

NH Supreme Court Extends Equal Protection to Children in Litigation Against DCYF

By Michael S. Lewis

In *Petition of New Hampshire Division for Children, Youth and Families*, No. 2021-0563 (Feb. 8, 2023) (*Petition of DCYF*), the New Hampshire Supreme Court imposed heightened scrutiny upon statutes depriving children of the



equal protection of our laws. While the decision focused on the State's effort to impose unequal status on children through its interpretation of the applicable statute of limitations, its outcome has broader implications. Among other things, it places the State's reliance on statutory caps to liability in peril.

The decision reached the New Hampshire Supreme Court from the State's appeal of a lower court decision. In that decision, the trial court, in *C.M. v. DHHS*, No. 217-2019-CV-00677 (Aug. 27, 2021), denied the State's motion to dismiss a tort action brought by children seeking relief from the State.

The facts of the case are harrowing. "DCYF received many complaints that the children were being abused and neglected." *Id.* slip. op. at 2. In 2014, after having first been removed from the home of the abusive parent, DCYF returned the children to her home. DCYF then learned of additional instances of violent child abuse from law enforcement and a physician. *Id.* at 4. One detective noted that DCYF failed to respond to her repeated entreaties to protect them for weeks. *Id.* In November of the same year, the abusive parent killed one of the siblings of the children under circumstances that led the State to successfully prosecute her for second degree murder. *Id.*

The surviving siblings sued the State for negligence arising from the State's failure to protect them. The State moved to dismiss on multiple grounds. The State argued that it had no duty to the children. The trial court rejected that theory, noting that "The vast majority of courts from other jurisdictions have held that an entity charged with investigating and protecting children from abuse and neglect, such as DCYF, owes a duty of care to conduct a competent investigation once it receives a report of suspected abuse." *Id.* at 10 (citations omitted).

The State also argued that the children were barred from seeking relief under the applicable statute of limitations. According to the State's theory, even though children, generally, may file suit two years after they reach

the age of majority for injuries they suffer as minors, when the State is the defendant, the same children must file suit within three years of the injury. The trial court, again, rejected that position. "The Court believes that the legislature did not intend to have a rigid three-year limitation for tort claims brought on behalf of children who were just eight and ten years old at the three-year anniversary of their sister's death. To interpret the law as the State is asking the Court to, would lead to an absurd, unfair, and unjust result." *Id.* at 8. The trial court's decision *did not* turn on State constitutional law.

In affirming the trial court, the New Hampshire Supreme Court went even further. It noted that the statute of limitations the State relied upon arose out of, and was contained within, 1985 legislation that responded to judicial concerns about the continued sustainability of the doctrine of sovereign immunity. *Petition of DCYF*, slip. op. at 3. Reviewing its precedent, the Supreme Court concluded, "when the State waives its sovereign immunity, a statute restricting the ability of a party to bring suit against the State must comport with the principles of equal protection guaranteed by the New Hampshire Constitution." *Id.* at 4. It further observed that because the right to bring a tort action is an "important right," the State bears the burden of justifying unequal treatment by demonstrating that the challenged legislation is substantially related to an important government interest. *Id.* at 5. The State's effort to create two classes of children, those who sue the State and those who sue all other entities, failed this test. *Id.*

The Court ruled that the purpose of the statute at issue, RSA 541-B, was to waive sovereign immunity and to permit tort recovery against the State. *Id.* at 5. The State's interpretation, far from accomplishing that goal, would extinguish the rights of children "injured by the State who do not have . . . a parent or next friend willing to bring suit on their behalf, like many in DCYF custody. . . ." In the case, the Court ruled that the State failed to articulate "any reason – let alone an important governmental one – for foreclosing lawsuits against the State for some child plaintiffs, while allowing lawsuits for children in the same position with claims against private tortfeasors." *Id.* at 6.

As a result of the decision, the State bears the burden of articulating important interests favoring the differential treatment of that class, under State equal protection law. Unlike rational basis review, the State cannot rely on post hoc or hypothesized justifications for its positions. It must identify the actual justification for treating abused and neglected children worse than the popula-

tion, generally. See *Lennartz v. Oak Point, P.A.*, 167 N.H. 459, 463 (2015).

This ruling has serious implications for defenses the State relies upon in civil litigation. RSA 541-B:14, for instance, limits recovery to \$475,000 per claimant and \$3,750,000 per any single incident. RSA 541-B, I. The legislature has not updated those limits since 2007. The amount of \$470,000 in 2007 is worth nearly \$700,000 in 2023, and \$3,750,000 in 2007 is worth over \$5.5 million in 2023. Because the same limits place litigants, including child litigants, in a worse position than the child population, generally, the State's unequal treatment should demand the same equal protection scrutiny set forth under *Petition of DCYF*.

The State will face difficulty offering an important justification for failing to update laws where the statute's purpose was to permit relief. Inflation is a predictable occurrence in the US. The difficulty will be exacerbated by public instances in which the State has acknowledged that the damages it has caused to children far exceeds the statutory cap. See Kristen Carosa, *Nearly \$7M settlement reached with girls sexually abused while under DCYF care*, WMUR.com (May 3, 2018) ("New Hampshire has agreed to pay millions of dollars to two girls who were abused by their parents while the Division of Children, Youth and Families was overseeing them.")

The State also will have to contend with the demands of State constitutional provisions not discussed in *Petition of DCYF*. Part I, Article 14, for instance, provides that "every subject of this State is entitled to a certain remedy . . . completely." It does not carve out

an exception for the State. Part I, Article 8 demands accountability and legality from the State. See Michael Lewis and Craig McMahon, *The End of Governmental Exceptionalism*, NH Bar News 4 (Jan. 16, 2019).

Can accountability and illegality, when proven, countenance an incomplete remedy against a State with a record as bad as DCYF's when it comes to protecting children in the face of mandatory duties? When thinking about this question, consider the outgoing director's implicit condemnation of the State in his interview with NHPR. Julie Furukawa, Mary McIntyre, *NH's DCYF direct is leaving. What work remains to improve the child welfare system?* NHPR.org (Apr. 24, 2023) ("Not every kid is getting access to everything that they need. So, there's still plenty of work to be done.")

Petition of DCYF suggests the answer should be no when it comes to determining civil litigation against the State for failing to protect our kids. These issues should and will be resolved by our courts as cases develop in this area, as news suggests they will. See Tim Callery, *Report prompts changes after Harmony Montgomery's death, but some say more must be done, Several New Hampshire children have died while under DCF care*, WMUR.com (Apr. 11, 2023) (describing serious DCYF dysfunction in relation to deaths of NH children.)

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