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STATE OF SOUTH CAROLINA

In the Supreme Court

S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case No. 2014-002513

Richard Stogsdill,

Appellant,

v.

South Carolina Department of Health and  
Human Services,

Respondent

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RESPONDENT'S RESPONSE TO THE AMICI CURIAE BRIEF OF PROTECTION AND  
ADVOCACY FOR PEOPLE WITH DISABILITIES, INC.; THE SOUTH CAROLINA  
NATIONAL ASSOCIATION OF ELDER LAW ATTORNEYS; AND THE SOUTH  
CAROLINA APPLESEED LEGAL JUSTICE CENTER

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STATEMENT OF THE ISSUE

Whether the limits set in the January 1, 2010, waiver renewal are unenforceable because they were not formally promulgated under the South Carolina Administrative Procedures Act (APA).

STATEMENT OF THE CASE

The Amici urge that the altered services provided to the Appellant under the 2010 Mental Retardation/Related Disabilities (now Intellectual Disabilities/Related Disabilities) Waiver (ID/RD waiver) renewal required promulgation through the SC Administrative Procedures Act in order to be effective.

Administration of this Waiver is the responsibility of the DHHS, but day-to-day management of the Waiver has been delegated to the DDSN. When a Medicaid applicant or recipient does not agree with a final determination of the DDSN, the managing agency, appeal may be made to the Appeals and Hearings Division of the DHHS and the DHHS is a Respondent.

The Appellant appealed the reduction in his services to the DHHS Division of Appeals and Hearings. On September 14, 2010, the DHHS Hearing Officer sustained the reductions. *R.S v. SCDHHS*, #10-MISC-042 (MR/RD). Appeal was taken to the Administrative Law Court, which affirmed in *Richard Stogsdill v. South Carolina Department of Health and Human Services*, 10-ALJ-08-0774-AP. Appeal was then taken to the Court of Appeals.

The matter or issue described in the Amici's Background statement has been decided by the Court of Appeals, which essentially found that reducing the Appellant's services did put him at risk of institutionalization. *Stogsdill v. SCDHHS*, 410 S.C. 273, 763 S.E.2d 638 (Ct. App. 2014). Given the weight of federal case law on this issue, the Department did not appeal that decision. The Departments will take the risk of institutionalization into account in making service authorizations for Participants in the waiver. That issue is not before the Court at this time. The issue in this case is whether the waiver changes affecting Appellant should have been promulgated through the Administrative Procedures Act.

In addition, the Respondent would refer the Court to the Respondent's Statement of the Case set forth in its main Brief.

#### **ARGUMENTS:**

**The Department has the authority to administer the Medicaid Program in South Carolina; application of the waiver provisions to the Appellant was subjected to an evidentiary hearing, the waiver provisions were renewed correctly under the federal regulations with public notice and input, and therefore should be enforceable:**

**Legislative authorization:** The Waiver document is a contract between the federal government and the State about what services the federal Medicaid Program will help pay for through the State's letter of credit at the Centers for Medicare and Medicaid. The waiver application must conform to the federal statutes at 1915(c) of the Social Security Act [42 USC §1396n(c)] and regulations at 42 CFR §440.300 et seq. These provisions, at §440.304(f) contain the requirement that "[t]he agency must establish and use a public input process for any changes in the services of operations of the waiver." The Department's enabling legislation, specifically at S.C. Code Ann. §§44-6-30, 40 & 70 requires the agency to develop and submit a Medicaid State Plan. It is also consistent with the federal regulations regarding the authority and independence of the single state agency that administers the Medicaid Program at 42 CFR §430.10. The Department is the duly designated single state agency for the administration of the Medicaid Program in South Carolina. 42 U.S.C. §1396 et. seq.; S.C. Code Ann. §44-6-10 et. seq.; and 42 CFR §431.10.

**Regulations:** The Department's regulation at S.C. Code R. 126-300(D) provides authority to make changes in the State's Medicaid Program. The regulation states:

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

directives.

In §44-6-90, the Legislature has said that the Department may promulgate regulations to carry out its duties. The legislation does not require the Department to set forth in regulation the specific provisions of each home and community based waiver.

**Caselaw:** Furthermore, in *Jane Doe v. SCDHHS*, 398 S.C. 62, 727 S.E.2d 605 (2011) the S.C. Supreme Court indicated that waiver provisions are enforceable with respect to the administration of the waivers, even though they are distinguishable from promulgated regulations. See page 74 of the S. C. version. Footnote 7 of the opinion does say that a policy cannot contradict a regulation and in that posture should be given no effect, but we know of no contrary regulation or law specifying a different level of services than is set forth in the waiver document.

