THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2014-000418

ALC Docket No. 10-ALJ-08-000418-AP

Albert C. Myers, ... Appellant,

v.

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

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Appellant's Initial Reply Brief

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I. Al is entitled to judgment on his due process and defective notice issues. Respondent admitted on page 2 of its brief that Al's "services and supplies were reduced and/or terminated" and on page 8, DHHS admitted that its "notices" failed to comply with federal requirements. The changes at issue in this appeal triggered the notice requirements contained in 42 C.F.R. 431.210 and required compliance with the due process requirements contained in *Goldberg v. Kelly.* 397 U.S. 254, 267 (1970). DHHS has admitted that it did not comply with 42 C.F.R. 431.210, and this violation is subject to repetition, yet it evades review. As the Fourth Circuit held in *Alexander v. Hill*: "We all are expected to abide fully by the law, and expose ourselves to sanctions whenever we fail to do so." 707 F.2d 780, 784 (4th Cir. 1983). See also *Antrican v. Odom*, 290 F.3d 178 (4th cir. 2002).

Respondent argues that this Court should not even consider this violation of Al's due process rights because the Administrative Law Court shaved off his defective notice claim in an unappealable interlocutory order in 2011, leaving him with no opportunity to have that decision reviewed by the Judicial Branch. Respondent's Brief at 5 to 7. He filed an appeal with DHHS on February 11, 2010 (R. __), after the director of DDSN denied his request for reconsideration. R. ___. (Letter dated January 13, 2010). On February 18, and again on February 24, the DDSN "MR/RD Medicaid Waiver Program Coordinator" sent *ex parte* memos to the DHHS Office of Hearings and Appeals. The following day, the DHHS hearing officer sent Al an "interlocutory order" requiring him to respond, in writing, by March 15, 2010. This order required Al to "present evidence that the Department has made an error in its decision." R. ___.

This was exactly the type of action that has been consistently prohibited by the United States Supreme Court in *Goldberg,supra.* In that case, the government attempted to require the

government benefits participant to provide a "written statement" of his claims and then dismissed the participant's appeal without providing an evidentiary hearing. *Goldberg*, where the government dismissed appeals without providing an opportunity to present evidence orally, or to confront and cross examine witnesses. 259 and 268. The United States Supreme Court ruled that "These omissions are fatal to the constitutional adequacy of the procedures." Id. at 268. The Supreme Court ruled in *Goldberg* that:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. (Emphasis added.)

Id. at 269. Despite this violation of Al's due process rights and the *Goldberg* directives, Al provided the hearing officer a five page response to the "interlocutory order" on March 15, 2010, which specifically included his claims that DHHS violated his due process rights, 42 U.S.C. 1396a(a)(3), the applicable regulations and the requirements set forth in *Goldberg* at 254. The hearing officer dismissed Al's appeal, finding that the issue was "whether the South Carolina Department of Health and Human Services (DHHS) ...has the authority to develop and determine policies and procedures for the implementation of Medicaid programs and services, and to alter or amend those policies and procedures as may be necessary as provided for under applicable

Federal law and Regulations." R. ___. Order dated May 6, 2010. The hearing officer found that Al "failed to respond to Hearing Officer's Interlocutory Order with an allegation of error in fact or in law as ordered..." Id. at 7.

Al's case was consolidated with the appeals of three other waiver participants in the Administrative Law Court and that Court adopted the holding in *Hickey v. DHHS*, Dkt. No. 10-ALJ-08-0650-AP (S.C.A.L.C. July 19, 2011), finding that the waiver changes were not enforceable, because they had not been promulgated as regulations. The ALC remand order found that the Appellants had "abandoned" their defective notice issue because the alleged defective notice was not included in the discussion section of Appellant's brief. Order of ALC at 13. But, that brief was omitted from the Record on Appeal prepared by DHHS after she ruled against Al. The Administrative Law Judge determined on Al's second appeal to the ALC that Al was not prejudiced, by the lack of notice because he:

> was sufficiently aware of the proposed changes in his services as a result of the waiver renewal, he was afforded the opportunity to a fair hearing, and he was represented by an attorney throughout the appeals process before the Department. Appellant has not shown how the process or his fair hearing would have been conducted differently had the notices complied with the technical requirements of 42 C.F.R. § 431.210."

