THE STATE OF SOUTH CAROLINA
IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

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Case 2013-002415

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Brook Waddle ..... Appellant,

v

South Carolina Department of Health and Human Services ..... Respondent.

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# INITIAL BRIEF OF APPELLANT

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## II. Statement of Issues on Appeal

1. **Do Respondent's longstanding practices of failing to provide notices containing all of the information required by 42 C.F.R. 431.210 and dismissing Medicaid fair hearing appeals without providing evidentiary hearings, for reasons other than those reasons contained in the notices, violate participants' constitutional and statutory rights to due process and the Medicaid Act? Are these violations subject to repetition and have they evaded review?**

2. **Does the agency's practice of purging the record of evidence fair hearing appellants have submitted violate their constitutional and statutory rights to due process and is this violation is especially egregious when the agency dismisses an appeal without providing the required evidentiary hearing, where it would be required to accept such evidence into the record?**

3. **Have the Department of Health and Human Services (DHHS) and the Administrative Law Court violated the Separation of Powers Doctrine by obstructing review of Medicaid appeals by the Judicial Branch of government and administering the program based on arbitrary binding norms established by Executive Branch bureaucrats in violation of laws and regulations promulgated by the South Carolina General Assembly and Congress?**

## III. Statement of the Case

### 1. Nature of the Case

The parties have widely different views about the nature of this case. Appellant Brook Waddle alleges that this appeal is primarily about ongoing and systemic violations of her right to due process that is guaranteed her under the United States Constitution, the Constitution of the State of South Carolina and the Medicaid Act. Brook complains that DHHS has established a pattern and practice of sending defective notices, or not sending notices at all, and of dismissing fair hearing appeals without providing an evidentiary hearing, based on reasons other than those reasons contained on the notices. She alleges that these constitutional and statutory violations are subject to repetition, but they have evaded review, thereby obstructing her right to judicial review for years. Id.

Respondent views the case far more narrowly. On the one hand Respondent has argued that this case is solely about DHHS' decision to deny payment for an oximeter cable. R. ____.

Instead of supplementing the record of Brook's 2007 appeal (Docket No. 07-ALJ-08-0626-AP), as Brook requested when this subsequent violation occurred, Respondents treated her complaint as a totally new appeal, assigning the case a new number (Case No. 13-MISC-21). This new appeal is hereinafter referred to as "Waddle II." But, then DHHS filed a motion to dismiss the appeal with the Administrative Law Court, appearing to argue that it is part and parcel of Brook's 2007 appeal. The 2007 appeal is referred to herein as "Waddle I." R. ___.

The Administrative Law Court ruled that Brook's complaints about systemic violations of federal and state laws in Waddle I are irrelevant to this appeal. Both the agency and the Administrative Law Court dismissed her appeal without providing an evidentiary hearing.

2. **The amount involved in the Appeal**

Rule 208 of the South Carolina Rules of Appellate Practice requires the appellant to state the amount involved in the appeal. Because the hearing officer dismissed Brook's request for a hearing without providing the evidentiary hearing required by 42 U.S.C. 1396a(a)(3) and did not allow her to call or cross examine Respondent's witnesses or allow her to submit evidence at the required hearing, the Record does not contain the price of the oximeter cable. Appellant requests that this Court take judicial notice that Medicaid reimbursement rate for the device in our sister state of North Carolina is $187.21. *See* http://www.ncdhhs.gov/dma/fee/DME/dme_rates_0114.pdf. Although the device is inexpensive, the failure to use an oximeter can lead to death, thus, the value of this case is actually the value of the life of Brook Waddle. In *People v. Murray*, the conviction of Michael Jackson's personal physician for manslaughter was recently upheld by the California Court of Appeals, in part because the jury found that he failed to use an oximeter to properly monitor Mr. Jackson's vital signs. Case No. B237677 (Cal.Ct.Ap. January 15, 2014). ("According to expert medical testimony presented at trial using a proper pulse oximeter could have saved Mr. Jackson's life." Id. at fn 8.)

Instead of monetary damages, in her administrative appeal, Brook has requested nothing more than a declaratory order requiring DHHS to comply with the law and to stop violating the constitutional right to due process of Medicaid participants. Brook also requests that this Court order DHHS to pay reasonable legal fees and costs incurred in this civil action.

### 3. History of Brook's Medicaid Appeals

#### a. The April, 2007 Fair Hearing Appeal at DHHS

Brook filed an appeal in 2007 when DHHS refused to pay for the services and equipment her physician determined that she needed upon discharge from MUSC. She requested that all Medicaid services be continued during her 2007 appeal, as required by 42 C.F.R. 431.231. Since her discharge from MUSC in 2007, she has been receiving tracheotomy supplies through Medicaid. Instead of scheduling and holding an evidentiary hearing in 2007, the DHHS hearing officer issued an interlocutory order. R. ___. This order required Brook to submit a "Memorandum of Understanding" and that the Memorandum be in a form and content approved by DHHS. R. ___. But Brook was unable to reach an "understanding" with DHHS and resolution of the appeal was out of her control. R. ___. No such form existed. R. ___. Even though Brook notified the hearing officer that she had tried to comply with her order, instead of scheduling an evidentiary hearing, the hearing officer issued an "Order to Show Cause" on August 17, 2007. This order, issued more than 90 days after Brook filed her request for a fair hearing, required Brook to brief the issues in her appeal before the hearing officer would schedule an evidentiary hearing. R. ___. At this point, approximately 120 days had passed since Brook had requested a fair hearing. On November 16, 2007, the hearing officer issued an order dismissing Brook's fair hearing as "moot," over her objections, without providing the requested evidentiary hearing. 42 C.F.R. 431.244. R. ___.

#### b. First Appeal to the Administrative Law Court in 2007

Brook appealed the hearing officer's dismissal to the South Carolina Administrative Law Court in 2007. R. ____. In 2009, approximately two years after Brook requested a fair hearing, the Administrative Law Court reversed the agency decision and remanded Brook's appeal back to DHHS, with instructions to provide an evidentiary hearing. R. ___.

#### c. Fair Hearing Proceedings on First Remand from Administrative Law Court in 2009

The hearing officer held an all day "fair hearing" at DHHS on April 24, 2009 and issued an order on July 9, 2009, upholding the agency's decision to deny the services and equipment her doctor had ordered in 2007. R. ___. Order of DHHS Hearing Officer dated July 9, 2009.

#### d. Second Appeal to the Administrative Law Court in 2009

Brook filed a second appeal with the Administrative Law Court in 2009. As the appellant, Brook bore the expenses of having the hearing transcribed. Rule 35, Rules of the Administrative Law Court. After briefing, a hearing was held in the South Carolina Administrative Law Court on June 14, 2009 and another hearing held on March 1, 2010, but that Executive Branch Agency (the Administrative Law Court) - on the second trip to that court - did not issue a final administrative order until more than two years later. By that time, more than 1,800 days had passed since Brook filed her request for a final administrative decision requesting that needed medical care be provided with "reasonable promptness." During this time, DHHS improperly reduced Brook's services below the number of hours she was receiving in 2007 when she filed Waddle I. *B.W. v. DHHS,* Case No. 07-MISC-028 (SCDHHS Nov. 19, 2013).

This Court may take judicial notice that in 2012, according to the South Carolina Administrative Law Court's Annual Accountability Report for FY 2011-2012, that Court's "suggested time frame" for disposing of Medicaid appeals was 180 days. *See* http://dc.statelibrary.sc.gov/bitstream/handle/10827/9423/ALC_Annual_Accountability_Report_2011-2012.pdf?sequence=1 at 14. This amount is double the time allowed by federal law to issue a final administrative decision in a Medicaid hearing. 42 C.F.R. 431.244(f) and *Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012). In FY 2012, the Administrative Law Court only ruled upon 40% of its Medicaid appeals within this 180 day period, taking an average of 284 days to decide Medicaid appeals. 2011-2012 Id. at 15. (This is in addition to the time Medicaid participants spend in the administrative proceedings at DHHS, and it does not take into account any prior appeal to the Administrative Law Court that was remanded back to DHHS.) CMS addressed the issue of delays resulting from remanding fair hearing appeals in the *State Medicaid Manual (SMM),* which is a manual issued by CMS, the federal agency authorized by Congress to administer the Medicaid program. This Manual "makes available to all State Medicaid agencies ... informational and procedural material needed by the States to administer the Medicaid program.... The manual provides instructions, regulatory citations, and information for implementing provisions of Title XIX of the Social Security Act (the Act). Instructions are official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies" *Shakhnes v. Berlin*, 689 F.3d 244, fn 11 (2d Cir. 2012). The SMM states that "a

conclusive decision in the name of the State Agency shall be made by the hearing authority" and that a remand "is not a substitute for a definitive and final administrative action." SMM § 2903.2(A).

Brook filed a motion to reconsider the Administrative Law Court's decision to remand her case to DHHS and more time passed for a third round of oral arguments to be held in the Administrative Law Court. Appellant's ALC Brief at 5. Instead of issuing an order that was appealable to the Judicial Branch, on July 30, 2013, the Administrative Law Judge again remanded Brook's case back to the agency, with instructions to determine:

1. The weekly hours of registered nursing that are needed by the Appellant, taking into consideration the practical scheduling concerns of qualified providers in the geographical vicinity of the Appellant.

2. The specific type of care and the number of weekly hours of each type of care required by the Appellant during the course of her treatment since her discharge from the hospital in May of 2007 consistent with the Medicaid Program, and the principal that the mother is not legally responsible for caring for the Appellant.

3. The number of hours of the authorized care described in #2 above, that have been provided by the mother (according to her qualifications), and the cost of that care, which amount shall be paid to the mother.

4. The amount to be paid for services provided by Brook's mother, requiring that her mother should be allowed to provide whatever care she is qualified to provide within the authorized hours of service.

5. The cost of an average digital speech device of the type described by Dr. Burton shall be determined and paid to the Appellant to defray the cost of the more expensive device.

