

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

DEBORAH BROOKS DURDEN ADMINISTRATIVE LAW JUDGE

Case No. 17 ALJ 08-0318-AP

Robert Levin,

Appellant,

v.

**South Carolina Department
of Health and Human
Services,**

Respondent.

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On August 15, 2018, this Court sent a letter indicating that preliminary review indicated that the issues challenged on appeal may not be immediately appealable. The Court requested a memorandum addressing the issue of whether the decision of the Administrative Law Court is appealable.

More than sixteen months after Levin filed a request for an expedited fair hearing, the Administrative Law Court (an Executive Branch Agency) issued an order upholding the agency's ruling requiring DHHS to simply evaluate Levin's need for a communications device and to assist Levin with paperwork, but the ALC erroneously affirmed the agency's ruling on all other grounds. Had the order required DHHS to provide the communications device his physician

determines on remand to be needed, that order would have been a final appealable order. Instead, the order simply sent Levin back to the DHHS morass, requiring him to fight his administrative battles in two venues. (In addition to his federal appeal now pending in the Fourth Circuit.) As such, it was not a final order that disposed of all issues.

In *Bone v. United States Food Serv.*, 399 S.C. 566, 571 (2012), in interpreting the final judgment rule articulated in section 1-23-390 of the Administrative Procedure Act, the Supreme Court ruled that an order remanding a case “for additional proceedings before an administrative agency is not directly appealable.” As the Supreme Court noted in *Bone*:

This Court's jurisprudence is in accord with the definition of a final judgment found in Black's Law Dictionary. It defines a final judgment as “[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs . . . and enforcement of the judgment.” Black's Law Dictionary 919 (9th ed. 2009). (Emphasis added.)

Id. at 559.

The State Medicaid Manual is the official medium by which the federal Medicaid agency issues “mandatory, advisory, and optional Medicaid policies and procedures to the Medicaid State agencies.” Forward to State Medicaid Manual. That Manual contains the federal agency’s “official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies.” Id. The State Medicaid Manual provides that “[a] conclusive decision in the name of the State agency shall be made by the hearing authority.” Manual § 2903.2(A). (Emphasis added.) Although the hearing authority may remand the matter to a local hearing officer, the State Medicaid Manual provides that “the materials submitted are insufficient to serve as [a] basis for a decision,” the Manual clarifies that such a remand “is not a substitute for definitive and final

administrative action." Id. See *Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012).

In *Doe v. Kidd I*, 501 F.3d 348, 354, the Fourth Circuit instructed DHHS that:

Section 1396a(a)(8) of the [Medicaid] 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). (Emphasis added.)

Doe first filed a request for a fair hearing in 2002, which was dismissed, despite Doe's objections, on motion of DHHS and the Department of Disabilities and Special Needs in 2003, without providing a fair hearing. *Doe v. Kidd I* at 351.¹ In 2011, the South Carolina Supreme Court remanded Doe's fair hearing appeal, finding that DHHS failed to apply the correct legal standard to determine whether Doe was "mentally retarded."² Even though the Fourth Circuit had ruled in 2007 that eligibility determinations must be ruled upon within 90 days, the DHHS did not issue a final ruling until 2013, finding Doe eligible for the program. Even after ruling that Doe qualified for the program, DHHS did not provide the services that had been ordered by the Fourth Circuit:

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. Moreover, the fact that the state administrative body found in Doe's favor — allowing her to seek CTH II placement — before this district court awarded her appropriate relief, does not diminish what Doe accomplished in this case.

¹ DHHS argued that Doe's appeal was moot, because it determined she was eligible for services, then immediately attempted to terminate her eligibility once her administrative appeal was dismissed by the hearing officer.

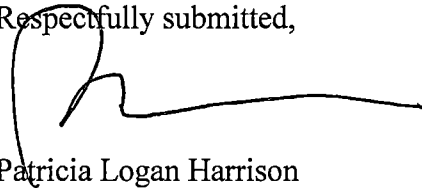
² The term "mentally retarded" has been replaced with the term "intellectually disabled."

