

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Hon. Shirley C. Robinson, Administrative Law Judge
Trial Court Case No. 2012ALJ080173AP

Appellate Case No. 2014-000418

Albert C. Myers,

Appellant,

v.

South Carolina Department of Health
and Human Services,

Respondent.

INITIAL REPLY BRIEF OF APPELLANT

Patricia Logan Harrison, Esq.
611 Holly Street
Columbia, SC 29205
803-256-2017
plh.cola@att.net
Attorney for Appellant

Damon C. Wlodarczyk, Esq.
Riley, Pope & Laney, LLC
PO Box 11412
Columbia, SC 29211
803-799-9993
Attorney for Respondent

RECEIVED

OCT 31 2014

SC Court of Appeals

TABLE OF CONTENTS

I. Respondent admitted in its brief that Al’s services and supplies were reduced and/or terminated and the South Carolina Court of Appeals recently held that these reductions violated the Americans with Disabilities Act when the affected person was at risk of institutionalization.. . . . 1

II. There is no evidence in the Record to support the lower court’s finding that Al abandoned the defective notice and due process issues and Respondent has admitted that its notice did not comply with the requirements of the Medicaid Act. 3

III. Al has suffered extreme prejudice as a result of Respondent’s violation of his due process rights. 6

IV. The waiver amendments are unenforceable and Respondent’s brief perpetrates a fraud on the Court by misleading the Court into believing that the services are available or have been provided to Al when they have not. 19

VI. The lower court erred in its determination that Respondent has not violated the anti-retaliation provision of the ADA and Section 504. 22

TABLE OF AUTHORITIES
 Myers v. SCDHHS REPLY BRIEF
 October 29, 2014

FEDERAL CASES

Abbingon v. Texas, 441 U.S. 418 (1979) 16

Antrican v. Odom, 290 F.3d 178 (4th cir. 2002) 22

Barker v. Riverside County Office of Educ., 584 F3d 821 (9th Cir. 2009) 27

Berlin v. Shakhness, 689 F.3d 244 (2nd Cir. 2012) 4

Crabtree v. Goetz, 3:08-0939, 2008 WL 5330506 at *30 (M.D, Tenn. Dec 19, 2008) 20

Doe 1-13 By and Through Doe, Sr. 1-13 v. Chiles, 136 F.3d 709 (11th Cir. 1998) 10

Doe v. Kidd I, 501 F.3d 348 (4th Cir. 2007) *passim*

Doe v. Kidd II, 419 F. App'x 411 (4th Cir. 2011) 9, 10, 26

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2nd 662 (1974) 7

Goldberg v. Kelly, 397 U.S. 254 (1970) 4, 6, 7, 17

Harris v. McRae, 448 U.S. 297 (1980) 22

Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979) 7

Long v. Benson, 383 F. App'x 930 (11th Cir. 2010) 20

Marlo M. V. Cansler, 09-CV-535 (E.D.N.C. 2009) 20

Moore v. Cook, Case No. 1:07-CV-631 (GANDC April 19, 2012) 8, 15, 20, 25

Ohio Bell Tel. Co. V. PUC, 301 U.S. 292 (1937) 4

Olmstead v. L.C., 527 U.S. 581 (1999) 1, 2

Pashby v. Cansler, 709 F.3d 2, 20

Peter B. v. Sanford, Case No. 6:10-767 (S.C.D.C. November 24, 2011) 16, 20

<i>Rolland v. Cellucci</i> , 138 F.Supp. 110 (D.Mass. 2011)	28
<i>Shakhness v. Eggleston</i> , 740F.Supp.2d 602 (S.D.N.Y., 2010)	4, 10, 11
<i>Turner v. Walsh</i> , 435 F.Supp. 707(W.D. Mo. 1977)	18
<i>United States v. Abilene & S.R. Co.</i> , 262 U.S. 274	4
<i>Vermont Yankee Nuclear Power Corp. V. NRDC</i> , (1978) 435 U.S. 519, 98 S.Ct. 119 1211, 55 L.Ed 460)	18
<i>Weber v. Cranston School Committee</i> , 212 F.3d 41 (1 st cir., 1999)	26
<i>Wichita R. & Light Co. v. PUC</i> , 260 U.S. 48 (1922)	4

FEDERAL STATUTES AND REGULATIONS

Americans with Disabilities Act	<i>passim</i>
Medicaid Act	<i>passim</i>
State Medicaid Manual § 2902.10	10, 19
42 U.S.C. 1396a(a)(3)	3
42 U.S.C. 1396a(a)(8)	9, 10
42 U.S.C. 1396a(a)(10)	9
42 U.S.C. 1396a(a)(17)	9
42 U.S.C. 1396r(a)(3)(f)	28
42 U.S.C. 1396r(e)(7)(B)(ii)	27
28 C.F.R. § 35.130(d) (2013)	2
42 C.F.R. 431.210	3, 5, 6, 7, 17
42 C.F.R. 431.213(c)	5
42 C.F.R. 431.230	5

42 C.F.R. 431.244(a) 4

42 C.F.R. 431.244(f) 10, 19

42 C.F.R. 435.911 9, 10

42 C.F.R. 435.930 9, 10

STATE CASES

B.W. v. DHHS, Case No. 07-MISC-028 (SCDHHS November 19, 2013) 8, 16, 17

B.W. v. DHHS, Case No. 07-MISC-028 (SCDHHS December 23, 2013) 8, 16, 17

B.W. v. DHHS, Case No. _____ (SCALC July 30, 2012) 15

Chewing v. Ford, 12 Moore’s Federal Practice § 60.21[4][a] (3d. Ed. 2000) 22

Consolidated Case in the South Carolina Administrative Law Court (SCALC October 29, 2010):
Edge, Eubanks, Morgan and Myers v. DHHS, Dkt. No. 10-ALJ-08-0501, 502, 503 and 504-AP .
 2, 9, 20, 27

Frank v. Kizer, 213 Cal.App.3d 919, 261 Cal.Rptr. 882 (Cal.App. 1 Dist., 1989) 18

Hickey v. DHHS, Dkt. No. 10-ALJ-08-0650-AP (S.C.A.L.C. July 19, 2011) 20, 21

Hoban v. State of Vermont, Op. No. 200-4-05, Lexis 40 (Vt. Super. 2005) 21

Jane Doe v. DHHS, 398 S.C. 627, fn. 7, 27 S.E.2d 605 (S.C. 2011) 21, 22

Lawson v. Department of Health and Social Services, C.A. No. 02A-09-002 HDR at 17 (Del
 Super 2/25/2004) at 17 (Del. Super. 2004), 18

Madison ex rel. Bryant v. Babcock Center, 634 S.E.2d 275 (S.C. 2006) 23

McCarran v. NCDHHS, 704 S.E.2d 899 (N.C. Ct. App. 2011) 21

Mullins v. N. Dakota Dept. of Human Services, 454 N.W.2d 732 (N.D.1990) 21

Mullis v. DHHS Dkt. No. 04-ALJ-30-0194-AP (SCALJ 2005) 16

Mullis v. DHHS Dkt. No. 10-ALJ-08-0775-AP (SCALJ 2012) 16

Rennich ex rel. Rennich v. N. Dakota Dept. of Human Services, 2008 ND 171,756 N.W.2d 182 (N.D. 2008) 21

Stogsdill v. DHHS, Case No. 10-ALJ-08-0774-AP (SCALC March 13, 2013) 8

Stogsdill v. DHHS, Case No. 2013-000762, Dec. No. 5271 (S.C.Ct.Ap. September 10, 2014) ... 1, 2, 16, 17, 20

STATE STATUES AND REGULATIONS

Medicaid State Plan 9

South Carolina Administrative Procedures Act 20, 21

S.C. Code Ann. § 1-23-10(4) (2005) 22

OTHER

SC Department of Disabilities and Special Needs Directive 250-10-DD “Funding for Services” [http://ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/250-10-DD%20-%20Revised%20\(121912\).pdf](http://ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/250-10-DD%20-%20Revised%20(121912).pdf) 24

SC Department of Disabilities and Special Needs Directive 250-11-DD “Outlier Funding Request System” [http://ddsn.sc.gov/about/directives-standards/Documents/attachments/250-11-DD%20Attachment%20A%20-%20Website%20\(121912\).pdf](http://ddsn.sc.gov/about/directives-standards/Documents/attachments/250-11-DD%20Attachment%20A%20-%20Website%20(121912).pdf) 25

Introduction.

