Read July 6, 2018

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Robert Levin, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	Docket No. 17-ALJ-08-0318-AP ORDER

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed on August 1, 2017, by counsel for Robert Levin (Appellant). Appellant seeks review of a final agency decision issued by the South Carolina Department of Health and Human Services (Department) affirming a decision to terminate Appellant's waiver services while he remained hospitalized. This Court has jurisdiction to hear this matter pursuant to Sections 1-23-380; 1-23-600(E); and 44-6-190 of the South Carolina Code. S.C. Code Ann. §§ 1-23-380 and -600 (Supp. 2017); S.C. Code Ann. § 44-6-190 (Supp. 2017).

BACKGROUND

Appellant is a Medicaid-eligible individual who receives services under the Head and Spinal Cord Injury (HASCI) waiver. Waivers are mechanisms within the Medicaid program which, under certain circumstances, waive some generic requirements of the Medicaid program. Waivers enable states to provide services to eligible participants in ways not permitted under the regular Medicaid program. This program is operated by the South Carolina Department of Disability and Special Needs (SCDDSN) for home and community-based services under Section 1915(c) of the Social Security Act. 42 U.S.C. § 1396n.

Initially, Appellant resided in a nursing home. Appellant eventually qualified for home and community based waiver services (HCBS) through HASCI and received fifty-six hours per week of personal attendant care for several years. On January 1, 2010, the five-year renewal of the HASCI waiver, as approved by the Centers for Medicare and Medicaid Services (CMS), went into effect. The renewed waiver placed a cap on certain services and excluded others. Consequently, Petitioner's attendant care hours were reduced from fifty-six to forty-nine hours per week.

Appellant did not appeal the reduction in services. Appellant remained in his home and continued to receive forty-nine hours of attendant care each week.

In 2012, Appellant filed an action in the United States District Court for the District of South Carolina alleging causes of action for violations of statutory and constitutional due process, the South Carolina Administrative Procedure Act, the American with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, the Medicaid Act, and 42 U.S.C. §§ 1983 and 1985 (Civil Rights). See Levin v. S.C. Dept. of Health & Human Services, C/A No. 3:12-cv-0007-JFA. On March 16, 2015, the federal court issued an order finding that Appellant had failed to meet his burden of proof to establish that the reduction in attendant care services created a serious risk of institutionalization in violation of the ADA, and dismissing that cause of action as well as Appellant's claim under Section 504 of the Rehabilitation Act. Levin v. S.C. Dept. of Health & Human Servs., No. 3:12-CV-0007-JFA, 2015 WL 1186370 (D.S.C. Mar. 16, 2015), appeal dismissed and remanded sub nom. Stogsdill v. S.C. Dept. of Health & Human Servs., 674 F. App'x 291 (4th Cir. 2017). In the federal court order dated March 16, 2015, several findings of fact relevant to this matter were made which are supported by the trial transcript submitted as evidence by both parties to the hearing officer below. Those findings include:

1. Charles G. Shissias, MD, Appellant's neurologist, had been treating Appellant for the last seventeen years;
2. Dr. Shissias was not Appellant's primary care physician;
3. Dr. Shissias was unaware of the number of attendant hours to which Appellant was entitled per week;
4. Dr. Shissias recommended that Appellant receive sixty hours of nursing care each week but could not remember when he signed an order requesting that level of care. He was unfamiliar with the services the Department had been currently providing to Appellant, and was unaware that any of Appellant's services had been reduced.
5. If Appellant received the same level of care that he had been receiving for several years which did not include nursing services (only attendant care), he would not be at any greater risk for institutionalization. The judge's conclusion was partially based upon Dr. Shissias' testimony that "if [Appellant's] care remains at its current level (i.e. 2010 reduced level), [Appellant] is at no greater risk of institutionalization than he has always been given his condition."

On or about April 28, 2015, Bhavesh R. Amin, MD, signed a second order for twenty-eight hours of nursing services. This order was submitted to the South Carolina Department of Disabilities and Special Needs (SCDDSN) with supporting medical documentation. The request for nursing services was approved but for twenty-one hours. From this time until his hospitalization on December 31, 2016, Appellant received forty-nine hours of attendant care, and twenty-one hours of nursing care per week. Appellant did not submit requests for reconsideration to SCDDSN, or for a fair hearing to the Department concerning the number of hours awarded. There is no indication in the record that Appellant's health or condition declined, or that he faced institutionalization during this period.

