

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL., :
ADAM MAY AND HEATHER MAY, :
IN THE MATTER OF D.M., I.M., B.M., :
RELATORS, :
v. :
DIRECTOR, DELAWARE COUNTY, :
OHIO, DEPT. OF JOB AND :
FAMILY SERVICES, ET AL., :
RESPONENT, :
AND :
DIRECTOR, OHIO DEPT. OF :
JOB & FAMILY SERVICES, ET AL., :
RESPONENT.

**RELATORS' MEMORANDUM IN OPPOSITION
TO RESPONDENT'S MOTION TO DISMISS**

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RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

"Kinship caregivers frequently face tremendous financial burdens when they assume responsibility for one or more children," additionally "[m]any caregivers lack affordable legal assistance to help them with decision-making and legal processes related to child placement options and agency proceedings. Caregivers often have to navigate legal and agency systems on their own."¹

I. INTRODUCTION

Relators have filed two petitions for a writ, although neither of the two were pertaining to the federal/ state laws surrounding financial responsibility. The two petitions previously filed, later dismissed, were Relators seeking a permanent custody status for D.M., I.M. and B.M. Which presents a very interesting point, if ODJFS/ DCDJFS had actually complied with federal/ state laws ensuring the disbursement of foster care maintenance payments to the eligible children from the day of the children's placement, on August 3, 2015, then perhaps the agency would have more of an incentive to provide permanency for the children. However, the agency is violating federal/ state laws, therefore no urgency exists for them to seek permanency. In reality, this situation is ideal for the agency, they went from paying roughly \$3,000.00 a month to paying \$0.00 a month for the children, of whom they have legal custody of. The children's placement may have changed however, the children's custody status has not. There is no substantial impact on the agency that this case has been pending in Delaware County, Ohio, Juvenile Division for two and half years, ***thirty (30) months***. This is twice as long as a child custody case usually takes in Ohio.² (Emphasis added).

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¹ Subcommittee on Responding to Child Abuse, Neglect and Dependency to the Supreme Court of Ohio Advisory Committee on Children, Families and the Courts, <http://law.capital.edu/>, *The Ohio Kinship Care Project*, (Pub. January 9, 2013).

² Ohio State Bar Association, <https://www.ohiobar.org/>, *What You Should Know about Changing Custody Agreements in Ohio*, (Pub. June 13, 2016)

According to a letter from the Director of Ohio Department of Job and Family Services, (ODJFS), "[t]he Ohio Department of Job and Family Services (ODJFS) is responsible for many of Ohio's safety net services. We supervise programs that provide cash and food assistance, child care, child support, unemployment compensation, protective services, and job- training and employment assistance. All of these programs provide vital services, often to Ohioans experiencing challenging times."³ Per the State of Ohio, Child and Family Services Plan for 2015- 2019, "ODJFS, under the provisions contained in the Ohio Revised Code (ORC), is authorized to: [a]ct as the single state agency to administer federal payments for foster care and adoption assistance made pursuant to Title IV- E. (ORC 5101.141) Oversee the Interstate Compact on the Placement of Children. (ORC 5103.233) Distribute funds to counties for a part of the counties' costs for children services. (ORC 5101.14) Issue certificates and licenses to family foster homes, medically fragile foster homes, treatment foster homes, group homes, Children's Residential Centers, and Crisis Care Facilities *once compliance with all requirements has been achieved.*"⁴ (Emphasis added).

II. ARGRUMENT

OAC 5101:2-47-01(B), guarantees that "[t]he Ohio department of job and family services (ODJFS) is committed to ensuring the maximum number of children receiving assistance under the Title IV- E foster care maintenance (FCM) program at any time. . . accordance with 45 C.F.R. 1355. 40 (01/ 2012)." "(2) This goal will be achieved by periodic monitoring and evaluation by ODJFS of agency case records and reports to ODJFS, with full realization *no child eligible to receive assistance under the requirements of the Title IV- E program may be denied assistance on the basis of this goal.*" (Emphasis added).