The horrible truth in this case is that in its quest to win at all costs, Respondent has lost sight of a young man who was forced into a nursing home in his thirties by governmental financial shenanigans, and he continues to suffer isolation, segregation, and unspeakable physical and mental anguish because of the agencies' stubborn refusal to comply with federal law contained in the Medicaid Act and the Americans with Disabilities Act.

I. Respondent admitted in its brief that Al's services and supplies were reduced and/or terminated and the South Carolina Court of Appeals recently held that these same reductions at issue in this case violated the Americans with Disabilities Act.

This Court should reverse the decision of the Administrative Law Court (ALC) because Respondent admits on page 2 of its brief that Al's "services and supplies were reduced and/or terminated" and the South Carolina Court of Appeals recently held that the reductions of services that are also at issue in this case violated the Americans with Disabilities Act when the reductions created the risk of institutionalization. *Stogsdill v. DHHS*, Decision No. 5271 (S.C.Ct. Ap. September 10, 2014), rehearing denied October 23, 2014. In this case the risk became a reality for Al within weeks of DDSN announcing that it intended to reduce his at-home services.

The only "reason" provided for reducing and terminating Medicaid services in 2010 was budgetary. *Stogsdill v. DHHS, supra*. As the Court of Appeals recently recognized, the United States Supreme Court ruled in *Olmstead v. L.C.* that "a state may have a defense to accommodating a Waiver participant's needs if doing so would present a fundamental alteration to its program." 527 U.S. 581, 603-04. In *Stogsdill*, the South Carolina Court of Appeals recently ruled that:

We join the Third, Ninth, and Tenth Circuits in holding that, although budgetary concerns

are relevant to the fundamental alteration calculus, financial constraints alone cannot sustain a fundamental alteration defense." Pashby, 709 F.3d at 323-24 (internal quotation marks omitted).

The hearing officer ignored the plain truth that services Al's physician had determined that he needed to remain out of an institution were reduced, terminated or denied. The hearing officer acknowledged in her order the medical need for services at issue in this appeal, but she incorrectly determined that Respondent would provide them anyway, when there is no factual support for that finding. Order at 13. The ruling was arbitrary, capricious and was not based on evidence presented at the hearing. (Why would Al go to the trouble of years of appeal if the services and equipment at issue has been provided or is available through some other mechanism? If respite services were an adequate substitute for the services Al's physician ordered, why did he lose his battle to remain in his home less than a month after DHHS informed his mother that it intended to reduce only his services, when the services of the other appellants in the Consolidated Case were continued?)

As recently recognized by the South Carolina Court of Appeals in *Stogsdill*, the United States Supreme Court concluded in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that requiring persons who have disabilities:

...to be institutionalized and segregated from the population at large discriminated against them in violation of the ADA. Id. at 599-602. Therefore, treatment for disabilities is to be provided in the most integrated, least restrictive setting possible. Id. at 602 n.13; see also 28 C.F.R. § 35.130(d) (2013) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

Opinion No. 5271 (S.C.Ct.Ap. September 10, 2014). The uncontradicted evidence in this case is that Al remained in the home for 34 years until DHHS informed his mother of its intent to reduce

his services at home.

II. There is no evidence in the Record to support the lower court's finding that Al abandoned the defective notice and due process issues and Respondent has admitted that its notice did not comply with the requirements of the Medicaid Act.

Respondent finally agreed in its Designation of Matter to include in the Record Appellant's February 22, 2011 brief which the ALJ claimed to have relied upon in determining that Appellant's defective notice issue was abandoned. R. Brief at 5-7 and R _____. Al has been complaining for years that this and other documents were purged from the Record by DHHS and that the ALC erred by not requiring the agency to include those records. That brief that is now included in the record, with the consent of Respondent, puts to rest the agency's issue preservation defense and it proves that the lower court was clearly in error in its finding that these due process and notice issues were "abandoned." The issues in the "Arguments" section of Appellant's February 22, 2011 ALC brief were stated as follows:

1. Have the Appellant's Constitutional and statutory due process rights to be heard before an unbiased tribunal been violated by the DHHS Division of Appeals and Hearings because the hearing officers were predisposed to rule against them?
2. Has Respondent violated 42 U.S.C. 1396a(a)(3), *the requirements of 42 C.F.R. 431.210* and the Appellant's Constitutional due process rights.

R. _____. (ALC Brief dated February 22, 2011 at 21 and 25.) The ALJ's finding that Al only discussed these issues in his statement of facts is contradicted by the brief itself, which is the best evidence of the arguments at made to the ALC in 2011. It appears that the lower court simply parroted the language of the ALC contained in the November 9, 2011 Order, without bothering to actually read the brief it relied upon to dismiss these claims.

Secondly, this was legal error to dismiss Al's due process and notice claims, because 42

C.F.R. 431.244(a) required the hearing officer to base her decision “exclusively” on evidence presented at the hearing. The brief in question was not even included in the Record before Judge Matthews. Basing the agency’s decision on evidence presented at the hearing was clearly a requirement established by the United States Supreme Court in *Goldberg v. Kelly*, where the highest court in the land ruled that:

...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)...

397 U.S. 254, 271 (1970). See also *Berlin v. Shakhness*, 689 F.3d 244, 256 (2d Cir. 2012). The ALC blatantly violated this basic rule of due process. The hearing officer did not identify the brief in the list of documents she considered in reaching her decision. R. 7-8. Yet, the ALC based its decision on a brief that was not in the record before her. The ALC’s conclusion on “abandonment” was contradicted by the brief itself, as well as the ruling of the hearing officer. It was legal error for the lower court to presume the infallibility of the State's defective notice defense without even reading the brief to see whether the State’s claims were true or not.¹ At the hearing, Al’s counsel complained that he was “ambushed” by the lack of notice of reasons that would be argued at the hearing and his service coordinator could not identify a reason provided in the “notice.” T. 75-78. The lower court’s finding of abandonment is not supported by any credible evidence in the record and its ruling may even suggest bias.

¹ Indeed, the hearing officer recognized at the hearing held on January 6, 2012 that one of the issues Appellant had raised was the lack of “adequate notice of the intended actions of reducing his services.” R. 4. The issue of defective notice was argued in the closing arguments at Al’s “fair hearing.” R. 196-197.