Order at 7. There is no doubt but that Al's guardian was aware by January of 2012 of the proposed changes in the waiver, but this decision ignores the clear and unambiguous federal requirement that DHHS had to provide Al with the reason for the adverse action. Al was not provided notice that DHHS would argue at the hearing that it had determined that 28 hours a week of personal care services would be sufficient to meet his needs. Dr. Buscemi had informed him that the reason was that no waiver participant could exceed the waiver limits because of "drastic budget reductions." The original "notice" sent in December 2009 stated that the reason

was that CMS had approved the waiver. The Court erred in its conclusion that Al was not prejudiced, because the only ground DHHS should have been allowed to argue were those contained in the original notice: i.e. that CMS had approved the waiver amendments. Because the Hearing Officer and the Administrative Law Judge allowed DHHS to change its reasons for reducing his services, Al did not have the opportunity to prepare, and the failure to provide the statute relied upon, the lower court erred in its decision regarding the defective notice.

Appellants filed a motion to reconsider which specifically referred to the issue of failure to provide notice. R. at __. (Pages 3 and 4). This motion was denied and Appellant's case was remanded, in a non-appealable interlocutory order. On remand, DHHS first scheduled hearings for all four waiver participants whose cases had been consolidated. But, before the hearings, DHHS decided to reduce only the services provided to Al, exceeding the waiver limits for the other three Appellants. R. ___. DHHS filed a brief dated December 29, 2009, that was received in the Office of Appeals and Hearings on January 3, 2010, three days before the hearing.

At Al's 2012 evidentiary hearing, Al relied upon 42 C.F.R. 431.244(a), which required the hearing officer to base her decision "exclusively" on evidence presented at the hearing. T. at 18, 75, 77, 85 yo 89, 178 and 183-184. At the *de novo* hearing, DHHS attempted to argue that Al's defective notice issue had been abandoned. T. at 178:13. But both sides presented evidence on the defective notice issue during the hearing. T. at 18:3-16, 75 to 78, 160:20, 178:13; 183-184. Appellant argued the defective notice and due process issue in his opening and closing statements. T. 18:3 and 183-184. The hearing officer did not list the first ALC brief, which was not included by DHHS in the Record on Appeal, in the long list of materials considered. R. _.

The Administrative Law Court ruled that Al had abandoned his defective notice issue, based on this omitted brief. For this Court to uphold the lower court's ruling on the defective notice issue would leave Al without a remedy or judicial review of this erroneous factual finding. Appellant's 2011 Brief submitted to the ALC. R. ___. How could Al possibly have appealed Judge Robinson's pre-remand order finding that he had "abandoned" the issue? The first opportunity Al had to raise the issue was at the "fair hearing" and then to raise the issue again to the Administrative Law Court in his brief filed on the second trip to that Court. Appellant's 2012 ALC Brief at 1 to 10. In *Espinosa v. Shah,* the district court recently ordered the State Medicaid Agency to comply with the notice requirements of the Medicaid Act and required the State to pay the plaintiffs' legal fees. 09-cv- 4103 (S.D.N.Y December 5, 2014). This Court should likewise rule that DHHS violated the notice and due process requirements and order DHHS to pay Al's costs and attorney fees, because the State was not substantially justified in reducing his services.

II. Al was prejudiced by the actions of DHHS. On pages 8 to 10 of Respondent's brief, DHHS argues lack of prejudice. But the transcript clearly demonstrates that Al was ambushed at the hearing based on grounds not previously provided to him. DHHS argues that it's "prehearing brief" signed on December 29 and received by DHHS Office of Hearings and Appeals on January 3, 2012 provided sufficient notice to Al of the grounds the agency would rely upon at the hearing held on January 6. This "notice" does not meet the clear and unambiguous requirements of 42 C.F.R. 431.210, nor does it meet the requirements of *Goldberg* which requires notice to be provided at a "meaningful time and in a meaingful manner." Id. at 268 citing *Armstrong v. Manzo*, 380 U.S. 545 (1965). The government benefits recipient must "have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by

confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg* at 268. DHHS failed to provide Al with adequate time to mount a defense to these claims over a holiday weekend just days before the January 6, 2012 hearing.

