THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM SOUTH CAROLINA
Administrative Law Court

Shirley C. Robinson, Administrative Law Judge

---

Case No.: 10-ALJ-08-0504-AP

---

Albert C. Myers .....Appellant,

v.

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

---

# RESPONDENT'S FINAL BRIEF

---


**SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES**

BYRON RONALD ROBERTS
RICHARD G. HEPFER
1801 Main Street, Suite 1100
Columbia, South Carolina 29201
(803) 898-2791 - Office

Counsel for the Respondent

**RILEY, POPE & LANEY, LLC**

DAMON C. WLODARCZYK
P.O. Box 11412
Columbia, South Carolina 29211
(803) 799-9993 – Office
(803) 239-1414 – Facsimile
damonw@rplfirm.com

Counsel for the Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES



FEDERAL REGULATIONS



STATUTES



RULES

## STATEMENT OF ISSUES ON APPEAL

I. THE LOWER COURT CORRECTLY RULED THAT APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE ALLEGED FAILURE TO COMPLY WITH 42 C.F.R 431.210(b)

A. APPELLANT'S ARGUMENTS ARE NOT PRESERVED FOR REVIEW

B. APPELLANT HAS FAILED TO ESTABLISH ANY PREJUDICE RESULTING FROM THE ALLEGED VIOLATION

II. THE LOWER COURT CORRECTLY RULED THAT THE WAIVER REDUCTIONS AND TERMINATIONS ARE ENFORCEABLE

III. THE LOWER COURT CORRECTLY RULED THAT APPELLANT'S MEDICAL NEEDS WERE EITHER BEING MET, WERE AVAILABLE TO BE MET UNDER THE CURRENT WAIVER LIMITS, OR WERE AVAILABLE TO BE MET THROUGH SOME OTHER MECHANISM

IV. THE LOWER COURT CORRECTLY RULED THERE WAS NO EVIDENCE OF RETALIATION

## STATEMENT OF THE CASE

This matter is before the Court of Appeals from an Order of the South Carolina Administrative Court (hereinafter "ALC") affirming a Final Administrative Order issued by the Respondent, the South Carolina Department of Health and Human Services (hereinafter "DHHS"), regarding the reduction and/or termination of Appellant's (hereinafter "Myers") services and/or supplies under Medicaid's Intellectual Disability/Related Disabilities[1] (hereinafter "ID/RD") waiver program.

Myers is a Medicaid participant with severe disabilities who is qualified to receive and was receiving ID/RD waiver services prior to January 1, 2010. As a result of the ID/RD waiver renewal effective January 1, 2010, Myers' services and supplies were reduced and/or terminated. Myers requested reconsideration of the January 1, 2010 changes to the South Carolina Department of Disabilities and Special Needs (hereinafter "DDSN") in December 2009. DDSN denied the request for reconsideration in a letter to Myers dated January 13, 2010.

On February 11, 2010, Myers appealed the changes to the Office on Hearings and Appeals for DHHS. On February 25, 2010, the DHHS hearing officer issued an Interlocutory Order/Cause of Action providing Myers the opportunity to submit in writing any assignments of errors he believed were made regarding his eligibility for Medicaid benefits. [R. pp. 58-59]. On March 17, 2010, the hearing officer received Myers' written response to the Interlocutory Order and DHHS submitted its reply on March 30, 2010. [R. pp. 51-57].

---

[1] The ID/RD waiver program was formally referred to as the Mental Retardation/Related Disabilities (MR/RD) waiver program.

By Order dated May 6, 2010, DHHS dismissed Myers' appeal concluding that Myers' failed to respond to the Interlocutory Order with an allegation of error in fact or in law. [Id.]. On May 21, 2010, Myers filed a Motion to Reconsider which does not appear to ever have been ruled upon. [R. pp. 75-79]. On June 18, 2010, Myers filed a Notice of Appeal with the ALC challenging the May 6, 2010 Order of Dismissal.

