

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

RECEIVED
SEP 23 2014
SC Court of Appeals

Richard Stogsdill,

Appellant,

v.

South Carolina Department of Health and
Human Services,

Respondent

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The court should rehear the matter in order to set forth the standard for determining the level of risk of institutionalization necessary for there to be a finding that elimination of services is violative of the integration mandate, originally set forth in Olmstead v. L.C., ex rel Zimring. 527 U.S. 581, 119 S.Ct. 2176, 144 L. Ed.2d540 (1999). Furthermore, the weight of the uncontroverted evidence in the form of Affidavits, does not show that the Appellant is at sufficient risk of institutionalization to meet the proper standard of serious or significant risk as established in this federal circuit.

The court based much of its opinion on the case of Pashby v. Delia, 709 F. 3d 307 (4th Cir. 2013), which sets a standard of “significant risk” of institutionalization. Pashby, at 322. Furthermore, the court in Pashby was “especially swayed by the Statement of the Department of Justice on the Integration mandate of Title II of the ADA and Olmstead v. L.C.” The standard in that Statement is “serious risk of institutionalization.” Therefore, in this circuit, the standard must be “serious” or “significant” risk of institutionalization. The standard in M.R. v. Dreyfuss, 697 F. 3d 706 was “serious” at 720, 726, 732, & 739. The standard in Fisher v. Okla. Healthcare Auth., 335 F.3d 1175, at 1184, was a “high risk for premature entry into a nursing home.” The level of risk of institutionalization was not an issue in the Radaszewski ex rel Radeszewski, 383 F.3d 599 (7th Cir. 2004) or Rodriguez v. City of New York, 197 F.3d 611 (2nd Cir. 1999) cases cited in this opinion.

The point is that any Waiver participant is always at “risk” of institutionalization no matter what services are in place. The need for institutionalization is the basic criteria for entrance into the program. See Appendix B-6(c) of the ID/RD Waiver Application at <https://www.scdhhs.gov/sites/default/files/SC.0237.R04.04%20ID%20RD%20AMENDE D%20CMS%20APPROVAL%202014.pdf>.

Under this provision, an individual must meet the level of care criteria for Medicaid Sponsored admission to an Intermediate Care Facility for the Intellectually Disabled (clearly an institution). Taken to its logical conclusion, then, any reduction in services would place any participant at some risk of institutionalization.

The question in this case should be whether, back in 2010, elimination of services down to the maximum allowed under the Waiver at that time put the Appellant at “serious’ or “significant” risk of institutionalization. In the January 2010 Waiver renewal PCA and attendant services were limited to a combined total of 28 weekly hours of, but availability of Respite care was increased to a maximum of 240 hours per month. Therapies were eliminated under the Waiver, but were still available under the State Plan. In addition, the services listed in Appendix C-1(a) of the Waiver document, as appropriate would be available. Even though it had not been tried by the Appellant, Employment Services (workshop) were ruled out by his physician and his psychological services provider. See Affidavits, at R., pp. 917 & 920. The Appellant also would not try institutional respite services, which would give his caregiver blocks of free time. See, testimony of mother at R., p. 329. Presumably, he would also be unwilling to attend Adult Day Health Care for part of the day. There he would receive constant monitoring and care, but he would have to be in a setting with the intellectually disabled.

Although the affidavits presented were determined by the court to set forth a quantum of proof that “...exceeds that offered by the plaintiffs in Pashby,” we are unable to see that in the affidavits. In the Pashby case the declarants, who were the Recipients and people familiar with their cases, made statements that the Recipients “may,” “might,” “probably” would or were “likely” to enter [an institution]. Pashby, at 322. The affidavits in this case state as follows:

1. The Affidavit of Lennie Mullis (R., p. 917): This affidavit primarily focuses on the Appellants psychological state as he ended his Vocational Rehabilitation

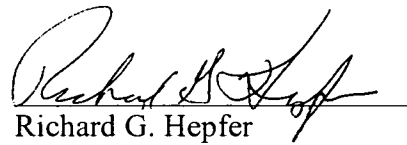
program. It says that a combination of personal care, companion and respite services is needed, but it defers to the appellant's treating physician to determine the number of hours needed for the Appellant to remain in the community.

2. The Affidavit of Dr. Joseph (R., p. 920): This affidavit says what the Appellant needs in terms of services. It does say that the Appellant would regress if the services were reduced; it does say that the burden on his parents would be greater; it does say that he would be "at risk" of institutionalization if the needed services are not provided; but it does not specify or explain that the risk is a serious or significant level of risk.
3. The Affidavit of the Appellant (R., p. 923): This affidavit does say that the recent changes (presumably the waiver limitations) will prevent people like him from remaining in their homes.
4. In an e-mail exchange with a DDSN Board member (R., p. 926) The Appellants mother says that cutting services would require her son to be put in an institution. Yet in testimony (R., p. 329) she could not imagine the Appellant being in institutional respite even for a short time

In sum, the professional providers, do not say that the Appellant would be at serious or significant risk of institutionalization if the services were limited. Furthermore, In this case, there has been no direct testimony by any of the Petitioner's attending providers. Although an attending physician's affidavit was entered into the Record (R. p. 920-922) as was the Appellant's psychological provider's affidavit, at R. p. 917-19, for their probative value (R. p. 313), they are still fundamentally hearsay

evidence. Since the hearing in this case, the Supreme Court has clarified the issue of hearsay evidence in administrative hearings, including probable cause hearings. The Court found that the Rules of Evidence, which are applicable in administrative hearings, expressly exclude the hearsay testimony. South Carolina Dept. of Motor Vehicles v. McCarson 391 S.C. 136, 705 S.E.2d 425 (S.C. 2011).

Therefore, upon rehearing, the Court should find that the Appellant did not meet the appropriate standard by showing that the proposed reconfiguration of services in January of 2010 placed the Appellant in significant or serious risk of institutionalization.



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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the Respondent in the above-captioned matter and that on the 23rd day of September, 2014, in Columbia, South Carolina, I served a copy of the forgoing Petition for Rehearing on the following persons by depositing the same in the United States Mail, postage paid, and addressed as follows:

Patricia L. Harrison
611 Holly Street
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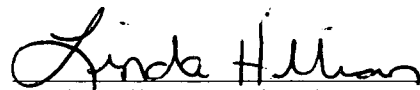
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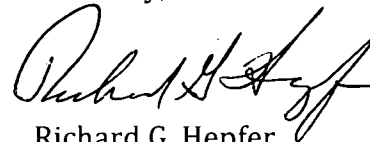
Re: Richard Stogsdill v. SCDHHS, Case Tracking # 2013-000762
Trial Court Case No. 2010ALJ080774AP

Dear Ms. Kitchings:

Enclosed for filing are six (6) copies of the Respondent's Petition for Rehearing. I have also enclosed a copy to be date-stamped and returned to the Department.

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

Sincerely,



Richard G. Hepfer
Of Counsel

Enclosure

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