At the hearing, the DHHS administrator in charge of the waiver program at issue in this case (T. 85:29-31) testified that there were "many reasons" for the reductions and terminations of services put into effect in 2010. These "many reasons" were breaking news to Al's guardian and his attorney, because they were not contained in the "notice" or in Dr. Buscemi's denial of Al's request for reconsideration. R. 261.[1] According to Ms. Lewis, these changes were made based on "assessments done by DDSN that they felt like services were not being applied properly to—according to the definitions of the services in place and there were services being over utilized or services being misutilized." There is no evidence in the record to support those "grounds" for the waiver amendments, or that Al, or any other waiver particpant "misutilized" Medicaid services. These "reasons" that were provided at the hearing were certainly not contained in the "courtesy announcement" provided to families in December 2009.[2] R. 86-89.

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[1] It is significant to note that the "reason" provided by Dr. Buscemi was that CMS had approved the amendment and that DDSN was not at liberty to exceed the waiver limits. R. 261. Yet, Respondent exceeded the waiver limits for all three of the other Medicaid participants whose cases were consolidated with Al's, applying them only to him. Respondent's Brief at 19. The application of the waiver limits against Al violated the "comparability" requirement of the Medicaid Act. 42 U.S.C. 1396a(a)(10)(A). *Pashby v. Delia,* 709 F.3d 307, 315 and 317 (4th Cir. 2013); *Pashby v. Cansler,* Case No.5:11-CV-273 (W.D.N.C. December 7, 2011); *K.G. v. Dudek,* Case No. 11-20684 at 2 (D.C.Fla. November 5, 2013), *Davis v. Shah,* Case No. 12-CV-6134 (W.D.N.Y. December 9, 2013). Respondent has failed to present any evidence that it obtained a waiver from CMS of its obligation to comply with the comparability requirement contained in 42 U.S.C. 1396a(a)(a)(10)(B) that obligates DHHS to provide comparable services to all participants in the DDSN MR/RD (now ID/RD) Medicaid waiver program.

[2] Ms. Lewis testified that "We considered that December 1, 2009 a courtesy announcement.

Nor were they contained in Dr. Buscemi's letter denying Al's request for reconsideration. R. at 261. Al was prepared to respond to either grounds of which he had notice: i.e. CMS approval does not mean that the State is in compliance with the Medicaid Act or the ADA. *Peter B. v. Sanford*, supra and *Pashby v. Delia, supra.* At the hearing, DHHS failed to produce even an iota of evidence that the reductions were based on budget reductions.[3] Ms. Lewis testified that "There were services that were being underutilized... and I think that the State and DDSN felt in conjunction that it was just time to re-evaluate it just like we do every five years." Id. at 86-89. But that "reason" had never been provided to Al prior to the hearing, nor was it the basis upon which the hearing officer upheld the reductions and terminations.

It is uncontested that Al was moved to a nursing home just days after his guardian received notice in December of 2011 of the agency's intention to impose the waiver amendments only against him, while continuing to provide services in excess of the caps to the other three consolidated Appellants. T. at 174, 5, 72, 166, 167. At the hearing, Al's service coordinator admitted that the reasons for the changes in the waiver program and the statutes she had relied upon were not contained in the "notice" sent in December 2009 that are contained at R. 852 and 856. T. at 77-78. It is not difficult to ascertain that any "notice" that was provided fails to 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 failed to provide Al with any written notice at all

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Our obligation for public notice had been—we felt like had already been met in other venues." *Id.*

