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Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS
Case No. 2013-000762

Richard Stogsdill,.....Petitioner,

v.

South Carolina Department of
Health and Human Services,.....Respondent.

PETITIONER'S REPLY TO RESPONDENT'S RETURN

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803-256-2017
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I. **The Return of DHHS demonstrates that the agency is likely to continue to ignore its obligations and to divert funds allocated by the General Assembly unless this Court requires the agency to promulgate regulations, as required by the South Carolina Administrative Procedures Act.**

Richard petitioned this Court to require DHHS to promulgate regulations for the administration of the Medicaid program and for determining medical necessity. Respondent claims in its Return that the Medicaid waiver amendments were authorized after holding "public hearings." R. Return at 16. But, the Record in this case documents that these changes were secretly planned. "After the fact" meetings were held after receiving funding appropriated by the General Assembly, without notice to that legislative body of the agency's intentions not to provide the level of services funded. These amendments were approved by the DDSN Commissioners (who were not aware of the falsity of the "budget reduction" alarms of agency officials), without even the local Disability and Special Needs Boards being informed of the agency's plan. R. 914. DHHS' claims of obtaining public input prior to amending the MR/RD Medicaid waiver are contradicted by the letter former Director of DDSN, Eugene A. Laurent wrote to Executive Directors and Chairpersons of DSN Boards on June 9, 2009:

> DDSN initiated proposed reductions and caps in the MR/RD waiver without involving the County Boards in the process, but also without notifying you that the proposal was going to the Commission. An oversight like this should not have happened. At this point, all I can do is apologize and initiate a process that ensures that it does not happen again.

R. 914. DHHS' claim of holding public meetings is misleading. The waiver amendments were approved by the DHHS Medical Advisory Board at the very end of the FY 2008-2009 legislative session, and they were implemented by the agencies prior to the start of the FY 2010 legislative session.

DHHS' budget reduction claim ignores the fact that six days after Richard filed his February, 2009 appeal, Congress reduced our State's matching rate for Medicaid services

from nearly 30% to only 20%, a 1/3 reduction in the amount of funds South Carolina would have to provide to maintain services at the pre-2010 level. After the passage of the American Recovery and Reinvestment Act (ARRA), Pub. L. 111-5, South Carolina's federal matching rate for Medicaid services was increased from 70% to 80%. *See* http://www.gpo.gov/fdsys/pkg/PLAW-111publ5/html/PLAW-111publ5.htm. Under the guise of "budget reductions," home based services were slashed and physical therapy, occupational therapy and speech and language services were terminated from the MR/RD Medicaid waiver effective January 1, 2010. R. 76. DHHS informed CMS that the waiver amendments were necessary "Due to the State of South Carolina's budget situation..." Id. Richard has shown the Courts that the cost of the MR/RD Medicaid program actually increased by tens of millions of dollars, once home based services were reduced. The total cost of the waiver program in 2009 was $217,252,605, with an average annual cost per participant of $36,209. R. 227, 232, 236, 891. DHHS informed CMS that the total cost of the program once the waiver amendments were put into place, beginning on January 1, 2010, would be $278,661,600, or an average cost of $51,869 per waiver participant. R. 75. Once home based services were reduced, the cost of the program increased by more than $61 million, according to DHHS' own calculations.

This Court may take judicial notice of the State Comptroller's press release documenting that DHHS allowed $225,945,013 to "lapse" at the end of FY 2009-2010. "Appropriations and Expenditures" at page 4 of Exhibit 5 (P.57). These lost funds could have generated $1,129,725,065 to provide additional Medicaid services, with the 80% federal match during the years the ARRA funds were paid to South Carolina. According to the State Comptroller, in FY 2013-2014, DHHS failed to spend $280,258,725 of the state funds allocated to provide Medicaid services. Exhibit 6 at 4 (P. 67). Thus, the State lost 70%

matching federal funds available last fiscal year - resulting in a total loss of $934,195,750.

