

RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3378-14T2

IN THE MATTER OF C.L.

Submitted May 17, 2016 – Decided June 2, 2016

Before Judges St. John and Vernoia.

On appeal from the Department of Human Services, Division of Developmental Disabilities.

M.L., co-guardian of C.L., appellant pro se.

Robert Lougy, Acting Attorney General, attorney for respondent Division of Developmental Disabilities (Melissa H. Raksa, Assistant Attorney General, of counsel; Gerard Hughes, Deputy Attorney General, on the brief).

PER CURIAM

M.L., as co-guardian and on behalf of C.L., appeals the January 22, 2015 final decision of the New Jersey Department of Human Services, Division of Developmental Disabilities (Division) denying a request that M.L. receive payment for providing care and supervision to C.L. from his allocated self-directed day services budget.¹ We affirm.

¹ We employ initials to protect the privacy of the parties.

I.

We discern the following facts and procedural history from the record. C.L. is a twenty-five-year-old male with autism and epilepsy. M.L. is C.L.'s mother and serves as his legal co-guardian with C.L.'s father and uncle. C.L. resides in his parents' home and has received support and funding from the Division's Self-Directed Services (SDS) program since 2012.² The SDS program is administered by the Division pursuant to the Self-Directed Support Services for Persons with Developmental Disabilities Act (Act), N.J.S.A. 30:6D-12.1 to -12.6, which was enacted to provide innovative alternatives to "supervised living arrangements for persons with developmental disabilities" and to allow the development of self-directed programs for persons with developmental disabilities. N.J.S.A. 30:6D-12.2. Participation in the Division's SDS program is voluntary.

Under the SDS program, C.L. receives an annual budget from the Division for self-directed day services, which include the purchase of daytime services described in C.L.'s service plan

² C.L. is on a waiting list for a fuller range of services under the Division's Community Care Waiver (CCW) program. N.J.A.C. 10:46C-1.1 to -2.7; see, J.D. ex rel. D.D.H. v. N.J. Div. of Developmental Disabilities, 329 N.J. Super. 516, 522 (App. Div. 2000) ("When appropriate services are not available, [the Division] must place the eligible individual on a waiting list for services." (citing N.J.S.A. 30:4-25.6)).

under N.J.A.C. 10:46C-1.3. The administration of self-directed daytime services includes a support coordinator, who assists the individual with the self-direction process and in accessing services. It also includes the designation of a fiscal intermediary, which is an agency that contracts with the Division to pay for the daytime services and serves as the employer of record of those providing the services.

M.L. manages the self-directed daytime services that C.L. receives from the Division. In 2013, a substantial portion of C.L.'s self-directed services budget was used to pay for Direct Support Professionals (DSPs), the persons who supervised and assisted C.L. for several hours during the day.

During the summer of 2013, M.L. suspected that the DSP providing daytime services to C.L. may have improperly accessed M.L.'s credit card. M.L. asked the DSP to submit to a personal background check, the DSP refused, and M.L. terminated the DSP's services.

On August 5, 2013, M.L. informed the support coordinator that it would take time to find a suitable replacement DSP who would be willing to care for C.L. M.L. requested that the Division permit her to serve as a paid emergency DSP for C.L. until a replacement could be retained because caring for C.L. prevented M.L. from focusing on her home business.

The Division denied M.L.'s request based upon a provision in the Division's Self-Directed Services Policies & Procedures (policy). The policy expressly prohibits the use of SDS program funds to pay for services furnished by a "parent/stepparent, spouse, guardian, or relative residing in the service recipient's residence." The policy includes an exception which permits a relative living in the residence to act as an emergency DSP, but the exception is inapplicable to "legally responsible relatives" such as M.L. The Division concluded that because M.L. is C.L.'s mother and legal guardian, the policy prohibited payment to her from C.L.'s SDS budget.

On October 13, 2013, M.L. filed a petition with the Division requesting that she be allowed to serve as the paid emergency support provider for C.L. when a DSP was not available. The Division determined the petition was a non-contested matter,³ and offered M.L. an informal conference on the matter.

The informal conference was held on December 6, 2013. Although the Division noted the difficulties confronted by C.L. and M.L., it subsequently upheld its decision denying the

³ A non-contested matter is an appeal "of non-waiver-funded services that are funded only by State funds and for which there are no statutory or regulatory rights of appeal." N.J.A.C. 10:48-3.1(a).

request that M.L. be paid from C.L.'s SDS budget for the care she provided for her son in the absence of a DSP. On behalf of C.L., M.L. requested an administrative review of the decision, and the Division offered an Administrative Paper Review in accordance with N.J.A.C. 10:48-4.3.⁴

On October 24, 2014, M.L., as the legal guardian of C.L., was provided with a recommended decision from the Division's Administrative Review Officer finding that the Division's denial of M.L.'s request to be paid for the care she provided to C.L. was proper. M.L. was advised that she could submit written comments, objections, or exceptions to the recommended decision within ten working days.