The notices DDSN provided to Al are contained at R. 852 to 856. It is not difficult to ascertain that they do not meet the unambiguous requirements of 42 C.F.R. 431.210. In some instances, the problem was not just that the notices were defective, but DDSN appears not to have provided Al with any written notice at all requests when DHHS denied services ordered by his physician. At the hearing, DDSN Service Coordinator Auker admitted that the agency had denied Al's request for nursing services, but the Record does not contain a written notice of denial or to advise him, in writing, of his right to appeal the denial of nursing services. T. at 63. She also admitted that Al's plan of care contained speech and language services, but those services (which were ordered by his physician) and the device were never authorized or provided. T. at 60. There is no notice in the Record of the denial of those services and the speech device. T. at . Nearly four years later, the device Al needs to make his needs known has not been provided. Also, the Record does not contain a written notice of denial of psychological services, although the service coordinator testified that these services would be terminated after Al moved to the nursing home. T. at 73. The record also does not contain a notice of termination of dental services. Al presented medical evidence that these services are medically necessary.

42 C.F.R. 431.213(c) requires the State to continue to provide these services and durable medical equipment until any appeal under that revised notice is finally determined. Also, 42 C.F.R. 431.230 requires DHHS to continue to provide services during an appeal. DHHS violated these clear requirements by terminating Al's services during his appeal when Al entered the nursing home. The notices, when given, were clearly defective and this pattern of reducing, terminating or denying services without providing a notice meeting federal requirements is obviously subject to repetition, yet it has evaded review. Al requests that this Court order DHHS, within thirty days, to provide the services Al's physician ordered that were terminated without

notice meeting the requirements of 42 C.F.R. 431.210 and to provide those services that were reduced or denied without providing a written notice of right to appeal, including those dental, speech, physical therapy, psychological services and durable medical equipment ordered by his physician.

Al requests that the Court determine that DHHS was not substantially justified in terminating Al's services and enforcing the waiver amendments, without meeting the notice requirements of 42 C.F.R. 431.210. He requests an order prohibiting DHHS from reducing or terminating Medicaid services in the future without meeting the strict requirements of *Goldberg* and the federal fair hearing regulations, with warnings of sanctions for future violation of the Court's orders.

III. Al has suffered extreme prejudice as a result of Respondent's violation of his due process rights

Respondent argues in its brief that Al suffered no prejudice. R.B. at 8. The Constitutional rights of persons who have disabilities are just as important as those of the rest of us, but the ALC time and again has treated those persons as second-hand citizens, as beggars who have no right to due process, instead of citizens with equal rights. If a driver appeared at a trial to defend himself against a written charge of speeding and was informed at the trial that the charges to be tried were not for speeding, but for driving under the influence of drugs, the decision would be reversed by any court without a moment's hesitation. But the courts have not viewed the rights of disabled Medicaid participants as being so important. Respondent ignores the United States Supreme Court's affirmation of the district court's finding in *Goldberg v. Kelly*, where it found:

[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed [90 S.Ct. 1020] of the case

against him so that he may contest its basis and produce evidence in rebuttal. 294 F.Supp. at 904-905.

397 U.S. 254, 266 (1970). The Supreme Court held persons who rely upon government benefits have a right to “adequate notice detailing the reasons for a proposed termination.” Id. at 267-268. Here, Respondent totally failed to provide detailed reasons for the termination, leaving Al to guess what grounds DHHS would rely upon at the hearing. Regardless of the other prejudices Al suffered as a result of Respondent’s illegal actions, the violation of his due process rights alone is sufficient reason to reverse the lower court.

The controlling case on the notice issue is *Kimble v. Solomon*, where, as here, the State Medicaid Agency “instituted an across-the-board reduction in Medicaid benefits without complying with federal regulations requiring individual notice to affected recipients.” 599 F.2d 599, 601 (4th Cir. 1979).² The Fourth Circuit ruled that the State had violated “important substantive rights” by failing to send “timely” and “adequate” notices to Medicaid participants. Id. 604. This violation, the Fourth Circuit found, was “more than a mere technical or procedural default” and, as here, Respondent’s error violated “important substantive rights.” Id. 604. Al requests an order requiring DHHS to comply with 42 C.F.R. 431.210 and to require the restoration of Al’s services until the State is in full compliance. Id. If this is not done, history has shown that DHHS will continue to violate 42 C.F.R. 431.210 without consequences and

² Unlike in *Myers*’ case, though, in *Kimble*, the reductions *were* promulgated as regulation. Even so, the district court held that the notices were not “adequate.” Id. at 602. In that case, the district court judge was distressed that he was not able to provide the Medicaid participants more relief. He wrote “I confess that I find the signing of this order as distasteful as anything I have done in my capacity as a judicial officer. However, I have reviewed the applicable law, and this action is taken reluctantly in light of the language of (*Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)) ... I have considered alternative forms of relief and I am satisfied that none would stand the scrutiny of appellate review.” Id. at 602-603. The Eleventh Amendment is no bar to this Court in awarding equitable relief to Al and other disabled persons affected by DHHS’ illegal reductions in Medicaid benefits.

vulnerable Medicaid waiver participants who are lucky enough to make it to a “fair hearing” will continue to be ambushed at the hearing and be prejudiced by being forced to spend years in appeals. *B.W. v. DHHS*, 07-MISC-028 (SCDHHS November 19, 2013 and December 23, 2013), *Stogsdill v. DHHS*, Case No. 10-ALJ-08-0774-AP (SCALC March 13, 2013), *Stogsdill v. DHHS*, *supra*.

Respondent complains on page 8 of its brief that “Myers never raised in his brief the issue of medical necessity, which is being raised now.” The record shows that it was Al that was prejudiced by Respondent basing its decision at the hearing on his need for the services. At a fair hearing, the government’s witness testify first. The record shows that Respondent’s witnesses did not testify that the reductions were based upon financial reasons - as Dr. Buscemi had done. It was Respondent’s witnesses at the hearing who testified that Al did not need the services his physician and other qualified professionals had determined to be necessary for him to remain in the community. T. 6:5 to 102:17. As noted in Respondent’s brief, the grounds DHHS relied upon at the hearing, and the findings of the hearing officer, were that the “combination of services” provided through the amended waiver was sufficient to prevent institutionalization. How else would Al counter that argument, but to provide evidence of the medical necessity for the services ordered by his physician? The arguments Respondent makes on page 8 of its brief are nothing but “bureaucratic gobbledegook having no relation to her [his] actual condition or needs.” *Moore v. Cook*, Case No. 1:07-CV-631 (GANDC April 19, 2012).

The bad faith of DHHS is demonstrated by the admission in Respondent’s brief on page 13 and the finding of the hearing officer that Al needs a speech device and psychological services - yet four years after he filed his appeal, these services and equipment still have not been provided.

Respondent's claims on page 13 that "physical therapy, nursing services...and other supplies would still be available to Myers through either the waiver or the Medicaid State Plan" are clearly contradicted by the testimony that he has not been provided those services and his requests for nursing services to provide tube feeding while at home were denied by DHHS. R. 63. Fair hearings have obviously become sport for the agency - like football, where they kick the ball back and forth as if it were not a human being's life on the line.