While at home on December 31, 2016, Appellant vomited and aspirated. Appellant's mother called emergency medical services. She testified that at the time of the incident, Appellant's bed was properly elevated, that he vomited because he was sick that day, that he had not vomited or aspirated prior to December 31, 2016, and that the vomiting did not have anything to do with Appellant's feeding or medication regimen. Eventually, Appellant was transferred to the long-term care unit at the hospital.

Shortly after Appellant's arrival at the hospital, Richland/Lexington Disabilities and Special Needs Board, an organization that administers SCDDSN HASCI Waiver Services, advised Appellant that his HASCI services were being terminated due to his hospital admission. On January 13, 2017, Appellant's mother requested reconsideration of this decision. On January 30, 2017, Beverly A. H. Buscemi, Ph.D., State Director for SCDDSN, advised Appellant that his request for reconsideration was being denied pursuant to Section 42 C.F.R. 441.301(b)(1)(ii), and the HASCI waiver document because of Appellant's admission into the hospital on December 31, 2016. 42 C.F.R. § 441.301(b)(1)(ii) provides that waiver program services cannot be provided to a participant if the participant is an inpatient of a hospital. The HASCI waiver incorporates this prohibition of receiving waiver services while being an inpatient at a hospital.

On February 8, 2017, Appellant appealed SCDDSN's determination and requested an expedited hearing setting forth seventy-one paragraphs of allegations in the complaint. Including the forty-two attachments, Appellant's complaint totaled five-hundred and twenty-eight pages. On February 10, 2017, the hearing officer ordered the Department to submit a pre-hearing brief identifying the issues to be addressed. On February 14, 2017, the Department submitted a brief

and supplemental materials setting forth six issues, as well as a brief in opposition to those issues outlined by Appellant.

On April 14, 2017, a fair hearing was held. Both parties were represented. Appellant introduced voluminous documentary exhibits, as evidenced by the Record on Appeal which exceeds two-thousand five-hundred pages. By order dated June 26, 2017, the hearing officer issued a lengthy decision addressing many issues concluding that Appellant's waiver services were properly terminated while he remained hospitalized. On July 17, 2017, Appellant filed a Protective Order to Alter or Amend, which was denied by the hearing officer on July 28, 2017. This appeal followed.

ISSUE

Whether substantial evidence exists to support the Department's decision.

STANDARD OF REVIEW

This Court reviews decisions of the Department in an appellate capacity. S.C. Code Ann. § 1-23-380 (Supp. 2017). According to Section 1-23-600(E) of the South Carolina Code (Supp. 2017), when acting in an appellate capacity, the court must apply the criteria of Section 1-23-380(5) (Supp. 2017) which states:

> (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority 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.

This section requires the ALC to apply the "substantial evidence" rule. See e.g., Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996); Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best W. Royal Motor Lodge, 282 S.C. 634, 321

S.E.2d 63 (Ct. App. 1984). The possibility of drawing two inconsistent conclusions from the evidence does not mean that the agency's conclusion was unsupported by substantial evidence. Id. See also, Waters, 321 S.C. at 227, 467 S.E.2d at 917. The well-settled case law in this State has also interpreted the rule to mean that a decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Co., 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996) (citing Kearse v. State Health and Human Serv. Fin. Comm'n, 318 S.C. 198, 456 S.E.2d 892 (1995)). Thus, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917 (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1994)).

Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant, 319 S.C. at 353, 461 S.E.2d at 391 (citing Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984)). However, "[d]etermining the proper interpretation of a statute is a question of law, and [an appellate court] reviews questions of law de novo." Palmetto Co. v. McMahon, 395 S.C. 1, 3, 716 S.E.2d 329, 330 (Ct. App. 2011) (citation omitted).

DISCUSSION

Appellant raises many issues in his appeal[1] which can be synthesized into the following categories: (1) whether the Department violated Appellant's due process rights; and (2) whether the Department properly concluded that Appellant's rights under the ADA and Rehabilitation Act were not violated.