M.L. submitted a November 21, 2014 written response to the recommended decision. M.L. argued that the Division's refusal to allow payments from an SDS budget to a lawful guardian of a person with developmental disabilities was unjust and discriminatory. M.L. also argued that the payments should be allowed because use of self-directed daytime services costs less

⁴ N.J.A.C. 10:48-4.3 has since been recodified in part in N.J.A.C. 10:48-4.2, which establishes the process for administrative reviews of informal conferences and permits parties to submit written arguments and evidence supporting their positions.

than placement of a person with developmental disabilities in a facility under the CCW program.

The Division issued its Final Agency Decision on January 22, 2015, finding that the Division's policy expressly barred the use of C.L.'s self-directed budget to pay M.L. for services she provides to care for her son, and denying the request. The Division noted that the policy barring the requested payments "is applied consistently to all individuals receiving services" under the SDS program and the "policy is designed to further sound administration of the [SDS] program by promoting oversight of the services provided and the payments rendered for those services." This appeal followed.

II.

"The scope of appellate review of a final agency decision is limited," and we will not overturn an agency's final decision "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." In re Carter, 191 N.J. 474, 482 (2007) (citations omitted). "[A] court may intervene when 'it is clear that the agency action is inconsistent with its mandate.'" In re Proposed Quest Academy Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013) (quoting In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1, 117 N.J. 311, 325 (1989)).

"Unless a [c]ourt finds that the agency's action was arbitrary, capricious, or unreasonable, the agency's ruling should not be disturbed." Brady v. Bd. of Review, 152 N.J. 197, 210 (1997).

Our Supreme Court has stated that,

[a]lthough sometimes phrased in terms of a search for arbitrary or unreasonable action, the judicial role [in reviewing an agency action] is generally restricted to three inquiries: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[In re Proposed Quest Academy Charter Sch., supra, 216 N.J. at 385 (alterations in original) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

The person challenging an agency action has "[t]he burden of showing that an action was arbitrary, unreasonable or capricious." McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002) (citing Barone v. Dept. of Human Servs., Div. of Med. Assistance & Health Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987)). Although we are not "'bound by the agency's interpretation of a statute or its determination of a strictly legal issue,' if substantial evidence supports the agency's decision, 'a court

may not substitute its own judgment for the agency's even though the court might have reached a different result.'" In re Carter, supra, 191 N.J. at 483 (citations omitted).

Agencies have the discretion "to select those procedures most appropriate to enable the agency to implement legislative policy." In re PSE&G Co. Rate Unbundling, 167 N.J. 377, 385 (2001) (quoting Texter v. Dep't of Human Servs., 88 N.J. 376, 385 (1982)). An agency's rule or regulation that "contravenes the statute which created it . . . 'will be set aside.'" In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 117 (App. Div.) (quoting In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004)), certif. denied, 216 N.J. 8 (2013).

M.L.'s appeal, as co-guardian and on behalf of C.L., is founded upon a plethora of arguments, many of which were not asserted before the Division, challenging the wisdom of the policy prohibiting payment for SDS services provided by the legal guardian of a person with developmental disabilities. M.L. contends that the policy creates a hardship for the family, is impractical because there can be delays in obtaining a qualified DSP, and illogically bars payment to a legal guardian who actually provides the services when payment would be otherwise made to a DSP for the provision of the services. Although M.L. offers numerous policy arguments for a change in

the Division's decision, we are convinced she has failed to establish that the Division's decision prohibiting the payment of funds from C.L.'s SDS budget to M.L. is arbitrary, capricious, or unreasonable. In re Proposed Quest Academy Charter Sch., supra, 216 N.J. at 385.

The Act provides for the provision of funding for self-directed services "to a person with a developmental disability or a person who has been authorized to serve as fiduciary of the person with a developmental disability." N.J.S.A. 30:6D-12.3. Here, M.L. is one of C.L.'s legal guardians and serves as his fiduciary for the Division's provision of funding for the self-directed services C.L. receives under the Act.

As noted by the Division in its decision, the policy prohibiting M.L. from receiving payment for SDS services she provides to C.L. promotes "appropriate oversight of the services provided and the payments rendered for the services." The policy is founded upon the Division's judgment that the fiduciary who is provided the funding on behalf of the person with developmental disabilities as required under N.J.S.A. 30:6D-12.3 should not also be the individual to whom the funds are paid. Allowing the fiduciary a personal entitlement to funds as a service provider could adversely affect the fiduciary's ability to independently – and without any conflict of pecuniary

interest – determine the timing and extent of the services provided, ensure the services are provided in a quality manner, and advocate on behalf of the person with the developmental disabilities.

A strong presumption of reasonableness attaches to the actions of an administrative agency. Smith v. Ricci, 89 N.J. 514, 525, appeal dismissed, 459 U.S. 962, 103 S. Ct. 286, 74 L. Ed. 2d 272 (1982). We are satisfied that the Division's policy and decision denying M.L.'s request for payment are consistent with the Act and reasonably designed to advance the Division's legitimate interest in providing funding only to fiduciaries who have no personal financial interest in the funds due under the SDS program. M.L., as co-guardian and on behalf of C.L., has failed to establish there is anything arbitrary, capricious, or unreasonable about the Agency's policy or decision.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION