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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case No. 2013-002415

Brook Waddle,
Petitioner,

v.

South Carolina Department of Health and Human Services
Respondent.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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I. Respondent's Counter-Statement of the Case. The denial of a physician's order for an oximeter cable is just one of many issues on appeal. As did the hearing officer, DHHS overlooks all other issues in its Counter-Statement of the Case. Return at 1 through 3. If DHHS was confused about the scope of the issues when Waddle filed her appeal in January of 2013, that confusion should have been cleared up by Waddle's timely Response to the hearing officer's "Pre-Hearing Conference Order" (Record at 157). Waddle identified the following issues in that Response:

1. Federal regulations require DHHS to base hearing decisions exclusively on evidence presented at an evidentiary hearing and the threat (and later follow through) to dismiss her fair hearing appeal violates those regulations.
2. Respondent has violated the 90 day standard of promptness for determining eligibility for services and equipment.
3. Federal regulations prohibit a hearing officer from dismissing a fair hearing appeal unless the appellant requests dismissal or fails to appear at a scheduled hearing.
4. DHHS improperly denied medically necessary equipment, supplies and services.
5. DHHS violated federal regulations that require the State to provide services in the amount, duration and scope necessary to prevent hospitalization and/or to delay institutionalization.
6. DHHS has violated the reasonable promptness mandate for providing equipment and services.
7. DHHS is in violation of the Americans with Disabilities Act and the Rehabilitation Act of 1973.
8. DHHS has violated the South Carolina Administrative Procedures Act by failing to promulgate regulations for the operation of Home and Community Based Waiver programs.
9. As documented by its own hearing officer, DHHS illegally reduced Waddle's services while her 2007 appeal was pending and has failed to provide services ordered by that hearing officer in 2013.
10. DHHS has failed to pay amounts to Waddle's mother, as ordered by the DHHS hearing officer in 2013.

11. The violation of Waddle's due process rights have been repeated and are subject to repetition, yet they have evaded review.
12. DHHS has acted with conscious indifference to Waddle's medical needs, and its officials have placed her at risk of further deterioration in her medical and physical condition.
13. DHHS violated Waddle's due process rights by requiring her to attend hearings in Columbia (rather than holding hearings in her home county), refusing to pay travel costs and costs of experts and refusing to provide an operational speech device needed for communication.

Record at 152 to 154. As authorized by 42 C.F.R. 431.240, Waddle also clearly requested in her March 19, 2013 Response an independent medical assessment. Record at 154. In that Response, Waddle unambiguously incorporated by reference "All allegations previously made by Appellant during the course of these proceedings and the appeal filed in 2007 are herein realleged." Record at 152.

Respondent's focus on the oximeter cable is nothing but a red herring intended to divert this Court's attention from the issues Waddle raised in her 2013 appeal - issues that the Executive Branch have illegally attempted to keep the Judicial Branch from resolving since 2007.

II. Petitioner's claims are not moot. The Administrative Law Judge adopted Respondent's version of the issues on appeal, finding that the one issue Respondent recognized was "sufficient to properly dispose of this case." Order at 3, footnote 6 in the Record at 4. He found that the federal questions Waddle raised below, alleging violation of the Medicaid Act, the Americans with Disabilities Act, the Rehabilitation Act and the South Carolina Administrative Procedures Act were somehow "not before the court." Order at 6, Record at 7. The Administrative Law Judge failed to even consider federal law in rendering his decision, relying solely upon state law and state cases, which are preempted by the federal law Waddle relies upon. Record at 1 to 9.