The Medicaid Act requires medical assistance to be provided with "reasonable promptness," interpreted by the courts as meaning within 90 days. 42 U.S.C. 1396a(a)(8). *Doe v. Kidd I, supra* at 354. ("Federal regulations direct state agencies to determine an applicant's eligibility for Medicaid within ninety days of the date of application and to "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. §§ 435.911, 435.930 (2002).") DHHS is a repeat offender in ignoring the reasonable promptness mandate and this Court has the power to hold the agency accountable for its wrongs. *Doe v. Kidd II, supra*. Federal regulations require that the State provide comparable services to persons with comparable needs and for services to be provided in the "amount, duration and scope" necessary to prevent institutionalization. 42 U.S.C. 1396a(a)(10) and (17). Yet, DHHS provided services in excess of the caps to all three other appellants in the Consolidated Case, while applying the caps to Al. In this case, Al has waited nearly five years for these services and his physician determined that he was institutionalized because those services and medically necessary equipment was not provided. A reasonable time period for DHHS to voluntarily provide the services has long ago expired. At footnote 2 in *Doe v. Kidd II*, the Court complains about the failure of DHHS to provide services with reasonable promptness:

Defendants argue that Doe I misapplied 42 C.F.R. 435.911, which appears to establish a timeline whereby a state agency must make a determination as to eligibility, but not a timeline for when an agency must actually furnish services. (Appellees' Br. at 39-40.) They would have us instead rely upon 435.930, which states only that Medicaid services are to be made available "without any delay caused by the agency's administrative procedures." See, e.g., *Doe 1-13 By and Through Doe, Sr. 1-13 v. Chiles*, 136 F.3d 709, 721-22 (11th Cir. 1998) (upholding a district court's conclusion that "reasonable promptness" means a period not to exceed ninety days). Because we find that Defendants have never provided Doe with the appropriate services, we will not address these more subtle issues of timeliness.

Doe v. Kidd II, fn. 2 (4th Cir., 2011). In *Doe v. Kidd I*, however, the Fourth Circuit found

“reasonable promptness” to mean within 45 or 90 days:

Section 1396a(a)(8) of the Act requires that state "medical assistance . . . be furnished with reasonable promptness to all eligible individuals." Federal regulations direct state agencies to determine an applicant's eligibility for Medicaid within ninety days of the date of application and to "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. 435.911, 435.930 (2002).

Doe v. Kidd, 501 F.3d 348 (4th Cir., 2007).

Contrary to Respondent's argument that Al has suffered no prejudice, the record demonstrates that he has suffered tremendously as a result of the violation of his due process rights, the failure to provide services with reasonable promptness that are comparable to other similarly situated Medicaid participants and are provided in the amount, duration and scope he needed to remain in the least restrictive setting. R.Brief 8. This defense demonstrates the conscious disregard the agency has shown to the medical needs of this extremely vulnerable man.

As the court found in *Shakhness v. Eggleston*,³ when the State provided defective notices and

³ In discussing the State's violation of the Medicaid notice requirements, the court recognized that "A right to appeal would be rendered meaningless if its bearers did not know when or how they could use it." 740 F.Supp.2d 602 (S.D.N.Y., 2010). "It stands to reason that placing a time limit on government action merely fleshes out the right to that action" a right to action implicitly includes a right to that action occurring within a certain time limit. Just as justice delayed is justice denied, so too is action delayed action denied." At 617. The regulations at 42 C.F.R. 431.244(f) and SMM § 2902.10 establish the right to a decision within 90 days. "The right is violated when the agency fails to carry the hearing through all steps necessary to completion within ninety days of the request for the hearing, except where the agency grants a delay at the appellant's request, or when required medical evidence necessary for the hearing can not be obtained within ninety days, in which cases an additional thirty day delay is permitted." *Shakhness* at 620.

failed to issue a final decision on the plaintiffs' appeal within 90 days:

These delays constitute harm in and of themselves. The decision of how to provide for one's health is of enormous importance, but for Medicaid applicants it must be put on hold pending a determination from the State as to what services will be provided. As the applicant awaits that decision they may face medical choices that reach into all aspects of their lives—whether to move in with family, or out of State, or to sell a home, or simply whether to purchase pain-easing treatment. ... (explaining that he has put off needed hernia surgery while awaiting State's decision.) All of those questions hinge on the services ultimately provided by the State. An unlawful delay in the determination of those services surely harms applicants. 740 F.Supp.2d 602, 634 (S.D.N.Y., 2010).

As in *Shakhness*, the DHHS “no prejudice” argument ignores Al’s terrible suffering that was described in detail by the experts who testified and the affidavits of Al’s physician and physical therapist. Because of the gross violation of Al’s due process rights, including his right to receive a written notice containing honest reasons for reducing and terminating his services, and a hearing based on the very same reasons included in the written notice, the record shows that Al and his family have experienced unspeakable suffering and prejudice that no citizen should endure - all because of this agency’s dogged determination to win this case.

Prejudice is demonstrated by the opinion of Al’s physician, Dr. Susan Munn, who stated in 2011 that “He is at high risk of infection and rapid decline in his health if these services are not provided.” R. 977. He needs physical and occupational therapy “to prevent regression and to prevent contractures” and she ordered speech therapy to diagnose and treat swallowing problems. On January 5, 2012 Dr. Munn stated that “Because the services ordered on June 24, 2011 were not provided, it has become necessary for Mr. Myers to be institutionalized in a nursing home.” R. 880. If the needed services had been provided in Al’s home, “it is likely that Mr. Myers would have been able to remain in the community in a less restrictive setting.” Id. Dr. Munn determined in January of 2012 that “In order to prevent depression and to maintain his mental health” Al

needs psychological services in the nursing home. R. 881. But those services were terminated by DHHS upon entry to the nursing home. Dr. Munn predicted that without physical therapy, “the contractures will worsen and he will lose the ability to sit upright without pain.” But DHHS refused to provide those services and Al has suffered through more than four years of bureaucratic mumbo jumbo in the Executive Branch, waiting to receive those pain relieving services. Dr. Munn predicted that the services she ordered “will prevent costly hospitalization which is likely to occur not only from contracture of his muscles, but from gastrointestinal and pulmonary disorders which are likely to result from worsening of his condition of scoliosis.” R. 881. She stated that “Because of his teeth clinching, Mr. Myers must be put to sleep for dental services and he needs to receive services as determined to be necessary by his dentist.” R. 881. She opined that Al “risks infection which would likely require hospitalization.” R. 881-882. In terminating Al’s dental services upon admission to the nursing home, DHHS ignored medical evidence that Al needed “to be fitted with a new mouth guard to prevent injury to his mouth that is painful and may lead to infection” and that “Poor oral status significantly increases the risk of respiratory infections, including pneumonia, in persons with developmental disabilities.” R. 882. Dr. Munn also determined that Al needed “a device that allows him to communicate with movement of his eyes.” R. 882. She stated that this was “critically important now that he will be in a setting with less supervision than he had at home and in order to prevent hospitalization.” R. 882. Dr. Munn reported that Al needed “a molded seat which conforms to his body in order to prevent gastrointestinal and pulmonary problems.” R. 882. According to Dr. Munn, it was the “failure to provide necessary supports” that resulted in Al being institutionalized, but “With the necessary services and supports, Mr. Myers would be able to live in the community.” She

described the services Al was receiving at home as “woefully inadequate.” - contrary to the opinions of agency bureaucrats, the hearing officer and the ALJ, who have no medical training. R. 882-883.