R. ___.

**e. Second Remand to DHHS in 2012**

In October of 2012, an additional two days of evidentiary hearings were held at DHHS on remand from the Administrative Law Court. This hearing was presided over by Honorable Elizabeth Hutto, Esq., who was and is believed to continue to be the Program Director for the

DHHS Office of Appeals and Hearings.[1] On December 10, 2012, approximately 150 days after the most recent remand by the Administrative Law Court back to DHHS, and more than four years after Brook filed her appeal, in December of 2012, Brook filed "Petitioner's Motion for an Interlocutory Order," requesting an interlocutory order requiring DHHS to restore the hours improperly reduced since 2007 (which had been reduced in violation of federal regulations at 42 C.F.R. 431.231 and DHHS' own policies), reimbursement for the speech device in the amount DHHS had already agreed to pay ($8,318.80) and partial payment to Brook's mother for services she provided for which Judge McLeod determined she was entitled to payment. R. ___. DHHS filed a response objecting to the requested interlocutory order, in part, because "a Final Administrative Decision...is no doubt imminent." R. ___. Yet, nearly a year passed before DHHS issued its order - while Brook's condition continued to deteriorate due to the refusal to provide even the hours she was receiving in 2007 when she filed Waddle I. More than six years after Brook requested a fair hearing complaining that the services her physician had ordered had not been provided with reasonable promptness, DHHS issued a decision on November 19, 2013. R. ___.

**f. Appeal of Denial of Tracheotomy Supplies in 2013**

In January of 2013, DHHS' agent, KePro sent Brook a notice informing her of the agency's decision to deny payment for an oximeter cable that she needs to measure the oxygen saturation level in her blood. R. ___ and ALC Order dated October 11, 2013 at fn 2. Like the other notices sent by DHHS, this notice did not contain the statute or regulations upon which the DHHS decision was based. Id. 42 C.F.R. 431.210. It also did not inform Brook of the procedure for appealing this denial. Id. Finally, the reason given for denying the prescription of Brook's physician eleven days after Apria submitted it to KePro was "Provider submitted no clinical information supporting request and prescription when requested to do so." Id. There is no evidence in the record that KePro or DHHS made any attempt to contact Brook's physician or to review the extensive medical records in the possession of DHHS to determine the medical

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[1] In February of 2013, Ms. Hutto was appointed as the interim Deputy Director and Chief Financial Officer for DHHS, while continuing to hold the position as Program Director for the Office of Hearings and Appeals.

necessity for the device. On January 30, 2013, Brook requested that the record in her Waddle I appeal "be supplemented with this latest denial." Id.

But, instead of treating this denial as further evidence of the ongoing and systemic violations that Brook complained of in her 2007 appeal, DHHS treated this information as a new and different appeal (referred to herein as "Waddle II") and assigned it a new case number and hearing officer. R. ___. Instead of scheduling an evidentiary hearing and issuing a decision within 90 days, this new DHHS hearing officer issued a "Pre Hearing Conference Order" which required the parties to confer within one month and imposed a burden on DHHS counsel to file a "summary of issues discussed" and to inform the hearing officer "whether consensus had been reached and any remaining issues." R. ___. The order required DHHS counsel to provide "with specificity, any additional information that will be submitted at the hearing..." and required Brook's counsel to attend the conference and to file "a statement of intention to continue the appeal process and to attend a Fair Hearing." But the order did not address the medical necessity of the device. Id. It did not mention the oximeter cable. Id. Brook's counsel complied with that order.

On March 19, 2013, Brook's counsel filed a three page document with the DHHS Office of Hearings and Appeals in response to that order, captioned "Appellant's Response to Order." In this Response, she indicated her intent to continue the appeal. R. ___. She incorporated and re-alleged all allegations made since 2007. In this Response, Brook requested reasonable accommodations during the hearing and she requested an independent medical assessment pursuant to 42 C.F.R. 431.240(b). R. ___.[2] Id. In the letter counsel for DHHS sent to the hearing officer in response to the Pre Hearing Conference Order, the agency admitted that the appeal arose from Apria'sdenial of payment for an oximeter cable based on that DHHS provider (not Brook) failing to submit "supporting clinical information" to its agent, KePro. R. ___. Counsel for DHHS deferred to Brook "to allow her to submit to the hearing officer any additional issues

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[2] DHHS paid the amount ordered for the speech device in January of 2013, but has appealed its own agency's order requiring payment to Brook's mother for services provided and it has refused to provide the number of hours ordered by the Director of the DHHS Office of Appeals and Hearings, who now also holds the position as Chief Financial Officer of DHHS.

she wishes to raise at the hearing." Id.

On March 27, 2013, the hearing officer sent an email to counsel complaining that Brook's Response "does not address the issue of my case (denial of prior authorization of an oximeter cable...)." (Emphasis added.) R. ___. The Pre Hearing Conference Order did not ask Brook to present proof of the medical necessity of the cable. The applicable federal regulations required that Brook be allowed to present testimony at an evidentiary hearing on that issue. 42 C.F.R. 431.242. Federal regulations at 42 C.F.R. 431.244(a) required the hearing officer to base her decision "exclusively on evidence introduced at the hearing." In the email dated March 27, 2013, the hearing officer demanded that Brook provide her with written "documentation of medical necessity for the cable." Brook asked in her formal Response that the hearing officer order a medical assessment, to be conducted at agency expense pursuant to 42 C.F.R. 240(b). Id. 42 C.F.R. 431.240(b) requires that this assessment be "obtained at agency expense and made part of the record."[3] Id. On April 4, 2013, the hearing officer issued an order dismissing Brook's request for a fair hearing without providing an evidentiary hearing, concluding that Brook had somehow "abandoned the appeal..." by not providing written proof of medical necessity for the cable prior to a hearing being scheduled. R. ___.

**g. Third Appeal to the Administrative Law Court in 2013**

On May 9, 2013, Brook filed an appeal with the South Carolina Administrative Law Court of the dismissal of Waddle II, which had been dismissed by the DHHS hearing officer on the grounds of "abandonment." Brook objected to the failure to provide an evidentiary hearing and the failure of the hearing officer to include in the Record on Appeal records of the 2007 appeal, which Brook had incorporated by reference in her Response to th hearing officer's Pre Hearing Order.[4] R. ___. In Issue 2 of Appellant's Initial Brief filed with the Administrative Law

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[3] 42 C.F.R. 431.250(f) provides for federal matching funding for assessments authorized pursuant to 42 C.F.R. 431.240(b). The federal match in South Carolina is approximately 70%

[4] It appears that the Administrative Law Court may have been under pressure to dispose of Medicaid cases more promptly than in the past. This Court may take judicial notice and compare that Court's 2012-2013 Accountability Report to the prior year's report, which shows that the average number of days to resolve a Medicaid appeal had increased from 284 days in FY 2011-2012 to 422 days by the following year. *See*

Court, Brook complained that:

> *DHHS and this Court, as agencies of the executive branch of state government, have violated the separation of powers provision of the South Carolina Constitution, Brook's Constitutional right to due process, her statutory right to notices of the denial, reduction or termination of Medicaid services meeting the requirements of 42 C.F.R. 431.210, her right to an evidentiary hearing meeting the requirements of 42 C.F.R. 431.242 and 244 and her right to a final administrative decision within 90 days of her April 28, 2007 appeal by failing to rule upon all of the issues raised in her 2007 appeal and delaying her opportunity for judicial review for more than six years.*

On page 19 of Appellant's Initial Brief, Brook alleged:

> *The State Medicaid Agency has failed to provide an evidentiary hearing when her requests for services have been denied, in violation of 42 C.F.R. 431.220. DHHS and this Court have limited and interfered with her freedom to make a request for a hearing in violation of 42 C.F.R. 431.221. In clear violation of 42 C.F.R. 431.223, DHHS has dismissed Brook's requests for an evidentiary hearing. It has denied her procedural rights to an evidentiary hearing as established in 42 C.F.R. 431.242. (Emphasis added.)*

Instead of simply providing this inexpensive device that is needed to measure Brook's oxygen saturation level, DHHS filed a Motion to Dismiss Brook's appeal with the South Carolina Administrative Law Court on September 11, 2013. R. ___. In this motion, DHHS asked the Administrative Law Court to dismiss Waddle II because her claim "is precisely or substantially the same in both proceedings."[5] R. __. Motion to Dismiss at 3. At that point,

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http://www.scalc.net/pub/FY2012-2013%20ALC%20Accountability%20Report.pdf http://dc.statelibrary.sc.gov/bitstream/handle/10827/12038/ALC_Annual_Accountability_Report_2012-2013.pdf?sequence=1 at 15. The number of Medicaid appeals had nearly doubled, increasing from 15 to 27 in just one year. Whereas in FY 2011-2012 forty percent of cases were resolved within the Court's own "objective" of 180 days between filing and disposition, a year later, only 23% of Medicaid appeals were being decided by the Administrative Law Court within 180 days. (These numbers do not include the time between the Medicaid participant filing her appeal with DHHS and the case being filed in the Administrative Law Court, nor are they believed to include prior appeals to the Administrative Law Court which were remanded back to DHHS). Dismissing Medicaid appeals, without providing a hearing, might have helped improve these statistics.

[5] The November 19, 2014 order of the hearing officer in Waddle I did not mention the denial of the oximeter cable.

DHHS agreed with Brook that the violations complained of in Waddle II were "encompassed in the complaint" filed in 2007. Id. at 4. ("Therefore, Appellant's appeal should be dismissed pursuant to Rule 12(b)(8) because the claims are precisely or substantially the same in both proceedings." Id.)

**h. DHHS Offer to Settle in 2013**

While Waddle I and II were pending, in September of 2012, DHHS offered to settle Brook's appeals by providing fewer hours than her physicians ordered since 2007, but more hours than are allowed by the current caps imposed on DDSN Medicaid waiver participants. November 19, 2013 Order at 10. But this offer would require Brook to abandon her challenge of the validity of the 2010 reductions, thus leaving her in worse shape than she was in when she filed her appeal in 2007. DHHS' offer would restore the number of hours of services nearly to the level she was receiving in 2007, but would not provide the number of hours her physicians ordered now or in the future.

**I. Administrative Law Court Order on 2013 Appeal (Waddle II)**

On October 11, 2013, without providing a hearing in the Administrative Law Court, the Administrative Law Judge issued an order dismissing Waddle II. He found that the hearing officer erred in ruling that Brook had abandoned her appeal. Despite both parties now arguing that the denial of the oximeter cable was included in the appeal that had been pending since 2007, the Administrative Law Judge concluded that "the oximeter cable is a new claim that has not been raised in other, pending proceedings." R. ___. His order dismissed Brook's appeal (Waddle II) on different grounds, i.e. that Brook "failed to challenge the hearing officer's decision in her Initial Brief." Id.

**j. Appeal of 2013 Administrative Proceedings to South Carolina Court of Appeals**

Brook received the Administrative Law Court's order dismissing her 2013 appeal (Waddle II) on October 15, 2013 and she filed and served a timely notice of appeal with the South Carolina Court of Appeals on November 12, 2014.

