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S.C. Supreme Court

IN STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case # 2014-002513

Richard Stogsdill,

Petitioner

v.

South Carolina Department of Health and Human Services,

Respondent

BRIEF OF AMICI CURIAE

PROTECTION AND ADVOCACY
FOR PEOPLE WITH DISABILITIES,
INC.

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INTEREST OF AMICI CURIAE¹

Protection and Advocacy for People with Disabilities, Inc., the South Carolina Chapter of the National Academy of Elder Law Attorneys, and South Carolina Appleseed Legal Justice Center respectfully submit this brief as amici curiae on questions of law, under the South Carolina Administrative Procedures Act (APA) and state and federal law, relevant to this appeal.

Protection and Advocacy for People with Disabilities, Inc. (P&A) is a statewide, nonprofit advocacy organization whose purpose is to promote the legal, civil, and human rights of people with disabilities.² The State of South Carolina has designated P&A to serve as the federally-mandated Protection and Advocacy System for South Carolina. S.C. Code Ann. § 43-33-310 to 43-33-400 (2015). As such, P&A is authorized by federal and state law to enforce the civil rights of people with disabilities and is specifically charged with protecting and advocating for the rights of people with developmental disabilities. Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15001 to 15009. Under state law, P&A has the power and the duty to advocate for the rights of people with disabilities by "pursuing legal, administrative, and other appropriate remedies" S.C. Code Ann. § 43-33-350(1) (Supp. 2013). P&A assists individuals with disabilities who experience discrimination as a result of a disability, or who are illegally denied needed services by a program or agency. The goals of P&A include increasing public knowledge about the rights of people with disabilities and participating in litigation affecting the legal rights and status of people with disabilities.

¹ Pursuant to Rule 213, SCACR, this brief is conditionally filed and accompanied by a motion for leave to file the brief.

P&A has participated as amicus curiae in cases before South Carolina appellate courts and the United States District Court for the District of South Carolina. *E.g.*, *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993); *Clemson Univ. v. Speth*, 344 S.C. 310, 543 S.E.2d 572 (Ct. App. 2001). More specifically, P&A has participated as amicus curiae in two cases addressing the 2010 cuts at issue in this case. *Peter B. v. Sanford*, 6:10-CV-767 (D.S.C. Feb 1, 2011)(order granting preliminary injunction preventing the implementation of the reductions in services; not reported); *Karen W. v. Sanford*, Petition in the Original Jurisdiction of the South Carolina Supreme Court (Petition Denied December 31, 2009).

Many P&A clients receive services through the Intellectual Disabilities/Related Disabilities (ID/RD) waiver. The ID/RD waiver is administered as part of the Medicaid program by the single state Medicaid agency, the South Carolina Department of Health and Human Services (SCDHHS). The South Carolina Department of Disabilities and Special Needs (SCDDSN) oversees the day-to-day operation of the waiver. *See generally Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007). Waiver recipients are eligible to receive services that enable them to live in the community, rather than in an institution. The legality of reductions by SCDHHS to these waiver services, specifically a cap of 28 hours on any combination of personal care, attendant, and companion services, is at issue in this case.

P&A represents many individuals who need appropriate services to enable them to live in the community—including clients who have no means to access hours of care in excess of the 28 hour cap at issue in this case. P&A is committed to ensuring that the

² Additional information regarding the work of P&A is available at

principles of the Americans with Disabilities Act (ADA), as interpreted in *Olmstead v. L.C.*, 527 U.S. 538 (1999), are followed in the state's implementation of Medicaid waivers. 42 U.S.C. § 12132.

