

POSTED
R

STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0092

Petition of Kyle Guillemette

RECEIVED
NEW HAMPSHIRE
SUPREME COURT
2018 OCT -14 A 11:33

Appeal by Rule 11 Petition for Original Jurisdiction
From the N.H. Department of Health and Human Services Administrative Appeals Unit

PLAINTIFFS' REPLY BRIEF

James Ziegra, Esq.
NH Bar No. 20689
Disability Rights Center- NH
64 N. Main St. -Suite 2
Concord NH 03301
(603) 228-0432
Jamesz@drcnh.org
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTSi
.....
.....
.....
.....

TABLE OF AUTHORITIES..... ii

SUMMARY OF ARGUMENT..... 1

ARGUMENT..... 1

**I. APPELLANT HAS SUFFERED A CONCRETE INJURY AND HAS
STANDING TO BRING THIS APPEAL**..... 1

**II. THE DEPARTMENT SUPERVISES WORKSOURCE, WHO IS AN
“ADMINISTRATOR” UNDER NH RSA 171-A.**.....3

**III. APPELLANT’S PROPOSED FINDINGS WOULD NOT RESULT IN
ABSURD OR UNREASONABLE OUTCOMES**4

CERTIFICATION OF SERVICE7
.....

TABLE OF AUTHORITIES

TABLE OF CASES:

<u>State v. Maxfield</u> , 167 N.H. 677(2015)	5
---	---

STATE STATUTES

RSA 126-A:5, VIII	2
RSA 171-A:1	6
RSA 171-A:4	3
RSA 171-A:8, II	5
RSA 171-A:8, IV	1
RSA 171-A:19	4

STATE REGULATIONS

He-C 203.14(f)	5
He-M 202.01	4
He-M 202.02(g)	4,n.2
He-M 202.07(j)	4
He-M 310.07(a)(1)	5
He-M 310.07(f)	5
He-M 310.07(a)(1)	2
He-M 507.13(a)(6)	4

SUMMARY OF THE ARGUMENT

Appellant Kyle Guillemette has standing to bring this case because his administrative due process rights were violated. Monadnock Worksource's ("Worksource") decision to terminate services has injured Mr. Guillemette. The plain meaning of the statute and its implementing regulations make clear a provider agency is an administrator and operates under the supervision of the Department of Health and Human Services ("the Department"). As such, a provider may terminate a client's services for a variety of reasons. The language in the statute is unambiguous and consistent with the Legislature's intended structure and implementation of the developmental services system. Mr. Guillemette's proposed findings would not lead to absurd or unreasonable results. Mr. Guillemette's interpretation merely requires a direct service provider follow the due process and notice requirements before properly discontinuing services to a client. By contrast, Respondant Worksource seeks to create unnecessary ambiguity in a plainly written statute and proposes the invalidation of regulations guaranteeing individual rights in order to justify its interpretation.

ARGUMENT

I. APPELLANT HAS STANDING TO BRING THIS APPEAL

Mr. Guillemette has standing to bring this appeal for several reasons. First, the decision made by Worksource to discontinue services without notice or a right to appeal violated Mr. Guillemette's due process rights. Appellant's writ at 5. The developmental services statute makes clear that a client has a right to challenge a decision adversely affecting services. More specifically, the termination provision of the statute permits a client to appeal to the Department a decision discontinuing services. N.H. Rev. Stat. Ann. RSA 171-A:8, IV.

The Department is obligated to provide an appeals process for individuals who receive services from “any provider, programs, services or facilities which are licensed or certified by the department.” N.H. Rev. Stat. Ann. 126-A:5, VIII. Since Worksource is certified by the Department to provide services on the Department’s behalf, the Department must provide the ability to appeal decisions that affect a person’s services. Worksource failed to notify Mr. Guillemette of the decision to discontinue services and failed to provide Mr. Guillemette with the ability to appeal, violating his due process rights.