In considering whether to order the agencies to promulgate regulations to stop this waste and insanity, the Court should consider DDSN's long history of failing to expend funds as allocated by the General Assembly for the intended purpose. For example, the report of the South Carolina Legislative Audit Council issued in December, 2008 reported that DDSN "spent just $7.6 million of the $25.4 million appropriated to operate new beds" as intended by the General Assembly. R. 720. DDSN lost the federal matching funds (then at 70%) South Carolina would have received had the funds been spent as intended by the General Assembly. Id. According to this audit, DDSN spent just $671,917 (only 6%) of the $10.5 million allocated by the General Assembly for the specific purpose of providing services to children with autism. R. 724. These funds were then spent without oversight by the General Assembly, not being included in the agency's annual budget.

Unless this Court orders DHHS to promulgate regulations for the administration of the Medicaid programs in this State, these agencies will continue to divert funds intended to provide services to Medicaid participants for other purposes, and to make changes in the Medicaid waiver programs based on false information submitted to CMS and questionable cost reports. R. 738.

II. The Court should establish standards for determining the medical necessity for Medicaid services and whether live medical expert testimony must be provided at "fair hearings."

Perhaps the best evidence of the harm that will come to Richard if this Court does not force the agency to promulgate regulations to determine how medical necessity will be

determined in his appeal on remand is contained in Respondent's Return.[1] R. Return at 4. It is clear from the arguments of DHHS that the agency has no intention of giving anything but illusory weight to the opinion of Richard's treating physician. As Judge Hendrix recognized in *Peter B.*, the State is required by *Olmstead v. L.C. ex rel. Zimring* to give the greatest deference to the treating physician. 527 U.S. 581, 601 (1999). In *Peter B. v. Sanford*, Judge Bruce Howe Hendricks discussed the importance of giving deference to the treating physician's opinions:

> The care the plaintiffs require is complicated, burdensome, and inexact. In some respects, there is no easy answer to their situations. But certainly, if anyone knows what might be the best, among many less than perfect alternatives, it is the plaintiffs, their families, and their physicians. To credit those accounts, earnestly, seems in keeping with the manner in which these cases are to be considered. *See Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring) ("The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference.")

Case No. 6:10-767, Report and Recommendation of Magistrate, November 24, 2010 at 7.

Richard has already endured two "fair hearings" at which the agency failed to provide evidence from a single medical source to support their decisions to reduce and terminate services. Yet, DHHS argues in its' Return that "it would be naive of the State" to allow the treating physician's opinion to be dispositive..." R. Return at 5. There is nothing in Respondent's Return that would lead this Court to think that DHHS has changed its ways. On page 5 of the Return, Respondent argues that "In this type of situation, physicians do not generally understand the scope of services available and often just agree with their patients

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[1] Richard prays that this Court not be lulled into believing Respondent's argument that he was not harmed by the delay in the state proceedings, based on claims that his services have continued. Richard filed an appeal in February, 2009, when the burden of providing an additional eight hours a day of care was shifted to his aging parents - the equivalent of a full time job - in addition to the hours of care they were already providing. His father died during his administrative appeal, leaving his working mother as the sole breadwinner in the family.

that more is better." According to DHHS, the hearing officer in this case and the Administrative Law Court, the agency should give more weight to the opinion of bureaucrats like those who testified for DDSN at the hearing, who have no medical training and no knowledge of his ability to perform any activity of daily living. Richard suggests that this Court should rule that when the State fails to provide evidence from a treating or examining physician, the treating physician's opinion is presumed to be correct.

This Court should consider the medical necessity standards established by the Eleventh Circuit in *Moore v. Reese* (637 F.3d 1220 (11th Cir., 2011)), as applied by the district court in *Moore v. Cook*. The district court judge ruled, after a two day bench trial, that the State's reduction in Moore's skilled nursing hours was arbitrary and capricious and based not on medical necessity, but on "bureaucratic gobbledegook." (N.D.Ga., No. 1:07-CV-631-TWT, April 20, 2012). See *B.W. v. DHHS* at R. 1131. In that case, the court held that the "treating physician assumes the primary responsibility of determining what treatment should be made available to his patients." *Moore* at 25. The State may establish the amount, duration and scope of services, but those services must be sufficient to achieve the purposes of the program (i.e. providing services in the community and avoiding institutionalization).

Alternatively, this Court should consider adopting policies established by the Social Security Administration for determining the weight that must be given to the opinions of the treating physician. In *Meyer v. Astrue,*(173 Soc. Sec. Rep.Serv. 381, 662 F.3d 700, 705 (4th Cir., 2011)) the Fourth Circuit discussed the weight that must be given in Social Security cases to the opinion of the treating physician and that the agency was required to consider the medical evidence contained in a letter from the treating physician. Id. *See* 20 C.F.R. § 404.1527(d)(2) (providing that a treating physician's opinion is entitled to

deference).

