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NH SUPREME COURT

STATE OF NEW HAMPSHIRE  
SUPREME COURT

Case No. 2018-0092

PETITION OF KYLE GUILLEMETTE PURSUANT  
TO RULE 11 OF THE SUPREME COURT

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MEMORANDUM OF MONADNOCK DEVELOPMENTAL SERVICES

INTRODUCTION

Since this appeal has been thoroughly briefed by the appealing (DRC) and respondent parties (Monadnock Workforce and DHHS), Monadnock Developmental Services (MDS) submits this brief Memorandum primarily to address the unintended consequences were the Court to adopt the scope of the “termination” argument advanced by the Disability Rights Center for Kyle Guillemette. In all other respects MDS adopts the Statement of Facts and Arguments presented by MWS and the State in their respective briefs.

BACKGROUND

MDS is one of ten “area agencies” designed under RSA 171-A:18 to provide services and supervision to persons with developmental disabilities throughout Southwestern New Hampshire, which includes thirty-four (34) incorporated cities and towns comprising the catchment area or Region V. He-M 505.04 (Table 505-1). This includes over 1,000 clients, their families and legal guardians. The role and responsibilities of the area agency are largely set out in He-M 505.03 (w), and include:

- (1) Coordination of application for services and eligibility determination process;
- (2) Service planning and coordination;
- (3) Service agreement development and monitoring;

- (4) Provision of services as prescribed in the service agreement;
- (5) Monitoring and safeguarding of rights; and
- (6) Annual assessment of satisfaction with, and review and continuous improvement of, quality of services.

In order to carry out these regional responsibilities, and in particular direct client services, MDS contracts with approximately 19 “vendor agencies”<sup>1</sup> such as MWS and another 47 home and for respite providers. Additional responsibilities, such as case management, service coordination, evaluations, monitoring and safeguarding of client rights are carried out “in-house” by area agency staff. Funding for all the above comes from the federal Medicaid program which is a “joint state and federal [effort] under which the federal government provides financial support to states that establish and administer a state Medicaid program, in accordance with federal law, through an approved state plan. Maxi Drug North, Inc. v. Commissioner, N.H. Department of Health and Human Services, 154 N.H. 102, 103 (2006). In addition, states are also permitted to apply for “waivers” of certain federal requirements with respect to the provision of home and community based services designed to delay or avoid institutionalization. 42 USC § 1396n ( c).<sup>2</sup>

A major feature of New Hampshire’s developmental disability system is its flexibility.<sup>3</sup> Clients, like

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<sup>1</sup>Vendor agencies, like MWS, typically serve several clients within the MDS catchment area.

<sup>2</sup>New Hampshire closed its only state institution, Laconia State School and Training Center, for persons with developmental disabilities in 1991 and relies almost entirely on the Medicaid Waiver Program to support its statewide community based system.

<sup>3</sup>New Hampshire’s developmental disability system is nationally acclaimed. The most recent survey (2016) by the United Cerebral Palsy (UCP) and University of Minnesota ranked it 4<sup>th</sup> in the nation overall based on five measures: (1) promoting independence; (2) health, safety and quality of life; (3) keeping families together; (4) promoting productivity; and (5) reaching those in need.

KG, and their families, can select from a variety of residential options and/or day or work program, through vendor agencies and/or individual providers, or alternatively, design and manage their own program and contract with various providers directly. See, He-M 521.

### **ARGUMENT**

In KG's case, he resides with his mother/guardian at their home in New Ipswich and received day services through a vendor agency (MWS) in Peterborough. But regardless of whatever "model" of services is selected, the area agency remains fundamentally accountable (both to the client and DHHS) for "monitoring and safe-guarding of [client] rights". He-M 503.03 (w)(5). There is good reason for this since persons with developmental disabilities typically suffer significant intellectual deficits which make them particularly vulnerable to abuse, neglect or exploitation by others. And this is where MDS takes issue with the argument and policy advanced by DRC in this appeal.

The position staked out by DRC means, in effect, that whenever there is any change, modification or termination of a client's services with a particular provider, and regardless of the reason, the client/guardian can effectively "veto" this change irrespective of the contract rights and responsibilities between the area agency and vendor agency or service provider. In the case of KG, his day services are provided under contract between MDS and MWS with mutual rights of rescission, generally with 30 days notice. DHHS Record at 226-233. MWS exercised its right to end their day program with KG and his mother, but with the mutual understanding that MWS would ultimately remain responsible for finding another approximate service provider, which it did. DHHS Record at 126. However, because New Hampshire's service delivery system is "voluntary" in nature, the area agency cannot force KG's guardian to accept an alternative provider even if there is an appropriate one available. See, RSA 171-A: 5; DHHS Record at 184-185.

From the perspective of KG's mother the AAU ruling is a disappointing outcome but from MDS' point of view the counter argument and outcome advanced by DRC have potentially profound consequences far beyond the relatively simple facts of this appeal. Since MDS, and all other agencies, employ so many different vendor agencies and service providers, including contracts with family managed providers and other individuals, it is essential that its contracts, and enforcement rights, remain intact to properly and immediately address a myriad of situations, including client's rights violations, fiscal instability, criminal and motor vehicle violations and health and safety issues, just to name a few. He-M 503.03. DRC's interpretation would essentially frustrate these obligations to the detriment, MDS believes, of the very developmental disability clients it is designated by law to both serve and protect.

**CONCLUSION**

For all the reasons set forth above, and those set forth by MWS and DHHS, the Court should affirm the Final Decision of the AAU Presiding Officer.

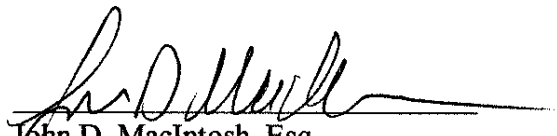
**ORAL ARGUMENT**

Counsel for MDS waives oral argument in favor of counsel for MWS and the Attorney General and consistent with Supreme Court Rule 16 (4) (b).

Respectfully submitted,  
Monadnock Developmental Services  
By and through its attorney  
JOHN D. MACINTOSH, P.C.

9/13/2018

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Date

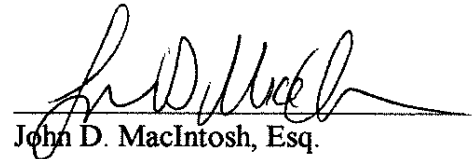
  
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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of MDS' Memorandum has been sent via first-class U.S. mail to James Ziegler, Esq., N.H. Disabilities Rights Center, Concord, New Hampshire; Karen Forbes, Esq., Shaheen & Gordon, Concord, New Hampshire; and Laura Lombardi, Esq., Office of the Attorney General, Concord, New Hampshire.

9/13/2012

\_\_\_\_\_  
Date

  
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John D. MacIntosh, Esq.