THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 2013-002415

Brook Waddle,
Appellant,

v.

South Carolina Department of Health and Human Services
Respondent.

BRIEF OF APPELLANT

Patricia Logan Harrison
611 Holly Street
Columbia, South Carolina 29205
803 256 2017
plh.cola@att.net

Kenneth Anthony
PO Box 3565
Spartanburg, South Carolina 29304
803 582 2355
kanthony@anthonylaw.com

Attorneys for Appellant

RECEIVED
MAY 20 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 2013-002415

Brook Waddle,
Appellant,

v.

South Carolina Department of Health and Human Services
Respondent.

BRIEF OF APPELLANT

Patricia Logan Harrison
611 Holly Street
Columbia, South Carolina 29205
803 256 2017
plh.cola@att.net

Kenneth Anthony
PO Box 3565
Spartanburg, South Carolina 29304
803 582 2355
kanthony@anthonylaw.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND REGULATIONS

STATE CASES

STATE STATUES AND REGULATIONS

OTHER STATE CASE

I. Statement of Issues on Appeal.

1. The hearing officer and the lower court exceeded their authority and erred as a matter of law by dismissing Appellant's request for a fair hearing in violation of 42 C.F.R. 431.223, because Appellant did not request dismissal in writing and she did not fail to appear at a scheduled hearing.

2. The hearing officer and the lower court exceeded their authority and violated Appellant's statutory rights contained at 42 U.S.C. 1396a(a)(3) and her constitutional right to due process guaranteed in the United States Constitution by refusing to provide an evidentiary hearing, instead basing her decision on evidence not introduced at an evidentiary hearing in violation of 42 C.F.R. 431.244(a).

3. The hearing officer and the lower court violated 42 C.F.R. 431.240 by ignoring Appellant's request for an independent medical assessment of the need for the oximeter cable, which should have been provided at the expense of the State, because the hearing officer considered it necessary to have a medical assessment other than that of the individual who made the original determination.

4. The hearing officer and the lower court exceeded their authority and violated Appellant's constitutional due process rights and the clear and unambiguous notice requirements of 42 C.F.R. 431.210 which require a written notice that (1) explain the agency's reason for denying payment for the oximeter cable and (2) identify the specific regulation or change in law that supported the agency's decision not to pay for the cable.

5. DHHS has violated the Americans with Disabilities Act by failing to provide the reasonable accommodations of paying for an oximeter cable that is needed to allow Appellant to remain in the least restrictive setting and Respondent failed to meet its burden under the ADA of proving that paying for the oximeter cable would fundamentally alter the State's system.

II. Standard of Review.

This Court may reverse or modify the agency's 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 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.

"Statutory interpretation is a question of law." *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct.App.2007). This court may decide matters of law with no particular deference to the lower court. *Pressley v. REA Constr. Co.*, 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct.App.2007). Particularly, in a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9 ; S.C.Code Ann. §§ 14-3-320 and -330 (1976 & Supp.2005), and S.C. Code Ann § 14-8-200 (Supp.2005)); *Osprey, Inc. v. Cabana Ltd. Partnership,*

340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); *Clark v. Cantrell,* 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Sloan v. South Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (S.C. 2006).

III. Statement of the Case.

The subject of this appeal is DHHS' January 9, 2013 denial of payment for an oximeter cable. R. 155, 159. In 2007, Appellant commenced an appeal alleging that DHHS failed to provide necessary medical services and equipment and those proceedings have been ongoing in the Executive Branch for more than seven years. The lengthy history of those proceedings is described in *Waddle v. DHHS*, DHHS Order dated November 19, 2013 at 1 to 3. A final state administrative order that is reviewable by the Judicial Branch has never been issued in that appeal that is now more than seven years old.[1]

But, while Appellant's 2007 appeal was pending at DHHS and before the

---

[1] DHHS filed a motion to reconsider which was denied by the hearing officer in that 2007 appeal. *Waddle v DHHS*, Order of Elizabeth Hutto dated December 23, 2013. That appeal is presently pending in the Administrative Law Court.

The hearing officer was not satisfied with this Response. R. 151. She "extended the due date" until April 2, requiring Appellant to provide documentation of the medical necessity for the oximeter cable. Id. But Appellant had asked the hearing officer to provide a medical assessment and a federal regulation required her to do so at government expense if she felt that such assessment was necessary. Then, instead of scheduling a hearing, on April 4, 2013, the DHHS hearing officer issued an order dismissing Brook's appeal. R. 147. The hearing officer dismissed Appellant's appeal without responding to her request for an independent medical assessment. R. 147-154.

