PAM 130, Sid's Medicaid eligibility cannot be terminated for failing to provide verification of her income.

Because the September 18 memo incorrectly classified the SNT principal as a countable asset, referenced the wrong portion of PEM 401 in reference to income, and because the Verification Checklist incorrectly and irrelevantly requested verification of the SNT's non-countable assets, Sid had grounds for an objection and filed a timely notice of hearing. At the time the hearing was requested by Sid, no negative action was pending. Under PAM 220,<sup>37</sup> the Department is required to provide adequate written notice when a negative action is taken. The record shows that Labron entered, deleted, and re-entered negative actions against Sid.<sup>38</sup> The record does not show any evidence that Sid was provided with proper notice of these negative actions. As Sid requested the administrative hearing before the Department took its negative action based on non-verification of income, the hearing was not to address the propriety of the negative action taken against Sid for failure to return the Verification Checklist.

ALJ Sexton based his denial of Sid's Medicaid eligibility on her failure to disclose income.<sup>39</sup> Sid did not receive income disbursements from the Trust; the Department did not properly request verification of theoretical income payments per PAM 220; Sid was not notified of the negative action; and the issue of failing to verify income was not properly in front of the administrative court. Thus, ALJ Sexton's decision to penalize Sid for not responding to a non-existent written request verifying non-existent income payments is arbitrary and capricious (MCL 24.306(1)(e)), and not based upon proper procedure (MCL 24.306(1)(c)), is obviously not supported by competent, material or substantial evidence (MCL 24.306(1)(d)), and is based on a material error of law (MCL 24.306(1)(f)). This Honorable Court has a duty to overturn the

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<sup>35</sup> AR Tab 2 at 14 [9].

<sup>36</sup> AR Tab 2 at 15.

<sup>37</sup> PAM 220, at 1-2, 25 (PPB 2007-004, 4/1/2007).

<sup>38</sup> AR Tab 2 at 19 [5], 18 [6], 17 [7], and 16 [8].

<sup>39</sup> AR Tab 1 at 5.

administrative decision of ALJ Sexton, as it is arbitrary, not based upon proper procedure, is not based upon material evidence on the whole record, and is legally incorrect. MCL 24.306(1).

- II. THE NOTICE OF HEARING FAILED TO STATE THE ISSUES INVOLVED AS REQUIRED UNDER MCL 24.271(d), NEITHER THE NOTICE OF HEARING OR THE HEARING SUMMARY ADEQUATELY STATED THE ISSUE OF NONCOMPLIANCE WITH VERIFICATION REQUESTS, AND THE DENIAL OF THE ORAL REQUEST FOR POSTPONEMENT WAS NOT BASED ON A GOOD CAUSE EVALUATION. AS SUCH, DID NOT HAVE AN OPPORTUNITY TO PREPARE FOR OR ADDRESS THE ISSUE OF NONCOMPLIANCE WITH VERIFICATION REQUESTS AND WAS DENIED BASIC DUE PROCESS OF LAW WHEN ALJ SEXTON CONDUCTED THE HEARING WITHOUT THE PRESENCE OF OR HER ATTORNEY.

- a. was Not Notified of the Negative Action Taken Against Her, The Notice of Hearing Failed to State the Issues Involved as Required Under MCL 24.271(d) and Neither the Notice of Hearing or the Hearing Summary Adequately Stated the Issue of Non-Compliance with Verification REQUESTS, which Resulted in a Deprivation of Sid's Due Process 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.

The Court of Appeals in *Hardges v Department of Social Services*, 177 Mich App 698, 702; \_\_\_ NW2d \_\_\_ (1989), stated that "Due process and the Administrative Procedures Act require that a party in a contested case be given timely and adequate notice detailing the reasons

for the proposed administrative action.”<sup>40</sup> The requirements for notice are set forth at MCL 24.271(2):

The parties shall be given a reasonable notice of the hearing, which notice shall include:

- (a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.
- (b) A statement of the legal authority and jurisdiction under which the hearing is to be held.
- (c) A reference to the particular sections of the statutes and rules involved.
- (d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

MCL 24.271 (2); Administrative Procedures Act of 1969, PA 306 of 1969, *emphasis added*.

