

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOSEPH CAMPBELL o/b/o,)	
KRISTY CAMPBELL,)	
)	
Plaintiff)	
)	
v.)	Civil No. 93-133 B
)	
DONNA E. SHALALA,)	
Secretary of Health)	
and Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION ¹

This Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the Secretary's determination that the minor plaintiff receives in-kind income in the form of rent-free shelter. The plaintiff challenges the Secretary's conclusion that a portion of rent-free shelter obtained by her father is in-kind income directly attributable to her.

¹ This action is properly brought under 42 U.S.C. 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 14, 1993 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

I. FACTUAL BACKGROUND

The plaintiff, Kristy Campbell, is a severely disabled nine year-old who receives monthly SSI benefits. Record pp. 12, 24. She lives with her father in East Corinth, Maine in a house owned jointly by her uncle and grandmother, Mary Campbell. *Id.* at 13, 22, 24, 27. Joseph Campbell, the plaintiff's father, pays no rent for the house but is responsible for repairing and maintaining the premises and paying the utility bills and property taxes. *Id.* at 13, 25, 28, 81. Joseph worked out this living arrangement in 1985 with his mother, Mary Campbell, half owner of the house, who wanted someone to look after it. *Id.* at 25-27, 33. At that time the house was unoccupied and had recently suffered a break-in and a fire. *Id.* at 26. Mary Campbell lives in Connecticut, *id.* at 65, 81, and the other owner, Joseph's brother, lives in California, *id.* at 27. The house had been used as a hunting and fishing camp by Joseph's father when he was alive. *Id.* at 26. Mary Campbell did not want to rent or sell the property but just wanted to maintain it so that it could pass to her children upon her death. *Id.* at 26-27.

Joseph has maintained the house since 1985, including renovating it after the fire, adding a porch and a room, fixing the floors, enclosing the back porch and making any necessary repairs, such as to the sewerage and the wiring. *Id.* at 25-27. This arrangement would have existed irrespective of whether Kristy was with him because his mother just wanted someone to take care of the house and property. *Id.* at 33. Although presently in arrears, he has paid the property taxes as best he can. *Id.* at 28. The property taxes are \$384.64 per year. *Id.* at 13. The rental value of the house is \$350 per month. *Id.* at 28. Based on these living arrangements, the Administrative Law Judge found that the plaintiff's SSI benefits were subject to a reduction because she received rent-free shelter from her grandmother. *Id.* at 14, 15. Citing the familial relationship between the landlord and the household members, the Administrative Law Judge concluded that the plaintiff and her father both receive in-kind income in the form of rent-free shelter from Mary Campbell. *Id.*

at 14. He also determined that the reduction in the plaintiff's benefits had been correctly calculated based on the presumed value of the shelter allocated to her. *Id.* at 14, 15. The amount of monthly in-kind income attributed to Kristy was \$155.66. *Id.* at 14.

The Appeals Council declined to review the decision, *id.* pp. 4-5, making it the final determination of the Secretary. 20 C.F.R. 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989). The Appeals Council agreed with the Administrative Law Judge's determination that the plaintiff is a recipient of in-kind income in the form of rent-free shelter from her grandmother. Record p. 4. It noted that "rent-free shelter benefits all members of the household." *Id.*

The sole question presented by this appeal is whether a portion of the rent-free shelter provided by the plaintiff's grandmother was properly attributed to Kristy as "in-kind" income. "In-kind" income is noncash income such as food, clothing or shelter. 20 C.F.R. 416.1102. The plaintiff does not dispute that a rental subsidy exists here, that is, in-kind income in the form of rent-free shelter. *See* 20 C.F.R. 416.1130(b). The plaintiff argues, however, that such in-kind income was provided solely to her father, through his contractual arrangement with his mother, and must therefore be attributed to Kristy through the parental "deeming" process. The deeming process is a detailed method the Secretary uses to allocate a parent's income to a child eligible for SSI. If the shelter counts as income solely to her father, such in-kind income would be statutorily exempt from deeming, and the plaintiff's benefits would remain the same, about \$317. *See* Record pp. 14, 32. Alternatively, if a portion of the shelter counts as income directly to the plaintiff, her monthly SSI benefits would be reduced to \$161.34. *See id.* The plaintiff does not dispute the value of the shelter allocated to her, to the extent that the Secretary's determination that a portion of the rent-free shelter is income to her is found to be correct.