Richard paid the cost of having a nurse testify at his first hearing - just to have that testimony evaporate - when DHHS changed its rules, without promulgating regulations or even considering the November 2009 order of its own hearing officer in his 2010 appeal. He provided the hearing officer with statements from his treating physician at both hearings, which carried great weight with the hearing officer at the 2009 hearing, and, later, carried great weight with the South Carolina Court of Appeals in *Stogsdill v. DHHS*. Appellate Case No. 2013-000762, Opinion No. 5271 (S.C.Ct. Ap. 2014 September 10, 2014). Yet, without citing any legal support applicable to Medicaid fair hearings, DHHS now argues to this Court that his physician's statements should not be considered by this Court, because they are nothing more than "hearsay." R. Return at 5. The case cited by DHHS is clearly distinguished, as it deals with whether the hearsay testimony of a police officer may be used to establish probable cause for an arrest. *S.C. Dept. of Motor Veh. v. McCarson*, 391 S.C. 136, 705 S.E.2d 425 (2011). If the rule is that impoverished Medicaid participants must present live testimony from their physicians at "fair hearings," there needs to be a regulation that so informs appellants of that requirement. The General Assembly and the medical profession should have the opportunity to carefully consider the imposition such a rule would impose on physicians, and that many may opt out of the program if they are likely to be subpoenaed to have to travel to Columbia to testify in these hearings. Persons like Richard should be allowed to rely upon the directions contained on DHHS' website that instructs "fair hearing" appellants as follows:

> Q. What Types of Evidence Can I Present at the Hearing?
> Witnesses – someone who can help prove your arguments
> Records – These can include any documents that show you meet the eligibility criteria such as income records, property records, medical records, or school records
> Documents – These can include items such as income tax documents, bank statements,

or a letter from your doctor

(Emphasis added.) *See* DHHS website at https://www.scdhhs.gov/site-page/appeals-and-hearings-frequently-asked-questions. This argument has been made by DHHS in bad faith for the purpose of misleading this Court.

III. DHHS attempts to reargue issues decided by the South Carolina Court of Appeals, which are not before the Court because DHHS failed to appeal those issues.

DHHS' Return demonstrates that the agency continues to exhibit a "win at all costs" attitude that will likely result in years of additional administrative appeals if Richard's case is remanded without promulgation of regulations to end its arbitrary and capricious practices. This arrogance is demonstrated on page 5, where DHHS states that it "apparently" must consider the directives of the United States Department of Justice, the agency Congress directed to promulgate regulations to enforce the Americans with Disabilities Act. The integration mandate of the Americans with Disabilities Act is not new - it has been the law for well more than a decade and DHHS is obligated to defer to DOJ's interpretation of its own statutorily authorized regulations. As the Ninth Circuit recognized in *M.R. v. Dreyfus:* "An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." 697 F.3d 706, 735 (9th Cir. 2012). It is ironic that this state agency that receives most of its funding from the federal government refuses to promulgate regulations, while thumbing its nose at the federal agency that was authorized by Congress to interpret and enforce the Americans with Disabilities Act through the promulgation of regulations.

Respondent cites the Department of Justice Statement of the law as "guidance." In *Pashby v. Delia*, the United States Court of Appeals for the Fourth Circuit relied upon that federal directive in holding that:

> Because Congress instructed the DOJ to issue regulations regarding Title II, we are especially swayed by the DOJ's determination that "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." U.S. Dept. of Justice, Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and Olmstead v. L.C., http:// www. ada. gov/ olmstead/ q& a_ olmstead. htm (last updated June 22, 2011); see also Olmstead, 527 U.S. at 597–98, 119 S.Ct. 2176 ("Because the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect." (citation omitted)).

