Public Policy Position
Amicus Brief in the Case of
Joseph Ayotte v. Michigan Department of Health & Human Services
(Case No. 339090)

The Children's Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 459 members. The Children's Law Section is not the State Bar of Michigan and the position expressed herein is that of the Children's Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Children's Law Section has a public policy decision-making body with 19 members. On March 15, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Section submitting an amicus brief in the case of *Ayotte v. Michigan Dept of Human Services*, 0 members voted against this position, 0 members abstained, 3 members did not vote.

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

JOSEPH AYOTTE,

Appellee,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellant.

COA Case No. 339090
Cir Ct Case No. 17-013506-AV
MAHS Case No.: 16-003368

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BRIEF OF *AMICI CURIAE*
CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN AND MICHIGAN PROBATE JUDGES ASSOCIATION IN SUPPORT OF APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTIONAL BASIS

The jurisdictional summary set forth in Appellant's Brief on Appeal is complete and correct. MCR 7.212(D)(2).

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE ORDER TO APPREHEND AND DETAIN ENTERED IN THE DELINQUENCY PROCEEDING DID NOT CONSTITUTE, FOR TITLE IV-E PURPOSES, THE FIRST COURT ORDER PLACING THE WARD INTO FOSTER CARE?

Amici Answer: YES.

Appellee Answers: YES.

The Lower Court Answers: YES.

Appellant Answers: NO.

II. WHETHER FUNDAMENTAL LEGAL POLICIES AND DOCTRINES REQUIRE THAT APPELLANT, AS THE PARTY WHOSE MISTAKES HARM APPELLEE, BE HELD RESPONSIBLE FOR SUCH HARM?

Amici Answer: YES.

Appellee Answers: YES.

The Lower Court Answers: YES.

Appellant Answers: NO.

III. WHETHER IT IS ERROR TO RELY UPON APPELLANT'S OWN UNPROMULGATED POLICY MANUAL WHERE STATE LAW DOES NOT AUTOMATICALLY EXEMPT APPELLANT FROM THE RULE PROMULGATION PROCESS FOR RULES PERTAINING TO FEDERAL FOSTER CARE FUNDING?

Amici Answer: YES.

Appellee Answers: YES.

The Lower Court Answers: YES.

Appellant Answers: NO.

STATEMENT OF INTEREST

A. Children's Law Section of the State Bar of Michigan

The Children's Law Section (Section or CLS) is a recognized section of the State Bar of Michigan. The Section has over 400 members who are attorneys and judges working in Michigan's child welfare system. Working together, the Section's members make crucial decisions each day that directly and substantially affect the lives of children and families. The Section provides services to its membership in the form of educational seminars, advocating and commenting on proposed legislation relating to child welfare law topics, and filing *amicus curiae* briefs in selected child welfare law cases filed in Michigan Courts.

The Section, because of its active and exclusive involvement in the field of child welfare/juvenile law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in these legal areas. The instant case is of particular interest to members of the Children's Law Section because it concerns the use and availability of federal foster care funding under Title IV-E of the Social Security Act. As such, the case concerns the interests of children and their families, when children are removed from their families' homes and placed into foster care settings throughout the State of Michigan. Because such out-of-home placements can be both lengthy in duration and costly, the availability of federal funds for such placements is of importance not only to the families involved, but to Michigan foster parents, to the funding units of local counties, and the Probate Courts and Family Law Divisions of Circuit Courts, as well.

B. Michigan Probate Judges Association

The Michigan Probate Judges Association (Association or MPJA) is an association of Judges whose mission, as referenced in Article II of the Association's Constitution, is "to

enhance the role of probate judges as servants of justice." Toward that end, the association promotes the proper administration of law, along with sound principles of equity, for the ordering of a just society.

Both the CLS and the MPJA work to advance the rights and interests of children and families who become involved in matters before the Probate Courts and Family Divisions of the Circuit Courts, in the State of Michigan. Both groups strive to improve courts and agencies serving children and their families, through regular meetings among peers, organizing and attending relevant training events, active engagement by members on multi-disciplinary task forces convened by the Michigan Department of Health and Human Services (DHHS), State Court Administrative Office (SCAO), Courts and other groups; and participation as *amicus curiae* in cases with the potential for widespread impact in the field of child welfare law.

STATEMENT OF FACTS

The Statement of Facts set forth in Appellant's Brief on Appeal as corrected by the Counter-Statement of Facts in Appellee's Brief on Appeal is complete and correct. MCR 7.212(D)(2).

ARGUMENTS

I. THE ORDER TO APPREHEND AND DETAIN ENTERED IN THE DELINQUENCY PROCEEDING DID NOT CONSTITUTE, FOR TITLE IV-E PURPOSES, THE FIRST COURT ORDER PLACING THE WARD INTO FOSTER CARE.