II. RELEVANT PROVISIONS

The SSI program pays benefits to those aged, blind or disabled individuals whose income and resources fall below certain minimum levels. 42 U.S.C. 1382, 1382a, 1382b. The regulations promulgated by the Secretary contain a complex web of rules for counting an applicant's income to determine the relative need for supplemental support. *See* 20 C.F.R. 416, subpt. K. "Income" is defined to include both earned and unearned income, 42 U.S.C. 1382a(a), and may be in cash or in kind. 20 C.F.R. 416.1102. "In-kind" income is noncash income such as food, clothing or shelter, or something a person can use to get one of these. *Id.* Unearned, in-kind income is called "in-kind support and maintenance." *Id.* 416.1130(a). In-kind support and maintenance means "any food, clothing or shelter that is given to you or that you receive because someone else pays for it." *Id.* 416.1130(b).

When an applicant is a child, the Secretary must look also to the income of the child's parents who live in the same household. *See* 42 U.S.C. 1382c(f)(2)(A). This process is termed "deeming." 20 C.F.R. 416.1160(a). Through deeming the Secretary allocates a portion of an ineligible parent's income to the child. *Id.* The Secretary does this because she expects that the ineligible parent will use some of his or her income to take care of the child's needs. *Id.* 416.1160(a)(2). Though the deeming process is quite detailed, the Secretary basically totals the parent's earned and unearned income, minus certain allowable exclusions, and allocates a portion of this amount to the eligible child based on the existing family situation. *See id.* 416.1160(c), 416.1165. The regulations exempt certain types of parental income from the deeming process. *Id.* 416.1161(a). Most important to this case, the value of any in-kind support and maintenance received by a parent is specifically excluded from the income deemed to a child. *Id.* 416.1161(a)(11).

When counting a child's income, the Secretary also recognizes the potential overlap of deemed parental income and in-kind support and maintenance. *See id.* 416.1148(b). Thus, when an eligible child lives with a parent whose income is deemed to her, as here, any food, clothing or

shelter that parent provides is not in-kind income to the child. *Id.* Any food, clothing or shelter received from another source, however, is in-kind income to the child. *Id.*

III. DISCUSSION

The outcome of this appeal, as stated earlier, depends upon the determination whether a portion of the rent-free shelter furnished by Mary Campbell constitutes income directly to Kristy. The Secretary's regulations do not speak to the particular circumstances of this case, nor has any reported case addressed this issue. The income counting provisions of the regulations do, however, provide a proper framework for answering the question. In deciding whether shelter constitutes actual income to a SSI recipient who, as here, also has deemed income, the regulations indicate that the source of such shelter is the determinative factor. *See* 20 C.F.R. 416.1148(b). Put another way, the question in this case becomes who provides Kristy with shelter. If shelter is given to Kristy by her grandmother, as argued by the Secretary, then it counts as income to her, *id.* 416.1130(b); if shelter is provided to Kristy by her father, then it does not count as income to her, *id.* 416.1148(b).

Given the factual basis of Joseph Campbell's arrangement with his mother and his legal obligation to support Kristy, I conclude that any shelter provided to Kristy comes from her father. The rent-free shelter furnished by Mary Campbell is thus not income to Kristy but rather income to her father, who then, like most parents, provides shelter to his child. I find that the contrary determination by the Secretary ignores the evidence of record. The housing arrangement involved here was strictly between Joseph and his mother for Joseph to take care of the property in exchange for a place to live. The evidence concerning this agreement indicates that Mary Campbell wanted nothing more than someone to look after her property. At the time the house was unoccupied and had recently suffered a break-in and a fire. Mary, who resides in another state, was understandably concerned about this and wanted someone to look after the house. Joseph agreed to do this --

specifically, to repair and maintain the premises and pay all utility bills and property taxes -- in exchange for the right to live in the house otherwise rent-free.