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³ ODJFS, <https://jfs.ohio.gov/>, *ODJFS SFY 2014 Annual Report, Letter from the Director*, p.3, (Rev. July, 2014).

⁴ ODJFS, <http://jfs.ohio.gov/>, *State of Ohio Child and Family Services Plan 2015-2019*, (Pub. June 30, 2014).

SEC. 422. [42 U.S.C. 622](a), states "[i]n order to be eligible for payment under this subpart, a State must have a plan for child welfare services which has been developed jointly by the Secretary and the State agency designated pursuant to subsection (b)(1), and which meets the requirements of subsection (b)." SEC. 422. [42 U.S.C. 622](b)(1)(B), "to the extent that child welfare services are furnished by the staff of the State agency or local agency administering the plan, a single organizational unit in such State or local agency, as the case may be, will be responsible for furnishing such child welfare services..." SEC. 422. [42 U.S.C. 622](b)(15)(B), subparagraph (A) shall ***not be construed to reduce or limit the responsibility of the State agency responsible for administering the State plan*** approved under title XIX to administer and provide care and services for children with respect to whom services are provided under the State plan developed pursuant to this subpart." (Emphasis added).

A. Enforceable right.

Title 42 U. S. C. 1983 imposes liability on anyone who, acting under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." This section authorizes suits to enforce individual rights under federal statutes as well as the Constitution. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Nonetheless, "Title 42 U.S.C 1983 does not provide an avenue for relief every time a state actor violates a federal law." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005). Rather, "to sustain a Title 42 U.S.C. 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *Id.* at 120 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002)). For this Court to find an individually enforceable right: 1) "Congress must have intended that the provision in question benefit the plaintiff"; 2) the asserted right must not be "so vague and amorphous that its enforcement would strain judicial competence"; and 3) "the statute must unambiguously impose a binding obligation on the States." *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) .

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To illustrate, in *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006), the evaluation whether Medicaid's freedom-of-choice provision established enforceable rights. The provision reads: “[a] State plan for medical assistance must provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required.” 42 U.S.C. 1396a(a)(23). The provision granted Medicaid-recipients an individually enforceable right to choose their medical provider, reasoning that the phrase “any individual eligible for medical assistance” evinced “the kind of individually focused terminology that unambiguously confers an individual entitlement under the law.” *Harris*, 442 F.3d at 461. Noted that “[t]he mandate does not contain the kind of vagueness that would push the limits of judicial enforcement.” *Id.* at 462. It is explained that “the ‘must provide’ language of the provision confirms that the statute is ‘couched in mandatory, rather than precatory, terms.’” *Id.* (quoting *Blessing*, 520 U.S. at 341), (*Barry v. Lyon*, 834 F.3d 706, 717 (6th Cir. 2016)) (holding that the federal Supplemental Nutrition Assistance Program—mandating that “[a]ssistance under this program shall be furnished to all eligible households,” 7 U.S.C. 2014(a)—created a privately enforceable statutory right).

Concluded, the Act confers upon foster parents an individually enforceable right to foster care maintenance payments. First, the Act mandates payments “on behalf of each child.” 42 U.S.C. § 672(a)(1). This focus on individual recipients is similar to language creating private rights in *Harris* and *Barry*. Unlike *Gonzaga*, the Act requires individual payments and focuses on the needs of specific children, as opposed to merely speaking to the state's policy or practice. Second, the Act confers a monetary entitlement upon qualified foster families and includes an itemized list of expenses that the state must cover. 42 U.S.C. 675 (4)(A). It therefore lacks vague and amorphous terms that might strain judicial competence. Finally, 42 U.S.C. 672(a)(1)'s “shall make” language “unambiguously impose[s] a binding obligation on the States.” *Blessing*, 520 U.S. at 341.

Both the Supreme Court and the Sixth Circuit, however, have found that laws phrased in the active voice, with the state as the subject, confer individually enforceable
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rights. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502–03, 509–10 (1990), superseded on other grounds by statute; *Harris*, 442 F.3d at 461–62. This should not be surprising: Congress must not only use rights- creating language, but also “unambiguously impose a binding obligation on the States.” *Blessing*, 520 U.S. at 341. When Congress names the state as the subject, writes in the active voice, and uses mandatory language, it leaves no doubt about the actor's identity or what the law requires.