As noted in Appellee's Brief on Appeal, the Supremacy Clause compels this Court to begin its analysis with the federal statutory language at issue. See, US Const, art VI, cl 2. Both the U.S. Supreme Court and the Michigan Supreme Court have repeatedly held that Subchapter IV of the Social Security Act preempts inconsistent state laws. *Carleson v Remillard*, 406 US 598, 600; 92 S Ct 1932; 32 L Ed 2d 352 (1972); *Townsend v Swank*, 404 US 282, 286; 92 S Ct 502; 30 L Ed 2d 448 (1971); *In re of Vary's Estate*, 401 Mich 340, 346; 258 NW2d 11 (1977). Even the Michigan Attorney General's Office has acknowledged this constraint upon state law. See, OAG 1985, No. 6325 (December 11, 1985) (**Appendix A**). As Appellee notes, incongruent state laws violate the Supremacy Clause, and congruent state laws result in a redundant analysis. Thus, the focus of this Court's analysis should be on the language contained in the statute in which Congress created Title IV-E foster care funding, *i.e.*, 42 USC 672.

Courts review issues of statutory interpretation *de novo*. *Kemp v Farm Bureau Gen Ins Co of Michigan*, 500 Mich 245; 901 NW2d 534 (2017). When interpreting statutes, a Court's goal is to give effect to the Legislature's intent, focusing first on the statute's plain language. *Id.* In doing so, Courts examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. *Id.* "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Kemp*, 500 Mich 245, __; 901 NW2d at 538-39.

A. Plain Language of the Statute

Subsection (a) of 42 USC 672 sets forth four areas of Title IV-E eligibility, specifically general eligibility requirements, removal and foster care placement requirements, AFDC eligibility requirements, and eligibility of certain alien children. 42 USC 672(a)(1)-(4). With regard to the general eligibility requirements, this federal statute requires that a child be "*removed from the home* of a relative specified in section 606(a) of this title (as in effect on July 16, 1996) *into foster care*" if "the removal *and foster care placement* met, and the placement continues to meet, the [removal and foster care placement requirements]" and "the child, while in the home, would have met the AFDC eligibility requirements ..." 42 USC 672(a)(1) (all emphasis added).

At least two features of this statutory language are salient. First, a child must be "*removed from the home* of a relative specified in section 606(a) of this title (as in effect on July 16, 1996) *into foster care*." 42 USC 672(a)(1) (all emphasis added). It is the prepositional phrase "into foster care" that rings the death knell for Appellant's argument on appeal in this case. The record is clear – and the parties do not dispute – that the ward in this case was removed from the home of a "specified relative."[1] The record is further clear – and the parties do not dispute – that the ward in this case was placed in a juvenile detention facility, not "into foster care" or "in a foster family home or child-care institution" as required by 42 USC 672(a)(1) and (2)(C).

Appellant proffers a somewhat convoluted argument that the ward's placement in a juvenile detention facility affects only the "reimbursability" of the ward's foster care placement, not the ward's general eligibility for Title IV-E federal foster care funds. The problem with

[1] See, 42 USC 606 (1995) (defining the term "specified relative" as a child's "father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home . . .").

Appellant's argument is that the requirement that the ward be "removed from the home ... into foster care" was enacted by Congress under the heading entitled "Eligibility." 42 USC 672(a)(1). Moreover, Title IV-E's definition of "foster care" expressly *excludes* "detention facilities ... or any other facility operated primarily for the detention of children who are determined to be delinquent." 42 USC 672(c)(2). So it was impossible for the ward's placement in a juvenile detention facility to affect only the "reimbursability" of the ward's foster care placement since, according to Title IV-E's definition of "foster care," the November 11, 2014, Order to Apprehend and Detain did not result in a placement in foster care to reimburse. Stated alternatively, a ward must first be placed "into foster care" before the issue of foster care placement reimbursability can arise, and 42 USC 672(c)(2) makes clear that placements in "detention facilities ... or any other facility operated primarily for the detention of children who are determined to be delinquent" are not foster care placements.

This analysis is confirmed by the second salient feature of the general eligibility requirements of 42 USC 672(a)(1). This feature requires that "the removal *and foster care placement* met, and the placement continues to meet, the [removal and foster care placement requirements]" of 42 USC 672(a)(2). 42 USC 672(a)(1) (emphasis added). Again, however, according to the statutory definition of "foster care," there can be no "foster care placement" when wards are placed in "detention facilities ... or any other facility operated primarily for the detention of children who are determined to be delinquent," as these are not foster care placements. 42 USC 672(c)(2).

Perhaps most harmful to Appellant's argument is that the contrary-to-the-welfare requirement of 42 USC 672(a)(2)(A) applies only when there is a "removal and foster care placement ..." 42 USC 672(a)(2)(A)(ii). Thus, the statutory obligation that state court judges

make such a contrary-to-the-welfare finding does not arise absent a foster care placement, which the parties agree does not occur when a child is placed in a juvenile detention facility. 42 USC 672(c)(2).

The correctness of Appellee's position is further bolstered by the other removal and foster care placement requirements. For example, the child's placement and care must be the responsibility of the State agency administering the State plan, *i.e.*, Appellant. Yet the parties readily acknowledge that the November 11, 2014, Order to Apprehend and Detain did not charge *Appellant* with the child's placement and care, but rather committed the child to the custody of the Arenac County Sheriff Office, the Roscommon County Juvenile Detention Center, or the Bay County Juvenile Facility, none of which are responsible for administering Michigan's Title IV-E plan.

Lastly, another section of the "Eligibility" portion of the federal statute, 42 USC 672(a)(2)(C), expressly requires that "the child has been placed in a foster family home or child-care institution." *Id.* Once again, though, "detention facilities ... or any other facility operated primarily for the detention of children who are determined to be delinquent" are not foster family homes or child-care institutions. 42 USC 672(c).

