

# The State of New Hampshire

**MERRIMACK COUNTY**

**SUPERIOR COURT**

JANESSA VERRILL,  
by and through her guardian,  
LISA VERRILL

v.

COMMISSIONER LORI SHIBINETTE, and the  
NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.: 217-2020-CV-00382

## **ORDER**

The petitioner, Janessa Verrill ("Ms. Verrill"), by and through her guardian, Lisa Verrill, has brought an action seeking declaratory judgment, injunctive relief, and attorney's fees, for violations of RSA 171-A. The respondents, Lori Shibinette and the New Hampshire Department of Health and Human Services (collectively, the "Department"), previously moved for summary judgment and were denied as to Count II of Ms. Verrill's Complaint. Ms. Verrill's cross-motion for summary judgment as to Count II was granted. The parties have since briefed their positions on the remaining Counts. In addition, the Department has requested the Court stay its orders pending appeal to the New Hampshire Supreme Court. The Court held a hearing on these issues on October 18, 2021. For the following reasons, Ms. Verrill's requests for declaratory judgment and attorney's fees are GRANTED, her request for injunctive relief is DENIED, and the Department's request to stay is DENIED.

## I. Background

The Court recounts the undisputed facts described in its March 1, 2021 Order as they remain unchanged at this stage. See Janessa Verrill v. Comm’r Lori Shibinette et al., No. 217-2020-CV-382 Court Doc. 19 (Mar. 1, 2021) (Kissinger, J.) Ms. Verrill is a high school student in Gilford over the age of 18 who suffers from a developmental disability. (Resp’t’s Mot. Summ. J. ¶ 9; Compl. ¶¶ 10–11; Pet’r’s Mot. Summ. J. ¶ 3.) Though she currently lives with her family, Ms. Verrill “can no longer be supported in her family’s home.” (Resp’t’s Mot. Summ. J. ¶ 9; Compl. ¶ 12.) As a result, Ms. Verrill applied for “home and community-based services” pursuant to RSA 171-A. (Resp’t’s Mot. Summ. J. ¶ 9; Compl. ¶¶ 13, 17.) Lakes Region Community Services, an “area agency” for purposes of the statute, determined that Ms. Verrill is “eligible for and in need of developmental services,” including “home and community-based services,” pursuant to RSA 171-A and administrative rules He-M 503.03, 503.05, and 517. (Resp’t’s Mot. Summ. J. ¶ 9; Compl. ¶ 18.) The Department, however, disagreed with the agency’s assessment, noting that Ms. Verrill is still in high school and “home and community-based services are not available to anyone who is still in school.” (Resp’t’s Mot. Summ. J. ¶ 9; Compl. ¶ 19.)

On March 1, 2021, the Court issued an Order granting Ms. Verrill judgment as a matter of law on Count II of the Complaint which sought declaratory judgment that “the purported practice [of] denying [her] benefits because she is still in school interferes with or impairs legal rights and privileges to which she is entitled under RSA 171-A.” Verrill, No. 217-2020-CV-382, at 3, 8. The Department moved for reconsideration which the Court denied on May 3, 2021. See Janessa Verrill v. Comm’r Lori Shibinette et al., No.

217-2020-CV-382 Court Doc. 23 (May 3, 2021) (Kissinger, J.) The Court now considers the remaining Counts of the Complaint and the Department's request to stay.

## **II. Analysis**

### Count I - Declaratory Judgment

For context, the Court describes the statutory scheme at issue in this case. The express purpose of RSA 171-A is to “establish, maintain, implement and coordinate a comprehensive service delivery system for developmentally disabled persons.” RSA 171-A:1. “Such services must be based upon the participation of disabled individuals ‘and their families in decisions concerning necessary, desirable, and appropriate services, recognizing that they are best able to determine their own needs.’” Petition of Guillemette, 171 N.H. 565, 569 (2018) (citing RSA 171-A:1, I). “They must also be ‘based on individual choice, satisfaction, safety, and positive outcomes’ . . . [and] be ‘relevant to the individual's age, abilities, and life goals.’” Id. at 570 (citing RSA 171-A:1, IV–V). The statute makes it the explicit “policy of this state . . . for persons with developmental disabilities and their families [to] be provided services that emphasize community living and programs to support individuals and families, beginning with early intervention.” RSA 171-A:1. The specific provision of RSA 171-A at issue reads as follows:

For persons in school and already eligible for services from the area agencies, funds shall be allocated to them 90 days prior to their graduating or exiting the school system or earlier so that any new or modified services needed are available and provided upon such school graduation or exit.

RSA 171-A:1-a, I(a).