Ignoring these irregularities, applicable federal law and giving consideration only to an

affidavit not contained in the Record on Appeal prepared and filed by DHHS, the South Carolina Court of Appeals dismissed Waddle's appeal in an unpublished decision solely on the grounds of mootness. *Waddle v. DHHS*, 2016 S.C. App. Unpub. LEXIS 129. The affidavit that court relied upon to determine that Waddle's case was moot was provided to the Administrative Law Court by DHHS in 2014, after the record was closed.¹

Respondent argues on pages 4 through 7 of their Return that providing an oximeter cable after Waddle filed her appeal in the Administrative Law Court somehow mooted all of Waddle's clearly expressed federal law claims, which were ignored by the hearing officer, the Administrative Law Court and the South Carolina Court of Appeals. DHHS correctly acknowledges that the Record on Appeal it prepared and filed is void of any evidence of mootness. Return at 6. But, even through the narrow lens suggested by Respondent, Waddle's case is anything but moot, because the violation DHHS now admits (not providing the cable until Waddle filed an appeal with the Administrative Law Court) is capable of repetition and DHHS' violations of the federal standard of promptness established by CMS has evaded review for Waddle and other waiver participants for more than a decade. *Doe v. Kidd III*, Case No 14-1428, 2016 U.S. App. LEXIS 14609 (4th Cir. August 9, 2016).

The Court of Appeals, and now the Respondent have somehow overlooked not only applicable federal law, but the controlling United States Supreme Court case on mootness. In *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, the United States Supreme Court established that the defendant has the burden to prove that it is "absolutely clear that violations

¹ As occurred in this Court in *Stogsdill v. DHHS*, the waiver participant's appeal was dismissed after the State was allowed to present its own one-sided and incomplete explanation not contained in the record, without the disabled person being allowed to supplement the record in response. 415 S.C. 568 (2016). Record at 65. Waddle was not provided an opportunity to cross examine the affiant and was again denied her due process rights to have the state courts consider her claims for violation of federal law.

could not reasonably be expected to recur.” 528 U.S. 173. DHHS has not met the high bar for mootness set by the United States Supreme Court. (“...a defendant claiming that its voluntary compliance moots a case bears a *formidable burden*.” 528 U.S. at 173.) (Emphasis added.) In this appeal, Waddle has documented repeated, and ongoing violations of federal law and important constitutional due process rights that will go unchecked without resolution by this Court. Waddle has shown that DHHS’ wrongful behavior will likely occur or continue and that the threatened injury is not just impending, but the violations Waddle complains of are very raw and they are all too real in her world. *Id.*

DHHS totally ignores the Supreme Court’s ruling in *Friends of the Earth* that “if mootness were simply ‘standing set in a time frame,’ the exception to mootness for acts that are ‘capable of repetition, yet evading review’ could not exist.” Citing *Olmstead v. L. C.*, 527 U.S. 581, 594, n. 6 (1999).

Waddle is a quadriplegic waiver participant whose family has already fallen apart during nearly a decade of futile state administrative appeals, while Respondent has arrogantly ignored the orders of its own hearing officer and the orders of the United States Court of Appeals interpreting the reasonable promptness mandate as requiring eligibility to be determined within 90 days. *Doe v. Kidd I*, 501 F.3d 348, 354 (4th Cir. 2007) *Doe v. Kidd II*, 419 F. Appx. 411, fn 2 and *Doe v. Kidd III*, Case No 14-1428, 2016 U.S. App. LEXIS 14609 (4th Cir. August 9, 2016).

The Executive Branch’s total disrespect for federal law, the violations of the reasonable promptness mandate and other controversies that Waddle brings to this Court demonstrate that these violations are capable of repetition, yet they have evaded review in the state courts. *Olmstead v. L.C.*, 527 U.S. 581, fn 6 (1999). Respondent’s late provision of an oximeter cable does not moot her federal claims. In *Doe v. Kidd I*, the Fourth Circuit held:

Where, as here, a defendant's voluntary conduct is the basis for the potential mootness, it is "well settled that [the] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (quotation marks and citations omitted).