Extreme prejudice is demonstrated by the statement of Dr. Darilyn Galloway Cooper, who described painful contractures and Al’s muscles and joints being “locked in abnormal positions” which are “very painful and inhibit(s) movement.” R. 878. She found that Al needed a molded wheelchair because of the severity of his contractures, but years later, it has not been provided. R. 878. According to this physical therapist, when Al missed a few weeks of therapy, a “host of problems” developed, making it difficult to diaper and toilet Al or to put him in his wheelchair. R. 878. “It took several weeks of efforts once Albert returned to physical therapy to increase his flexibility enough for non-painful wheelchair sitting tolerance.” R. 878. When physical therapy services were not provided, Al showed “a marked increase in spasticity, scissoring lower extremity pattern and decreased flexibility of hamstring and quadriceps muscles that made sitting difficult and painful without physical therapy.” R. 878. Prejudice is demonstrated by Dr. Cooper’s report that Al displayed “signs of grimacing during stretches” after just a few weeks of not receiving physical therapy...”due to pain with range of motion when physical therapy was provided on an inconsistent basis.” R. 878. Three weeks after physical therapy was restored (before these services were terminated by the waiver amendments), Al was “again non-grimacing during transfers and stretches due to decreased pain during these movements.” R. 878. His physical therapist predicted that his “...contractures will worsen ...if he is not provided with physical therapy...making it impossible to seat him in a wheelchair and drastically reducing his quality of life.” R. 879. Ms. Coker also predicted that this would “lead to skin breakdown

because of improper cleaning because of inaccessibility to some areas.” R. 879.

Prejudice is demonstrated by the testimony of Dr. Sandra Ray, a licensed Speech Language Pathologist who has more than two decades of experience working with persons like Al. R. 116. Dr. Ray testified about Al’s need for a communications device and the physical and mental pain and suffering he endures every day because medically necessary services and equipment have been denied. R. 116 to 131. Dr. Ray was formerly a Risk Manager for a national company that provides residential services to persons like Al and she was especially qualified to assess the risks resulting from the failure to provide the services at issue in this case. R. 116. Her job as Risk Manager included responsibility for reviewing incident reports from around the country to assure that medical needs of Mentor’s residents were being met through corrective action. R. 116-117. She was responsible for writing of policies and procedures for the company. R. 116-117. She testified about the exhaustion Al experiences when he is unable to communicate his needs. R. 118-120. Al is unable to tell anyone when he is hurting or needs to be moved because he does not have a speech generating device. R. 121. This former Risk Manager testified about the danger of Al’s skin breaking down and that he is likely to develop ulcers if he is not able to communicate. R. 123. Dr. Ray testified that a speech device is needed for Al to receive psychological counseling and that he needs a molded wheelchair to prevent pressure sores. R. 128. Al was prejudiced by the failure of the hearing officer and the ALC to consider these consequences of the services ordered by Al’s physician not being provided by DHHS.

Prejudice was demonstrated by the testimony of Lennie Mullis, who also has decades of experience working with persons who have disabilities. Her testimony supported the findings of Al’s doctor, Dr. Cooper and Dr. Ray. R. 131. Ms. Mullis provides psychological services and

behavior supports to severely disabled persons like Al who receive services from DDSN. R. 132. She testified that Al's scoliosis has increased with the lack of physical therapy services. R. 132. Ms. Mullis also described the risks of respiratory infection, skin breakdown and gastrointestinal blockage that occur when Al is immobile. R. 132-133. She also testified about Al's need for a communication device and the risks associated with terminating dental services. R. 134-136. She testified that Al needs physical therapy, a speech generation device, dental services, and psychological services. R. 147. She also testified about DDSN denying nursing services and additional Personal Care Services that Al needed to remain in the home. R. 148.

Al was also prejudiced by the lower court ignoring the testimony of Lisa Jones, who was Al's caregiver in the home. She testified about his need for constant care and that he did not receive the nursing services he needed to remain at home. R. 149-158. The hearing officer and the ALC failed to explain how the new definition of Personal Care Services affected the ability of persons like Al to remain in the community.

There is absolutely no evidence from a qualified source that any "remix" of services schemed up by DHHS would begin to meet his needs. R. Brief at 9-10. As in *Moore v. Cook*, Al was prejudiced and the agency violated the amount, duration and scope requirements of the Medicaid Act because the sole purpose for the "remix" was to shift the burden of caring for the disabled person to parents, who, in Al's case, has no legal duty to provide for his care. *Moore v. Cook*, 1257-1258 (N.D. Ga., April 19, 2012). *See also* decision of ALJ John McLeod in *B.W. v. DHHS*, which was remanded to HHS by the ALC, specifically by the Hon. John D. McLeod, on July 30, 2012 and the decisions of hearing officer Elizabeth Hutto issued on November 19, 2013 and December 23, 2013. The overwhelming evidence in this case - and the only evidence from

qualified medical sources - demonstrates that Al was not receiving sufficient hours of services at home as a result of the waiver reductions. R. _____. It is significant that, as in *B.W. v. DHHS*, the State has failed to provide evidence from a single examining or treating medical professional to rebut the opinions of Al's witnesses and declarants. Decisions dated November 19, 2013 and December 23, 2013.

Al has been prejudiced by this ongoing pattern of DHHS denying services based on opinions of DDSN lay persons, who have absolutely no medical training, was also present in *Peter B. v. Sanford*, R&R of Judge Bruce Howe Hendricks in Case No. 6:10-cv-00767 (S.C.D.C. November 24, 2011) and *Stogsdill v. DHHS*, a case in which this Court recently found that the reductions at issue in this case violated the Americans with Disabilities Act (ADA). Appellate Case No. 2013-000762, Opinion No. 5271 (S.C.Ct.Ap. September 10, 2014). For the benefit of the public, this Court should exercise its power to stop this pattern so as to protect Al and others like him from further harm.

The prejudice to Al far exceeds any possible harm to the State in this case. As the Administrative Law Court recognized in *Mullis v. DHHS I*:

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. Citing *Abbington v. Texas*, 441 U.S. 418 (1979).⁴

Dkt. No. 04-ALH-30-0194-AP (SCALJ 2005).

Al will always be dependent upon Medicaid services to meet his medical needs and it is

⁴ DHHS terminated Ms. Mullis' certification a second time in 2010, and again the Administrative Law Court found that the hearing officer acted arbitrarily and improperly in refusing to admit the 2005 Order and failed to provide a meaningful opportunity to be heard. *Mullis v. SCDHHS*, Dkt. No. 10-ALJ-08-0775-AP (SCALJ 2012).

simply a matter of time before he suffers the same harm that has resulted from the State's conscious disregard for his due process rights and right to receive medically necessary services with reasonable promptness.

Historically, tribunals and courts of South Carolina, the courts have responded to the agencies' due process violations with a forgiving "go and sin no more" admonition and findings of lack of prejudice to the Medicaid participant. *Stogsdill v. DHHS, supra* (S.C.Ct.Ap. September 10, 2014). But DHHS has ignored those admonitions and the practice continues, causing severe harm to Al and his family and other waiver participants. As in *B.W. v. DHHS*, the agency has repeatedly reduced services needed by quadriplegic Medicaid participants who rely on these services to sustain life, without providing notice of the reasons for the denial, reduction or termination of Medicaid services. Case No. 07-MISC-028 (SCDHHS Nov. 19, 2013 and Dec. 23, 2013). The ALC and the hearing officer erred in finding that Al was not prejudiced by Respondent's illegal acts. But, DHHS would not be prejudiced by this Court issuing an order finding that the waiver reductions made without providing notice meeting the requirements of 42 C.F.R. 431.210 are invalid and requiring DHHS to comply with the due process standards set forth in *Goldberg v. Kelly*. 397 U.S. 254 (1970). In *Goldberg*, the United States Supreme Court held that "The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." *Id.* Al's right to continued services was equally important and he has been prejudiced by the lengthy delays caused by the Executive Branch in this case, which support his claims of retaliation.

As the district court held in *Turner v. Walsh*:⁵ "[T]he interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." 435 F.Supp. 707, 715-716 (Mo.D.C. 1977). See also *Frank v. Kizer*⁶, 213 Cal.App.3d 919, 261 Cal.Rptr. 882 (Cal.App. 1 Dist., 1989).