ODJFS/ DCDJFS may argue that because the Act does not dictate the amounts that States must pay to foster parents, it is not sufficiently specific and definite to qualify as enforceable under, 42 U.S.C. 1983. But the Supreme Court in *Wilder* recognized a private right to a monetary benefit even though the law granted states discretion to set the applicable rate. “That the [statute] gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the [statute], but it does not render the [statute] unenforceable by a court.” *Wilder*, 496 U.S. at 519. Accordingly, 42 U.S.C. 672(a) confers an individually enforceable right to foster care maintenance payments.

B. Enforceable under 42 U.S.C. 1983

Once a plaintiff demonstrates that a statute creates a private right, “there is only a rebuttable presumption that the right is enforceable under 42 U.S.C. 1983.” *Abrams*, 544 U.S. at 120 (quoting *Blessing*, 520 U.S. at 341). The state may rebut the “presumption by demonstrating that Congress did not intend that remedy for a newly created right.” *Id.* (citing *Blessing*, 520 U.S. at 341, and *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)). “[E]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under 42 U.S.C. 1983.” *Id.*

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In Wilder, the Medicaid Act “authorize[d] the Secretary to withhold approval of plans,” to “curtail federal funds to States whose plans are not in compliance,” as well as required States to set up an administrative review system. 496 U.S. at 521–22. Notwithstanding these procedures, the Court found that “the Secretary's limited oversight” and “[t]he availability of state administrative procedures do not foreclose resort to 42 U.S.C. 1983.” *Id.* at 522–23. Similarly, in Harris, was held that a plaintiff could sue under 42 U.S.C. 1983 because the Medicaid Act “does not provide other methods for private enforcement of the Act in federal court.” 442 F.3d at 462. Further, noted that the authority to “withhold funds to non-complying States” and “the Act's requirement that States grant an opportunity for a fair hearing are not inconsistent with a private action.” *Id.* at 463. Blessing, 520 U.S. at 348 finding that Congress left open access to 42 U.S.C. 1983 because the statute “contains no private remedy through which aggrieved persons can seek redress.” Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 427–28 (1987).

The Act's weak enforcement mechanisms fall short of foreclosing access to 42 U.S.C. 1983 remedies. Like in Wilder, Blessing, and Harris, the reviews of state's plan only on a program-wide basis, and lacks authority to ensure the state provides benefits to individual foster parents. Indeed, a state could implement a plan that substantially conforms to the Act's requirements, yet neglect to pay foster parents in individual cases. Absent resort to 42 U.S.C. 1983, foster families possess no federal mechanism to ensure compliance with the Act. And although the Act requires states to provide for administrative review of denied claims, 42 U.S.C. 671(a)(12), the “availability of state administrative procedures ordinarily does not foreclose resort to 42 U.S.C. 1983.” Wilder, 496 U.S. at 523; Harris, 442 F.3d at 463.

Having determined that the Act creates an individually enforceable statutory right, we next evaluate whether the Relators are entitled to maintenance payments. Section 672(a) restricts the class of children entitled to benefits in two relevant ways. First, the child must be in the legal custody of the Title IV-E agency, once the child is adopted or
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placed in a permanent guardianship, the Act no longer requires maintenance payments. 42 U.S.C. 672(a)(2)(B). Second, the child must be placed in a licensed or approved "foster family home." *Id.* 42 U.S.C. 672(a)(2)(C). ODJFS/ DCDJFS does not dispute that the said children are in their legal custody, nor do they ignore that Relators are licensed foster parents. Though, ODJFS/ DCDJFS does argue that Relators are not eligible to receive foster care maintenance payments due to their relation to the children and they claim Relators are the permanent custodians of D.M., I.M. and B.M. Relators ask this Court to order ODJFS/ DCDJFS to make payments.

