

IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.*
Lindsey Sodano;
:
:
State of Ohio *ex rel.*
M.S.;
:
:
State of Ohio *ex rel.*
Theresa Grant;
:
:
State of Ohio *ex rel.*
Jennifer Dietsch;
:
Original Action for Writ of
Mandamus
Relators,
:
-vs-
:
COMPLAINT FOR
WRIT OF MANDAMUS
:
Ohio Department of Developmental
Disabilities
:
30 E Broad St.
:
Columbus, Ohio 43215
:
Respondents.

COMPLAINT FOR WRIT OF MANDAMUS

Michela Huth
Attorney Reg. No. 0091353
PO Box 17, Bolivar, Ohio 44612
Tel: 330 440 4027
Michelahuth.esq@gmail.com

Counsel for Relators

Ohio Attorney General
30 E. Broad Street, 25th Floor
Columbus, OH 43215

*Counsel for Respondent Ohio Department
of Developmental Disabilities*

INTRODUCTION

1. This is an original action in mandamus within this Court's constitutional authority.
2. This Court has original jurisdiction over this matter under the Ohio Constitution, Article IV, Section 2(B)(1)(b) and (d) and the Rules of Practice of the Supreme Court of Ohio, Rule X, vest this Court with original jurisdiction to grant a writ of mandamus, a writ of prohibition, and other writs.
3. Respondent Ohio Department of Developmental Disabilities is an administrative department of the State of Ohio's executive branch.
4. This action involves the Ohio Department of Developmental Disabilities' ("DODD") guidance/interpretation of Ohio law, which is being implemented and enforced as if this guidance has the force and effect of law. *See* Exhibit A ("DODD FAQ").
5. This guidance/interpretation forms the basis for Respondents' demand that a parent direct care worker¹ of their minor developmentally disabled child, must undergo a new provider search every four to six months to replace that parent direct care worker.
6. Relators are entitled to the requested writ of mandamus because they have no recourse in the ordinary court of law, and Respondent DODD has no authority to propound administrative interpretation/guidance that alters the meaning of the plain unambiguous language set forth in Ohio Administrative Code 5160-44-32.

¹ "“Direct care worker’ refers to the person providing hands on care to an individual receiving a Medicaid 1915(c) waiver program service.” *See* 5160-44-32(B)(4).

THE RELATORS

7. Relator Lindsey Sodano is the parent of a developmentally disabled minor child who receives homemaker personal care services through an Individual Options Medicaid Waiver. Relator Sodano qualifies under OAC 5160-44-32 to provide services to her child (Relator M.S.) as a direct care worker.² She has been working as her minor child's direct care worker since the autumn of 2022. Relator Sodano has undergone one replacement provider search so far.

8. Relator M.S. is the disabled minor child of Relator Lindsey Sodano, and this child receives homemaker personal care services through an Individual Options Medicaid Waiver. Relator M.S. has been a Medicaid HCBS waiver recipient receiving Homemaker Personal Care services for about ten years.

9. Relator Theresa Grant is the parent of a developmentally disabled minor child who receives homemaker personal care services through a Level One Medicaid Waiver. Relator Grant's minor child first received a Medicaid HCBS waiver in 2019. Relator Grant qualified under OAC 5160-44-32 to provide services to her child as a direct care worker, and worked as her minor child's direct care worker starting in October of 2023. However, because of the unlawful DODD guidance requiring a new search for a replacement provider every "four to six months", Relator Grant was no longer permitted to be the direct care worker starting in the autumn of 2024. The county board of developmental disabilities deemed a replacement provider as being "willing and able." Relator Grant disagreed that the replacement provider was able and qualified, and therefore she continued to provide the services, but was not permitted to receive

² Parents of a minor child who provide Medicaid waiver services to their child are called "direct care workers," which is defined by 5160-44-32(B)(4) as "the person providing hands on care to an individual receiving a medicaid [] waiver program service."

compensation through the Medicaid Waiver program. Consequently, she provides services without pay, to her minor child.