B. Rendering Foster Care Placement Language a Nullity

To accept Appellant's argument would be to render the "into foster care" and "foster care placement" language of the federal statute a mere nullity. "When interpreting a statute, '[Courts] must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *People v Rea*, 500 Mich 422, 427–28; 902 NW2d 362, 364 (2017) (citation omitted). Appellant's argument emphasizes the "removed from the home" aspect of the statute while virtually ignoring the "into foster care" and "foster care

placement" requirements. As Appellee aptly notes, if this language is ignored, anytime a Court were to remove a child for any reason no matter how long, the Court would have to comply with Title IV-E foster care funding laws just in case subsequent events prevented the child from returning home and required the child's actual foster care placement.

C. Resulting in Absurd Unpredictability

Appellant's construction also results in absurd and illogical results. It is axiomatic that "statutes must be construed to prevent absurd or illogical results and to give effect to their purposes." *Gross v Gen Motors Corp*, 448 Mich 147, 164; 528 NW2d 707 (1995).

According to Appellant, judges in any and all legal contexts – even non-foster care contexts – must foresee whether the child before them will be placed into foster care at any time prior to their return home and then apply Title IV-E foster care funding law requirements. Prognostication is not the responsibility of the Judiciary, and the charge places an impossible onus on judicial decisionmakers. As with this Court, lower court judges concern themselves with the facts of the case before them, not hypothetical scenarios.

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; *the avoidance of deciding hypothetical questions*; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; *the sufficient ripeness or maturity of a case*; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making. [*Natl Wildlife Fedn v Cleveland Cliffs Iron Co*, 471 Mich 608, 614–15; 684 NW2d 800 (2004) (all emphasis added), *revs'd on other grds by Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010).]

The Judge members of Amicus Michigan Probate Judges Association frequently address wards in the delinquency context during early morning hours and in other non-workday contexts during which information regarding the ward's home life is virtually non-existent. When a judge

issues an Order to Apprehend and Detain, the focus is on apprehending a ward who has violated one or more of the State's criminal laws. To require judges to make foster care related contrary-to-the-welfare findings in such a context would necessarily also require police officers and detectives to serve as *de facto* Children's Protection Services (CPS) workers and not only investigate criminal activity but also investigate the juvenile perpetrator's homelife all before seeking judicial authorization to detain the ward. Not only is this not required by law, it imposes an undue burden upon law enforcement officers who are in the business of enforcing criminal laws, not acting as social workers. All of these adverse consequences that flow from Appellant's strained construction of the federal statute run contrary to the rule that Courts must interpret statutes in the most reasonable manner possible. *Duffy v Michigan Dept of Nat Res*, 490 Mich 198, 215 n 7; 805 NW2d 399 (2011).

The only other option would be for judges, who must often sign Orders to Apprehend and Detain during late night and early morning hours, to make contrary-to-the-welfare decisions without sufficient information regarding the ward's home. Judges could surely err on the side of caution and simply check and fill in the contrary-to-the-welfare box provided on State Court Administrative Office forms in every case on the off-chance that the ward might require a foster care placement at some unknown point in time prior to returning home. However, not only would this constitute an abdication of judicial responsibility, it is the epitome of the "mere pro forma exercise in paper shuffling to obtain Federal funding" that Congress sought to eschew from the very beginning. See, *e.g.*, Senate Report No. 96-336 to accompany H.R. 3434, October 2, 1979, pp 15-16. (**Appendix B**).

Other than police officers and detectives serving as social workers or judges making baseless contrary-to-the-welfare findings, Appellant offers no insights into how judges are

supposed to make a proper contrary-to-the-welfare finding as soon as a ward is taken into custody when there is minimal if any information available regarding the ward or his homelife and the ward enjoys the constitutional right to remain silent. Appellant's "first-order requirement" may be easy for social workers to understand and to remember, but it is not supported by the statutory language set forth in Title IV-E, nor is it workable in real world law enforcement and judicial settings.

Similarly, Appellant's interpretation of Title IV-E as applying to any court order entered in any context that removes a child from his or her home wreaks havoc on a county's ability to budget its County Child Care Fund. Counties are required to maintain a foster care system that provides for the care and boarding of juveniles that come within the jurisdiction of a county's probate or family court. MCL 400.55(h); *Oakland Co v State of Michigan*, 456 Mich 144, 154-155; 566 NW2d 616 (1997). To implement this mandate, state law requires each county to place certain money it receives into a separate Child Care Fund. MCL 400.117c. To provide financial support to counties, Appellant must distribute to each county an amount of funds which "equal[s] 50% of the annual expenditures from the child care fund . . ." MCL 400.117a(4)(a).