Count I of the Complaint seeks a declaration that Ms. Verrill is entitled to home and community-based services and that the Department's rationale for refusing such

services to Ms. Verrill is invalid and unlawful. (See Compl. ¶¶ 25, 27.) The Court previously found that “nothing in the language of RSA 171-A:1-a, I(a) bars the provision of services to otherwise eligible individuals on account of their enrollment in school.” Verrill, No. 217-2020-CV-382 (Mar. 1, 2021), at 5. As such, the Department was generally misapplying RSA 171-A by denying services to eligible individuals due to their enrollment in school. Accordingly, the Department was also misapplying RSA 171-A to Ms. Verrill as an eligible individual enrolled in school. For the reasons discussed in its previous Order regarding Count II of the Complaint, the Court finds that Ms. Verrill is entitled to home and community-based services, and that the Department’s rationale for refusing her such services is invalid and unlawful. Thus, Ms. Verrill’s request for declaratory judgment in Count I is GRANTED.

#### Count III - Permanent Injunctive Relief

Count III of the Complaint seeks permanent injunctive relief ordering that the Department may not continue to deny Ms. Verrill services because she is still in school. (See Compl. ¶ 39.) The Court “has the power to grant injunctive relief where a party would otherwise suffer immediate irreparable harm.” Thompson v. New Hampshire Bd. of Med., 143 N.H. 107, 109 (1998). “The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” Pike v. Deutsche Bank Nat’l Tr. Co., 168 N.H. 40, 45 (2015). “An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law, and the party seeking an injunction is likely to succeed on the merits.” Id. The Court “retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity.” Id.

Here, the Department has represented to the Court that it intends to comply with the Court's declaration that the Department cannot deny home and community-based services to Ms. Verrill under RSA 171-A due to school enrollment. (See Def. Mem. Remaining Issues And Req. Stay at 1–2.) Accordingly, the Court expects the Department to render appropriate home and community-based services to Ms. Verrill as soon as practicable after issuance of this Order. As such, Ms. Verrill is not facing immediate danger of irreparable harm if the Court does not issue the requested injunction. Thus, Ms. Verrill's request for injunctive relief is DENIED. However, the Court may re-open the case and reconsider injunctive relief should the Department fail to live up to its representations.

#### Count IV - Attorney's Fees

Count IV of the Complaint alleges that because a declaration that the Department's practice of denying services to individuals due to their enrollment in school is unlawful substantially benefits all individuals who are still enrolled in school, and who need home and community-based services, an award of attorney's fees is justified. (Compl. ¶¶ 44–45.) "Although each party to a lawsuit normally bears the expense of its own attorney's fees, there are judicially-created and statutory exceptions to this rule." Bedard v. Town of Alexandria, 159 N.H. 740, 744 (2010). One such judicially-created exception is the "substantial benefit" theory. Id. "Under the 'substantial benefit' theory . . . attorney's fees may be awarded when a litigant's action confers a 'substantial benefit' upon the general public." Id.

The Court finds that Ms. Verrill's successful action confers a substantial benefit upon the general public. By obtaining a declaratory judgment that the Department's

practice of denying services to eligible individuals is unlawful, the public is directly benefited. Eligible individuals enrolled in school will now be able to properly receive appropriate services as contemplated by RSA 171-A. In particular, the explicit policy that “persons with developmental disabilities and their families [are to] be provided services that emphasize community living and programs to support individuals and families, beginning with early intervention” is served due to Ms. Verrill’s successful action. RSA 171-A:1.

Accordingly, the Department shall pay Ms. Verrill’s reasonable attorney’s fees to be established after appeal, or after this Order becomes final, whichever occurs first.

#### Request for Stay

The Department intends to appeal this Court’s orders to the New Hampshire Supreme Court. As such, the Department requests that the Court stay its orders and judgment while the Department’s appeal is pending. The Department argues that absent a stay, it will be in an untenable position of determining how to provide services that are not currently funded but that would not be required if successful in its appeal. (See Def. Mem. Remaining Issues And Req. Stay at 16.) The Court does not find this to be a valid justification to stay its rulings. As discussed above, the Court’s rulings confer a substantial benefit to others similarly situated to Ms. Verrill. Granting the Department’s request to stay would deny these important benefits to the public. As such, the importance of the Court’s rulings on this matter to Ms. Verrill, and others similarly situated, justifies denying the Department’s request to stay. Accordingly, the Department’s request to stay is DENIED.

In sum, the Court finds that Ms. Verrill is entitled to home and community-based services, and that the Department's rationale for refusing her such services is invalid and unlawful. As such, Ms. Verrill's request for declaratory judgment is GRANTED. The Court finds that Ms. Verrill's action confers a substantial benefit upon the general public, and thus her request for attorney's fees is GRANTED. In light of the Department's representation that it will comply with this Court's orders, Ms. Verrill is not facing immediate danger of irreparable harm, and thus her request for injunctive relief is DENIED. Finally, because there are no valid justifications for staying the Court's rulings, and because a stay would potentially deny Ms. Verrill services that she, and others similarly situated, are lawfully entitled to, the Department's request to stay is DENIED.

### **III. Conclusion**

For the foregoing reasons, Ms. Verrill's requests for declaratory judgment and attorney's fees are GRANTED, and her request for injunctive relief is DENIED. The Department's request to stay is DENIED.

**SO ORDERED.**

10/26/21  
Date

  
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John C. Kissinger, Jr.  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 10/28/2021