South Carolina Chapter of the National Academy of Elder Law Attorneys (SCNAELA) is a state chapter of the National Academy of Elder Law Attorneys (NAELA).³ SCNAELA is an education and advocacy organization. Members of SCNAELA are South Carolina attorneys who practice in the area of elder law, which includes advocacy for people who are elderly and people who are disabled. The mission of SCNAELA is to educate and assist attorneys in providing advocacy, guidance, and services to enhance the lives of people as they age as well as individuals with special needs. SCNAELA has, as the organization has evolved, placed an increasing emphasis on systemic, as well as individual, advocacy for people with disabilities, regardless of age, with particular emphasis on access to government benefits and services that are essential to achieving as much dignity and independence as possible.

South Carolina Appleseed Legal Justice Center (Appleseed) is a non-profit organization, based in Columbia, South Carolina, and loosely affiliated with 14 other public interest justice centers in the Appleseed network within the United States. The mission of Appleseed is to identify and examine social injustice, make recommendations, and advocate for effective solutions. Appleseed has served a wide range of needs for the low income community in South Carolina for the past 25 years through legal work, economic development, social legislation, and public and legal education. As an

<http://www.pandasc.org/>.

³ Additional information regarding the activities of the SCNAELA is available at <https://www.naela.org/>.

advocate for low income South Carolinians, Appleaseed has an interest in the present case based on the methods employed by SCDDSN to cut Medicaid services, which could be employed to cut services to low income South Carolinians as well as individuals with disabilities. Appleaseed is also concerned with any state agency's circumventing the South Carolina Administrative Procedures Act by establishing binding norms without going through the proper regulatory process.

Allowing state agencies to cut services in a manner inconsistent with state and federal law could have a very negative impact on the low income community in South Carolina. The Amici have clients who are significantly affected by SCDHHS procedures. They also filed a brief on the issue in this appeal in the case before the South Carolina Court of Appeals. R. 1409 – 1450.

BACKGROUND

SCDDSN provides services to individuals with intellectual disabilities, related disabilities, autism, head injuries, and spinal cord injuries. S.C. Code Ann. § 44-20-10 to 44-20-510 (2002 and Supp. 2014). The vast majority of SCDDSN's funding derives from the federal Medicaid⁴ program, passed through to SCDDSN from the state Medicaid agency, SCDHHS. Medicaid funds are used to provide health care to those with exceptional health-care needs, including services to individuals requiring long-term care. Medicaid funded long-term care may be provided either in institutions or in the community. *See generally* 42 U.S.C. §§ 1396d(a)(1), (4)(A), (15); 1396a(a)(10)(A)(ii); 1396n(c). Because some conditions of federal Medicaid law are waived in order to provide certain groups of people with services in the community rather than in

institutions, these programs have been historically referred to as “waivers.” 42 U.S.C. § 1396n(c); *see generally Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007). Using Medicaid funds for waiver services, rather than for institutional care, prevents unjustified institutional isolation of persons with disabilities in compliance with the Americans with Disabilities Act (ADA) and the United States Supreme Court’s landmark decision in *Olmstead v. L.C.* 527 U.S. 581 (1999). Waivers must be designed so that services in the community are cost neutral compared with institutional care, but such services are typically much less expensive than care in an institution. *See* 42 U.S.C. § 1396n(c); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1178 (10th Cir. 2003).

SCDDSN provides for the day-to-day operation of the 1915(c)⁵ Medicaid waiver relevant to this action, the ID/RD waiver. However, SCDHHS remains the single state Medicaid agency responsible for the Medicaid program. *See* S.C. Code Ann. § 44-6-30(1) (Supp. 2014); 42 C.F.R. § 431.10(a), (e).

The Appellant is a participant in the ID/RD waiver. The ID/RD waiver is for persons who (1) have an intellectual disability (formerly referred to as mental retardation) or a related disability, (2) are eligible for Medicaid, (3) meet level of care for an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID), and (4) who need home and community based services in order to live in the community. *See*

⁴ Medicaid is a joint federal and state program. *See Doe v. Kidd*, 501 F.3d 348, 351 (4th Cir. 2007).