501 F.3d 348, 354 (4th Cir. 2007).² See also *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013).

This Court has ruled that "A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court." *Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander*, 414 S.C. 355, 359 (2015). In *S.C. Ret. Syst. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013), this Court explained that "[M]oot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties." Thus, "Appellate court[s] will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506 (2010). But, this Court has also recognized three general exceptions to the mootness doctrine" that are applicable in this case. *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

The first is the "capable of repetition but evading review" established in *Friends of the Earth*. Second, where there is an "imperative and manifest urgency to establish a rule for future conduct in matters of important public interest," this Court has established an exception to the mootness doctrine. 345 S.C. 568, 549 S.E.2d 596. Third, where a decision by the trial court "may

² Strangely, on page 7 of the Return, DHHS cites this case in support of its argument that Waddle's case is moot. DHHS also cites *Stogsdill v. S.C. DHHS*, 410 S.C. 273, 763 S.E.2d 638 (Ct. App. 2014), without mentioning that Stogsdill filed a petition for certiorari now pending in the United States Supreme Court and his federal case is scheduled to be heard in Richmond in December, 2016. The Court of Appeals ordered DHHS to provide a fair hearing in *Peter Brown v. S.C.D.H.H.S.*, but the agency dismissed his request for a fair hearing on remand two years later without providing an evidentiary hearing. 410 S.C. 273, 763 S.E.2d 638 (Ct.App. 2014).

affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot...” Id. at 568, 549 S.E.2d 596.

All of these exceptions apply in this case. DHHS has left Waddle hanging in the Executive Branch Fair Hearing Gulag for nearly a decade. The failure of DHHS to comply with the reasonable promptness mandate, other Medicaid Act requirements, the Americans with Disabilities Act and the Rehabilitation Act are of great public interest, affecting thousands of disabled citizens and their families in South Carolina. Medicaid waiver participants are the “least of these” who have no resources to spend years in futile administrative appeals, or they would not be receiving Medicaid waiver services. The decision to dismiss Waddle’s fair hearing appeal most certainly affects future events and the intentional dismissal of her complaints regarding issues she first raised in 2007 has collateral consequences.

These violations are widespread and continuing. Respondent’s disregard for its obligations to comply with the reasonable promptness mandate has been recognized recently by the United States Court of Appeals for the Fourth Circuit in *Doe v. Kidd III*.³ Case No 14-1428, 2016 U.S. App. LEXIS 14609 (4th Cir. August 9, 2016). That court ruled in 2007 that Medicaid waiver participants like Waddle have a private right to enforce 42 U.S.C. 1396a(a)(8). 501 F.3d 348. In 2011, the Fourth Circuit ruled that DHHS had “abdicated its duty” to provide services with reasonable promptness. *Doe v. Kidd II*, 419 F.App’s at 420. (“In *Doe II*, this Court determined that, in light of our holding that the defendants continued to violate the timeliness provisions of the Medicaid Act, ‘there can be no question that Doe is the ‘prevailing party’ for purposes of § 1988.’”) *Doe v. Kidd III* at 17. In *Doe v. Kidd III*, that court ruled that her case “changed the legal landscape under the Medicaid Act” and that:

³ DHHS has filed a motion for *en banc* review or a panel rehearing.

Importantly, the district court failed to recognize that the defendants — not Doe — repeatedly violated the Medicaid Act, even after Doe I and Doe II was decided. It was not until August 2013, two and a half years after Doe II, that the defendants came into compliance with the Medicaid Act.

Id. at 31. Yet, the legal landscape in South Carolina courts remains as it always has been, with the lower courts ignoring federal questions and continuing to dismiss cases based on conflicting state statutes and regulations.