On September 13, 2010, Myers filed with the ALC a Motion for Extension of Time to file his brief and a Motion to Consolidate his appeal with three (3) other separate appeals pending before the ALC which involved nearly identical issues and in which all of the appellants were represented by the same counsel. [R. pp. 80-91]. On September 24, 2010, DHHS filed a Return to the motion for extension of time and consolidation and a Cross-Motion to Dismiss. [R. pp. 182-188]. The cases were consolidated by the ALC in an October 4, 2010 Order. [R. pp. 49-50].

On November 9, 2011, the ALC issued an Order which found: 1) there was no impermissible *ex parte* contact between DDSN and the Director for the Division of Appeals for DHHS; 2) that even if the correspondence at issue could be construed as impermissible *ex parte* contact, Myers failed to establish any resulting prejudice; 3) that Myers' arguments alleging his due process rights were violated because DHHS failed to provide adequate notice was abandoned; and 4) Myers was entitled to an evidentiary hearing regarding the reduction or elimination of Medicaid services to comply with due process. [R. pp. 33-48].

On November 21, 2011, Myers filed a Motion to Alter or Amend. [R. pp. 189-197]. DHHS filed its Return to the Motion to Alter or Amend on December 1, 2011. [R. pp. 219-223]. As to Myers, the motion was denied by the ALC in an Order dated December 6, 2011. [R. pp. 31-32].

On remand, the Appeals Division for DHHS convened a fair hearing on January 6, 2012. [R. pp. 217-218]. At the fair hearing, evidence was presented in the form of testimony and documentation. Additionally, both parties had the opportunity to orally present their arguments to the hearing officer. On February 9, 2012, the hearing officer issued her Final Order making findings of fact and conclusions of law which affirmed DHHS's actions. [R. pp. 20-30].

On February 26, 2012, Myers filed a Rule 59(e), SCRCP, Motion to Alter or Amend. [R. pp. 237-242]. On March 8, 2012, DHHS filed its Return to the Motion to Alter or Amend. [R. pp. 244-247]. By Order dated March 19, 2012, the hearing officer declined to alter or amend the Final Agency Order. [R. pp. 15-19].

On April 13, 2012, Myers appealed the Final Agency Order to the ALC. [R. pp. 249-250]. By Order dated February 3, 2014, the ALC affirmed the Final Agency Order. [R. pp. 1-14]. On March 5, 2014, Myers served his Notice of Appeal of ALC's Order to this Court. [R. p. 318].

## STATEMENT OF FACTS

The ALC's Order concisely sets forth the relevant facts. [R. pp. 1-2, 4-5]. Additionally, facts as relevant to the issues on appeal are more fully set forth below.

## STANDARD OF REVIEW

The standard of review is governed by the Administrative Procedures Act. S.C. Code Ann. § 1–23–380 provides in part that appellate review must be confined to the record and the appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the agency's decision or remand the matter for further proceeding.

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority granted of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(4)&(5); Doe v. S. Carolina Dep't of Health & Human Servs., 398 S.C. 62, 70-71, 727 S.E.2d 605, 609-10 (2011).

## ARGUMENTS

I. THE LOWER COURT CORRECTLY RULED THAT APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE ALLEGED FAILURE TO COMPLY WITH 42 C.F.R 431.210(b)

Myers argues the lower court erred in finding he was not prejudiced by the alleged failure of the notices to contain the regulations and reasons which were being relied upon for the reduction and/or termination of his Medicaid waiver services. [Appellant's Brief, p. 17].

A. APPELLANT'S ARGUMENTS ARE NOT PRESERVED FOR REVIEW

In its November 9, 2011 Order, the ALC determined Myers' allegation that DHHS failed to provide him adequate written notice of the reduction in his Medicaid services as required by 42 C.F.R. 431.210 was abandoned on appeal. [11/9/11 ALC Order, p. 13 citing Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)]. The ALC specifically found that although the alleged

violation was mentioned in the "Facts" section of Myers' brief, the brief did not include the issue as a separate ground on appeal and there was no reference or citation to any legal authority contained within the discussion section of the brief. [Id.].