⁵ States may operate a variety of Medicaid waivers. The ID/RD waiver is a 1915(c) waiver, named after the section of the Medicaid act that created it. Social Security Act, § 1915(c), as amended, 42 U.S.C. § 1396n(c).

generally DDSN ID/RD Waiver Manual, Chap. 1.⁶ The level of care required to qualify for an ICF/IID is similar to that required to receive services in a nursing home. *Doe v. Kidd*, 501 F.3d at 351.⁷ In other words, individuals on the waiver have significant deficits and need significant assistance similar to the needs of individuals in institutions.

In late 2009, SCDHHS sought and received the approval of the United States Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) to amend the ID/RD waiver to limit or cap certain services. *See* R. 940. The amended waiver places a service use cap or flat cap on the number of hours an individual can receive of particular services: Personal Care I and II, Adult Attendant Care, Adult Companion Care, Nursing, and In-Home Respite Services.⁸ These services provide care to address the needs of individuals who live in their own homes or the home of a family member or friend. Only the waivers for which SCDDSN provides the day-to-day operation were amended to place caps on personal care. The Community Choices waiver, which provides services to people who are elderly or who are disabled, is

⁶ The Waiver Manual is available at <http://ddsn.sc.gov/providers/medicaidwaiverservices/idrd/Pages/default.aspx> (last viewed Nov. 8, 2015).

⁷ The Fourth Circuit describes the level of care as being like that of a nursing home, but technically the level of care that must be met is ICF/IID.

⁸ Specifically, Personal Care II, Adult Attendant Care, and Adult Companion Care are capped at a maximum of 28 hours per week (the waiver participant may use a combination or a single service, but the single service or combination cannot exceed 28 hours per week); Personal Care I is capped at 6 hours per week; Nursing is capped at 56 hours per week or 42 hours per week depending upon whether an licensed practical nurse (LPN) or registered nurse (RN) provides the service; and in-home respite is capped at 68 hours per month, with some exceptions. The waiver document provides that the respite cap may be exceeded for individuals requiring extraordinary care in order to remain in the community. ID/RD Waiver Manual, Chap. 10, Adult Attendant Care Services, Adult Companion Services, Personal Care Services, Respite Care, Nursing Services available at <http://ddsn.sc.gov/providers/medicaidwaiverservices/idrd/Pages/default.aspx> (last viewed Nov. 8, 2015).

operated by SCDHHS and does not cap personal care services. The amount of personal care provided under that waiver is based upon the participant's need for the service. *See generally* Community Choices Waiver Application, Appendix C: Participant Services; C-1/C-3 Service Specification; Service-Personal Care (listing no limits on amount, frequency, or duration of the service).⁹

Any individual on the ID/RD waiver will have a set of identified and documented health and safety needs, and a plan of care that addresses how those needs are to be met through services or interventions. *See* ID/RD Waiver Manual, Chap. 1, p. 3 (“Upon enrollment, approved providers may be authorized to render the needed services that are indicated on the participant’s Support Plan [or plan of care] and included in his/her approved waiver budget”).¹⁰ An example of a health-oriented need is continued support with personal care tasks like bathing. The person to support this need would be a caregiver working for a qualified personal care provider; the caregiver would either perform the task or help with it. Also, any service, including personal care, provided through the waiver must be provided in accordance with a written plan of care. 42 C.F.R. § 441.301(b)(1)(i).

In addition to addressing needs and goals, development of an individual’s plan of care also involves determining the amount, duration, and scope of services that are necessary. 42 C.F.R. § 440.230. Personal care needs, the subject of this appeal, are generally objective and quantifiable. Even individuals who do not have a disability must

⁹ Community Choices Waiver Application available at [https://www.scdhhs.gov/internet/pdf/Application%20for%201915\(c\)%20HCBS%20Waiver%20SC_00405_R02_00%20-%20Jul%2001,%202011.htm](https://www.scdhhs.gov/internet/pdf/Application%20for%201915(c)%20HCBS%20Waiver%20SC_00405_R02_00%20-%20Jul%2001,%202011.htm) (last viewed Nov. 8, 2015).

