STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Case No. 10-ALJ-08-0774-AP

Richard Stogsdill, Appellant,

v.

South Carolina Department of Health and Human Services, Respondent

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RESPONDENT'S RESPONSE TO THE AMICI CURIAE BRIEF OF PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC.; SOUTH CAROLINA LEGAL SERVICES; THE SOUTH CAROLINA NATIONAL ASSOCIATION OF ELDER LAW ATTORNEYS; AND THE SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER

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## STATEMENT OF THE ISSUES

I. Whether the January 1, 2010, limitations on services provided in the ID/RD Waiver violate the ADA by placing the Appellant at sufficient risk of institutionalization.

A. Is the risk speculative or serious?

B. Is accommodating the Appellant required by the ADA and *Olmstead*?

II. Whether the limits set in the January 1, 2010, Waiver renewal are unenforceable because they were not formally promulgated under the South Carolina Administrative Procedures Act (APA).

## STATEMENT OF THE CASE

The Amici urge that the altered services provided to the Appellant under the 2010 Waiver renewal violate the integration mandate of the ADA as further defined in *Olmstead*, and as interpreted by the DOJ and several federal court preliminary injunctions. They further urge that, under State law, such program changes require promulgation through the SC Administrative Procedures Act.

Administration of this Waiver is the responsibility of the DHHS, but day-to-day management of the Waiver has been delegated to the DDSN. When a Medicaid applicant or recipient does not agree with a final determination of the DDSN, the managing agency, appeal may be made to the Appeals and Hearings Division of the DHHS and the DHHS is a Respondent.

The Appellant appealed the reduction in his services to the DHHS Division of Appeals and Hearings. On September 14, 2010, the DHHS Hearing Officer sustained the reductions. *R.S v. SCDHHS*, #10-MISC-042 (MR/RD). Appeal was taken to the Administrative Law Court, which affirmed in *Richard Stogsdill v. South Carolina Department of Health and Human Services*, 10-ALJ-08-0774-AP. Appeal was then taken to this court.

Essentially, on the first issue, the Amici argue that a fair number of injunctions issued by federal courts in the wake of the *Olmstead* decision have extended the meaning of *Olmstead* to some level of risk of institutionalization. On the second issue, the argument is that the Waiver changes affecting Appellant should have been promulgated through the Administrative Procedures Act.

ARGUMENTS

**Background**

The Appellant in this matter is a Medicaid-eligible individual, who has been receiving services under the South Carolina Intellectual Disabilities/Related Disabilities (ID/RD)

Waiver[1]. Under this Waiver, beneficiaries are provided a mix of services through the Department of Disabilities and Special Needs (SCDDSN). Waivers are mechanisms within the Medicaid Program under which, by having certain generic requirements of the Medicaid program "waived," States are able to provide services to individuals in ways not allowed under the regular Medicaid Program. This and other waivers operated by DDSN are for home and community based services under Section 1915(c) of the Social Security Act [42 USC §1396n(c)]. These types of waivers allow services to be provided in the home or community, in lieu of institutional services. On January 1, 2010, the five-year renewal of the ID/RD waiver, as approved by the Centers for Medicare and Medicaid Services (CMS), went into effect. The renewed Waiver included a cap or limit on some services and excluded others. The pertinent changes for this case are:

1) Personal Care (PC) Services were limited to twenty-eight (28) hours per week. Personal Care Aides (PCAs) assist Waiver participants with activities of daily living (bathing, dressing, feeding and toileting).;
2) Occupational, Speech and Physical Therapies were eliminated from the Waiver, but are available (if certain criteria are met) from the regular Medicaid Program.
3) The limits on Respite Services were set at sixty-eight (68) hours per month, but adjustable up to 240 hours per month according to the situation. Respite care services are similar to PCA services.

The current waiver documents including the Waiver and the approvals by the CMS are at http://www1.scdhhs.gov/openpublic/insideDHHS/Bureaus/BureauofLongTermCareServi

[1] Previous to the 2011 legislative year, this Waiver was called the Mental Retardation/Related Disabilities MR/RD Waiver.