This rent-free shelter, therefore, was something Joseph alone obtained, and then in turn provided to his daughter. There is simply no evidence in this record that Kristy was ``given" shelter by her grandmother, other than incidentally through Joseph's agreement to look after her property. This situation is no different than if Mary had given money to Joseph so that he could rent a place to live; such money would be income solely to Joseph and attributable to Kristy only through the parental deeming rules. Likewise, when a parent procures in-kind income, like rent-free shelter, and then provides the benefits of such in-kind income to his children, that income is direct to the parent and attributable to the children only through the parent. *See* 20 C.F.R. 416.1148(b).

The determination that Kristy's shelter derives from Joseph finds further support in the legal relationship between Joseph and Kristy. As her father, Joseph owed Kristy ``a state-imposed legal duty of support." *See King v. Smith*, 392 U.S. 309, 329 (1968); 19 M.R.S.A. 443-A. Like most children, Kristy receives rent-free shelter by residing in her father's household; this is not a case where she lives with her grandmother or some other relative. *See* 20 C.F.R. 416.1132. The shelter Kristy receives is thus not independent of her relationship to her father. Through Joseph's arrangement with his mother, whereby he obtained his own residence, Joseph has merely fulfilled his parental duty of providing shelter for his daughter. As it relates to his legal obligations to Kristy, this situation is no different than if he had rented a place on the open market or purchased his own home. Indeed, to charge Kristy directly for the shelter she receives by living in her father's household when other children are not charged directly for such support would implicate Fifth Amendment equal treatment concerns. *Cf. Moreland v. Sullivan*, 765 F. Supp. 970, 975-76 (C.D. Ill. 1991) (child support payments). Such an interpretation of the Secretary's income counting provisions is obviously to be avoided. *See United States v. Clark*, 445 U.S. 23, 33-34 (1980).

At oral argument the Secretary referred the court to a section of the Program Operations

Manual System ("POMS") entitled "Living Arrangements and In-Kind Support and Maintenance." See POMS SI 00835.000. The Secretary argues that this POMS section reflects the established policy of allocating a rental subsidy to all members of a household because it benefits all members of the household. See *id.* SI 00835.380A. Though not cited by either, this is apparently the basis of the Administrative Law Judge's and Appeals Council's decisions. See Record pp. 4, 14.

I first note that the POMS, though not carrying the force of law, is entitled to some consideration when interpreting the Secretary's regulations. *Hermes v. Secretary of Health & Human Servs.*, 926 F.2d 789, 791 n.1 (9th Cir.), *cert. denied*, 112 S. Ct. 71 (1991). At first glance it appears that the cited POMS section would dictate the result the Secretary advances in this case. Upon further reading, however, it is clear that application of this POMS section does not prescribe a result at variance with my reading of the relevant regulations. Keeping with the regulations, as it must, the POMS does not count in-kind support that comes from a person living within the same household, like Joseph, whose income is deemed to the SSI recipient. See POMS SI 00835.020 ("In-Kind Support and Maintenance from Within a Household"). This section mirrors 20 C.F.R. 416.1148(b). Consequently, application of the POMS in this case does not, as suggested by the Secretary, dictate a different result, because it does not impact the determination that Kristy's shelter comes not from her grandmother but from her father.

IV. CONCLUSION

Based on Joseph's living arrangement with his mother and his legal obligation to support his daughter, I conclude that the source of Kristy's shelter is her father, Joseph. Any shelter Kristy receives derives solely from her parent-child relationship to her father. The rent-free shelter furnished by Mary Campbell is thus not in-kind income direct to Kristy but rather income only to her father. Under the regulations this income can be allocated to Kristy only through the deeming process, as with all other parental income, and cannot be counted as separate in-kind income to her. Because the Secretary has chosen to exempt in-kind support and maintenance from the parental income deemed to a child, Kristy's SSI benefits are not affected by the rent-free shelter her father receives. Accordingly, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 16th day of March, 1994.

David M. Cohen
United States Magistrate Judge