spend a certain amount of time on activities of daily living like brushing teeth, bathing, preparing and consuming meals, cleaning clothes, maintaining living space, etc. *See generally*, ID/RD Waiver Manual, Chap. 10, Personal Care Services.¹¹ For individuals, whether assistance with these activities is needed or not, the amount of time and effort expended to accomplish these tasks by the individuals or their caregivers is a fairly consistent and determinate amount. Further, failure to accomplish these activities can place an individual's health and safety at risk. Depending upon the activity and the individual's health, an individual may deteriorate if personal care needs are not met. The failure to provide for an individual's needs in the community may lead to unjustified isolation of the individual in an institution in violation of the Americans with Disabilities Act as interpreted by *Olmstead v. L.C.* 527 U.S. 581 (1999); *see* 42 U.S.C. § 12132.

The Amici adopt the Petitioner's statement of the facts for the following argument.

ARGUMENT

I. The arbitrary caps on services violate the Administrative Procedures Act.

The Amici's interest is in our clients receiving the services they need to continue to live in the community, rather than in an institution. If the array of waiver services is inadequate the individual will face increased risk of needing institutional care.

Uncertainty about the availability of services on a Medicaid waiver also creates a risk of

¹⁰ ID/RD Waiver Manual, Chap. 1 available at <http://ddsn.sc.gov/providers/medicaidwaiverservices/idrd/Pages/default.aspx> (last viewed Nov. 8, 2015).

institutional care. When an individual is “determined to be likely to require [an institutional level of care],” the individual must be informed of the feasible alternatives to living in an institution. 42 U.S.C. § 1396n(c)(2)(C). The Medicaid agency must give that individual a choice between the waiver program and the institutional program. *Id.* If the Medicaid waiver program has inflexible and binding rules, some individuals, such as the Petitioner, will not fit into the waiver program and may be forced to seek care in an institution. The Amici advocate for flexibility because a “one size fits all” approach to community services can lead to unnecessary institutionalization. Such results violate the ADA’s integration mandate.

Under the principles of administrative law, the process for an agency to implement rules is formal and stringent, because agency rules are binding and inflexible and agency policies must be waivable or flexible. Otherwise, business and citizens would be adversely affected by inflexible policies established without legislative or public oversight. Therefore, the APA places limits on state agencies’ power by requiring promulgation of regulations to create and enforce rules. S.C. Code Ann. §§ 1-23-10 to 1-23-160 (2005 and Supp. 2014). The APA applies to agency action creating rules, not policies; however, the distinction between rules and policy is not always clear. The issue in this case is whether agencies can circumvent the APA by creating rules without having to promulgate the rules as regulations.

The APA sets forth that “[r]egulation’ means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements

¹¹ Available at <http://ddsn.sc.gov/providers/medicaidwaiverservices/idrd/Pages/default.aspx> (last viewed on Nov. 8, 2015).

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). Legislative or rule-making action by an agency requires opportunity for notice and comment—in other words, compliance with the APA. S.C. Code Ann. §§ 1-23-10 to 1-23-160 (2005 and Supp. 2014). Policy statements that do not create rules do not have to be promulgated as regulations. If a statement by an agency is not promulgated by a regulation, it is not binding or enforceable. S.C. Code § 1-23-10(4); *see Doe v. S.C. Dept. of Health and Human Servs.*, 398 S.C. 62, 73, 727 S.E.2d 605, 611 (2011)(The issue in *Doe* was the age of onset requirement to access the ID/RD Waiver. SCDDSN created an age 18 requirement through policy. “[W]e find DDSN’s policy guidelines are not entitled to any deference in this regard. The scope of DDSN’s rulemaking authority is defined by the South Carolina General Assembly, and DDSN may exercise such authority only in that manner.”); *S.C. Dept of Motor Vehicles v. Cain*, S.C. Admin. Law Court #06-ALJ-21-0790-AP¹² (En banc, March 3, 2007) (Department hearing officers did not follow Department policy and the Department appealed the decision. The Administrative Law Court, sitting en banc, held “because the Department has not promulgated Department policy VS-001 as a regulation, DMVH hearing officers are not required to treat it as anything more than a non-binding guideline.”).