ces/Mental%20RetardationRelated%20Disability%20Waiver.asp

The ID/RD Waiver has been in existence in South Carolina since the early 90's. See *Stogsdill v. Sebelius*, 2013 WL 521483 (D.S.C., page 2, only the Westlaw cite is available at this time)[2]. Obviously, the purpose of the Waiver was not originally to comply with the integration mandate of *Olmstead v. L.C.* 527 US 581 (1999). The purpose was just to encourage individuals to stay at home rather than go to an institution for care. Frankly, despite the opposite view (that a one-person institution is, due to inefficiencies of scale, the most expensive form of care), home care saves the State a great deal of money. The State would be much better off financially if all long term care could be provided at home. However, the State has inherited, so to speak, the fixed costs of an aging population of intellectually disabled individuals who for one reason or another want (or their families need them to) remain institutionalized. Often the reasons have to do with the amount of care needed and the capacity of the family. For the DDSN, Medicaid waivers are a very desirable method of providing care. Despite allegations to the contrary, neither Department has any interest in putting more individuals into institutions. The DDSN's yearly Accountability Report, a public document at: http://ddsn.sc.gov/about/Documents/DDSN%20Acct%20Report%202013-Final.pdf, page 31. shows how institutional care for this population has decreased and home and community based services have increased in the past ten (10) years. It is financially and therapeutically better to provide care in the home, in the Waiver.

[2] This Stogsdill case is the federal action that seeks the same relief as in this case. The citation is to a decision dismissing the federal Defendants.

The Amici have cited 42 CFR §440.230 as authority for the notion that the services provided to the Appellant are inadequate. We believe that the Amici have misunderstood the import of 42 CFR §440.230 as set forth in the Medicaid regulations. As explained in Respondent's Brief, the requirements in §440.230 do not apply to individual Plans of Care, but to the adequacy of the services to meet the general needs of the population served. The language of §440.230 does not require each individual's Plan of Care to be adequate. It does require the amount, duration, and scope of the services to be adequate to generally achieve the purposes of the service. Again, referring to the Supreme Court's earlier case of *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 83 L.Ed.2d 661 (1985), wherein the Court addressed this section of the regulations:

> [M]edicaid programs do not guarantee that each recipient will receive the level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services... That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered-not "adequate health care."

With respect to individual needs, we agree with the Amici's statement that generally speaking an individual's activities of daily living can be objectively quantified. However, as we see the requirement, the State only needs to set up a program that meets the needs of the majority of the affected population. For example, PCA services are limited to twenty-eight (28) hours per week. In the usual case, it could be reasonable to figure two (2) hours each morning to prepare for the day and two (2) hours in the evening to prepare for bed, or twenty-eight (28) hours of personal care per week. All that is required, under §440.230, is that the level of service generally, not individually, meets the

needs of most of the cases.

If S.C. Const. art. X, §7 does not make it so for the State and General Assembly, then S.C. Code Ann. §11-9-20 at least makes it essential for state agencies to operate within their budgets. On January 1, 2010, in part to cope with budget cuts, the reconfiguration of the ID/RD waiver services went into effect. It takes a while, sometimes years, to plan, submit, and implement a waiver renewal. Some of the services, which, in the view of the agencies, had been overutilized, under informal limits, became subject to limits specified in the Waiver. Other, less expensive services were also more fully described in an effort to compensate for the loss of services. For example, Respite care (a service somewhat like the PCA service) can now be provided in increasing amounts to compensate for burdens on the primary caregivers.[3]

Thus, in accordance with the best practice, as they saw it, the DDSN and DHHS prepared the new Waiver for submission to The Centers for Medicare and Medicaid services (CMS). Public hearings were held throughout the State. CMS approved the Waiver in accordance with 42 CFR §441.300 et seq. All of the Medicaid application and approval requirements were met. Having done so, there was no doubt for the agencies that the implementation of the Waiver complied with the requirements of the federal agency that oversees the Medicaid Program. This was the "package" that the State could provide for adult ID/RD individuals.

[3] A basic requirement to participate in the Waivers is that there be informal supports such as family, so that the waiver services compliment the informal supports. See page 1 of the Waiver document.

Public notice of the changes was apparently sufficient so that the Appellant realized the potential impact on the amount of services he was to receive. On December 29, 2009, he appealed any reduction in his services. Although the original Hearing Officer acknowledged that the Appellant should have gotten a specific individualized Notice about any reduction, suspension, or termination of services, it is hard to see how the Appellant was prejudiced by the absence of such a Notice. He appealed before the effective date of implementation, he received an informal reconsideration by the Director of the DDSN (Record, p. 940), and he filed his own Brief (Record, p. 174) and received an agency Brief (Record, p. 151) before *the de novo* hearing. For several discussions about the lack of prejudicial effect of faulty notice, see the Hearing Officer's Decision in this case (*R.S. v. SCDHHS*, #10-MISC-042 (MR/RD), at page 8 of the Decision and page 16 of the Record), the similar Administrative Law Court case of *Albert C. Meyers* v. *SCDHHS*, 2012-ALJ-080173-AP (beginning at page 6 of that Order, which was supplemented by Respondent's letter to this court on March 10, 2014), and *Pashby v.Delia*, 709 F.3d 307, at 325.