III. STANDARD OF MANDAMUS

The Ohio Supreme Court has articulated three requirements for a writ to issue: "(1) a clear legal right to the relief prayed for; (2) respondents are under a clear duty to perform the acts; and (3) Relator has no plain adequate remedy in the ordinary course of the law."⁵

A. Clear legal right to the relief prayed for.

The first requisite is that Relator must have a clear legal right to the relief prayed for. ODJFS/ DCDJFS has deemed D.M., I.M., and B.M. Title IV- E eligible to receive foster care maintenance payments and recognizes that Relators are certified foster parents. OAC 5101:2-1-01 (121), defines foster care maintenance as "an individual entitlement for financial assistance for board and care of children who meet the eligibility requirements contained in Chapter 5101:2-47 of the Administrative Code, who are in the placement and care of a Title IV- E agency and are in an approved substitute care placement." The definition of entitlement is "[a]n individual's right to receive a value or benefit provided by law."⁶ USLegal classifies that "[a]n entitlement refers to a guarantee of access to benefits based on established rights or legislation. Entitlement programs are government

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⁵ State ex rel. Nat. Broadcasting Co., Inc. v. City of Cleveland, 38 Ohio St3d 79 (1988).

⁶ Free Dictionary, <http://legal-dictionary.thefreedictionary.com/>, *Entitlement*, (Acc. June 25, 2017).

programs that require payment to persons who succeed specific qualifications."⁷ Sec. 472. [42 U.S.C. 672](a)(1), explains that "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative... into foster care." The said children have met the specific qualifications therefore, entitled to receive foster maintenance payments.

ODJFS/ DCDJFS argue that Relators are ineligible to receive foster care payments because they are related to the children and claim that Relators are the children's "permanent custodians." RC 2151.011(31), clarifies that "[p]ermanent custody" means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations." Relators are **not** the children's permanent custodians, and never have they been, as ODJFS/ DCDJFS claim they are. (Emphasis added).

SEC. 471. [42 U.S.C. 671](a), explains that "[i]n order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which -" (29) (B), "explains the options the relative has under Federal, State, and local law to participate in the care and placement of the child, including any options that may be lost by failing to respond to the notice; (C) describes the requirements under paragraph (10) of this subsection to become a foster family home and the additional services and supports that are available for children placed in such a home." Relators were **not** presented with any "options" under the law. ODJFS/ DCDJFS did **not** describe the requirements to become a foster family home and ODJFS/ DCDJFS did not describe the

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⁷ USLegal, <https://definitions.uslegal.com/>, *Entitlement Law and Legal Definition* (Acc. June 25, 2017).

additional services and supports available for the children, if placed in such a home. In fact, ODJFS/ DCDJFS denied Relators additional services and supports, even after Relators fulfilled the requirements under paragraph 10 of SEC. 471. [42 U.S.C. 671]. (Emphasis added).

Relators have been in compliance with; the general requirements for foster caregivers and applicants, (OAC 5101: 2-7-02), the care and treatment team, (OAC 5101: 2-7-03), records and confidentiality, (OAC 5101: 2-7-04), sleeping arrangements, (OAC 5101: 2-7-05), meals, (OAC 5101: 2-7-06), health services, (OAC 5101: 2-7-07), alternative care arrangements, (OAC 5101: 2-7-08), care, supervision and discipline, (OAC 5101:2-7-09), social and education, (OAC 5101: 2-7-11), site and safety requirements for a foster home, (OAC 5101: 2-7-12), required notification, (OAC 5101:2-7-14), and transportation, (OAC 5101:2-7-15). The children were placed "in such a home," as required under SEC. 471. [42 U.S.C. 671](10), and yet ODJFS/ DCDJFS refuses to provide *any* services and supports. (Emphasis added).