County officials presumably use their best efforts to carefully budget County Child Care Funds. However, when Appellant belatedly decides that it erred in a Title IV-E determination, it simply shifts the economic harm of its own mistake onto the counties by demanding that they return the 50% portion of foster care funding that Appellant received as Title IV-E funds from the federal government. As explained in greater detail below, such an arrangement gives the State no incentive to operate effectively, and requires that counties essentially act as insurers of Appellant's Title IV-E determination errors. The federal government conducts Title IV-E audits every three years, so Appellant's mistakes sometimes are not discovered until years later, long

after county officials have budgeted County Child Care Funds in reliance upon Appellant's Title IV-E determinations and with the understanding that Title IV-E foster care funds were available for particular cases. Appellant then shifts the blame for its own Title IV-E determination mistakes onto unwitting judges who entered orders in non-foster care related contexts and shifts the economic burden of the mistakes onto county Child Care Funds. At some point in time, county officials should be allowed to rely upon Appellant's representations regarding Title IV-E funding in individual cases, and Appellant should be precluded from shifting blame for its own errors onto everyone but itself.

D. <u>Counties' interest in IV-E determinations and *Black v Dept of Soc Services*</u>

Notwithstanding counties' very real economic interest in Appellant's Title IV-E determinations, Amici would be remiss not to mention this Court's ruling in *Black v Dept of Soc Services*, 212 Mich App 203; 537 NW2d 456 (1995), where this Court held that only a juvenile ward had standing as the "applicant" to appeal from the denial of public assistance benefits. The basis of the Court's decision was the language contained in MCL 400.37, which provides in pertinent part:

> If the application be disallowed, or if the applicant is dissatisfied with the amount of the assistance he is receiving, or is to receive, he may demand, in writing, a hearing of his case .... *The applicant or recipient* may appeal to the circuit court of the county in which he resides, which court shall have power to review questions of law involved in any final decision or determination of the state department. [MCL 400.37 (emphasis in original).]

Despite the apparent distinction between the terms "applicant" and "recipient," this Court held that the county could not properly be considered an applicant.

> We do not believe that Washtenaw County may properly be considered an "applicant." While the county did complete the application in this case, it did so on petitioner's behalf as an authorized representative. Contrary to Washtenaw County's assertion, this interpretation does not deprive the word "or" in the statute of meaning. A person whose application is denied would be an applicant

> but not a recipient; an individual who is dissatisfied with the level of his benefits would be a recipient but not an applicant.
>
> We believe the circuit court abused its discretion by allowing Washtenaw County to intervene. It is true that if petitioner's hospital bill is not paid through Medicaid, the county would be responsible because it referred petitioner to the facility. However, this did not give the county an interest relating to petitioner's benefits. The county's obligation to the hospital is separate and distinct from petitioner's right to Medicaid coverage. [*Id.* at 205-06]

Five years after this Court decided *Black*, the Michigan Supreme Court significantly altered the rules regarding standing in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). Rejecting Michigan's former rule of standing that was predicated upon US Const, Article III, § 1, the Michigan Supreme Court in *Lansing Sch Ed Ass'n* substantially altered the scope of standing and concluded that "a litigant has standing whenever there is a legal cause of action." *Lansing Sch Ed Ass'n*, 487 Mich at 372. "Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing." *Id.* "A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id.*

According to this Court's ruling in *Black*, a child, and only a child, may challenge the disallowance of Title IV-E funds. This ruling places the funding of a child's placement in foster care into none other than the child's own hands. This results in litigation such as the present case being litigated nominally on behalf of the child when it is the county who is the real party in interest because it is the County Child Care Fund that becomes financially liable for 50% of the costs of a child's foster care placement if Title IV-E funding is disallowed. Amici are not aware

of any case in which 50% of the costs of a child's foster care placement was billed to the foster child and pursued as a debt collection action upon non-payment.

Simply put, disallowing Title IV-E funds results in a dispute between the State and the county, not the State and the foster child. It is pure legal and factual fiction to claim that foster children concern themselves with how their placement will be funded and whether they are eligible for Title IV-E funding. If Title IV-E funding is denied, the child is not returned home; rather, the County Child Care Fund picks up the tab. Thus, it is the county and only the county which has a "substantial interest" in whether a child is eligible for Title IV-E funding and it is the county which also suffers "special injury or right" and is detrimentally affected in a manner different from the citizenry at large if Title IV-E funding is denied. *Lansing Sch Ed Ass'n*, 487 Mich at 372.

"The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.'" *Lansing Sch Ed Ass'n*, 487 Mich at 355. It belies logic to claim that a foster child is going to maintain litigation in an effort to continue his stay in foster care more vigorously than the county would maintain litigation in an effort to challenge its responsibility for 50% of the costs of a child's foster care placement, which can often amount to figures well into the tens or hundreds of thousands of dollars. It is fair to presume that many if not most foster children would wish to return home and thus would have no problem with their foster care placement losing federal funding. It is untenable then that this Court would appoint such children as the sole party with standing to challenge the funding of a placement that most of them do not want in the first instance.

In stark contrast, tens if not hundreds of thousands of dollars of county funds are usually at stake when Appellant decides to deny IV-E funding outright or to change its prior Title IV-E

determinations, discontinuing Title IV-E funding, and then recoup from the county that amount of Title IV-E funding that was paid as a result of Appellant's erroneous Title IV-E determinations. No one but the county is financially liable for funding a child's foster care placement if Appellant decides to deny or discontinue Title IV-E funding, so it would seem that the county would have paramount, if not sole, standing to challenge Appellant's Title IV-E determinations.