Appellant filed a notice of appeal in Administrative Law Court and filed an initial brief. ALC Brief of Appellant. R. 58. Instead of filing a brief, as required by SCALC Rule 37, Respondent filed a Motion to Dismiss in the Administrative Law Court. R. 61. ALC Motion to Dismiss and ALC Order dated October 11, 2013 at 4. To the knowledge of counsel neither the Rules applicable to "Matters Heard on Appeal from Final Decisions of Certain Agencies" nor the Administrative Procedures Act authorize the Administrative Law Court to dismiss a case based on such a motion, except for ALC Rule 38 which applies only to a party failing to comply with the ALC's Rules. ALC Rules 33 to 41. But there is no allegation in this case that Appellant failed to

comply with any rule of the Administrative Law Court. That court, as an Executive Branch agency, is obligated to comply with its own rules requiring the State to file a brief in this case and to comply with federal law in the administration of the Medicaid program. 42 C.F.R. 431.223 prohibits the dismissal of a fair hearing appeal by any state entity without providing an evidentiary hearing where the appellant has an opportunity to present witnesses and to cross examine adverse witnesses, except where the recipient requests dismissal in writing or fails to appear at a scheduled hearing.

The Administrative Law Court improperly dismissed Appellant's appeal without requiring DHHS to file a brief meeting the requirements of ALC Rule 37. R. 2. The ALC order dismissing Appellant's appeal was received by Appellant's counsel on October 15, 2013. Appellant filed this appeal in the South Carolina Court of Appeals on November 12, 2013. R. 60.

IV. Statement of the Law

Medicaid is a "cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). The federal and state

governments share the cost of Medicaid, but each state government administers its own Medicaid plan. *See Conn. Dep't of Soc. Servs. v. Leavitt,* 428 F.3d 138, 141 (2d Cir.2005). State Medicaid plans must, however, comply with applicable federal law and regulations. *Doe v. Kidd I,* 501 F.3d 348, 351 (4th Cir. 2007) citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). ("Once a state elects to participate in the program, it must comply with all federal Medicaid laws and regulations." Id.) *See also* 42 U.S.C. § 1396c; 42 C.F.R. § 430. Any state that elects to participate in the Medicaid program must designate "a single State Agency" to administer— or to supervise the administration of— the state's Medicaid plan. *See* 42 U.S.C. § 1396a(a)(5). In South Carolina, the South Carolina Department of Health and Human Services (DHHS) is the Single State Agency responsible for the administration of the program. *Doe v. Kidd I* at 351. Although the State agency may delegate to other entities the performance of certain responsibilities, *see* 42 C.F.R. § 431.10(e), the State agency must (1) "[h]ave methods to keep itself currently informed of the adherence of local [entities] to the State plan provisions and the agency's procedures for determining eligibility," and (2) " [t]ake corrective action to ensure their adherence," 42 C.F.R. § 435.903.

The Medicaid Act requires that states electing to participate in the Medicaid program must grant "an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 1396a(a)(3).

The Code of Federal Regulations requires explicit information to be contained in notices provided pursuant to 42 U.S.C. 1396a(a)(3). The notice must be in writing and it must contain (1) the reasons for the intended action; and (2) the specific regulations that support, or the change in federal or state law that requires the action. 42 C.F.R. 431.210(b) and (c). Where such notice is not provided at least 10 days before the adverse action, services must not be reduced or terminated pending the fair hearing decision. 42 C.F.R. 431.211 and 431.230. Services must be reinstated where advance notice meeting these requirements is not provided. 42 C.F.R. 431.231

A hearing on the merits must be provided to any applicant who requests it because she believes the agency has taken an action erroneously or where a claim is denied or not acted upon with reasonable promptness. 42 C.F.R. 431.220. States are prohibited from dismissing a fair hearing appeal without providing an evidentiary hearing except in two extremely limited circumstances.

42 C.F.R. 431.223. One is where the recipient withdraws the request in writing, and, two, where the participant fails to appear at a scheduled hearing without good cause. Id.

CMS regulations require the hearing officer to base decisions "exclusively on evidence introduced at the hearing." (Emphasis added.) 42 C.F.R. 431.244(a). The decision must identify the regulations supporting the decision, the reasons for the decision and the supporting evidence (which must have been introduced at the hearing). 42 C.F.R. 431.244(d) and (e). The Medicaid recipient must be allowed to bring witnesses to the evidentiary hearing, to present argument without undue interference and to question or refute testimony or evidence. 42 C.F.R. 431.242. The recipient must be given an opportunity to confront and cross-examine adverse witnesses, which simply cannot occur when a hearing is not provided. 42 C.F.R. 431.242(e).