**k. Third DHHS Order on 2007 Administrative Appeal (Waddle I)**

Back at DHHS, on November 19, 2013, the hearing officer assigned to Waddle I (the action filed in 2007) issued an order on the 2007 administrative appeal. This decision confirmed

that DHHS had repeatedly over a period of years violated Brook's due process rights and that DHHS had improperly reduced her services during the appeal. R. ___. November 19, 2013 Order. The hearing officer ordered DHHS to provide the number of hours Brook's physician had ordered in 2007 during the pendency of her state administrative appeal, ordered DHHS to pay her mother for services that Medicaid should have paid and to reimburse Brook for a speech device that should have been provided in 2007. Id.

However, the hearing officer ruled that the Office of Appeals and Hearings does not have the authority to order DHHS to exceed the caps contained in the waiver document. R. ___. However, according to this order, the agency (DHHS) has the authority to exceed waiver limits "for this particular participant," at its discretion:

> The Respondent's September 2012 settlement letter implicitly acknowledges that it may be appropriate to exceed Waiver limits for this particular participant; however, *an Administrative Hearing Officer does not have the authority to exceed the limits of the Waiver program.* (Emphasis added.)

Order dated November 19, 2013 at 31. This Court may take judicial notice that in *Peter B. v. Sanford*, 6:10-cv-00767-JMC -BHH, Report and Recommendation of Magistrate Judge dated November 24, 2010 (S.C.D.C. 2011) and in *Richard Stogsdill v. Sebelius*, Case No. 3:12-0007-TMC (SCDC), DHHS has argued that federal courts do not have jurisdiction over lawsuits brought by DDSN Medicaid waiver participants contesting the validity of these caps. DHHS has argued to those federal courts that the state administrative "fair hearing" proceedings are the sole remedy available. DHHS has also argued to the federal district court judge and the United States Court of Appeals for the Fourth Circuit in *Doe v. Kidd I and II* that the state administrative appeal process is the only remedy for Medicaid waiver participants who object to violations of federal law in the administration of Medicaid programs in South Carolina. *Supra.*

**l. Third Appeal to the Administrative Law Court of the 2007 Appeal in 2013**

Brook appealed the decision of the hearing officer, i.e. the decision that the hearing officer does not have the authority to exceed the caps imposed in 2010 (without authorization of the General Assembly or promulgation of regulations) to the South Carolina Administrative Law

Court in December of 2013.[6] R. ___. If she had not filed this appeal, her services would have immediately been reduced below the amount her physicians and the hearing officer found to be inadequate to meet her needs.

Upon receipt of this November 19, 2013 order, HHS filed a motion to reconsider its own hearing officer's order in Waddle I and the hearing officer issued another order on December 23, 2013, affirming that the November 19, 2013 order was her "final order." R. ___ and ___. When the hearing officer issued the December 23, 2013 order on DHHS' motion to reconsider the November 19, 2013 order of the DHHS hearing officer, DHHS then filed an appeal of its own agency's final order with the South Carolina Administrative Law Court. ___ and ___.

**m. Current Status**

Brook requested additional time to file her brief in this Court after the issuance of the DHHS hearing officer's decision, hoping to negotiate a resolution. R. ___. That request was granted by this Court. R. ___. Unfortunately, the parties were unable to settle either appeal. The hearing officer, who had been promoted to the position of Chief Financial Officer for DHHS in February of 2013, while continuing to hold the position as Director of the Office of Hearings and Appeals, filed a request with the Administrative Law Court requesting an additional eight weeks to file the Record on Appeal in Waddle I. R. ___. The Administrative Law Court granted that motion to delay filing the transcript and the date for filing the Record on Appeal in Waddle I has been extended to April 3, 2014, nearly seven years after Brook filed her appeal and requested that medically necessary services be provided with "reasonable promptness." R. ___.

4. **Proceedings in the lower court.**

Rule 208 requires appellants to include in the Statement of the Case the proceedings in the lower court that have affected the appeal or may throw light upon the questions involved in the appeal. The pleadings the parties have filed and the orders of the agency and the lower court are included in Brook's Designation of the Record.

IV. **Standard of Review**

The standard of review in this case is governed by the Administrative Procedures Act.

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[6] Brook also alleges that a mathematical error was made in the calculation of the amount owed to Brook's mother for services she provided. R. ___.

S.C. Code Ann. § 1-23-380(5) (Supp.2010). *Jane Doe v. DHSS*, S.E.2d 605, 398 S.C. 62, 71 (S.C. 2011). This Court may affirm the agency's decision, remand the matter, or reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority granted of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

*Id.* Brook seeks injunctive relief and a declaratory judgment in this action, not money damages. Declaratory judgments, in and of themselves, are neither legal nor equitable. *See Felts v. Richland County,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). The standard of review for a declaratory judgment action is determined by the nature of the underlying issue. "Actions for injunctive relief are equitable in nature." *Shaw v. Coleman*, 373 S.C. 485, 492, 645 S.E.2d 252, 256 (Ct.App.2007). *See also* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 193 (1999). In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence. *Shaw at 492. See also Ingram v. Kasey's Assocs.,* 340 S.C. 98, 105, 531 S.E.2d 287, 290-91 (2000); *Townes Assocs. v. City of Greenville,* 266 S.C. 81, 85, 221 S.E.2d 773, 776 (1976).

The court may substitute its judgment for that of the agency on issues of law. *Mullis v. the South Carolina Department of Health and Human Services,* 04 ALJ 30-0194-AP (2005). While construction of a statue by an agency is accorded the "most respectful consideration," the final responsibility for the interpretation of the law rests with the Court. Id. "An agency's mistaken interpretation of a statute or regulation will constitute reversible error of law." Id. A reviewing court may reverse an agency's final decision as arbitrary if the decision is without rational basis, is based alone on one's will and not upon a course of reasoning and exercise of

judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Id. An abuse of discretion occurs where the deciding judge bases his decision on an error of law without evidentiary support. *Id.* at 475.

Statutory interpretation is a question of law that is subject to *de novo* review. *Town of Summerville v. City of N. Charleston,* 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citation omitted). " The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue,*388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.,* 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). "If the statute is ambiguous ... courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted). But, where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail,*381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

## V. Background

### 1. The Medicaid Program

Medicaid is a federally funded program through which the federal government "provides financial assistance to states so that they may furnish medical care to needy individuals." *Jane Doe v. DHHS*, 398 S.C. 62, 727 S.E.2d 605 (S.C. 2011). Participation in the program is voluntary; however, participating states must comply with requirements imposed by the Medicaid Act and related regulations. *Wilder v. Virginia Hosp. Assoc.,* 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). ("Although North Carolina may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, it is not entitled to assert that interest to insulate itself from the requirements of the federal program."), cert. denied, *Odom v. Antrican*, 537 U.S. 973 (2002). To receive federal funding, a state must submit and have approved a " plan for medical assistance" that describes the nature and scope of the state's Medicaid program. *Id.* A state's plan must provide covered medical services with reasonable promptness to all Medicaid beneficiaries for whom they are medically necessary. *See* 42 U.S.C. § 1396a(a)(1), (a)(10)(A)(I), (a)(10)(B) (2006); *Doe v. Kidd I,* 501 F.3d 348, 354 (4th Cir. 2007) and *Doe v. Kidd II,* Case No. 10-1191 (4th Cir. March 24, 2011). When

DHHS denies, reduces or terminates services, or fails to provide services with reasonable promptness, DHHS is obligated to provide a evidentiary hearing meeting all of the due process requirements of *Goldberg v. Kelly*, 397 U.S. 254, 261(1970). 42 U.S.C. 1396a(a)(3) and 42 C.F.R. 431.200 et. seq.

In S.C. Code Ann. § 44-6-730, the South Carolina General Assembly directed DHHS to "promulgate regulations as are necessary for the implementation of this article and as are necessary to comply with federal law. In addition, the commission shall amend the state Medicaid plan in a manner that is consistent with this article." S.C. Code Ann. (Emphasis added.) S.C. Code Ann. § 44-6-190 requires DHHS to promulgate regulations pursuant to the Administrative Procedures Act and directs that appeals from decisions by the department are heard pursuant to the Administrative Procedures Act, Administrative Law Judge, Article 5, Chapter 23 of Title 1 of the 1976 Code.

Agency policy is contained in the DHHS website which sets forth "Appeals and Hearings Frequently Asked Questions" at
https://www.scdhhs.gov/site-page/appeals-and-hearings-frequently-asked-questions
This web page informs the public that the DHHS hearing officer "will decide whether the action proposed or taken by the South Carolina Department of Health and Human Services is correct and fair" and it informs the public that the hearing is "a court-like procedure conducted by a hearing officer of the Division of Appeals and Hearings." DHHS explains that;

> The hearing officer listens to your explanation of why you do not agree with the action taken by the South Carolina Department of Health and Human Services. The hearing officer will also listen to the South Carolina Department of Health and Human Services' explanation of the action taken on your case. Both sides can ask questions of any witnesses. The hearing officer will ask questions to get enough information to decide if your case was handled correctly, based on the current regulations and policies.

In keeping with 42 C.F.R. 431.210, this web page correctly states that the notice must contain the following information:

(1) A statement of the proposed action

(2) The reason for the proposed action

(3) The regulation or policy that supports the action (see Regulations and Policy Links)

(4) An explanation of your right to a fair hearing

(5) An explanation of how you can continue to receive benefits during the appeal process This policy informs appellants that they must provide DHHS prior notice if they intend to be represented by an attorney at the hearing. (But DHHS does not impose this requirement to notify the appellant that an attorney will represent the department at the hearing.) According to this policy, appellants are informed that if they "withdraw or abandon" an appeal, their benefits will be discontinued. This policy describes "an Interlocutory Order" as is "a document sent to you and/or the South Carolina Department of Health and Human Services requesting additional action(s) or information." DHHS informs appellants in this policy that DHHS may require them to attend a pre hearing conference and that if they do not respond to the Interlocutory Order by the due date, the hearing officer has the authority to dismiss the appeal. Appellants are also informed that a notice of hearing will be mailed at least 30 days before the hearing date. DHHS instructs appellants that DHHS may submit a brief, but that "Even if you do not give the hearing officer a brief, you can still make arguments, call witnesses, and submit documents at the hearing." Evidence allowed into the record includes medical records, or school records" and "a letter from your doctor."[7] Documents may be submitted before or at the hearing. According to this agency policy, participants will be allowed to make an opening statement, present arguments and evidence, cross-examine the other party's witnesses and to present a closing statement. The fact sheet does not mention the requirement that DHHS issue a decision within 90 days, or that it must provide services with "reasonable promptness" (interpreted by the courts as meaning no later than 90 days).