10. Relator Jennifer Dietsch is the parent of a developmentally disabled minor child who receives homemaker personal care services through a SELF Medicaid Waiver. Relator Dietsch qualifies under OAC 5160-44-32 to provide services to her child as a direct care worker, and she has been working as her minor child's direct care worker since spring of 2024. Relator Dietsch has been forced to undergo one "four to six month" search in 2024, and she has been informed a provider search process must begin again shortly.

ALLEGATIONS

I. Ohio Administrative Code 5160-44-32

11. On January 1, 2024, the Ohio Department of Medicaid ("ODM") adopted Ohio Administrative Code 5160-44-32. *See* Ex. B.

12. OAC 5160-44-32 is titled "Home and community based Medicaid waiver program provider and direct care worker relationships".

13. OAC 5160-44-32 is applicable to the Medicaid Waivers which the children of the adult Relators receive: (1) Individual Options Medicaid Waiver; (2) Level One Medicaid Waiver; and (3) SELF Medicaid Waiver. *See* 5160-44-32(A).

14. OAC 5160-44-32 authorizes parents of minors to be employed as direct care workers³ (caregivers) for their minor children through Medicaid home and community-based waivers ("HCBS"⁴). *See* OAC 5160-44-32(E).

³ Parents of a minor child who provide Medicaid waiver services to their child are called "direct care workers," which is defined by 5160-44-32(B)(4) as "the person providing hands on care to an individual receiving a medicaid [] waiver program service."

15. OAC 5160-44-32 lists certain specific conditions that must be met in order for the parent of a minor child to work as that child's direct care worker:

(E) Parents of minor child and spouse of an individual:

(1) A parent of a minor child, or the spouse of an individual may only provide HCBS waiver services to an individual if both of the following conditions are met:

(a) There is no other willing and able provider or direct care worker available to provide the HCBS waiver services to the individual.

(b) ODM, ODA, DODD, or their designee has determined the health and safety needs of the individual can be ensured

II. The Ohio Department of Developmental Disabilities administrative interpretation of OAC 5160-44-32

16. As set forth above, on January 1, 2024, OAC 5160-44-32 went into effect in Ohio.

17. In advance of the above effective date, on November 20, 2023, Respondent DODD published administrative guidance on OAC 5160-44-32.

18. This administrative guidance is in the form of a document titled "Frequently Asked Questions around Ohio Admin. Code 5160-44-32". (hereinafter "DODD FAQ"). *See* Ex. A.

19. The DODD FAQ is also available on DODD's website at https://dodd.ohio.gov/waivers-and-services/services/paid_family.

⁴ "'Home and community-based services (HCBS)' refers to services available to individuals to help maintain their health and safety in a community setting in lieu of institutional care as described in 42 C.F.R. 440 subpart A (October 1, 2023). Programs which provide HCBS include the assisted living waiver, the individual options waiver, the level one waiver, the MyCare Ohio waiver, the Ohio home care waiver, pre-admission screening system providing options and resources today (PASSPORT), and the self-empowered life funding waiver." 5160-44-32(B)(7).

20. The DODD's direct link to the pdf of the DODD FAQ is <https://files.elfsightcdn.com/eafe4a4d-3436-495d-b748-5bdce62d911d/01fcd232-db43-4e4a-bf14-21e7ef79bd74/Frequently-Asked-Questions-DODD-2024-04-17-.pdf>.
21. The DODD FAQ includes mandates and limitations that are not contained in OAC 5160-44-32.
22. These mandates and limitations are being implemented and enforced as if they are the rule of law. *See* Exs. C to F. (Setting forth Relators' and other parents' reports on implementation and enforcement of this guidance.).
23. The specific DODD administrative interpretation/guidance which Relators are challenging herein is the requirement that a new replacement provider search is to be repeated every "four to six months":

PROVIDER SEARCH/PROVIDER TRANSITION:

How often does the Board need to re-engage in the provider search process?

DODD expects that each Board would re-engage the provider search process every four to six months. During the provider search process, the Board would continue to authorize services to the parent through the completion of the process and would only begin to transition services if a willing and able provider is identified and would transition as described below.

Ex. A, p. 4.