Presumably in an attempt to cure the abandonment on appeal of this issue, Myers filed a Motion to Alter or Amend the November Order arguing that the ALC should amend or alter the Order with respect to the ALC's rulings on the notice and *ex parte* communication issues as unnecessary in light of the ALC's remand of the cases for evidentiary hearings, which was specifically addressed by the ALC and denied. [R. pp. 31-32].

When the notice issue was raised in the second appeal to the ALC, the ALC noted that the issue was previously addressed and it was determined that the issue was not preserved for appellate review. [R. p. 6].

Myers now argues that the ALC erred in ruling that the notice issue was not preserved for appellate review because "Appellant's Brief in the consolidated appeal, which the Administrative Law Judge claims to have relied upon, was not in the Record before her and the judge had ignored [Myer's] request to supplement the Record to include that brief and other documents DHHS had selective omitted." [Appellant's Brief, p. 13].

As an initial matter, in reviewing Myers' Designation of Matters to be Included in the Record on Appeal, there does not appear to be any briefs submitted for this Court's consideration from the first ALC appeal, which resulted in the November 2011 ALC Order.

Second, briefs to the ALC are separate and distinct from the Record on Appeal to the ALC as specifically provided for in the South Carolina Rules of Procedure for the

ALC. See Rule 36, ALC (governing time for service, filing and content of record on appeal); Rule 37, ALC (governing time for filing, service and content of Briefs). Accordingly, Myers' Brief to the ALC would have been separate from the Record on Appeal and, more importantly, it would have been filed at least thirty (30) days after the Record on Appeal was filed with the ALC. Rule 37, ALC.

Finally, not only did the ALC specifically refer to portions of Myers' brief in determining the issue was waived on appeal, but the ALC also specifically found that, "[w]hile some documents were omitted from the record in this matter, all documents omitted are now a part of the record." [R. p. 44]. Accordingly, Myers' argument that the ALC erred by not considering his brief or allowing him to supplement the record with the brief for consideration are without merit.

As the only evidence in the record before this Court concerning the issue of whether Myers' abandoned his arguments of defective notice are contained in the ALC's Order and Order denying the Motion to Alter or Amend, this Court is bound by the determination that the issue was not preserved for appellate review. See Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (ruling an "issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court"); S.C. Code Ann. § 1-23-380(4) (stating appellate review must be confined to the record); Rule 37(B)(3), ALC ("the brief shall be divided into as many parts as there are issues to be argued, and each such part shall bear an appropriate caption, followed by a discussion and citation of authority"). Therefore, the Final Agency Order should be affirmed.

B. APPELLANT HAS FAILED TO ESTABLISH ANY PREJUDICE RESULTING FROM THE ALLEGED VIOLATION

Although the ALC determined that issue of whether or not Myers' due process rights were violated for inadequate notice was not preserved for appellate review, the ALC went on to discuss how the issue failed on the merits. [R. pp. 6-8]. Myers argues the ALC erred in finding he was not prejudiced by the notice's failure to set forth the regulation being relied upon regarding the reduction in benefits. [Appellant's Brief, p. 17]. Myers contends that had he known the medical necessity of his home-based services was going to be challenged, he could have provided live testimony from his treating physicians and his dentist. [Id.].

As an initial matter, the ALC found and DHHS acknowledged that the notice required under 42 C.F.R. § 431.210 did not include a citation to a specific regulation supporting the reduction in benefits or a new or changed federal or state law that required the action. [R. p. 7]. However, the ALC went on to find that Myers failed to provide any evidence of how the process or his fair hearing would have been conducted differently had the notices been technically complied with. [Id.].

In Myers' brief to the ALC, he argued that DHHS for the first time argued that his personal care services were reduced because DHHS changed the definition of personal care services to eliminate "supervision," and this reason was not contained in the notices. [Myers' ALC Brief, pp. 5]. Myers never raised in his brief the issue of medical necessity, which is being raised now. [Id. at pp. 2-7]. In fact, Myers did not allege that he was substantially prejudiced by the argument in that brief. [Id.].

