STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
Kenneth and Angela Hensley, on behalf of their minor child BLH, and All Others Similarly Situated,)	Civil Action No. 2013-CP-42-01569
Plaintiffs,)	
vs.)	**ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
South Carolina Department of Social Services)	
Defendant.)	

The matter before the Court was Defendant South Carolina Department of Social Services' ("Defendant" or "DSS") Motion for Summary Judgment (filed April 1, 2024) and Plaintiffs, Kenneth and Angela Hensley, on behalf of their minor child BLH, and All Others Similarly Situated, ("Plaintiffs" or "BLH") Motion for Summary Judgment (filed April 15, 2024).

Oral arguments in this matter were held on June 5, 2024. Attorneys T. Ryan Langley and James Fletcher Thompson appeared for the Plaintiffs and Attorney Andrew Lindemann appeared for Defendant. The Court, after considering the submitted motions, memorandum, pleadings, exhibits, and oral arguments hereby denies Defendant's Motion for Summary Judgment and grants Plaintiff's Motion for Partial Summary Judgment as to the issue of exhaustion of administrative remedies.

The Court incorporates the previous Orders in this matter into this Order by reference herein and the Form 4 Order by Judge J. Mark Hayes, II filed July 9, 2024.

FACTS

In June 2002, the then-State Director of DSS issued across-the-board cuts in the adoption subsidies that DSS had contracted to pay some 4,100 families, including BLH's adoptive parents. In 2004, the DSS rescinded a similar cut in subsidies for children in foster care yet has *never restored* the cut in benefits for adoptees whose adoptive parents had earlier accepted all the legal responsibilities of parenthood. BLH, in this lawsuit, alleges a *single count* against DSS for a breach of contract. The evidence before the Court was the contractual agreement between the parties. The Court relied on this document and the plain and ordinary meaning of the words was used.

I. Summary Judgment Standard

Rule 56(c) of the *South Carolina Rules of Civil Procedure* states a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). *Catawba Indian Nation v. State*, 407 S.C. 526, 535–36, 756 S.E.2d 900, 905–06 (2014).

The parties stipulated the relevant facts and agreed that this Court's decision on the exhaustion of administrative remedies issue is appropriate for summary judgment. "Whether administrative remedies must be exhausted is a matter within the [circuit court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof." See *Holman v. S.C. Education Lottery Commission*. 441 S.C. 18, 29, 891 S.E.2d 701 (2023) (citing *Hyde v. S.C. Dep't of Mental Health,* 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994).

"An abuse of discretion occurs where the [circuit court] was controlled by an error of law or where [the circuit court's] order is based on factual conclusions that are without evidentiary support." *Stanton v. Town of Pawleys Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (quoting *Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992)).

ANALYSIS

II. This Court Denies Defendant's Motion for Summary Judgment

Defendant DSS moved for summary judgment on the grounds of failure to exhaust administrative remedies and on the grounds that the Fourth Circuit case Hensley v. *Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013) bars this state Court action by collateral estoppel. The Court finds that the Fourth Circuit case is instructive, but does not, as a matter of law, bar the Plaintiff from going forward with its case as plead. For the reasons outlined below, the Defendant's Motion for Summary Judgment on the failure to exhaust administrative remedies is also not supported by the law. Accordingly, Defendant's Motion for Summary Judgment is denied.

III. The Court Grants Plaintiff's Motion for Summary Judgment on the Issue of Exhaustion of Administrative Remedies

a) Permissive and not Mandatory Language

For the reasons stated below, the Plaintiffs' motion for summary judgment as to the issue of exhaustion of administrative remedies is granted; the Plaintiffs have established that seeking an administrative remedy would have been a futile act.

The contract (adoption subsidy agreement) provides notice to the adoptive parents of their appeal rights as follows: "Adopted parents **may** appeal DSS' decision to reduce, change, or terminate any adoption subsidy in accordance with the rules and procedures of the state's fair hearing and appeal process. Information **may** be requested from DSS." (emphasis added).

The Plaintiffs contend that the bolded language in the adoption subsidy agreement does not require that the adoptive parents pursue this administrative remedy.

Similarly, the Plaintiffs contend that the statute regarding redress for subsidy reductions is not mandatory. Rather, like the adoption subsidy agreement, the Plaintiffs assert that it offers a mechanism for redress, but does not purport to be an exclusive or compulsory mechanism.[1] Plaintiffs cite *Edge v. State Farm Insurance Company*, 345 S.C. 136, 139-40, 546 S.E.2d 647, (2021) to support their position that there is no requirement to pursue administrative remedies when both the contractual and statutory language is discretionary, and not mandatory.[2] The Court agrees with this contention.