III. Ohio Administrative Code 5160-44-32 does not require a new direct care worker search every "four to six months"

24. As set forth above, DODD FAQ mandates that the county boards of developmental disabilities "re-engage the provider search proves every four to six months[]". *See* Ex. A.
25. DODD, by and through their unlawful guidance, is mandating that any parent who works as a direct care worker for their minor child undergo a required replacement care worker search process every "four to six months." *See* Ex. A, p. 4.

26. DODD's guidance/interpretation of OAC 5260-44-32 mandating that there be a re-engagement of a provider search every "four to six months" is not contained anywhere in OAC 5160-44-32.
27. Nor is there any language in OAC 5160-44-32 which could be interpreted to require a new provider search every "four to six months."
28. For the minor child's parent to be deemed eligible to be the child's direct care worker initially, there must be "no other willing and able provider or direct care worker available to provide the HCBS waiver services to the individual." 5160-44-32 (E)(1)(a)
29. OAC 5160-44-32 does not include any limit or expiration date on the parent of a minor child working as that child's direct care worker after both of the conditions set forth in 5160-44-32 (E)(1) are met.
30. OAC 5160-44-32 does not require new and repeated searches to replace the already designated parent direct care worker, after the initial search showed that there was "no other willing and able provider or direct worker available".

IV. Detrimental effects of the challenged administrative guidance/interpretation

31. The "four to six month" replacement direct care worker provider search that DODD has imposed through its administrative guidance places an enormous strain on struggling Ohio families and the provider agencies that wish to employ them.
32. DODD's unlawful guidance has caused, *inter alia*, significant and ongoing upheaval, distress, and uncertainty for disabled minor children and their families.
33. The unlawful guidance jeopardizes the stability of care, violates administrative rulemaking requirements, and creates unnecessary financial and emotional distress.

34. The exact procedures for the “four to six month” replacement provider search may vary slightly by county boards of developmental disabilities, depending on each county board.
35. Generally, the county board publishes an online job posting to attract applicants to replace the existing parent direct care worker.
36. The county board then collects applications for a period of ten to fifteen business days, and then sends the names and contact information for all the applicants to the minor child’s parent.
37. Inherent in the replacement provider search is the need for the parent direct care worker to participate in the screening and interviewing of those applying to replace the parent care worker.
38. DODD directs the county board and parent to work together to locate and hire a “willing and able” applicant to replace the existing parent direct care worker.
39. The county boards of developmental disabilities and the parent care worker engage in the new provider search process as required by the unlawful DODD FAQ.
40. If no “willing and able” replacement provider is found, the parent direct care worker is then permitted by the Respondent DODD’s illegal guidance to be employed as a direct care worker for an additional four to six months.
41. This process repeats per the illegal guidance every four to six months until the child turns eighteen years of age.
42. The Affidavits of the Relators’ and other parents’ at Exhibits C to F, detail the above described replacement search provider process.
43. According to the guidance in the DODD FAQ, if the parent rejects the provider(s) the county board of developmental disabilities deems to be “willing and able” for “whatever reason,”

then the disabled minor child is not able to access their authorized care hours under the Medicaid waiver program.

44. The parent direct care workers are not allowed to continue working as their children's direct care workers if they reject the replacement providers "for whatever reason." *See* Ex. A, p. 2.

What if I don't want to choose the provider that is available? What about Free Choice of Provider?

The rule specifies that a parent of a minor child/spouse can only be paid when there is no other willing and able provider or direct care worker. If a parent/spouse chooses not to use those willing and able providers, for whatever reason(s), the parent/spouse does not, therefore, become the paid provider for their minor child/spouse under this rule.

Efforts to identify an appropriate provider(s) will be well-documented. DODD will expect to see this information if there is a dispute.

Ex. A.

45. One of the obvious detrimental effects of this illegal guidance is that it keeps the minor child, the parent direct care worker, and their family in a near-constant state of upheaval and instability.

46. In addition, these families are being forced to undergo onerous search and interview processes as often as every 120 days, despite the fact that the conditions of OAC 5160-44-32 (E)(1) have already been met, and no health and safety issues have been reported.

