STATE OF SOUTH CAROLINA

In the 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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RETURN TO MOTION TO VACATE ORDER AND SUPPLEMENT THE RECORD

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- RETURN TO MOTION TO VACATE ORDER AND TO SUPPLEMENT THE RECORD

Background

The Petitioner in this matter, is an individual, currently receiving a multitude of services under the Medicaid ID/RD Waiver.[1] He was eligible for and receiving services under the Waiver before any of the appeals referenced in the Petitioner's Motion. In 2010, the renewed waiver contained limitations on services which impacted the Petitioner and he appealed the imposition of the limits on his services. The Court of Appeals found that the limits could not be imposed if they would place the Petitioner at risk of institutionalization and ordered the Department to assess the Petitioner's need for services to prevent institutionalization. Of the two (2) remaining issues (notice and promulgation), the Supreme Court granted certiorari on the sole issue of whether the waiver criteria had to be promulgated as regulations before they could be enforced. At oral argument on the promulgation issue, the progress on the assessment of the Petitioner's needs ordered by the Court of Appeals became a side issue. At the request of the Court, the Respondent proffered documents showing the status of the assessment. The Petitioner alleges fraud and misrepresentation in the Respondent's characterization of the progress of the assessment and believes that such misconduct requires a rehearing of the promulgation issue.

Reasonable Promptness

[1] See the Assessment sent to the Court on November 20, 2015. Currently the Petitioner is receiving about 118 hours of paid care per week, in addition to equipment, supplies, and coverage of medical care. .

The Petitioner further asserts that the Respondent is violating the "reasonable promptness" provision of the Medicaid Act by not providing services he needs which have been delayed while this appeal has been in progress, since 2010.

In Doe v. Kidd, cited by Petitioner, the court found an individual right under §1983 to enforce the "reasonable promptness" language in 42 CFR §435.911 435.930. Kidd does not stand for the proposition that the Medicaid applicant receive the services he wants or even the services his doctor orders with reasonable promptness. It just means that he should receive the services agreed upon by the state. see Moore ex rel. Moore v. Reese, 637 F.3d 1220 (11th Cir. 2011) in which the court found that the treating physician's determination could be reviewed by the State, which had an interest in ensuring that only medically necessary services were provided. We do realize that upon the remand ordered in the circuit court case, the district court roundly chastised the State's experts for their stance, See Moore by Moore v. Cook, 2012 WL 1380220 (N. D. Ga., April 20, 2012). Nevertheless, the holding of the circuit court cannot be denied: that the orders of the attending physicians are not dispositive, and the State has a right to review the attending physician's orders to ensure that only necessary services are covered by the Program.

Other Issues

In addition the Petitioner asserts that the provisions of the 2009 appeal were never effectuated, proper notice was not given for the 2010 limitation, the Departments retaliated against the Petitioner by terminating him from the program in error, because

they thought he had moved out of state, and that the administrative appeal process is too long.

It appears to us that the Hearing Officer did not retain jurisdiction once she issued the Order in the 2009 case and the waiver changes intervened (January 2010), so that although the doctor's orders were considered as required by the Hearing Officer, services were limited by the new waiver. The Court of Appeal has clearly modified that position in its recent ruling on the risk of institutionalization. The notice issue was resolved by the Court of Appeals. The termination of the Petitioner's eligibility was clearly an error and did not significantly interrupt his services. We cannot deny that the administrative appeals process takes time, but would remind the Court that there should be no reduction in services during the pendency of the appeal. See, 42 CFR §431.230.

Perjury

The Petitioner asserts that alleged perjury by the Respondent's assessment team warrants a new hearing.

We assert that there was no perjury. Even if any errors or misstatements by the assessment team could be seen as perjury, which we strongly deny, the subject matter of the Motion is not related to the promulgation issue. The assessment was a side issue the Court inquired into out of concern for the Petitioner. It is not germane to the

promulgation issue.

The Assessment

The Petitioner followed the process for receiving an assessment. Therefore, the Petitioner asserts that the Respondent's attorney misled the Court into thinking that the Petitioner had failed to cooperate in obtaining an assessment.

The normal assessment of the Service Coordinator (case manager) was used to establish most of the current level of service. That assessment was supplemented by an assessment by a DDSN nurse which, in the fall of 2015, yielded another fourteen (14) hours of nursing care. The Court of Appeals ordered an assessment notwithstanding the waiver limits. The Petitioner has often complained of the lack of medical expertise in the level of service decisions made by Service Coordinators. We believed that the most effective way to accomplish the assessment was to have the State's physician and a social worker to assess the medical and social situation unconstrained by the waiver provisions. In this way, with proper authorization, there could be a peer to peer discussion regarding the need for waiver services.

The Role of CMS

The Center for Medicare and Medicaid Services (CMS) is the federal agency which oversees the Medicaid program. The Petitioner asserts that the Respondent's attorney

misled the Court by indicating that CMS had the ultimate power to enforce the Medicaid provision.