42 C.F.R. 431.244(f) requires that the State agency "must take final administrative action ... [ordinarily, within 90 days" of the date a fair hearing is requested. *See* 42 C.F.R. § 431.244(f)(1)(ii) (" regulation"). In *Shakhnes v. Berlin*, the Second Circuit held that:

> ...the regulation's 90-day requirement 'merely further defines or fleshes out the content' of the right to 'an opportunity' for Medicaid fair

hearings, such that Plaintiffs have a right— enforceable under § 1983— to final administrative action "[ordinarily, within 90 days" of their request, *see* 42 C.F.R. § 431.244(f).

689 F.3d 244, 254 (2d Cir. 2012). That court held that:

> We further conclude that the right to an opportunity for Medicaid " fair hearings" includes a right to a decision following such hearings. That being so, we have little difficulty concluding that the regulation's 90-day requirement " merely further defines or fleshes out the content of that right." *See Harris,* 127 F.3d at 1009.

Id. at 256.

In addition to the specific requirements contained in 42 C.F.R. 431.200 et. seq., the state's Medicaid fair hearing system must be in compliance with all of the due process requirements the United States Supreme Court set forth in *Goldberg v. Kelly,* 397 U.S. 254 (1970). As the Second Circuit discussed in *Shakhnes*:

> ...*Goldberg* says that "*the decisionmaker's conclusion* ... must rest solely on the legal rules and evidence adduced at the hearing," and that " *the decision maker should state the reasons for his determination and indicate the evidence he relied on.* " *Goldberg,* 397 U.S. at 271, 90 S.Ct. 1011 (emphasis added). In addition, the *Goldberg* Court emphasized that " an impartial decision maker is essential." *Id.* We see little reason why this would be so unless the right to a fair hearing includes the right to a decision.

Supra at 256.

In addition to meeting all of the requirements of the Medicaid Act, DHHS is required by the Americans with Disabilities Act (ADA) and *Olmstead*, as well

as state law, to provide services in the least restrictive environment. *Doe v. Kidd, 501* F.3d 348 (4th Cir. 2007), citing *Olmstead v. L.C.* 527 U.S. 581 (1999); S.C.Code Ann. § 44-20-20 (2006). The United States Supreme Court has determined that the burden of proving whether an action would cause a fundamental alteration under the ADA lies with the State. *Olmstead* at 603. Once a qualified individual proves his *prima facie* case in an action brought under the ADA, i.e. demonstrates that (1) he is a qualified person with disabilities, as defined in the ADA, (2) the State has determined that community based treatment is appropriate and (3) he does not oppose living in the community, then the burden shifts to the State to prove that providing the requested service or equipment would require a "fundamental alteration" in the nature of its programs. *Olmstead,* 527 U.S. at 604.

V. Argument

1. **The hearing officer and the lower court exceeded their authority and erred as a matter of law by dismissing Appellant's request for a fair hearing in violation of 42 C.F.R. 431.223, because Appellant did not request dismissal in writing and she did not fail to appear at a scheduled hearing.**

Federal regulations clearly and unambiguously specify very limited circumstances in which a State may dismiss a Medicaid recipient's fair hearing appeal. The applicable regulation contained at 42 C.F.R. 431.223, titled "Denial

or dismissal of request for a hearing" provides that:

> The agency may deny or dismiss a request for a hearing if-
> (a) The applicant or beneficiary withdraws the request in writing; or
> (b) The applicant or beneficiary fails to appear at a scheduled hearing without good cause.

The hearing officer's order fails to mention or rely upon this, or any other federal statute or regulation. Likewise, the Administrative Law Court failed to address 42 C.F.R. 431.223, which applies to it as an Executive Branch agency of the State. Instead, the hearing officer relied upon a state regulation, DHHS Regulation 126-154 and the Administrative Law Court improperly upheld that decision. DHHS Regulation 126-154 provides that:

> A Hearing Officer has the authority, among other things to: direct all procedures; issue interlocutory orders; schedule hearings and conferences; preside at formal proceedings; rule on procedural and evidentiary issues; require the submission of briefs and/or proposed findings of fact and conclusions of law; call witnesses and cross-examine any witnesses; recess, continue, and conclude any proceedings; dismiss any appeal for failure to comply with requirements under this Subarticle.

The hearing officer exceeded her statutory authority by relying upon a state regulation which contradicts not only the clear and unambiguous regulation of CMS, the federal agency authorized by Congress to administer the Medicaid program, but it also conflicts with the agency's own regulation which states:

§ 126-399. Conflict Between State and Federal Regulations

When the requirements of the State and the Federal regulations are not in agreement, the requirements of the Federal regulations shall prevail.