Second, the discontinuation of services has caused ongoing injury to Mr. Guillemette. Part of the services Mr. Guillemette received from Worksource was designed to improve his “severe social deficiencies.” Appendix to Brief of Monadnock Worksource at 38. In fact, Mr. Guillemette’s mother has testified that since Worksource discontinued providing services, Mr. Guillemette has regressed. *Id.*

Third, services from a different direct service provider are inferior to the services offered by Worksource. Mr. Guillemette’s desire to keep Worksource as a service provider is not arbitrary. Direct service providers are not interchangeable. Appellant’s brief at 11. When a direct service provider discontinues services, the client loses services and staff that are unique to that provider. More importantly, Worksource is one of the few providers in the region that offers “location based” services to its clients. A “location based” service provider is one which has a central gathering area for clients to meet in the morning and reconvene throughout the day. Other direct service providers are “community based,” meaning that they have an office for staff and administration, but no area for clients to meet, socialize and interact with one another. For a client with severe social deficits, this opportunity to interact with peers is important. Under the location based service model provided by Worksource, Mr. Guillemette has flourished. Appellant’s Appendix at 184. The only other “location based” service provider willing and able to meet Mr.

Guillemette's needs, Opportunity Networks, initially told MDS that they would need to hire staff and would be able to serve Mr. Guillemette within 60 days. State's Brief at 8. However, this provider subsequently withdrew its offer to provide services because of an inability to find and hire staff to work with Mr. Guillemette.¹ Respondant's actions have caused an undue delay in the delivery of services, and left Mr. Guillemette to choose from "community based" providers that offer inferior services compared to the "location based" services that Mr. Guillemette has received since entering the developmental services system.

II. THE DEPARTMENT SUPERVISES WORKSOURCE

Respondant incorrectly asserts that Worksource is not an "administrator" because the Department does not supervise Worksource's operations. Worksource Brief at 16. However, statutory law requires the Department to supervise all aspects of the developmental system. The legislature charged the Department to develop and maintain a comprehensive developmental service delivery system, which operates "under the supervision" of the department. N.H. Rev. Stat. Ann. 171-A:4. Because direct service providers operate within the service delivery system, they are necessarily under the supervision of the Department. Thus, interpreting the term "administrator" to include direct service providers is consistent with the plain meaning of RSA 171-A.

"Administrator" is not a relic of the Laconia State School era. The definitions in RSA 171-A have been amended 12 times since being adopted in 1975. All references to "Laconia Developmental Services" were removed from the statute in 2001, yet the term "administrator" remains. Respondant is attempting to create ambiguity in the statutory language where it simply does not exist. A plain reading of the statutory language, combined with the stated intent and

¹ The inability to find staff is due to a workforce shortage. Finding, hiring and retaining qualified staff is a problem throughout the service delivery system.

purpose of RSA 171-A leads to the unambiguous and inescapable conclusion that direct service providers are “administrators.”

To comply with its mandate to supervise the developmental services system, the Department created the Office of Client and Legal Services OCLS to provide supervision. The statute and the rules contain numerous provisions which allow the Department to investigate complaints against provider agencies.² The legislature instructed the Department to create OCLS to ensure that rights of people in the developmental services system are protected. N.H. Rev. Stat. Ann. 171-A:19. OCLS is authorized investigate and respond to complaints made against any program funded through the bureau of developmental services, including direct service providers. N.H. Admin Rule He-M 202.01. Further, direct service providers must allow OCLS “unfettered access” to the premises, staff, records, and files, as well as access to “any other program documents or information determined relevant” by the complaint investigator. N.H. Admin Rule He-M 202.07(j). If a direct service provider “fails to permit or interferes with any inspection or investigation,” then the Department is obligated to revoke the provider’s certification. N.H. Admin. Rule He-M 507.13(a)(6). Nothing in RSA 171-A or its implementing rules to indicates that the legislature intended for sub-contractors to be able to operate without Departmental supervision.

III. APPELLANT’S PROPOSED FINDINGS WOULD NOT RESULT IN ABSURD OR UNREASONABLE OUTCOMES

A ruling that provider agencies must afford service recipients with the individual rights outlined in He-M 310 would not produce absurd or unreasonable results. Worksource posits that even if a provider agency were unable to afford to finance a necessary service, or if a client’s

² A “complaint” includes “any allegation or assertion that right of an individual as set forth in He-M 310.” N.H. Admin. Rule He-M 202.02(g).

needs became too great for that provider to manage, the provider would have no choice but to continue to provide those services in perpetuity. Respondant Worksource Brief at pp. 21-22. This assertion fails to acknowledge that in both of these examples, the provision of services could be terminated, as it would not be in the best interest of the client to remain with that provider, which is a permissible justification to discontinue services.³ He-M 310.07(a)(1). To prevail on appeal, the Respondant has the burden to prove, by a preponderance of the evidence, that terminating or discontinuing services is in the best interest of the client. N.H. Rule Admin. He-C 203.14(f).

