



While devoting much of its brief to asserting that the facts found by its hearing examiner are owed great deference (see Respondent's brief at pp. 9-16), DHSS does not dispute the facts described at p.3-5 of Petitioner's initial brief. Under these facts, it was undisputed that Audrey Miller's husband, Willie, did not have actual significant responsibility for his child Yolanda between the time Petitioner and the child left Racine County for Dane County in March, 1995 and the time of the administrative hearing when circumstances had changed and Yolanda needed adult supervision for the summer, a time subsequent to the relevant deprivation time period. (Tr. 51, 53). For the reasons described in this document and Ms. Miller's initial brief, Petitioner continues to maintain that the Department's decision finding Yolanda Miller "not deprived" as of March 21, 1995 is incorrect.

#### ARGUMENT

##### A. The DHSS Decision is Contrary to the Social Security Act

The Department does not directly contradict the statements made by Ms. Miller on this point at pp. 9-13 of her brief. However, the Department does appear to try to take issue with the strength of Petitioner's arguments. Those elements of analysis are misplaced.

For instance, the Department indicates that the two explanatory federal memoranda permitting a finding of deprivation while allowing some contact between the non-household parent and child might be entitled to "some deference". Respondent's brief at

7. However, the case cited for that proposition, Willev v. Ives, 696 F. Supp. 1388, 1395 (D.Me. 1988) states that if the federal memorandum is applicable to a situation involving a federal program, and is a reasonable interpretation of the federal statute, the deference owed to it is total, not "some". There can be no serious argument that the two memoranda are a reasonable interpretation of "AFDC deprivation", so the Court should find that to the extent DHSS strayed from an interpretation allowing some parent-child contact while continuing to consider the parent "absent" and the child "deprived" for AFDC purpose, that discrepancy constitutes legal error.

Similarly, the Department argues that AFDC regulations require a finding of non-deprivation for any amount of physical care, maintenance or guidance to the child, citing Freeman v. Lukhard, 465 F. Supp. 1269 (E.D.Va. 1979). This argument is also misplaced for at least three reasons. First, Freeman predates the two relevant federal memoranda and it is not clear how the case would be decided had the Court been aware of the federal agencies' interpretation. Second, the decision >is contrary to those memoranda, and Petitioner submits is not an accurate analysis of federal law. Third, Freeman limits its discussion to state regulations purporting to interpret federal law; whereas Wisconsin has no such regulations. It is clearly incorrect to equate deprivation with a total cessation of contact or support; and the Department's apposite conclusion is incorrect.

As stated above, the Department also agrees that the

"potential" for parental guidance or support is insufficient to show non-deprivation. However, it then equates Mr. Miller's promises of future contact, guidance and support with actual parental involvement as opposed to the "potential" involvement it truly suggests. Mr. Miller may consider himself a part of the family unit, but he did not act that way for any time period relevant to the March 21, 1995 application, and further it is significant that he is being considered liable for child support for Yolanda; a fact inconsistent with inclusion in Ms. Miller's family. (Tr. 52) By any reasonable criteria, including the caselaw cited at pp.12 of Ms. Miller's initial brief, and the two federal memoranda, there is no doubt that the Department's contention that as of March 21, 1995 (the date of the AFDC application in Dane County), Mr. Miller showed anything more than potential involvement is clearly incorrect.<sup>1</sup>

As such, and as outlined in petitioner's main brief, the DHSS hearing examiner's decision, as adopted by DHSS, applied a standard that is inconsistent with the provisions and purpose of the Social Security Act.

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<sup>1</sup> It is noteworthy that the Department cites a front-end fraud 'investigator's report for the view that Yolanda Miller is "not deprived", but ignores the conclusion in a similar report that the investigator did not believe Mr. Miller that he was ever going to join his spouse in Dane County, and that he recommended that Ms. Miller seek a divorce to obtain AFDC. Compare Respondent's brief at pp.14-15 with Tr. 38.

B. The DHSS Decision is Contrary to the Department's Own Policy

The respondent's decision is not only contrary to federal law, but the respondent's own policy and practice. As discussed in petitioner's main brief (see pages 14-15), the DHSS policy regarding joint custody, as well as prior hearing decisions, have found the deprivation standard to be satisfied even though the absent parent had considerable involvement with the children.