[3] This Court may take judicial notice of the fact that in FY 2010, DHHS allowed $225,945,013 in State funding to "lapse" (resulting in the loss of 70% matching federal funding) according to the Annual Report of the State Comptroller at http://www.cg.sc.gov/publicationsandreports/Documents/Press/2010YearEndPressRelease.pdf.

requests when DHHS denied services ordered by his physician, including nursing services, physical therapy, occupational therapy, speech and language equipment and supplies, as well as the discontinuation of psychological services, dental services and "specialized services" required by PASARR. R. 846, 848 and 797 to 844. DDSN Service Coordinator Auker admitted that the agency had denied Al's request for nursing services before he was placed in the nursing home, but the Record does not contain a written notice of denial or to advise him of his right to appeal the denial of nursing services or notice of denial of speech and language services and the speech device his physician and a licensed speech and language pathologist determined to be medically necessary. T. at 60 and 63, R. 115 to 131 (Sandra Ray testimony). Nearly five years after Al filed his appeal DHHS still has not provided a communications device or speech services. R. at 260 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 and she even admitted that he would continue to need those services.[4] T. at 73. Finally, as evidence of the continuation of this violation of due process, Al never received any notice when DHHS and DDSN conducted a PASSAR evaluation just prior to his entry into the nursing home and they failed to notify him that they determined that he did not need specialized services. DHHS argues that adequate notice was provided because service coordinators attended meetings where the reductions were discussed. Respondent's Brief at But, the Seventh Circuit ruled that reliance on a case worker to explain the reason for the government action was

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[4] 42 C.F.R. 431.213© 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.

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). DHHS failed to provide any reference to law or regulation. 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 provisions, 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] 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.

Respondent argues on page 8 in its brief that Al suffered no prejudice. Respondent

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[5] 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.

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 the State "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). 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." Id. 604.

Al also suffered prejudice by DHHS' failure to provide medically necessary services with reasonable promptness. R.Brief 8. DHHS arguments demonstrate the conscious disregard the agency has shown to Al's medical needs. As the court found in *Shakhness v. Eggleston,*[6] when

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[6] 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

the State provided defective notices and 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 suffering that was described in detail by the experts who testified and the affidavits of Al's physician and physical therapist. Prejudice was 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.

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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 (See *Shakhnes v. Berlin*, 689 F.3d 244 (2nd Cir. 2012)) SMM § 2902.10 (State Medicaid Manual) 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.

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. Dr. Munn 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" and there is no medical evidence to support the lower Court's finding that Al's needs would be met by 28 hours a week of attendant care and the respite hours authorized. R. 882-883.

Prejudice was also 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, this equipment has not been provided. R. 878. When Al missed even 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" and he showed a "marked increase in spasticity..." R. 878. When physical therapy services were not provided, Al showed "a marked increase in spasticity." 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. 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 was also 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. 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 testified about the exhaustion Al experiences when he is unable to communicate his needs, because DHHS has failed to provide the speech device his physician ordered and his inability to participate in psychological counseling due to his speech impairment. R. 118-121, 128. She also spoke about the danger of Al's skin breaking down and that he is likely to develop ulcers if he is not able to communicate and his need for a molded wheelchair seat to prevent skin breakdown. R. 123 and 128.

Prejudice was also demonstrated by the testimony of Lennie Mullis. R. 146 - 149. Her testimony supported the findings of Al's doctor, Dr. Cooper and Dr. Ray. R. 131. 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 in the nursing home and the denial of nursing services when he was home. R. 147-148.

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 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).