This is consistent with both Title IV-E and Sixth Circuit Federal Court of Appeals precedent. The *ratio decidendi* of *Black* focused upon the statutory language "applicant or recipient" contained in MCL 400.37. In contrast, Title IV-E requires that each State's Title IV-E Plan "provide[] for granting an opportunity for a fair hearing before the State agency *to any individual* whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness." 42 USC 671(a)(12). Relying upon this language, the Sixth Circuit Federal Court of Appeals has repeatedly ruled that Title IV-E "grants foster parents an enforceable right to an administrative hearing." *Timmy S v Stumbo*, 916 F2d 312, 317 (CA 6, 1990). See also, *D.O. v Glisson*, 847 F3d 374 (CA 6), cert den __ US __; 138 S Ct 316 (2017).

When Title IV-E funding is disallowed or discontinued, foster children are unaware of this fact because it merely shifts 50% of the costs of the child's foster care placement from the federal government to the county government. However, when Title IV-E funding is disallowed or discontinued, county governments become acutely aware of this fact because they must now assume responsibility for what was the federal government's responsibility. As noted above, Title IV-E requires that each State's Title IV-E Plan "provide[] for granting an opportunity for a fair hearing before the State agency *to any individual* whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness." 42 USC 671(a)(12).

There is no reason to assume that this language was not intended also to apply to county governments.

The rule announced in *Black* is unworkable and seems to be based in part upon the legal fiction that foster children understand and manage the financing of their own placement. The rules regarding standing have since changed dramatically. Title IV-E requires that each State's Title IV-E Plan provide an opportunity for a fair hearing "to any individual." Accordingly, Amici thus invite this Court to revisit and overturn its ruling in *Black*.

E. Title IV-E is remedial statute to be liberally construed

Ultimately, Title IV-E was enacted to help States defray certain costs of foster care for dependent children. In this regard, Title IV-E is a remedial statute, and "[r]emedial statutes are to be liberally construed in favor of the persons intended to be benefited." *Leelanau Co Sheriff v Kiessel*, 297 Mich App 285, 295; 824 NW2d 576 (2012). As noted in Appellee's Brief on Appeal, in the class-action litigation of *Dwayne B. v Granholm*,[2] Appellant promised that it would "maximize available federal funding opportunities" and "[e]stablish a unit within the Children's Services Administration charged with maximizing Title IV-E reimbursements from the federal government."[3] This representation and agreement by Appellant is consistent with giving the remedial Title IV-E a liberal construction. Appellant now instead proffers a prudent steward argument and maintains that it must construe Title IV-E as narrowly as possible to conserve scarce resources. But this argument not only runs afoul of Appellant's representations

[2] *Dwayne B. v Granholm*, ED Mich Civil Action Number 2:06-cv-13548.

[3] Settlement Agreement, pp 2, 44, *Dwayne B. v Granholm*, ED Mich Civil Action Number 2:06-cv-13548. This Court may take judicial notice of its own judicial records and documents as well as those from other courts. See, *e.g.*, *Thomas v Thomas*, 176 Mich App 90, 93; 439 NW2d 270 (1989); *In re Stowe*, 162 Mich App 27, 32; 412 NW2d 655 (1987); *Nichols v Prosecuting Atty for Oakland Cnty*, 35 Mich App 580, 582-83; 192 NW2d 667 (1971).

in the federal lawsuit, it is inconsistent with giving the remedial Title IV-E statute a liberal construction.

Appellant's first-order rule is inconsistent with the plain language of the enabling legislation, nullifies the plain language of the legislation, results in absurdity, and is unworkable for everyone except perhaps social workers in search of a simple rule to simplify complex federal legislation. This Court should decline Appellant's invitation to rewrite Title IV-E and should apply its contrary-to-the-welfare requirement only to orders placing children into foster care. Accordingly, Amici respectfully request that the Court affirm the well-reasoned ruling of the lower court.

II. FUNDAMENTAL LEGAL POLICIES AND DOCTRINES SEEK TO ENCOURAGE PARTIES TO IMPLEMENT REASONABLE SAFEGUARDS AGAINST RISKS OF INJURY AND TO ALLOCATE BLAME AND LIABILITY COMMENSURATE WITH FAULT, AND FOR THIS REASON, APPELLANT SHOULD BEAR THE RISK OF LOSS ASSOCIATED WITH ITS OWN ERRONEOUS DECISIONS REGARDING ELIGIBILITY FOR TITLE IV-E FEDERAL FOSTER CARE FUNDS.

Appellant's current practice runs contrary to underlying legal policies and doctrines regarding fault and responsibility. As noted above, when Appellant discovers that it erred in a Title IV-E determination, it shifts the economic harm of its own mistake onto counties by demanding that they return the 50% portion of foster care funding that Appellant received as Title IV-E funds from the federal government. This type of responsibility-shifting is unsupported by law.

Whether based in tort or in contract, legal policies have long sought to penalize misrepresentations and to protect another's reasonable reliance upon another's representations. Michigan's various doctrines regarding misrepresentation – even mere silent, innocent, or

negligent misrepresentation[4] – work to dissuade people from making false representations upon which others rely, even if the reliance is by third parties. See, *e.g.*, *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974) (holding that title abstractor's duty to perform abstracting duties in a diligent and reasonably skillful, workmanlike manner extends to all persons that the abstractor could reasonably foresee relying on the accuracy of the abstract); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 34–35; 436 NW2d 70 (1989) (adopting Restatement Torts, 2d, §552 as standard applicable to accountant's potential third-party liability for negligent misrepresentation).

