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March 10, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Richard Stogsdill v. SCDHHS, Case Tracking # 2013-000762
Trial Court Case No. 2010ALJ080774AP

Dear Ms. Kitchings:

Pursuant to 208(b)(7), we are enclosing a copy of Case #12-ALJ-08-0173-AP (A.C.M. v. SCDHHS) issued by the Administrative Law Court. We believe that this case is instructive on the issue of adequate notice, the promulgation issue and issue of deference to the treating physician. Copies have been sent to all other counsel.

If there are questions or anything else is required, my direct is (803) 898-2791.

Sincerely,

Richard G. Hepfer
Deputy General Counsel

cc: Patricia L. Harrison
Anna Maria Darwin
Sarah Garland St. Onge
Amy Landers May
Kirby Mitchell
Stephen Suggs

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Albert C. Myers, Appellant, v. South Carolina Department of Health and Human Services, Respondent.	)	Docket No. 12-ALJ-08-0173-AP ORDER

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC" or "Court") in its appellate jurisdiction pursuant to S.C. Code Ann. § 1-23-600(D). Appellant Albert C. Myers ("Appellant") appeals the final administrative decision of the South Carolina Department of Health and Human Services ("Department") to reduce or discontinue services and/or supplies under the Mental Retardation/Related Disabilities ("MR/RD") waiver program. The changes concerning the MR/RD waiver program were imposed as a consequence of substantial reductions in State budget appropriations for the agency.

Upon careful review of this matter, considering the Record on Appeal, the briefs, and applicable law, the Department's final decision is AFFIRMED.

BACKGROUND

Factual Background

Appellant is the recipient of Medicaid Services and is currently receiving services under the MR/RD waiver program. Prior to the MR/RD waiver renewal on January 1, 2010, Appellant was authorized to receive the following: Dental; 5 units per week of Community Services; 5 units per week of Day Activity; Specialized Medical Equipment; Supplies and Assistive Technology – Peri Wash; Attend Wash clothes; Diapers; 4 units per week of Physical Therapy; 45 hours per week of Personal Care Aide II services; 48 units annually of Daily Respite; and 456 units annually of Hourly Respite. After the waiver renewal became effective, Appellant received the following modified services: physical therapy services were eliminated from the waiver; twenty-eight (28) hours per week of Personal Care Aide II services; sixty-eight (68) units per month of Respite care, with an

exception granting Appellant an additional 33 units per month (for a total of 101 units of Respite Care per month); beginning approximately January 12, 2011, Appellant was authorized 6 hours per week of Personal Care Aide I services; and, psychological counseling. During the pendency of this appeal, Appellant continues to receive physical therapy, 101 hours of respite care per month, and 45 weekly hours of Personal Care Aide II services.

In December of 2011, Appellant became a resident of a long-term care facility.

Procedural Background

On January 13, 2010, the Director of the South Carolina Department of Disabilities and Special Needs ("DDNS") notified Appellant in writing that the decision to reduce his services based upon the MR/RD waiver renewal on January 1, 2010, was upheld. On February 25, 2010, the Department's hearing officer issued an Interlocutory Order asking Appellant and/or his representative for a written statement of any allegation of any error made by the agency in its modification of the Medicaid sponsored waiver services provided through DDSN. Appellant's counsel responded to the Interlocutory Order on March 15, 2010, and counsel for the Department submitted his reply to the allegations contained within Appellant's response to the Interlocutory Order. Based upon the filings made by Appellant, the Department hearing officer issued an Order of Dismissal on May 6, 2010. No evidentiary hearing was conducted prior to the hearing officer's Order of Dismissal.

On May 21, 2010, Appellant submitted a motion for reconsideration of the hearing officer's May 6, 2010 Order of Dismissal. On June 18, 2010, Appellant filed a notice of appeal with the ALC to challenge the Department's May 6, 2010 Order of Dismissal. On November 9, 2011, this Court remanded Appellant's appeal to the Department to conduct an evidentiary hearing. Specifically, the Court found that it was an error to dismiss Appellant's case without conducting an evidentiary hearing. A hearing was conducted before a Department hearing officer on January 6, 2012. On February 9, 2012, the Department hearing officer issued an order upholding the reductions to Appellant's services. Appellant filed a Motion to Alter or Amend the Department's decision; however, the hearing officer denied this motion on March 19, 2012. Based upon the denial of his motion, Appellant filed a notice of appeal with the ALC on April 13, 2012, to challenge the Department's final decision in this matter.