When a Medicaid participant files a request for a fair hearing, it is the policy of DHHS to continue providing services on appeal until a final administrative ruling is issued by the Administrative Law Court. R. ___. Order dated Nov. 19, 2003 Order at 31. ("According to Dr. Veldheer, if a participant requests continuation of services, those services are continued through the Administrative Law Court level." Id. at 26.) See also Affidavit of Byron Roberts, general counsel for DHHS attached to Brook's December 10, 2012 Motion for an Interlocutory Order,

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[7] But this Court may take notice that DHHS has argued that sworn affidavits of health care providers should not be considered by hearing officers or considered as evidence, because they are "hearsay." R. ___.

which states:

> ...if the DHHS Hearing Officer denies a Medicaid Waiver appeal, and the service recipient appeals that decision to the South Carolina Administrative Law Court, DHHS has a longstanding practice of keeping the services in effect during the pendency of the Administrative Law Court. Rule 34 of the Administrative Law Court Rules provides for an automatic stay of agency action during the pendency of an appeal to the ALC unless a party requests otherwise, but DHHS does not, as a practice, ask that the automatic stay be lifted in appeals involving service eligibility issues. This has been true for the administrative appeals...generally.

R. ___.

In addition to "regular," or "State Plan" Medicaid benefits, the State provides Medicaid Home and Community Based services through the Head and Spinal Cord Injury (HASCI) program administered by the South Carolina Department of Disabilities and Special Needs (DDSN) under contract with DHHS. S.C. Code Ann. 44-38-310. This program was created by 42 U.S.C. § 1396n© (2000), allowing states to waive the requirement that persons with disabilities live in an institution in order to receive certain Medicaid services. *Doe v. Kidd I,* 501 F.3d 348, 351 (4th Cir. 2007). The Medicaid waver program enables states to receive federal financial assistance specifically to provide medical care for needy individuals who would otherwise require institutional care. Id.

Prior to 2010, DHHS did not have caps on DDSN Medicaid waiver services, but drastic reductions were implemented on January 1, 2010, with caps imposed on the number of hours provided in the home. *Peter B. v. Sanford,* 6:10-cv-00767-JMC -BHH, Report and Recommendation of Magistrate Judge dated November 24, 2010 (S.C.D.C. 2011). R. ____. Those caps were reversed by the Administrative Law Court in every known case in which the Medicaid waiver participant had a lawsuit pending in federal court when the Administrative Law Court issued its decision. When many of these "parallel track" waiver participants filed requests for an administrative hearing at DHHS, an "interlocutory order" was issued and their appeals were dismissed by the DHHS hearing officers without providing evidentiary hearings required by 42 U.S.C. 1396a(a)(3). Yet, while these administrative appeals were pending, after dismissal of their "fair hearing appeal" without providing an evidentiary hearing, DHHS continued to argue to the federal district court judges that the administrative appeal process was the sole remedy available to Medicaid participants and that the federal courts do not have jurisdiction to consider

complaints involving violations of the Medicaid Act. *Peter B. v. Sanford, supra.*, *Hickey v. Forkner*, Docket No. 10-ALJ-08-0650AP (SCALC July 19, 2011).

In *Hickey v. DHHS*, the DHHS hearing officer dismissed the individual's fair appeal without providing an evidentiary hearing in 2010. R. ____. The South Carolina Administrative Law Court ruled that the DHHS hearing officer violated the participant's due process rights by dismissing Hickey's appeal without providing an evidentiary hearing and that the 2010 caps could not be enforced, because they established binding norms without promulgating regulations. *Hickey v. DHHS,* Docket No. 10-ALJ-08-0650AP (SCALC July 19, 2011). In *Hickey v. Forkner* the federal district court issued an order prohibiting DHHS from applying the 2010 caps to reduce Hickey's services, allowing her to continue to receive 50 hours a week of PCA services - which is 22 hours a week over the cap established in 2010 by DHHS. Case No. 4:10-2696-TWL-TER (SCDC December 21, 2011). The federal court held that DHHS had improperly treated the 28 hour a week cap as a "binding and enforceable rule without promulgating the cap as a regulation pursuant to the Administrative Procedures Act." Id. The federal district court reported that DHHS informed the Court that it had no plan to promulgate the caps as a regulation. Id. DHHS has continued to treat these caps as binding norms for other Medicaid participants, in complete disregard for the ruling of the Administrative Law Court in *Hickey*.

The Administrative Law Court likewise, ruled that DHHS committed legal error by dismissing appeals in other cases based on Medicaid participant's responses to "interlocutory orders" without providing evidentiary hearings required by 42 U.S.C. 1396a(a)(3) in *Edge v. DHHS*, Docket No. 10-ALJ-08-0501-AP (SCALC October 29, 2010); *Eubanks v. DHHS*, Docket No. 10-ALJ-08-0502-AP (SCALC October 29, 2010); *Morgan v. DHHS*; Docket No. 10-ALJ-08-0503-AP (SCALC October 29, 2010).[8] Yet, this same practice continues without corrective

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[8] In an order that conflicts with *Hickey*, in *Richard Stogsdill v. DHHS*, the hearing officer upheld the 2010 caps, despite DHHS having previously determined, in 2009, that more hours were medically necessary. R. ___, ____ and ___. (Orders of DHHS hearing officer and the Administrative Law Court in Richard Stogsdill). Richard Stogsdill's case is on appeal to this Court, with oral arguments scheduled for March 12, 2014. S.C.Court of Appeals Case No. 10-ALJ-0774-AP. The cuts were also recently upheld by the Administrative Law Court in *Myers v. DHHS*, 11-MISC-302(MR/RD) (SCDHHS February 9, 2012), in another order that contradicts *Hickey*. As in Brook's case, in Myers, the hearing officer first dismissed his case without

action in Waddle II and other cases.

In *Peter B. v. Sanford*, the district court granted the plaintiff's motion for a preliminary injunction, prohibiting DHHS from imposing the 2010 caps on Michelle M. and Chip E., which had not been promulgated as regulation. Case No. 6:10-767-TMC (D.S.C. March 7, 2013). R. ___. The South Carolina Administrative Court, adopted the holding in *Hickey*, ruling that the caps on DDSN Medicaid waiver services were unenforceable against Michelle M. and Chip E. *Eubanks v. DHHS*, Docket No. 10-ALJ-08-0502-AP (SCALC October 29, 2010); *Morgan v. DHHS*; Docket No. 10-ALJ-08-0503-AP (SCALC October 29,2010). Yet DDSN and DHHS continue to enforce the caps against those Medicaid participants like Brook who have not yet filed federal lawsuits.[9]

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providing a hearing, based on Myers responses to an "interlocutory order" that were unsatisfactory to the hearing officer. Id. On remand from the Administrative Law Court, the hearing officer upheld the reductions. Myers' case was frozen in the Executive Branch for four years before an opportunity for judicial review was made available to Myers on February 3, 2014, when the Administrative Law Court issued an order upholding the reductions. *Myers v. DHHS*, Docket No. 12-ALJ-08-0713-AP (SCALC Feb. 3, 2014). R. ___.

[9] Subsequently, the federal district court dismissed the lawsuits brought by Chip E. and Michelle M., because they prevailed in their administrative appeals and DHHS assured the court that the caps would not be enforced against them. *R.* ____. *Peter B. v. Buschemi*, Case No. 6:10-767-TMC (D.S.C. 2012). Their attempt to appeal this interlocutory order was denied by the Court of Appeals for the Fourth Circuit, because the federal district court judge stayed the claims of the third plaintiff, Peter B., pending resolution of his state administrative appeal. The South Carolina Court of Appeals had remanded Peter's case to DHHS with instructions to provide a fair hearing "in accordance with this opinion and pursuant to 42 C.F.R. § 431.220(a)(1)-(2)." *Brown v. DHHS*, 393 S.C. 11, 709 S.E.2d 701 (S.C.App. 2011). But, in violation of that order of the South Carolina Court of Appeals, the DHHS hearing officer dismissed Peter's appeal again two years later, without providing a hearing on the merits of his case. *Peter Brown v. DHHS* (SCDHHS March 12, 2013). See also *Peter Brown v. DHHS,* Docket No. 13-ALJ-08-0159-AP (SCALC Feb. 4, 2014). The Administrative Law Court upheld that dismissal, over the objections of Peter's guardian in February, 2013. In *Peter Brown v. DHHS.* and in *Richard Stogsdill v. DHHS.*, the DHHS Office of Appeals and Hearings purged from the record on appeal the testimony and evidence presented in the evidentiary hearings held in 2006 (Brown) and 2009 (Stogsdill). DHHS has not imposed the 2010 caps on Richard Stogsdill, solely because he has a pending lawsuit in the federal district court, and his services continue pending resolution of his federal case. The district court dismissed Stogsdill's claim against the federal government, allowing his private action against state actors to proceed. *Richard Stogsdill v. Sebelius*, No. 12-

The "comparability statute" of the Medicaid Act requires that services and eligibility requirements provided to one member of a covered group must be made available to all participants in that program. 42 U.S.C. § 1396a(a)(10)(B)(I), (ii). Services provided to any individual in a group of covered persons must be "equal in amount, duration, and scope for all recipients within the group." 42 C.F.R. § 440.240. Courts have consistently recognized that states have violated the comparability requirement when some recipients are treated differently from other recipients in cases where each has the same level of need. *Schott v. Olszewski,* 401 F.3d 682, 688-89 (6th Cir.2005) (finding treatment was not comparable when Medicaid did not reimburse recipient for medical expenses she paid out of pocket after she was wrongfully denied coverage); *White v. Beal,* 555 F.2d 1146, 1151-52 (3d Cir.1977) (finding statute was illegal when it covered eyeglasses for those suffering from eye diseases but did not cover glasses for patients when refractive error caused poor eyesight).

Section 1320c, et seq. of the Social Security Act requires the creation of a peer review system developed through disinterested "Quality Improvement Organizations (QIO's)." Quality Improvement Organizations review the activities of health professionals in the area "for the purpose of determining whether... the quality of such services meets professionally recognized standards of health care[.]" 42 U.S.C. § 1320c-3(a)(1)(B). QIO's must "apply professionally developed norms of care, diagnosis, and treatment based upon typical patterns of practice within the geographic area served by the organization as principal points of evaluation and review, taking into consideration national norms where appropriate." *Id.* at § 1320c-3(a)(6)(A). DHHS has contracted with KePro to provide QIO reviews. Because DHHS refused to provide an evidentiary hearing, where Brook could have called KePro and DHHS witnesses to testify, this Court should take judicial notice of DHHS' website that announced its contract with KePro as its chosen "Quality Improvement Organization."[10] *See*

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7, D. S.C.; 2013 U.S. Dist. LEXIS 18062 (S.C.D.C. Feb. 11, 2013).