Substantial Evidence Supports the Hearing Officer's Decision that Appellant's Due Process Rights were Not Violated

Appellant claims that his due process rights were violated (1) when he requested additional attendant and nursing care services in June 2014, and again on October 5, 2016, and did not receive proper notice in a timely manner regarding the decisions; (2) when his waiver services were terminated upon his admission to the hospital in January 2017; (3) when the Department's

[1] Appellant has referenced matters that occurred subsequent to the date of the fair hearing and the issuance of the final decision. The Court is constrained to limit its review to those issues raised to and ruled upon by the hearing officer, and those matters contained in the record from the fair hearing.

termination notice failed to comply with federal requirements; and (4) when the hearing officer failed to issue a timely determination.

Appellant claims that his due process rights were violated when he failed to receive proper notice as to his request for additional attendant and nursing care services in June 2014 and again on October 5, 2016. Appellant's 2014 request was thoroughly argued and addressed in federal court which issued an order on the matter in 2015. Levin v. S.C. Dept. of Health and Human Services, 2015 WL 1186370 (D.S.C. Filed March 16, 2015). As indicated in the federal court order which is a part of the record in this case, the Department provided Appellant with a release for medical records to be completed and returned to process the request. It is undisputed that the release was never executed. In fact, Appellant's counsel advised his representative not to execute the releases. Thus, the Department could not make a determination on the 2014 request for additional services, and a notice of a decision on the request for services was not required. 42 C.F.R. § 431.206(c)(2)-(4).

Further, Appellant has failed to establish how the lack of any notice which may have been required, prejudiced him. Both the federal court and the hearing officer concluded that Appellant did not face a risk of institutionalization based upon the services he was receiving at that time. See Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984) ("proof of a denial of due process in an administrative proceeding requires a showing of substantial prejudice"). This Court agrees.

Appellant argues that the failure to execute releases is merely a ruse used by the Department as an excuse not to assess his needs and references a federal court case in which Appellant's case manager purportedly testified that a release was not needed to obtain medical records from a provider. This Court reviewed the single page in the record from a transcript which purports to support that claim.[2] From this page, it is undiscernible who was asking and answering the questions; in what venue the questions were asked and answered; in which case the questions were interposed; or the context in which the questions were asked. Even if certain agencies are permitted to share information, and some providers with whom the Department has a contract may be willing to provide Appellant's health care information, Appellant has set forth no justifiable reason for his failure to timely execute the requested releases for the Department to efficiently

[2] This single page is marked as Exhibit W to Appellant's seventy-seven-page administrative complaint, and appears in the Record on Appeal at page 382.

secure the most current and complete set of protected health care records necessary to review Appellant's request.

Appellant next argues that he was denied due process when no action was taken after his submission of a subsequent medical order and request for additional services to Richland/Lexington Disabilities and Special Needs Board in October 2016. The Court disagrees. Appellant was hospitalized on December 31, 2016. Notice was provided to Appellant on January 5, 2017, that he could no longer receive waiver services while he remained hospitalized, and that his services were being terminated. Section 441.301(b)(1)(ii) states that if an agency furnishes home and community-based services as defined by Section 440.180 under a waiver, the waiver request must provide that services are furnished only to beneficiaries who are not inpatients of a hospital. 42 C.F.R. § 441.301, .180.

Appellant avers that the hearing officer erred in concluding that Appellant's due process rights were not violated when the Department terminated his services upon his admission to the hospital in January 2017. This Court concurs with the hearing officer's finding. As referenced above, 42 C.F.R. § 441.301(b)(1)(ii) prohibits the State Medicaid agency from providing waiver services while a participant is an inpatient in a hospital. See also Stogsdill v. S.C. Dept. of Health and Human Servs., 2017 WL 3142497 (D.S.C. July 25, 2017). Appellant argues that the notice of termination of services dated January 5, 2017, provided to him upon his admission to the hospital did not comport with federal requirements of 42 C.F.R. § 431.210. He claims that the notice neither advised him of his right to request an expedited hearing nor fully informed him of the legal basis upon which the termination was based. As the notice was never entered into the record, it was impossible for the hearing officer to determine whether it was deficient, and this Court cannot make such a decision for the same reason.[3] Regardless, Appellant has neither alleged nor established how the purported deficient notice resulted in prejudice to him as he timely filed an appeal seeking a fair hearing, and received one. See Palmetto Alliance, Inc., supra.