In *Lawson v. Department of Health and Social Services* the State Medicaid Agency provided defective notices, as DHHS has done in this case. C.A. No. 02A-09-002 HDR at 17 (Del. Super 2/25/2004) at 17 (Del. Super, 2004). The State argued that because the plaintiff was provided the reasons for the intended action at the hearing, the participant's due process rights were not violated. The agency argued that it had cured the violation of the Medicaid notice requirement:

DHSS contends that a fair hearing occurred and therefore it is irrelevant that the prior due process violations occurred. However, even if a later constitutionally fair proceeding occurred, that will not alter a procedural due process violation that preceded the hearing.

Id. at 17. The court held on pages 11 and 12 in *Lawson* that:

All notices must contain information needed by the claimant to determine from the notice

⁵ In *Turner*, the district court ordered the Medicaid agency to restore services improperly terminated and to reissue notices that comply with the federal regulations: "Nevertheless, under the circumstances presented herein, defendants' error is undisputably clear, as is their burden to correct and prevent future tragic results of that error. The Court is further convinced from the evidence adduced herein that defendants may issue the supplementary notice and continue benefits at their June levels pending that notice and any appropriate hearing requests which result therefrom, without unwarranted or similarly tragic effects on other programs. Under the circumstances presented herein, a Herculean effort to correct a tragic error is only simple justice." *Turner v. Walsh*, 435 F.Supp. 707, 716 (W.D. Mo., 1977).

⁶ The court held in *Frank*, that "Whether due process is satisfied by lesser standards than contained in the HHS regulations is not open to debate in this forum... 'Absent constitutional constraints or extremely compelling circumstances' (Vermont Yankee Nuclear Power Corp. v. NRDC (1978) 435 U.S. 519, 543, 98 S.Ct. 119 1211, 55 L.Ed.2d 460), the federal regulations must be followed." Id.

alone the accuracy of the Division's action or intended action. At a minimum all notices must indicate the proposed action to be taken, including denial of benefits; provide citation(s) to the regulation(s) supporting the action being taken, and provide a detailed individualized explanation of the reason(s) for the action being taken. This includes, in terms comprehensible to the claimant, an explanation of why the action is being taken, and if the action is being taken because of the claimant's failure to perform an act required by the regulation, an explanation of what the claimant was required by the regulation to do and why his or her actions failed to meet this standard.

Persons like Al have lifelong disabilities and they have no choice but to continue to rely upon DHHS to provide services they need to survive and they are prejudiced when the strict letters of the Medicaid Act are not enforced. Medicaid cases are not like car wrecks, where the defendant is ordered to replace the car and the parties have no reason to deal with each other after the court's decision is rendered. Each time DHHS ignores a physician's order to provide medically necessary services and equipment, Al will again have to revisit the "fair hearing" process. It is a matter of great public interest to enforce the due process rights of Medicaid participants and to end the waste of judicial resources that occurs when DHHS blatantly ignores its obligations to provide proper notice, a hearing and resolution with reasonable promptness, interpreted by the courts as meaning within ninety days. *Doe v. Kidd I*, 501 F.3d 348 (4th Cir. 2007).⁷

IV. The waiver amendments are unenforceable because DHHS failed to establish reasonable standards for the operation of the Medicaid program and to

⁷ The State Medicaid Manual interprets the 90 day requirement contained at 42 C.F.R. 431.244(f) at Section 2902.10, which provides: Prompt, Definitive And Final Action (42 CFR 431.244(f)).--The requirement for prompt, definitive, and final administrative action means that all requests for a hearing are to receive prompt attention and will be carried through all steps necessary to completion. The requirement is not met if the State dismisses such a request for any reason other than withdrawal or abandonment of the request by the claimant or as permitted elsewhere in these instructions. Adhere to the time limit of 90 days between the date of the request for the hearing and the date of the final administrative action except where the agency grants a delay at the appellant's request, or when required medical evidence necessary for the hearing can not be obtained within 90 days. In such case the hearing officer may, at his discretion, grant a delay up to 30 days

promulgate regulations as required by the South Carolina Administrative Procedures Act

At page 10, Respondent argues that DHHS was not required to promulgate the waiver amendments as regulations. Respondent argues that it should be able to reduce services based on the decisions of agency employees, without the need of approval of the General Assembly. This Court has recently ruled that the Respondent is not required to promulgate regulations under the South Carolina Administrative Procedures Act. *Stogsdill v. DHHS, supra*.⁸ But the Court found that the waiver amendments were unenforceable for another reason ... because they violated the Americans with Disabilities Act. *Id.*

In reducing and terminating Al's services, DHHS has ignored the finding of the South Carolina Administrative Law Court in the Consolidated Case. *Edge, Eubanks, Morgan and Myers v. DHHS*, Dkt. No. 10-ALJ-08-0501, 502, 503 and 504-AP (SCALC October 29, 2010). In that case, the ALJ ruled that "...CMS approval of the waiver does not have the force and effect of law because the waiver reduction was not promulgated as a regulation." *Id.* at 14. Federal courts across the country have agreed that CMS approval does not override the State's obligation to comply with federal law. *Pashby v. Cansler, supra*; *Crabtree v. Goetz*, 3:08-0939, 2008 WL 5330506, at *30 (M.D. Tenn. Dec. 19, 2008); *Marlo M. v. Cansler*; 09-CV-535 (E.D.N.C. 2009); *Moore v. Cook, supra*; *Peter B. v. Sanford*, Case No. 6:10-767 (S.C.D. November 24, 2011), *Long v. Benson*, 383 F. App'x 930 (11th Cir. 2010).

In the Consolidated Case, the ALC agreed with its decision in *Hickey v. DHHS*, where the court discussed other states where Medicaid changes that were not promulgated as regulations that were determined to be unenforceable:

⁸ The time for appealing that decision had not expired at the time this brief was filed.

I find no legal support for this argument. On the contrary, other states which have considered this precise question have held 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. In *McCarran v. N.C. Dept. Health and Human Services*, 704 S.E.2d 899 (N.C. App. 2011), the North Carolina Court of Appeals held that it was error of law for the agency to rely upon the provisions of a waiver to deny services to a Medicare beneficiary. The court held 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. Likewise, in *Hoban v. State of Vermont*, Op. No. 200-4-05, Lexis 40 (Vt. Super 2005), the Superior Court of Vermont held that a cap on HCBS contained in a Medicaid waiver program was void due to the agency's failure to promulgate the cap as a regulation under the state APA. See also, *Mullins v. N. Dakota Dept. of Human Services*, 454 N.W.2d 732 (N.D. 1990) (invalidating unpromulgated manual provisions purporting to define individuals eligible for benefits). Compare, *Rennich ex rel. Rennich v. N. Dakota Dept. of Human Services*, 2008 ND 171, 756 N.W.2d 182, 188 (N.D. 2008) (distinguishing situation where conditions of eligibility are set by federal statute and regulation).

Dkt. No. 10-ALJ-08-0650-AP (SCALC July 19, 2011) at 678. Furthermore, the ALC in *Hickey* found that the agency was not exempt from the rulemaking mandate of the Administrative Procedures Act:

I conclude that the general language allowing the Department to promulgate regulations does not override the more specific requirements of the APA. To interpret Section 44-6-90 as urged by the Department would imply that every agency given general authority to promulgate regulations is thereby exempted from the requirements of the APA. Such an interpretation does not yield a reasonable and practical construction consistent with the purpose and policy expressed in either the APA or § 44-6-90. Therefore, the Department erred in treating the cap on PCA II services as a binding and enforceable rule without promulgating the cap as a regulation pursuant to the APA.