Understanding the importance of relative caregivers, the Fostering Connections to Success and Increasing Adoptions Act of 2008, Public Law (P. L.)110-351, made numerous amendments to the Social Security Act to promote the safety, permanency, and well-being of children and youth in foster care. P.L.110- 351 amended the Act at section 471(a)(10) to *explicitly permit* child welfare agencies to waive on a case- by- case basis non- safety related licensing standards for relative foster family homes. The law also required the U. S. Department of Health and Human Services, (HHS), to submit a Report to Congress on children placed in relative foster family homes and the use of licensing waivers. (Emphasis added).

To prepare the report to Congress, "[s]tates were asked to provide the following information for Fiscal Year (FY) 2009 on relative care: [t]he number and percentage of children in foster care placed in licensed relative foster family homes; [t]he number and percentage of children in foster care placed in unlicensed relative foster family homes;

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[t]he frequency of case- by- case waivers of non- safety licensing standards for relative foster family homes; [t]he types of non- safety licensing standards waived; [a]n assessment of how such case- by- case waivers of non- safety licensing standards have affected children in foster care, including their safety, permanency and well- being; [r]easons why relative foster family homes may not be licensed *despite authority* to grant such case- by- case waivers of non- safety licensing standards; [a]ctions the State plans to take, or is considering taking, to increase the percentage of relative foster family homes that are licensed while ensuring the safety of children in foster care and improving their permanence and well- being; and [s]uggestions the State has for administrative and/ or legislative actions to increase licensed relative care."⁸ At that time, the State of Ohio had 146 children in licensed relative homes, which is less than 1%. The number of children in unlicensed relative homes was 2, 270, which is 17%. The State of Ohio had no data to report on the frequency of licensing waivers approved. *Id.* (Emphasis added). Despite the many changes, within federal laws surrounding the growing need for relative caregivers and the important roles relative caregivers could have on children that have been removed from their homes due to abuse/ neglect, ODJFS/ DCDJFS ignore these changes leaving relative caregivers with no support or services.

B. Respondent is under a clear duty to perform the acts.

The second requisite is that the respondent is under a clear duty to perform the acts. OAC 5101: 2-52-04(E)(3), outlines ODJFS/ DCDJFS' responsibilities for the interstate compact on the placement of children, stating that the "PCSA holding custody of the child shall: [m]aintain financial responsibility for the care, medical care and education of the child and retain jurisdiction of the child until one of the following occurs. . . from the receiving state." OAC 5101: 2-47-04(A), affirms that "[t]he Title IV- E agency that holds legal responsibility as defined in rule 5101:2-47-13 of the Administrative Code for the care and placement of the child retains responsibility for the management of the

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⁸ U.S. Dept. of Health and Human Services, <https://www.acf.hhs.gov/>, *Report to Congress on States' use of waivers of non- safety licensing standards for relative foster family homes*, (Pub. 2011).

foster care maintenance (FCM) case regardless of where the biological family is living or where the child is placed." OAC 5101:2-47-01(C), confirms that "[t]he Title IV- E agency is responsible for the administration of the (FCM) program. The Title IV- E agency having responsibility for the placement and care of the child shall: (1) *ensure the proper administration of funds, allocated or reimbursed*, (2) [d]etermine eligibility for FCM program services, (3) [m]aintain a separate FCM case record for each program eligible child in the legal responsibility of the Title IV- E agency. (4) [a]ssure that each child... case plan of the child." (Emphasis added).

Per OAC 5101:2-42-90(J), "[t]he PCSA or PCPA shall develop an individual child care agreement (ICCA) each time a child is placed in a substitute care setting, including a children's residential center (CRC) administered by the PCSA." ODJFS' ICCA, (JFS 01700), section sixteen on page eight, clarifies the agency's rights and responsibilities and it reads identical to legal custody, as defined under ORC 2151.011(A)(21). "When a child is placed in the temporary custody of (a Title IV- E agency), Ohio Revised Code stipulates that the Agency has the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education and medical care, all subject to any parental residual rights, privileges, and responsibilities."