III. DHHS failed to provide evidence from any qualified medical source to contradict the opinions of medical necessity of Al's physician. 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." There is absolutely no evidence from a qualified source that any "remix" of services schemed up by DHHS would begin to meet Al's needs and there is no justification for terminating and reducing his services, when the other three waiver participants kept their hours.. 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*, 2012 WL 1380220, at *10 (April 19, 2012). *See also* decision of ALJ John McLeod in *B.W. v. DHHS*, which was remanded to HHS by the ALC, on July 30, 2012 and the decisions of hearing officer Elizabeth Hutto issued on November 19, 2013 and December 23, 2013, Case No. 07 MISC 028. The overwhelming evidence in Al's, like B.W.'s 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. 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. Respondent's witnesses 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, but they had no medical training. T. 6:5 to 102:17. DHHS claimed at the hearing that the "combination of services" provided through the amended waiver was sufficient to prevent institutionalization. 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," which Al substantiated by uncontradicted medical evidence. *Moore v. Cook*, Case No. 1:07-CV-631 (D.C.N.Ga. April 19, 2012). The most blatant gobbledegook is the fact that the hearing officer and the ALJ ruled that Al needs services that are simply **still** not being provided, as Al's condition deteriorates, as predicted by his experts.

IV. DHHS failed to provide legal support for its argument that the waiver amendments were enforceable without being promulgated as regulations. On pages 10 and 11 of Respondent's Brief, DHHS argues that the South Carolina Supreme Court decision in *Jane Doe v. DHHS* supports the lower court's decision that the waiver amendments did not have to be promulgated as regulations to be enforceable. 398 S.C. 62, 727 S.E.2d 605 (S.C., 2011). This argument is misleading. The sole issue ruled upon by the South Carolina Supreme Court in *Doe* was whether DHHS erred in applying an age 18 cut off for manifestation of mental retardation, not whether the State violated mandatory provisions of the Medicaid Act or regulations interpreting the Act, as in Al's case. As recognized by that Court in *Jane Doe,* neither the

Medicaid Act, nor its implementing regulations include an age 18 age of onset requirement. Other states (now including South Carolina) provide for an age 22 age for mental retardation.. *Jane Doe* at fn 13. Disagreeing with the dissent in Jane Doe, the majority of the South Carolina Supreme Court 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). DHHS has argued that the Supreme Court decision in *Doe v. DHHS* supports its argument that the terms of the waiver document are controlling, because they have been approved by CMS.

But the federal requirements at issue in Al's case are not optional for the states (notice and due process, reasonable promptness, reasonable standards, comparability and amount, duration and scope requirements) once the state decides to accept Medicaid funding. 42 U.S.C. 1396a(a)(3), 42 C.F.R. 431.210 and 431.244, 42 U.S.C. 1396a(a)(8), 42 U.S.C. 1396a(a)(10) and 42 U.S.C. 1396a(a)(17). The ALC acknowledged that the waiver amendments do not have the force of law, because they were not promulgated as regulations.

In *Doe v. Kidd I,* the Fourth Circuit held that compliance with the requirement of providing Medicaid services with "reasonable promptness" is mandatory. *Supra.* (And in *Doe v. Kidd II,* the Fourth Circuit ruled that the Respondent in this case had "abdicated" its responsibility for complying with this mandate, as Appellant claims DHHS has also done in this case. Case No.

10-1191 at 17 (4th Cir. March 24, 2011).The Medicaid Act requires medical assistance to be **provided** with "reasonable promptness," not just promised. Doe v. Kidd II. Reasonable promptness has been interpreted by the courts as meaning within 90 days. 42 U.S.C. 1396a(a)(8). *Doe v. Kidd I* 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).") *See also Doe 1-13 By and Through Doe, Sr. 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998).

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). *Pashby v. Delia, supra.* As in *Peter B.* and *Moore v. Cook*, and *Crabtree v. Goetz*, 3:08-0939, 2008 WL 5330506 at *30 (M.D, Tenn. Dec 19, 2008), CMS had approved the reductions in *Pashby,* which the federal court found to be violative of federal law. DHHS' argument that CMS approval

V. Al provided evidence showing that DHHS and DDSN acted in retaliation against Al in violation of the anti-retaliation requirements of the Americans With Disabilities Act. The bad faith and retaliation by the State agencies 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 states on page 13 that "physical therapy, nursing services...and other supplies would still be available to Myers..." This is just not true - these services and equipment **have not been provided** and other services have been terminated. Those

claims are clearly contradicted by the testimony at the hearing. Before his admission to the nursing home, Al's requests for nursing services to provide tube feeding while at home were denied by DHHS, yet DHHS prohibited a personal care attendant or respite provider from tube feeding him. T. 63 and 155.