DHHS' reliance in its Brief upon the dissent in *Jane Doe v. DHHS* is erroneous and it contradicts the holding of the majority of the Justices in that case. R.B. at 11. Disagreeing with the dissent, the majority of the Justices ruled that:

In accordance with our statutory law, we hold an agency guideline does not have the force of law, and in any event, can never trump a regulation. Our law provides that "[r]egulation" means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C.Code Ann. §

1–23–10(4) (2005) (emphasis added).

398 S.C. 627, fn. 7, 27 S.E.2d 605 (S.C. 2011). In this case, the regulations Respondent attempts to trump are federal regulations that interpret the Medicaid Act. While States are not required to participate in Medicaid waiver programs, as a condition of accepting a 70% federal match, the State is obligated to comply with all federal regulations. ("Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX." *Harris v. McRae*, 448 U.S. 297, 301 (1980)). See also *Doe v. Kidd I*, *supra* and *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002).

In any event, the Medicaid Act requires States to establish “reasonable standards” for the administration of Medicaid programs and, regardless of whether the South Carolina APA requires Respondent to promulgate regulations, the agency has failed to establish such standards and has, instead, administered the program based on the whims of State bureaucrats.

V. The waiver amendments are unenforceable and Respondent’s brief perpetrates a fraud on the Court by misleading the Court into believing that the services are available or have been provided to AI when they have not provided those services

In its brief, Respondent misleads this Court into believing that the services at issue in this case have been provided, or are available to AI. R.Brief at 12 and 13. That argument may perpetuate a fraud upon the Court, because there is not a scintilla of evidence in the record that the services which were identified at the hearing as being needed both at home and in the nursing home have been provided. As the South Carolina Supreme Court held in *Chewning v. Ford*: “Fraud upon the court is ‘fraud which . . . subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual

manner its impartial task of adjudging cases that are presented for adjudication.”” As the Court of Appeals noted: “It has also been defined as "fraud that does, or at least attempts to, defile the court itself. . . ." Citing 12 Moore's Federal Practice§ 60.21[4][a] (3d. ed. 2000). Specifically, "extrinsic fraud” is fraud that, as in this case, deprives a person of the opportunity to be heard.” Id. A reasonable person reading Respondent’s brief and the ALC order would believe that DHHS has met its obligation to provide the medical assistance at issue in this case. Nothing could be further from the truth.

Al filed an appeal nearly five years ago and the services his doctor ordered have not been provided. Respondent has ignored the extensive evidence provided at the 2012 hearing documenting not only the medical necessity for the services and the equipment ordered by Al’s physician, but the severe and irreversible consequences if they are not provided. R. _____. The agency has failed to contradict the opinion of Al’s qualified treating physician with evidence from any qualified source.

Respondent also misleads the Court with its argument that “The waiver program was never intended to provide 24-hour-a-day care...” R.Brief at 13. Respondent provides no legal authority in support of this claim and DDSN directives discredit the argument. This argument ignores the fact that 24 hour care and supervision is provided by DDSN - but only to those participants who are admitted to congregate programs, where they spend their days and nights with other disabled persons. *Madison ex rel. Bryant v. Babcock Center*, 634 S.E.2d 275 (S.C., 2006) and *Doe v. Kidd I, supra* . (An ICF/MR, is “an institution like a nursing home.”) DHHS discriminates against waiver participants who want to remain in their own homes. Funding is based upon where the participant lives, with persons who live in their own homes receiving significantly less funding.

This Court may take judicial notice of DDSN Directives contained on the agency’s website. Directive 250-10-DD is the directive for “Funding for Services,” which is found at [http://ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/250-10-DD%20-%20Revised%20\(121912\).pdf](http://ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/250-10-DD%20-%20Revised%20(121912).pdf). According to this directive, “high needs” individuals living in CTH II (group homes) receive the same funding as individuals living in an ICF/MR, a nursing facility for persons who have intellectual disabilities or related disabilities. The attachment to this directive contains the rates paid based on the setting where the individual lives.

[http://ddsn.sc.gov/about/directives-standards/Documents/attachments/250-10-DD%20Attachment%20-%20Website%20\(121912\).pdf](http://ddsn.sc.gov/about/directives-standards/Documents/attachments/250-10-DD%20Attachment%20-%20Website%20(121912).pdf). This document shows that the funding level for persons living at home is \$10,185 per year, while the base level funding level for “high needs” persons living in group homes or ICF/MR institutions is \$74,253 per year. But an application for outlier funding can be made for persons in residential programs whose cost of care exceeds \$94,291 a year. Id. Directive 250-11-DD is the department directive for the “Outlier Funding Request System.” See

[http://ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/250-11-DD%20-%20Revised%20\(121912\).pdf](http://ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/250-11-DD%20-%20Revised%20(121912).pdf). This directive provides a mechanism to provide additional funding to persons whose costs exceed the rates set in Directive 250-10-DD. This directive provides funding for 1:1 “Intensive Supervision” for persons whose cost of care in a congregate setting licensed by DDSN whose costs exceed \$94,291 in a residential setting, or \$26,938 at home.

Attachment A to Directive 250-11-DD demonstrates the falsity of the claim that the waiver does not allow for 24 hour care and supervision. This document allows for payment for “1:1

staff support.” [http://ddsn.sc.gov/about/directives-standards/Documents/attachments/250-11-DD%20Attachment%20A%20-%20Website%20\(121912\).pdf](http://ddsn.sc.gov/about/directives-standards/Documents/attachments/250-11-DD%20Attachment%20A%20-%20Website%20(121912).pdf). But, Attachment B only allows outlier funding for 1:1 staffing provided in a residential or day program (i.e. segregated congregate setting). [http://ddsn.sc.gov/about/directives-standards/Documents/attachments/250-11-DD%20Attachment%20B%20-%20Website%20\(121912\).pdf](http://ddsn.sc.gov/about/directives-standards/Documents/attachments/250-11-DD%20Attachment%20B%20-%20Website%20(121912).pdf). DDSN’s own directives contradict DHHS’s argument that no waiver participants receive 24 hour care. Since Appellant was not entitled to take discovery in this case, he asks that the Court inquire of counsel, or the Director of DDSN, about whether there are waiver participants who receive 24 hour care in the DDSN system.

The argument on page 15 that the 2010 waiver limits “did not constitute a reduction in services, but only a reconfiguration of services which were sufficient to meet Myers’ medical needs” is, as described in *Moore v. Cook*, nothing but bureaucratic gobbledegoop that has no factual support in the record. Respondent’s argument on page 18 regarding nursing services also misleads the court. Al attended a day program for five hours a day where nurses were present (Adult Day Health Care). R. 44. But, that left nineteen hours a day without nursing services, during which time three feedings had to be administered to keep Al alive. (And no assistance with these feedings for twenty four hours a day during weekends and holidays.) But a DDSN policy, which has not been promulgated as regulation, prohibits waiver participants who receive this Adult Day Health Care from receiving any other nursing services. Because Al is fed through a feeding tube, this required his mother to provide tube feedings (each taking an hour and a half) in the mornings, afternoon and evenings every day, and at mid-day every weekend and holiday.