Respondent argues that it is not bound by its prior decisions and that the principles of res iudicata do not apply to administrative decisions. See Respondent's Brief at pp. 6-7. Ms. Miller does not maintain that DHSS can never deviate from its prior decisions. Rather, petitioner's argument is that where a DHSS decision deviates from a prior rule, policy, or practice, the deviation must be satisfactorily explained. S227.57(8) Wis. Stats. (1993-94); see also Arrowhead United Teachers Organization v. WERC, 116 Wis.2d 580, 342 N.W.2d 709 (1984). The Department does not do so, and under its standards for joint custody situations, could it satisfactorily explain why a situation in which both parents are meaningfully involved would allow for AFDC and a deprivation finding; while in this situation where Mr. Miller showed little actual involvement until long after the AFDC application was made and denied, deprivation was not found.

The Court in Carleson v. Remillard, 406 U.S. 598, 602 (1972) found that eligibility for AFDC benefits based on a parent's absence is not limited to cases of divorce or desertion, and that the reason for the absence is irrelevant. Because the reason for

a parent's absence is irrelevant, the DHSS joint custody policy is clearly applicable to this case. so too, are prior DHSS administrative decisions involving the deprivation issue.

The Department's joint custody policy and the prior decisions noted in petitioner's main brief (see page 14, and Exhibits C through G), set forth a standard that allows for a finding of deprivation where the parent is continuously absent, but maintains a regular pattern of contact with the children. The policy and prior decisions, like the federal regulation and memoranda, recognize that the total cessation of contact is not necessary. Ongoing DHSS policy thus examines whether or not the absent parent has continued to function as a regular provider of support, care, or maintenance, or whether that function has been interrupted. The policy has been to find deprivation where the parental role is interrupted, even though regular visitation is maintained.

The joint custody policy and the prior decisions set forth a useful standard that can be used to determine whether or not deprivation exists. The DHSS decision in this case, by focusing on what the absent parent has promised or might do, as opposed to his actual functioning, deviates from DHSS policy and prior practice. There is no explanation for the deviation and none is apparent; without such, the DHSS decision should be reversed. In effect, this decision, precludes a finding of deprivation based on continual absence whenever any pattern of visitation or support occurs.

In contrast, the DHSS joint custody policy, recognizes and allows for AE'DC eligibility in cases where the absent parent

maintains regular contact. Since, as discussed above, the reason for a parent's absence is irrelevant for AFDC purposes, there is no rational reason to treat these two groups of children differently. By treating them differently, respondent violates petitioner's legal right to AFDC as of March 21, 1995.

C. The DHSS Decision is Contrary to the Substantial Evidence In This Record and the Findings of Fact

Respondent maintains that there is substantial evidence to support the DHSS decision and rehearing decision in this matter. Petitioner disagrees.

As stated above (supra at p. 1-2), and in her initial brief at p\* 16, conjecture that Willie Miller could or should have a role providing parental guidance or support is insufficient factual evidence even under the broad deference given to an administrative agency under the substantial evidence test. The issue in this case is whether or not the petitioner's child is deprived within the meaning of the AFDC program. To find that she was not, the hearing examiner must have found that Mr. Miller's role as a provider of maintenance, physical care, or guidance has not been terminated or interrupted; or that he can be counted on to plan for her care. The hearing examiner found that there was no reason why the children's father could not function as a provider. However, he made no finding that he did function as a provider. Nor is there any evidence in the record to support such a finding.

The petitioner and her niece and neighbor Leslie Harris testified that Willie Miller did not provide regular physical care

or guidance to the children. (Tr. 52, 53) His role from March until June was that of limited visitation and virtually no financial support. Moreover, the petitioner testified that she did not know what his role would be in the future. (Tr. 51) Based on this uncertainty, attested to without contradictory evidence, Mr. Miller cannot be counted on to provide for his children.

Given this evidence and the examiner's own findings, there is simply no support for the conclusion that Yolanda Miller was not deprived as of March 21, 1995. Based on the record as a whole, the facts demonstrate that she is deprived within the meaning of the AE'DC program and eligible for such benefits if otherwise eligible for the program.

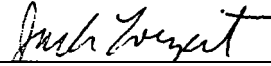
#### CONCLUSION

Based on the above and petitioner's main brief, the DHSS decision in this matter should be reversed and the respondent should be ordered to consider Yolanda Miller "deprived" based on Willie Miller's absence on March 21, 1995. The Court should also remand this matter to determine if Ms.' Miller was otherwise eligible for benefits at that time.

Thank you for your attention.

Dated at Madison, Wisconsin this ozfi day of January, 1996.

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