On January 26, 2015, ODJFS/ ODJFS entered into an Agreement for Temporary Custody of D.M., I.M. and B.M., (JFS 01645), which has not been terminated. Per OAC 5101: 2-42-06(C), "[b]y execution of the JFS 01645, a PCSA or PCPA accepts the responsibilities as specified on the JFS 01645, in addition to any further responsibility imposed by law on one who holds temporary custody of a child." Relators solely have physical custody of the children and according to ORC 3127.01(B)(14), "[p]hysical custody" means the physical care and supervision of a child." Therefore, ODJFS/ DCDJFS has a legal obligation to financially support the said children.

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On May 22, 2017, Director of ODJFS signed an "Operating Request" to the State of Ohio Controlling Board. "The Ohio Department of Job and Family Services (ODJFS) respectfully requests Controlling Board approval of a waiver of competitive selection in the amount of \$761,998.00 for FY 2018 and \$761,998.00 for FY 2019 from fund 3N00, ALI 600628 (Foster Care Program - Federal) and fund 5U60, ALI 600663 (Family and Children Support) to renew a contract... for foster care." The important part of this request is what the Director of ODJFS states within the fourth paragraph, "[t]he consequences of not providing these services are potential loss of Ohio's Title IV-Waiver, and Title IV-E and Title IV-B funding due to non-compliance with the HHS terms and conditions."⁹ The state of Ohio has the potential to lose federal funding under 45 CFR 1356.71, the "[f]ederal review of the eligibility of children in foster care and the eligibility of foster care providers in title IV-E programs." 45 CFR 1356.71 (a)(c)(4), describes that "[a]t the completion of the primary review, the review team will determine the number of ineligible cases." The review will determine if the state is "substantial compliance" or "noncompliance." 45 CFR 1356.71(d), explains that the "Title IV-E agencies will be reviewed against the requirements of title IV-E of the Act regarding." 45 CFR 1356.71 (d)(iii), "[r]esponsibility for placement and care vested with the title IV-E or other public agency per section 472(a)(2)(B) of the Act; 45 CFR 1356.71 (d) (iv), [p]lacement in a licensed foster family home or child care institution." Per 45 CFR 1356.71(h)(1), "[d]isallowances will be taken, and plans for program improvement required, based on the extent to which a title IV-E agency is not in substantial compliance with recipient or provider eligibility provisions of title IV-E, or applicable regulations in 45 CFR parts 1355 and 1356." The Director of ODJFS is fully aware that DCDJFS is violating federal/ state laws therefore, Relators will presume that the Director

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⁹ Ohio Office of Budget and Management, <https://ecb.ohio.gov/>, *Operating Request; Controlling Board No. JFS0100428, (Approved June 12, 2017)*.

would want to immediately address and correct these issues, given that she is concerned that the state may lose federal funds due to non-compliance. The state of Ohio may be "county-administered," with the execution of Subgrant Agreements throughout the state, though these subgrantees are overseen by the Director of ODJFS. The Subgrant agreements allow Subgrantees to administer programs under Title IV-E of the Social Security Act, in accordance with all applicable laws, *including but not limited to rules or regulations promulgated by the federal government.* (Emphasis added).

C. Relators have no plain adequate remedy in the ordinary course of the law.

The third requisite is that Relators have no plain adequate remedy in the ordinary course of the law. A "plain and adequate remedy" has been interpreted to include administrative appeals. Relators realize that a writ of mandamus is an extraordinary remedy and comprehend to the need for exhausting administrative remedies first. Exhausting administrative remedies prevents premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors.

Relators filed a grievance complaint with DCDJFS, (OAC 5101:2-5-11), on August 13, 2015, and their complaint was quickly denied. Relators requested a state hearing, with ODJFS Bureau of State Hearings, which was overruled with compliance. DCDJFS was ordered to provide them with the "following information: a) [h]ow to apply for Ohio works first (OWF) child-only financial assistance and Medicaid coverage, b) [h]ow to apply for certification as a foster caregiver, c) [t]he requirements for foster caregiver certification, d) [t]he difference in payment between an OWF child-only payment and the foster care per diem, e) [t]he difference (if any) in the eligibility for supportive services. Ohio Admin. Code 5101:2-42-18(B) (5) (a-e)." ¹⁰ Relators were already licensed foster parents, which was clearly communicated during the state hearing. The state