The Court finds it can make this decision without reaching Plaintiffs' argument that the exhaustion of administrative remedies is permissive solely based on the word "may," which appears in the contract. This court concludes this argument is not determinative in the granting of this motion but is rather only instructive. Instead, to the degree this decision is discretionary

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[1] **SECTION 63-9-1790.** Review of decisions.

A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations.

The DSS regulations on this subject are equally permissive, and not mandatory:

1. The family **has a right** to appeal any decision made by the department on supplemental benefits, both before and after finalization of the adoption, according to the Department's approved appeal process.

2. The family will be informed of its right to a judicial review in accordance with the Administrative Procedures Act. (See S. C. Reg. Section 114–4380(G)) (emphasis added).

[2] "The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation. *Byerly v. Connor*, 307 S.C. 441, 415 S.E.2d 796 (1992). Pursuant to the plain and ordinary meaning of the regulation, an aggrieved party may appeal to the Commissioner; however, nothing prevents the aggrieved party from bypassing an administrative hearing before the Commissioner and bringing an action in the circuit court as *Edge* did in this matter. By using the word "may" instead of "shall," the regulation allows, but does not require, an aggrieved party to appeal to the Commissioner. *See Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995)* (use of word "may" signifies permission and generally means the action spoken of is optional or discretionary); *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980) (same)."

Edge v. State Farm Insurance Company, 345 S.C. 136, 139-40, 546 S.E.2d 647, (2021) (footnotes omitted)

the Court holds that the facts presented do not require the exhaustion of those administrative remedies because the plaintiff has established the issue of futility.

b) Futility

The stipulated facts are as follows: On June 20, 2022, adoptive parents received a letter from Elizabeth G. Patterson, then state Director of the Department of Social Services. Ms. Patterson announced a unilateral and across-the-board reduction in the monthly subsidy rate of $20 per child. This is an undisputed fact.

The letter from Ms. Patterson stated that the department "has made every effort to avoid taking any action that affects critical services to children and families. However, it is now necessary to take additional measures in order to stay within the department budget." Ms. Patterson continued: "Please be assured that this action has not been taken without much thought and consternation. I would not be asking families to make this financial sacrifice if I did not feel it was necessary in order to continue to provide essential, protective service and assistance to as many children as possible." In short, the letter from Director Patterson announced that this was a necessary action, and a decision made at the highest level of the agency.

It is clear to this court that the DSS decision concerning the $20 monthly payment was not an individualized decision based on the specific needs of the adopting family or the special needs of the child. Instead, the decision was an overall financially driven agency decision. Therefore, any individual recipient of the subsidy who had been deprived of the $20 monthly amount would have reasonably concluded the futility of appealing this decision. This court concludes that where the highest placed person within an organization has announced a decision, and that decision is an across-the-board decision and is not unique or fact specific to

the denied recipient, a reasonable person would consider an appeal to be vain or futile.[3] See *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct.App. 2010) (recognizing an exception to the requirement of exhaustion of administrative remedies when a party demonstrates that pursuit of administrative remedies would be a "vain or futile" act).

Once a party has established their right to summary judgment, the opposing party must come forth with facts to counter the moving party's right to summary judgment. Here, DSS has provided no facts to sufficiently counter the Plaintiff's position. Accordingly, the Court finds as a matter of law, there was no reasonable requirement for the Plaintiff to exhaust the administrative remedies in order to recover the $20 monthly amount. Under the facts presented, this Court finds that the Plaintiff has established this issue of futility and, therefore, is entitled to summary judgment as to the exhaustion of administrative remedies issue.

As a result, this Court denies the Defendant's Motion for Summary Judgment and grants the Plaintiff's Motion for Partial Summary Judgment ordering that Plaintiffs were not required to exhaust their administrative remedies prior to instituting this action because any such attempt would have been futile.

AND IT IS SO ORDERED.

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The Honorable Judge J. Mark Hayes, II
Presiding Judge of Spartanburg County
Seventh Judicial Circuit

August _____2024.

[3] Similarly, the Supreme Court of South Carolina has found that it would be futile to require a parent to exhaust administrative remedies when a school board of trustees has already acted adversely to the parent. In *Storm M.H., v. Charleston County Board of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012), a parent from Berkeley County sought to enroll her child in a magnet school in Charleston County. When the Board of Trustees decided that only Charleston County residents were eligible for enrollment, the parent did not pursue available administrative remedies, but instead filed an action in the circuit court. The Supreme Court held that "we find it would have been futile for Parent to exhaust her administrative remedies as the Board's decision was certainly to be unfavorable." *Id.* at 487. There, like here, when the highest placed and most powerful person or entity has already spoken, it is futile for a parent to assume the outcome of an administrative procedure would be different.

Spartanburg Common Pleas

Case Caption: Blh , plaintiff, et al VS South Carolina Department Of Social Services

Case Number: 2013CP4201569

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132