Whether Myers now relies on the "medical necessity" argument or his "supervision" definition argument, both fail to show he suffered substantial prejudice for

the failure of the notices of reduction in services to contain the regulation being relied upon by DHHS to make the reductions.

Contrary to Myers' arguments, the agency hearing officer did not find that his needs were not "medically necessary." The agency hearing officer found that, based upon Myers' needs for assistance with his daily living activities while living at home, which were itemized, the combination of services available to Myers under the new waiver limits in the form of Personal Care I, Personal Care II and Respite were sufficient in amount to cover his daily needs. [R. pp. 7, 9]. Moreover, although Myers' now argues he would have presented live testimony from his treating physician, he did provide a statement and affidavit from his treating physician which was introduced into evidence and considered by the hearing officer. [R. pp. 5, 611, 614]. The ALC affirmed the Final Agency Order, finding substantial evidence in the record to support the hearing officer's decision. [R. p. 12].

Additionally, the record reflects that the change in the definition of personal care services, specifically PC II services, was made to include terms like "active hands on care" because that was the intent of the service. The testimony indicates that PC II services were not intended to include and never have included supervision. PC II services were specifically intended to give a bath, prepare a meal, or make a bed. There was further testimony that unlike PC II, PC I services are not "hands-on care to the person *per se*[,]" but can include assistance in maintaining the persons area. [R. p. 328, line 20-p. 343, line 27]. Moreover, DHHS provided to Myers' a pre-hearing brief prior to the fair hearing setting forth its arguments. [R. pp. 225-236].

For the foregoing reasons, there is nothing in the record to establish substantial prejudice to Myers as a result of the notice of reduction in services failing to contain the

regulation supporting the reduction and, therefore, the Final Agency Order should be affirmed.

## II. THE LOWER COURT CORRECTLY RULED THAT THE WAIVER REDUCTIONS AND TERMINATIONS ARE ENFORCEABLE

Myers contends the waiver caps that went into effect January 1, 2010, are unenforceable because the reductions in services were not promulgated as regulations under the South Carolina Administrative Procedures Act. In support of his argument, Myers relies on the ALC case of Hickey v. DHHS, Dkt. No. 10-ALJ08-0656-AP (SCALC July 19, 2011). [Appellant's Brief, p. 18].

"The federal government has made it manifestly clear that states have wide discretion in designing a waiver program that is tailored to the needs of the particular state." Doe, 398 S.C. at 71, 727 S.E.2d at 610. In reviewing the waiver at issue in Doe, the court noted that the waiver application only provided DHHS could provide home and community services to a specific subset of categorically needy participants without having to provide the same services to all categorically needy people in the state. Id. The court opined, "[t]o the extent a state *is permitted* to issue regulations *interpreting the general eligibility requirements* included in its waiver application, no regulations had been promulgated concerning the waiver at issue in that case" and, therefore, it was error in denying Doe her services based upon a requirement neither contained in the waiver document or promulgated by regulation. Doe, 398 S.C. at 73, 727 S.E.2d at 611 (emphasis added).

To add further clarity, Justice Hearn in a separate opinion stated, "I agree with the majority's holding that South Carolina can impose more restrictive criteria for mental

retardation *in its waiver application or in a regulation.*" Doe, 398 S.C. at 75, 727 S.E.2d at 612 (emphasis added).

As the Supreme Court of South Carolina has held that the terms set forth in a waiver application can be enforced without promulgating regulations, or terms can be enforced which are not set forth in the waiver application by promulgating regulations, it controls as precedent and the conclusions set forth in Hickey are not binding.[2] Id. Therefore, the Final Agency Order should be affirmed.