R. _____. Respite caregivers and Personal Care Attendants cannot provide tube feedings. R. _____.

Respondent's brief might lead a reader into believing that Al is receiving dental, psychological and physical therapy services now, services ordered by his physician. R. 19. But, the record does not support this claim. The record shows that there were services in Al's plan of care which were not provided for years. R. _____. R. Brief at 19. Appellant requests that the Court ask counsel at the hearing whether any of those medically necessary services have been provided to Al since he was institutionalized in December of 2011. Al has never been provided with the speech device ordered by his physician, even though it has been in his plan of care for years. R. _____. As in *Doe v. Kidd I and II*, DHHS has again failed to provide medically necessary services in the participant's plan of care with reasonable promptness. *Supra*.

VI. Al has provided credible evidence of Respondent's violation of the anti-retaliation provision of the ADA and Section 504.

The court recognized in *Weber v. Cranston School Committee* that: "It is a practical reality that recipients of federal funds sometimes respond to complaints about their treatment of a disabled child by retaliating against the disabled child, the initiator of the complaint (who is often a parent), or both." 212 F.3d 41 (1st Cir., 1999). Respondent argues that Al failed to provide any evidence of retaliation on page 14 of its brief, but the Record shows that Respondent has failed to rebut Al's credible claims of retaliation. At the meeting DDSN and DHHS held to announce the waiver reductions, Al's mother spoke in support of families against the reductions. T. 161:4-27. She gathered names of 40 to 45 others whose services would be reduced or terminated if DHHS put its plan into action and created a mailing list. R. 161-163. Al's mother testified that her list eventually grew to "about 600." R. 161. She quickly became communication central for an

advocacy group known as “South Carolina Voices.” R. As Voices grew, so did the warnings of retaliation. T. 164:9-18. Working from her computer at home, Al’s mother provided much needed information to families across the State which allowed them to challenge these reductions. R. 161-163. She corrected misinformation that the agencies were disseminating in their attempt to chill family members from challenging the reductions - like threatening parents that that they would have to repay DHHS if their adult children lost their appeals. R. 164. The evidence in the Record shows that Al’s mother did participate, assist, encourage and aid others in protected acts. R. Brief at 17. *Barker v. Riverside County Office of Educ.*, 584 F.3d 821 (9th Cir., 2009).

The record contains evidence of retaliation. Al’s request for nursing services was denied after Al’s mother spoke at the public hearing and became active in Voices. Al was the only one of the four waiver participants who was singled out in the Consolidated Case to have his services cut after the ALC determined that the waiver reductions violated the South Carolina APA. The PASSAR evaluation finding that Al did not need the services that had been medically necessary before the waiver amendments - services the hearing officer and the agency later admitted he needs - is evidence of retaliation. The PASSAR review is federally mandated when a person who has mental retardation or a related disability, like cerebral palsy, is admitted to a nursing facility. 42 U.S.C. 1396r(e)(7)(B)(ii).⁹ The purpose of the review is to determine if the patient needs

⁹ All testimony and medical statements in the record from qualified experts document Al’s need to receive speech and language services, a speech generating device, dental services, psychological services, physical therapy, a specialized wheelchair with body molding and companion services - all of which are “specialized services” under PASARR. See testimony of Sandra Ray beginning at 102-31, testimony of Lennie Mullis at 26, Statement of Dr. Munn at 877 and 880, Statement of Dr. Galloway-Coker at 878. Al is entitled to receive these Medicaid

“specialized services.” Id. Without informing Al’s guardian, or contacting his physician, or even his DDSN service coordinator, DDSN and DHHS conducted the evaluation finding that “specialized services” are not needed. R. 848-851. The Level I screening found that Al needed further evaluation based on his diagnosis of mental retardation. R. 849. An unidentified person who has an “MA” determined that despite Al being a person who has mental retardation, cerebral palsy, a seizure disorder, scoliosis, club feet and Arthrogryphica, but that he had no need for “specialized services.” R. 850 and T. This finding is contradicted by all of the medical evidence in the record and not supported by evidence from a single qualified source.

Even the hearing officer and the agency admit that Al needs psychological services, physical therapy and a speech device, but Al’s requests for these services have been denied and these services have not been provided, despite knowledge of the severe consequences to Al’s health.

VII. Conclusion.

These services at issue in this case were reduced giving no deference to the opinion of Al’s treating physician - without input from any physician at all. *Olmstead* at 601. Al prays for an order requiring DHHS to immediately provide speech and language services, a speech device,

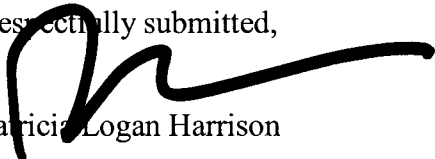
services, whether they are funded by the Medicaid Waiver in the community or by DHHS in the nursing home through the PASSAR requirements of the Medicaid Act. 42 U.S.C. 1396R(a)(3)(f). R. 607. Al provided the hearing officer extensive documentation of the PASSAR requirements and the PASARR “assessment” conducted by DHHS and DDSN determining that he has no need for “specialized services.” 42 C.F.R. 483.126 requires that nursing facility services be supplemented by “specialized services” when the patient has mental retardation or a related disability. R. 633 to 636. The PASSAR screening requirements are contained in the DHHS Nursing Facility Services Provider Manual at R. 645 to 647. As the court held in *Rolland v. Cellucci*, the PASARR “active treatment” requirements for nursing home patients are not “merely aspirational.” 138 F.Supp. 110, 117 (D.Mass. 2001). This case was presented to the hearing officer. R. 89-99. The PASARR requirements obligate the State to provide the same services individuals would receive in a DDSN ICF/MR (now ICF/MD). Id. at 117, R. 94.

as determined by his physician to be appropriate, dental services, psychological services, physical therapy, companion services and all other specialized services his physician determines to be medically necessary.

Appellant requests that the Court inquire into whether services at issue in this case, which Respondent leads this Court into believing are being provided or available to Al have actually been provided. Alternatively, Appellant requests permission to take depositions of employees of DDSN and DHHS and to supplement the record with these depositions and medical records which document the consequences of Respondent's failure to provide the requested services. Appellant respectfully requests an order finding that Respondent has acted without substantial justification, requiring DHHS to provide services deemed by his physician to be medically necessary and requiring Respondent to pay legal fees and costs.

By separate motion, Al requests permission to exceed the page limit by four pages due to the extensive record and complicated issues in this case.

Respectfully submitted,



Patricia Logan Harrison

611 Holly Street

Columbia, South Carolina 29205

803 256 2017

plh.cola@att.net

Attorney for Al Myers

October 29, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Hon. Shirley C. Robinson, Administrative Law Judge
Trial Court Case No. 2012ALJ080173AP

Appellate Case No. 2014-000418

Albert C. Myers,

Appellant,

v.

South Carolina Department of Health
and Human Services,

Respondent.

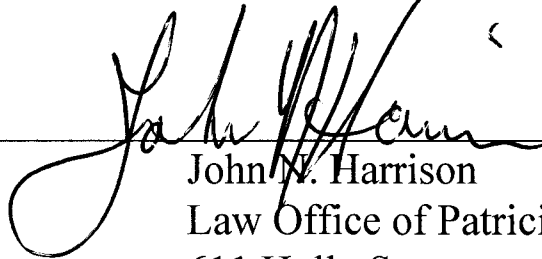
RECEIVED

OCT 31 2014

SC Court of Appeals

CERTIFICATE OF SERVICE

John N. Harrison certifies that he has served Appellant's *Initial Reply Brief* in the above captioned case on the Respondent by United States Mail to Damon C. Włodarczyk, Esq., Riley Pope & Laney, LLC, PO Box 11412, Columbia, SC 29211, on October 29, 2014.



John N. Harrison
Law Office of Patricia Logan Harrison
611 Holly Street
Columbia, South Carolina 29205
(803) 256-2017