Doe v. Kidd, III, 656 Fed. Appx. 643, 658 (4th Cir. 2016), cert. denied *Kidd v. Doe*, 137 S. Ct. 638, 196 L. Ed. 2d 520, 2017 U.S. LEXIS 505 (U.S., Jan. 9, 2017). The Fourth Circuit ordered the state defendants to pay Doe's counsel \$669,077.20, exclusive of costs, in addition to \$39,173.75 in GAL fees for litigation through 2013. *Doe v. Kidd*, 2018 U.S. Dist. LEXIS 25532 (S.C.D.C. 2018). In addition, on remand from the Fourth Circuit, the district court awarded an additional \$1,328,181.41 in legal fees incurred in the state fair hearing proceedings and federal litigation after 2013.

DHHS could resolve this dilemma and reduce the cost to taxpayers by agreeing to actually provide the device determined by Levin's treating physician to be needed, so that Levin will not be forced into another piecemeal appeal, where he will be forced to twice bear the cost of providing the Court multiple copies of the extensive record on appeal.

In September, a new director will assume responsibilities as head of the South Carolina Department of Disabilities and Special Needs, and the current director of the South Carolina Department of Health and Human Services was not in that position when the fair hearing was held. Appellant's counsel suggests that this case might be resolved by court ordered mediation, requiring both directors to attend. At the very least, such a meeting could at least resolve the decades-old practice of these agencies insisting in the state courts that hearing officers have no jurisdiction over violations of federal law, while, at the same time arguing to the federal courts that Medicaid waiver participants' complaints may only be resolved through the fair hearing process.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'P. Logan Harrison', written over the typed name.

Patricia Logan Harrison
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803 360 5555

August 27, 2018

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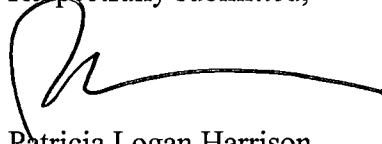
CERTIFICATE OF SERVICE

I certify that on this date, I served a copy of the Memorandum dated August 27, 2018 on:

Damon C. Wlodarczyk
Riley, Pope and Laney LLC
P.O. Box 11412
Columbia, South Carolina 29211
Attorney for the South Carolina Department of Health and Human Services

by mail, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, to the addresses listed above.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'P. Logan Harrison', with a long horizontal flourish extending to the right.

Patricia Logan Harrison
47 Rosemond Road
Cleveland, South Carolina 29635
803 360 5555
pharrison@loganharrisonlaw.com

Attorney for Appellant

August 17, 2018

**Patricia Logan Harrison
Attorney at Law
47 Rosemond Road
Cleveland, South Carolina 29265**

August 27, 2018

Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

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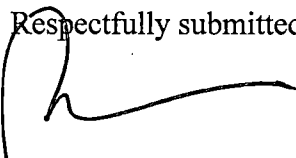
SC Court of Appeals

RE: Robert Levin v. DHHS
Case No. 2018-1398

Dear Ms. Kitchings:

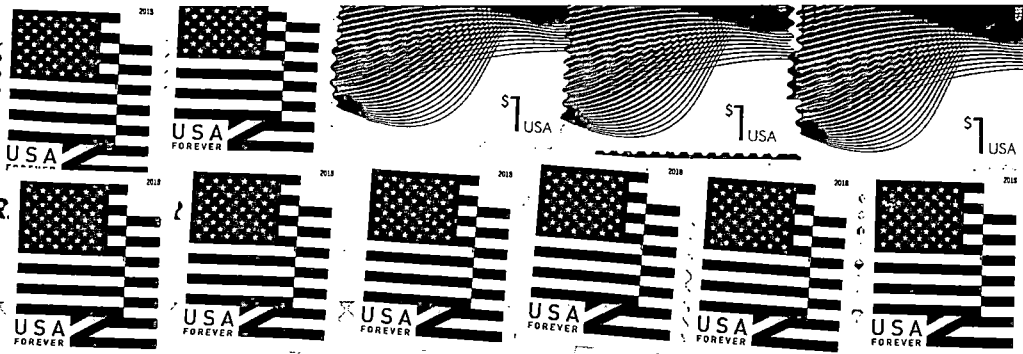
Please find enclosed Appellant's Memorandum requested by the Court. We would appreciate your stamping and returning the copy in the enclosed stamped envelope.

Thank you very much for your assistance.

Respectfully submitted,

Patricia Logan Harrison

cc: Damon Wlodarczyk, Esq.

PRESS FIR.



FROM:

Patricia Logan Harrison
Attorney at Law
47 Rosemond Road
Cleveland, South Carolina 29265
29265
29635

TO:

Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

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