In evaluating whether the Department’s notice adequately explains the issues, the *Hardges* court explained that

At a minimum, due process requires the agency to explain, in terms comprehensible to the claimant, exactly what the agency proposes to do and why the agency is taking this action. If [the Department] finds that a claimant has not performed some action that the regulations require, the notice must explain what the claimant was required to do and how his or her action failed to meet this standard ... This detailed information is needed to enable claimants to understand what the agency has decided, so that they may assess the correctness of the agency’s decision, make an informed decision as to whether to appeal, and be prepared for the issues to be addressed at the hearing. 177 Mich App 698 at 703, *emphasis added*.

The Program Administrative Manual states that a beneficiary is to be provided with adequate written notice when a negative action takes effect.<sup>41</sup> Specifically, the Department is to “[g]ive timely notice for a **negative action** unless policy specifies adequate notice or no notice . . . . A timely notice is mailed at least 11 days before the intended negative action takes effect. The action is pended to provide the client a chance to react to the proposed action.” *Id.*

<sup>40</sup> *Hardges v Department of Social Services*, 177 Mich App 698, 702; \_\_ NW2d \_\_ (1989) *citing* MCL 24.201 et seq.; MSA 3.560(101) et seq.; MCL 24.271; MSA 3.560(171); *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970); and *Rochester Community Schools Bd of Ed v State Bd of Ed*, 104 Mich App 569; 305 NW2d 541 (1970).

<sup>41</sup> Program Administrative Manual 220, 1-2, 4, 25 (PPB 2007-004, 4/1/2007).

The Request for Hearing submitted by [redacted] on October 12, 2006, clearly addresses the issue of whether the SNT contains countable assets and was clearly in opposition to the memo issued by [redacted] on September 18, 2006 which concerned the classification of the assets in the SNT, and the net income from the SNT, as “countable.”<sup>42</sup> As no negative action was pending concerning the noncompliance with verification requests at the time the Request for Hearing was submitted, the issue to be adjudicated at the administrative hearing should have been whether the SNT contained countable assets and whether those assets needed to be verified.

The issue of noncompliance with verification requests was not adequately disclosed on either the Notice of Hearing or the Hearing Summary submitted by the Department, and [redacted] was not notified about any negative case action regarding said issue. Further, the Notice of Hearing is completely silent as to *any* of the issues involved in the case; in direct conflict with the notice requests described above in MCL 24.271 (2)(d).<sup>43</sup> 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.<sup>44</sup> The Department attempts to assert that [redacted] was adequately advised of the issue of noncompliance with verification requests because the fourth paragraph of the facts provided on the Hearing Summary mentions that “instead of receiving the information requested, [Labron] received the Hearing request.”<sup>45</sup> This argument is not persuasive at all because the fourth paragraph also notes that “there was no negative action pending at the time the Hearing request was received.” It defies logic to assume that the description of facts surrounding the receipt by the Department of the Hearing Request adequately explained, in a comprehensible manner, that a hearing requested on the issue of the countable nature of the SNT would instead address the issue of noncompliance with verification requests when there was no negative action pending at the time of the request. As such, [redacted] was not adequately advised of the inclusion of the issue regarding noncompliance with verification requests, the inclusion of the issue regarding noncompliance with nonexistent verification requests for nonexistent income, and the exclusion of the issue of whether the SNT is a countable asset.

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<sup>42</sup> AR Tab 2 at 14 [9].

<sup>43</sup> AR Tab 3 at 1.

<sup>44</sup> AR Tab 2 at 23 [1].

<sup>45</sup> AR Tab 2 at 23 [1].