ISSUES ON APPEAL

1. Did the Department's "notices" violate Appellant's due process rights by failing to comply with 42 C.F.R. 431.210(b), which requires the Department to inform Appellant of "the reasons for the intended action" sought to be implemented by the Department?

2. Did the Department fail to identify the statute or regulation it relied upon to support the Department's actions in this matter?

3. Did the Department and an employee of DDSN participate in ex parte communications regarding Appellant's case?

4. Did the Department fail to promulgate the service caps as regulations, thereby causing the service caps to be unenforceable?

5. Was the Department's decision that services ordered by Appellant's treating physician are not medically necessary supported by the substantial evidence in the Record?

6. Did the Department retaliate against Appellant as a result of a family member advocating on his behalf regarding an alleged violation of the anti-retaliation provisions of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and the Civil Rights Act?

STANDARD OF REVIEW

This Court's appellate review of final decisions of the Department is governed by standards provided in S.C. Code Ann. § 1-23-380. See also S.C. Code Ann. § 1-23-600(E). Section 1-23-380 provides that this Court "may not substitute its judgment for the judgment of the [Department] as to the weight of the evidence on questions of fact." § 1-23-380(5). However, this Court, pursuant to § 1-23-380(5),

> may 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 of the [Respondent];
> (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.; see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) (stating "'[s]ubstantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.") Id. at 135, 276 S.E.2d at 306. "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Hull v. Spartanburg County Assessor, 372 S.C. 420, 424, 341 S.E.2d 909, 911 (Ct. App. 2007) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). Accordingly, "[t]he 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (citing Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm., 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

Further, an abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (application of standard to circuit court) (citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987)); see also Converse Power Corp, 350 S.C. 39, 47 564 S.E.2d 341, 345 (Ct. App. 2002) (quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.")).

DISCUSSION

A. Generally

i. Medicaid

Medicaid is an optional state program created under Title XIX of the Social Security Act. It enables states to receive federal financial assistance specifically for the medical care of needy individuals. See 42 C.F.R. § 1396; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v.

Kidd, 501 F.3d 348, 351 (4th Cir. 2007). States are not required to participate in Medicaid; however, if they choose to do so, they must comply with all federal Medicaid laws and regulations. Wilder, 496 U.S. 498; Doe, 501 F.3d at 351; see also Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002) ("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)). As a prerequisite to receiving federal assistance, a state must submit a detailed plan, referred to as the "State Plan," to the Center for Medicare/Medicaid Services ("CMS") for approval. 42 C.F.R. § 1396a.

In South Carolina, the Department is the state agency responsible for administering and supervising the state's Medicaid programs. S.C. Code Ann. § 44-6-30(1); Doe, 501 F.3d at 351. Furthermore, DDSN is responsible for the state's treatment and training programs for people with mental retardation and related disabilities. Doe, 501 F.3d at 351. Accordingly, in some instances, such as the case at hand, DDSN can act as an agent for HHS. Id.

Medicaid provides funding for state-run homes and community-based care through a waiver program. See 42 C.F.R. § 1396n(c). The waiver program provides Medicaid reimbursement to participant states for providing community-based services to individuals who would otherwise require institutional care. Id. In this appeal, the waiver program at issue is the MR/RD waiver Program.

ii. MR/RD Waiver Program

States must seek approval for these waiver programs from the CMS. If a waiver is approved, the CMS waives compliance with state program requirements while permitting states to remain eligible for reimbursement with federal grants. Id. Waivers are approved for a period of two to three years and may be renewed thereafter. Under a program operated by DDSN, CMS has waived the requirement that an individual live in an institution to receive services. The MR/RD Waiver Program permits a recipient to receive services at home or in the community, rather than in an Intermediate Care Facility for the Mentally Retarded ("ICF/MR") such as a nursing home. Doe, 501 F.3d at 351.

After receiving approval from CMS, South Carolina's MR/RD waiver renewal became effective on January 1, 2010.