We understand that CMS has only the power to withhold and disallow funds and that CMS often defers to private efforts at enforcement. However, that does not prevent CMS from unilaterally and frequently changing its interpretation of the Medicaid provisions. 42 CFR §430.30 et seq. describes the consequences for failing to comply. Although some push back is possible, generally the State is responsive to CMS guidance in order to avoid disallowances from the State's grant. The statements at oral argument go to the shifting interpretations of CMS and the consequences of noncompliance.

Availability of the Medical Record

The Petitioner alleges that the assessment amounts to perjury because it ignores the regular assessment process and fails to reference information that was available to the team for their assessment.

Again, the level of services authorized by the regular process of going through the Service Coordinator, even with the exception authorized by the DDSN nurse do not rise to the level ordered by the attending physician. We believe that it only fair and professionally sound for the State's physician to be able to review and discuss the physicians order for waiver services. It is true that the assessment team did not access the physician notes that were sent to the DDSN nurse. This was an oversight. The notes

were in the DDSN offices, but the team was unaware of them. In retrospect the notes would have been useful in knowing for certain the diagnoses and medications and other treatments. The team's physician would still have needed to bring the information current and discuss with the attending why the Petitioner's condition warranted the waiver services ordered.

Consulting with Client

The Petitioner again mentions the reasonable promptness requirement and that failure to authorize the services ordered by the attending will mean that the some of the burden of caring for the Petitioner will fall on the mother. The Petitioner also implies that failure to inform the Director of the details of this litigation amounts to misconduct of some kind.

See above on reasonable promptness. Some of the burden of care will fall on the mother. The program is not designed to provide 24 hour a day care. See page one of the waiver document:

> Waiver services complement 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.

Just because the Director may not know the details of each particular case, does not mean that the Director has not provided general and sufficient guidance to counsel or other staff by providing guidance for handling similar cases and delegating decision making to counsel and staff.

Relief Requested by Petitioner

The Petitioner seeks an exception to the prohibition on rehearing for denial of Certiorari (SCACR 221(a)) due to alleged misstatements to the Court.

Of course we deny any attempt to mislead the Court by misstatements. We did ask for permission to contact the Petitioner's providers and have not been authorized to do so. The normal assessment process and the nurse exception has led to the current level of services. Since a physician ordered the level of waiver service sought, we thought it only fair that the state's physician be able to discuss the services requested by the attending. We have not been able to obtain authorization to do so.

Argument and Conclusion

The Petitioner reprises his complaints about fraud requiring a rehearing, requiring a new assessment process, reasonable promptness, and frequent changes in rules

We strongly deny that there was any attempt to fraudulently mislead the court. Furthermore the subject of the alleged fraud is the assessment ordered by the Court of Appeals. The Petitioner has complained that Service Coordinators do not have sufficient medical training to make level of service decisions. It is true that they are largely influenced by the waiver limits. Now, based on the Court of Appeals order, a State

physician stands ready to have a peer to peer discussion with the attending. All that is needed is an authorization. The rules have been changed by the Court of Appeals, not by the agency. The agency is attempting to work out a way to implement the change. We believe the proposed process is a logical implementation.

Respondent's Request for Relief

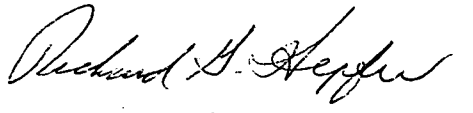
We request that the Court deny the Motion to Vacate the Order and Supplement the Record and also deny the request for a rehearing. If the Court takes jurisdiction of this matter, we respectfully request the following documents be admitted in response to the Petitioner's proffer:

1) The 2009 hearing record available;
2) Correspondence between the Respondent's counsel in the federal case and the Petitioner's counsel;
3) Evidence of interpretive changes in CMS guidance;
4) Documents regarding the context of Dr. Platt's alleged long ago documentation inconsistencies;
5) Documentation regarding the Director's delegation of decision making in these cases;
6) Documents to explain the oversight of medical records submitted to the DDSN nurse for consideration of an increase in nursing hours.

Finally, if the Court takes jurisdiction of the matter, we also respectfully request that the

Petitioner be required to provide written authorizations for the State's physician and social worker to contact the Petitioner's providers for the purpose of discussing the waiver services needed to avoid institutionalization.

Respectfully submitted,



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Columbia, SC
January 16, 2015

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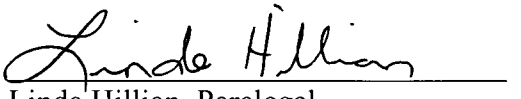
CERTIFICATE OF SERVICE

I hereby certify that I am a paralegal for the Respondent in the above-captioned matter and that on the 16th day of February, 2016, in Columbia, South Carolina, I served a copy of the forgoing Return to Motion to Vacate Order and to Supplement the Record by depositing the same in the United States Mail, postage paid addressed to:

Patricia L. Harrison
611 Holly Street
Columbia, SC 29205



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