[10] The notice does not state whether Apria is a Managed Care Organization (MCO) and it does not advise Brook about how she can initiate an appeal. If Apria is a Managed Care Organization, the time frame for resolving her appeal is significantly reduced. 42 C.F.R. 431.244(f) provides that a decision must be issued "as expeditiously as the enrollee's health

https://www.scdhhs.gov/sites/default/files/QIOMedicaidBulletin.pdf. According to its website at /www.kepro.com/services/independent-medical-reviews.aspx, KePro is:

> ...dedicated to assuring that members are not unfairly denied medically necessary services. Our appeals are performed by independent, objective peer reviewers much like us who know the ropes. KEPRO performs fee-for-service and managed care appeals.

In Waddle II, there is no evidence of any review being conducted by peer reviewers at KePro before the DHHS hearing officer dismissed her appeal, over Brook's objections, without providing a fair hearing. The process Kepro is supposed to follow was discussed in *In the Matter of Protests of Carolinas Center for Medical Excellence et al*, Case Nos. 2011-114, 115 and 116 (Richland County Chief Procurement Officer, June 21, 2011).

2. **History of Brook's Medicaid Services**

Upon discharge from the hospital in 2007, DHHS provided some services at home through both "regular" Medicaid and the HASCI program, pursuant to Brook's plan of care that DDSN approved. But DHHS denied Brook's request for payment for the number of hours and durable medical equipment that had been determined by her treating physician to be medically necessary. R. ___. November 19, 2013 Order. As the hearing officer recognized in her December 23, 2013 order, even though these services were inadequate to meet Brook's needs at home:

> After many months of delays, the Petitioner was forced to accept Respondent's proposed hours if she wanted to return home. There was no viable alternative.

R. ___. DHHS also refused to pay for the speech device that had been ordered by two physicians. Id.

Brook is unable to move her arms or her legs, she breathes through a tracheotomy and

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condition requires, but no later than 3 working days after the agency receives, from the MCO or PIHP..." 42 C.F.R. 438.410 contains rules for the resolution of expedited appeals:

> (a) General rule. Each MCO and PIHP must establish and maintain an expedited review process for appeals, when the MCO or PIHP determines (for a request from the enrollee) or the provider indicates (in making the request on the enrollee's behalf or supporting the enrollee's request) that taking the time for a standard resolution could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function.

suffers from grand mal seizures. R. ___ and ___. Id. at 1 and 15. She is fed by an attendant. She is afflicted by spastic quadriplegia, a neurogenic bladder, hypothyroidism, dysphagia, and hypotension. She has a history of pulmonary embolus and staff infections, including MRSA. Id. at 18 and 19. She has been hospitalized with confusion and an altered mental state and suffers from depression and anxiety. Id. at 18.

Brook must be suctioned throughout the day to clear mucus from her tracheotomy tube which "could be deadly ..." Id. at 14. Since returning home, Brook has suffered frequent bouts of pneumonia which require suctioning as frequently as three to five times an hour. Id. Brook requires catheterization and a bowel program and has suffered from frequent urinary tract infections and painful kidney stones. Id. at 15. Brook cannot feel when she is wet, causing her skin to break down. Id. Id. She has a history of decubitus ulcers and must be turned once or twice every two hours to prevent skin breakdown. Id. She needs, but is not receiving, physical therapy and occupational therapy to improve contractures which prevent her from straightening her arms. Id. Her skin breaks when her arms are stretched. Id. Brook takes daily medications for seizures, depression, neuropathy pain, prevention of muscle and bladder spasms and for migraine headaches. Id.

Waddle I has lingered in the Executive Branch for nearly seven years without a decision that is appealable to the Judicial Branch. More than 2,500 days have passed since Brook filed her 2007 administrative appeal complaining that DHHS was refusing to provide medically necessary services and equipment with reasonable promptness. Brook identified the following issues in her 2007 appeal:

1. The State's failure to provide Brook with services in the least restrictive setting, including, but not limited to, nursing services, attendant services, psychological services, *assistive technology devices and other services for which appellant is eligible to receive*. (Emphasis added.)

2. The State has failed to provide medially necessary services with "reasonable promptness."

3. The State erred in denying requested services in violation of applicable federal case law and regulations.

R. ___. In Waddle II, Brook alleged that DHHS' denial of the oximeter cable violated her right to due process and rights under the Medicaid Act. She has alleged that this action constituted evidence of continued violations of federal law that were appealed in Waddle I.

Brook testified at the 2012 hearing (through an affidavit, because she was unable to attend the hearing) that she would "rather die than go to a SCDDSN Regional Center like Whitten Center or to attend a workshop..." November 19, 2013 Order at 21. Ms. Hutto's order in Waddle I that was issued on November 19, 2013 determined that community based treatment is appropriate for Brook and that she requires "constant care and cannot be left alone." Id at 21 and 24. According to that order, Brook has not received the RN services that she needs. Id. The hearing officer ruled that Brook "should receive the maximum services available under the HASCI Waiver." Id. According to the order of the DHHS hearing officer in Waddle I, Brook has been "maintained at home with fewer services than those to which she was entitled due to the extraordinary efforts and dedication of her mother." Id. at 25.

In one denial notice sent in 2007, DHHS informed Brook that the number of hours ordered by her physician exceeded HASCI limits. But this rule was contradicted in testimony from agency witnesses in Waddle I, because prior to 2008, DHHS did not impose caps on HASCI services. Id. at 7 and 9. In another notice, DHHS informed Brook that her request for services was being denied, because the cost would exceed the cost of nursing home care. R. ____. But, as the DHHS hearing officer stated in the November 19, 2013 order, according to testimony at Brook's 2012 fair hearing, "The HASCI Waiver Document is clear that there is no individual cost limit." According to the testimony of the director of the HASCI program, DDSN was following "limits we were applying at the direction of HHS," but no regulations were ever promulgated allowing either agency to limit Medicaid waiver services and no documentation of the basis for those limits appears in the record. Id. at 7.

In 2010, without promulgating regulations or obtaining approval of any kind from the South Carolina General Assembly, DHHS implemented "across the board" cuts in Medicaid waiver services. *Peter B. v. Sanford, supra. and Hickey v. Forkner, supra.* The hearing officer noted in the November 29, 2013 order that these reductions were implemented without providing an "individual assessment to determine whether the cuts were appropriate..." Id. at 10.

According to the current Chief Financial Officer for DHHS (hearing officer Hutto), no cost analysis was performed by DHHS to determine if less expensive services could be used and no medical review of the consequences of the cuts was performed by DHHS or DDSN. Id.

The DHHS hearing officer found that the notices DDSN issued to Brook in Waddle I "were improper as they did not contain the statutes or regulations the actions were based upon nor did they provide instruction on how to appeal the negative action." Id. at 22. The November 19, 2013 order states that "the reasons for the denials given in these notices were erroneous according to the testimony of the Respondent." Id. The hearing officer determined that Brook's services were "improperly reduced several times" while her appeal was pending and that these reductions "occurred without notice and the opportunity to appeal." Id. She ruled that DHHS improperly reduced Brook's services in 2008 without providing the required notice. Id. The order states that DHHS again "improperly reduced" Brook's hours in 2009 while her appeal was pending and that DHHS again "failed to provide proper notice." Id. The order states that DHHS erred by failing to reassess her need for services when her parents divorced and her mother became Brook's sole family caregiver. Id. at 23. She found that the DDSN service coordinator erroneously asserted that Brook was restricted to receiving two hours a day of RN services. Id. Because of "miscommunication and service reductions," according to that order, Brook's mother has provided all of the care that DHHS improperly failed to provide. Id.

Also according to the November 19, 2013 Order, prior to 2010, there was no evidence that the State conducted medical reviews of Brook's condition to determine the number of hours of care that she requires. R. ___. Id. at 16. DHHS has not "provided any records which indicate that a physician for the Respondent has ever reviewed the Petitioner's medical needs." Id. at 24. Since 2010, a "centralized nurse" conducts an assessment to determine medical necessity, but this DDSN nurse has never met Brook nor been to her home. Id. at 16 and 17. The "centralized nurse" does not give any deference to physicians' orders that exceed the caps DDSN has imposed. Id. The State failed to present any medical witnesses with "direct knowledge" of Brook's condition at any of the hearings. DHHS' medical director, Dr. Burton, was "somewhat familiar" with Brook's case, but he never met Brook before the day he testified and he has no training in head or spinal cord injuries and he admitted that he was only "vaguely familiar" with

the HASCI program. Id. Dr. Burton admitted at the 2009 hearing that he did not have expertise to override the orders of a treating physician. Id. His decision to deny services was based upon "Department guidance and the SCDHHS provider manual policy." Id.

Even though the DHHS hearing officer ruled at page 25 that Brook's benefits "should have continued at the levels ordered by her treating physician during the pendency of this appeal," in violation of DHHS' policy, those services were repeatedly reduced and Brook has remained a captive in the Executive Branch Medicaid Appeal Gulag.

## VI. Arguments

### 1. Do Respondent's longstanding practices of failing to provide notices containing all of the information required by 42 C.F.R. 431.210 and dismissing Medicaid fair hearing appeals without providing evidentiary hearings, for reasons other than those reasons contained in the notices, violate participants' constitutional and statutory rights to due process and the Medicaid Act? Are these violations subject to repetition and have they evaded review?

### a. The lower court's decision to deny payment for the oximeter cable should be reversed by this Court, because the DHHS notice was defective.

In January, 2013, DHHS, through its agent, KePro, sent Brook a notice informing her of its decision to deny payment for an oximeter cable that she needs to measure the oxygen level in her blood. R. ___. It is clear on the face of the notice that it did not contain the statute or regulations relied upon - in violation of the clear and simple mandate contained in 42 C.F.R. 431.210. The notice also did not inform Book about how she might obtain a hearing. The reason given for denying the oximeter cable was that "Provider submitted no clinical information supporting request and prescription when requested to do so." R. ___. There is no evidence that this decision to deny funding for an oximeter cable was based on the opinion of a physician or that KePro of DHHS reviewed the voluminous medical records available to DHHS or that any physician or nurse was consulted before denying payment for this inexpensive but life saving equipment.