In interpreting the APA, this Court has adopted a “binding norm” test to decide which agency statements must be promulgated to be enforceable.¹³ In *Home Health*

¹² Available at <http://www.scalc.net/decisions.aspx?q=4&id=10548> (last viewed Nov. 8, 2015).

¹³ Several law review articles have been critical of the binding norm test. Morgan Mitchell, *Wolf or Sheep?: Is an Agency Pronouncement a Legislative Rule, Interpretive Rule, or Policy Statement?*, 62 Ala. L. Rev. 839 (2011); Sam Finklea, Case Note, *Spectre*,

Serv., Inc. v. S.C. Tax Comm., this Court considered whether an agency document violated the APA because it established a rule of general applicability without being promulgated as a regulation. 312 S.C. 324, 440 S.E.2d 375 (1994). *Home Health* involved whether a bingo operator could allow an employee to temporarily sit in for a player “during the player’s absence from the game.” *Id.* at 326, 440 S.E.2d at 377. While the Court did not find that the policy issued by the Tax Commission was a rule of general applicability, establishing a binding norm, the Court cautioned the Tax Commission against circumventing the regulation process:

Whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm. *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369 (1983). In our view, the document issued was similar to a policy statement as opposed to a binding norm given that the document was not issued by the commissioners and thus, no final agency approval had been given. Therefore, we do not find that the APA was violated in this instance. We caution respondent that when there is a close question whether a pronouncement is a policy statement or regulation, the commission should promulgate the ruling as a regulation in compliance with the APA.

Id. at 328-29, 440 S.E.2d at 378.

In the case of *Sloan v. S.C. Board of Physical Therapy Examiners*, this Court again sent a warning to agencies that wish to circumvent the APA. 370 S.C. 452, 636 S.E.2d 598 (2006). *Sloan* involved whether a physical therapist could be employed by a

LLC v. DHEC and the Administrative Procedures Act, 18 Southeastern Env'tl. L.J. 229 (2010). In addition to the binding norm test, other tests used by the federal circuits include the substantive impact test, the agency intent test, the clarification test, and the delegated power test. *Mitchell*, 62 Ala. L. Rev. at 842 – 844. The 28 hour cap on services would need to be promulgated as a regulation under any of these federal tests because the rule has a substantial effect on the public, the agency intended it to be binding, it limits the rights of the public to access these services, and the General Assembly has delegated to the agency the authority to promulgate rules to carry out its duties.

physician, who will then refer patients to her. The Board had endorsed an opinion by the Attorney General that such employment arrangements violated S.C. Code Ann. § 40-45-110(A)(1) (2011). *Sloan*, 370 S.C. at 476, 636 S.E.2d at 611.

Under the line of federal cases we relied on in *Home Health Service*, courts have held that whether an agency's action or statement amounts to a rule--which must be formally enacted as a regulation--or a general policy statement--which does not have to be enacted as a regulation--depends on whether the action or statement establishes a "binding norm." When the action or statement "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," then it is a binding norm which should be enacted as a regulation. **But if the agency remains free to follow or not follow the policy in an individual case, the agency has not established a binding norm.**

Id. at 475-76, 636 S.E.2d at 610 (emphasis added); *see also*, *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 363 S.C. 67, 74-75, 610 S.E.2d 482, 485-86 (2005) (A regulation failed for vagueness because it did not include a test to determine what "small" was; the test had to be promulgated by regulation.); *Courts v. Agency for Health Care Admin.*, 965 So. 2d 154, 159 (Fla. Dist. Ct. App. 2007) (In Florida a similar rule has been applied specifically to the Medicaid agency: "[T]his court has held that, if an agency changes a non-rule-based policy, it must either explain its reasons for its discretionary action based upon expert testimony, documentary opinions, or other appropriate evidence, or it must implement its changed policy or interpretation by formal rule making." (citations omitted)).