The Department's failure to comply with the due process notice requirements detailed in MCL 24.271 (2)(d) and PAM 220 resulted in the inability of [redacted] to prepare for the issue of noncompliance with verification requests and address the issue in the hearing brief submitted in lieu of testimony. As [redacted] was not notified that the issue to be heard at the administrative hearing was that of noncompliance with verification requests, the Hearing Brief submitted in lieu of testimony solely addressed the issues that spurred the Hearing Request: whether the SNT contained countable assets under PEM 401, and whether verification of those assets is necessary or relevant to the issues presented.

The failure to include a description of the matters in question resulted in massive confusion during the administrative hearing,<sup>46</sup> which [redacted] was unable to remedy because she was not granted a postponement and was unable to be present at the hearing.

The October 16, 2006, request for a hearing was submitted by [redacted] in objection to the determination issued by [redacted] on September 18, 2006. The request for a hearing was submitted in an effort to have a fair hearing on the issues of whether the [redacted] Special Needs Trust (hereinafter "SNT") is countable, and whether a review of the assets contained in the SNT was even relevant to determine Medicaid eligibility.

When the request for a hearing was submitted, no negative action was pending regarding the verification requested by DHS with Form 3503. This was discussed at length during the February 15, 2007, hearing in front of ALJ Sexton. As such, ALJ Sexton's concentration on the issue of whether [redacted] complied with verification requests, and ALJ Sexton's refusal to address the core issue of whether the SNT is a countable asset, is completely illogical, based upon improper procedure, and is legally and factually incorrect. This Honorable Court is under an obligation to overturn administrative decisions that are arbitrary, capricious, based upon improper procedure, and based upon material errors of law under MCL 24.306(1), thus [redacted] respectfully requests that this Court overturn the decision of ALJ Sexton.

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<sup>46</sup> Transcript at 11-15.

- b. The Denial of [redacted]'s Oral Request for Postponement was Not Based on a Good Cause Evaluation and Resulted in a Deprivation of [redacted]'s Due Process Rights.

The Instructions that were enclosed with the Notice of Hearing for the February 15, 2007, hearing state the following:

POSTPONEMENT: If you cannot attend the hearing as scheduled, you must telephone us at once . . . or write to us immediately. **WE WILL ADVISE YOU WHETHER OR NOT WE FIND GOOD CAUSE TO GRANT YOUR REQUEST FOR A CHANGE IN THE TIME OR DATE OF HEARING.**<sup>47</sup>

Based upon the plain language of the above-quoted Postponement Instruction, a “good cause” determination has to be made in order to deny a claimant’s request for a postponement. It logically follows that an opportunity to present a good cause explanation would be given prior to a good cause determination being made. If the Department does not require an opportunity to present a good cause argument prior to a determination of whether there is good cause to grant a request for a change in the time or date of a hearing, then the Postponement Instruction would not include the “good cause” qualifier.

On February 5, 2007, [redacted]’s counsel, [redacted], timely requested an adjournment via telephone.<sup>48</sup> On February 9, 2007, [redacted] received a telephone call from [redacted] denying her request for an adjournment “because too many adjournments are requested and hearings don’t get held.”<sup>49</sup> [redacted] was not given the opportunity to present a good cause justification for the request for postponement. The denial of [redacted]’s timely request for an adjournment was not based upon good cause. This denial directly contradicts the plain language of the Department’s Postponement Instruction, and denied [redacted] due process of law.

As the postponement request was summarily denied, [redacted] arranged for an associate of her firm, [redacted] to participate in the telephone hearing and submitted a Hearing Brief in lieu of testimony.<sup>50</sup> The hearing brief thoroughly and adequately addressed the issues that the SNT is not countable or available, and that a review of the assets contained in the SNT was neither necessary or relevant per PEM 401 pages 13 and 14.<sup>51</sup> The Hearing Brief did not address

<sup>47</sup> AR Tab 3 at 2, *emphasis not added*.

<sup>48</sup> AR Tab 2 at 24.

<sup>49</sup> AR Tab 2 at 24.