III. THE LOWER COURT CORRECTLY RULED THAT APPELLANT'S MEDICAL NEEDS WERE EITHER BEING MET, WERE AVAILABLE TO BE MET UNDER THE CURRENT WAIVER LIMITS, OR WERE AVAILABLE TO BE MET THROUGH SOME OTHER MECHANISM

Myers argues the agency hearing officer erred in its determination that the services ordered by his physician were not medically necessary. [Appellant's Brief, p. 21. Contrary to Myers' argument, the hearing officer did not determine that the physician's ordered services were not medically necessary, but rather determined that Myers failed to establish how the mix of services offered by DHHS would fail to meet his medical requirements as prescribed by his physicians. [R. p. 17, para. 3].

At the fair hearing, a letter from Myers' treating physician was introduced into evidence. The letter provided in part the following:

1) that Myers' mother was well trained in his medical needs and was able to supervise and monitor the care he needed;

2) that Myers' mother was trained to administer his medications and feed him via gastric tube;

---

[2] The SC Supreme Court decided Doe five (5) months after the Hickey Order was issued by the ALC. Accordingly, the ALC did not have the benefit of the Doe opinion at the time it issued its Order.

3) that Myers required twenty-four hour supervision;

4) that Myers required nursing services to administer gastric tube feeding three times a day and medications in the evening;

5) that Myers required nursing services to monitor for decubitus ulcers and to monitor his stoma;

6) that Myers required physical and occupational therapy to prevent contractures which would require surgical intervention;

7) that Myers required speech therapy to diagnose and treat swallowing issues.

[R. p. 612].

In addition, the hearing officer heard testimony from Myers' personal care attendant regarding his daily routine, the care he received and by whom. [R. p. 468, line 23-p. 475, line 30].

Additionally, the hearing officer received evidence as to the following:

1) that physical therapy, although discontinued in the waiver, was still available to adults under the Medicaid State Plan; [R. p. 21, lines 15-19]]

2) that an assistive speech device can be provided through the waiver; [Id.]

3) that speech therapy was available outside of the waiver through the State Plan; [Id.]

4) that Myers received five (5) to six (6) hours per day (Monday – Friday) of adult day health care, which also provided transportation to and from his home and provided his noon meal, which continued to be authorized under the new waiver limits; [R. p. 53, lines 18-24].

The waiver program was never intended to provide 24-hour-a-day care to its participants, but rather, it was designed to "compliment and/or supplement the services

that are available to participants through the Medicaid State plan and other federal, state, and local public programs *as well as the supports that families and communities provide.*" [R. p. 536].

Myers was provided a fair hearing and the hearing officer concluded that his need for assistance with daily activities when he lived in the community could be met through a combination of services currently provided or available in the form of Personal Care I, Personal Care II and respite care. [R. pp. 26-28]. The hearing officer further concluded that Myers' need for an assistive speech device and psychological services would be available to him through the waiver document. [R. pp. 28-29]. Finally, the hearing officer concluded that physical therapy, nursing services, regular medical appoints, medications and other supplies would still be available to Myers through either the Waiver or the Medicaid State Plan. [Id.].

Myers failed to produce any arguments, authority, or evidence in the record that the medical needs set forth by his physicians would not be met through the range of services offered to him through the waiver program and State Medicaid Plan. See 42 C.F.R. § 440.230 (each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose); see also Alexander v. Choate, 469 U.S. 287, 303 (1985) (stating "[M]edicaid programs do not guarantee that each recipient will receive the level of health care precisely tailored to his or her particular needs [but] [i]nstead, the benefit provided through Medicaid is a particular package of services . . . [which] has the general aim of assuring that individuals will receive necessary medical care . . .."). As there is substantial evidence to support the hearing officer's findings, the Final Agency Order should be affirmed.

## IV. THE LOWER COURT CORRECTLY RULED THERE WAS NO EVIDENCE OF RETALIATION

Myers contends he has been retaliated against due to his mother's advocacy efforts against the 2010 waiver application. [Appellant's Initial Brief, p. 45]. As evidence of the alleged retaliation, Myers cites to the following:

1) That Myers used to receive 24 hour respite care for $70 prior to 2010 waiver, but after the reductions, DHHS paid $270 a day for respite services in an institution;
2) That Myers requested nursing services which were denied;
3) That DDSN staff members sent memos to the Office of Hearings and Appeals outlining the agency's position on the appeal without copying Myers' counsel;
4) That after the ALC reversed and remanded Myers' first appeal (which was consolidated with three other cases) ordering that a fair hearing be held, DHHS only maintained the reductions as to Myers and not the three (3) other participants;
5) That Myers was only awarded 101 hours of respite care under the 2010 waiver, yet a participant can be awarded up to 240 hours;
6) That Myers' dental, psychological and PT services were cancelled during the pendency of the appeal.