709 F.3d 307, 322 (4th Cir., 2013).

This Court should also consider that the Fourth Circuit ruled in 2011 that DHHS "abdicated" its responsibility to provide services contained in Sue Doe's plan of care for eight years, in violation of the reasonable promptness mandate of the Medicaid Act. *Doe v. Kidd II*, 419 Fed. Appx. 411 (4th Cir. 2011). This Court may take judicial notice that in the state administrative hearings involving the appellant in that case, DDSN continued to apply an age eighteen age of onset requirement, in open violation of this Court's 2011 order (in the parallel state proceeding). *See* the 2014 Audit of the South Carolina Legislative Audit Council, which reported that "DDSN's eligibility directive is inconsistent with an Supreme Court order." http://lac.sc.gov/LAC_Reports/2014/Documents/DDSN.pdf at 60. The LAC noted that:

> In its opinion, the Supreme Court majority noted that DDSN's commission has the authority to promulgate regulations that define ID in the context of waiver services, but it has not. DDSN is currently involved in litigation regarding whether it must promulgate regulations related to eligibility...the commission has statutory authority to promulgate regulations, should it wish to further clarify agency operations.

Id. at 61. This is an agency that believes it is not subject to complying with court orders or federal or state law.

As with its obligation to promptly comply with an order of this Court in *Doe,* Respondent demonstrates its belief that compliance with the integration mandate promulgated by the Department of Justice is optional. R. Return at 5. DHHS arrogantly argues that "except

for the DOJ guidance on the Americans with Disabilities Act, and the developing line of temporary injunctions ...this case..would be about the "package" of services provided under the waiver." It is likely that, without an order establishing reasonable standards for determining medical necessity, DHHS will simply find that the "proposed reconfiguration of services in January of 2010" did not place Richard at risk of institutionalization. R. 1179.

Perhaps most telling as to the agency's intention for complying with federal law and the order of the Court of Appeals in this case to determine the medical necessity for Richard's services, is the argument DHHS makes on pages 6 and 7 of their Return, where the agency argues that it "only needs to set up a program that meets the needs of most of the affected population" to comply with the Medicaid Act. R. Return at 6. This argument ignores a long line of decisions issued by state and federal courts since the passage of the Americans with Disabilities Act five years later, in 1990. This pre-*Olmstead* and pre-Americans with Disabilities Act case considered whether the cuts at issue enacted by the State of Tennessee violated Section 504 of the Rehabilitation Act. Respondent totally ignores the case law, the enactment of the Americans with Disabilities Act and the Department of Justice's promulgation of the "integration mandate" during the ensuing thirty years in making this frivolous argument. But, that argument gives light to how DHHS will rule if Richard's case is remanded without this Court establishing reasonable standards for the agency to follow in future "fair hearing" appeals where medical necessity must be determined. According to DHHS "All that is required under § 440.230 and *Alexander*, is that the level of service generally, not individually, meets the needs of most of the cases." If this were the case, all DHHS would have to do was to provide residential habilitation services to meet the needs of most waiver participants.

Providing services to meet the needs of "most" Medicaid waiver participants was not the directive the Fourth Circuit gave DHHS in *Doe v. Kidd II, supra.* That Court recognized that Doe was entitled to a private right of action when DHHS failed to provide her the services necessary to meet her individual needs. It is significant for the Court to note that in *Doe v. Kidd,* as well as other cases in the federal courts, DHHS has argued that a Medicaid waiver participant's sole remedy is in the state administrative process. *Doe v. Kidd I* at 355. ("Having determined that Doe's reasonable promptness claim is neither moot nor waived, we consider whether Doe may enforce § 1396a(a)(8) through a § 1983 action. Appellees argue that she may not because Congress provided a comprehensive remedial scheme for individual state Medicaid cases, thereby precluding § 1983 as a means of review.") Yet, in *B.W. v. DHHS*, the hearing officer (now Deputy Director of DHHS) ruled that "an Administrative Hearing Officer does not have the authority to exceed the limits of the Waiver program." R. 1135. It is difficult to imagine an effort being more futile than requiring Richard to spend more time and money pursuing a remedy through the administrative proceeding process. If this Court does not correct this misinterpretation of the Medicaid Act, Richard will surely return to this Court, perhaps a decade later.[2]

Whether DHHS has violated the South Carolina Administrative Procedures Act by

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[2] This Court may take judicial notice of the January, 2014 DDSN Commission minutes that reported that at the start of 2014, DDSN had accumulated a $9 million war chest to pay for litigation. *See* http://ddsn.sc.gov/DDSNCommission/Documents/meeting%20minutes/01%20January%2016,%202014%20Commission%20Mtg%20Minutes.pdf at 3. As Judge Baxley found in *T.R. v. S.C. Dept. of Corrections*, "The hundreds of thousands of tax dollars spent defending this lawsuit, at trial and most likely now on appeal," would be "better expended" improving the delivery of services. R. 1243. Case No. 2205-cp-40-2925, now on appeal to the South Carolina Court of Appeals.