<sup>50</sup> Hearing Transcript at 34 lines 12 – 19.

<sup>51</sup> AR Tab 2 at 23-60.

the issue of noncompliance with verification requests because [redacted] had not received notice of any negative action regarding this issue, and said issue was not before the administrative court.

Under PAM 220, the Department is required to give written notification of negative actions against a beneficiary.<sup>52</sup> There is no evidence showing that the Department complied with their own notice requirements. The hearing brief did not address the issue of whether the negative action taken against [redacted] based upon the requested verification of assets was correct because neither the notice of hearing nor the hearing summary adequately stated that noncompliance with verification requests were ever an issue that was to be adjudicated at the February 15, 2007, administrative hearing. Though [redacted]'s associate [redacted] did participate in the hearing on behalf of [redacted], [redacted] participation was strictly limited to presenting the Hearing Brief, prepared by [redacted]; in lieu of testimony.

The law is clear, that "[i]f a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party." MCL 24.272(1); MSA 3.560(172)(1). Further, MCL 24.272 (2) and (3) clearly states that a written answer may be presented in lieu of testimony; The Department of Human Service's Program Administrative Manual at 600 (page 27) also states that written documents may be admitted in lieu of testimony. The Hearing Brief adequately addressed the original issues that were to be heard at the administrative hearing, and as [redacted] was able to present a written document instead of attending the hearing, [redacted] was afforded a fair hearing on the issues of whether the SNT was a countable or available asset and whether it was relevant or necessary for the asset to be verified per PEM 401 at pages 13 and 14.

However, as [redacted] was not advised that the hearing would address the issue of noncompliance with verification requests, she was unable to address the issue in her written Hearing Brief. This, combined with the failure to base the denial of the request for postponement on good cause, resulted in a violation of [redacted]'s procedural and substantive due process right(s) to a fair hearing. [redacted] was not given the opportunity to argue why the negative action based upon her noncompliance with verification requests was premature. Because the Department failed to comply with the notice requirements in MCL 24.272 and because [redacted] was not granted a postponement, she was unable to clarify for ALJ Sexton that the purpose of the hearing was to address the issue of whether the SNT was countable and she was unable to

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<sup>52</sup> Program Administrative Manual 220, at 1-2, 25 (PPB 2007-004,4/1/2007).

redirect the focus of the hearing to that issue. If [redacted] were properly granted a postponement, despite the failure of the Department to give proper notice, she would have been afforded a slight opportunity to participate in the hearing on the issue of noncompliance. The complete lack of pre-hearing notice combined with the summary denial of her request for a postponement constitutes a clear deprivation of [redacted]'s due process rights. This deprivation resulted in a decision by ALJ Sexton that completely failed to address the material issue of the case. Further, as the SNT is neither available or countable, ALJ Sexton's decision to deny Medicaid based upon [redacted] failure to give irrelevant information is not only legally and factually incorrect, but it is a substantive and material error of law that must be overturned under MCL 24.306(1)(f).

Under MCL 24.306(1) (c) and (e), this Honorable Court must overturn decisions by administrative tribunals that are not based upon proper procedure and/or are arbitrary. The Department's denial of [redacted] adjournment request was based upon work-flow needs without consideration of the impact the denial would have on the due process rights of [redacted]. [redacted] was not provided with notice of the negative action against her and was thus unable to address the issue of noncompliance with the verification request in her hearing brief. Further, ALJ Sexton failed to address the issue of whether the assets within the SNT are countable, and whether [redacted] is required to verify non-existent income. As ALJ Sexton's erroneous decision to deny [redacted]'s eligibility for failure to provide verification was based upon improper procedure, which resulted in material prejudice, and was arbitrarily focused on an issue not properly presented, the administrative decision is not authorized by law under *Brandon School Dist v Michigan Ed Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991), and must be overturned.