Thus, as reflected in the Medical Care Advisory Committee meeting Minutes of May 19, 2009, R. pp.848-852, in accordance with the best practice, as they saw it, with the advice of DDSN and under the authority of State and federal law, DHHS staff prepared the waiver renewal for submission to The Centers for Medicare and Medicaid Services (CMS). Public sessions were held throughout the State. R. p.292. CMS approved the Waiver in accordance with 42 CFR §441.300 et seq. All of the Medicaid application and approval requirements were met. Having done so, there was no doubt for the agencies that the implementation of the waiver complied with the requirements of State law and the federal agency that oversees the Medicaid Program

Since the Department is charged, by statute with the administration of the Medicaid Program, some respect and consideration should be given to its interpretation of the rules governing the Program, including its method of making changes to the State Plan to take advantage of the Medicaid waiver option. It is clear that the Legislature intended for the Department to work with the federal government to receive Medicaid funding for the Medicaid Program in South Carolina that include the basic Medicaid State Plan and waiver options. That endeavor requires the flexibility to challenge or acquiesce to frequent federal interpretations of their own regulations. The lengthy promulgation process in South Carolina does not allow for sufficient flexibility.

**There was an evidentiary hearing in this case on the issue of the service limitations as applied to the Appellant:**

DDSN staff decisions were admittedly applied without discretion as required by the waiver document and by contract. However, the Department's Appeals Division, which under S.C. Code R. 126-150, et seq., has the authority to issue the Department's final decision on agency matters, did not apply the waiver provisions without discretion, but scheduled an evidentiary hearing on the application of the 2010 waiver reductions to the Appellant. The agency Hearing Officer "...was free to follow or not follow the policy in [this] individual case." See, *Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 476 (2006).

Thus, under the South Carolina Administrative Procedures (APA), the limits were not rules of "general applicability" because they were only "...descriptions of agency

procedure applicable only to agency personnel;” S.C. Code Ann. §1-23-10(4). In this case, the Appellant has already been successful in making an agency rule through the quasi-judicial or adjudicative function of the agency. There is no need for the agency to exercise its quasi-legislative function by promulgating regulations on this issue.

**There is ample public notice and access to the waiver provisions:**

**Public Notice:** Federal rules issued on January 16, 2014, require a process of public comment for substantive changes to waivers and new waivers. The federal regulations are at 42 CFR §441.304

(e) The agency must provide public notice of any significant proposed change in its methods and standards for setting payment rates for services in accordance with § 447.205 of this chapter.

(f) The agency must establish and use a public input process, for any changes in the services or operations of the waiver.

(1) This process must be described fully in the State's waiver application and be sufficient in light of the scope of the changes proposed, to ensure meaningful opportunities for input for individuals served, or eligible to be served, in the waiver.

(2) This process must be completed at a minimum of 30 days prior to implementation of the proposed change or submission of the proposed change to CMS, whichever comes first.

(3) This process must be used for both existing waivers that have substantive changes proposed, either through the renewal or the amendment process, and new waivers.

(4) This process must include consultation with Federally-recognized Tribes, and in accordance with section 5006(e) of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), Indian health programs and Urban Indian Organizations.

(Emphasis added.)

Furthermore, exact copies of the waiver applications and approvals are on the Department's website. For those not familiar with computer use, copies should be available in the State's depository libraries in accordance with S. C. Code Ann. §60-2-10

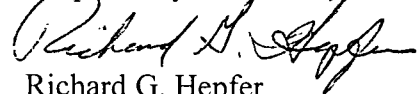
et seq.

### Conclusion

State and federal statutes and regulations give the Department the authority to prepare and administer the South Carolina State Medicaid Plan (Title XIX). Waivers modify the State Plan by allowing certain populations to receive Medicaid services in ways not allowed under the regular Medicaid Program. That specific criteria will be included in the State Plan and therefore also in the waivers is within the contemplation of the enabling statutes and regulations. Furthermore, in this case, the limits were not treated as binding norms by the Department's hearing officer. Finally, the State Plan and the waiver documents are readily and publically available.

For those reasons and any reason appearing in the record, the Court should affirm the decision of the Court of Appeals on this issue.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a Paralegal for the Respondent in the above-captioned matter and that on this 16<sup>th</sup> day of November, 2015, in Columbia, South Carolina, I served a copy of the forgoing Respondent's Response to the Amici Curiae Brief of Protection and Advocacy for People with Disabilities, Inc.; the South Carolina National Association of Elder Law Attorneys; and the South Carolina Appleseed Legal Justice Center on the following persons by depositing the same in the United States Mail, postage paid, and addressed as follows:

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