B. Sufficiency of Notice

Appellant argues that his due process rights were violated because the Department's notices failed to comply with 42 C.F.R. § 431.210(b), which requires the Department to inform Appellant of "the reason for the intended action." Appellant also argues that his due process rights have been violated because the notice informing him of a change to his services did not include the statute or regulation relied upon to support the Department's actions. As noted by the Department, the Court addressed these issues in its November 9, 2011 Order and concluded that Appellant did not preserve the issues for appellate review:

> Appellants appear to challenge the Department's failure to provide adequate written notice of the reduction in services pursuant to the waiver renewal as required under 42 C.F.R. § 431.210. However, I find this ground on appeal has not been preserved for appellate review. Appellants refer to this alleged violation within the "Facts" section of the brief. Appellants do not include this issue as a separate ground on appeal and there is no reference or citation to any legal authority contained within the discussion section of their brief. Thus, I conclude that this ground on appeal has been abandoned. Glasscock, Inc., 348 S.C. at 81, 557 S.E.2d at 691.

November 9, 2011 Order, at 13. Nevertheless, even if it could be construed that Appellant adequately preserved these issues on appeal, Appellant's argument must fail.

"'Generally, due process is flexible and calls for such procedural protections as the particular situation demands.'" Leventis v. S.C. Dep't of Health and Envtl. Control, 340 S.C. 118, 131, 530 S.E.2d 643, 650 (Ct. App. 2000) (citing Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998)). "Any party in an administrative agency proceeding is entitled to certain procedural opportunities of notice and a fair hearing." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984). "'The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.'" Leventis, 340 S.C. at 131, 530 S.E.2d at 650 (citing Ogburn-Matthews)). Further, "proof of a denial of due process in an administrative proceeding requires a showing of substantial prejudice." Palmetto, 282 S.C. at 435, 319 S.E.2d at 698; see also Leventis, 340 S.C. at 131-32, 530 S.E.2d at 650.

Although due process is a flexible concept, federal regulations provide specific requirements regarding the notice requirements for state-level Medicaid hearings. The procedures for appealing a decision regarding Medicaid services provided under the Waiver program are set forth in 42 C.F.R. §§ 441.200 et seq. Those regulations provide that a state-level hearing for Medicaid recipients under

a state waiver "must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970)." 42 C.F.R. § 431.205(d). The state agency must grant an opportunity for a hearing to any applicant who requests it because his claim for services is denied, 42 C.F.R. § 431.220(a)(1), or if the state agency takes action to suspend, terminate or reduce services. 42 C.F.R. § 431.200(b). The agency is required to provide notice of the fair hearing, which must contain specific information:

> a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take;
> (b) The reasons for the intended action;
> (c) The specific regulations that support, or the change in Federal or State law that requires, the action;
> (d) An explanation of--
> (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or
> (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
> (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

42 C.F.R. § 431.210. As the state agency administering the Medicaid program, the Department must comply with all federal Medicaid laws and regulations. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007).

In this matter, the Department acknowledges that the notice did not include a citation to a specific regulation supporting the reduction or to a new or changed Federal or State law that required the action. Nevertheless, the Department asserts that Appellant was well-aware of the issues prior to his fair hearing before the Department. Accordingly, in order for the Court to overturn the Department's decision because the notices did not meet the technical requirements of the federal regulation, Appellant must show that he was prejudiced by such notices. See Palmetto, 282 S.C. at 435, 319 S.E.2d at 698; see also Leventis, 340 S.C. at 131-32, 530 S.E.2d at 650.

In reviewing the Record, Appellant was sufficiently aware of the proposed changes in his services as a result of the waiver renewal, he was afforded the opportunity to a fair hearing, and he was represented by an attorney throughout the appeals process before the Department. Appellant has not shown how the process or his fair hearing would have been conducted differently had the notices complied with the technical requirements of 42 C.F.R. § 431.210. As such, Appellant has simply not provided any evidence to the Court of how he was prejudiced by the lack of technical compliance with 42 C.F.R. § 431.210. See Kocher v. Dep't of Health and Human Serv. of State of Wis., 152

Wis.2d 170, 179-80, 448 N.W.2d 8, 12 (Wis.App. 1989) (finding that Medicaid service recipient was not prejudiced by inadequate notice and was provided with an "effective opportunity to defend" the Department's termination action where a "case summary" was sent to Appellant's attorney prior to the termination hearing, "elaborat[ing] the nature and reasons for the termination action"); see also Hopkins v. Dep't of Human Services, 802 A.2d 999 (Me. 2002) (holding, in a termination of Medicaid benefits action, that Appellants were unable to show substantial prejudice where the Department failed to meet the technical notice requirements of 42 C.F.R. § 431.210).