[3]Moreover, as the hearing officer noted, SCDDSN's letter addressing Appellant's request for reconsideration set forth all the information required by statute, regulation, and case law. Additionally, the regulations governing expedited appeals did not take effect until January 20, 2017. As such, the Department was not required to inform Appellant of his rights to an expedited appeal at the time Appellant's termination was sent. See 42 C.F.R. § 431.244(f)(3). The applicable regulations can be found at Medicaid and Children's Health Insurance Programs: Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Other Provisions Related to Eligibility and Enrollment for Medicaid and CHIP, 81 FR 86382-01.

Appellant argues that his services must be maintained pending the administrative appeal process. Appellant makes a general reference to Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) and argues (yet provides no citation to legal authority) that Goldberg, and 42 C.F.R. § 431.230 (which requires that services be maintained during the administrative process) "trump" 42 C.F.R. § 441.301(b)(1)(ii). Section 441.301(b)(1)(ii) of the Code of Federal Regulations specifically prohibits a state Medicaid agency from providing waiver services while a participant is an inpatient at a hospital.

In an email exchange on January 6, 2017, between counsel for Appellant and the Department, the Department's attorney "[C]onferred with DHHS and confirmed that if [Appellant] is ready for discharge, there would be no change to his services, which would be picked up as normal upon discharge from the hospital." This was confirmed in the Department's January 30, 2017 response to Appellant's request for reconsideration which stated, "If [A]ppellant continues to be enrolled in the HASCI Waiver program, upon discharge from the hospital to his home, his previously authorized services can be immediately reauthorized." As represented by the Department, when the appeal was filed, the services remained in place pending the administrative appeal and were available immediately upon discharge. The Department complied with 42 C.F.R. § 431.230 to the extent doing so did not violate 42 C.F.R. § 441.301(b)(1)(ii).

Appellant submits that his due process rights were violated by the hearing officer's failure to issue his final determination within ninety days in violation of 42 C.F.R. § 431.244(f).[4] The Department submits that any delay was a direct and proximate result of Appellant's excessive submissions of irrelevant documentation and argument on issues not appropriate for a fair hearing, and that the exception provided in Section 431.244(f)(4)(B) applies. Section 431.244(f)(4)(B) states that an agency must take final administrative action on a fair hearing request within the time limits set forth except under unusual circumstances such as when there is an administrative or other emergency beyond the agency's control. This Court finds that under the circumstances presented in this case, Appellant's argument as to delay is completely undermined by Appellant's hindrance of the process, and that no due process violation occurred.

[4]At the hearing, Appellant maintained that the hearing officer failed to provide an expedited hearing in violation of case law and recently enacted regulations. Appellant claimed that the fair hearing and final administrative action had to be performed within three days from the date the request was granted. The hearing officer outlined the law, and circumstances surrounding the hearing and concluded that the fair hearing and final administrative decision must be and were conducted as expeditiously as possible.

As documented in the hearing officer's order of June 30, 2017,[5] Appellant's Complaint contained seventy-one allegations against the Department invoking state and federal law and arguing matters that were not within the jurisdiction of the hearing officer. Including the forty-two attachments, Appellant's complaint totaled five-hundred and twenty-eight pages. Appellant submitted hundreds of pages of documents, some of which were admitted while others were proffered. The Record in this case exceeds two-thousand seven-hundred pages and it, along with Appellant's briefs, contain an inordinate amount of extraneous information impertinent to the fair hearing, and this appeal. Despite Appellant's excessive submissions, the hearing officer's decision indicates that he conducted the hearing as expeditiously as possible, and carefully reviewed and considered all the arguments and documents. Moreover, Appellant has failed to allege how he has been prejudiced by any delay.

The Court also rejects Appellant's argument that the hearing officer improperly issued an interlocutory order requiring a pre-hearing brief to clarify issues. South Carolina's regulations governing fair hearings grant the hearing officer the authority to make such a request. S.C. Code of Regs. 126-154 (2012) grants hearing officers the following authority:

> 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; and dismiss any appeal for failure to comply with requirements under this Subarticle.

(emphasis added).

Given the extensive pre-trial brief and attachments submitted by Appellant on February 8, 2017, it was within purview of the hearing officer to request one from the Department (which was requested on February 10, 2017, and received by the hearing officer on February 14, 2017) to determine if a valid factual dispute existed, to clarify issues on appeal, and to address the breadth of the request for a hearing. Due process was not violated as Appellant was given sufficient notice, an effective opportunity to defend by confronting any adverse witnesses, and by presenting his own arguments and evidence orally. Goldberg, supra.