47. The initial search required by OAC 5160-44-32 (E)(1)(a) already proved that "there is no other willing and able provider or direct care worker available to provide the HCBS waiver services to the individual."

48. The condition of OAC 5160-44-32 (E)(1)(b), "ODM, ODA, DODD, or their designee has determined the health and safety needs of the individual can be ensured," has also already been met, as the county board of developmental disabilities already determined the parent was

qualified and was able to ensure health and safety needs when initially approving that parent to be a direct care worker.

49. The unlawful DODD guidance/interpretation of a new search every “four to six months” forces parent caregivers into a cycle of job and health insurance instability.

50. Parents leave their existing careers to meet their disabled children’s federally mandated care requirements, only to be replaced by a different direct care worker four to six months later.

V. DODD’s unlawful guidance has significantly impacted disabled children and their parent providers

51. Severely disabled children require stability and familiarity, which are disrupted by frequent caregiver changes. This is especially concerning for teenage girls, who, under this plan, may be forced to receive intimate care—such as bathing, dressing, and menstrual hygiene—from a rotating series of unfamiliar adult men. This raises significant concerns about both safety and dignity.

52. If a disabled teenage girl is not comfortable having her bathing, diapering, dressing, and menstrual care done by a revolving group of unfamiliar men and rejects the agency that employs those men after the county board judges them to be “willing and able,” under the DODD guidance, the teen’s mother cannot be her direct care worker.

53. One prospective direct care worker, during the interview with Relator Grant, was wearing a hat that said, “Fuck You Fuck You.” *See* Ex. C, ¶ 5 – Relator Grant’s Affidavit.

54. While this direct care worker may meet the county board’s definition of “willing and able,” Relator Grant did not feel comfortable exposing her disabled daughter to profanity and had doubts about the direct care worker’s judgement and professionalism. *See* Ex. C.

55. In Relator Grant's case, one applicant admitted she did not have "Valid American Red Cross or equivalent certification in first aid" nor "Valid American Red Cross or equivalent certification in cardiopulmonary resuscitation," (Ex. C, ¶ 4) -- both of which are requirements of OAC 5123-2-08. Despite this person not being a qualified direct care worker, the county board deemed the applicant "willing and able" because the applicant stated she could become qualified prior to her start date. The parent rejected the applicant because she did not hold the legally required certifications, but because the county board deemed the applicant "willing and able" to become qualified, the parent was then removed from being the direct care worker under DODD guidance. *See* Ex. C.

56. Relator Sodano has experienced this unlawful mandate to repeatedly search for a replacement provider, despite already satisfying the conditions set forth in OAC 5160-44-32 (E)(1). *See*

57. Relator Sodano co-leads grassroots advocacy efforts to advocate for fair and reasonable family caregiver policies at the state and federal levels. Through her news and advocacy effort, End Ohio's Parent Penalty, Relator Sodano has gathered stories from parent direct care workers across Ohio who have been subject to the illegal "four to six month" replacement provider search. These parents wish to remain anonymous out of fear of retaliation from their county boards of developmental disabilities or DODD. *See* Ex. E – Relator Sodano Affidavit II; *see also* Ex. F - Brittney Seymour's Affidavit (Ms. Seymour details the continuous searches the government requires her to undergo to replace herself as the direct care worker.).

58. In addition to the DODD guidance causing upheaval in the lives of the disabled minor and the parent direct care worker, there are also deleterious effects upon the agencies that employ the parent direct care workers.

59. The provider agencies that employ parents of minors must risk losing dependable, qualified employees when the parent employee is replaced by another provider.

60. Nowhere in OAC 5160-44-32 or any other statute is there any allowance for the county boards to come into a private business and terminate an employee without cause.

61. The provider agency also loses the minor child as a client when the child's authorized care hours are transferred to the replacement "willing and able" provider agency.

COUNT ONE
DODD's Unlawful Rule Making
"Four to Six-Month" Provider Search

62. "To be entitled to a writ of mandamus, [Relator] must establish a clear legal right to the requested relief, a clear legal duty on the part of [Respondent] to provide it, and the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Scott v. City of Streetsboro*, 150 Ohio St. 3d 1, 4, 2016-Ohio-3308, ¶ 18 (internal citation omitted).