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¹⁰ ODJFS Bureau of State Hearings. Case No. 3080621. March 26, 2016

ODJFS Bureau of State Hearings. Case No. 3080622. March 26, 2016

ODJFS Bureau of State Hearings. Case No. 3080623. March 26, 2016

hearing ruling provided Relators with only more confusion and delay, Relators then asked for an administrative appeal. The administrative appeal ruling was "[w]e find that none of these provisions contemplate the inclusion of Foster Care Maintenance issues as appealable issues to a state hearing. Therefore we do not address the merits of the appeal as they are not appealable to a state hearing and we affirm the hearing decision."¹¹ Relators filed for a judicial review for a more definitive ruling. The administrative appeal stated, "[i]f you disagree with the decision, you may appeal it to the court of common pleas pursuant to sections 119.12, 5101.35(E), and 5160.31 of the Revised Code. Additionally, "[y]ou must also file a copy of the notice of appeal with the court of common pleas in the county in which you reside (Franklin County, if you do not reside in Ohio). On May 18, 2016, within the allotted thirty days, Relators filed for a judicial review in the Court of Common Pleas, Franklin County, Ohio. On November 22, 2016, Judge CoCroft states "[t]he record demonstrates that the decision was mailed on April 18, 2016, and the Bureau of State Hearings affirmed this decision. Thus, the record demonstrates that the April 18, 2016 Administrative Appeal Decision did not address the merits of the appeal, specifically relying on the definitions as set forth in what it cited as, purported O.A.C. 5101: 6-3-01, and affirmed the State Hearing Decision on a procedural matter. Thereafter, Appellant filed the appeals herein."¹² The Court concluded "that Appellant had a right to a hearing on the merits and thus, the April 18, 2016, Administrative Appeal is **REVERSED AND REMANDED.**" *Id.*

Respectfully submitted,

/s Adam May

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Respectfully submitted,

/s Heather May

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¹¹ ODJFS Bureau of State Hearings. Adm. App. Case No. 3080621. April 18, 2016
ODJFS Bureau of State Hearings. Adm. App. Case No. 3080622. April 18, 2016
ODJFS Bureau of State Hearings. Adm. App. Case No. 3080623. April 18, 2016

¹² Heather May ET AL- VS- Ohio State Department of Job and Family Services, Case No. 16CV004864, Franklin Co. Court of Common Pleas.

Heather May ET AL- VS- Ohio State Department of Job and Family Services, Case No. 16CV004866, Franklin Co. Court of Common Pleas.

Heather May ET AL- VS- Ohio State Department of Job and Family Services, Case No. 16CV004903, Franklin Co. Court of Common Pleas.

Another administrative appeal was held on April 6, 2017. "The state hearing decision is REVERSED and the Agency is ordered to redetermine FCM eligibility according to Chapter 5101:2-47 of the Ohio Admin. Code by starting with the fact of a valid removal from the AR's home on January 26, 2015. The Agency will need to determine whether all other elements of eligibility are met including ADC- relatedness. The agency is directed to send the Appellant written notice of the action taken as a result of this decision via an ODJFS 4074, 4065, 7334, 7401 or other appropriate state form."¹³ Shortly after the second administrative appeal decision, a caseworker from ODJFS/ DCDJFS notified Relators, via email, their ineligibility to receive foster care maintenance payments on behalf of the said children due to Relators being the children's "permanent custodians."

There is no inherent right to appeal a decision of an administrative board, commission or other administrative body. The right to appeal is conferred by statute only. *Kelsey's Learning Ctr. V. Ohio Dept. of Job and Fam. Servs.*, 2006-Ohio-3657. The decision of ODJFS/ DCDJFS not to administer foster care maintenance payments to Relators is expressly not subject to appeal. Two very important competing concerns are implicated when a party wishes to challenge a particular state actor's decision that expressly is not appealable. The first concern is that the unavailability of an appeal indicates the clear intention that full discretion is to be entrusted to the state agency. The opposing concern is that if an agency's discretionary decision were truly allowed to be absolutely unchallengeable, an aggrieved party would have no remedy whatsoever, giving the state agency unfettered discretion and raising fundamental due process concerns. Sec. 16, Article I of the Ohio Constitution, which provides that a remedy shall be available "by due course of law."