Appellant raises several other arguments in his appeal that are without merit. Appellant argues that his due process rights were violated when the hearing officer excluded information

[5] The fair hearing was requested on February 8, 2017. Both parties requested and participated in discovery. On April 14, 2014, a fair hearing was held. On June 26, 2017, the final decision was issued.

about budgetary issues. Appellant's allegations related to his original reduction in his waiver services that affected all HASCI participants in 2010. This issue was not only unrelated to the suspension of Appellant's benefits on December 31, 2016, upon his admission to the hospital but also, time barred. See 42 C.F.R. § 431.221(d) ("The agency must allow the applicant or beneficiary a reasonable time, not to exceed 90 days from the date that the notice of action is mailed, to request a hearing.").

Appellant argues that the hearing officer violated Appellant's due process rights in failing to order an independent medical assessment. He maintains that both he and the Department requested one. The Department did not request an independent assessment of Appellant as alleged. As indicated in the hearing officer's decision, the Department made several requests for Appellant to execute and return a medical release so that the Department could gather medical records in anticipation of having a complete assessment performed to ascertain his needs. Appellant never executed the releases. Finally, the decision to order an independent medical assessment is with the sole discretion of the hearing officer.

> 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.

42 C.F.R. § 431.240(b) (emphasis added). Therefore, the hearing officer did not err in declining to order an independent medical evaluation.

Substantial Evidence Supports the Hearing Officer's Decision that Appellant's Rights Pursuant to the American with Disabilities Act and Rehabilitation Act were Not Violated

Appellant argues that he "was on the brink of institutionalization when nursing services and an eye gaze device were determined to be medically necessary in 2014" and that the hearing officer erred in concluding that he was not at serious risk of institutionalization based upon the services he was receiving at that time. This does not comport with the evidence. Neither Appellant's request for an expedited hearing nor the final decision on appeal makes mention of any request for services in 2014. Any issues related to the services being rendered in 2014, are time barred. See 42 C.F.R. § 432.221(d). Even if the issue was not time barred, it fails on its merits. This issue was addressed in the federal action brought by Appellant. As evidenced by the transcript and order contained in the record, Appellant's physician testified that if Appellant's care remained

at its current level (which at the time consisted of forty-nine hours of attendant care only), Appellant would be at no greater risk of institutionalization than he was previously. Levin v. S.C. Dept. of Health and Human Services, 2015 WL 1186370 (D.S.C. March 16, 2015).

Appellant argues that the hearing officer erred in denying his request for additional services. Appellant requested that the hearing officer order the Department to immediately provide sixty hours of nursing care a week, in addition to one-hundred and twenty-two hours of attendant care services a week, for a total of one-hundred eighty-two hours per week of services, so that Appellant could leave the hospital and return home. The hours requested exceed the total number of hours in a week. After an analysis including consideration of Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), the hearing officer concluded that Appellant's rights had not been violated under the ADA and the Rehabilitation Act. Appellant argues that there is no substantial evidence to support the decision. The Court disagrees.

Appellant was hospitalized on December 31, 2016, and at the time of the fair hearing. This made him ineligible to receive waiver services. See 42 C.F.R. § 441.301(b)(1)(ii). Thus, the hearing officer lacked legal authority to order any new services beyond the HASCI Waiver services that were in place prior to Appellant's hospitalization, and available upon his discharge.

Even if the hearing officer had the legal authority to award additional nursing and/or attendant care services not previously received by Appellant prior to December 31, 2016, the hearing officer correctly concluded that Appellant failed to show that without the additional services sought but not provided, a significant risk of institutionalization was created. See Stogsdill v. S.C. Dept. of Health & Human Servs., 410 S.C. 273 (Ct. App. 2014) (citing Pashby v. Delia, 709 F.3d 307, 321-325 (4th Cir. 2013). Appellant's mother attested that the condition that resulted in his hospitalization had not occurred in the ten years he had been living at home, that it was not related to his peg tube feeding, or the administration of his medication. She represented that it occurred simply because Appellant had a cold. The only evidence presented was that the incident was isolated and unrelated to the services Appellant was receiving immediately prior to hospitalization.[6] Additionally, the record fails to show any problems, concerns, or conditions to suggest that Appellant's health changed or deteriorated, or that his risk of institutionalization significantly increased at any point prior to his hospitalization on December 31, 2016. Thus, the