Retaliation was demonstrated by the fact that DHHS provided services in excess of the caps to all three other appellants in the Consolidated Case, while applying the caps to Al. R. ___. 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 was communication central for the 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 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 have admitted that 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).[7] The purpose of the review is to determine if the patient needs "specialized services." Id. Without informing Al's guardian, or contacting his

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[7] 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 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. Caleche*, 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.

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 Arthrogrypothica, 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 - or even by the findings of the hearing officer and the ALC, who admitted that Al needs psychological services, physical therapy and a speech device, but his requests for these services have been denied, despite DHHS's knowledge of the severe consequences to Al's health. Respondent has failed to rebut Al's claims that he has suffered from retaliation resulting from his guardian's advocacy efforts.

VI. Respondent perpetrates a fraud on the Court by attempting to mislead the Court into believing that the services are available or have been provided to Al 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 Al. 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**. Al has suffered severe and irreversible consequences which were predicted by his experts. R. ___. The agency has failed to contradict the opinion of Al's qualified treating physician and other professionals 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 (the ALC recognized that the waiver document is not enforceable) and DDSN's own directives discredit the argument. 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. *Olmstead v. L.C.*, 527 U.S. 581 (1999) and *Stogsdill, supra.* Funding is based upon where the participant lives, with persons who live in their own homes receiving significantly less funding, supervision and services. This is a clear violation of the integration mandate. *Stogsdill, supra.*

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," at 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 funded by DDSN. 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. 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-%20 Revised%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. 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. 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 sufficient to meet Myers' medical needs" is, as in *Moore v. Cook*, nothing but bureaucratic hogwash intended to transfer the burden of care to families. 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 five days a week. R. 44. But, that left nineteen hours a day, weekends and holidays without nursing services, during which time three feedings had to be administered to keep Al alive. A DDSN policy, which has not been promulgated as regulation, prohibits waiver participants who receive this day service from receiving any other nursing services. Because Al is fed through a feeding tube, this required his aging 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. T. 172-173. Respite caregivers and Personal Care Attendants cannot provide tube feedings. T. 54-56.

Respondent's brief might lead the Court into believing that Al is receiving dental,

psychological and physical therapy services now, services ordered by his physician. R. 19. But, he is not. The record shows that there were services in Al's plan of care which were not provided for years, even before he entered the nursing home. 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 violated the Medicaid Act by failing to provide services in the participant's plan of care with reasonable promptness. *Supra.*

VII. Conclusion. The 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 has provided evidence that is uncontradicted by anything but Respondent's unsupported arguments that he has been subjected to retaliation. Al prays for an order requiring DHHS to immediately provide speech and language services, a speech device, 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 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.

Respectfully submitted,

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December 30, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2014-000418

ALC Docket No. 10-ALJ-08-000418-AP

Albert C. Myers, ... Appellant,

v.

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

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Certificate of Service

The undersigned hereby certifies that on the 30th day of December, 2014, I mailed Appellant's Initial Reply Brief (Corrected), the Designation of Matter on Appeal and the Certificate of Services to the following persons by United States Priority Mail:

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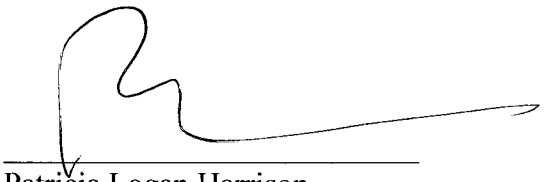

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December 30, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

RE: Albert Myers v. SCDHHS
Appellate Case No. 2014-000418

Dear Ms. Kitchings:

Enclosed is Appellant's original Initial Reply Brief and a copy to clock and return, along with a stamped envelope. Thank you for your assistance.

Cordially,

Patricia Logan Harrison

cc: Damon Wlodarczyk, Esq.
Byron Roberts, Esq. and Richard G. Hepfer, Esq.