Because Appellant has not demonstrated substantial prejudice resulting from the hearing notices provided by the Department, the Court will not overturn the Department's decision as urged by Appellant.

C. Ex parte Communication

Appellant next argues that the Department participated in ex parte communications with DDSN. On February 18, 2010, the MR/RD waiver program coordinator for DDSN sent a memorandum to the Director of the Department's Division of Appeals concerning the reductions in service for the Appellant. On February 24, 2010, the same DDSN coordinator sent another memorandum to the Director concerning Appellant's service package. Based upon these memos, Appellant argues that the Department and DDSN participated in ex parte communication regarding his case, and thus, it is impossible to receive a hearing before an unbiased tribunal.

Pursuant to S.C. Code Ann. § 1-23-360, employees of an agency, authorized to determine decisions in a contested case, may not communicate with a party unless notice and an opportunity is given to all parties to participate in such communication:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member:
> (1) May communicate with other members of the agency; and
> (2) May have the aid and advice of one or more personal assistants.

The agency employees named in the memo do not perform any adjudicatory functions with regard to the cases before the Department. In fact, the Department's Director of the Division of Appeals and Hearings is responsible for assigning cases to be heard by the Department's hearing

officers. The Department's hearing officers are responsible for "making findings of fact and conclusions of law," and no hearing officer was included in the communications. Furthermore, pursuant to Section 1-23-360, agency members may participate in permissible communication with other members of the agency. The Department and DDSN are separate agencies, but as discussed above, these agencies work together as the Department administers and manages the state's Medicaid programs, and DDSN is responsible for the state's treatment and training programs for people with mental retardation and related disabilities. Moreover, even if the February 18, 2010 and February 24, 2010 memos could be construed as impermissible ex parte communication, Appellant has not shown how the memos prejudiced him in any way. See Ross v. MUSC, 328 S.C. 51, 492 S.E.2d 62 (1997) (discussing that when determining whether ex parte communication by an administrative agency warrants reversal of the agency's decision, the court does not follow a per se rule automatically reversing the agency decision; rather, the court considers whether prejudice resulted from the ex parte communication).

D. Promulgation of Regulations

Appellant next argues that the Department erred in its decision because it failed to promulgate regulations prior to implementing the change in service caps. In its brief, the Department acknowledges that "it is questionable whether an un-promulgated Waiver provision can be a 'binding norm' upon a recipient of Waiver services." The Department further asserts that because Appellant was given an evidentiary hearing, his due process rights as established in Goldberg v. Kelly, 397 U.S. 254 (1970), have been met.

As discussed above, South Carolina must seek approval for waiver programs from the CMS. However, CMS's approval of the State's Medicaid Plan or Manual does not make it a binding document.[1] In order for a policy manual to create a binding rule it must be promulgated as a regulation. Home Health Serv., Inc. v. S.C. Tax Comm'n, 312 S.C. 328, 440 S.E.2d 375 (1994). "[W]hether an agency's action or statement amounts to a rule – which must be formally enacted as a regulation – or a general policy statement – which does not have to be enacted as a regulation – depends on whether the action or statement establishes a 'binding norm.'" Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006). In determining whether a policy

[1] The Court is unaware of any federal regulation or law which provides that CMS' approval of our State's Medicaid Plan constitutes sufficient authority to exempt the Department from the requirement to promulgate regulations concerning the administration of standards and procedures relating to services and programs provided under Medicaid.

statement establishes a "binding norm," an important consideration is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not follow the policy at issue in a particular situation. Home Health Serv. Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994). If the policy at issue "so fills out the statutory scheme" that the agency will only look to whether the policy's criteria are met in taking action or rendering a decision, the policy will be considered a "rule" or "regulation." Id. On the other hand, if the agency remains free to consider the individual facts in taking action or rendering a decision, the policy at issue will not be considered a binding norm. Id. Thus, to determine whether a policy or guideline establishes a binding norm, courts look to the actions of the agency, not to the labels given by the agency.