This Court has not applied the binding norm test when a more specific state statute either makes it clear that a regulation must be promulgated regardless of the binding nature of the agency rule or when a specific state statute provides a clear and more stringent alternative to the APA process of promulgating a rule. In *Captain's*

Quarters Motor Inn, Inc. v. S.C. Coastal Council, this Court held that the Coastal Council “overstepped its statutory authority in formulating and applying this test for purposes of permit applications without formalizing it by regulation.” 306 S.C. 488, 491, 413 S.E.2d 13, 14 (1992). The statute authorizing the Council’s ability to grant or deny permits required the Council to promulgate regulations. *Id.*

Applying the ruling in *Captain’s Quarters* to the facts in this case, SCDHHS is authorized, but not required to, promulgate regulations. S.C. Code § 44-6-90. However, SCDDSN, the agency which controls the day-to-day operations of the ID/RD Waiver, is required to promulgate regulations. S.C. Code § 44-20-220 (Supp. 2014); *see generally Doe v. S.C. Dept. of Health and Human Servs.*, 398 S.C. 62, 73, 727 S.E.2d 605, 611 (2011). SCDDSN is required to promulgate regulations “governing the operation of the department and the employment of professional staff and personnel.” S.C. Code § 44-20-220 (Supp. 2014). Section 220 could be applied to require the promulgation of a regulation prior to even getting to the issue of whether the 28 hour cap is a binding norm, as in the case of *Captain’s Quarters*. 306 S.C. 488, 413 S.E.2d 13.

In *Spectre, LLC v. S.C. Dept. of Health & Envtl. Control*, this Court interpreted the Coastal Zone Management Act (CZMA). 386 S.C. 357, 688 S.E.2d 844 (2010). Pursuant to the CZMA, the Department of Health and Environmental Control (DHEC) had promulgated the coastal management plan (CMP) which was required to be promulgated by other means outside the APA. “The CZMA set out specific procedures DHEC must follow in enacting the CMP, which included statewide hearings and public review of DHEC documents.” 386 S.C. at 369, 688 S.E.2d at 850. Also, the CZMA required review and approval by the Governor and General Assembly prior to the CMP

becoming final and binding. *Id.* This Court held, “the more stringent requirements for enactment of the CMP, as outlined above, suggest that the General Assembly did not believe it was meant to be an unenforceable document.” 386 S.C. at 371, 688 S.E.2d at 851.

In *Spectre*, a specific state statute sets out a procedure to create a binding rule or regulation by other means than what is set out in the APA. Unlike DHEC’s authority with regard to the development of the CMP, the General Assembly has not set forth other means by which SCDHHS or SCDDSN may promulgate binding rules. Neither SCDHHS nor SCDDSN has enabling legislation which allows the promulgation of rules by other means. The scope of SCDHHS’ and SCDDSN’s rule making authority is defined only by the General Assembly and not by the federal government. *Doe*, 398 S.C. 62, 73, 727 S.E.2d 605, 611 (2011). Because there is no other means created by statute, a SCDHHS or SCDDSN statement purporting to create either policy or rules is subject to the binding norm test interpreting the APA. *See Sloan*, 370 S.C. 452, 636 S.E.2d 598 (2006); *Home Health*, 312 S.C. 324, 440 S.E.2d 375 (1994). Clearly, the 28 hour cap, with no exceptions allowed, creates a binding rule, as found by the Court of Appeals. *Stogsdill v. S.C. Dept. of Health and Human Serv.*, 410 S.C. 273, 278, 763 S.E.2d 638, 640 (2014).