The "fair hearing" notice requirements contained at 42 C.F.R. 431.210 are unambiguous and they are mandatory. The Supremacy Clause of the United States Constitution requires that DHHS comply with these regulations instead of the conflicting policies adopted by DHHS. The federal regulation at 42 C.F.R. 431.210 requires DHHS to provide in its notices of denial,

reduction or termination of Medicaid benefits both "the reasons for the intended action" and "the specific regulations that support, or the change in Federal or State law that requires, the action." There can be no doubt but that the South Carolina General Assembly directed DHHS to comply with federal law in providing notices to Medicaid participants. S.C. Code. Regs. § 126-380. Denial, Termination, or Reduction of Benefits requires that:

> A. When an individual's Medicaid benefits are denied, discontinued or changed, the individual shall receive notice pursuant to Title XIX of the Social Security Act. The notice shall include an explanation of the individual's right to a fair hearing, the method to obtain a hearing, and the right to representation.

42 C.F.R. 431.210(b) and ( c).

The notice DHHS' agent, KePro, sent to Brook denying payment for an oximeter cable was clearly and plainly defective, because it did not contain the specific information required by 42 C.F.R. 431.210. It was legal error to deny payment for the oximeter cable based on this notice. This is a common practice for DHHS to ignore this federal notice mandate and Medicaid participants, including Brook, will continue to suffer unless this Court holds DHHS accountable for this violation and enjoins the agency from violating the law in the future, with appropriate consequences for contempt.

42 C.F.R. § 431.244(d) is meaningless if DHHS can notify the participant of one reason in the notice, then proceed to dismiss an appeal for a different reason not specifically allowed by the applicable federal rules. The "reason" KePro provided for denying payment for the oximeter cable Brook needed was that one of DHHS' providers failed to meet the agency's timeliness standards. The notice stated that KePro, had not received information it had requested from DHHS' provider, Apria, within 48 hours. R. 14. This "notice" did not even address or consider Brook's need for the equipment or the consequences of not receiving it. But, the hearing officer dismissed Brook's appeal based on reasons that were totally different from those reasons contained in the notice, which is a violation of 42 C.F.R. 431. 210. The actual reason the hearing officer used as grounds to dismiss Brook's appeal are that Brook did not comply to her satisfaction with an email she sent on March 27, 2013. That is not an allowable reason for dismissing an appeal and it was not included as grounds for dismissal in KePro's notice.

The federal regulations require DHHS to explain the circumstances under which a

hearing will be granted and how to continue benefits if an appeal is requested. 42 C.F.R. 431.210(d). The notice KePro sent on January 9, 2013 does not contain this information and it is facially deficient. DHHS should not be allowed to terminate a supply as important as an oximeter cable based on a defective notice that did not inform Brook of how she could continue to receive tracheotomy supplies while she fought the appeal.

Dismissing Brook's appeal on grounds not included in the notice directly conflicts with the federal regulation at 42 C.F.R. 431.223 which sets forth only two very limited grounds for dismissing an appeal (1) where the participant requests dismissal in writing, and (2) where the appellant fails to appear at a hearing without good cause. Not only did the hearing officer and the lower court allow the agency to violate 42 C.F.R. 210, the notice requirement, but their decision is in direct conflict with 42 C.F.R. 431.223. This violation of unambiguous requirement that the notice contain the reasons for the denial prejudiced Brook and violated her constitutional right to due process.

**b. By dismissing Brook's appeal without providing a hearing, DHHS illegally denied her right of due process to be heard on her claims that DHHS had violated the Americans with Disabilities Act and the reasonable promptness mandate of the Medicaid Act.**

By dismissing Brook's appeal without providing an evidentiary hearing on her complaints, the hearing officer violated Brook's due process rights by failing to address or rule upon Brook's allegations that DHHS had violated the Americans with Disabilities Act. (Yet in the federal courts, DHHS argues that this is Brook's sole venue for addressing violations of the ADA.) The Hearing Officer failed to respond to Brook's allegations contained in "Appellant's Response to Order" alleging that the reductions in her services during the administrative appeals process violated agency policy and that DHHS had failed to rule upon her "emergency motion" that she had filed in December 2012.[11] R. ___. Brook alleged in her Response that the agency's

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[11] At the hearing in 2012, DHHS argued that the reductions in services that occurred without notice in 2008 and 2009 were not properly before the hearing officer, because Brook had not filed new appeals addressing those reductions. Yet, when she raised this issue in what DHHS considered to be a new appeal in 2013, the hearing officer did not even address her complaint that DHHS had failed to act upon her request with reasonable promptness.

refusal to comply with the July 2010 order of the Administrative Law Court, the ADA and the Medicaid Act constituted "conscious indifference of DHHS and its officials to risks of harm to Appellant and the decline in her medical and psychological condition." R. at ___. The hearing officer also ignored Brook's requests that DHHS provide reasonable accommodations to allow her to participate in the fair hearing appeal. Id. She requested adaptive equipment that would allow her to participate in the hearing, which is required by the ADA, but the hearing officer ignored this request also by simply not scheduling a hearing. Id.

The hearing officer also ignored Brook's request for an independent medical assessment. Instead, the hearing officer illegally shifted the burden to Brook to provide a medical assessment, not just at the hearing, but to provide proof of medical necessity even before she would schedule a hearing. This is a clear violation of the mandate of the United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which is specifically incorporated into the Medicaid regulations. 42 C.F.R. 431.202(b). The hearing officer exceeded her authority under the statute, these regulations and *Goldberg* by requiring written proof before scheduling a hearing and her decision was arbitrary and capricious and it was intended to harm Brook and to protect the agency.

These violations of Brook's due process rights have been repetitive, as is evident from the November 19, 2013 order, as well as dismissed appeals of Brown, Hickey, Edge, Eubanks, and Morgan. Brook and other vulnerable and powerless waiver participants have been prejudiced and they are likely to be subjected to these illegal acts again in the future and this Court should issue a strong rebuke by this Court and an order enjoining these Executive Branch agencies from future violations.

**c. The hearing officer's decision to dismiss Brook's appeal without providing an evidentiary hearing must be reversed, because it violated the Supremacy Clause of the United States Constitution and Doe's right to due process.**

42 U.S.C. 1396a(a)(3) is unambiguous and it requires the State:

> ...to provide for granting an opportunity for a fair hearing before the State agency [responsible for the Medicaid program] to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness," §

1396a(a)(3).

*Doe v. Kidd I*, 501 F.3d 348, 357 (4th Cir. 2007). The due process standards which are set forth in *Goldberg v. Kelly*, and cited in the federal Medicaid regulations at 42 C.F.R. 431.202(d), require that " *the decisionmaker's conclusion* ... must rest solely on the legal rules and evidence adduced at the hearing," and that " *the decision maker should state the reasons for his determination and indicate the evidence he relied on.* " *Goldberg,* 397 U.S. at 271.

The hearing officer erred as a matter of law in interpreting S.C. Code Ann. Regs. 126-154 as preempting federal law. The hearing officer's interpretation, i.e. that this state regulation allows a Department of Health and Human Services hearing officer to dismiss a Medicaid participant's administrative appeal without providing an evidentiary hearing is just plain wrong.[12] This was legal error because this state regulation is preempted under the Supremacy Clause of the United States Constitution by 42 U.S.C. 1396a(a)(3) of the Medicaid Act, which states that a State Plan for medical assistance must - (3) "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." In relying upon this state regulation that is preempted by federal law, the hearing officer and the Administrative Law Court failed to consider another DHHS regulation which correctly recognizes that federal Medicaid laws and regulations are controlling in this case and all Medicaid appeals. DHHS Regulation § 126-399, which is titled "Conflict Between State and Federal Regulations," provides that:

> When the requirements of the State and the Federal regulations are not in agreement, the requirements of the Federal regulations shall prevail.

Federal law clearly and unambiguously required the hearing officer to base her decision exclusively on evidence presented at an evidentiary hearing. 42 C.F.R. 431.244(a) provides that:

> Hearing recommendations or decisions must be based exclusively on evidence introduced at the hearing.

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[12] The hearing officer's "Findings of Fact" erroneously state that Petitioner's attorney failed to return a response to the "Pre Hearing Conference Order," thereby abandoning Brook's appeal. R. at 2 But, in response to that "Pre Hearing Conference Order," Brook's counsel filed and served a three page response on March 19, 2013. R. ___.

When a hearing officer fails to provide a fair hearing, it is impossible for her decision to be based exclusively on evidence presented at a hearing. As this Court has recognized, 42 C.F.R. 431.220(a) requires that "the State agency must grant an opportunity for a hearing to ...(1) Any applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness, and (2) Any recipient who requests it because he or she believes that the agency has taken an action erroneously." (Emphasis added.) *Brown v. DHHS*, 303 S.C. 11, 709 S.E.2d 701, 705 (S.C.App. 2011). ("Accordingly, the remainder of the order is vacated, and the case is remanded to DHHS for a hearing on the merits in accordance with this opinion and pursuant to 42 C.F.R. § 431.220(a)(1)-(2).").[13] Granting a hearing is mandatory, not optional...the federal regulations say "must," not "may."

The decision of the hearing officer and the lower court also ignores the mandate of federal law contained at 42 C.F.R. 431.205, which states that the Medicaid agency "must be responsible for maintaining a hearing system that meets the requirements of this subpart." (Emphasis added.) That subpart requires that the State's hearing system must provide for a hearing and that the hearing system "must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and any additional standards specified in this subpart." In *Goldberg*, the United States Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires an evidentiary hearing before government benefits can be terminated. The Court held that the appellant is not entitled to a trial, but she is entitled to an oral hearing before an impartial decision-maker, the right to confront and cross-examine witnesses, and the right to a written opinion that sets out the evidence relied upon and the legal basis for the decision. In *Goldberg*, as in Brook's case, the government agency argued that allowing an appellant the opportunity to provide a written statement to "demonstrate why his grant should not be discontinued or suspended," without providing an evidentiary hearing met the requirements of due process. Id. at 258. But, in declaring that procedure to be

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[13] But two years later, DHHS once again dismissed Brown's appeal, over his objections, without providing an evidentiary hearing. *Brown v. DHHS*, (SCDHHS 2013) and (SCALC 2014). R. ___ and ___.

unconstitutional, the Supreme Court ruled that when "welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process." Id. at 264. Brook was denied the right to a pre-termination hearing before funding for her tracheotomy supply, i.e. an oximeter cable, was denied.