In 42 U.S.C. 1396a(a)(3), Congress clearly and unambiguously mandated that DHHS must:

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

Federal regulations contained at 42 C.F.R. 431.223 authorize the State to deny or dismiss a hearing under limited circumstances, none of which that are not present in this case:

§ 431.223. Denial or dismissal of request for a hearing

The agency may deny or dismiss a request for a hearing if-

(a) The applicant or beneficiary withdraws the request in writing; or
(b) The applicant or beneficiary fails to appear at a scheduled hearing without good cause.

This requirement is not complicated or hard to understand. It is not rocket science. The State must simply provide the recipient an evidentiary hearing meeting the requirements clearly set forth in 42 C.F.R. 200 et seq., then make a decision based on the evidence presented at the hearing. Likewise, 42 C.F.R. 431.244(a) could not be more clear in requiring that "Hearing recommendations

or decisions must be based exclusively on evidence introduced at the hearing." When a Medicaid participant has not been provided an evidentiary hearing, it is impossible to meet the federal requirement that the decision must be based entirely on evidence introduced at the hearing. Appellant did not request, in writing or otherwise, that her appeal be dismissed and she never failed to appear at a scheduled hearing - the hearing officer refused to even schedule a hearing.

Appellant's rights have been prejudiced by Respondent's violations of federal law, the hearing officer and the Administrative Law Judge exceeded the statutory authority of the Executive Branch and the decision to dismiss Appellant's appeal was made upon unlawful procedure. The act of dismissing Appellant's "fair hearing" was arbitrary and capricious and these Executive agencies denied Appellant's constitutional right to due process, as will be discussed in more detail below. Appellant requests that this honorable Court reverse the decision of these Executive Branch agencies and that they be required to comply with federal law in the administration of the Medicaid program.

Appellant requests an order prohibiting Respondent from terminating services prior to providing an evidentiary hearing, paying for the oximeter cable and finding that she is the prevailing party in this appeal. Appellant requests a

finding that the State acted without substantial justification and that the court award legal fees pursuant to S.C. Code of Laws 15-77-300. Such an award is appropriate and just in this case because Appellant contested state action where the agency acted without substantial justification in pressing its claim to deny critical medical equipment by dismissing Appellant's request for a fair hearing and there are no special circumstances that would make the award of attorney's fees unjust. Since the DHHS hearing officer and the Administrative Law Judge willingly and knowingly refused to provide an evidentiary hearing and, in any event, it is unclear whether either Executive tribunal has the authority to award or deny fees under S.C. Code of Laws 15-77-300, Appellant requests that this Court set forth in its order the correct procedure in Medicaid appeals for awarding fees pursuant to that statute.[2]

2. **The hearing officer and the lower court exceeded their authority and violated Appellant's statutory rights contained at 42 U.S.C. 1396a(a)(3) and her constitutional right to due process guaranteed in the United States Constitution by refusing to provide an evidentiary hearing, instead basing their decisions on evidence not introduced at an evidentiary hearing in clear violation of 42 C.F.R. 431.244(a).**

Elizabeth Hutto, who is now the Deputy Director of DHHS, in charge of

---

[2] S.C. Code § 15-77-310 provides that "The party shall petition for the attorney's fees within thirty days following final disposition of the case. The petition must be supported by an affidavit setting forth the basis for the request." But it does not specify what "court" has the authority to award fees in an action brought for violation of the Medicaid Act.

Eligibility, Enrollment and Member Services, was the hearing officer who heard Appellant's appeal in October of 2012 and issued orders on November 19, 2013 and December 23, 2013. *Waddle v. DHHS, supra.* Ms. Hutto described in her November 19, 2013 order the due process rights of Medicaid participants as follows:

> Medicaid recipients have due process rights prior to an adverse action impacting their Medicaid benefits. 42 C.F.R. § 431.200 et seq.; *Goldberg v. Kelly*, 397 U.S. 254 (1970)...Federal regulations require that the notice of adverse action must explain the beneficiary's hearing rights, the right to representation, and the rights to continued benefits, and musts be sent 10 days before an adverse action. 42 CFR § 431.206, 431.210, 431.211, 431.230.

Waddle v. DHHS, DHHS Order dated November 19, 2013 at 25. That order describes the procedure that DHHS must follow to continue benefits during an appeal. Id. at 26. She found that DHHS "violated Petitioner's due process rights in enforcing its waiver reductions against her during the pending appeal." Id. at 30.

As discussed above in this brief, 42 C.F.R. 431.244(a) required the hearing officer and the Administrative Law Court to base their decisions exclusively on evidence introduced at the hearing. Those decisions simply could not possibly have been based exclusively on evidence presented at a hearing - without providing a hearing. Appellant's constitutional rights to due process

were egregiously denied by the agency and the Administrative Law Court. The agency and the Administrative Law Court violated the Supremacy Clause and the Fourteenth Amendment of the United States Constitution by refusing to provide an opportunity for Appellant to be heard on her claim.