Respondent audaciously argues that it “resolved” Waddle’s claims by providing an oximeter cable years after this appeal was filed and that “there remains no actual controversy.” Return at 5 and 7. On Waddle’s second appeal to the Administrative Law Court, Judge McLeod reversed the hearing officer for the second time, ordering the agency to determine the number of nursing and personal care hours needed, without consideration of the services provided by Waddle’s mother, because her mother is not legally responsible for caring for the Petitioner. Hutto Order at 5 contained in Record at 18. More than a year later, the DHHS hearing officer ruled (1) that hearing officers have no authority to exceed waiver limits, (2) that DHHS violated the notice requirements of 42 C.F.R. 431.210, (3) that DHHS illegally reduced Waddle’s services during her appeal, (4) that DHHS must provide the number of hours ordered by her physician during the administrative appeal, and (5) that DHHS must pay her mother for services rendered. Order at 14 to 52. Despite Waddle filing a Petition in 2014 in the Administrative Law Court asking that court to immediately provide relief by enforcing the agency’s 2013 order, DHHS has refused to comply with its own hearing officer’s order. Record at 369.

This Court should grant Waddle’s petition for certiorari because her claims are not moot and nearly a decade after she filed claims for violation of federal law, even the relief granted by the Administrative Law Judge in 2012 and that awarded by the agency’s own hearing officer in 2013 remains illusory, leaving Waddle without the services she desperately needs.

III. DHHS has violated Waddle’s due process rights. Respondent attempts to relitigate the

issue of whether Waddle failed to respond to an “order” of the hearing officer. Return at 7. Respondent’s argument on page 8 - that Waddle first raised the issue the State’s violation 42 C.F.R. 431.223 relies upon the Administrative Law Judge’s clearly erroneous ruling that Waddle “failed to raise as an issue on appeal the hearing officer's dismissal of Appellant's appeal for abandonment due to failure to submit a statement of intent to continue her appeal and attend a Fair Hearing.” That court’s finding that “It is only in her Reply Brief that Appellant makes an argument specifically addressing the hearing officer's decision in this matter to dismiss Appellant's appeal for abandonment” is contradicted by the record and is clearly erroneous. The Administrative Law Court ignored Waddle’s argument on page 19 of her opening brief filed in that court containing those specific arguments:

In clear violation of 42 C.F.R. 431.223, DHHS has dismissed Brook's requests for an evidentiary hearing. It has denied her procedural rights to an evidentiary hearing as established in 42 C.F.R. 431.242.

Record at 93. Then, on page 22 of that opening brief, Waddle argued further to the Administrative Law Court that:

Instead of providing a fair hearing and basing her order on "exclusively on evidence introduced at the hearing" - a very simple concept - the agency dismissed yet another request for a fair hearing in violation of 42 C.F.R. 431.223.

Record at 96. Waddle could not have been more clear in her opening brief arguments that this federal rule was violated and that her constitutional and statutory due process rights were violated when the hearing officer dismissed her case without providing a hearing. The Administrative Law Court’s ruling was not only clearly erroneous, but it was arbitrary, because it was based alone upon the judge’s will and was without any support in the record. *Hatcher v. South Carolina Dist. Council of Assemblies of God, Inc.*, 267 S.C. 107, 117 (1976). The lower court’s decision was not based “upon any course of reasoning and exercise of judgment,” the court considered itself not bound by controlling federal law, the decision was made capriciously, at pleasure, and

without adequate determining principle. Id. It was nonrational and was not governed by any fixed rules or standard. Id.

IV. The hearing officer's order dismissing Waddle's appeal was not supported by substantial evidence. Respondent argues on pages 8 through 12 that this Court should not grant certiorari because the hearing officer's order is supported by substantial evidence. But the only evidence properly in the record is that "introduced at a hearing" 42 C.F.R. 431.244(a) or included pursuant to 42 C.F.R. 431.244(b), which provides that the record must consist of "(1) The transcript or recording of testimony and exhibits, or an official report containing the substance of what happened at the hearing; (2) All papers and requests filed in the proceeding; and (3) The recommendation or decision of the hearing officer." Waddle was unequivocally denied her due process rights to present testimony, to cross-examine DHHS' witnesses and to provide exhibits when the hearing officer illegally dismissed her case without providing an evidentiary hearing.

