

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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OCT 02 2014

SC Court of Appeals

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

Richard Stogsdill,

Appellant,

v.

South Carolina Department of Health and
Human Services,

Respondent

RETURN TO APPELLANT'S PETITION FOR REHEARING

In response to the Appellant's Petition for a Rehearing on various issues, the Respondent offers the following Return on a few points:

1. Deference to the Appellant's attending physician (Appellant's Issue 2): A close reading of Justice Kennedy's concurrence in the Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999), at 609 & 610, reveals that nothing is said regarding the treating physician's discretion about what services should be offered. The concurrence deals with two (2) decisions to which deference is due:

- a. The treating physician's decision about whether to deinstitutionalize patients "...into settings with too little assistance and supervision...;" and
- b. "...the program funding decisions of the state policymakers."

Thus, the treating physician's recommendations with respect to setting must be tempered by the State's discretion for program funding. Olmstead does not stand for the proposition that the State must give uncritical discretion to the treating physician's recommendation as to the level of services provided, nor that the treating physician's recommendations as to level of services is dispositive.

2. Failure to comply with the Administrative Procedures Act (Appellant's Issue 4): As the court correctly found, in Doe v. South Carolina Department of Health and Human Services, 398 S.C. 62 (2011), the South Carolina Supreme Court determined that South Carolina could have listed additional criteria in the waiver application..."

Furthermore, as an additional ground, the Department's promulgated regulations, at S.C. Code Ann. R. 126-300(D), include, by reference, the waiver approvals issued by CMS as federal directives. The regulation states:

D. Services are subject to limits and procedural requirements described in the South Carolina State Plan for Title XIX (Medicaid), provider manuals, Medicaid Bulletins, and federal directives.

3. Violation of due process (Appellant's issue 5): In this case, the original hearing Officer for the agency determined that the agency did not afford proper notice to the Appellant of the changes in the Waiver that affected him. The agency acknowledges that error and the flaw in the process. However, the fact that the Appellant, through counsel, sought a reconsideration of the limits two (2) days before they became

effective indicates that Appellant did have actual knowledge of the effects that the limits would have on his services. Furthermore, the Reconsideration decision and notice of appeal rights issued by Dr. Buscemi (R. pp. 940 & 941) provided adequate notice of the issues and the opportunity to be heard by the DHHS Appeals Division. Therefore, no substantial prejudice can be shown as required by Jones v. S.C. Dep't of Health and Environmental Control, 384 S.C. 295 (Ct. App. 2009)

4. Violations of the “reasonable promptness” provision (Appellant’s Issue 6): 42 USC §1396a(a)(8) provides as follows:

A State plan for medical assistance must—
(8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals; (Emphasis added)

The rule applies to the reasonably prompt provision of what the Program staff authorizes and determines is appropriate. Obviously, the applicant can dispute, through an administrative appeal, the scope of the authorization, but the applicant does not automatically get anything he or she additionally requests while the appeal is pending. In any case, any misunderstandings are not relevant here because the Hearing Officer had substantial evidence to find that authorized services themselves had been provided with reasonable promptness. It is the amount of the services that is at issue here.

5. Violation of the “comparability” requirements (appellant’s Issue 7): The regulation (§440.240) clearly requires comparability within the State Plan, the contract with the federal government that describes the State’s Medicaid Program. The implementing federal regulations in 42 CFR provide:

§ 440.240 Comparability of services for groups. Except as limited in §440.250— (a) The plan must provide that the services available to any categorically needy beneficiary under the plan are not less in amount, duration, and scope than those services available to a medically needy beneficiary; and (b) The plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all beneficiaries within the group: (1) The categorically needy. (2) A covered medically needy group.

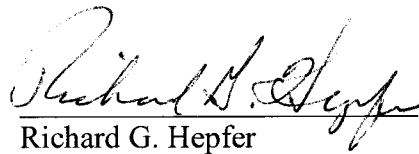
This provision clearly deals with the requirement that services be the same as among various eligibility groups within the categorically needy (low income, aged, disabled, etc.) and groups within the medically needy (such as those who can spend down their resources to become eligible) and between the two (2) categories. The medically needy are not covered in South Carolina. The regulation addresses services provided under the State Plan. Waiver services are not addressed by the regulation. In fact, the designation “waiver” indicates that certain requirements of the Medicaid program, such as comparability are “waived” so that services can be provided to the waiver participants in ways not allowed under the regular Medicaid Program – in this case in ways not comparable to the way services are provided to categorically eligible recipients under the State Plan.

The Waiver document at issue here, at item 4-A specifically requests waiver of the comparability requirement so that the waiver services may be offered to the individuals eligible for the waiver and not to individuals who qualify under the groups specified in the State Plan. Therefore the comparability provisions do not apply. The waiver document is at

<https://www.scdhhs.gov/sites/default/files/SC.0237.R04.04%20ID%20RD%20AME>

NDED%20CMS%20APPROVAL%202014.pdf.

For the reason specified above, the court should decline to rehear the issues set forth by the Appellant in his Petition for Rehearing.



Richard G. Hepfer
Of Counsel
South Carolina Department of Health
and Human Services
1801 Main Street
P.O. Box 8206
Columbia, South Carolina 29202-8206
Voice: (803) 898-2791
Fax: (803) 255-8210
Bar #3076
Attorney for the Respondent

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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 2nd day of October, 2014, in Columbia, South Carolina, I served a copy of the forgoing Return to the Appellant's 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
Columbia, SC 29205

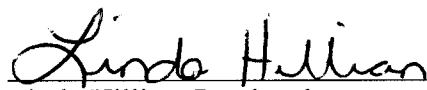
Anna Maria Darwin
Protection and Advocacy for
People with Disabilities
545 N. Pleasantburg Drive, Suite 106
Greenville, SC 29607

Sarah Garland St. Onge
Protection and Advocacy for
People with Disabilities
3710 Lnadmark Drive, Suite 208
Columbia, SC 29204

Amy Landers May
South Carolina Chapter of the National
Academy of Elder Law Attorneys
c/o the Landers May Firm
601 Devine Street
Columbia, SC 29201

Kirby Mitchell
South Carolina Legal Services
701 South Main Street
Greenville, SC 29601

Stephen Suggs
South Carolina Appleseed Legal
Justice Center
PO Box 7187
Columbia, SC 29202



Linda Hillian, Paralegal

Office of General Counsel

Department of Health and Human Services

Post Office Box 8206

Columbia, SC 29202-8206

Voice: (803) 898-2794

Fax (803) 255-8210

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SC Court of Appeals

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

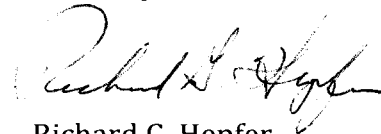
Re: Richard Stogsdill v. SCDHHS, Case Tracking # 2013-000762
Trial Court Case No. 2010ALJ080774AP

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of the Respondent's Return to the Appellant'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