The United States Court of Appeals for the Fourth Circuit has addressed the issue of the requirements for notice and a hearing under the Medicaid Act and that Court's opinion is binding on DHHS and the Administrative Law Court in Medicaid appeals. In *K.C., by and through Africa H. v. Shipman,* the district court granted a preliminary injunction to severely disabled plaintiffs on their claims that the North Carolina State Medicaid Agency violated their rights under the Medicaid Act and the Due Process Clause of the Fourteenth Amendment when the State reduced their health care services without providing notices meeting the requirements of 42 C.F.R. 431.210 and an opportunity for a hearing. Case No. 12-1575 (4th Cir. May 10, 2013). The district court ruled in that case that plaintiffs were entitled to the notice and appeal rights provided for by the Medicaid statute and the Fourteenth Amendment and that the defendants had failed to comply with those requirements. Id. at 111. (In district court, the case was captioned *L.S. v. Delia,* 5:11-CV-354-FL (NCED March 29, 2012)) The United States Court of Appeals for the Fourth Circuit denied the State's

appeal of the district court's decision, upholding the findings of the district court judge. Case No. 12-1575 (4th Cir. May 10, 2013).

The district court in that case recognized that: "The Medicaid Act requires participating states and managed care entities to provide each Medicaid recipient with adequate written notice and an opportunity for an impartial hearing before services are denied, reduced or terminated. §§ 1396a(a)(3) and 1396u-2(a); 42 C.F.R. §§ 431.200 and 438" and that federal approval of the State's Medicaid Plan "specifies that defendant Delia must provide the opportunity for a fair hearing pursuant to federal regulations, 42 C.F.R. § 431.200 subpart E, to every waiver participant whose services are denied, suspended, reduced, or terminated. 42 C.F.R. § 431.200(a)." In ruling that the defendants violated the Medicaid participants' rights under federal law and due process, the North Carolina federal district court held that:

> ... plaintiffs were entitled to the notice and appeal rights outlined in the Medicaid regulations, cited above, as well as under general principles of due process. See O'Bannon v. Town Court Nursing Ctr. , 447 U.S. 773, 786-87 (1980); Goldberg v. Kelly , 397 U.S. 254, 269-71 (1970); McCartney ex rel. McCartney v. Cansler , 608 F.Supp.2d 694, 699 (E.D. N.C. 2009).

Id. The district court in North Carolina also ruled that:

> ...plaintiffs are likely to succeed on the merits on their claims that the same actions violated plaintiffs' due process rights under the Fourteenth

> Amendment. Plaintiffs have set forth the applicable law in detail, including the Supreme Court decision in Goldberg, which required that welfare recipients have timely and adequate notice detailing the reasons for proposed termination, that the opportunity to be heard be tailored to the capacities and circumstances of those to be heard, an opportunity to confront and cross-examine the witnesses relied on by the opposing side, and an impartial decision maker. 397 U.S. at 268-71.

Id. Further, the district court recognized that: "Additionally, the public interest always lies with upholding the law and having the mandates of the Medicare Act and due process enforced." Appellant's case also presents a matter of great public concern and these violations are bound to continue unchecked unless this Court upholds the due process rights of severely disabled Medicaid waiver participants who do not have access to the arsenals available to the State.

In the present case, it is undisputed that the hearing officer and the Administrative Law Court refused to grant Appellant's request for a fair hearing. The requirement to provide an evidentiary hearing is clear and unambiguous and there is no doubt but that the agency and the Administrative Law Court knowingly ignored Appellant's constitutional rights to due process by failing to provide the requisite hearing. This is not an isolated case.

These same actors violated the right of Peter Brown to an evidentiary hearing through similar diversionary tactics and this Court ordered DHHS to provide Peter with a hearing on the merits of his case in 2011. *Peter Brown v.*

DHHS, 393 S.C. 11, 709 S.E.2d 701, 705. (S.C.App. 2011). But, two years later, DHHS again dismissed Peter's appeal over his objections without providing an evidentiary hearing and his appeal is pending in this court and in an action filed in the federal district court. *Peter B. v. Sanford*, Case No. 6:10-767 (DCSC March 7, 2013).

The agency should be enjoined from reducing Appellant's services (including durable medical equipment) without providing an evidentiary hearing required by 42 U.S.C. 1396a(a)(3), now and in the future, as these violations are subject to repetition, yet these Executive Branch agencies have evaded review by the Judicial Branch.

For the reasons set forth above, Appellant prays for an order enjoining DHHS from reducing or terminating services (including durable medical equipment) prior to providing proper notice and an evidentiary hearing on the merits and finding that she is the prevailing party in this appeal. Appellant prays for an order finding that the State acted without substantial justification and for an award of legal fees.