failing to promulgate regulations for the administration of the Medicaid program and determining medical necessity in Medicaid cases is a novel question of law which should be considered and ruled upon by this Court. The issues raised in this case are matters of important public interest, which have also been raised in other cases now pending in the South Carolina Court of Appeals. *B.W. v. DHHS*, 2013-2415[3]; *Al Myers v. DHHS,* 2014-418; *Ex Parte: South Carolina Department of Disabilities and Special Needs*, 2013-2208; *Mims v. Babcock Center,* 2014-1373; and, finally *S.C. Protection and Advocacy v. DHHS,* 2014-244, a case filed in the South Carolina Court of Common Pleas in 2007 complaining about the arbitrary and capricious policies used by DDSN in the program at issue in this case. The decision of the South Carolina Court of Appeals, acknowledging that the waiver amendments establish a binding norm, but finding that it was not necessary to promulgate regulations to enforce the reductions, is in conflict with prior decisions by this Court regarding the establishment of binding norms without promulgating regulations. *Sloan v. Sc Bd. of Physical Therapy ex'mnrs*,

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[3] Richard prays that, in determining whether to consider his "binding norm" issue, the Court will consider the refusal to apply reasonable standards in determining medical necessity in *B.W. v. DHHS*. R. 1111. B.W.'s physician ordered RN and LPN nursing services and personal care attendant services to be provided more than seven years ago. She filed her appeal in 2007 - but has yet to be provided review by the Judicial Branch. DHHS refused to comply with the order of its own hearing officer R. 1145, and filed a motion to reconsider, arguing that this waiver participant, who is quadriplegic and has seizures and a host of other serious medical complications, is not at risk of institutionalization. R. 1175. B.W. filed an Petition asking the Administrative Law Court to enforce the hearing officer's order more than six months ago. R. 1150. But, instead of simply providing the services its hearing officer (who is now Deputy Director of DHHS) ordered DHHS to provide during the appeal, DHHS asked the Administrative Law Court to dismiss B.W.'s Petition, in complete disregard for this severely disabled Medicaid participant's deteriorating condition. Exhibits 3 and 4 (Pages 49 and 52). There is no reason to believe that this agency will voluntarily agree to provide the services Richard's physician has ordered, when it continues to stubbornly refuse to provide the services its' own hearing officer ordered in that case. Like others, B.W.'s case has been "frozen" in the Executive Branch of government.

636 S.E.2d 598, 370 S.C. 452 (S.C., 2006) and *Doe v. DHHS,*[4] *supra.*

IV. DHHS violated the clear and unambiguous notice requirements at 42 C.F.R. 431.210 and *Goldberg v. U.S* and a court order is needed to prevent ongoing violations of Richard's due process rights.

DHHS argues that Richard was provided adequate notice of the 2010 reductions, because he learned that his services were going to be reduced and he appeared at a "fair hearing." Respondent argued that because DDSN service coordinators attended meetings where the reductions were discussed and they passed this information on to waiver participants, their due process rights were protected. R. Return at 8. But, the Seventh Circuit ruled that reliance on a case worker to explain the reason for the government action was insufficient to meet constitutional due process requirements. *Vargas v. Trainor,* 508 F.2d 485, 489 (7th Cir.1974). In *Rodriguez v. Chen,* the court found that citation to the applicable law in notices of termination or reductions in services must be not only accurate, but that they must be "tailored to the individual case," so that the applicant "can understand why the government took the adverse action in order to prepare his or her appeal." 985 F.Supp. 1189, 1195 (1974). It is undisputed that DHHS failed to provide any reference to law or regulation in support of its argument. R. Return 7, 8, and 9. In *Rodriguez*, the court explained that "Providing incorrect, cryptic or inaccessible citations without further guidance to low-income individuals is providing no any guidance at all." Not only must the State cite to the general

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[4] This Court held in *Doe v. DHHS* that:
...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. 62, 727 S.E.2d 605, fn 7 (S.C. 2011). Instead of promulgating regulations for the Medicaid program, a handful of state employees have established binding norms.