### III. IN CONSIDERATION OF THE DEPRIVATION OF [redacted]'S DUE PROCESS RIGHTS, PUBLIC POLICY, AND THE VEXATIOUS NATURE OF THE ADMINISTRATIVE HEARING, AN AWARD OF ATTORNEY FEES IS NECESSARY AND APPROPRIATE.

It is clear in this case that in addition to the Department failing to comply with PAM 220's requirement to give proper and adequate written notice of a negative action, it did not properly request verification of [redacted]'s income under PAM 130, and failed to abide by Medicaid regulations concerning requesting verification of un-countable assets under PAM 130 and PEM 500. Combined with the Department's complete lack of compliance with State Medicaid policy, [redacted]'s due process rights were clearly violated when her request for an adjournment was [redacted].



summarily denied, and when she was not notified of the inclusion of the issue of noncompliance with verification requests as a hearing issue. In the same reckless and inappropriate vein with which \_\_\_\_\_'s Medicaid eligibility was handled prior to the administrative hearing, during and after the hearing ALJ Sexton completely failed to consider the proper issue in front of him (which was whether the assets in the SNT are countable for Medicaid purposes, and whether said assets and non-existent income are subject to verification) and instead erroneously based his decision on an issue that was not properly noticed or ripe for adjudication.

\_\_\_\_\_ did not prevail at the administrative level. As such, she is unable to make a request for costs and fees under the Administrative Procedures Act.<sup>53</sup> However, this Honorable Court is acting under the colors of an Appellate Court, and as such, MCR 7.216 is applicable. Under MCR 7.216 (C)(1), this Honorable Court can assess actual and punitive damages for “vexatious” proceedings. Also, this Honorable Court can award costs, including attorney fees, to the prevailing party in this action under Michigan Court Rule 2.625 (A). The Michigan Court Rules state that “an appellant in the circuit court who improves his or her position on appeal is deemed the prevailing party.” MCR 2.625(B)(4). There is no question that the administrative proceedings, as well as the final order of ALJ Sexton, are vexatious, as such, if \_\_\_\_\_ prevails in the circuit court, this Honorable Court should award her attorney fees for the time and effort spent regaining her eligibility.

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 request for Attorney fees and costs is appropriate in this action and this Honorable Court should grant her request. Allowing this decision to stand would be an abuse of discretion, would violate \_\_\_\_\_ (and similarly situated Medicaid beneficiaries') rights, and would essentially give permission to the Department to completely disregard the rules set forth in its Program Administrative (and Eligibility) Manuals.

#### RELIEF REQUESTED

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<sup>53</sup> see MCL 24.323, MCL 24.325, and 600.2421d

respectfully requests that this Honorable Court overturn the arbitrary decision by ALJ Sexton that was based upon improper procedure and is thereby unauthorized by law. MCL 24.306(1) and *Brandon School Dist v Michigan Ed Special Services Ass'n*, 191 Mich App 257, 263 (1991).

Further, respectfully requests that this Honorable Court remand this case to ALJ Sexton for him to make a factual determination as to whether the Special Needs Trust is an "other trust" under PEM 401.

If, on remand, ALJ Sexton finds that the facts of the case support a classification of the SNT as an "other trust", respectfully requests that this Honorable Court order the administrative tribunal to find that

1. the assets contained in the SNT are not countable for Medicaid purposes,
2. disbursements from the SNT are to be counted only to the extent that money is actually disbursed to and not if disbursements are made to third parties in exchange for goods and services in accordance with the provisions of the SNT and PEM 500 at page 33.
3. is not required to submit verification of the assets contained in the SNT, and
4. eligibility for Medicaid is to be retroactively reinstated.

further requests that this Honorable Court Order the Department to pay her attorney fees and costs in connection with the administrative proceeding and this appeal as the ALJ decision is contrary to law, vexatious, and merit-less.

Respectfully submitted,

PLC

By: \_\_\_\_\_

Petitioner/Appellant

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P.C.

By: \_\_\_\_\_

By: \_\_\_\_\_

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