3. **The hearing officer and the lower court violated 42 C.F.R. 431.240 by ignoring Appellant's request for an independent medical assessment of the need for the oximeter cable, which should have been provided at the expense of the State, because the hearing officer considered it necessary to have a medical assessment other than that of the**

individual who made the original determination.

On March 27, 2013, ignoring Appellant's March 19, 2013 written request for an independent medical assessment, the hearing officer improperly placed the obligation to provide "documentation of the medical necessity of the cable" on Appellant. The hearing officer shifted to the Appellant, who cannot lift her arms or move her legs and cannot even speak, the burden of obtaining, at the recipient's expense, an independent medical assessment in violation of 42 C.F.R 431.240(b). That clearly violated that federal regulation, which requires that:

> If the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, and *if the hearing officer considers it necessary to have a medical assessment* other than that of the individual involved in making the original decision, such a medical assessment must be obtained at agency expense and made part of the record. (Emphasis added.)

This federal regulation is not difficult to understand and it places the burden on the State to obtain and pay for an independent medical assessment where, as in this case, (1) the hearing involves medical issues such as those concerning a diagnosis or a review team's decision, and (2) the hearing officer considers another medical assessment to be necessary. With those conditions met, the federal regulations provide that the assessment must be obtained at agency expense and must be made part of the record. Instead, the hearing officer

dismissed Appellant's appeal in violation of a multitude of federal regulations and Appellant's due process rights. The hearing officer erred as a matter of law and exceeded her authority by placing this burden on Appellant, a severely disabled quadriplegic Medicaid participant who struggles each and every day just to stay alive and breathing after DHHS illegally and repeatedly reduced her services while her 2007 appeal has been pending for seven years. In her November 19, 2013 order, now Deputy Hutto (who was then a hearing officer) described Appellant as follows:

> The medical records review conducted by the Respondent and the testimony of witnesses for both parties indicate that the Petitioner is quadriplegic, who relies upon a tracheostomy to breathe, and suffers from several complicated medical conditions including recurrent pneumonia, seizures and skin break down. Due to her condition, she is at continued risk for infection. She requires constant care and cannot be left alone

Waddle v. DHHS, Order dated November 19, 2013 at 24.

42 C.F.R. 431.240 means something. This requirement was not included in the federal regulations for no reason at all. It was included in those regulations by the federal agency authorized by Congress to administer the federal Medicaid program after publication in the federal register and opportunity for public comment. That federal regulation says that the hearing officer "must" obtain an independent medical assessment, it does not say "may."

CMS understood that impoverished Medicaid recipients do not have money to pay for expert opinions and that federal agency instructed the States that when a hearing officer determines that a medical assessment is necessary, the hearing officer must obtain the assessment at State expense. This responsibility cannot be met by a hearing officer sending an email saying that she did not like Appellant's Response to the hearing officer's (illegal) interlocutory order.

The intentional violation of this requirement is a matter of great public concern. Medicaid waiver participants are the most disabled and vulnerable citizens of our state and they must, by definition, be impoverished in order to qualify for Medicaid benefits. This violation is subject to repetition, yet it has evaded review again and again, where Appellant's services have been reduced without medical justification. Appellant requests an order requiring DHHS to obtain an independent medical assessment at government expense when requested by a recipient prior to terminating or reducing services in this and all future Medicaid appeals in which the hearing officer determines that an additional medical assessment is needed.

Appellant prays for an order finding that she is the prevailing party on this issue, that the State acted without substantial justification and for legal fees.

4. **The hearing officer and the lower court exceeded their authority and violated Appellant's constitutional due process rights and the clear and unambiguous notice requirements of 42 C.F.R. 431.210 which require a written notice that (1) explain the agency's reason for denying payment for the oximeter cable and (2) identify the specific regulation or change in law that supported the agency's decision not to pay for the cable.**

Respondent's notice was defective in this case and this violation of 42 C.F.R. 431.210 is subject to repetition, yet this violation also evaded review again and again with this same Appellant. Deputy Hutto of DHHS (who was then a hearing officer) found in her Order issued on November 19, 2013 the following violations:

> Referring to the notice dated March 14, 2007, Ms. Hutto found that "This notice did not include any reference to a supporting statute or regulation as a basis for this decision nor did the notice provide any information regarding the continuation of benefits pending an appeal. Order at 7.
>
> As to the notice dated March 29, 2007, Ms. Hutto stated: "Again, no statute or regulations were cited on this notice not was there any justification or analysis regarding whether the cost for this care would be greater than the cost of a nursing home...This notice made no mention of continued benefits pending appeal."
>
> According to that order, the denial notices sent to Appellant upon discharge from the hospital in 2007 "were improper as they did not contain the statutes or regulations the actions were based upon nor did they provide instruction on how to appeal the negative action. Order at 22. The reasons for the denials were "erroneous" according to the uncontradicted testimony of the DHHS witness. Id. While Appellant's appeal was pending, Appellant's "services were improperly reduced several times" and these reductions "occurred without notice and the

opportunity to appeal." Id.