The "papers and requests filed in the proceeding" include the record from the 2007 appeal, which Waddle requested to be incorporated in her Response filed on March 19, 2013. Record at 152. Waddle's due process rights were denied when DHHS intentionally omitted those documents, because it was DHHS' duty to prepare and file a complete record. ALC Rule 36 (A).⁴ S.C. Code of Laws 1-23-380 (4) provides that:

The review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.

⁴ The Administrative Law Judge held that Waddle should have supplemented the record pursuant to ALC Rule 36. Order at 7, Record at 8. But that rule does not provide for supplementation of the record, but instead limits review of the Administrative Law Court to the record filed by the agency. ALC Rule 36(G). It was that court's duty, when this error was called to its attention to require the agency to comply with the Administrative Law Court's own rule. Instead, that judge allowed DHHS to supplement the record with an affidavit obtained years after the record was closed, which is the sole grounds for Respondent's mootness argument.

Yet, when Waddle called to the Chief Judge's attention the alleged irregularities in procedure before the agency below, instead of remanding to require DHHS to include the full record, he ignored Waddle's objections and did not require a sister Executive Branch agency to comply with his own court's rules.

The requirements for "Fair Hearings for (Medicaid) Applicants and Recipients" are outlined in 42 C.F.R. §§ 431.200 to 431.250. The following provision at 42 C.F.R. 431.232 is of particular importance in this appeal:

The applicant or recipient, or his representative, must be given an opportunity to

- (a) Examine at a reasonable time before the date of the hearing and during the hearing:
 - (1) The content of the applicant's or recipient's case file; and
 - (2) All documents and records to be used by the State or local agency at the hearing;
- (b) Bring witnesses;
- (c) Establish all pertinent facts and circumstances;
- (d) Present an argument without undue interference; and
- (e) *Question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.*

Federal regulations at 42 C.F.R. § 431.223 provide that the state Medicaid agency may only 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 regulation is interpreted by CMS in the State Medicaid Manual at § 2902.3(B). The State Medicaid Manual is "an informal rule issued by the Department of Health and Human Services' . . . Centers for Medicare and Medicaid Services" *Wong v. Doar*, 571 F.3d 247, 250 (2d Cir. 2009). That manual provides that this standard is met only when the state agency notifies the appellant that he missed the hearing and the appellant fails to respond. Specifically, the Manual provides that a fair hearing can only be considered abandoned when (1) a claimant or his representative fails to appear **and** (2) "if within a reasonable time (of not less than 10 days) after the mailing of an inquiry as to whether he wishes any further action on his request for a hearing[.]

no reply is received.'" (Id. ¶ 35 (quoting State Medicaid Manual § 2902.3(B).) (Emphasis added.) After Waddle responded to the hearing officer's order on March 19, 2013, the hearing officer sent not a notice, but an email on March 27, 2013 demanding information that turned out not to be relevant to the appeal. Record at 151. Seven days later, the hearing officer dismissed Waddle's appeal, finding that it was "abandoned." Record at 148.

The Second Circuit recently addressed this issue in *Fishman v. Paolucci*, where the court remanded the appeal even after Medicaid participants failed to appear at a scheduled hearing. 628 Fed. Appx. 797 (2d Cir. 2015). On remand, in *Fishman v. Daines*, 2016 U.S. Dist. LEXIS 28034 (2016), the district court granted the plaintiff's motion for a preliminary injunction, finding that the state must not only provide a scheduled hearing, but that CMS rules require the state to wait ten days after it posts a default notice, even after the participant fails to appear at the hearing.

Respondent argues that Waddle's case should not be heard by this Court, because there is no "valid factual dispute" and she failed to provide information requested by the hearing officer. Return at 10. First, Waddle provided a written response to the hearing officer's order, which is contained in the Record at 154. Secondly, the purpose of the requirement of providing a hearing is to determine whether factual disputes exist.