[Appellant's Brief, pp. 35-37, 43, 45].

The hearing officer concluded that although DHHS elected not to impose waiver caps as to three (3) of the participants whose cases were consolidated with Myers' case in the first ALC appeal, the hearing officer found valid DHHS's

explanation that two (2) of the participants were currently involved in federal litigation against DHHS and the third participant involved a minimal reduction in the annual limit of nutritional supplements (32 cases per year prior to 2010 to 24 cases per year after 2010), which DHHS elected not to impose the 24 case reduction. [R. pp. 29, 584]. Additionally, the hearing officer reiterated that the 2010 waiver limits did not constitute a reduction in services, but only a reconfiguration of services which were still sufficient to meet Myers' medical needs. [R. p. 29].

On appeal, ALC found substantial evidence in the record to support the hearing officer's decision for continued litigation in Myers' case. [R. pp. 13-14].

Myers argues the following provisions have been violated:

> Section 504 incorporates the anti-retaliation provision of Title VI of the Civil Rights Act of 1964 by providing that:
>
> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 ... shall be available to *any person aggrieved by* any act or failure to act by any recipient of Federal assistance....29 U.S.C. § 794a(2) (emphasis added). The anti-retaliation provision of Title VI of the Civil Rights Act incorporated by section 504 states:
>
> No recipient or other person shall intimidate, threaten, coerce, or discriminate against *any individual* for the purpose of interfering with any right or privilege secured by Section 601 of [the Civil Rights] Act or this part, or because *he has made* a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

Barker v. Riverside Cnty. Office of Educ., 584 F.3d 821, 825 (9th Cir. 2009) (emphasis added).

The anti-retaliation provision of Title II of the American with Disabilities Act ("ADA") provides:

> 28 C.F.R. § 35.134. Retaliation or coercion.

(a) No private or public entity shall discriminate *against any individual* because *that individual* has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of *his or her having exercised* or enjoyed, or on account of *his or her having aided or encouraged* any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

(emphasis added) [Appellant's Brief, pp. 27-28].

In reviewing Myers' brief to the ALC and the Brief to this Court, it appears the argument is 1) that DHHS retaliated against Myers' mother for her advocacy efforts by reducing or not providing Myers services, or 2) that Myers' was retaliated against by reducing or not providing services due to his mother's advocacy efforts. However, there is no evidence in the record that Myers made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing. There is no evidence in the record that any person intimidated, threatened, coerced, or discriminated against Myers for the purpose of interfering with any right or privilege secured by the Civil Rights Act. There is no evidence Myers opposed any act or practice made unlawful under the ADA or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA. Finally, there is no evidence of any coercion, intimidation, threat or interference in Myer's exercise or enjoyment of, or on account of Myers having exercised or enjoyed,

or on account of Myers having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act.

Simply put, there are no grounds for a retaliation claim by Myers under Section 504 of the Rehabilitation Act or under the ADA when Myers did not participate or assist, encourage or aid another individual in participating in a protected act. Although Myers' mother may have sufficient grounds to bring an action for retaliation based upon her alleged protected acts, she has never been a party to this action and, therefore, there is no standing for the claim. See Barker, 584 F.3d 821, 825 (Barker's complaint alleged that her supervisors at the Riverside County Office of Education retaliated against her after she voiced concerns that employer was not complying with requirements of federal and state law in how it provided educational services to its disabled students); Weber v. Cranston Sch. Comm., 212 F.3d 41, 48 (1st Cir. 2000) (stating "courts have accorded standing to non-disabled individuals suing because of retaliation for attempts to vindicate the rights of a disabled person"); Whitehead v. School Board for Hillsborough County, 918 F.Supp. 1515, 1522 (M.D.Fl.1996) (granting standing to the parents of a child with Down's Syndrome who sought damages under Section 504 for retaliation against *them* in their capacity as parents).