As was the case with the plaintiffs in *Goldberg*, Brook "lacks independent resources" and her "situation becomes immediately desperate" when her benefits are reduced. Id. In *Goldberg*, the Supreme Court recognized that the welfare participant's "need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." Id. In dismissing Brook's appeal without providing the evidentiary hearing required by *Goldberg* and 42 C.F.R. 431.205, the lower court erred as a matter of law in failing to recognize that:

> Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Id. at 265. As a hearing officer for the State Medicaid Agency, Ms. Johnson is charged with knowledge of the requirements of *Goldberg*, in which the Supreme Court directed:

> It is not enough that a welfare recipient may present his position to the decisionmaker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore, a recipient must be allowed to state his position orally.

(Emphasis added.) The directive contained in 42 U.S.C. 431.244(a) comes directly from the directive of the United States Supreme Court in Goldberg that provides:

> Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292 (1937); *United States v. Abilene & S. R. Co.*, 265 U.S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, *cf. Wichita R. & Light Co. v. PUC*, 260 U.S. 48, 57-59 (1922).

The hearing officer's March 27, 2013 email required Brook, after she had filed a three page response to the hearing officer's Pre Hearing Order, to prove to her in writing, before a hearing was even scheduled, that the oximeter cable was medically necessary. Brook had already responded to this hearing officer's "interlocutory order," by advising the hearing officer that she intended to participate in a fair hearing and that it would be legal error to dismiss her appeal, citing 42 C.F.R. 431. "unless the appellant requests dismissal or fails to appear at a scheduled hearing without good cause." R. ___. She requested that the hearing officer order an independent medical assessment and provide the hearing she was entitled to receive.

The hearing officer's decision to ignore this controlling Supreme Court case and the applicable federal statute and regulations was at very best arbitrary and capricious. In no uncertain terms, the Supreme Court directed government benefits agencies in *Goldberg* that: "Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department." The facts that this is the second time a DHHS hearing officer has dismissed Brook's appeal complaining about DHHS' denial of services, without providing an evidentiary hearing, and the fact that this practice appears to be routine for the agency (as will be discussed in the issue addressing the violation of the Separation of Powers Doctrine) underscores the importance of a strong rebuke by this Court and an order requiring the Executive Branch agencies involved to comply with the United States Constitution and the requirements set forth by the United States Supreme Court in *Goldberg*.

The Supremacy Clause of the United States Constitution clearly preempts state regulations and requires DHHS and the lower court to comply with federal law. Instead, DHHS has repeatedly violated the clear requirements of 42 U.S.C. 1396a(a)(3) and CMS regulations contained at 42 C.F.R. 431.200 et seq. and their decisions must be reversed.

By dismissing Brook's appeal without providing an evidentiary hearing, the agency and

the lower court also violated the Fourteenth Amendment of the United States Constitution, which prohibits the States from depriving any person of life, liberty, or property, without due process of law. As the Administrative Law Court recognized in *Mullis I*: "Due process of law is one of the most important guarantees found in the United States Constitution."[14] *Supra*. Pursuant to Article I, Section 22 of the South Carolina Constitution. In *Mullis v. DHHS I*, DHHS terminated Mullis' certification as a provider of DDSN waiver services in violation of her due process rights for two years before her eligibility was restored. 04 ALJ 30-0194-AP, Order dated March 22, 2005. R. ___. In *Mullis,* the Court determined that the guarantee of due process contained in the Fourteenth Amendment of the Federal constitution prohibits the State from depriving any person of "life liberty or property, without due process of law." *Mullis* at 10 or 15. Due process guarantees "basic fairness before a tribunal for all citizens." Id. Fundamental to due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mullis* at 10, citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). But, as in Brook's case, DHHS repeated this illegal process against Mullis several years later in complete disregard for the prior findings of the South Carolina Administrative Law Court in *Mullis v. DHHS II,* 10-ALJ-08-0775 (S.C.A.L.C. April 23, 2012). In the 2012 appeal, the Administrative Law Court again held that DHHS' wrongful termination of Mullis' contract was arbitrary and capricious, an abuse of discretion and that it was clearly erroneous in light of the reliable, probative and substantial evidence in the record.

In addition to the agencies violating the federal Constitutional rights of Appellant, SCDDSN has violated the state constitutional due process rights granted to Appellant in Article I, Section 22 of the South Carolina Constitution which provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

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[14] The patterns and practices of DHHS which violate the basic tenants of due process are found not only in the many cases DHHS has improperly dismissed without a hearing, but in two cases involving a provider of DDSN services whose due process rights were violated multiple times, without any attempt to correct the agency's illegal practices. In *Mullis v. DHHS I*, DHHS improperly terminated her status as a provider of services in violation of her due process rights.10-ALJ-08-0775 (S.C.A.L.C. April 23, 2012).

(Emphasis added.) This provision is specifically aimed at Administrative agencies such as DHHS. Lowell et.al, *South Carolina Administrative Practice and Procedure*, 2004 at page 47. In this case, substantial rights of Brook have been prejudiced by the agency's repeated violation of her constitutional and statutory due process rights to an evidentiary hearing before an impartial decision maker. S.C. Code Ann. § 1-23-380(5) (Supp.2010). Brook requests an injunctive order reversing the decision of the lower court and prohibiting DHHS from terminating any services or funding for durable medical equipment without providing an evidentiary hearing on the merits of her case. Brook requests an order reversing the decision of the agency and the lower court and requiring DHHS on all future appeals to comply with the due process requirements set forth herein. Brook requests an order finding that she is the prevailing party on this issue.

2. **Does the agency's practice of purging the record of evidence fair hearing appellants have submitted violate their constitutional and statutory rights to due process and is this violation is especially egregious when the agency dismisses an appeal without providing the required evidentiary hearing, where it would be required to accept such evidence into the record?**

Brook was prejudiced when the hearing officer dismissed her appeal and submitted an incomplete Record on Appeal to the Administrative Law Court. Brook requested in her Response to Hearing Officer Johnson's interlocutory order that allegations made "in the course of these proceedings and the appeal filed in 2007" be included in the record and those documents should have been included in the Record on Appeal. But, instead of providing an evidentiary hearing at which she would be allowed to submit this evidence of past wrongful acts, patterns of violation of due process and other testimony and evidence, as required by 42 C.F.R. 431.220, 431.240 and 431.244, the hearing officer dismissed her appeal and refused to include those documents in the Record on Appeal. The hearing officer purged Brook's carefully compiled record and did not include any of the testimony, pleadings and evidence that Brook had established at great cost during the six years she had spent in State Administrative Appeals Siberia. This practice of purging the record has been used by DHHS in other cases where DHHS refuses to include in subsequent Records on Appeal to the Administrative Law Court any of the evidence compiled before remand by the previous Administrative Law Court decisions. *Stogsdill v. DHHS* and *Brown v. DHHS, supra*. This is especially prejudicial to poor and disabled citizens like Brook who do not have funds to pay doctors and other health care providers to make repeated appearances or to prepare multiple declarations or affidavits on the same issue.

Medicaid participants are entitled to rely upon 42 U.S.C. 1396a(a)(3) and the regulations interpreting that act so that they do not end up at the Administrative Law Court with an inadequate record because the DHHS hearing officer violated the law and denied their right to introduce evidence and testimony at a hearing. 42 C.F.R. 431.244(b)(2) requires DHHS to include in the record "all papers and requests filed in the proceeding." South Carolina Rules of the Administrative Law Court require the agency to include in the Record on Appeal "All pleadings, motions, and intermediate rulings; all evidence received or considered; all proffers of proof of excluded evidence and the transcript of the testimony taken during the proceeding." By short circuiting this process, DHHS has violated Brook's right to have a complete record.

**3. Have the Department of Health and Human Services (DHHS) and the Administrative Law Court violated the Separation of Powers Doctrine by obstructing review of Medicaid appeals by the Judicial Branch of government and administering the program based on arbitrary binding norms established by DHHS bureaucrats in violation of laws and regulations promulgated by the South Carolina General Assembly and Congress?**

The South Carolina Constitution provides in S.C. Const. art. I, § 8 that :"In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." In this case, the Executive Branch was required by federal law to issue a final order within 90 days of Brook's request for a fair hearing, after which the affected participant may seek judicial review. 42 C.F.R. 431.244(f), *Shakhnes v. Berlin*, No. 11-2003-cv (2d Cir. August 13, 2012) and *Doe v. Kidd I*, 501 F.3d 348 (4th Cir. 2007). The mandate that Congress imposed on the States to issue final decisions with "reasonable promptness" gives the Executive Branch 90 days to fix their errors. 42 U.S.C. 1396a(a)(3) and 42 C.F.R. 431.244(f), 42 C.F.R. 435.911. After that time, Medicaid participants are entitled to petition the Judicial Branch to review wrongful acts taken by the Executive Branch in administering the Medicaid program. This is especially important where life and death matters - like tracheotomy supplies - are at issue and a delay of years might result in death for want of an inexpensive device denied by DHHS.

DHHS and the Administrative Law Court, both agencies within the Executive Branch, have repeatedly violated the reasonable promptness standard of the Medicaid Act and they have attempted to prevent the Judicial Branch from reviewing their wrongful acts against the most needy, fragile, and vulnerable citizens of South Carolina. *Doe v. DHHS, supra and Brown v. DHHS, supra.* Through this system of delays and remands - administrative law keep away - persons like Brook may die before they reach the door of the court house.

As the South Carolina Supreme Court recently held:

> The preservation of a separation of powers has been a basic tenet of democratic societies at least since Baron de Montesquieu warned that "[t]here would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." *See* Montesquieu, *The Spirit of Laws* 152 (Thomas Nugent trans. 1949). Consistent with this notion, the South Carolina Constitution requires the branches of government be "forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8.

*South Carolina Public Interest Foundation and Sloan v. South Carolina Transportation Infrastructure Bank*, 27266 (SCSC June 12, 2013). As the Court recognized in that case:

> "One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government." *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1979). "The legislative department makes the laws[, ] the executive department carries the laws into effect, and the judicial department interprets and declares the laws." *Id.* at 84, 261 S.E.2d at 305. This delineation of powers amongst the branches "prevents the concentration of power in the hands of too few, and provides a system of checks and balances." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

In this case, these Executive Branch agencies have ignored both federal and state law and the intentions of Congress and the General Assembly. They have failed, or even refused, to promulgate regulations whereby the Legislative Branch would have an opportunity to review their procedures and policies and the public would have an opportunity to have input at public hearings.