> According to the hearing officer, in July, 2008, when DHHS reduced Appellant's benefits while her 2007 appeal was pending: "There is no notice in the record regarding this service reduction." Order at 9 and 22.
>
> Appellant's services were again reduced "improperly" in July, 2009, while her 2007 appeal was pending. Id. at 11. Hearing Officer Hutto stated in her November 19, 2013 order that: "There is no notice in the record regarding this reduction." Order at 9 and 10. The hearing officer found that "The Respondent again failed to provide proper notice." Id. at 22.

Waddle v. DHHS, supra.

Appellant requests an order finding that Respondent's notice was defective, these violations have been longstanding and that DHHS should be enjoined from terminating or reducing services without providing written notices meeting all of the requirements of 42 C.F.R. 431.210. Appellant requests that this Court rule that Appellant is the prevailing party on this issue, that the state Executive Branch tribunals and DHHS were not substantially justified in failing to provide proper notice and that Appellant's legal fees be paid pursuant to S.C. Code of Laws 15-77-300.

5. **DHHS has violated the Americans with Disabilities Act by failing to provide the reasonable accommodations of paying for an oximeter cable that is needed to allow Appellant to remain in the least restrictive setting and Respondent failed to meet its burden under the ADA of proving that paying for the oximeter cable would fundamentally alter the State's system.**

Respondent is required by the ADA and *Olmstead*, as well as state law, to provide services in the least restrictive environment. *Doe v. Kidd, 501* F.3d 348 (4th Cir. 2007), citing *Omstead v. L.C.* 527 U.S. 581 (1999); S.C.Code Ann. § 44-20-20 (2006). The United States Supreme Court has determined that the burden in on the State to prove that a requested accommodation would cause a fundamental alteration under the ADA once the disabled person has met her *prima facie* case by demonstrating that (1) she is a qualified person with disabilities, as defined in the ADA, (2) the State has determined that community based treatment is appropriate and (3) she does not oppose living in the community. At that point, the burden then shifts to the State to prove that providing the accommodation would require a "fundamental alteration" in the nature of its programs. *Olmstead,* 527 U.S. at 603 and 604. The State has not met its burden.

There can be no question that Appellant has clearly presented a *prima facie* case demonstrating that she is a disabled person, that the State has determined that her receiving services in the community is appropriate and that she does not oppose receiving services in the community - indeed that is her clear choice. The State has totally failed to meet its burden of proving that providing Appellant with an oximeter cable would fundamentally alter the

State's programs and that providing this equipment would be inequitable "given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons" who are disabled.

In discussing the meaning of "fundamental alteration," the plurality in *Olmstead* instructed the States that:

> Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

Id. at 604. One way that the State may meet its burden by demonstrating that it has made reasonable modifications to its programs is to demonstrate that it has a comprehensive or effectively working plan to provide services in less restrictive settings:

> If, for example, the State were to demonstrate that it had *a comprehensive, effectively working plan* for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.

Id. at 605-606 (emphasis added). But, unlike most states, South Carolina does not have a comprehensive or effectively working *Olmstead* plan.

Not only has the State failed to prove that providing the oximeter cable would cause a fundamental alteration in its programs, it is obvious from the protracted litigation in this case in which the State has denied Appellant's simple request for a fair hearing that State taxpayers have spent far more money defending an indefensible position than they would have spent paying for the needed device. As Judge Baxley found in *T.R. v. South Carolina Department of Corrections*:

> We are now eight years into this litigation.[3] Rather than accept the obvious at some point and come forward in a meaningful way to try and improve its mental health system, Defendants have fought this case tooth and nail - on the facts, on the law, on the constitutional issues, portraying itself as beleaguered by the burdensomeness of the Plaintiff's discovery, and generally harrumphed by the invasive nature of Plaintiff's counsel's tactics and strategies.
>
> ...
>
> The hundreds of thousands of tax dollars spent defending this lawsuit, at trial, and most likely now on appeal, would be better expended to improve the mental health services delivery at SCDC.

T.R. v. South Carolina Department of Corrections, Case No. 2005-CP-2925 at 45, Richland County Court of Common Pleas, January 8, 2014.

The same obstructionist tactics exhibited by the State's attorneys in *T.R.* have been used by Executive Branch state agencies in Appellant's case to keep her from receiving a simple device that she needs to measure her oxygen supply.