Here, even if Waddle failed to appear at a scheduled hearing, the post-default notice requirement contained at § 2902.3(B) is entitled to deference. *Fishman, supra*. DHHS was in clear violation of those controlling federal rules, which the Administrative Law Court failed to consider.

Strangely enough, Respondent relies upon the decision of the United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254. That case, which is incorporated by reference in 42 C.F.R. 431.205, prohibits states from taking action affecting government benefits without providing an evidentiary hearing where the beneficiary may be heard orally and have the

opportunity to defend and confront witnesses and evidence. *Id.* at 261. The Supreme Court recognized there that, like Waddle:

By hypothesis, a welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.

397 U.S. 261, citing *Kelly v. Wyman*, 294 F.Supp. 893, 899, 900 (1968). The Supreme Court held that the state's desire to protect public funds "does not justify denying a hearing meeting the ordinary standards of due process." *Id.* This is because "the stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." *Id.* at 266. Thus, government benefits participants are entitled to "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and **evidence orally.**" *Id.* at 267-268. (Emphasis added.) These due process rights are important in cases, as here, "where recipients have challenged ... incorrect or misleading factual premises or ... misapplication of rules or policies to the facts of particular cases." *Id.*

Waddle's due process rights were violated because she was not "permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses." *Id.* The Supreme Court found these omissions to be "fatal to the constitutional adequacy of the procedures." *Id.* (Emphasis added.) The lower courts ignored *Goldberg's* holding that "It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand ..." *Id.* at 268. That is because:

...[w]ritten submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional

assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue...written submissions are a wholly unsatisfactory basis for decision.

Id. at 268. They ignored the Supreme Court ruling that: “a recipient must be allowed to state his position orally” because:

...where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be **perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice,** or jealousy.

Id. Thus, Medicaid beneficiaries like Waddle must be protected by:

...the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Id. Therefore, the Supreme Court ruled that “Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.”

CMS incorporated the Supreme Court’s ruling that “the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing” in 42 C.F.R. 431.244(a). In 42 C.F.R. 431.210, CMS incorporated the requirements set forth in *Goldberg* requiring written notice.

It is significant here that the true reasons for DHHS’ failure to provide an oximeter cable were not contained in either the notice provided to Waddle or the prehearing letter provided by DHHS to the hearing officer. The notice provided to Waddle did not contain either the reasons for the denial or the regulation relied upon. In its response to the hearing officer’s “interlocutory order,” DHHS informed Waddle that “The request was denied because Apria did not include any supporting clinical information with the request... Apria did not submit additional information as requested. The request was denied administratively for failure to supply the necessary

information to allow KePro to make a determination.” Record at 155. But, it was not until November 2014, that DHHS’ employee, disclosed an entirely new and undisclosed reason for denying payment for the oximeter cable. Record at 305. Had DHHS informed Waddle in January, 2013 of the real reason for the denial, the error could have been promptly remedied, instead of the parties continuing to litigate this issue in 2016.

Respondent’s reliance on *Mims* ignores the fact that after DHHS dismissed his fair hearing appeal, Mims elected to file an action in the state circuit court, alleging, among other things, violation of his due process rights. After the circuit court dismissed Mims’ lawsuit, this Court remanded in 2012, yet his lawsuit still is pending in the South Carolina Court of Appeals. *Mims v. Babcock Center*, 399 S.C. 341, 732 S.E.2d 395 (2012). See *Mims v. South Carolina Department of Disabilities and Special Needs*. Case No. 2014-1373. (The complaint against the Babcock Center was settled, but oral arguments may be held in the South Carolina Court of Appeals in December, 2016).