In fact, in *Law Offices of Lawrence J Stockler, PC v Rose*, *supra*, this Court adopted Section 552 of the Restatement Torts, 2d as the minimum standard applicable in reviewing the scope of potential third-party liability for negligent misrepresentation. At that time, Section 552 of the Restatement Torts, 2d provided:

> "(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> "(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

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[4] As the Michigan Supreme Court has noted, the doctrine of innocent misrepresentation is well settled in this State, recognized:

> by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity. [*United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 115; 313 NW2d 77 (1981), quoting *Holcomb v Noble*, 69 Mich 396, 399; 37 NW 497 (1888) (MORSE, J., concurring) (emphasis omitted).]

> "(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> "(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> "(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them." [*Law Offices of Lawrence J Stockler*, 174 Mich App at 35–36 (quoting Restatement Torts, 2d , §552).]

Simply put, every legal doctrine that comes to mind, whether *ex delicto* or *ex contractu*, routinely places culpability for misrepresentations upon the party making the misrepresentation. As set forth in Appellee's Brief on Appeal, these doctrines include estoppel *in pais* (so-called "equitable estoppel"), estoppel by laches, promissory estoppel, money had and received, and the Voluntary Payment Doctrine to name a few. Underlying each of these longstanding and well-established doctrines is the fundamental notion that a person who makes a misrepresentation is responsible for the damages incurred by others who change their position to their detriment in reliance upon the misrepresentation. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 115; 313 NW2d 77 (1981). Another fundamental principle underlying these doctrines is that one who makes a misrepresentation should not be allowed to escape the consequences of their actions by subsequently changing their position at the expense of others who reasonably relied upon the misrepresentation. *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974). Yet this is precisely what Appellant seeks to do in this case – and in many other Title IV-E cases around the State of Michigan.

According to Appellant and the ALJ, Appellant has carte blanche to represent that a ward is eligible to receive Title IV-E foster care funding, causing county officials to believe that they

now have more funds in the County Child Care Fund available for other wards and to budget accordingly, only to then change position months or years later and claim that the ward is not in fact eligible to receive Title IV-E foster care funding.

Appellant goes to great lengths to characterize the Michigan's Title IV-E Plan as a "contract" between the state and federal governments. This is incorrect, however. Michigan's Title IV-E Plan is nothing more than a Microsoft Word template downloadable from the US DHHS's website which contains a matrix of rows and columns for Michigan DHHS staff to complete with Michigan laws, rules, and regulations that administer federal Title IV-E federal foster care law at the state level.[5] At best, Michigan's Title IV-E Plan is an interpretive statement of federal and state laws, rules, and regulations which lacks the force of law. *Michigan Dept of Ed v Grosse Pointe Pub Sch*, 266 Mich App 258, 282 n 17; 701 NW2d 195 (2005), *vacated on other grds* 474 Mich 1117 (2006). The federal government uses the state plan approach because "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v United States*, 505 US 144, 161; 112 S Ct 2408; 120 L Ed 2d 120 (1992). See also, *Printz v United States*, 521 US 898, 935; 117 S Ct 2365; 138 L Ed 2d 914 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.") However, "Congress may attach conditions on the receipt of federal funds," *South Dakota v Dole*, 483 US 203, 206; 107 S Ct 2793; 97 L Ed 2d 171 (1987), so it requires States to submit "plans" showing that the State has in effects laws, rules, and regulations to implement federal law requirements at the state level.

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[5] See, https://www.acf.hhs.gov/sites/default/files/cb/title_iv_e_pre_print.docx

The only contract that exists in this situation, then, is the implied contact that arises when Appellant actively represents to counties that Appellant will pay the county's 50% portion with federal Title IV-E federal foster care funds, and the county agrees to accept the funding, which is mandatory under federal law so long as eligibility requirements are met. See, 42 USC 672(a)(1)(A)-(B) (providing that if child satisfies criteria a State "*shall* make foster care maintenance payments on behalf of each child who has been removed from the home . . ."); *Suter v Artist M*, 503 US 347, 358; 112 S Ct 1360; 118 L Ed 2d 1 (1992) (holding that Title IV-E "is mandatory in its terms.") This contract is express between the state and county governments and it is also implied by law in order to avoid the inequity of having county governments pay for Appellant's mistakes, which continue to persist despite years of training and opportunity to acquire competency in this area.

When Appellant seeks to recoup money from counties that received Title IV-E funds as a result of Appellant's own errors, Appellant is essentially attempting to assert a common law claim for money had and received. However, "the action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover." *Trevor v Fuhrmann*, 338 Mich 219, 223–24; 61 NW2d 49 (1953). "[A]s a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action." *Id.* "The action for money had and received is ... an equitable action, and must be subject to equitable principles," *Atkinson v Scott*, 36 Mich 18, 21 (1877), so it

presumably requires a showing of clean hands (which in the instant scenario the county possesses) and conduct that is not *in pari delicto* (of which the county is likewise innocent).