While South Carolina has not directly addressed this question, other states have concluded that the provisions of a waiver document must be promulgated as regulations under the state's APA in order to be enforceable as a rule or binding norm. See McCrann v. N.C. Dept. Health and Human Services, 704 S.E.2d 899 (N.C. App. 2011) (holding that it was error of law for the agency to rely upon the provisions of a waiver to deny services to a Medicare beneficiary, and that the provisions of the waiver limiting benefits were "rules" that must be promulgated as regulations pursuant to the state APA in order to carry the force of law); Mullins v. N. Dakota Dept. of Human Services, 454 N.W.2d 732 (N.D. 1990) (invalidating unpromulgated manual provisions claiming to define individuals eligible for benefits).

Although CMS approved South Carolina's proposed waiver reductions, the new service caps do not have the force and effect of law. The waiver document has never been promulgated as a regulation yet the Department clearly treats it as a binding document. Notwithstanding, the Department is the agency in South Carolina that the General Assembly has granted the sole authority to ultimately resolve issues concerning the provisions of the Medicaid services at issue in this case. As such, the Department's interpretation of Medicaid law and regulations is entitled to due respect and consideration. However, that respect and consideration is limited.[2] Accordingly, based upon applicable law, I conclude that the Manual is not a binding document and does not have the force and

[2] See Comm'r of Public Works v. S.C. Dep't of Health and Envtl. Control, 372 S.C. 351, 641 S.E.2d 763, 767 (Ct. App. 2007) ("Generally, 'the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.' Indeed, the courts will typically defer to agency interpretation. We note, however, '[t]he primary rule of statutory construction is that the Court must ascertain the intention of the legislature.' Where the terms of the statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Thus, the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation.") (citations omitted).

effect of law. As a result, this Court must determine whether the Department based its decision solely upon the newly implemented service caps or whether those service caps were considered along with other evidence specific to Appellant's case.

E. Change in Appellant's Services

Appellant primarily argues that the Department's decision should be reversed because the decision of the agency that the services ordered by Appellant's treating physician are not medically necessary is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record, the decision was arbitrary and capricious and characterized by the abuse of discretion and it was affected by error of law. In response, the Department asserts that every category of need presented by the Appellant was either being met, was available through the waiver program, or was available to Appellant through some other mechanism.

In the Department's decision, the hearing officer noted that she was aware of "numerous" federal cases where the courts have found that a reduction in services that lead to a waiver participant's institutionalization violates the Americans with Disabilities Act ("ADA") of 1990. Nevertheless, the hearing officer determined that, based upon the evidence presented before her, the waiver reductions as applied to Appellant did not violate the ADA. Specifically, with regard to the elimination of Speech Therapy under the 2010 waiver renewal, testimony was presented that speech therapy was available outside of the waiver program under the Medicaid State Plan. It is likely Appellant would be eligible to receive this service if his attending physician prescribed the speech therapy to avoid hospitalization. Further, the revised waiver includes a provision for Specialized Medical Equipment, Supplies, and Assistive Technology. As noted by the hearing officer, it is likely that this provision would allow for Appellant to be provided with an assistive speech device. Like speech therapy, physical therapy was eliminated under the revised waiver. Appellant presented sufficient testimony that he will need physical therapy to avoid inpatient hospitalization; however, the Department also presented testimony that a waiver participant may still receive these services under the Medicaid State Plan, provided that specific guidelines are met within the Physicians Manual.

With regard to personal care aide services and respite services, the waiver renewal modified the number of hours Appellant received personal care aide and respite services. At the hearing, testimony was presented to explain the differences and limits of the two types of services, specific to

Appellant's case. The personal care aide services were described as hands-on assistance in the performance of daily living activities, where as respite services are provided on a short-term basis for the relief of the person normally providing the patient's care. As noted by the hearing officer, although the Department modified Appellant's service hours, the combination of the services appear to be in a sufficient amount to cover Appellant's daily needs. With regard to psychological services, the Record demonstrates that Appellant was in need of these services after the loss of his caregiver, and the Department was providing these services to him. Finally, regular medical appointments, some medications, and supplies are available under the State plan, and Appellant's Adult Dental Services are available under the wavier. Accordingly, as determined by the hearing officer, Appellant's regular and emergency medical, dental, and supply needs are available either under the terms of the Waiver or through the State Plan.