---

[3] Appellant's appeal entering into its eighth year, having been filed in 2007.

In *People v. Murray*, the conviction of Michael Jackson's personal physician for manslaughter was recently upheld by the California Court of Appeals, in part because the jury found that he failed to use an oximeter to properly monitor Mr. Jackson's vital signs. Case No. B237677 (Cal.Ct.Ap. January 15, 2014). That court reported that: "According to expert medical testimony presented at trial using a proper pulse oximeter could have saved Mr. Jackson's life." Id. at fn 8.

It is not inconsequential that as a condition of receiving 70% matching federal funding to operate the Medicaid program in South Carolina, DHHS has assured the federal government that it will provide necessary safeguards to protect the health and welfare of Medicaid waiver participants like Appellant. 42 C.F.R. 441.464. The failure to provide this device and the patterns and practices complained of in Appellant's 2013 complaint (R. 152, 159) has squarely placed her at risk of insitutionalization. *Peter B. v. Sanford,* Case No. 6:10-cv-00767, Report and Recommendation, November 24, 2011.

Appellant requests an order finding that Respondent is in violation of the Americans with Disabilities Act by failing to prove that providing the requested cable is not a reasonable accommodation and that it would fundamentally alter the State's programs for DHHS to provide the cable, that Appellant is the prevailing party on this issue, that Respondent was not substantially justified in

denying payment for this device and that she is entitled to an award of legal fees pursuant to S.C. Code 15-77-300.

VI. Conclusions

However complicated and convoluted other provisions of the Medicaid Act may be, federal law is quite clear and unambiguous that an evidentiary hearing must be granted to any participant who requests one. Appellant has shown that her statutory and constitutional rights to due process have been violated. In addition to demonstrating other violations of the Medicaid Act described herein, Respondent has failed to prove that paying for the oximeter cable would fundamentally alter the State's programs and Appellant is entitled to an order finding that Respondent has violated the Americans with Disabilities Act. Appellant requests an order granting the relief requested in her Brief. Appellant prays for an order finding that she is the prevailing party, that the State was not substantially justified in failing to provide the oximeter cable and that she is entitled to legal fees pursuant to S.C. Code 15-77-300, along with instructions for claiming those fees.

Respectfully submitted,

Patricia Logan Harrison
611 Holly Street
Columbia, South Carolina 29205
plh.cola@att.net

Kenneth Anthony
PO Box 3565
Spartanburg, South Carolina 29304
803 582 2355
Attorneys for Appellant
kanthony@anthonylaw.com

May 28, 2014

Final May 18,2015

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Administrative Law Court
Ralph K. Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2013-002415

Brook Waddle, ... Appellant,

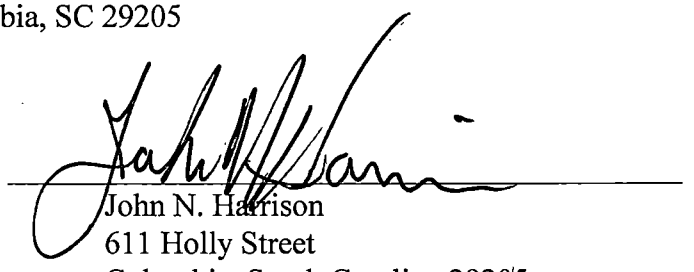
v.

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

CERTIFICATE OF SERVICE

John N. Harrison certifies that he has served the single-sided *Brief of Appellant* and *Reply Brief of Appellant* in the above captioned case by hand delivery to the following on June 12, 2015:

Damon C. Wlodarczyk, Esq.
Riley Pope & Laney, LLC
2838 Devine Street
Columbia, SC 29205



John N. Harrison
611 Holly Street
Columbia, South Carolina 29205
(803) 256-2017

PATRICIA L. HARRISON
ATTORNEY AT LAW
611 HOLLY STREET
COLUMBIA, SOUTH CAROLINA 29205

TELEPHONE (803) 256-2017 FAX (803) 256-2213

June 12, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box11629
Columbia, South Carolina 29211

RE: **Brook Waddle v. SC Department of Health and Human Services**
Appellate Case No. 2013-002415
SCCA Notices dated June 5, 2015

Dear Ms. Kitchings:

Enclosed are 15 single-sided copies of the following (one unbound):

1. *Brief of Appellant*
2. *Reply Brief of Appellant*

We apologize for the inconvenience of the printer's error in printing the brief and for the confusion in refiling the Record on Appeal. Also enclosed is a *Certificate of Service*. Please clock and return the copies of this letter and the *Certificate of Service.*

Sincerely,

Patricia Logan Harrison

Enclosures

c: Damon C. Wlodarczyk, Esq.