V. Respondents remaining arguments are without merit. Respondent argues that Waddle’s issues on appeal were not preserved for appellate review. Return at 12. For the reasons set forth above, this argument is clearly erroneous, as she raised these issues at every level. It is remarkable that Respondent argues that Waddle “failed to present a proper record,” when it was Respondent’s hearing officer who denied Waddle the right to develop a record in a statutorily required evidentiary hearing, then failed to include documents in the Record on Appeal that Waddle incorporated by reference in her Response to the hearing officer’s interlocutory order.

Despite these flagrant violations of federal law, the hearing officer’s November 19, 2013 order contains constitutes undisputed evidence that this Court may rely upon to grant the relief Waddle requests. Record at 314. In *Doe v. Kidd I*, the Fourth Circuit held that:

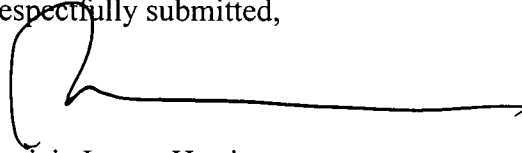
Section 1396a(a)(8) of the Act requires that state "medical assistance . . . be furnished

with reasonable promptness to all eligible individuals." Federal regulations direct state agencies to determine an applicant's eligibility for Medicaid within ninety days of the date of application and to "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. §§ 435.911, 435.930 (2002). 501 F.3d 354. The fact that a final state administrative order on Waddle's January 30, 2013 appeal was not issued until October 11, 2013, in and of itself, proves that the State violated the reasonable promptness mandate of the Medicaid Act.

Respondent arrogantly ignores the ruling of the South Carolina Court of Appeals in *Stogsdill v. DHHS* in its assessment of Waddle's Americans with Disabilities Act claims. 410 S.C. 273, 763 S.E.2d 638 (Ct.App. 2014), petition for certiorari pending in the United States Supreme Court. More astonishing is that Respondent argues that because the Executive Branch still has not issued a final administrative order in the 2007 appeal, this Court should not grant certiorari in this 2013 appeal. Undisputed facts contained in the November 19, 2013 order (Record at 2) document that Waddle is entitled to relief under the the Americans with Disabilities Act. Record at 58. Waddle prays that this Court will carefully review that order, the petition Waddle filed in the Administrative Law Court asking that court to enforce that order, and the fact that more than two years later, that court still has not issued a final state administrative decision in that 2007 appeal in considering her petition for a writ of certiorari in this case.

VI. Conclusion. Waddle prays that this Court will consider that in *Stogsdill v. Keck*, where seven years after he filed his first administrative appeal, DHHS' motion to dismiss was granted on the grounds of abstention, based on his pending administrative appeal. *Stogsdill v. Keck*, 2014 U.S. Dist. LEXIS 158974, on appeal to the United States Court of Appeals for the Fourth Circuit. Waddle risks being thrown back into the Executive Branch gulag which, *Stogsdill* still suffers through, placing her at great risk of continued decline in her condition, even death, unless this Court grants her petition. For the reasons set forth above, Waddle prays that this Court should grant the petition for certiorari. Her very life is in this Courts hands.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by a long horizontal line extending to the right.

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In the Supreme Court

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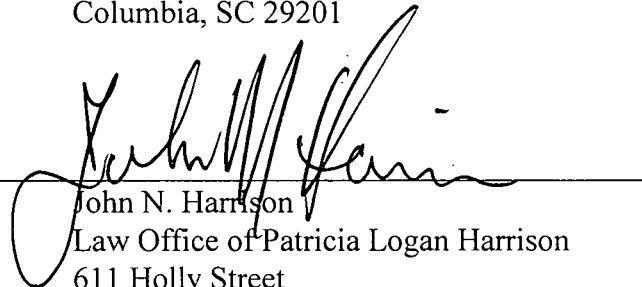
South Carolina Department of Health and Human Services, Respondent.

CERTIFICATE OF SERVICE

John N. Harrison certifies that he has served the *Reply to the Return to the Petition for a Writ of Certiorari* in the above captioned case by U.S. Mail to the following on August 29, 2016:

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