The Amici argue that, in this case, the advice of the Appellant's attending physician was not given appropriate deference. EPSDT is the acronym for early and periodic screening, diagnosis and treatment, described at §1905(r) of the Social Security Act [42 U.S.C.§1396d(r)]. If the Appellant were a child, under the EPSDT provisions, and if the services he wanted were "medically necessary," they would have to be provided, if they were coverable under any Medicaid Program, even if the services were not covered under South Carolina's specific Medicaid program. EPSDT cases are about medical necessity.

This is not such a case.

This case, in which the Appellant is an adult, is about the "package" of services provided under the Waiver. In the *Olmstead* decision, Justices Breyer and Kennedy were concerned about discharging those in need of care into systems with too little supports. That type of "deference" discussed was the deference to the treating physicians' advice about discharge. The other type was deference to the "program funding decisions of the State policymakers." *Olmstead*, page 610. As far as we can see there is nothing in *Olmstead* about deferring to the treating physicians on what must be included in the "package" available to deinstitutionalized individuals. Nevertheless, well-reasoned, evidence-based recommendations of attending physicians should be given the utmost consideration, but it would be naïve of the State to allow such recommendations to be dispositive as to services. In this type of situation, we believe that physicians do not generally understand the scope of services available and often just agree with their patients that more is better.

South Carolina has chosen to provide a specific set of home and community based waiver services to intellectually disabled individuals or individuals with related disabilities through its Intellectual Disabilities and Related Disabilities (ID/RD) Waiver. Providing services in this way is optional for the State, and the State does not have to provide waiver services to take advantage of the other aspects of the regular Medicaid Program.

**I. The Amici contend that the change in services, contained in the January 1, 2010, Waiver renewal violated the ADA as further explicated in the *Olmstead* decision by placing the Petitioner in serious risk of institutionalization.**

Primarily, with respect to the institutionalization issue, the Department does not believe that the reconfiguration of services set forth in the Waiver would force individuals into institutions. That is speculative. At any rate, insufficient facts were alleged in the initial submissions of the Appellant to convince the Hearing Officer that the application of the Waiver provisions to the Appellant would have led to institutionalization.

The Hearing Officer and the Administrative Law Judge reviewed the arguments of the Parties, submitted in writing, and determined that the Waiver limitations were not in violation of *Olmstead.* It is true that numerous circuit courts throughout the country have issued preliminary injunctions against implementing waiver and other service reductions. Those courts have initially found that the reductions of services may be a violation of the ADA and *Olmstead* because they tend to put beneficiaries at risk of institutionalization. In issuing preliminary injunctions the courts have almost all preserved the *status quo* since the balance of hardship weighs against the beneficiaries. The Hearing Officer in this case declined to so hold and the Administrative Law Court agreed. Both decisions, we believe, relied substantially on the finding that instead of being a straightforward reduction in services, the South Carolina Waiver renewal was a reconfiguration of services. In this case, Respite Care, a similar service, was available to supplement the limitation in Personal Care Aide services (to 28 hours per week). At page 335 of the Record, it can be seen that by the time of the Hearing Officer's decision, the Appellant was authorized 104 hours monthly of Respite services. That translates into about twenty five (24) hours per week of a paid person to supervise and care for the Appellant, in lieu

of his regular caregiver. Altogether, with the 28 hours of PCA services, this equaled to over seven (7) hours per day of individual care hours. Plus the Waiver allows an adjustment up to 240 hours, or about fifty-six (56) weekly hours of Respite alone, not counting the twenty eight (28) hours of PCA services.

### A. Is the risk speculative or serious?

The June 22, 2011, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* at *http://www.ada.gov/olmstead/olmstead_ta.htm,* asks and answers the question:

> **6. Do the ADA and *Olmstead* apply to persons at serious risk of institutionalization or segregation?**
> **A:** Yes, the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.

In the Statement's cover document the DOJ says that, "it reflects the views of the Department of Justice only."

One notes that the actual *Olmstead* decision is silent about any risk of institutionalization. That case dealt with individuals who were institutionalized and wanted to get out of the institution and resume community living. Even if the DOJ can find that the actual

*Olmstead* decision had directly spoken of the treat of institutionalization, the DOJ cannot bring itself to say that anything less than a serious risk of institutionalization violates the ADA.