The Court of Appeals applied *Arrowood v. N.C. Dept. of Health & Human Servs.*, 140 N.C. App. 31, 535 S.E.2d 585 (2000) to identify an exception to the requirement that state agencies promulgate rules under the APA. *Stogsdill*, 410 S.C. at 278, 763 S.E.2d at 640. The Court of Appeals did not cite to *Spectre* or *Captain’s Quarters*, but noted that “based on the relevant statutory scheme and federal/state nature of Medicaid and the

Waiver, DDSN was not required to pass a regulation to enact the cap as an enforceable provision.” *Id.*

The Court of Appeals decision in this case is inconsistent with case law from multiple jurisdictions applying various state’s administrative procedures. In cases where a state Medicaid agency’s policy is challenged because of failure to follow the state APA, courts have consistently held that the state APA requires the promulgation of regulation. *McCarran v. NC Dep’t of Health and Human Services*, 704 S.E.2d 899 (N.C. App. 2011)(The provisions of a waiver limiting benefits were rules that must be promulgated as regulations pursuant to the state APA); *Dept. of Social Services, Div. of Medical Services v. Little Hills Healthcare, LLC*, 236 S.W.3d 637 (Sup. Ct of Missouri En banc 2007)(“ Promulgation of a rule requires compliance with the rulemaking procedures specified in section 536.021, RS Mo Supp.2006, and a failure to promulgate a rule as required voids the decision that should have been properly promulgated as a rule.”); *Morningside House Nursing Home v. Comm. Of N.Y. State Dept. of Health*, 614 N.Y.S. 2d 589, 591, 206 A.D. 2d 617, 619 (App. Div. 3rd Civ., 1994)(“Respondent’s failure to promulgate the policy embodied in the letter as a rule or regulation renders the determination based upon that policy irrational.”); *Weaver v. Colo. Dep’t of Social Servs.*, 791 P.2d 1230 (Colo. Ct. App. 1990)(Denial of benefits based on an unpromulgated rule violated the state APA); *Mullins v. N.D. Dep’t of Human Servs.*, 454 N.W.2d 732 (N.D. 1990)(invalidating unpromulgated manual provisions purporting to define individuals eligible for benefits); *see generally M.R. v. Dreyfus*, 97 F.3d 706, 723 (9th Cir. 2011)(Due to the economic downturn, in-home personal care services were reduced across the board pursuant to Wash. Admin. Code § 388-106-0125 as an emergency regulation); *Cota v.*

Maxwell-Jolly, 688 F. Supp. 2d 980, 986-987 (N.D. Cal., 2010)(Medicaid cuts brought on by enactment of legislation).

This Court’s decision in *Doe v. S.C. Dept. of Health & Human Servs.* is consistent with South Carolina’s requirement to promulgate rules in matters of general applicability. In *Doe*, this Court addressed eligibility for ID/RD waiver services and the definition of “mentally retarded.”¹⁴ 398 S.C. at 66-67, 727 S.E.2d at 607-608. The term mentally retarded is defined partially in terms of the age of onset of the condition. One of the issues before the Court was whether the age of onset requirement was age 18 or age 22. In looking at that issue, the Court simply noted that the waiver document did not address the age of onset issue. 398 S.C. at 66, 727 S.E.2d at 607 (“South Carolina’s waiver application with the federal government does not include any age-of-onset requirement and reveals no intent to vary from or otherwise limit the group of individuals encompassed by the SSI definition of mental retardation.”); 398 S.C. at 74, 727 S.E.2d at 611 (“South Carolina *could have* listed additional criteria in the waiver application for the purpose of defining the population to whom it would provide waiver services.”). This Court found that the 18 year age of onset requirement in SCDDSN’s policy guidelines contradicted the 22 year age of onset requirement in S.C. Code Ann. Regs. 88-210 (F). *Id.* In contrast, the dissent found that the definitions in Regulation 88-210 only apply to “the licensing of programs.” 398 S.C. at 77-78, 727 S.E.2d at 613. Because the dissent found that Regulation 88-210 was inapplicable, the dissent then turned to DDSN’s policy guidelines for the determination of whether the age of onset requirement is 18 or 22 and