Thus, when Appellant makes an incorrect Title IV-E determination and agrees to pay, albeit (possibly) erroneously, 50% of a ward's foster care with Title IV-E funds the dispute that results is that between Appellant and the federal government, not Appellant and the county. *Cf.*, *Gandy v Cole*, 35 Mich App 695, 704; 193 NW2d 58 (1971) ("When one receives payment in good faith, in the ordinary course of business, and for a valuable consideration the money cannot be recovered even though it was fraudulently obtained from a third person.") (citing *Walker v Conant*, 69 Mich 321; 37 NW 292 (1888)). This is the very basis of the so-called Voluntary Payment Doctrine addressed in Appellee's Brief on Appeal.

Notwithstanding this well-settled precedent, Appellant seeks to establish a new law, one independent of this longstanding precedent regarding erroneously paid monies. According to Appellant, it should have no culpability for mistakes committed by no one but itself; instead, it should be able to make counties pay for its own ineptitude. One of the policies underlying tort law is "to encourage implementation of reasonable safeguards against risks of injury." *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), *abrogated on other grds by Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29; 323 NW2d 270 (1982). See also, *Holloway v Gen Motors Corp Chevrolet Div*, 403 Mich 614, 626; 271 NW2d 777 (1978) ("[E]ncouraging tortfeasors to adopt corrective measures is one of the purposes of the tort law, another purpose is to compensate injured persons.") So long as Appellant is permitted to foist the consequences of its own actions onto well-intentioned judges and unwitting counties, Appellant will not have an incentive to implement reasonable safeguards against risks of erroneous Title IV-E determinations or to adopt corrective measures regarding its Title IV-E determination abilities.

Appellant's argument runs contrary not only to statutory language and fundamental canons of statutory construction, it also ignores age-old concepts and policies regarding personal responsibility and the allocation of fault among parties when one has erred and the other has not. Accordingly, Amici respectfully request that the Court affirm the lower court's ruling.

III. IT IS ERROR TO RELY UPON APPELLANT'S OWN UNPROMULGATED POLICY MANUAL WHERE STATE LAW DOES NOT AUTOMATICALLY EXEMPT APPELLANT FROM THE RULE PROMULGATION PROCESS FOR RULES PERTAINING TO THE RECEIPT OF FEDERAL FUNDS.

Preservation of Issue / Standard of Review: This issue was not presented to the lower court but is properly before this court since "it is an issue of law for which all the relevant facts are available." *Dept of Envtl Quality v Morley*, 314 Mich App 306, 316; 885 NW2d 892 (2015). "Whether an agency's policy is invalid because it was not promulgated pursuant to the procedures of the [Administrative Procedures Act] is a question of law subject to de novo review." *City of Romulus v Michigan Dept of Envtl Quality*, 260 Mich App 54, 81–82; 678 NW2d 444 (2003).

A. The Promulgation Requirement

Section 7 of the Michigan Administrative Procedures Act (MAPA), MCL 24.201, *et seq.*, provides in part:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. [MCL 24.207.]

"The Legislature has defined 'rule' broadly so as to defeat the inclination of "agencies to label as "bulletins," "announcements," "guides," "interpretive bulletins," . . . which, in legal operation and effect, really amount to rules . . ." *Detroit Base Coal for Human Rights of*

Handicapped v Dep't of Soc Servs, 431 Mich 172, 183; 428 NW2d 335 (1988) (quoting Cooper, 1 State Administrative Law, p 108.) See also, *City of Romulus*, 260 Mich App at 82 ("[A]n administrative agency cannot rely upon a guideline or unpromulgated policies in lieu of rules promulgated under the APA.").

In support of reversing the lower court's decision, Appellant cites at length its own non-promulgated Children's Foster Care Manual (FOM). Appellant's FOM is a DHHS statement, standard, policy, or instruction of general applicability that implements or applies law enforced or administered by DHHS and prescribes the procedure or practice of the DHHS with regard to Title IV-E funding. Thus, the Children's Foster Care Manual constitutes a "rule" as that term is defined by the APA, but the DHHS has failed to promulgate the manual pursuant to the rule promulgation provisions of the APA.

"When promulgating rules, an agency must follow specified statutory procedures that include various notice and public hearing requirements." *Goins v Greenfield Jeep Eagle, Inc*, 449 Mich 1, 10; 534 NW2d 467 (1995). "A failure to follow these procedures . . . will prohibit a rule from having the force of law" and "renders the rule invalid." *Id.* at 9, 10. See also, *Constantino v Mich Dep't of State Police*, 794 F Supp 2d 773, 776 (WD Mich 2011) ("A rule that is not properly promulgated cannot be enforced") (applying Michigan law); *Detroit Base Coal for Human Rights of Handicapped*, 431 Mich at 183 ("A rule that does not comply with the procedural requirements of the APA is invalid under Michigan law."); *Blank v Dep't of Corr*, 222 Mich App 385, 392; 564 NW2d 130 (1997) ("Generally, the failure of an administrative agency to follow the approval process of the APA renders the rule void.")