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¹³ ODJFS Bureau of State Hearings. Adm. App. Case No. 3080622. February 15, 2017
ODJFS Bureau of State Hearings. Adm. App. Case No. 3080623. February 15, 2017

Courts have determined that some level of review must be recognized. Furthermore, courts have determined that a writ of mandamus provides an appropriate balance between the extreme of allowing no challenge at all and the other alternative of completely ignoring the explicit directive that an agency's particular determination is not meant to be appealable. In such a mandamus action, the aggrieved party can challenge the agency's decision, but must demonstrate an abuse of discretion before relief can be provided.

"In order for a court to grant a motion to dismiss for failure to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." O' Brien v. Univ. Community Tenants Union, Inc., 42 Ohio St.2d 242, 245 (1975).

IV. CONCLUSION

A very similar case arose through service of a guardian ad litem, (GAL), for neglected and abused children. In 2013, two young boys were removed from their home and were appointed a guardian ad litem. The Kentucky Cabinet for Health and Family Services approved a great- aunt, but she could only afford to take one of the boys. One was placed with her, the other in a foster home. Looking for a way to unite the brothers the guardian ad litem had discovered that the cabinet was wrongly denying them foster care maintenance payments, and not only to them but to all other children placed with relatives. The GAL filed a motion demanding for this family the same foster care maintenance payments that children placed with non- relatives were receiving. The cabinet refused. On January 27, 2017, the 6th U.S. Circuit Court of Appeals ruled that the district court's decision is reversed and that Kentucky must pay relatives who serve as foster parents in the same manner it pays non- relative, licensed foster parents.¹⁴ Currently, the Kentucky Cabinet for Health and Family Services is seeking a review from the U.S. Supreme Court.

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¹⁴ United States Court of Appeals, Sixth Circuit. Case No. 16- 5461, (Decided: January 27, 2017).

Relators respectfully request that this court not dismiss their motion. Relators' complaint in mandamus contains significant merit regarding noncompliance of state and federal laws. ODJFS/ DCDJFS have breached the Interstate Compact on the Placement of Children by neglecting to maintain their financial responsible for D.M., I.M., and B.M. ODJFS/ DCDJFS have violated state and federal laws by denying Title IV- E foster care maintenance payments to eligible children. The decision of ODJFS/ DCDJFS not to administer foster care maintenance payments have violated the rights of Relators', as well as the rights of D.M., I.M. and B.M. Under state and federal law, ODJFS/ DCDJFS was required to allocate foster care maintenance payments to Relators when the children were placed with them, through an ICPC. Relators have been seeking the receipt of foster care payments for the said children for almost two years, only to learn that the entire time the children have been eligible to receive foster care maintenance payments. In which the Title IV- E agency is only responsible for 37.68% of the payment. Ohio's Federal Financial Participation for Title IV- E foster care maintenance payments for Federal Fiscal Year 2017, (October 1, 2016, through September 30, 2017), is 62.32%.¹⁵

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¹⁵ ODJFS, <http://emanuals.jfs.ohio.gov/>, *FCASPL 312, Title IV-E Foster Care Maintenance Ceilings Revisions*, (Pub. September 23, 2016).

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL., :
ADAM MAY AND HEATHER MAY, :
IN THE MATTER OF D.M., I.M., B.M., :
RELATORS, :
v. :
DIRECTOR, DELAWARE COUNTY, :
OHIO, DEPT. OF JOB AND :
FAMILY SERVICES, ET AL., :
RESPONENT, :
AND :
DIRECTOR, OHIO DEPT. OF :
JOB & FAMILY SERVICES, ET AL., :
RESPONENT.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
MEMORANDUM IN OPPOSITION
TO RESPONDENT'S MOTION TO DISMISS

Respectfully submitted,

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