[6] Appellant had been receiving the same number of hours of attendant services for approximately one and one-half years without incident.

substantial evidence in the record supports the hearing officer's conclusion that "nothing in the record indicates that Petitioner's hospitalization has increased his risk of institutionalization." Appellant has stated in his brief that his condition had deteriorated since his hospitalization. This Court can only consider the evidence that was presented to the hearing officer at the hearing on April 14, 2017. Appellant has failed to meet his burden of demonstrating a serious risk of institutionalization, or a violation of the ADA or the Rehabilitation Act. Thus, the final decision should be affirmed on this issue.

The Hearing Officer Erred in Concluding that There was No Evidence Levin Requested a Communication Device

In his complaint, Appellant requested that the hearing officer order a speech evaluation to be performed within thirty days, and that an appropriate Adult Communication Device be provided with reasonable promptness. The hearing officer denied Appellant's request stating that the issue was not properly before him because there was no evidence in the record showing that a request for an Adult Communication Device had been submitted to the Department and had been denied or not acted upon. Appellant argues that the hearing officer's decision was in error as the need for the device was identified by multiple providers whose affidavits were provided to Appellant's case manager.

The Department maintains that there are no physician orders for a speech device and no evidence that a request was made to the Department for a speech device. The Department continues by stating that the only medical evidence submitted by Appellant on this issue is that on October 3, 2016, Appellant's primary care doctor ordered a "referral for a speech evaluation prior to eye gaze device evaluation." He noted that Appellant was seeking a speech evaluation as "they're trying to have him fitted for a communication assistive device."

Upon a close review of the record, this Court determines that the hearing officer was in error on this issue. Given the medical order of October 3, 2016, providing that a speech evaluation was to be conducted, along with the Department's care plans, it is evident that the Department was aware at a minimum that an evaluation was to be conducted, yet failed to act. The Department had almost three months prior to Appellant's hospitalization to facilitate that evaluation. Moreover, the Department's own care plan dated October 29, 2015, which was electronically signed by Carmen Hay, Service Coordinator, stated that Appellant needed to improve his communication ability so that he is understood. To that end, the care plan stated, "Eye gaze communication device **to be provided** under SPM, for 365 days from the plan date." (emphasis added). Similarly, the

Department's care plan of October 7, 2016 which was electronically signed by another service coordinator, restated "Eye gaze communication device **to be determined**, for 365 days from the plan date." (emphasis added).

Provided Appellant is otherwise eligible, the Court orders the Department to facilitate an evaluation as soon as possible to determine if, and what kind of, an assisted communication device (including an eye gaze communication device) is appropriate for Appellant. If any such a device is appropriate, the Department shall, with reasonable promptness, guide Appellant in securing and completing any paperwork that needs to be submitted for the Department to provide the device to Appellant in a timely manner.

ORDER

Based on the foregoing,

IT IS HEREBY ORDERED that the decision of the South Carolina Department of Health and Human Services is **AFFIRMED** as **MODIFIED.**

IT IS FURTHER ORDERED that the Department shall facilitate an evaluation as soon as possible to determine if an assisted communication device (including an eye gaze communication device) is appropriate for Appellant. If such a device is appropriate, the Department shall, with reasonable promptness, guide Appellant in securing and completing any necessary paperwork that needs to be submitted for the Department to provide the device to Appellant in a timely manner.

AND IT IS SO ORDERED.

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

June 20, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

June 20, 2018
Columbia, South Carolina

FILED

June 20, 2018

SC ADMIN. LAW COURT

B7465

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

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

August 2, 2018

HAND DELIVERY

V. Claire Allen
Deputy Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Robert Levin v. SCDHHS
Appellate Case No. 2018-001398
Your Letter dated July 30, 2018

Dear Ms. Allen:

Enclosed per your letter are the following:

(1) The SCALC Order dated June 20, 2018, being appealed;
(2) Filing fee of $100.00.

Please clock the copy of this letter.

Thank you for your assistance in this matter.

Sincerely yours,

John N. Harrison
Law Office of Patricia Logan Harrison

Enclosures

c: Damon C. Wlodarczyk. Esquire