Both the Michigan Supreme Court and this Court have made clear on several occasions that an administrative agency may not attempt to bind a member of the public through an

unpromulgated administrative manual. See, *e.g.*, *Goins*, 449 Mich at 10 (holding that Secretary of State manual does not have force of law because it is not properly promulgated as a rule); *Pharris v Secretary of State*, 117 Mich App 202; 323 NW2d 652 (1982) (holding that Secretary of State hearing examiners guidelines published in internal policy manual are not binding because they are not promulgated pursuant to the APA). More specifically, this Court has made clear that the DHHS may not attempt to bind a member of the public through its own unpromulgated administrative manuals. See, *Powers v Dep't of Soc Servs*, 179 Mich App 416, 419; 446 NW2d 505 (1989) (holding that unpromulgated policies contained within DHHS manual were without legal authority or effect). See also, *In re Rood*, 483 Mich 73, 130; 763 NW2d 587 (2009) (Young, J., concurrence) (characterizing the DHHS's Children's Foster Care Manual as an "internal operating manual" that "does not have the force of law, or even of an administrative rule.") It was, therefore, error for the ALJ to predicate his decision upon Appellant's non-promulgated FOM.

B. <u>The Exception to the Promulgation Requirement</u>

Appellant maintains that its FOM is exempt from the promulgation process by virtue of MCL 400.6(4) and MCL 24.207(o). The statute MCL 400.6 provides:

> The family independence agency may develop policies to implement requirements that *are mandated by federal statute or regulations* as a *condition of receipt of federal funds*. Policies developed under this subsection are *effective and binding on all those affected by the programs*. Policies described in this subsection are exempt from the rule promulgation requirements of Act No. 306 of the Public Acts of 1969. [MCL 400.6(4) (all emphasis added).]

Similarly, the statute MCL 24.207 likewise provides:

> Rule does not include ... [a] policy developed by the department of health and human services under section 6(4) of the social welfare act, 1939 PA 280, MCL 400.6, *to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds*. [MCL 24.207(o) (all emphasis added).]

"[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *Am Fed'n of State, Cnty & Mun Employees (AFSCME), AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996).

Appellant's argument fails because the narrowly construed exception of MCL 400.6 applies only to its "policies to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds." MCL 400.6(4). No federal statute *mandates* that any time a court removes a child from his or her home that the court adhere to Title IV-E federal foster care law and also find that it is contrary for the child to remain in the home. Federal statutes and regulations require such a finding only when a court removes a child from the home and places the child "into foster care." See, 42 USC 672(a)(1). Since this aspect of FOM 902 does not implement requirements mandated by federal statute or regulations as a condition of receipt of federal funds, it does not come within the exception to the general promulgation requirement.

Appellant's reliance upon the United States' DHHS Child Welfare Policy Manual does not alter this conclusion because the federal manual does not constitute a federal "regulation." The noun "regulation" is a legal term of art which means "[a] rule or order, *having legal force*, usu. issued by an administrative agency . . ." Black's Law Dictionary (9th ed. 2009) (emphasis added). See also, *Providence Yakima Med Ctr v Sebelius*, 611 F3d 1181, 1188 (CA 9 2010) ("A regulation is defined as a 'rule or order, having legal force, usually issued by an administrative agency.'") (**Appendix C**); *RI Hosp v Leavitt*, 548 F3d 29, 40 (CA 1 2008) ("A 'regulation' is often defined as a generally applicable statement that has the legal effect of binding an agency or other parties.") (**Appendix D**); *Kennecott Utah Copper Corp v US Dep't of Interior*, 88 F3d

1191, 1207 (CA DC 1996) ("We have interpreted 'regulation' to mean a statement that has 'general applicability' and that has the 'legal effect' of 'binding' the agency or other parties.") (**Appendix E**).

The Administration for Children and Families' (ACF) unpromulgated Child Welfare Policy Manual was never published in the Federal Register and the Manual therefore lacks the force and effect of law, so it does not constitute a federal regulation. Absent a federal statute or promulgated federal regulation which predicates Appellee's eligibility to receive Title IV-E federal foster care funds upon a contrary-to-the-welfare finding being made in juvenile delinquency proceedings, the narrowly construed exception of MCL 400.6(4) cannot justify enforcing the FOM against members of the public as though it has the force and effect of law.

Even if the FOM somehow constituted a properly promulgated regulation – which it does not – for the reasons stated above it does not "mandate" a "requirement" that a contrary-to-the-welfare finding be made in juvenile delinquency proceedings. Conspicuously absent from Appellant's Brief on Appeal is any citation to a federal statute or regulation which mandates that a contrary-to-the-welfare finding be made in juvenile delinquency proceedings as a condition of receipt of federal funds. "[C]ourts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). Having failed to provide a citation to a federal statute or regulation which "mandates" a "requirement" that a contrary-to-the-welfare finding be made in juvenile delinquency proceedings as a "condition" of receipt of federal funds, Appellant's argument that its FOM is covered by the promulgation exceptions of MCL 24.207(o) and MCL 400.6(4) fails. Accordingly, Amici respectfully request that the Court affirm the lower court's ruling.

RELIEF

WHEREFORE, Amici respectfully request that this Honorable Court affirm the lower court's rulings in full, and to grant any and all other relief appropriate under the circumstances.

Respectfully submitted,

Dated: 6/11/18

William E. Ladd (P30671)
Chair, Amicus Committee of the
State Bar of Michigan Children's Law Section

Dated: _____

Hon. Dorene S. Allen, P32468
President,
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