63. DODD's imposition of the "four to six month" replacement provider search is unlawfully legislating without conforming to the requirements of Ohio's statutory rulemaking process.

64. Ohio Revised Code Chapter 119 establishes the procedural requirements for creating administrative rules that have the force and effect of law, and these requirements include public notice, opportunities for public comment, and review by the Joint Committee on Agency Rule Review (JCARR).

65. By bypassing these requirements, DODD has unlawfully legislated through guidance, creating obligations that have significant legal and practical effects on parent direct care worker and their disabled minor children receiving Medicaid HCBS Waivers.

66. Because this guidance was not subject to public review or comment, it lacks the transparency, accountability, and statutory authority required under Ohio law, and is unenforceable.

67. OAC 5160-44-32 does not include any limit or expiration date on the number of months or years a parent of a minor child can work as that child's direct care worker after the conditions set forth in OAC 5160-44-32 (E)(1) have been met.

68. Under OAC 5160-44-32 (E)(1)(a), there would be an initial provider search to determine whether there is "no other willing and able provider or direct care worker available."

69. If this initial search does not produce a willing and able provider or direct care worker, the condition of OAC 5160-44-32 (E)(1)(a) has been met.

70. The parent could be the direct care worker as long as all other conditions of OAC 5160-44-32 are met.

71. Meeting the condition of OAC 5160-44-32 (E)(1)(a) does not expire after "four to six months" as DODD's unlawful guidance dictates as if it was the rule of law.

72. Respondents have altered the meaning of clear text, and this is impermissible. *See TWISM Ents., LLC v. State Bd. of Registration for Professional Engineers Surveyors* (2022), 172 Ohio St.3d 225, 235, 2022-Ohio-4677, ¶ 44 (explaining that "an administrative interpretation should never be used to alter the meaning of clear text.").

73. "If the text is unambiguous, the court should stop right there." *Id.*

74. The text of the OAC is unambiguous in that it does not require a never-ending repeat search for a non-parent direct care worker every "four to six months."

75. As explained by this Court “[w]hen it comes to interpretation of text involving common words used in their ordinary sense, there will rarely, if ever, be a need for a court to look to an agency interpretation.” *Id.*

76. If there was a statutory requirement for a parent to conduct repeated provider searches every four to six months, this requirement would have been written into the statutes. *See Id.* at 239. ¶ 62 (“This court expects a statutory requirement to be “written * * * into the statute.”) (internal quotation and citation omitted).

77. Moreover, as to a lack of a remedy, the Ohio Administrative Code deprives the parent of a minor disabled person of the remedy notice and appeal rights:

(J) A decision by ODM, ODA, DODD, or their designee related to whether someone qualifies under this rule to serve as a provider or a direct care worker for an individual is not subject to notice and appeal rights under division 5101:6 of the Administrative Code.

5160-44-32(J).

78. Relators lack an adequate remedy in the ordinary course of law, as there is no other avenue available to stop Respondent from continuing to issue unlawful guidance and from continuing to implement and execute the purported dictates set forth in this guidance.

79. Relators are entitled to a writ of mandamus on the bases set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Relators respectfully request this Honorable Court issue a writ of mandamus compelling Respondent Ohio Department of Developmental Disabilities to: (1) publicly retract the current unlawful guidance challenged above; and (2) formally notify the public, the county boards, the parent care worker, and the minor disabled child, that the unlawful guidance as to the required “four to six month” provider replacement search no longer has the

force and effect of law, and that parent direct care workers who met the conditions set forth in OAC 5160-44-32 can continue to work as direct care workers as long as they are willing and able.

DATED this 14th day of December 2024.

Respectfully submitted,

/s/ Michela Huth

MICHELA HUTH (Reg. No. 0091353)

PO Box 17, Bolivar, OH 44612

Phone: 330-440-4027

Email: michelahuth.esq@gmail.com

Attorney for Relators