Brook has been denied judicial review by the Executive Branch of government by these agencies' practice of cycling and recycling her case between state agencies by misusing the power of remand. The Executive Branch has totally ignored Brook's Constitutional and statutory right of due process and a final determination which must be issued within 90 days of the request for a fair hearing pursuant to federal regulations. *Doe v. Kidd I*, 501 F.3d 308 at fn 3. (4th Cir. 2007). These agencies have ignored 42 C.F.R. 435.930, which requires the State to "furnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." They have ignored the State's assurances made to CMS that "safeguards necessary to protect the health and welfare of recipients" will be provided. 42 C.F.R. 441.353.

42 C.F.R. 431.202(d) clearly provides that "The hearing system must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and any additional

standards specified in this subpart." But Brook has been denied, until now, the ability to have judicial review of these violations. DHHS and DDSN have violated the separation of powers prohibition by failing to promulgate regulations, as required by the South Carolina Administrative Procedures Act and by reducing, denying and terminating her services based on binding norms established by the agencies without promulgating regulations. *Hickey v. DHHS,* Docket No. 10-ALJ-08-0650AP (SCALC July 19, 2011); *Edge v. DHHS*, Docket No. 10-ALJ-08-0501-AP (SCALC October 29, 2010); *Eubanks v. DHHS*, Docket No. 10-ALJ-08-0502-AP (SCALC October 29, 2010); *Morgan v. DHHS*; Docket No. 10-ALJ-08-0503-AP (SCALC October 29,2010).

The Preemption Clause of the United States Constitution prohibits DHHS from dismissing Brook's appeal without providing a fair hearing meeting the requirements of *Goldberg* and 42 C.F.R. 431.200 et. seq. and judicial review of agency actions. The United States Supreme Court recently addressed the issue of a State Medicaid Agency's violation of the Preemption Clause of the United States Constitution. In *Wos v. E.M.A.*, North Carolina's Medicaid Agency attempted to enforce a state Medicaid lien statute which conflicted with the anti-lien provisions of the Medicaid Act. 568 U.S. ___, (U.S. Supreme Court March 20, 2013). Justice Kennedy wrote in his majority opinion that "Where state and federal law 'directly conflict" state law must give way." Affirming the decision of the Fourth Circuit, the Supreme Court ruled in *Wos* that:

> Preemption is not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operational effect.

That is exactly what the Executive Branch of government has done in Brook's case. Many of the provisions of the Medicaid Act are quite complicated and difficult to understand. The Act has been described as "an aggravated assault on the English language, resistant to attempts to understand it." *Schweiker v. Gray Panthers*,453 *U.S.* 34 *(1981)*. But, the requirements to provide a notice that meets the statutory provisions of 431.210 and the simple requirement to give every Medicaid participant who requests one a fair hearing and a final administrative decision within 90 days is not in any way complicated or difficult to understand.

42 C.F.R. 431.244(f) means something. According to the South Carolina Administrative Law Court's Annual Accountability Report for FY 2011-2012, that Court's "suggested time frame" for disposing of Medicaid appeals was 180 days, double the time CMS allows for a State to issue a final administrative appeal decision. *See* http://dc.statelibrary.sc.gov/bitstream/handle/10827/9423/ALC_Annual_Accountability_Report_2011-2012.pdf?sequence=1 at 14. 42 C.F.R. 431.244(f) and *Shakhnes v. Berlin*, 689 F.3d 244 (2d

Cir. 2012). That year, the Administrative Law Court only ruled upon 40% of its Medicaid appeals within this 180 day period, taking an average of 284 days to decide Medicaid appeals, not counting the time spent in proceedings at DHHS or earlier proceedings in the Administrative Law Court on the same issue. 2011-2012 Id. at 15. By the next year, the average length of time to decide a Medicaid appeal had increased to 422 days and only 23 percent of the Medicaid appeals were decided within 180 days. See Accountability Report for FY 2012-2013 at http://www.scalc.net/pub/FY2012-2013%20ALC%20Accountability%20Report.pdf. These numbers do not even include the number of days in DHHS "fair hearing" proceedings or in prior appeals of the same case to the Administrative Law Court.

CMS has addressed the use of remands to drag out administrative proceedings in the State Medicaid Manual (SMM), which contains CMS' official interpretations of the law and regulations. This manual is binding on Medicaid State agencies and the Administrative Law Court. *Shakhnes v. Berlin*, 689 F.3d 244, fn 11 (2d Cir. 2012). The SMM states that "a conclusive decision in the name of the State Agency shall be made by the hearing authority" and that a remand "is not a substitute for a definitive and final administrative action." SMM § 2903.2(A). Yet, these agencies have a long history of dragging out administrative appeals for years, flat out ignoring the reasonable promptness mandate, refusing to grant hearings on the merits and dismissing fair hearing appeals based on agency policy without complying with 42 U.S.C. 1396a(a)(3) or the unambiguous requirements set forth in 42 C.F.R. 431.424 and 244.

Brook prays for this Court to issue an order finding that the Medicaid "fair hearing" process violates the Separation of Powers Doctrine because it obstructs the timely review of denials of DHHS by the Judicial Branch and the reasonable promptness requirements of the Medicaid Act. The Executive Branch simply cannot comply with the mandates of federal law, which requires a final administrative decision to be issued within 90 days, under the current scheme. The current process requires the Medicaid participant to file an appeal with DHHS, which must provide at least 30 days notice prior to the evidentiary hearing required by 42 U.S.C. 1396a(a)(3). The agency has completely ignored 42 C.F.R. 431.244(f) by further delaying decisions through the issuance of "interlocutory orders" that violate *Goldberg* by requiring written proof instead of an evidentiary hearing. DHHS has flaunted its violations of Congress' reasonable promptness mandate. Once the appellant reaches the Administrative Law Court, another Executive Branch agency, she must wait for DHHS to provide the Record on Appeal, which sometimes takes months. Then each side is allowed thirty days to file briefs with the Administrative Law Court and notice must be provided before a hearing can be held in that Court. Despite federal regulations which prohibit the Executive Branch from using remands to

delay a final decision, that is standard process in Medicaid appeals and Medicaid participants get sicker by the day, requiring more expensive treatment when their basic medical needs are ignored by the agency that has assured CMS that it will protect the health and welfare of Medicaid waiver participants.

This is a matter of extreme public importance. In order to qualify for Medicaid, in the DDSN Medicaid waiver programs in South Carolina, the participant cannot own more than $2,000 in liquid assets. For every participant who makes it through the Herculean hurdles imposed by DHHS, then the Administrative Law Court there is a multitude of the most vulnerable citizens of our State who have no access to justice and no ability to navigate their way through the Executive Branch to the Courts of this State. Due process requires that these persons have access to the Judicial Branch. Not only do their lives hang in the balance, but taxpayers of this State are paying for expensive hospitalizations and institutionalization because Executive Branch agencies are denying funding for medically necessary services, like a simple oximeter.

## VII. Conclusions

For the reasons set forth above, this Court should reverse the decision of the South Carolina Administrative Law Court and issue an order finding that the due process rights of Brook Waddle granted under the United States Constitution, the Constitution of South Carolina and the statutes discussed above have been violated. She requests an order reversing the decision of the lower court and requiring DHHS to pay for equipment necessary to care for her tracheotomy, including the oximeter cable ordered by her physician and other services in her approved plan of care. Brook requests a declaratory order requiring DHHS to include all contents described in 42 C.F.R. 431.201 in notices of adverse actions issued by DHHS or its agents and declaring that all notices issued by DHHS that do not contain all of the elements set forth in 42 C.F.R. 431.210 are null and void, requiring that the agency restore services and medical assistance in terminations or denials where defective or no notices have been provided, as required by 42 C.F.R. 431.231( c)(1).

Brook requests that this Court issue an order declaring that DHHS and its agents shall not dismiss any request for a fair hearing except where the appellant requests dismissal in writing or fails to appear at a scheduled hearing without good cause. Brook requests an order directing DHHS to address in a timely fashion (i.e. within 90 days of a request) all issues raised by appellants in requests for fair hearings where services are denied or not acted upon with reasonable promptness or where a hearing is requested because the appellant believes that the agency has taken an action erroneously. 42 C.F.R. 431.220(a)(2). She requests an order requiring DHHS to include in the Record on Appeal filed with the South Carolina Administrative Law

Court all records related to appellant's pending appeals in which a final administrative decision has not been issued, upon the request of the appellant.

Brook requests a declaratory order finding that the South Carolina Administrative Procedures Act, S.C. Code 1-23-380 requires judicial review upon exhaustion of administrative remedies and that a final Executive Branch decision must be issued within 90 days of DHHS receiving a request for a fair hearing, and that a remand by the South Carolina Administrative Law Court or DHHS "is not a substitute for a definitive and final administrative action." SMM § 2903.2(A). Brook requests an order declaring that S.C. Code 1-23-380 is not the sole remedy available to Medicaid participants and that the Administrative Procedures Act does not limit the scope of judicial review available under other means, including exercising her right to bring an action in federal court for violation of federal law.

Brook requests that this Court declare that these Executive Branch agencies have violated the Separation of Powers Doctrine and requiring that a final administrative decision, appealable to the Judicial Branch, must be issued by the South Carolina Administrative Law Court within 90 days of a request for a fair hearing, except where the appellant requests an extension of time.

Brook requests an order directing DHHS to promulgate regulations for the administration of the Medicaid program, including Medicaid waiver programs administered by DDSN, and that the agency has acted without substantial justification in not previously promulgating regulations to carry out the program which do not conflict with federal law.

Finally, Brook requests that this Court declare that she is the prevailing party in this civil action and findings that the State has acted without substantial justification in this appeal, entitling her to legal fees. Brook requests directions on the correct procedure for filing a fee petition in this case.

Brook prays for such other relief as this Court shall determine to be necessary, just and proper.

Respectfully submitted,

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February 24, 2014

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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Case No. 2013-002415

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Brook Waddle, Appellant,

v

South Carolina Department of Health and Human Services, Respondent.

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CERTIFICATE OF SERVICE

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Patricia L. Harrison certifies that she has served Appellant's Initial Brief and Designation of Matter in the above captioned case on The South Carolina Department of Health and Human Services by United States Mail to Shealy B. Reibold, Esq., SC Dept of Health and Human Services, PO Box 8206, Columbia, SC 29202-8206 on February 24, 2014.

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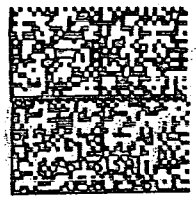

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