¹⁴ The Court noted that “[s]ubsequent to the briefing and arguments in this case, the General Assembly, in 2011 Act No. 47 changed the references to mental retardation . . .

argued that those guidelines should have been followed by the Court. *Id.* at 8 (“[T]he majority ostensibly agrees the guidelines are in effect unless they conflict with state law.”) The majority's response to the dissent’s argument is in footnote 7 of the decision:

[T]he dissent finds the policy guidelines are entitled to deference in interpreting section 44–20–30. 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). Thus, because the age-eighteen-onset requirement found in DDSN's policy guidelines has not been formally adopted as a regulation, it does not have the force and effect of law and is entitled to no deference. Indeed, the only South Carolina law addressing the age onset requirement is Regulation 88–210.

398 S.C. at 68 n.7, 727 S.E.2d at 608 n.7. Because the 28 hour cap creates a binding norm, it must be promulgated as a regulation in order to be enforceable.

CONCLUSION

Transparency is tremendously important for individuals with disabilities to know their rights and to be able to exercise those rights. The APA provides an important vehicle for individuals to advocate for their rights, including the rights under the ADA. “[U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when [1] the State's treatment professionals determine that such placement is appropriate, [2] the affected persons do not oppose such treatment, and [3] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”

to ‘intellectual disability.’” The Court used the term “mental retardation” to remain consistent with the record in the case. *Doe*, 398 S.C. at 67 n.5, 727 S.E.2d at 607 n.5.

Olmstead v. L.C., 527 U.S. 538, 607 (1999); 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).

In part to help states meet the requirement imposed by Title II, the Medicaid waiver programs were established to provide care in the community for individuals who want to be in the community and whose needs can be met in the community. *See generally Radaszewski v. Maram*, 383 F.3d 599, 601-02 (7th Cir. 2004).

Each amicus in this case represents or advocates for individuals who receive services through SCDHHS and SCDDSN. These Amici organizations have seen the negative effect that the Respondent's changes are having on individuals with disabilities and their families. Respondent's changes to the ID/RD waiver, especially the 28 hour cap on personal care services, place individuals like the Petitioner at risk of institutionalization. Implementing a flat hourly cap on personal care services, showing indifference to individuals' needs, is contrary to the ADA. Making that cap a rule without exception is contrary to the APA.

Respectfully submitted,

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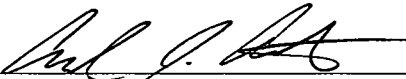
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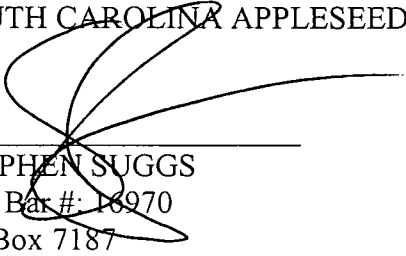
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GLOSSARY OF ACRONYMS

- ADA - Americans with Disabilities Act
- ALC - Administrative Law Court
- APA – Administrative Procedures Act
- CMS - U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services
- HCBS - Home and Community Based Services
- ICF/IID - Intermediate Care Facility for Individuals with Intellectual Disabilities
- ID/RD – Intellectual Disabilities/Related Disabilities
- OAPA - Omnibus Adult Protection Act
- P&A – Protection and Advocacy for People with Disabilities, Inc.
- SCDDSN - South Carolina Department of Disabilities and Special Needs
- SCDHHS - South Carolina Department of Health and Human Services
- SCNAELA – South Carolina Chapter of the National Academy of Elder Law Attorneys