On the merits, there is substantial evidence in the record to support the hearing officer's decision that there was no retaliation.

Myers' mother claimed he used to receive 24 hour respite care for $70 prior to 2010 waiver, but that service was eliminated. The record reflects that the service was eliminated for all participants, not just Myers. Moreover, the elimination of this service prompter Myers' mother to speak out against it. Therefore, the elimination occurred

*before* any action by the mother. [R. p. 502, line 17-p. 504, line 2]. Therefore, there is no evidence of retaliation.

Myers' mother claims her request for nursing services was denied in retaliation. Although the request for nursing services was denied on the grounds that Myers was already receiving nursing services while attending his daily adult day heath care center, Myers never sought reconsideration through DDSN and the denial was not appealed to DHHS. [R. 362, line 21-p. 363, line 7]. Accordingly, if the denial was made in error, neither DDSN nor DHHS had the opportunity to review or correct the issue. Therefore, the unappealed denial of nursing services when there was evidence in the record that Myers was receiving nursing services at the ADHC facility five (5) days a week is insufficient to demonstrate retaliatory conduct.

The allegation that DDSN staff members sent memos to the Office of Hearings and Appeals outlining the agency's position on the appeal without copying Myers' counsel was raised to the ALC. The ALC determined the memos did not constitute *ex parte* communication. (R. pp. 8-9]. As this issue has not been appealed to this Court, it is the law of the case. Therefore, as there was no wrongdoing, it cannot be used as evidence of retaliation.

Myers argues that because DHHS only maintained the reductions as to Myers and not the three (3) other participants following the first ALC appeal, that is evidence of retaliation. As indicated by DHHS's letter to the hearing officer, two (2) of the participants were also involved in federal litigation against DHHS in the case of Peter B. *et al.* v. Mark Sanford *et al.*, 6:10-cv-00767-TMC, which was filed March 24, 2010. As to the third participant, the sole issue was the reduction in the participant's annual

amount of nutritional supplement from 32 cases to 24 cases. As the reduction was nominal, DHHS elected not to enforce the waiver as to that participant. [R. p. 584].

Myers also argued he was only awarded 101 hours of respite care under the 2010 waiver, yet a participant can be awarded up to 240 hours. The hearing officer found that the services offered to Myers were sufficient to cover his medical needs as ordered by his physician as discussed more fully above. Moreover, there is no evidence in the record that Myers requested more than 101 hours of respite care. Accordingly, it is not retaliation simply for the fact that DDSN determined 101 hours of respite care (in addition to other services) would meet Myers' medical needs when there is no evidence additional hours of respite care were requested or denied.

Finally, Myers' alleged that his dental, psychological and PT services were cancelled during the pendency of the appeal in retaliation. However, the record reflects this was not the case. At the fair hearing, Myers' services coordinator testified to the following services he was receiving prior to being admitted into a nursing home:

1) Adult Day Health Care
2) Adult Day Health Care Nursing
3) Personal Care Aide II
4) Persona Care Aide I
5) PT
6) Medical services
7) Dental/vision exam

[R. 371, lines 2-7].

Based upon the foregoing, there is no evidence of retaliatory conduct and there was substantial evidence in the record to support the hearing officer's decision that there was no retaliation. Therefore, the Final Agency Order should be affirmed.

## CONCLUSION

For the reasons set forth, Respondent respectfully requests the Court affirm the Final Agency Order and dismiss this appeal.

RILEY POPE & LANEY, LLC

Damon C. Wlodarczyk
Post Office Box 11412
Columbia, South Carolina 29211
Telephone: (803) 799-9993
Facsimile: (803) 239-1414

Columbia, South Carolina

March 19, 2015