The Appellant also argues that the Department failed to give deference to the opinion of his treating physician while considering the provisions of the revised waiver as applied to his case. South Carolina courts have not adopted a rule of per se deference to the opinions of treating physicians. In contrast, it appears our courts have determined that the amount of deference that should be given to a treating physician's opinion depends on the evidence and issue presented in a particular case. See e.g., James v. S.C. Employee Insurance Program, 371 S.C. 637, 640 S.E.2d 474 (Ct. App. 2006) (giving deference to the treating physician's opinion); Wilson v. State Budget and Control Board Employee Insurance Program, 374 S.C. 300, 648 S.E.2d 310 (Ct. App. 2007) (giving deference to the opinion of an independent physician). During the hearing, Department employees testified that Department service coordinators "consider" the opinions of a waiver participant's treating physician. There was also testimony that the service coordinators make decisions by giving "equal weight to all of the information" concerning the waiver participant to obtain "a holistic picture" of his case. Appellant did not present any evidence or testimony to refute the Department's statement regarding the opinions of treating physicians. Based on the evidence in the Record, in Appellant's case, the Department made its decision after weighing all the available information, which included the opinions of Appellant's treating physicians, and there is no requirement that the Department defer to physician opinions in cases such as Appellant's.

In reviewing the Record and in consideration of Appellant's arguments, there is substantial evidence in the Record to support the Department's decision. The revised Waiver, as applied to

Appellant's case, does not violate Appellant's rights. All of the services requested as needed by Appellant are available either through the Waiver, the Adult State Plan, or some other service available through the Department. Although Appellant challenges the Department's reduction of his personal care aide service hours, based upon the testimony presented at the hearing, Appellant's needs can be adequately met through the less expensive Respite or other services. Accordingly, there is substantial evidence in the Record to support the hearing officer's conclusion that Appellant's daily needs were being met under the revised provisions of the waiver.

F. Retaliation

Appellant next argues that he and his guardian have been subjected to retaliation from the Department as a result of his guardian advocating on behalf of Appellant regarding the anti-retaliation provisions of the ADA and the Civil Rights Act. As support for his assertion, Appellant states that he is the only one of the four individuals included in the November 9, 2011 Remand Order that the Department seeks to impose the previously asserted reductions, in accordance with the waiver limits.

Appellant's counsel represented all four individuals named in the November 9, 2011 Remand Order. Based upon that order, the Department scheduled fair hearings for each individual. Subsequently, Appellant's counsel requested that all four fair hearings be cancelled based upon her interpretation of the Remand Order. In response, the Department informed Appellant's counsel that the hearings regarding the other three individuals would be cancelled. More specifically, the Department determined that it would not impose the proposed reductions in two of the cases because of a pending federal lawsuit involving those two individuals. With regard to the third individual, the Department determined that there was a very minimal difference between the previous waiver limits and the proposed waiver limits concerning that individual's annual limit on nutritional supplements.

In reviewing the Record, the Department has adequately explained its rationale for continued litigation in Appellant's case. There is nothing in the Record to suggest that the Department has retaliated against him based upon his appeal to the Department. While Appellant's guardian provided testimony of individuals in the community warning of possible retaliation and regarding other families' experiences, she failed to present any evidence of actual retaliation specific to Appellant. Such speculation does not trigger a violation under the federal law and regulations. Appellant cannot seek relief based on the prospect of home future harm. See Beaufort Realty Co. v.

Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001) (stating that concern over the potential for future harm is insufficient and that a party must present evidence of injury in fact). Accordingly, the Department's decision is supported by substantial evidence in the Record. Further, the Department's decision is not arbitrary, capricious, or an abuse of discretion.

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that the Department's decision to modify Appellant's services and/or supplies is **AFFIRMED**.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

February 3, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s).
This 3 day of February 2014
By: Judicial Law Clerk

Department of Health and Human Services
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