The Amici correctly state on page 14 of their Brief that the *Olmstead* case dealt with individuals living in an institution. As also stated, much of the recent caselaw has extended the holding in *Olmstead* and held that a policy of the public entity may violate integration mandate even if it does not result in institutionalization, but only puts a participant in danger of institutionalization. However, the words of the DOJ are "serious risk." We would add that much of that caselaw consists of preliminary injunctions and settlement agreements, with very few of the cases going to final decision on the merits. The circuit court cases, for the most part, consist of remands and preliminary injunctions for which no final outcome is reported. It is certainly not difficult to understand why, in these cases, a circuit court judge would want to maintain the *status quo*. Finally, we note that the DOJ has persuasively intervened in many of these cases with its view of the impact and extension of *Olmstead*. Here are some examples:

In *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013), the district court's preliminary injunction was sustained by the circuit court. In a strong dissent, Judge Agee did not believe the injunction was warranted because 1) North Carolina could choose to completely eliminate the services in question; 2) the North Carolina constitution requires a balanced budget; 3) in *Olmstead*, at 603 the Supreme Court rejected the proposition that the ADA imposes a standard of care to individuals; 4) North Carolina , in structuring

services must take into account the needs of others with disabilities; 5) the risk of institutionalization was speculative; and *Olmstead*, at 607 allows consideration of budgetary constraints.

In *M.R. v. Dreyfus*, 663 F.3d 1100 (9th Cir. 2011), the circuit reversed a denial of injunctive relief by the district court. The injunction, put in place by the circuit court, remains the status of the case. The decision relied in part on the DOJ's filed Statement of Interest.

In *Arc of Wash St. Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005), the Plaintiffs were excluded from the Waiver because there were insufficient slots to accommodate them, but the circuit court declined to require the state to increase the size of its Waiver Program, because, under *Olmstead* to do so would be a fundamental alteration of the program, and the State was making sufficient progress in deinstitutionalizing individuals.

In *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004), the circuit court initially reversed and remanded the district court's decision to grant the State judgment on the pleadings against the Plaintiff who wanted full funding of at-home private duty nursing for her adult son. Upon remand the district court found that under *Olmstead*, the son should be provided sixteen (16) daily hours of skilled nursing care. 2008 WL 2097382 (N.D. Ill. Not reported in F. Supp. 2d). The circuit court holding was not a decision on the merits, but the district court found sufficient guidance in the circuit court's decision to

apply *Olmstead* as controlling. In this case, we do know the final outcome which was issued by the district court.

In *Fisher v. Oklahoma Health Care Auth.*, 335 F. 3d 1175 (10th Cir. 2003), the circuit court, finding that the Plaintiffs showed a high risk of institutionalization as a result of the State's policy which allowed for fewer drugs for community residents over residents of institutions, reversed the district court's summary judgment in favor of the State and remanded the case for further proceedings. No further proceedings are reported.

Even in some of the recent district court cases mentioned by the Amici, there is no further guidance than the maintenance of the *status quo*.

In *Wilborn v. Martin*, ___ F. Supp. 2d ___, WL 4401856 (M.D. Tenn., Aug 15, 2013), the district court found that Plaintiff was likely to succeed on his claim to have the State continue his home health benefits when he became an adult (turned 21) and maintained the *status quo* with a preliminary injunction.

In *Hampe v. Hamos*, 917 F. Supp. 2d 805 (N.D. Ill.2013), the district court denied cross motions for summary judgment, finding that there were still factual issues as to whether the Plaintiffs were qualified individuals and whether the accommodations requested were reasonable, but that the State could not rely on a fundamental alteration defense because it did not have a comprehensive working plan for community integration.

In *Arc of Cal v. Douglas*, 956 F. Supp. 2d 1113 (E.D. Cal. 2013), the district court denied the motion for a preliminary injunction by a provider of services to the developmentally disabled. The injunction sought to stop reimbursement reductions, but Plaintiffs were unable to show that were likely to prevail or suffer irreparable harm.

In sum, we do not know of a case in which a circuit court has made a final decision that a state has violated the Olmstead integration mandate by creating a serious risk of institutionalization. We believe that this is a construct of the DOJ that is an impermissible extrapolation of *Olmstead.*

### B. Fundamental Alteration or Reasonable Modificiation

Under *Olmstead,* States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others in the State with mental disabilities. *Olmstead*, at 587. However, "[t]he State's responsibility once it provides community-based treatment to qualified persons with disabilities is not boundless," *Olmstead* at 603.