Mr. Guillemette's interpretation merely requires that a direct service provider give its client notice of termination and the right to appeal. Both RSA 171-A and He-M 310 require that the direct service provider refer the client back to the area agency to recommend an appropriate service to replace the one being discontinued. RSA 171-A:8, II; He-M 310.07(f). There is nothing absurd or unreasonable about affording a recipient of services the due process rights that are included in both the statute and the regulations. Mr. Guillemette's proposed findings would allow the developmental services statute as well as its implementing regulation to be interpreted consistently.

On the other hand, Respondant Worksource's proposed interpretation would lead to an absurd and unjust result. When interpreting statutory language, this Court construes all parts of the statute in order to effectuate its purpose in order to avoid an absurd or unjust result. State v. Maxfield, 167 N.H. 677, 679 (2015). To reconcile Worksource's interpretation, the plain language of the statute and regulations at issue would need to be ignored. Further, this interpretation would eliminate Department supervision of service providers, nullify the entire section of rules guaranteeing individual rights for service recipients and would unjustly deprive

³ It is hard to imagine that a case manager for an Area Agency, or a client, or their guardian, would agree that it is in a client's best interest to continue receiving services from an unfunded or underqualified provider.

individuals like Mr. Guillemette their statutory right to appeal an adverse decision regarding their services. The explicit purpose of the developmental service system emphasizes the importance of individual choice, safety, and consumer input regarding which services are most appropriate. N.H. Rev. Stat. Ann 171-A:1. Given this purpose, the absurdity of Worksource's proposed outcome cannot be overstated.

Respondants have mischaracterized Mr. Guillemette's proposed findings. Direct service providers are never unwillingly compelled to serve a client, and Mr. Guillemette has never maintained that an individual client has the ability to compel an unwilling provider to begin providing services to a client. Instead, after a direct service provider agrees to provide services, that provider is obligated to follow the procedure of RSA 171-A and He-M 310 in order to properly terminate that service provision agreement.

Direct service providers agree to serve a client willingly and with open eyes. A service provider first receives a proposal from an area agency the outlines what services will be necessary. After agreeing to provide those services, the provider signs an agreement with the area agency and the client. At any point prior to signing an agreement, direct service providers can, without justification, withdraw their offer to provide services. However, once a direct service provider enters into an agreement to provide services for a client, they must serve that client within the rules and regulations created by the Department. Mr. Guillemette contends that the individual rights found in RSA 171-A and He-M 310 cannot be contracted away by an agreement between the area agency and the direct service provider. This interpretation has no bearing on, and does not interfere with, the right of an area agency to enter into a contract with individual service providers.

Respectfully submitted this 4th Day of October, 2018.

KYLE GUILLEMETTE

By and through his attorneys,
DISABILITY RIGHTS CENTER-NH

Date: 10/4/2018

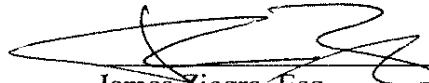
A handwritten signature in black ink, appearing to read "James Ziegra", is written over a horizontal line.

James Ziegra, Esq., NH Bar No 20689
64 N. Main St.- Suite 2
Concord NH 03301
(603) 228-0432

CERTIFICATION OF SERVICE

Pursuant to N.H. Supreme Court Rule 16, I hereby certify that on this 4th day of October, 2018, two copies of the above-described reply brief were mailed to: N.H. Dept. of Health and Human Services, AAU, 105 Pleasant St, Room 121C, Concord, NH 03301; to Karyn Forbes, Esq. 107 Storrs St., Concord, NH 03301, John MacIntosh, Esq. 24 Montgomery St., Concord, NH 03301; and to Laura E.B. Lombardi, Esq., 33 Capitol St, Concord, NH 03301.

10/4/2018
Date


James Ziegra, Esq