provisions in the notice, but it must also explain how the applicable provision has been applied to the individual's particular case to comply with procedural due process and the applicable Medicaid provisions. Id. at 1195.[5]

Richard never argued that he did not know that DHHS intended to cut his services. He knew that DHHS threatened to reduce his services, but he did not know what "reasons" DHHS would rely upon at the "fair hearing," so that he could prepare his case. What DHHS failed to provide to Richard was an honest reason for reducing and terminating services and the regulation or statute it relied upon. As the DHHS hearing officer recognized in *B.W. v. DHHS*:

> Federal regulations require that the notice of adverse action must explain the action to be taken and the reason, cite the specific legal support for the action, explain the beneficiary's hearing rights, the right to representation, and the rights to continued benefits, and must be sent 10 days before an adverse action.

R. 1129.

The "notices" in the Record state that services are being terminated because he "moved out of state." R. 925-926. Richard prays that this Court grant his Petition for cert. and rule that all he should have been required to prove at the "fair hearing" was that he did not move. Dr.

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The administrator of the MR/RD Medicaid waiver program admitted at the "fair hearing" in 2012 that the "notices" provided to waiver participants did not meet the federal requirements. T. at 85-89. *Goldberg* requires "adequate notice detailing the reasons for a proposed termination." 397 U.S. at 267-68. In order to comport with due process, it is well established that notice must be reasonably calculated to apprise the claimants of the action taken and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). When due process considerations are at stake, "the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures." *Mathews v. Eldridge,* 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-903, 47 L.Ed.2d 18 (1976). When applying this balancing test to the present case, the scales of justice require DHHS to provide more information in their notices. Notice must be sufficient to give the charged party a "chance to marshal the facts" and to "prepare a defense." *Wolff v. McDonnell,* 418 U.S. 539, 564.

Buscemi informed Richard in her letter denying his request for reconsideration that his services were being terminated because the "approved limits cannot be exceeded and they must be applied to all MR/RD Waiver participants." R. 940. But, DHHS informed the federal court that it did not intend to apply the caps to Michelle M., Chip E. or Peter B. *Peter B. v. Sanford, supra.*

DHHS has admitted that this violated the notice requirement of the Medicaid Act. DHHS argues on pages 12 and 13 that the waiver document is published on its website. The Record documents that not only was this document not available to Richard at the time of his 2009 hearing, but, when his mother requested a copy of the waiver document, the Associate Director of DDSN responded that her agency was not in possession of it. R. 238. The language of 42 C.F.R. 431.210 is plain and clear and this Court should rule that DHHS has failed to comply with those mandates

The lower court failed to recognize the orders of the Court of Appeals for the Fourth Circuit requiring that services must be provided with "reasonable promptness." In *Doe v. Kidd,* that Court recognized that the "reasonable promptness" mandate required services to be provided within 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 I at 354. In *Doe v. Kidd II*, the Fourth Circuit noted that:

> 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).

Footnote 2. Because of this State proceeding, Federal District Court Judge Joseph Anderson dismissed Richard's federal lawsuit, leaving him without a remedy if this Court decides not to consider his reasonable promptness, reasonable standards and other claims for violation of the Medicaid Act that he has raised since 2009 in the administrative proceedings. Exhibits 1 and 2 (P. 17 and 46). The target of this hide-and-seek game is a severely disabled young man who asks only for his right to live in his own home at no greater cost than DDSN would pay for his services at a Regional Center. *See Knowles v. Horne,*3:08-cv-1492 (D.C.Tx. February 10, 2010) and *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004).The "fair hearing" system is illusory, wasteful and futile and it violates the Separation of Powers mandate by denying Medicaid waiver participants review by the Judicial Branch. Richard respectfully prays that this Court will grant his Petition for Certiorari and hear his appeal.

Respectfully submitted,

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January 2, 2015
Corrected January 5, 2015

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Certificate of Service

I, John N. Harrison, certify that I hand delivered the corrected *Petitioner's Reply to Return of Respondent* and the Motion to file the same in the above case to Richard G. Hepfer, Esq., Office of General Counsel, South Department of Health and Human Services, 1801 Main St, Columbia, SC 29201, on January 5, 2014.

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