In the *Olmstead* case, the Court considered the Justice Department's regulations and general approach in enforcing the ADA. It found that courts must consider the totality of the expenses and programs undertaken by the State when evaluating the fundamental

alteration defense. More generally, the States retain the right, as explained in the implementing regulations not to "take any action that [they] can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3). The concept of "fundamental alteration" is further explained, in part, below:

> Sec. 35.130 General prohibitions against discrimination.
>
> (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.
> (b)
> .............
> (7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

"Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Olmstead*, at 604.

In evaluating a fundamental-alteration defense, the [court] must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental

disabilities, and the State's obligation to mete out those services equitably. *Olmstead*, at 597.

Thus the courts have acknowledged the fundamental alteration defense in applying the rules in *Olmstead.* In essence, consideration must be given to the cost of the services, and the impact on the State's ability to continue to provide care for others in its charge. During the pendency of this case, the Departments have submitted a succession of Waiver amendments and renewals describing the types and limits of services available under this Waiver. Those amendments (including the limits) have been duly evaluated and approved by CMS. The DDSN has responsibility, under this Waiver and under State law, not only for providing services to the Appellant but to all of the other citizens in their system. See S.C. Code Ann. §44-20-250 et seq. In order to equitably apportion services, the Department must be allowed to reasonably limit otherwise "boundless" services. In short, if the Department spends too much on any one Participant, others in their system will suffer.

**II. The Petitioner asserts that the waiver limits are unenforceable because they were treated as a binding norm, and cites <u>Hickey v. SCDHHS</u>, Docket No. 10-ALJ-08-0656-AP in support.**

The Respondent relies on its position as set forth in its Final Brief, but just to recap:

*Hickey* was an administrative appeal that came up to the Administrative Law Court (ALC) from the Department's Division of Appeals and Hearings. The Department's Hearing Officer had dismissed the case without a hearing, finding that the Department's

policies were dispositive of the case. The ALC holding in *Hickey* was not that the Waiver limitations are unenforceable, but that they are not a binding norm and therefore may not be enforced without an opportunity for an evidentiary hearing.

The cases cited by the Amici about the characteristics of a policy as opposed to a regulation, show only that there is no clear rule in South Carolina. That may be fortunate. If State agencies had to promulgate every rate change and scope of service adjustment through the administrative process, the operation of state government would come to a standstill.

The Department is the duly designated single state agency for the administration of the Medicaid Program in South Carolina. 42 U.S.C. §1396 et. seq.; S.C. Code Ann. §44-6-10 et. seq.; and 42 CFR §431.10. The Department's regulations at S.C. Code R. 126-300(D) provide authority to make administrative changes in the Department's Programs. Furthermore, since the *Hickey* case, the South Carolina Supreme Court has specifically stated that the Department may establish enforceable criteria in the Waiver documents. *Jane Doe v. SCDHHS*, 398 S.C. 62, at 74.

CONCLUSION

In short, we believe that the DOJ's Statement and opinion letters submitted in cases has had the effect of impermissively extending violations of the "integration mandate" of *Olmstead.* At this point it seems that virtually any diminution or perceived insufficiency of home and community based services that creates the slightest risk of

institutionalization is seen by courts as a potential violation. On that basis quite a few courts in various circuits have chosen to maintain the *status quo* by issuing preliminary injunctions and denying summary judgments. This is much like an unfunded mandate in which the DOJ ratchets back the flexibility of the states and requires them to augment their original packages of home and community based services. The packages were put together by the states, considering their responsibilities to other disabled citizens, to do what they could to keep people in their homes and communities. No doubt when the straight-up decision on the merits is made, the federal circuit court will actually apply the more narrow holdings in *Alexander* and *Olmstead.* We urge you to do the same and affirm the Order of the Administrative Law Court.

Respectfully Submitted,

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April 11, 2012

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South Carolina Department of Health and Human Services, Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a Paralegal for the Respondent in the above-captioned matter and that on this 11th day of April, 2014, in Columbia, South Carolina, I served a copy of the forgoing Respondent's Response to the Amici Curiae Brief of Protection and Advocacy for People with Disabilities, Inc.; South Carolina Legal Services; the South Carolina National Association of Elder Law Attorneys; and the South Carolina Appleseed Legal Justice Center on the following persons by depositing the same in the United States Mail, postage paid, and addressed as follows:

Patricia L. Harrison
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